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## RETHINKING THE RENTER/OWNER DIVIDE IN PRIVATE GOVERNANCE

Hannah J. Wiseman\*

### *Abstract*

*The revered status of American homeownership has deep and seemingly impenetrable roots. In our modern mythology/reality, the castles that shelter and nurture our pursuit of the good life are under siege. A narrative common to both popular media accounts and a burgeoning property literature warns that private homeowners' associations hold dominion over millions of Americans, dictating what they may do with their property and foreclosing when they cannot pay association fees or fines. In response to this threat, legislatures, courts, and academics are fighting to stave off these intrusions by the content and use of constraining servitudes. In focusing on the harms to property owners, these critics have unjustifiably omitted renters—a large and growing segment of the population. Nearly every American rents living space at some stage of life, and rentals are expanding as the real estate market continues on its uncertain trajectory. Tenants have no less lofty life goals than do homeowners, yet they, too, are governed by private rules for property use that severely limit certain property uses and allow termination of their property interest through eviction or sale. The rules in rental communities, moreover, serve fundamentally the same purpose as those set by homeowners associations, which is to control neighbors' uses to increase property value. The key difference between the two types of communities, beyond simple physical layout, lies in tradition: a woman's home is her castle, but her apartment is her rickety tenement. Even this distinction is vanishing, however, as private communities with now-familiar "intrusive" rules continue their decades-old proliferation, objections notwithstanding. If, then, private governance of property is fundamentally problematic, it is no less problematic for renters. But if, as seems more likely, we are generally willing to accept certain private rules in communities as a reasonable response to the interests of both owners and tenants, critics of private governance must explain why*

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*traditional notions of property should prevail over a modern approach to property consumers' demands.*

#### INTRODUCTION

From its feudal roots in seisin, fee simple ownership—originally symbolized by the transfer of dirt from one owner's hands to another—has enjoyed an almost mythological status. America has rejected most meaningful differences between the property use rights of a fee simple owner and those of a nonfreehold lessee,<sup>1</sup> yet we have clung to the notion that a man's house is his castle.<sup>2</sup> This idea has become a partial reality as we have perpetuated it, albeit far from perfectly, through our laws. It has been sorely tested, however, as nearly one-fifth of Americans<sup>3</sup> have contracted for detailed and seemingly intrusive private governance of property through condominiums and private subdivisions (private communities).<sup>4</sup> In response to this threat to our cherished ideal, there have been loud, persistent, and sometimes-successful calls to rein in the perceived injustice of these proliferating private regimes.

Indeed, policymakers and attorneys have expressed growing consternation about elderly or lonely homeowners who cannot own pets<sup>5</sup> and politically

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<sup>1</sup> See D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 12–13 (2009) (observing that “the freehold-leasehold distinction no longer has any legal significance”).

<sup>2</sup> Cf. 3 WILLIAM BLACKSTONE, COMMENTARIES \*288 (“[E]very man's house is looked upon by the law to be his castle.”).

<sup>3</sup> ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT, at xiii (2005). “Private” communities, traditionally defined as communities governed by private covenants, conditions, and restrictions and some form of private association, have existed for more than half a century in the United States and began to gain more attention as they became more common. The number of these communities exploded from approximately 500 in 1962 to 20,000 by 1975, and to 300,800 communities by 2008. See Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 771 nn.68–70 (2010) (citing EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994)); *Industry Data*, COMMUNITY ASS'NS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Oct. 4, 2012); see also Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1116–17 (2007) (describing the growth of private communities).

<sup>4</sup> The traditional definition of private community only includes private subdivisions, condominiums, and cooperatives. See *infra* Part II.

<sup>5</sup> See, e.g., Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 9–10 (1995) (discussing the dissent that the author wrote—while serving as an Associate Justice on the Supreme Court of California—in *Nahrstedt v. Lakeside Village Condominium Association, Inc.*, 878 P.2d 1275, 1278–79 (Cal. 1994) (in bank), referencing the American dream and arguing that denying condominium owners the right to own pets imposed a substantial burden on some owners with only a minimal benefit to the larger community).

concerned or religious owners barred from posting signs or symbols in their windows and yards.<sup>6</sup> The Third Restatement of Property, for instance, would protect the homeowner's freedom from unnecessary design controls in servitudes because "[l]ong tradition supports the individual's right to determine the aesthetic qualities of the home."<sup>7</sup> California once allowed every owner in a private subdivision or condominium to have one pet.<sup>8</sup> Many states, in turn, prevent private property owners' associations (POAs) from banning solar panels or clotheslines,<sup>9</sup> while newspapers berated the POA that initiated foreclosure proceedings against an active military service member after his wife forgot to pay association dues.<sup>10</sup> The federal government, too, bars various associations from restricting owners from flying the American flag.<sup>11</sup>

A robust private community literature has similarly focused on POAs, with some scholars, like Professor Gerald Frug, arguing that they problematically allow humans to indulge selfish expectations—thus encouraging exclusivity, latent discrimination, and antiredistributive attitudes<sup>12</sup>—and others worrying that private governance forces people into intrusive property rules that they do not fully understand or simply should not have to endure, ultimately dashing their hopes for property ownership.<sup>13</sup> On the other side of the debate, Professor Robert Ellickson

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<sup>6</sup> See, e.g., Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57, 58, 89 (2010) (arguing that common interest community restrictions on religious symbols on homes' exteriors or in yards "violate human dignity, undermine the common good, and deny the critical role of private property in protecting religious exercise" and that "[r]eligious exercise on one's property, like political participation through the posting of yard signs, represents a basic societal norm"); Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice,"* 37 URB. LAW. 335, 336–37 (2005) (noting with criticism detailed rules, including those that ban signs).

<sup>7</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.9 cmt. a (2000).

<sup>8</sup> CAL. CIV. CODE § 1360.5(a) (West 2007) (repealed 2012; repeal operative 2014).

<sup>9</sup> See LaVonda N. Reed-Huff, *Dirty Dishes, Dirty Laundry, and Windy Mills: A Framework for Regulation of Clean Energy Devices*, 40 ENVTL. L. 859, 881 n.106 (2010) (listing states that ban servitudes that prohibit clotheslines or renewable energy devices).

<sup>10</sup> See Valerie Wigglesworth, *HOA Foreclosed on Frisco Home of Soldier While He Was in Iraq*, DALL. MORNING NEWS (June 26, 2010), <http://www.dallasnews.com/news/community-news/frisco/headlines/20100626-HOA-foreclosed-on-Frisco-home-of-4111.ece/>.

<sup>11</sup> See 4 U.S.C. § 5 (2006).

<sup>12</sup> See, e.g., Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1677–78 (2001) (describing how individuals in private communities withdraw financial support for public services); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998).

<sup>13</sup> See, e.g., Gregory S. Alexander, *Conditions of "Voice": Passivity, Disappointment and Democracy in Homeowner Associations*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST 145, 159, 162 (Stephen E. Barton & Carol J. Silverman eds., 1994) [hereinafter Alexander, *Voice in Homeowner Associations*] (describing residents' frustrations with private community governance); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE

and other renowned property theorists have argued that subdivisions governed by private governments fulfill expectations for property value, community character, and neighborhood control.<sup>14</sup>

With few exceptions,<sup>15</sup> critical reactions to curbed property-use rights have ignored the tenant,<sup>16</sup> who lives not in a private subdivision or condominium but in

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GOVERNMENT (1994) (voicing a variety of concerns, including with the content of rules); James L. Winokur, *Choice, Consent, and Citizenship, in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST 87, 99 (Stephen E. Barton & Carol J. Silverman eds., 1994) (arguing that “few prospective owners intelligently review the restrictions to which they subject themselves upon acceptance of a deed”); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 6–7 (1989) [hereinafter Alexander, *Dilemmas of Group Autonomy*] (expressing concerns about notice of detailed rules); Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness, and the Demise of Community*, 47 VILL. L. REV. 553, 572–76 (2002) (worrying about zealous enforcement of covenants by neighbors and the lack of up-front notice of rules); Franzese & Siegel, *supra* note 3, at 1124–25 (expressing concern that some municipalities offer few options other than to join a private community and that the rules within the communities “are more akin to an adhesion contract than the product of informed, meaningful choice”); *cf.* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 847–48, 855, 881–83 (noting the benefits of controlling community aesthetic in private communities as well as drawbacks, such as insufficient consumer appreciation of rules and changing community norms); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1379 (1994) (noting that private associations and legal treatment of these associations may fulfill certain communitarian principles but will not lead to a “frictionless society”).

<sup>14</sup> See, e.g., NELSON, *supra* note 3, at 265–66 (echoing Liebmann’s argument and touting the unique local democratic process offered by private associations); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1528, 1557–58 (1982) (advocating against legislative interference with private communities’ choices of voting system to protect freedom of contract); Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 906 (1988) (suggesting that covenants “look like mini-constitutions”); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 369 (1993) (arguing that existing public neighborhoods should be able to form their own private associations); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 877–78 (1999) (suggesting that private community governance, as opposed to progressive zoning, “could involve a rediscovery of the habits of small scale association of the nineteenth century” and promote American democracy); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 263 (1976) (arguing that private associations instill a sense of community).

<sup>15</sup> See, e.g., Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1034–41 (2009) (exploring theories of property such as the libertarian and efficiency frameworks; investigating the strange result that Congress guarantees that a homeowner, but not a renter, may fly a flag; and analyzing the reasons for this); Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1056 (2008) (noting “severe constraints” on tenant autonomy but focusing on

an apartment or home governed by the equally intrusive private landlord with eviction powers. Rental properties are no less common than private subdivisions—indeed, nearly every American rents at some point, and rentals are increasingly popular<sup>17</sup> with residents seeking convenient urban living or an alternative to the shaky real estate market.<sup>18</sup> Further, and more importantly, the governance of a multiunit apartment building, which is the most common form of rental property,<sup>19</sup> is fundamentally similar—despite differences in ownership arrangement and physical layout—to the governance of a subdivision, the object of central concern in the private community literature.

Both apartment renters and subdivision owners have voluntarily joined a community<sup>20</sup> of closely packed people, where neighbors are difficult to avoid. Partially as a result of these tight living quarters, they have consented to a variety of rights-constraining rules that do not remotely resemble the American dream: they have agreed, for example, to prohibit themselves from owning pets, posting signs, or painting their walls red, and to submit to potential eviction or foreclosure<sup>21</sup> by a private entity. The private rules that form these communities

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homeowners). Some laws focus on tenants and protect them from certain potentially intrusive rules. *See, e.g.*, HAW. REV. STAT. ANN. § 521-52 (LexisNexis 2006) (prohibiting landlords from barring the display of political signs). But laws protecting owners abound. *See, e.g., infra* notes 253–256 and accompanying text.

<sup>16</sup> *See* sources cited *supra* note 13 (showing scholarship that addresses homeowner, but not tenant, concerns).

<sup>17</sup> JOINT CENTER FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES 2 (2011) (noting that “the housing bust and Great Recession have pushed up the share and number of renter households” and predicting that “further increases in the renter population are likely”); Motoko Rich, *Homes Aren't Selling, but in Apartments, It's a Landlord's Market*, N.Y. TIMES, Feb. 25, 2012, at A1 (noting that “[f]amilies who might previously have bought homes are . . . staying in rentals longer” and “about two million more households are renting” than in 2004), available at <http://www.nytimes.com/2012/02/25/business/homes-arent-selling-but-its-an-apartment-landlords-market.html>.

<sup>18</sup> *See* Todd Newcombe, *Renting the New American Dream?*, GOVERNING, Nov. 2010, at 27, 27 (describing the trend of more families renting or buying apartments).

<sup>19</sup> Edward L. Glaeser, *Rethinking the Federal Bias Toward Homeownership*, 13 CITYSCAPE, no. 2, 2011, at 5, 5 (“More than 85 percent of single-family dwellings are owner occupied; more than 85 percent of dwellings in homes with more than three units are rented.”).

<sup>20</sup> As described in more detail in Part I, “community” as used in this Article refers to a cluster of living structures that has discrete formal or informal boundaries, including a neighborhood, town, city, or private common interest community. This builds from Professor Lee Fennell's use of the “neighborhood aesthetics.” *See* Fennell, *supra* note 13, at 847; *see also* Wiseman, *supra* note 3, at 699–700 & n.5 (employing a similar definition).

<sup>21</sup> *See* RiverPointe Homeowners Ass'n v. Mallory, 656 S.E.2d 659, 659–61 (N.C. Ct. App. 2008) (affirming the authority of a POA to foreclose on a lien that resulted from a homeowner's failure to follow proper landscaping procedures and pay the associated fine); Franzese & Siegel, *supra* note 3, at 1118 (“An infraction of the rules can lead to the

exist for similar purposes: to reduce annoyances generated by neighbors, to ensure daily enjoyment of property, and to allow the landlord or developer—and later the POA—to preserve the value of the community as a whole. Although both owners and renters may not be choosing specific rules for these reasons—indeed, they often may consent to constraints they despise—the rules nonetheless exist largely to accomplish these results.<sup>22</sup>

Despite these fundamental similarities, the private community literature unjustifiably places homeowners on a protective pedestal by omitting renters from its ambitious praise and critique of private governance of property.<sup>23</sup> In current scholarly accounts,<sup>24</sup> which overwhelmingly use definitional criteria that should logically include rentals, concerns about the impact of private rules and enforcement on renters either play second fiddle to impacts on owners or receive no attention at all.<sup>25</sup> To determine whether this omission can be justified, this Article focuses on the most common forms of rental and ownership: the multiunit apartment and the single-family home. It explores in depth the differences between these two property uses and their significance to the critiques of private governance, concluding that while some of these differences matter, they largely fail to support special treatment for homeowners. Tenants may not need as much notice of freedom-constraining rules, for example, if they generally expect more

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imposition of penalties against the homeowner, often in the form of significant fines, the denial of the right to use the facilities, and even foreclosure.” (citations omitted)).

<sup>22</sup> Note that this Article uses the term “value preservation” more broadly than would the utilitarian literature, following something closer to the human flourishing literature. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 768 (2009); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1243 (2005).

<sup>23</sup> Note that scholars, although not including the multiunit apartment building within the private community category, have evaluated renters’ experiences within traditionally defined private communities (subdivisions and condominiums). See, e.g., Ellickson, *supra* note 14, at 1544 (observing that private communities exclude renters from voting and justifying this choice); Jonathan D. Ross-Harrington, Note, *Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium*, 28 YALE L. & POL’Y REV. 187, 188–90 (2009) (noting the rising number of renters of condominium units and describing problems). Most renters, however, do not live in homeowners’ and condominium associations. See AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009, at 1 (2011), available at <http://www.census.gov/prod/2011pubs/h150-09.pdf> (showing a total of approximately 35.4 million year-round, occupied housing units in rental in 2009); Ross-Harrington, *supra*, at 188 (explaining that in 2009 more than 2.1 million condo units were rented). Professor Reichman seems to hint at the similarities between owned private communities and rented ones, describing the rise of consumer demand for indoor services and common areas in owned communities, similar to those found in multiunit apartments. See Reichman, *supra* note 14, at 260.

<sup>24</sup> See sources cited *supra* notes 12–14.

<sup>25</sup> But see sources cited *supra* note 15.

property controls than do homeowners<sup>26</sup> and can exit unwanted rules more easily.<sup>27</sup> On the whole, however, this close investigation reveals few significant dissimilarities beyond simple tradition. Within our old and stubborn property story, a person's house is her castle, but her apartment is her rickety tenement. And while tradition can give rise to legitimate concerns about notice in the face of homeowner expectations, even these have faded as the subdivision and its rules have become a regular feature of American life.

The Article unfolds in three parts. Part I begins by identifying the essential characteristics of private communities—combining existing accounts from the literature and proposing a new, more comprehensive sphere that includes rental property. This Part then notes the striking similarities between two particular types of rented and owned communities that are employed in the comparative model presented in this Article: the apartment building and the private subdivision. After exploring these similarities, Part II identifies the differences between these types of communities, acknowledging distinct landlord, tenant, and owner interests in property value, varying spatial characteristics, and other relevant differences. This Part concludes that none of the differences appear to justify wholesale omission of rentals from the private community sphere, thus requiring an explanation from those who would protect owners but not tenants from use-limiting rules. Part III then explores potential justifications for excluding renters or limiting their role in the private community literature, concluding that with the partial exception of notice-based concerns, these accounts fail to rest on legitimate renter-owner differences. While this conclusion does not invalidate the existing property scholarship, it suggests that scholars exploring the benefits and drawbacks of use-limiting rules should address a much larger body of private governance, including the long-accepted rental. It also opens up important opportunities for cross-pollination of private governance lessons between the ownership and rental contexts.

#### I. PRELIMINARY DEFINITIONS AND STRUCTURAL EXPLANATIONS: IDENTIFYING ESSENTIAL CHARACTERISTICS OF PRIVATE COMMUNITIES

Labeling a community as “private” has several important implications. First, it tells us, generally, how courts and legislatures will treat those who govern the community and allows us to assess whether we agree with the loose system of public oversight for these actors. Many federal and state constitutional provisions do not apply to individuals who privately govern property, for example.<sup>28</sup> Compared to municipalities exercising delegated state powers, landlords,

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<sup>26</sup> This expectation may arise, for example, from multiunit tenants' rental of smaller spaces with shared walls. *See infra* text accompanying notes 168–170.

<sup>27</sup> *See infra* text accompanying notes 180–188.

<sup>28</sup> *But see* John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 823 (1990) (explaining that “some state courts have applied their state charters to private entities”).



developers, and POAs also operate under few binding legislative directives, with the exception of, for example, the Fair Housing Act,<sup>29</sup> constraints on eviction or foreclosure procedures,<sup>30</sup> and occasional state procedural rules that require disclosure of private rules and notice of POA meetings.<sup>31</sup> Second, and most importantly for this Article, defining a community as “private” places it within a broad normative literature that has both praised and maligned private communities and proposed a variety of reforms for them. So far, however, this literature has ignored rentals,<sup>32</sup> failing to note that rental properties fit all of its proffered definitions and have purposes and functions that largely parallel those of owned private communities.

This Part places rentals within the literature’s private community sphere, thus setting the stage for a framework that enables a broader normative evaluation of private governance of property. It introduces and defines the core private communities discussed in this paper and explains why including rentals within the private community realm is important. The Part concludes by categorizing the ways in which the literature has defined private communities and by explaining why each definition should naturally include rentals.

#### A. *Selecting Structural Categories of Comparison*

In arguing that privately governed homes and rented properties are essentially the same and merit similar treatment, this Article relies largely on structural comparisons. It identifies quintessential rented and owned communities governed by private entities, explains why both are in fact “private” and could be defined as “communities,” and explores potential differences between them that might justify the literature’s treatment of homeowners as a favored class, which should allegedly be protected from the vagaries of private governance or should enjoy its unique benefits. For its categories of “quintessential” owned and rented properties, the Article explores two specific types of communities: the multiunit apartment and the private subdivision of single-family homes. These are the most common forms of rented and owned properties, and they capture many core assumptions about rental and ownership, assumptions that have been incorporated—often wrongly—into law and scholarship. Although some renters live in detached single-family

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<sup>29</sup> Fair Housing Act, 42 U.S.C. § 3604(a)–(c) (2006) (making discrimination in sale or rental unlawful).

<sup>30</sup> *See, e.g.*, FLA. STAT. ANN. § 720.305(2) (West Supp 2012) (prohibiting POA liens resulting from fines of less than \$1,000); *infra* note 83 (showing that a majority of states do not allow self-help eviction).

<sup>31</sup> *See, e.g.*, MINN. STAT. § 515B.4-107 (West Supp. 2010) (requiring disclosure of servitudes and bylaws before the execution of a purchase agreement for a property); VA. CODE ANN. § 55-509.4(A)(ii) (Supp. 2011) (same); WASH. REV. CODE ANN. § 64.34.332 (West 2013) (requiring POAs to meet at least once a year and to provide ten days’ notice of meetings).

<sup>32</sup> *But see* sources cited *supra* note 15.

homes or duplexes, and some owners live in condominiums or cooperatives, these facts are ignored within the boundaries of this Article.

As Professor Edward Glaeser has observed, “there is a strong connection between homeownership and structure type,” which predominantly involves owners of homes, and renters who inhabit units in large, shared buildings.<sup>33</sup> One economic reason for this trend is that an owner of a single, detached, and relatively small unit (the home) internalizes “all the benefits from maintenance,” whereas maintenance benefits in large condo buildings—conducted by a management association—are divided among all residents.<sup>34</sup> Even if the maintenance project were so large as to create per capita benefits higher than those that would have accrued had the owner done the maintenance in her unit only, this often may not occur; “a great deal can go wrong” in large condo projects.<sup>35</sup> Whether due to this reason or the fact that “multiple owners make coordination costly,” thus pushing owners away from units in large, shared structures, more than 86% of detached single-family homes in the United States were owned in 2000, while more than 88% of 20- to 49-family and “50-family or larger” buildings were rented.<sup>36</sup>

Beyond structural trends, this Article also ignores owned condominiums and cooperatives and rented single-family homes because they offer only a bland comparison. The aim is to persuade the reader that what appear to be the most divergent of property types—the single-family home in an exclusive subdivision and the multifamily apartment in a busy urban setting—are in fact nearly identical in terms of their purposes and governance structures.<sup>37</sup> While there are many counterarguments to this assertion—which are explored in Part II—the Article attempts to prove its point from the most difficult comparison, rather than the easiest. Many likely would agree that condominium owners and apartment tenants have much in common: they more easily bother their neighbors—thus producing externalities that require controlling rules—and a third party typically provides most building maintenance—thus creating different incentives for upkeep by unit tenants. Most may be skeptical, however, that apartment tenants have a good deal in common with single-family homeowners with white-picket fences. Here begins the project of persuasion.

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<sup>33</sup> Glaeser, *supra* note 19, at 12.

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 16 exhibit 1.

<sup>37</sup> This Article employs the multiunit apartment building and the private subdivision as models for several reasons. First, most critiques of private communities focus on the subdivision, not the condominium or cooperative. Rules that affect single-family homes seem to generate the most angst in the literature. *See supra* notes 12–13 and accompanying text. Second, it is clear that multiunit apartments are similar to condominiums, and we might expect similar rules in those two contexts; this Article embarks upon the more difficult comparison to show that even a subdivision of single-family homes created by one developer is fundamentally similar to a multiunit apartment building governed by one landlord.

*B. Placing Rental Properties Within the Private Community Literature*

The general distinction between public and private governance in the legal literature and jurisprudence has become increasingly blurry<sup>38</sup> as municipalities contract out traditionally public functions,<sup>39</sup> as agency processes increasingly incorporate private actors,<sup>40</sup> and as public neighborhoods adopt zoning rules that are nearly identical to private covenants.<sup>41</sup> Indeed, the general consensus in the literature seems to be that the distinction is, or should be, dead.<sup>42</sup> Rather than attempting to artificially distinguish between the private and public spheres, the story goes, we should focus on the processes within those spheres and the substantive results of those processes. Accountability to the public, fairness, efficiency, and effectiveness of governance are the relevant metrics in this new world<sup>43</sup>—not whether an actor is public or private.

Despite the apparent death of the public-private divide, one tenacious distinction has remained, and even grown, within the literature. A rapidly expanding body of scholarship has followed the rise of the “private” community and has either exalted or bemoaned this trend.<sup>44</sup> The scholarship’s definition of private community, which precedes its normative analyses, has been sparse, but this Part explores the four definitions typically followed. It then identifies how rentals fit within each of these definitions and pinpoints the fundamental similarities between two privately governed communities: the multiunit apartment building and the private subdivision.

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<sup>38</sup> See Mark Cantora, *Increasing Freedom by Restricting Speech: Why the First Amendment Does Not and Should Not Apply in Common Interest Communities*, 39 REAL EST. L.J. 409, 410 (2011) (describing the “blurring of the distinctions between the ‘public’ and ‘private’”).

<sup>39</sup> See, e.g., Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 86 (2007) (describing the trend in privatization of city child welfare services); Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719–22 (2010) (identifying various scenarios of contracting out services).

<sup>40</sup> See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 610–16, 625–30, 639–40, 653–55 (2000) (arguing that we must move beyond the public-private focus in administrative law).

<sup>41</sup> Wiseman, *supra* note 3, at 719 (describing how many new zoning rules look substantively like servitudes).

<sup>42</sup> See Freeman, *supra* note 40, at 565, 594 (arguing that “there is neither a purely public nor a purely private realm” in administrative law); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350 (1982) (describing public-private distinction as having reached “utter decrepitude”).

<sup>43</sup> See Freeman, *supra* note 40, at 625–30, 639–40, 653–55; Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1441 (1982) (describing “public/private” as having “slipped into memory with the other old favorites”).

<sup>44</sup> See *supra* notes 13–14 and accompanying text.

### *1. Rental Properties as Private Governance Systems*

The literature follows four core definitions of private community that look either to its private governance components (including an association that writes and enforces private rules, such as servitudes), the uniquely private functions of that community, its fit with the state action test, or, more simply, the extent to which the community is open to the public.

#### *(a) Private Associations, Rules, and Enforcement*

Private communities, simply put, “possess much of the power and trappings of local municipal government but arise out of private relationships,”<sup>45</sup> and the property literature has already taken great pains to describe these increasingly common governance forms. Most descriptive efforts assign three core characteristics to their subject matter: the community must be governed by private rules—that is, rules not written by a traditional elected government, such as a city council; it must have a private governing entity such as a POA, which is elected but is not a traditional public body; and it must grant this entity the power to enforce the private rules.<sup>46</sup> In a private subdivision—the type of private community typically discussed in the literature—a developer writes rules in the form of servitudes that run with the land.<sup>47</sup> After subdividing lots, she records a plat, creates a deed for each lot, and includes identical servitudes in each deed before recording it.<sup>48</sup> The developer retains control of the subdivision until a certain percentage of lots are sold,<sup>49</sup> thereby acting like a landlord who enforces her own privately written rules. The developer then hands over control of the subdivision to a POA and passes her “landlord-type” status to this group.<sup>50</sup> Either the association or individual homeowners—all private entities—can enforce the servitudes in the deeds by notifying noncomplying homeowners of their rule violations, requesting corrective action, and resorting to the court if homeowners continue to violate

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<sup>45</sup> Reichman, *supra* note 14, at 253.

<sup>46</sup> See, e.g., ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-112, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 3 (1989) (describing a residential community association (RCA) as having “covenants in the ownership deeds that require membership in the association,” “a mandatory dues obligation to fund a range of services that may be provided by the association,” and “restrictions on the activities of members, enforceable by the RCA and the courts”).

<sup>47</sup> URBAN LAND INST., THE HOMES ASSOCIATION HANDBOOK 198 (1964) (describing the preparation of the servitudes).

<sup>48</sup> *Id.* at 198–99.

<sup>49</sup> Fennell, *supra* note 13, at 858 n.157 (describing various accounts of the percentage of lots that typically must sell before the developer relinquishes control of the subdivision to a POA).

<sup>50</sup> Nelson, *supra* note 14, at 872 (“In most new associations, the developer retains the majority of the votes until the late stages of project development.”).

these rules.<sup>51</sup> The public municipality in which the subdivision is located also has regulatory control of the subdivision through zoning and similar police powers,<sup>52</sup> but the additional layer of private rules and enforcement in the subdivision distinguishes it from the underlying public municipality.

Following this set of essential characteristics, which includes private rules and a private enforcing entity layered above a public regime, rental communities are clearly private. A landlord, who writes rules in addition to those enacted by a public municipality, inserts detailed property use restrictions into a lease. These rules, like servitudes, are not created by a traditional public entity such as a city council, which follows required rule-writing procedures in open meetings acts and other public rule-based protections.<sup>53</sup> Instead, the landlord creates the rules within a lease and simply declares them to be so; with the tenant's signature, they become enforceable. The landlord—like the developer and POA—enforces the rules privately, although she relies on the public backstop of the courts. She informs tenants of noncompliance, and if they fail to modify their property uses as requested, she typically resorts to a judicial forum for eviction procedures.<sup>54</sup> Although, as Part II will explain, there are important differences between the manner in which private rules in rented and owned communities are created and enforced, rental communities fit the core characteristics of a community defined by its private institutions.

*(b) Traditional Powers, Responsibilities, and Characteristics of Private Communities*

Rather than looking solely to institutions to define private communities, the literature sometimes attempts to identify broader characteristics and functions of public governments and to compare these characteristics in order to draw a definitional line between the two. This literature suggests that we know a private community when we see one, looking to perceived clear differences between public and private governance such as “[t]he tiny size of most . . . [POAs],”<sup>55</sup> “their

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<sup>51</sup> Franzese & Siegel, *supra* note 3, at 1135–37 (2007).

<sup>52</sup> See, e.g., Wiseman, *supra* note 3, at 724 (describing a development that reminds owners in the servitudes that they remain subject to city zoning laws).

<sup>53</sup> See, e.g., N.Y. PUB. OFF. LAW §§ 102, 103 (McKinney 2008) (providing that “[e]very meeting of a public body shall be open to the general public” and defining “public body” as “any entity . . . performing a governmental function for the state or for an agency or department thereof, or for a public corporation”); Steven J. Mulroy, *Sunlight's Glare*, 78 TENN. L. REV. 309, 315 & n.27 (2011) (listing the fifty state open-meetings laws).

<sup>54</sup> See Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 777–85 (1994) (describing the typical procedures).

<sup>55</sup> Some property owners' associations, however, are quite large. Reston, Virginia, for example, has a population of approximately sixty thousand. See *Who We Are*, RESTON ASS'N, <https://www.reston.org/InsideRA/Governance/WhoWeAre/Default.aspx?qenc=HzT>

narrow range of functions,” and “the absence of the redistributive, police, conscriptive, general welfare taxation, and enforcement privileges characteristic of sovereign power.”<sup>56</sup> Private communities, the literature notes, also may not use force against residents or condemn property.<sup>57</sup>

Professor Ellickson takes a more nuanced approach, rejecting the contention that most of these characteristics are uniquely public and proposing that the meaningful difference between a publicly and privately governed community is coercion.<sup>58</sup> He observes that individuals voluntarily subject themselves to a private community’s rules by choosing to purchase a property to which those rules attach,<sup>59</sup> whereas individuals may only choose *among* various cities’ and municipalities’ rules. Anyone living in the United States must accept certain public, involuntary rules such as municipal taxation or zoning. “Public entities have involuntary members when they are first formed”<sup>60</sup>—someone living in an area that the government chooses to incorporate may find herself subject to new local taxes and zoning rules, for example. And if a majority votes for new municipal regulations, those objecting in the minority have no recourse but to exit.<sup>61</sup> On the other hand, when a developer first forms a private community the new membership in this community is “wholly voluntary.”<sup>62</sup> Homeowners may choose to purchase property within the community and, in so doing, subject themselves to the covenants, conditions, and restrictions that the developer has recorded and attached to the property, or they may go elsewhere.

Combining these broad characteristics of private communities, one finds all of the features of a multiunit rental. As with a POA, agreement to the rules governing rental property is voluntary, not coercive, assuming tenants do not face severe income constraints and landlords lack monopoly powers. Landlords, like POAs, may not require residents to join. Landlords also may not condemn property or directly arrest or jail tenants, although their powers to refuse lease renewal and

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<sup>56</sup> Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 49 (1990).

<sup>57</sup> Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 640 (1993).

<sup>58</sup> Ellickson, *supra* note 14, at 1522 (citing Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977)) (observing that “the modern homeowners association has virtually all of the indicia that [Frank] Michelman would have us associate with a [traditional public] government”).

<sup>59</sup> *Id.* at 1524. This assumes that the individual is aware that purchasing the property results in the automatic attachment of recorded covenants, conditions, and restrictions.

<sup>60</sup> *Id.* at 1523.

<sup>61</sup> The exit and voice theory was introduced by Albert Hirschman in 1970. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>62</sup> Ellickson, *supra* note 14, at 1523.

convert rental units to condominiums or other purposes (constrained in some states by legislatively required tenant buy-out options)<sup>63</sup> resemble condemnation authority. The landlord of a multiunit apartment complex governs a small territory and oversees a narrow range of functions, including rule writing and enforcement, maintenance, and limited common services such as landscaping and laundry facilities, within this territory. This landlord does not shoulder the broad service and regulatory-based responsibilities of a public government. Finally, like the members of a community association board, she does not enjoy any of the limited immunity that states tend to grant local governments,<sup>64</sup> although, as a private actor, she is not constrained by many of the laws that limit municipalities' discretion.

(c) *State Action*

Drawing a private community sphere using the features that *should* distinguish it from a traditional public community is an approach rather disconnected from the reality of the law. If our goal is to determine why the difference matters, we can alternatively begin “with the public/private distinctions that present law relies on in fact, and . . . build upward, toward the theoretical abstractions and justifications.”<sup>65</sup> In the property governance context, this practically grounded approach requires a brief analysis of the Supreme Court's state action doctrine, which labels a government as “public” only if it fits an increasingly long list of necessary characteristics. This test is thin because of its extremely high threshold for “publicness,” but the private community literature sometimes uses it as a dividing line.<sup>66</sup>

Allegedly private governments may engage in state action, and thus be defined as “public,” when they “assum[e] government functions or powers,”<sup>67</sup>

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<sup>63</sup> See, e.g., MICH. COMP. LAWS SERV. § 559.204 (LexisNexis 2007) (requiring that tenants be notified prior to sale of apartments for condominiums, remain within the apartment for 120 days or the remainder of the lease, whichever is longer, and to terminate the tenancy within 60 days of receiving notice, among other protections).

<sup>64</sup> See, e.g., Illinois Tort Immunity Act, 745 ILL. COMP. STAT. ANN. 10/2-204 (West 2010) (providing basic municipal immunity); *Pelaez v. Seide*, 810 N.E.2d 393, 395 (N.Y. 2004) (explaining that in New York, “As a rule, municipalities are immune from tort liability when their employees perform discretionary acts involving the exercise of reasoned judgment”); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 46, at 16 (“[B]oard members do not have immunity from lawsuits when carrying out their official duties.”); Kathryn E. Litchman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOY. U. CHI. L.J. 765, 783–84 (2007) (explaining that the Act remains intact despite subsequent constitutional changes).

<sup>65</sup> Stone, *supra* note 43, at 1444.

<sup>66</sup> See, e.g., Hyatt & Stubblefield, *supra* note 57, at 657–61 (applying the state action doctrine to common interest communities).

<sup>67</sup> Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 597 (1991); see also David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on*

when there is “joint participation between state officials and private entities,”<sup>68</sup> and when the conduct of the private entity is essentially the conduct of the state as a result of state regulation.<sup>69</sup> The actions of private communities also may become public when courts enforce private servitudes<sup>70</sup> or, potentially, lease provisions. To cross the state actor threshold under the public function test, the community’s government must “discharge functions ‘traditionally performed’ by and ‘exclusively reserved to’ government.”<sup>71</sup> Most common-interest communities and rental communities are solidly “private” under this test.<sup>72</sup> Only large, isolated,

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*Nonmembers*, 105 YALE L.J. 761, 787 (1995) (citing *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522 (1987)) (introducing the public function test).

<sup>68</sup> Strickland, *supra* note 67, at 597.

<sup>69</sup> Wayne Hyatt and Jo Anne Stubblefield believe that a broader theory of state action—the “state involvement” test—may potentially apply to community associations. Hyatt & Stubblefield, *supra* note 57, at 658. In describing this theory, they appear to refer to the “nexus” test in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974), as they cite to this case and refer to state statutes regulating the creation of condominiums and other common interest communities. Hyatt & Stubblefield, *supra* note 57, at 659 n.278. The nexus test is distinct from the symbiotic relationship test. See Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1798 n.61 (2010); 16C C.J.S. *Constitutional Law* § 1467 (2011) (explaining that under the Fourteenth Amendment, the “‘close nexus test’ differs from the ‘symbiotic relationship test’ in that the former focuses on the connection between the state and the specific conduct that allegedly violates the plaintiff’s civil rights, whereas the latter focuses on the entire relationship between the state and the defendants”).

<sup>70</sup> Hyatt & Stubblefield, *supra* note 57, at 658.

<sup>71</sup> See *Morse v. Republican Party*, 517 U.S. 186, 271 (1996) (Thomas, J., dissenting) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978)); Strickland, *supra* note 67, at 631 (“The *Flagg Bros.* Court apparently held that in order for a private entity’s activities to be deemed state action under the government function theory, the activity must be one traditionally undertaken exclusively by the sovereign *and* it must substantially displace the government’s traditional role in that activity.”). The original public function test emerged in *Marsh v. Alabama*, 326 U.S. 501, 502, 506 (1946).

<sup>72</sup> Hyatt and Stubblefield argue that the “overwhelming majority of community associations do not have the characteristics necessary to constitute the functional equivalent of a municipality.” Hyatt & Stubblefield, *supra* note 57, at 661; see also *Brock v. Watergate Mobile Home Park Ass’n*, 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (concluding that a “homeowner’s association lacks the municipal character of a company town” because “the homeowners own their property and hold title to the common areas pro rata” and “the services provided by a homeowners association . . . are merely a supplement to, rather than a replacement for, those provided by local government”); *Laguna Publ’g Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813, 825 (Ct. App. 1982) (finding that “Leisure World,” a private subdivision of homes, was not a company town—a state actor—for free speech purposes because it was “solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred”; noting, however, that the subdivision’s attributes “bring it conceptually close to characterization as a company town”); Hyatt & Stubblefield, *supra* note 57, at 661 n.293 (citing to *Brock*, 502 So. 2d 1380); Kennedy, *supra* note 67, at 784 n.127 (citing to *Laguna Publ’g*, 182 Cal. Rptr. 813).



multiuse developments with both businesses and residential units—all governed by one private association—may have the characteristics necessary to be sufficiently governmental.

The remaining tests, as they have played out in the courts, offer similarly thin definitions.<sup>73</sup> An entity is a state actor and thus public under the symbiotic relationship test when the actor has “so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.”<sup>74</sup> In an extreme yet rare example, a California municipality worked with a developer to restrict the number of occupants in homes and place minimum age requirements on occupants,<sup>75</sup> thus pushing the developer into public territory under this test. Although developers often implement servitudes with age restrictions, they rarely do so in concert with a public local government.<sup>76</sup> Landlords, similarly, often have an insufficiently strong relationship with the government to be a state actor, unless, perhaps, they lease property from the government and rent it to residents, or are centrally involved in a government-subsidized rental housing program.

Similar to the symbiotic relationship test, a landlord or POA can become a state actor when the government directs its actions, typically through heavy or coercive regulation,<sup>77</sup> and thus creates “a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”<sup>78</sup> Indeed, states regulate some meaningful aspects of common interest communities,<sup>79</sup> controlling the conditions for creating condominiums, for example, and sometimes defining POAs’

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<sup>73</sup> See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974) (showing that the symbiotic relationship test may only apply to a lessee-lessor relationship between the government and the actor); Strickland, *supra* note 67, at 624 (“Perhaps because of the theory’s ambiguity, the Court has not really used [the symbiotic relationship test] to find state action since deciding *Burton [v. Wilmington Parking Authority]*, 365 U.S. 715 (1961).”).

<sup>74</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). The doctrine has since changed, potentially in confusing ways. Justice O’Connor, dissenting in a more recent case, argued that for the state to have been in a symbiotic relationship with a private enterprise, it must have “affirmatively influenced or coerced the private party to undertake the challenged action.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 411 (1995) (O’Connor, J., dissenting).

<sup>75</sup> *Park Redlands Covenant Control Comm’n v. Simon*, 226 Cal. Rptr. 199, 206–07 (Ct. App. 1986); Kennedy, *supra* note 67, at 786 (describing the case).

<sup>76</sup> See EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 49–52 (1999) (describing retirement communities created by developers through covenants, conditions, and restrictions with minimum age requirements).

<sup>77</sup> See 16C C.J.S. *Constitutional Law* § 1466 (2011).

<sup>78</sup> *Jackson*, 419 U.S. at 351; see also *BeVier & Harrison*, *supra* note 69, at 1798 n.61 (identifying the nexus test as a distinct state action test and citing to *Jackson*).

<sup>79</sup> *Hyatt & Stubblefield*, *supra* note 57, at 659–60.

foreclosure powers.<sup>80</sup> States similarly regulate a variety of rental actions, from minimal health and safety requirements to eviction procedures.<sup>81</sup> But this test, again, is unlikely to push most private governments into the public sphere. Indeed, if an electric utility—a natural monopoly that is both endorsed and highly regulated by the state—does not operate under sufficient state control to create the necessary nexus,<sup>82</sup> then it would be difficult to say that private communities have the nexus that implicates state action.

A final means of differentiating truly private actors from public ones under the state action test is to look to their reliance on courts for rule enforcement. Taken to the extreme, this doctrine would force all private communities, both rented and owned, into the public sphere; all community leaders must resort to courts for rule enforcement if informal efforts break down.<sup>83</sup> Indeed, the Middle District of Florida follows a rule, at least in First Amendment cases, that “judicial enforcement of private agreements contained in a declaration of condominium constitutes state action.”<sup>84</sup> In light of most courts’ narrow application of *Shelley v. Kraemer*,<sup>85</sup> however, courts likely will rarely find state action when a POA

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<sup>80</sup> *Golden Sands Club Condo., Inc. v. Waller*, 545 A.2d 1332, 1336 n.5 (Md. 1988) (discussing due process requirements for a condominium association to impose foreclosable lien against units under Maryland law).

<sup>81</sup> See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504–05 (1982) (concluding that “[t]he decisive element in the transformation of the residential landlord-tenant relationship has been its subjection to pervasive, mostly statutory, regulation of it incidents,” including “rent regulation, security of tenure for the tenant, and the qualification of the landlord’s traditional rights to alienate the freehold or to convert it to another use”).

<sup>82</sup> *Jackson*, 419 U.S. at 352.

<sup>83</sup> Kennedy, *supra* note 67, at 786 (“State involvement is implicated in the frequent enforcement by the state of the association’s governing documents.”); Kara B. Schissler, Note, *Come and Knock on Our Door: The Fair Debt Collection Practices Act’s Intrusion into New York’s Summary Proceedings Law*, 22 CARDOZO L. REV. 315, 328 n.67 (2000) (explaining that only “a minority of states still allow landlords to employ self-help—the use of all necessary and reasonable force—to evict a tenant”).

<sup>84</sup> *Gerber v. Longboat Harbour N. Condo.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) (relying on *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

<sup>85</sup> 334 U.S. 1 (1948). Although the Court in *Shelley v. Kraemer* blocked courts from enforcing racially restrictive covenants, finding that residents’ reliance on courts to enforce the private servitudes removed the servitudes from the private sphere, courts have not tended to extend *Shelley*’s reasoning beyond discriminatory covenants. See Hyatt & Stubblefield, *supra* note 57, at 658–59. Hyatt and Stubblefield note that some courts have limited *Shelley*’s holding to racially restrictive covenants; others have applied the holding to all discriminatory covenants, and still others have extended it further. For a case finding state action when trial courts enforced a private community’s age restriction (and upholding the restriction under rational basis equal protection review), see *Riley v. Stoves*, 526 P.2d 747, 752 (Ariz. Ct. App. 1974), and Kennedy, *supra* note 67, at 784 n.128 (citing to *Riley*, 526 P.2d 747). Landlords’ use of the courts to enforce lease rules will, similarly, typically not make them state actors under *Shelley*. In *Knubbe v. Sparrow*, 808 F. Supp. 1295 (E.D. Mich. 1992), for example, a landlord, following state eviction procedures,

requests an injunction under a covenant or a landlord commences an eviction action.

(d) *Openness to the Public*

One state has jettisoned the state action doctrine, at least in the context of expression, for a test similar to California's approach validated in *PruneYard Shopping Center v. Robins*<sup>86</sup>: New Jersey law creates a public-private dividing line based largely upon a community's openness to the public. The New Jersey Supreme Court, unlike most states,<sup>87</sup> does not require that an entity be a state actor before subjecting it to the free speech requirements of the New Jersey Constitution; rather, it applies a three-part test that looks to the "normal use" of the private property, the extent to which the public has been invited onto the property, and the connection between the expressional activity and the private and public uses on the property.<sup>88</sup> In a homeowners' association, the normal use of the property is residential and thus private; the public has not been invited to the premises (particularly in a gated community); and if homeowners are, for example, prohibited from posting signs in their yards, this speech relates to the manner of management of the private community—not a broader, public matter. A private subdivision is unlike a private property to which the public is invited for "public commerce" or "academic discourse."<sup>89</sup> Thus, a private homeowners' association may ban most signs in yards without offending the New Jersey Constitution.<sup>90</sup> The rules relate to the private use of the property and exist for good reason: "The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that [POA] residents enjoy."<sup>91</sup> The same could be said of rental communities, which exist for private residential purposes, do not invite the broader public onto the premises for the purpose of exchanging ideas and speech, and, like

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obtained a court order that tenants be evicted and pay restitution; the tenants argued that the landlord had "wrongfully secured" the writ of restitution under state law. *Id.* at 1302. The Eastern District of Michigan found that "[w]hile the procedures established by a statute are the products of state action, a private party's misuse of a state statute is not state action." *Id.* at 1301.

<sup>86</sup> 447 U.S. 74 (1980); *id.* at 81–82 (holding that although inviting the public onto property does not automatically subject the property to constitutional requirements, states may more vigorously define and protect free speech rights and require a shopping center to allow individuals to exercise speech and petition rights there).

<sup>87</sup> Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1071 (N.J. 2007) ("[T]he vast majority of other jurisdictions that have interpreted a state constitutional provision with language similar to our constitution's free speech provision require 'state action' as a precondition to imposing constitutional obligations on private property owners.").

<sup>88</sup> *Id.* at 1072.

<sup>89</sup> *Id.* at 1073.

<sup>90</sup> *Id.* at 1074.

<sup>91</sup> *Id.* at 1073.

POAs, contain “residents [who] have contractually agreed to abide by the common rules and regulations.”<sup>92</sup>

In sum, whether one looks to the various strands of the narrow state action doctrine or to more comprehensive definitions of privateness applied in the literature, the landlord-tenant relationship is a quintessentially private governance system. Rental properties, like private subdivisions, contain private rules in a lease and rely on a nongovernmental entity (a landlord) and ultimately the courts for enforcement. Landlords, like community associations, cannot force residents into agreeing to rules; they lack the coercive authority of a public government. Just as a homeowner who dislikes particular subdivision rules may opt out of buying a home in a particular private community (assuming that she is mobile and there are other housing options), a tenant (assuming the same conditions) may reject a rental if she dislikes the rules in a lease. Landlords also tend to govern smaller territories than do public governments,<sup>93</sup> and they lack the traditional sovereign powers of a public government, although, as discussed in Part II, they wield broad powers and are likely to affect property use more powerfully than a local public government. Finally, just as the few courts that have addressed constitutional challenges to private governmental decisions have tended to omit community associations from the state actor category,<sup>94</sup> courts will rarely label landlords as public.

## 2. Identifying the “Community” in Both Rented and Owned Private Properties

The private governance sphere carved out in the law and literature of private communities clearly should include rentals, but one might reasonably object that tenants do not fall within traditional understandings of community despite their communal nature. The multifamily rental exhibits the same communal characteristics seen in a private subdivision, although it is debatable whether these characteristics fall within traditional understandings of community.

Not all private communities are true communities, which possess the warm characteristics typically associated with community such as inclusiveness, communication, generosity, and, more generally, a shared spirit of togetherness.<sup>95</sup> Both types of rented and owned properties highlighted in this Article are formed, however, in part for the *purpose* of creating these types of cohesive environments.<sup>96</sup> While many tend to think of private subdivisions as uniform rows

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<sup>92</sup> *Id.*

<sup>93</sup> Some apartment complexes are, however, larger than towns in terms of population.

<sup>94</sup> See *supra* note 72 and accompanying text.

<sup>95</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 273–74 (2000) (defining community and suggesting similar attributes); Richard G. Lorenz, *Good Fences Make Bad Neighbors*, 33 *URB. LAW.* 45, 48–49 (2001) (defining community by its functions, including the need to “provide a human interaction” and “to bring together different types of people”).

<sup>96</sup> Alternatively, even when a developer does not intend to form a community, one may form anyway. See, e.g., Reichman, *supra* note 14, at 262–63 (noting that the structure

of beige houses and rental spaces as bland multiunit apartments, developers and landlords offer a variety of private communities, from eco-spaces to international houses and artists' cooperatives.<sup>97</sup> Many, in turn, allow for chance interactions with neighbors in common areas or offer periodic community meals and volunteer days.<sup>98</sup> Indeed, developers often advertise that their spaces provide various forms of real community. Crystal Manor, a private subdivision of affordable homes in Citrus County, Florida, for example, claims, "The neighborhood children run from house to house playing games while the adults share a block party barbecue and everyone knows everyone."<sup>99</sup> The Rosecrest master-planned community in Utah similarly advertises "[a] place that, by its very design, fosters relationships and recreates the close-knit neighborhoods of a bygone era."<sup>100</sup>

Landlords, too, claim that their apartment buildings foster community. Atlantic Heights in Barnegat, New Jersey, describes how residents can "engage in some friendly competition on either the outdoor basketball court or tennis court,"<sup>101</sup> and The Gables in Washington, DC, proclaims, "Get More Than An Apartment, Get A Real Community!!!"<sup>102</sup>

Private communities, while aiming (or merely claiming) to create true communities, also might encourage individuals to be more active participants in shaping their collective space and values. Civic virtue is nearly always linked to homeowners in the literature, but when one controls for the duration of residence or the stability of an individual's living situation, homeowners might not in fact be significantly better civic participants than renters.<sup>103</sup> While renters may be somewhat less likely than homeowners to "help solve local problems, know the

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of the homeowners' association could unwittingly provide a mechanism for reversing the anticommunity trends of the last century).

<sup>97</sup> See, e.g., *Cohousing Directory*, COHOUSING, <http://www.cohousing.org/directory/view/20598/> (last visited Oct. 3, 2012) (describing a green, privately governed community in New Hampshire).

<sup>98</sup> See, e.g., CROOKED RIVER RANCH CLUB & MAINTENANCE ASS'N, <http://www.crookedriverranch.com/> (last visited Oct. 29, 2012) (describing community events such as a brown bag event and a farmers' market within the private community); OZARK N. SHORES, <http://www.ozarknorthshores.com/community.html> (last visited Oct. 3, 2012) (describing monthly POA potlucks); *What's Happening Around the Ranch...*, PROP. OWNERS ASS'N OF TERLINGUA RANCH, INC. (Sept. 21, 2011), <http://www.patri.org/events.html> (on file with author) (describing community pools, concerts, and volunteer opportunities, among other events).

<sup>99</sup> Crystal Manor, COSGROVE BUILDERS, [http://www.homesbycosy.com/crystal\\_manor.htm](http://www.homesbycosy.com/crystal_manor.htm) (last visited Oct. 3, 2012).

<sup>100</sup> ROSECREST, <http://www.rosecrestutah.com/> (last visited Oct. 3, 2012).

<sup>101</sup> *Luxury Style and Comfort*, ATLANTIC HEIGHTS, <http://www.atlanticheights.com/community.htm> (last visited Oct. 2, 2012).

<sup>102</sup> *Get More Than an Apartment, Get a Real Community!!! Pets Welcome!!!*, CRAIGSLIST (Sept. 3, 2011), <http://washingtondc.craigslist.org/nva/apa/2580520363.html> (on file with author).

<sup>103</sup> See Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 903 (2011).

head of their school board, and engage in neighborhood activism,” these differences are modest.<sup>104</sup> Renters also participate in local political and social organizations at a rate and intensity comparable to homeowner participation.<sup>105</sup> In short, the view of renters as disinterested citizens who care little about their communities is not always accurate. Renters, like homeowners, may demand private governance structures that provide them with a voice in community decisions. Those lacking tenants’ rights groups or similar self-governance mechanisms have fewer opportunities for participation in community decisions than do POA members, and this may need to change.

Having considered both the “private” and “community” elements of the private community law and literature, it appears that rentals fall squarely within both elements of this definitional sphere, and this will have important implications moving forward. It suggests a re-evaluation of the literature and suggests how lessons from two types of classic private communities—the apartment building and the private subdivision—may be particularly relevant in both communities. If state laws should constrain POAs’ discretion to enforce private rules against homeowners, for example, perhaps they should similarly limit landlords’ enforcement powers, or at least give tenants opportunities to form associations and to have more voice in enforcement priorities and techniques. To ensure recognition of a new, more inclusive category of private governance within the property literature, we could perhaps label this new, broader evaluative space as the “privately governed community.” This Article, however, continues the use of the shortened term “private community” and expands its reach.

### *C. Identifying the Fundamentally Similar Purposes and Features of Rented and Owned Private Communities*

The fact that both rented and owned private communities meet the existing litmus tests for privateness is unsurprising. When we focus on the quintessential rental community—the multiunit apartment building—and its counterpart in the ownership context—the private subdivision—striking similarities emerge.<sup>106</sup> At their core, both communities aim toward the same central goal of maximizing collective property values. Indeed, POAs, which shrink collective action problems by acting for the community as a whole, behave much like landlords. Rented and owned communities can also both reduce externality conflicts, protect the aesthetic and “emotional” character of the community (defining a space as lively or quiet, for example), attempt to offer a “true community,”<sup>107</sup> encourage civic participation, and provide common services. Despite these laudable goals, individuals in both

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 904, 906.

<sup>106</sup> See *supra* Part I.A (explaining why this Article does not discuss condominiums and single-family rented homes).

<sup>107</sup> For skepticism about the ability for private communities to offer “true” communities and a definition, see Wiseman, *supra* note 3, at 708 n.44.

types of communities may end up despising the detailed rules to which they have committed themselves through a deed or lease—thus requiring further consideration (provided in Part III) of the merits of the private governance system and the rules that it creates. The following subparts flesh out these strong and as-yet unexplored similarities between the purposes of rented and owned private communities, and of the private rules that form these communities.

### *1. Protecting Property Values*

The extent to which private rules and enforcement actually maintain property values in the homeownership context is heavily debated.<sup>108</sup> Those writing the rules in both rented and owned communities, however, seem to believe that the rules protect against value losses, and they largely write them for this purpose.<sup>109</sup> Landlords collectively control the actions of individual residents to preserve long-term property value and guarantee short-term rental income by attracting residents.<sup>110</sup> Indeed, recent economic models suggest that landlords are incentivized to maintain property to avoid vacancy and lost rent,<sup>111</sup> and rules support this maintenance. Similarly, POAs control individual households to protect neighborhood property values,<sup>112</sup> which are largely determined by the actions of neighbors—hence the “location, location, location” mantra in real estate.

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<sup>108</sup> Professor Lee Fennell observes, for example, that homeowners tend to be overly risk averse, constraining too many property uses and modifications. Fennell, *supra* note 13, at 870–73.

<sup>109</sup> *Id.* at 858, 875 (describing how developers implement large rule sets in hopes of preserving property value).

<sup>110</sup> See, e.g., William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377 (describing pleasant, low-income rental communities). *But cf.* Hanoch Dagan, *Inside Property*, 63 U. TORONTO L.J. 1, 4 (2013), available at <http://ssrn.com/abstract=2006737/> (noting that “modern landlord-tenant law is interested in addressing not only the vulnerability of landlords to the possible opportunism of tenants” but also “is preoccupied with the ability of landlords to affect the conditions of the premises,” thus describing how public law affects this core purpose of the landlord’s private rules).

<sup>111</sup> Glaeser, *supra* note 19, at 13 (noting that landlords “have the same long-run price incentives [as do owners] and they benefit from the higher rent that they can charge as a result of maintenance”); Thomas J. Micelli & C.F. Sirmans, *Efficiency Rents: A New Theory of the Natural Vacancy Rate for Rental Housing* 1–3 (Univ. of Conn. Working Paper No. 2010-30, 2010), available at <http://www.econ.uconn.edu/working/2010-30.pdf>. *But see* Glaeser, *supra* note 19, at 14 (noting that landlords often conduct maintenance themselves for economic reasons). This may detract from the argument that landlords will use rules to ensure upkeep and to preserve value; although even if the landlord provides the maintenance, she will not want a sloppy tenant to reverse these benefits.

<sup>112</sup> See, e.g., Caitlin S. Dyckman, *The Covenant Conundrum in Urban Water Conservation*, 40 URB. LAW. 17, 22–23 (2008) (“[C]ovenants that run with the land have come into widespread use for larger developments . . . because the developer can assure the

Both renters and homeowners would, generally speaking, prefer to have unfettered freedom to do what they like with their living space, be it planting cactus in the lawn or owning six cats. One consideration, however, ultimately trumps this preference for individual freedom: neighbors' uses, which annoy the individual occupant on a daily basis and may negatively affect property value, collectively motivate individual owners to seek out a third-party entity to regulate these uses, and they lead renters to accept restrictive lease conditions.<sup>113</sup>

By creating a set of rules up front, to which prospective tenants or homebuyers sign on, both rented and owned private communities avoid the transaction costs incurred by neighbors individually contracting for rules.<sup>114</sup> Further, they eliminate the free rider problems associated with rule enforcement in areas with shared space: one resident's enforcement of a servitude or lease provision would benefit all members of the community, and the resident could not exclude others from this benefit. The POA or the landlord of a multiunit apartment building avoids this barrier by centrally enforcing shared rules.

## 2. *Reducing Externality Conflicts and Preserving Community Character*

Many property uses, from cactus growing to cat keeping, have effects that drift beyond the walls of an individual home or the boundaries of a yard—effects that both impact property values and, relatedly, individuals' daily enjoyment of property. These are the “neighbor externalities” that finally push the individual to cede freedom of property use to collective control. Backyard grills send smoke onto neighboring porches, and a television blaring in a living room can interrupt a neighbor's peaceful dinner. Although nuisance law and public zoning regulations control many of these externalities—and indeed, some zoning laws have become quite detailed in their restrictions<sup>115</sup>—they may fail to prevent a variety of activities that bother neighbors.<sup>116</sup>

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quality and marketability of the product until all units are sold, even if construction and sales occur over a period of years . . .”).

<sup>113</sup> See Cantora, *supra* note 38, at 424 (“People join [common interest communities (CICs)] for the express purpose of living in a situation in which everyone will have some rights restricted so that everyone will have some other benefits expanded.”); Susan French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 347 (1992) (“Americans have been willing to give up some degree of freedom to secure the advantages of ownership in common interest communities.”).

<sup>114</sup> See Epstein, *supra* note 14, at 907–15 (explaining that “recordation and common plan building schemes” have reduced the transaction costs of contracting for shared spaces and associated covenants).

<sup>115</sup> See, e.g., Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1122–49 (2006) (describing states' approval of aesthetic zoning, including billboards); Wiseman, *supra* note 3, at 719–20 (describing the expansion of zoning to protect architectural features).

<sup>116</sup> See NELSON, *supra* note 3, at 37 (describing the limitations of traditional zoning).



Developers and landlords form private communities, at least in part, to address this public legal deficiency by implementing a set of uniform rules that attaches to each property in a community. Through these uniform rules, the communities guarantee a limited range of externalities and allow community “consumers” to choose the type of externalities that they most wish to avoid.<sup>117</sup> In writing rules that apply in addition to those within public zoning and building codes, private community governments also aim to promote a certain type of community character. Gathering together similar preferences against certain types of externalities tends to do this, both by defining a consistent aesthetic and supporting less tangible values, such as noise and liveliness. Discerning consumer-homeowners who despise brightly colored houses can band together in a private subdivision,<sup>118</sup> and students who dislike the din of late-night parties can select the quiet apartment complex. Private communities, both by limiting externalities and imposing uniformly detailed rules, endeavor to shape the whole living space—not just the physical aesthetic of individual homes or apartments, but also the character of the community that surrounds the homes or units.<sup>119</sup> As Professor Lee Fennell has persuasively argued, living spaces can no longer exist in isolation; property is a complex, interwoven web of individual lots or units and their surrounding space,<sup>120</sup> and, to a large extent, the creators of private communities recognize this.

### 3. *Offering Shared Services and Facilities*

In addition to creating rules that protect property values and collect similar rule preferences, landlords and developers offer apartment buildings and private subdivisions in part to provide common facilities and services for residents, from building a courtyard or pool to shoveling snow.<sup>121</sup> Several of the subdivisions and apartments introduced in Part I.B.2 above, for example, promise amenities such as

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<sup>117</sup> For a discussion of Charles Tiebout’s community consumer hypothesis in the private community context, see Wiseman, *supra* note 3, at 727–39; Fennell, *supra* note 13, at 857–60.

<sup>118</sup> See Fennell, *supra* note 13, at 857 (explaining that “people who enjoy fixing cars could enter one community, while people who enjoy displaying and viewing concrete gnomes could enter a different community”).

<sup>119</sup> See ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 46, at 4 (noting that developers of residential community associations “are able to produce more attractive and marketable homes, which include a livable environment, not just a house”); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 3 (“[R]estrictions serve the significant salutary purpose of maintaining a desirable character and quality in many residential areas.”).

<sup>120</sup> See LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009).

<sup>121</sup> ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 46, at 12 (“RCAs commonly provide a variety of services . . .”).

maintenance, landscaping, clubhouses, picnic areas, and fitness centers.<sup>122</sup> Many homeowners list maintenance services and shared facilities as a primary reason for joining a private subdivision,<sup>123</sup> and renters likely have similar motivations.

Considered together, the collective purposes and functions of rented and owned private communities are similar in important ways. POAs in private subdivisions largely mimic the older, more established private governance model of the landlord of the multiunit building, who provides one set of rules, one enforcer, and common services and facilities. Individuals in both types of communities may not, in the end, enjoy the rules to which they have agreed. As discussed in Part III, those who are unaware of or do not fully understand the rules that they commit to when renting or buying in a private community may experience an unpleasant shock when they learn of the intrusiveness of the rules—and homeowners, in particular, may not anticipate the rules. Regardless of their satisfaction with the constraints imposed, however, tenants and buyers in private communities both experience a common element: a detailed set of rules uniformly limiting all community occupants' uses of their individual properties, and a central, private entity that enforces the rules.

Identifying rental governance as a private system matters because, *inter alia*, it highlights the “tension between private volition and social control”<sup>124</sup> that Professor Richard Epstein has identified as a persistent theme in law. Having labeled a community as private, normative questions arise as to exactly how *much* discretion we should grant to private actors, who, by definition, wield regulatory powers without the checks traditionally placed on public officials;<sup>125</sup> whether these communities are good for society as a whole; and whether and why the rules within these communities benefit the community consumers who are choosing to live there.<sup>126</sup>

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<sup>122</sup> *Get More Than an Apartment, Get a Real Community!!! Pets Welcome!!!*, *supra* note 102 (advertising, among other features, on-site management, business center, fitness center, BBQ/Picnic Area, and a clubhouse); *Luxury Style and Comfort*, *supra* note 101 (advertising, among other features, emergency twenty-four-hour maintenance, tot lot and play area, BBQ area, fitness center, tennis court, clubhouse, and landscaping throughout the seasons); *Our-Community*, ROSECREST COMMUNITIES, <http://www.rosecrestcommunities.com/our-community/> (last visited Oct. 9, 2012) (advertising, among other features, “10+ miles of improved trails,” “clubhouses,” and “maintenance-free living”).

<sup>123</sup> See PHILIP A. VANNO, ZOGBY INT’L, FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH TRACKING POLL 15 (2007) (showing “maintenance-free” as one of the best aspects of living in community associations).

<sup>124</sup> Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1353 (1982).

<sup>125</sup> For a detailed discussion of the limits of a private group’s autonomy and the conflict between allowing factions to fulfill their preferences and governing these factions’ external relations with the larger community, see Alexander, *Dilemmas of Group Autonomy*, *supra* note 13.

<sup>126</sup> For a general discussion of the extent to which consumers actively “choose” communities, as opposed to mistakenly falling into them, see Wiseman, *supra* note 3.

The literature has conducted this essential analysis for owned communities—one category within the private governance sphere in property—but it has consistently ignored rentals.<sup>127</sup> Part II evaluates this omission by developing a framework of the relevant differences between rented and owned communities. Although some of the differences are meaningful, none justify the exclusion of rentals from the private community literature.

## II. IDENTIFYING MEANINGFUL RENTER-OWNER DIFFERENCES

The functional similarities between rented and owned private communities open the door for many shared concepts that have not yet been explored. State laws requiring POAs to provide notice to owners of meetings and offer open meetings,<sup>128</sup> for example, may be relevant for tenants demanding some self-governance responsibilities, such as the ability to agree on and request modifications of lease rules. The similarities also show that the private community literature, in omitting the entire rental field from its discussions, is missing a very important thread and should perhaps reconsider some of its core assumptions. If intrusive rules, arbitrary enforcement, and harsh punishments (including foreclosure) are problematic for owners, then it would be beneficial for the literature to explore why renters do not merit similar, if not identical, treatment.

Not all lessons from private subdivisions will transfer logically to the multiunit complex, of course, and landlord-tenant law, while offering fruitful comparisons for private subdivisions, will likely be irrelevant in some ownership contexts. A framework is therefore necessary to identify just how inclusive the new sphere of private governance of property may be—and whether it matters that the literature has omitted renters from this sphere. The framework developed in this part serves this purpose, allowing us to determine whether the literature's homeowner focus is justified and to locate the areas of private governance that are ripest for comparison. The framework hints that none of the differences fully justify omission of renters from normative discussion of private communities or prevent the effective transfer of lessons from one community to another—a conclusion explored in detail in Part III.

### A. *Different Structural Mechanisms*

The clearest factor that differentiates rented from owned communities is simply that, although they have similar *types* of governance structures and rules, the mechanisms for creating and enforcing the rules in each community differ substantially. When created, for example, rules encapsulate different levels of input from those governed by them, and enforcement actions flow from different incentives in the two types of private communities.

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<sup>127</sup> *But see supra* note 23 (discussing renters' experiences within owned private communities).

<sup>128</sup> *See* sources cited *supra* note 31.

### 1. Rule Creation

The private community literature worries that in writing private rules, subdivision developers provide too few rule options to homeowners and include too many servitudes within subdivision declarations.<sup>129</sup> It appears, however, that landlords may be just as likely to provide inadequate rule variety and too many rules, which may be uniform across many rental apartment options.

The techniques for writing rules in rented and owned private communities do differ, however, and these may enhance certain concerns in the ownership context. Landlords write lease rules independently; they typically are constrained only by public law that provides minimal tenant protections with respect to housing conditions and prohibits discriminatory treatment.<sup>130</sup> These rules are temporary and therefore somewhat low risk, thus offering options for experimentation: the landlord can change them in a year or two when the lease expires. If the tenants want new rules or fewer of them (if they overwhelmingly argue that parties after midnight should be banned, for example, but restrictions on balcony flowerpots and chairs should be removed), the landlord may be willing to compromise. Further, the landlord contracts individually with tenants in a lease, thus perhaps better catering to each community member's preferences and offering more rule variety.

Developers of common interest communities, on the other hand, write and record more permanent rules<sup>131</sup> with an accordingly higher cost of failure, and they involve more parties in the rule-writing process. Indeed, the developer typically consults extensively with attorneys and sometimes with potential buyers during the rule writing process.<sup>132</sup> These rules, comprised of a set of servitudes, are not negotiated individually with each owner of the community; rather, they attach to and run with the land. The developer, concerned about selling homes and ensuring long-term property values, implements one uniform set of rules, thus offering no rule variety among properties within one subdivision; further, the developer often uses the same rules in all of her subdivisions.<sup>133</sup> She also will likely include more

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<sup>129</sup> See, e.g., Carmella, *supra* note 6, at 66 (expressing concern that "residents of CICs are often subject to numerous detailed controls," many of which are standardized); Fennell, *supra* note 13, at 850–53 (noting that uniform rules are not unique to subdivisions, but expressing concerns about inadequate rule experimentation and too many rules); Franzese & Siegel, *supra* note 3, at 1126 (worrying about the prospective homebuyer's inability to negotiate rules).

<sup>130</sup> See Fair Housing Act, 42 U.S.C. § 3604(a)–(c) (2006).

<sup>131</sup> URBAN LAND INST., *supra* note 47, at 198 (1964); Fennell, *supra* note 13, at 838.

<sup>132</sup> See Hyatt & Stubblefield, *supra* note 57, at 652.

<sup>133</sup> See Fennell, *supra* note 13, at 868 n.156, 875 (describing the use of boilerplate language and suggesting that developers might use it in order to save money); Winokur, *supra* note 119, at 4 (noting increasing use of servitudes); Wiseman, *supra* note 3, at 740 n.280.

rules than are desired to cater to the early, risk-averse owners who want to ensure that no one will paint their house purple or put plastic flamingos in the yard.<sup>134</sup>

Landlords' and developers' rule-creation processes and purposes intersect in several important ways, however, and create similar concerns (or benefits). Developers, like landlords, operate above a public law baseline. Under *Shelley v. Kraemer*, for example, developers may not write and record certain discriminatory covenants<sup>135</sup> (and landlords likely may not include discriminatory lease provisions, as these, too would require enforcement by the courts); both landlords and developers are also subject to the Fair Housing Act.<sup>136</sup> As rule writers, developers and landlords also have similar incentives. Both want to fill the "units" within a community—whether they are single-family lots or one-room apartments—and to maintain the units' value; they write rules aimed at these goals, and this likely will affect the variety and quantity of rules offered.<sup>137</sup> The landlord, who is centrally focused on long-term value, controls uses of units that may negatively impact tenants' enjoyment of apartments and thus prevent full occupancy, as well as those that will damage the property.<sup>138</sup> This may lead to uniform rules across units, thus subjecting unit occupants to the same constrained choices criticized in subdivisions.

Perhaps more importantly, developers and landlords, who are both private writers of rules, often rely on templates. Landlords may follow the standardized lease form written by the state or local realtors' association,<sup>139</sup> and subdivision developers frequently rely on boilerplate language.<sup>140</sup> This limits the ability of both tenants and homeowners, as community consumers, to "vote" for or reject particular rules by refusing to sign; if they find the same set of rules in the competing apartment building or subdivision, their choices will be limited to questions of design and location. Although landlords may potentially negotiate

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<sup>134</sup> See Fennell, *supra* note 13, at 869 ("Because the earliest residents bear the greatest risk—unlike later residents, they cannot reassure themselves about a community by scanning the completed neighborhood—they are likely to desire a high level of protection against uncertainty in the form of restrictive servitudes.").

<sup>135</sup> 334 U.S. 1, 12 (1948).

<sup>136</sup> See Fair Housing Act, 42 U.S.C. § 3604(a)–(c) (2006).

<sup>137</sup> See Gillette, *supra* note 13, at 1429–30 (explaining that the developer does not cede control to the POA until a certain percentage of homes are sold and "[t]he developer desires to market homes within the association, and compliance with the covenants, by defining the nature of the community, serves as a marketing tool to attract residents whose interests are reflected in those covenants. Hence, one would imagine that market-based incentives would induce the developer to interpret the covenants in a manner consistent with the norms of the community.").

<sup>138</sup> See, e.g., Micelli & Sirmans, *supra* note 111, at 1–2 (describing landlords' incentives to avoid vacancy).

<sup>139</sup> See, e.g., Residential Lease Contract (June 17, 2007) (prepared from form contract provided by Texas Apartment Association and Austin Apartment Association) (on file with author).

<sup>140</sup> See Fennell, *supra* note 13, at 868 n.156 (citing to several sources that confirm the use of boilerplate language); Winokur, *supra* note 13, at 98–99.

individually with unit occupants for rule modification, this assumes that the landlord is willing to bargain—an assumption that several courts have rejected.<sup>141</sup>

## 2. Rule Enforcement

Just as private community scholars worry about the content of the rules created by subdivision developers, they also often criticize the private mechanisms for enforcing these rules. Professors Paula Franzese and Steven Siegel, for example, are concerned that “[f]ew checks are in place to protect from autocratic, petty or misguided rule.”<sup>142</sup> Professor Franzese further notes problems associated with the “zealous homeowners’ associations” that act as the “nice police” within subdivisions.<sup>143</sup> The overzealous and even vindictive enforcement of rules by landlords, however, receives little attention in the private community context despite media and scholarly accounts of evictions after tenants complained of poor conditions or formed tenants’ associations.<sup>144</sup>

The enforcement mechanisms in the two private communities do vary, but these differences suggest that we should perhaps be *more* concerned about enforcement of private rules in the rental context than in the ownership context—or at least that we should explore this possibility. Landlords may implement decisions about property use quickly and unilaterally, while POAs (once the developer cedes control) must, at least in some cases, take time to vote and agree

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<sup>141</sup> See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 170 n.130 (2005) (explaining that “[c]ourts often hold . . . that tenants have no bargaining power in dealing with prospective landlords and must meekly accept whatever terms the landlord seeks to impose through standard form lease contracts” and citing to several cases).

<sup>142</sup> Franzese & Siegel, *supra* note 3, at 1135.

<sup>143</sup> Franzese, *supra* note 6, at 338; see also Franzese & Siegel, *supra* note 3, at 1130 (explaining that boards may use rules and rule enforcement as “weapons”); Wiseman, *supra* note 3, at 738 n.270 (describing one homeowner’s complaint about alleged retaliatory enforcement by a board).

<sup>144</sup> See, e.g., Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 149–50 (1997) (describing historic landlord retaliation through eviction after tenants formed an association or complained of conditions); Jamie Larson, *Landlord Evicts Outspoken Tenant*, REGISTER-STAR (July 27, 2011, 1:00 AM), <http://www.registerstar.com/articles/2011/07/27/news/doc4e2f95ed331b6815799869.txt> (describing an eviction following a conditions complaint). These evictions can, of course, be challenged in court under both the Constitution and public eviction standards—which do not allow eviction in retaliation for speech. See, e.g., N.Y. REAL PROP. LAW § 223-b (McKinney 2006) (prohibiting landlord retaliation for, among other acts, the formation of tenants’ organizations). Homeowners challenging POA enforcement will face a difficult business judgment rule or a more deferential standard of review. See, e.g., Lori A. Roberts, *Topping Palm Trees in the Name of CC&R Enforcement*, 51 S. TEX. L. REV. 413, 423 (2009).

on rule enforcement decisions.<sup>145</sup> The moderating votes of certain association members could protect homeowners against vindictive or arbitrary enforcement, while tenants lack a second voice that could force the landlord to take more reasonable enforcement action.

Relatedly, landlords do not operate under private rules that narrow their enforcement discretion, although they must follow state-mandated eviction procedures<sup>146</sup> and certain other public law constraints.<sup>147</sup> POAs, in contrast, must comply with a complex set of private bylaws governing how they must reach enforcement decisions. Bylaws often require public meetings, for example, set the percentage of votes required (if any) to amend rules, and describe proper procedures for notifying homeowners of violations.<sup>148</sup> Limited public law requirements constraining association procedures also apply in some states.<sup>149</sup> Tenants therefore may face a higher danger of unfair enforcement than do homeowners.

Private community scholars could argue that public law constraints on landlord enforcement adequately protect tenants and that similar protections are lacking in the ownership context. For example, Hawaii requires that lease terms and conditions must apply “to all tenants of the property in a fair manner” if they are to be enforced, but offers no such protection in the ownership context.<sup>150</sup> This disparity may be true, but if so, it must be empirically explored.

### *B. Homeowners’ and Tenants’ Different Property Interests*

Private community scholars are not only concerned about the creation of problematic rules or unjust rule enforcement; they also dislike the substance of private subdivision rules.<sup>151</sup> The Third Restatement, for example, would eliminate

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<sup>145</sup> See Franzese, *supra* note 13, at 588 (“[T]he system is set up to require dealings with . . . the board of directors or homeowners’ association—who in turn enforce a formal code . . .”). In some cases, however, one or several POA members make unilateral decisions to, for example, deny a homeowner’s request to modify an exterior feature, or send a letter demanding that a homeowner repair a property feature or cease a particular activity.

<sup>146</sup> Self-help eviction is prohibited in a majority of states. See Schissler, *supra* note 83, at 328 (“[A] minority of states still allow landlords to employ self-help—the use of all necessary and reasonable force—to evict a tenant.”).

<sup>147</sup> See, e.g., HAW. REV. STAT. ANN. § 521-52(b)(3) (LexisNexis 2006) (providing that a lease obligation or restraint shall not be enforceable against a tenant unless “[i]t applies to all tenants of the property in a fair manner”).

<sup>148</sup> URBAN LAND INST., *supra* note 47, at 397–402 (model bylaws).

<sup>149</sup> See *supra* note 31 (citing various state requirements such as annual meetings and ten days’ notice of the meeting).

<sup>150</sup> See Franzese, *supra* note 13, at 556 (describing the nearly unlimited discretion of a POA board to impose penalties); Reichman, *supra* note 14, at 269 (describing the “unlimited discretion” of most modern architectural review committees in subdivisions).

<sup>151</sup> See *infra* Part III.

servitudes that address “design, materials, colors, or plants that may be used,”<sup>152</sup> because although these restrictions “may contribute to the maintenance of property values,” “they are not necessary to the effective functioning of the community.”<sup>153</sup> But if a landlord may impose these types of rules on renters, thus preserving unit values and preventing occupants from, say, enduring neighbors’ garish outdoor decorations, why may property owners not collectively restrain their property uses to achieve similar goals?

The occupants of rented and owned living spaces do, of course, have strikingly different interests in the properties,<sup>154</sup> and these interests may influence the types of rules that are acceptable in one community but not the other. Tenants are generally unconcerned about the value of the unit and particularly the long-term value, aside from the risk of losing a security deposit, being sued, or living in unpleasant conditions.<sup>155</sup> Homeowners, on the other hand, are centrally concerned about property value.<sup>156</sup> But an investigation of private governments’ incentives—those of landlords, developers, and POAs—reveals that the purposes of the use limiting rules are quite similar.

### *1. Preferences for Different Types of Value-Preserving Rules*

A home’s value plays a central role in property owner decision making, and a POA is focused on protecting two types of property values: the individual homeowner’s daily enjoyment of her property and her long-term property value, which the value of the community as a whole affects. Although the owner can

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<sup>152</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.9 (2000).

<sup>153</sup> *Id.* cmt. a.

<sup>154</sup> This Article uses the term “value interest” rather than “financial interest” to capture the many elements of a property user’s interest.

<sup>155</sup> See, e.g., Kathryn Hake, *Is Home Where Arkansas’s Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law “Caveat Lessee,”* 59 ARK. L. REV. 737, 742 (2006) (“Even a handy tenant has no incentive to conduct maintenance and repairs because he has . . . no incentive to increase the value of the property for his landlord’s benefit.”).

<sup>156</sup> See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 9 (2001) (arguing that homeowners’ votes in local governance are primarily shaped by concerns about property value). Although this Part focuses on the property value interest, homeowners and renters have important goals for property that move far beyond financial value, as the human flourishing literature has emphasized primarily in the ownership context. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 822–24 (2009) (arguing for a more careful exploration of the land-use model that assumes a “rational” landowner motivated primarily by a desire to maximize her wealth” (citation omitted)). Both homeowners and renters use property to fulfill their emotional and social needs, for example, which the human flourishing literature would, at minimum, include within utility-based measures. See, e.g., Alexander, *supra* note 22, at 766–73 (describing community-based connections).



control her own activities and thus, to some extent, the value of her home,<sup>157</sup> she relies on the rules to control neighbors' uses that spill over to her property—uses that are best understood as “neighbor externalities.” To reduce these externalities, the rules governing a subdivision regulate many exterior uses,<sup>158</sup> even temporary ones, because they have strong spillover effects. These rules may also regulate interior uses of the home, both temporary and permanent, that are sufficiently powerful to impact neighbors.<sup>159</sup> Because homeowners individually care about the long-term value of their home, however, there is less incentive to regulate interior uses that lack noticeable externalities.

The landlord of a multiunit apartment, like the POA in a subdivision, focuses on tenants' daily enjoyment of property because she wants to maximize value, in this case by filling the most units at the highest possible rent over the long term. Unhappy tenants may move out or refuse to rent at the outset.<sup>160</sup> The landlord also aims to preserve the long-term property value of the structures that she owns. To do this, she will write the same types of externality-limiting rules found in a private subdivision: she will focus most closely on regulating permanent exterior uses of units (modifications to balconies and doors, for example) and interior uses with spillover effects. The fundamental difference between rental and ownership, however, lies in the landlord's need to preserve long-term value.

The landlord, who must protect an investment while ceding control of the property to an individual with different incentives, must somehow ensure that her tenant will not unduly damage the property. This value interest supports unique lease rules that prevent damage to the structure of the property, including the interior. POAs also may implement some regulations that prohibit substantial interior damage, though, for fear that poor landowner decisions about interior uses—a remodeling job that converts a home to a sports bar decor, for example—will lower property values.

On the whole, the difference between value considerations in rented and owned communities, although fundamental, probably results in relatively few categorical differences in the rule sets of the two communities. Rules restricting individuals' uses of property are imposed to protect short-term enjoyment and long-term property values, both of individual units or homes and of the community as a whole.

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<sup>157</sup> See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (noting that “individual residents themselves have strong incentives to keep their own property values up and to prevent ‘visual clutter’ in their own yards and neighborhoods . . .”).

<sup>158</sup> See Hyatt & Stubblefield, *supra* note 57, at 611–12 (explaining that POAs' “power is generally used to regulate conduct on the exterior portions of private property that might be visible from other private or common property or that might result in unreasonable annoyances to persons beyond the boundaries of the private property”).

<sup>159</sup> See, e.g., Franzese, *supra* note 6, at 339–40 (describing covenants affecting the interior).

<sup>160</sup> See generally Micelli & Sirmans, *supra* note 111 (explaining that tenants unhappy with maintenance may vacate).

## 2. *Direct and Indirect Representation of Individuals' Property Value Preferences*

A second value difference in rented and owned communities arises from distinctions in the rule enforcement process. Landlords and POAs, as small “governments” that implement rules to preserve property values, represent this interest in different ways. The landlord writes and enforces her own rules, thus directly capturing her desire to maximize property value and reduce use conflicts among neighboring units. POAs, in contrast, bring considerations other than property value into their rule enforcement decisions. Although the members of the association want to maintain the value, some members also may want to give neighbors special enforcement favors.<sup>161</sup> They also might use their position of power to break the rules themselves.<sup>162</sup> Certain procedural constraints on POAs therefore may be necessary to dampen these illegitimate incentives for rule enforcement.

From the perspective of ensuring that rule enforcement adequately encapsulates the landlord's property value concerns, landlords typically do not need these types of enforcement checks. As discussed in Part II.A.1, however, tenants need procedural constraints on enforcement for other reasons, such as ensuring that rule enforcement by the landlord is not arbitrary or vindictive.

Considered together, private community rules and their enforcement all aim to maintain individual unit or home values and, more importantly, collective values of the community as a whole. Even in owned communities, POAs may not trust the homeowners to adequately maintain this collective value, as individual preferences could trump the collective, long-term good. Landlords, too, are concerned that tenants will not maintain either individual unit value or the value of the apartment complex as a whole. And finally, both POAs and landlords may zealously enforce rules to effectuate their value preserving purposes, although POAs may require more direction in this area to ensure that enforcement is not conducted for purposes unrelated to this goal.

### C. *Space*

In addition to voicing concerns about rule writing, enforcement, and substance, the literature has (legitimately) focused on the physical effects of private subdivisions, namely the walling off of thousands of residents through the creation of gated communities.<sup>163</sup> Despite decrying the negative societal effects of physical walls, the literature immediately turns to the individual homeowner within this gated community, worrying that the homeowner's own castle is inadequately

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<sup>161</sup> See, e.g., Wiseman, *supra* note 3, at 738 n. 270 (describing homeowners' claims that POAs enforced rules vindictively and arbitrarily).

<sup>162</sup> See *id.*

<sup>163</sup> See *infra* note 174 and accompanying text.

protected from intrusive rules.<sup>164</sup> This special treatment of owned homes within subdivisions likely arises in part from assumptions about space: that residents of single-family homes on separate lots are entitled to exclusive use of property, while renters of units, although technically holding the same exclusive possessory right, are not.

If the literature were to more closely investigate this assumption, it would be correct to note that when units within a private community are closer together, more types of property uses will have substantial spillover effects. Rules that reduce neighbors' conflicts through strict constraints on property use may therefore find more purchase in apartments, where units are closer together, than in private subdivisions of single-family homes. On the other hand, single-family homes have more spillover effects beyond the borders of the private community.<sup>165</sup> This may justify strict regulation of certain uses in private subdivisions to mitigate these societal externalities.

### *1. The Size of Property and its Proximity to Other Structures*

One way of envisioning spatial differences, which may affect rule expectations, is to locate a property's "zone of exclusion." This zone is analogous to curtilage in the Fourth Amendment context, but it is more broadly defined here as the space surrounding the walls of a unit or home; within this space, the tenant or owner may claim exclusive use rights. The size of the zone of exclusion strongly influences the spillover effects of property uses. Someone who occupies a single-family property with a large zone of exclusion likely has different expectations for her use of property than does a tenant in a high-rise apartment. Based on these expectations, the literature's assessment of private rules—and our laws' reactions to them—therefore may reasonably vary. A larger zone of exclusion might include a hedge that shields the homeowner's view of ugly neighboring structures and blocks noise, for example. Even a homeowner in a private subdivision with hundreds of neighboring lots therefore may not expect many rules limiting her and her neighbors' uses. Indeed, this owner already has several common law and constitutional protections against annoyances, and she may not need the help of private rules. She may exclude trespassers both from the walls of her home and from her property boundaries, and she may sue for nuisance if neighbors generate smoke, noise, or other intrusions that interfere with her use of the yard.<sup>166</sup> Finally, under the Fourth Amendment, the government may not enter the curtilage of a home except with a warrant.<sup>167</sup>

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<sup>164</sup> See, e.g., Franzese, *supra* note 6, at 338–41 (criticizing the "regimentation" of rules that govern everything from the neatness of homes' interiors to pet weights and garage door closure).

<sup>165</sup> See *infra* text accompanying notes 171–172.

<sup>166</sup> See, e.g., Morgan v. High Penn Oil, 77 S.E.2d 682, 688, 690 (N.C. 1953) (holding that oil company operations may constitute a private nuisance whether operated negligently or not).

<sup>167</sup> United States v. Dunn, 480 U.S. 294, 300 (1987).

A renter of a unit within a multiunit complex, in contrast, has a smaller zone of exclusion and perhaps anticipates more private rules that will uniformly constrain her and her neighbors' uses. Take a hypothetical owner or renter of Unit A in a multiunit building abutted by a common hallway to the front, other units to both sides, and a sidewalk and businesses behind the unit. Police and the public may walk down the hall directly outside of her unit. Other property users will be close by and, in pursuing normal activities—running dishwashers or televisions, for example—will be heard through shared walls.

Despite these external annoyances, within the walls of her unit, the owner still enjoys exclusion powers, including the ability to keep out unwanted individuals through common law trespass. In many states, she also may sue for nuisance.<sup>168</sup> Like a homeowner, the tenant has rights against government officials acting without a warrant;<sup>169</sup> a smaller curtilage simply shrinks this zone to a smaller area, and with it, expectations for privacy.<sup>170</sup>

In sum, for multiunit apartment buildings, which provide individuals with fewer physical and legal opportunities to exclude various annoyances, private rules strictly limiting the use of stereos, decorations on windows, visitor hours, and even interior wall colors may be expected and may therefore seem reasonable. In private subdivisions, expectations for detailed rules likely will differ depending on the proximity of the units.

## 2. *The Environmental and Social Effects of Single and Multiunit Structures*

Although owners of single-family homes on large lots in a private subdivision may not need many private rules to keep out neighbor externalities, these owners should perhaps anticipate another sort of rule. Single-family homes have more impacts outside of the community than do multiunit structures, and this may justify more limitations on activities with effects that drift beyond subdivision boundaries.

Considered individually, single-family homes are less efficient than multiunit structures.<sup>171</sup> They take up more space due to the lack of shared walls, prevent

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<sup>168</sup> RESTATEMENT (SECOND) OF TORTS § 821E cmt. c (1977) (providing that creators of nuisances will be liable to all “possessors of the land,” and including renters in this category). *But see* Kent v. Humphries, 281 S.E.2d 43, 45–46 (N.C. 1981) (finding that a tenant at will has an insufficient interest in property to win a nuisance claim).

<sup>169</sup> Even the occupant of a hotel room maintains this right to exclude. *See* Stoner v. California, 376 U.S. 483, 490 (1964); *see also* Greg Knopp et al., *Warrantless Searches and Seizures*, 83 GEO. L.J. 692, 737 n. 263 (1995) (comparing motel warrant cases).

<sup>170</sup> *See* *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974), in which the government claimed that it could enter the backyard of one unit of a four-unit complex without a warrant because of the multiunit nature of the complex. However, the court determined that “[w]hile the enjoyment of [the petitioner’s] backyard [was] not as exclusive as the backyard of a purely private residence,” the yard was “not as public or shared as the corridors, yards or other common areas of a large apartment complex or motel.” *Id.* at 484.

<sup>171</sup> *See, e.g.*, MARILYN A. BROWN ET AL., BROOKINGS INST., SHRINKING THE CARBON FOOTPRINT OF METROPOLITAN AMERICA 11–12 (2008), *available at*

occupants from sharing infrastructure like heating units and laundry facilities, and often have water-intensive lawns.<sup>172</sup> This apartment-subdivision difference, although important, is somewhat limited. First, both multiunit structures and subdivisions have strong environmental effects, although they differ in magnitude. One notable inefficiency in multiunit buildings, for example, arises when landlords charge a uniform per-unit fee for all services, including electricity and water.<sup>173</sup> Because all occupants pay the same fee, they have little incentive to curtail their own resource use.

Another difference between rented multi-unit apartments and private subdivisions is starker, however. Many private subdivisions, in addition to generating environmental effects, have important social externalities in their creation of exclusive zones of luxury, some of which arise from the subdivisions' physical layout or rules,<sup>174</sup> as further described in Part III. Apartments, too, increasingly offer gated and luxury amenities.<sup>175</sup> But gated apartments—which are

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[http://www.brookings.edu/~media/research/files/reports/2008/5/carbon%20footprint%20s arzynski/carbonfootprint\\_report.pdf](http://www.brookings.edu/~media/research/files/reports/2008/5/carbon%20footprint%20s arzynski/carbonfootprint_report.pdf) (explaining that units with shared walls have lower carbon emissions); Ellie Carroll, *Twenty-Five Years in the Making: Why Sustainable Development Has Eluded the U.N. and How Community-Driven Development Offers the Solution*, 32 HOUS. J. INT'L L. 545, 568–69 (2010) (describing how ecovillages often use shared structures to improve efficiency).

<sup>172</sup> Cf. Dyckman, *supra* note 112, at 36 (explaining that of three POAs investigated in California, “only one of the three would replant with a lower water-consuming palate” despite “concern for the high water cost associated with common area landscaping”); Benjamin Wermund, *Without Water Restrictions, Hutto Neighborhoods Nag About Lawn Care*, AUSTIN AM. STATESMAN (Sept. 26, 2011, 9:01 PM), <http://www.statesman.com/news/local/without-water-restrictions-hutto-neighborhoods-nag-about-lawn-1879184.html> (explaining that a subdivision in Texas asked homeowners to continue watering their lawns despite a severe drought).

<sup>173</sup> See Frederick R. Fucci et al., *Alternative Energy Options for Buildings: Distributed Generation*, in GREEN REAL ESTATE SUMMIT 2010, at 337, 347 (PLI Real Estate Law & Practice, Course Handbook Ser. No. 386, 2010) (explaining that “most multi-family buildings still do not have submeters” and that “if a multi-unit building is submetered, this alone will save a significant amount of electricity, once a resident makes a direct correlation between his or her own usage and the cost of power”).

<sup>174</sup> Cf. BLAKELY & SNYDER, *supra* note 76, at 2–3 (estimating that more than three million Americans lived in gated communities in 1999); U.S. CENSUS BUREAU, SERIES H150/07, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007, at 66 (2008), available at <http://www.census.gov/prod/2008pubs/h150-07.pdf> (indicating that in 2007, Americans lived in 10,393,000 housing units with “[c]ommunity access secured with walls or fences”). Not all of these communities are necessarily private subdivisions.

<sup>175</sup> See, e.g., Vivian S. Toy, *Vertigo in the Markets: Rent*, N.Y. TIMES, Feb. 12, 2012, at RE1, available at <http://www.nytimes.com/2012/02/12/realestate/for-rentals-no-ceiling-in-sight.html> (describing the rise of the luxury rental and noting that “[h]ardwood floors have replaced the long-ubiquitous parquet, and washers and dryers in apartments have become de rigueur”); RICHDALe APARTMENTS, <http://www.richdale.com/houston/> (last visited Oct. 4, 2012) (describing luxury gated apartment complexes in Houston); *Austin Apartments*, TRIANGLE, <http://www.triangleaustin.com/Austin-TX-apartments.asp> (last

even more prevalent than gated owned communities—are often low-income rentals,<sup>176</sup> suggesting the gates have a very different purpose.

The spatial differences between multiunit apartment buildings and subdivisions of single-family homes are meaningful, but they do not suggest that rules within rented and owned communities serve wholly different purposes. Namely, provisions in leases and servitudes attached to deeds centrally aim to reduce the conflicts of neighboring property uses. The closer the units, the more likely the conflict, but this is all a matter of degree. A barking dog in the yard of a single-family home may be just as irksome as a TV blaring behind the wall of an apartment unit. Considered more broadly, the spatial differences between single-family homes and multiunit apartments, such as the tendency for owned subdivisions to be exclusive and more environmentally damaging, may potentially demand external rules that trump or weaken certain private rules. As discussed here, however, as more people flock to rentals, luxury apartment buildings with fancy amenities and exclusive tendencies may increasingly sway governments to similarly intrude upon private rental rules.

#### *D. Duration of Property Use*

An additional, often-cited divide between tenants and property owners is the length of their stay.<sup>177</sup> The literature tends to assume that tenants are highly mobile and care little about the long-term vitality of their community, while property owners are fixtures within their neighborhoods.<sup>178</sup> This creates two distinctions between rented and owned private communities—exit options and the formation of

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visited Oct. 29, 2012) (advertising “an onsite cardio workout facility and a resort style pool” as well as “courtyard views, private garages or attached garages”); *Luxury Apartments*, APARTMENT GUIDE, <http://www.apartmentguide.com/luxury-apartments-for-rent/> (last visited Oct. 4, 2012) (listing luxury apartments in sixteen major cities); *Welcome Home, Luxury Apartments & Town Homes Located in Suburban Buffalo, NY*, BMW MGMT. CO., <http://www.luxuryaptswny.com/> (last visited Oct. 4, 2012); *The Seneca*, CAMPUS APARTMENTS, <http://www.campusapts.com/seneca/> (describing a luxury apartment complex near Ohio State University) (last visited Oct. 4, 2012).

<sup>176</sup> Cf. Thomas W. Sanchez et al., *Security Versus Status? A First Look at the Census’s Gated Community Data*, 24 J. PLAN. EDUC. & RES. 281, 281 (2005) (concluding from the 2001 census that “low-income renters are actually more likely to live in walled or gated communities compared to affluent homeowners”).

<sup>177</sup> See, e.g., Stern, *supra* note 103, at 914 (explaining how homeownership, which prompts “longer residence duration” also “affects social contribution”).

<sup>178</sup> See, e.g., Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 149–50 (2010) (observing that communities “worry that tenants will do less than homeowners to keep up their homes and contribute to the community” because “[m]ost tenants have little financial stake in their own housing units,” although noting that causation is difficult to establish).

norms<sup>179</sup>—that could potentially justify different treatment of rules and governance structures in each community.

*1. Exit and Voice: Why Mobile Tenants May Have More Options to Escape Rules*

Tenants often sign short leases that guarantee them one or two years of occupancy.<sup>180</sup> Although they have few opportunities to voice their objections to lease rules or landlord enforcement of these rules during this short term, they may have easier exit options than do landowners; they need not sell an expensive investment in order to leave.<sup>181</sup> In light of this option, the literature may justifiably be more concerned about problematic rules and governance structures in owned than in rented communities.

Although renters have greater ease of exit than do homeowners, after the rule-creation process, homeowners in private subdivisions may have more voice, which could moderate the effects of their constrained exit option. The bylaws in private subdivisions often provide for modification of the original covenants, conditions, and restrictions.<sup>182</sup> The modification is not easy; residents often must muster a supermajority vote to change the rules.<sup>183</sup> Still, this offers a voice option that most tenants lack.<sup>184</sup> Owners in subdivisions also can influence rule enforcement by participating on the architectural and design review committee, for example, which grants or denies owners' proposals to deviate from the rules. Tenants typically lack these types of formal venues to voice concerns about rules in their leases.

With tenants' constrained voice options come certain meaningful limitations on exit: Some long-term renters<sup>185</sup> must stay within one community due to family, a job, or other considerations. Even for short-term renters, as Professor Ellickson notes, "the out-of-pocket and aggravation costs of moving are not trivial."<sup>186</sup> Some laws in the rental context already recognize this, providing special protections for the handicapped and elderly when landlords of multiunit buildings propose to

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<sup>179</sup> For a full and persuasive account of norms that govern neighbors' interactions, such as the repairing of a fence or garden damaged by a neighbor's cattle, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>180</sup> See Stern, *supra* note 103, at 938.

<sup>181</sup> For the original theory of individuals' ability to influence governmental actions through voice and exit, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

<sup>182</sup> See NELSON, *supra* note 3 (describing amendment provisions).

<sup>183</sup> See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 46, at 16 (noting that "some association covenants contain no provision for alteration" and that some "require a unanimous vote," but that "many covenants now substitute supermajorities . . . for unanimity").

<sup>184</sup> Tenants may, on the other hand, be able to renegotiate the lease before signing it for a second term.

<sup>185</sup> See Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 951 (1991) (describing occasional long-term rent scenarios).

<sup>186</sup> Ellickson, *supra* note 14, at 1552.

convert them to owned condominium complexes.<sup>187</sup> Tenants also may lack a choice of alternative rules even if they could exit, however. Many cannot afford to buy a home or unit,<sup>188</sup> and their options for other communities and rules are limited—particularly where landlords tend to use uniformly worded leases.

## 2. *A Lack of Opportunity for Norm Establishment: Why Mobile Residents May Need More Rules*

Due in part to the higher cost of exit, homeowners tend to stay in one place longer; permanent residents, in turn, tend to develop repeat relationships with neighbors and establish informal norms that control many neighbor externalities,<sup>189</sup> thus perhaps justifying fewer use-constraining rules in owned communities than in rented ones. If Resident A's property use in a private subdivision annoyed neighbors, these neighbors could spread unpleasant rumors in the community or express displeasure directly to Resident A. Resident A, knowing that she would see her neighbors at next year's potluck or board meeting or simply meet them on the street, would feel informal pressure to conform her uses to neighborhood expectations and avoid continued interactions with neighbors who disapproved of her property use.

More temporary residents (typically renters) may experience fewer of these informal pressures and may therefore reasonably expect to encounter more formal rules that control the external effects of property uses. This duration distinction, although relevant, does not apply to the many long-term renters who have deep ties with their neighbors.<sup>190</sup> Further, even short-term renters are incentivized to avoid

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<sup>187</sup> See, e.g., Tenant Opportunity to Purchase Act, D.C. CODE § 42-3404.02 (2011) (requiring any "owner of a housing accommodation" to "give the tenant an opportunity to purchase"); Bernard V. Keenan, *Condominium Conversion of Residential Rental Units: A Proposal for State Regulation and a Model Act*, 20 U. MICH. J.L. REFORM 639, 712–13 (1987) (explaining that conversion laws tend to protect low-income, disabled, and elderly residents, although the elderly are the most commonly protected group); Kathryn B. Richards, *The Illinois Condominium Property Act: An Analysis of Legislative Efforts to Improve Tenants' Rights in the Condominium Conversion Process*, 57 DEPAUL L. REV. 829, 836 n.50 (2008) (listing acts that protect the elderly and disabled when condominium conversion is proposed).

<sup>188</sup> See A. Mechele Dickerson, *The Myth of Homeownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 207 (2009) (explaining that "many lower- and middle-income homeowners simply cannot afford to buy homes unless they accept risky, complex mortgage products that force them to gamble that the return on their investment . . . will be large enough to 'cover' the high cost of their investments . . .").

<sup>189</sup> See generally ELLICKSON, *supra* note 179 (describing how in many public communities, neighbors develop their own, complex informal laws to, for example, govern damage to property by cattle).

<sup>190</sup> See Ellickson, *supra* note 14, at 1551–52 (noting that "a settled tenant is likely to have sentimental ties with neighborhood people and places").



angering their unit neighbors.<sup>191</sup> Indeed, multiunit apartment complexes—which often include smaller, more closely packed populations of residents than do subdivisions—may offer ideal opportunities for norm creation.<sup>192</sup>

The reader who has progressed this far will likely predict the conclusion here, as in the subparts above: differences in the duration of a resident’s time within a private community matter, but not substantially. Renters’ hypothetical ability to exit disliked rules more easily may not be real in light of income and other constraints; this cautions against broad assumptions that the literature should concern itself only with problematic rules in owned communities, where exit is difficult. Further, norm creation likely occurs in both communities, although to different degrees, which suggests that certain types of private rules may overreach and address problems that norms could better solve.

### *E. Tradition*

A final difference between rented and owned private communities rests within the powerful yet nebulous realm of tradition. Mobile tenants may have different expectations for property and property rules simply because these rules have been common for so long, and the long tradition of detailed rules in leases may place tenants on notice of these rules. Homeowners, in contrast, might not expect certain types of rules because of the freedoms traditionally associated with ownership of single-family homes: the home is a castle, within which an individual is free to do what she pleases, and rules and governance to the contrary are unacceptable. As the Third Restatement of Property argues, in proposing that “design controls” are unnecessary in a common interest community:

Long tradition supports the individual’s right to determine the aesthetic qualities of the home and, within limits imposed by zoning and building codes, to construct structures that suit his or her tastes and needs. Purchasers in communities without design controls may have a reliance interest in the absence of such controls that should be protected.<sup>193</sup>

Tradition appears to be the core pillar supporting many private community scholars’ handwringing about the effects of private governments on the occupants of castles. Unfortunately, it is also the weakest pillar unless we can show that homeowners who still view the home as a castle free of detailed rules were

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<sup>191</sup> See Kathryn Hendley, *Resolving Problems Among Neighbors in Post-Soviet Russia: Uncovering the Norms of the Pod*’ezd, 36 L. & SOC. INQUIRY 388, 402–06 (2011) (explaining that the majority of unit dwellers preferred self-help in solving disputes, such as talking with neighbors).

<sup>192</sup> See, e.g., Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 602–03 (2008) (describing a “handful of neighbors living in a small apartment complex or dormitory, where neighbors can monitor neighborhood norms in a less costly fashion”).

<sup>193</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.9 cmt. a (2000).

legitimately unaware of rules that they committed to when buying—a possibility discussed in Part III. It is true that homeowners in America have, historically, enjoyed a freedom from rules that severely restrict individual property uses, and that tenants have long faced detailed lists of rules.<sup>194</sup> Indeed, the Supreme Court has looked to tradition in prohibiting a public government from banning signs in residential yards, concluding that “[a] special respect for individual liberty in the home has long been part of our culture and our law,” particularly a respect for the ability to “speak” from the home, and that “[m]ost Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views.”<sup>195</sup>

As we have seen, however, homeowners increasingly encounter detailed rules in private subdivisions; over the past few decades, common interest communities with complex sets of servitudes have grown astronomically.<sup>196</sup> With the rising prevalence of subdivisions, the tradition of freedom from rules is fast fading. Although private subdivisions are more common in certain states than in others—representing the majority of new home development in states like California, Texas, and Florida before the real estate crash<sup>197</sup>—at least one private subdivision with a long list of rules exists in every state.<sup>198</sup> The tradition of rules in rented communities is indeed a longer one, but owned communities are quickly catching up, thus weakening the tradition distinction.

Looking beyond tradition to other differences between rented and owned communities, there are some justifications for separating renters from owners, but still not enough to divide these communities into two spheres within normative discussions about private governance. Homeowners tend to live in larger spaces with yards or fences separating properties, they typically live in these spaces for a longer time than do tenants in apartment buildings, and they have a much greater value interest—particularly in their individual property—than do renters. They also may have a more difficult time exiting their community, and therefore may find it difficult to avoid problematic rules. But these generalizations are not always true, and the differences are a matter of degree. Where critiques of private rules cannot locate a relevant difference between owners and renters to support its wholesale

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<sup>194</sup> Fennell, *supra* note 15, at 1056 (noting that “renters often face rather severe constraints on their autonomy with regard to matters such as pet keeping, decorating, and landscaping” and concluding that despite rising restraints on autonomy in common interest communities, homeowners typically have more freedom of use).

<sup>195</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).

<sup>196</sup> Common interest communities existed prior to the 1960s, but between the ’60s and ’70s they grew substantially and have since expanded at an increasingly rapid rate, ballooning to nearly 300,800 in 2008. *See Wiseman, supra* note 3, at 711 (citing *Industry Data, supra* note 3).

<sup>197</sup> MCKENZIE, *supra* note 3, at 11–12 (explaining that almost all new development in these states is within private communities).

<sup>198</sup> *See Ross-Harrington, supra* note 23, at 212 (“The fifty states, the District of Columbia, and Puerto Rico all have enacted legislation designed to govern the establishment, management, and dissolution of common-interest communities.”).

omission of tenants, those critiques must be revisited, and Part III takes up this task.

### III. EVALUATING PRIVATE COMMUNITY CRITIQUES AND THEIR FAILURE TO RELY ON LEGITIMATE RENTAL-OWNER DIFFERENCES

This Part analyzes the specific critiques of private communities in the private community literature in light of the differences identified in Part II, explaining why rentals should play a central role in each of these critiques. Exploring potentially legitimate justifications for varied rental-owner treatment, this Part shows that the nearly universal view of renters as lowly tenement inhabitants unworthy of legal concern must cede to a more inclusive analysis. First, it explores the general tenor of the critiques, which tend to focus on whether private-community residents voluntarily consent to rules or are unknowingly bound. This should affect both renters' and homeowners' level of comfort with the private rules, at least with respect to how they influence the daily lives of those subject to the rules. Second, this Part addresses critiques that apply to the internal working of private communities and their rules, including whether residents—both renters and owners—have adequate notice of the private rules; whether developers of private communities offer adequate options among rule sets and respond to consumer signals; whether residents have opportunities to modify rules that they dislike; whether residents can ensure fair and nondiscriminatory enforcement of rules; and whether, independent of residents' voluntary acceptance of the rules, they are somehow substantively problematic. Finally, this Part explores normative assessments of private communities' external impacts, suggesting how we might favor or oppose private rules—in both rented and owned communities—based on their environmental and social effects outside of the communities.

#### A. *Introducing the Existing Critiques*

Normative analyses of private communities must be understood in the context of the property governance systems that create them, which are largely contractual.<sup>199</sup> Under the consent theory of private communities, a resident commits to private governance by purchasing property to which servitudes attach and, in so doing, contracts into the rules.<sup>200</sup> A resident who dislikes the covenants, conditions, and restrictions in a particular private community can choose not to

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<sup>199</sup> A resident's purchase of property and an accompanying deed containing servitudes or signature on a lease is, under one view of property, not in fact "contractual" but has many contract-like elements. Cf. Lee Hargrave, *Public Records & Property Rights*, 56 LA. L. REV. 535, 543 (1996) ("Unlike the common law, which treats leasehold interests as property rights or real rights, the civil law majority view has been that a lease is a contract that produces only personal rights and obligations.").

<sup>200</sup> Natelson, *supra* note 56, at 54 (1990) (describing the "consent theory"); *id.* at 42 n.4 (listing the "consent" theorists as including Robert Ellickson, Richard Epstein, and Uriel Reichman).

purchase in the community and to remain in a public neighborhood instead, or to find a property in an alternative private community with different rules.

Objections to the consent theory of private communities arise on several different fronts. Some focus on their societal effects, arguing that even if consumers have consented to joining these communities, we must consider the externalities generated by millions of individuals contracting for exclusive private living.<sup>201</sup> Others challenge the core assumptions of the theory, arguing that consumers do not truly consent because they fail to fully understand or internalize the effects of property rules when purchasing property in a private community.<sup>202</sup> Still others—again disagreeing with the premises of the theory—argue that private communities may systematically fail to reflect consumers’ true preferences because of imperfect information signals running from them to developers, and other market-based problems.<sup>203</sup> Substantively, scholars are also bothered by the content of the rules, worrying that regardless of how or why the rules came about (including by consumer choice), they intrude into traditional core areas of property use and improperly limit freedom of use that individuals expect to accompany property ownership.<sup>204</sup>

The private community scholarship has developed a rich account of the benefits and pitfalls of property systems formed by private contracts,<sup>205</sup> but it has focused nearly exclusively on private subdivisions. In so doing, it has failed to acknowledge the “other” private communities—the rental properties outside of private subdivisions that are equally as contractual as private homeowners’ associations.

### *B. Internal Private Community Problems*

Consumers contracting to live in spaces governed by POAs or to rent do so under a variety of conditions that can make the contract less than voluntary or simply a bad deal for the consumer. These conditions arise both at the consumer level—where residents “purchase” private communities by moving to them and agreeing to their rules—and the producer level—where developers, responding to

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<sup>201</sup> See, e.g., Cashin, *supra* note 12; Franzese & Siegel, *supra* note 3; MCKENZIE, *supra* note 3.

<sup>202</sup> See, e.g., Fennell, *supra* note 13, at 880–81 (describing consumers’ potential inability to fully understand the significance of the rules they are committing to by purchasing in a private community).

<sup>203</sup> See, e.g., *id.* at 855 (describing rules in private communities “that are inefficiently restrictive for some individuals with regard to some uses”).

<sup>204</sup> See, e.g., Winokur, *supra* note 119, at 4–5 (describing private rules’ interference with personal liberties); Carmella, *supra* note 6, at 66 (arguing that rules “can border on the absurd, like prohibitions on cracked flowerpots or overweight pets” and that “even prohibitions that are reasonable, when considered on an individual basis, can in the aggregate create an oppressive servitude regime”).

<sup>205</sup> See *supra* notes 12–14.

signals from consumers and governments, create properties governed by private rules.

1. *Consumer Failure: Inadequate Notice and Rule Comprehension*

(a) *Homeowners*

A detailed literature suggests that some residents purchasing homes in private subdivisions are not aware of the rules that attach to their property.<sup>206</sup> A visual inspection of the property will not alert a buyer to all rules in a thick packet of detailed servitudes. At best, she can walk through the subdivision and likely pick up hints of rules; a lack of garages visible from the street, for example, may alert the buyer to a backyard garage requirement. But all servitudes will not lead to visible signs of rules,<sup>207</sup> and constructive notice will be incomplete. The buyer also may not receive actual notice of the servitudes, particularly in states that do not require disclosure of servitudes to prospective buyers prior to closing.

In many cases, title searches or disclosure rules do alert a buyer to the existence of private rules that attach to property,<sup>208</sup> and some buyers read these rules. Even when servitudes are disclosed or made apparent by visual inspection, however, consumers often do not read them in full.<sup>209</sup> Worse yet, behavioral economics research suggests that, due both to limitations of the human mind and of language, even a diligent purchaser who reads and agrees to the rules will not, and perhaps cannot, fully comprehend their import.<sup>210</sup>

A prospective purchaser may both misunderstand the meaning of a rule in the present and struggle to internalize its future import; she also cannot predict all potential future applications of the rule. A rule that is generally worded may not describe the many activities that it prohibits, and its interpretation by private rule enforcers with broad discretion cannot be fully predicted *ex ante*; a ban on lawn ornamentation, for example, may prohibit the planting of flowers in a front yard as interpreted by the architectural review board of the POA. The consumer, on the other hand, may assume that the rule bans pink flamingos and birdbaths, not gardens. Even for a specifically worded rule, the consumer may simply fail to internalize its effect if the rule is conveyed without examples of its application or

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<sup>206</sup> Alexander, *Voice in Homeowner Associations*, *supra* note 13, at 156 (concluding, from twenty-one interviews, that “[l]ess than 10 percent of the residents interviewed had read the rules before closing on the home” in a private community); Winokur, *supra* note 13, at 99 (concluding that few residents have knowledge of rules).

<sup>207</sup> See Carol M. Rose, Comment, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1405–06 (1982).

<sup>208</sup> See Stewart E. Sterk, *Publicly Held Servitudes in the New Restatement*, 27 CONN. L. REV. 157, 165 (1994) (observing that “properly recorded servitudes will be rediscovered through ordinary title searches”).

<sup>209</sup> Wiseman, *supra* note 3, at 746–47.

<sup>210</sup> See *id.* at 733 (describing the consumer’s inability or failure to understand the rules).

even images.<sup>211</sup> And if she can visualize the effects of a rule, the owner still cannot fully know her future self. Someone who dislikes the aesthetic of solar panels now and agrees to a clearly worded covenant prohibiting solar panels may later be inspired by a friend who develops a passion for environmental protection; the prohibition may then seem burdensome. Finally, prospective purchasers may understand a detailed rule—a requirement to pay a \$200 fee monthly, for example—but miscalculate their ability to comply with it, as demonstrated by recent foreclosures in private subdivisions as a result of fee default.<sup>212</sup>

If rule modification had low transaction costs, then purchasers' upfront commitment to rules not known or fully comprehended would not be problematic. There often are nearly insurmountable barriers to modifying rules contained in original common interest community servitudes, however,<sup>213</sup> therefore leaving residents with only the high-cost option of exit if they dislike rules to which they have committed.

(b) Renters

Homeowners living in private subdivisions are not the only community consumers who sometimes lack full knowledge or understanding of rules. Just as many homeowners fail to take in long lists of servitudes, many tenants do not read leases,<sup>214</sup> or at least do not easily understand much of their language.<sup>215</sup> Tenants

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<sup>211</sup> See Franzese & Siegel, *supra* note 3, at 1126–27 (expressing concerns about the wide lack of understanding of rules in private communities); Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 761–65 (2008) (explaining that “consumers make systematic mistakes in choosing among different credit card products” and citing to several factors that may be relevant for private community consumers, including, for example, consumers’ underestimation of how much they can borrow due to optimism about their “future credit needs” or “future will power”); Wiseman, *supra* note 3, at 733 (citing to Bar-Gill and discussing the difficulty of understanding the import of servitudes).

<sup>212</sup> See, e.g., Wade Goodwyn, *Not So Neighborly Associations Foreclosing on Homes*, NAT’L. PUBLIC RADIO (June 29, 2010), <http://www.npr.org/templates/story/story.php?storyId=128078864&ps=cprs/> (describing an HOA’s foreclosure on a veteran’s home for missing two dues payments).

<sup>213</sup> See *supra* note 183 and accompanying text.

<sup>214</sup> See Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 256 (1970) (describing a survey of 100 “sample” tenants in Ann Arbor, Michigan, finding that 57% of tenants had carefully read their first lease with a landlord before signing it, but that only 50% read subsequent leases, while only 25% carefully read the “typed in” or handwritten lease portions).

<sup>215</sup> See, e.g., Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 821–22 (1974) (concluding from a survey of “representative” lease forms from sixteen cities that “even the median-length form, with 3800 words, could not be read and fully understood by a bright law student in less than an hour”); see also Daniel E. Wenner, Note, *Renting in Collegetown*, 84 CORNELL L. REV. 543, 553 n.62, 555 n.71 (1999) (discussing Mueller’s and Berger’s work).

surprised by unexpected rules can partially blame meaningful differences between the sale of a home and the rental of a unit. Seller disclosure forms often require sellers to explain whether the property is part of a POA,<sup>216</sup> and a response of “yes” might possibly alert a buyer to the existence of rules enforced by the association. Title reports should similarly reveal servitudes, and a motivated purchaser could search the deeds herself at the county clerk’s office.

Leasing a residence—a much smaller commitment than home buying—is typically a faster transaction involving fewer steps, and thus fewer opportunities for notice, than the home-buying process. A lessee looks at an apartment, indicates interest, and signs a lease after the landlord has completed a credit check. The prospective tenant may see the lease for the first time when she meets the landlord to sign it, and the landlord might include an additional packet of rules referenced but not included in the lease.<sup>217</sup> Further, leases need not be recorded, nor are landlords typically required to disclose lease rules to prospective renters prior to the stage at which they quickly read and sign the lease.<sup>218</sup> A potential renter in an apartment building may pick up on some rules from a physical survey of the premises,<sup>219</sup> but many lease provisions apply to the use of the interior of a unit, and renters looking at vacant apartment interiors may lack constructive notice of these rules.

Even if a renter manages to diligently read all of the rules in a lease before signing, problems of rule comprehension similar to those in the POA context will apply.<sup>220</sup> The lease may contain general rules without examples, which do not indicate, *ex ante*, how the landlord will enforce them. And the consequences of violating a rule are high; some standard leases provide that a tenant may be evicted for a failure to comply with any condition in the lease.<sup>221</sup> Renters may obtain some

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<sup>216</sup> See, e.g., OKLA. REAL ESTATE COMM’N, APPENDIX A. RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT 3 (2012), available at <http://www.ok.gov/OREC/documents/Residential%20Property%20Condition%20Disclosure%20Statement%207-1-12.pdf> (asking seller, “Are you aware of a mandatory homeowner’s association?”); TEX. REAL ESTATE COMM’N, SELLER’S DISCLOSURE OF PROPERTY CONDITION, 3 (2011), available at <http://www.trec.state.tx.us/pdf/contracts/op-h.pdf> (asking sellers whether they are aware of “[h]omeowners’ [a]ssociation or maintenance fees or assessments”). These forms do not ask whether the seller is aware of servitudes that attach to the property.

<sup>217</sup> See, e.g., Residential Lease Contract, *supra* note 139 (containing thirteen additional pages of rules incorporated into the lease by reference).

<sup>218</sup> See Mueller, *supra* note 214, at 257 (concluding from a survey of one hundred Ann Arbor tenants that “[a] disturbing forty-six per cent of the tenants stated that they had found in their leases terms that were both significant and objectionable and yet that had not been mentioned in their oral discussions with the landlord or his agent”).

<sup>219</sup> Ross-Harrington, *supra* note 23, at 205.

<sup>220</sup> See Berger, *supra* note 215, at 822 (noting the complexity of leases). *But see* Mueller, *supra* note 214, at 260 (noting in a college town survey a surprisingly high level of comprehension of certain lease provisions).

<sup>221</sup> See, e.g., ARK. CODE ANN. § 18-17-901(a)(3) (Supp. 2009) (allowing eviction proceedings to commence when “terms or conditions of the rental agreement have been violated”).

information about the diligence of the landlord in enforcing rules by speaking with other tenants in an apartment building or by looking around.<sup>222</sup> An unkempt, poorly maintained apartment building may suggest that the landlord is lax in more ways than one—in making needed repairs and in enforcing rules. Even for detailed, clear rules in the lease, however, which the renter knows the landlord will enforce, renters, like homeowners, may not fully internalize the import of rules. Renters entering into short-term leases may be even less likely to carefully consider how the rules will personally affect them.

The private community literature's failure to address tenants' knowledge and understanding of rules that constrain property uses may be justified, in part, by several of the differences described in Part II, including differences in the duration of property ownership, value interest, and the proximity of living spaces to other units. The literature may simply be less concerned about renters' knowledge and understanding of rules up front because renters have short leases that allow for relatively easy exit, have a lower interest in the long-term value of the property and the assurance that rules will protect these values, and expect more intrusive rules when entering a multiunit apartment with shared walls. But as Part II.D.1 explained, renters' options for exit are not as simple as they are portrayed to be, so a lack of notice of rules may have important implications. Renters also may risk receiving *less* notice of rules than value-driven owners. With respect to the proximity of living spaces, owners, too, should expect at least some rules that limit uses in a subdivision with shared fences—particularly in light of the increasing prevalence of private subdivisions with detailed sets of servitudes.

In sum, concerns about notice and understanding of rules in private governance regimes for property apply in both the ownership and rental context. Although some of the differences identified in Part II justify distinguishing the notice concerns in each type of community, they do not support the literature's failure to consider tenants' knowledge and awareness of lease rules.

## 2. *Producer Failure: Developers' and Landlords' Responses to Inaccurate Consumer Signals*

### (a) *Homeowners*

The failure of some consumers to notice or understand rules when they commit to them may cause distortions in the production of private communities. If droves of homeowners are mistakenly signing on to rules that they dislike, then developers, by producing communities with these rules, are responding to inaccurate preferences.<sup>223</sup> Although the developer retains control over the community for some time, she does not witness the full “life cycle” of the

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<sup>222</sup> Ross-Harrington, *supra* note 23, at 205.

<sup>223</sup> See Franzese & Siegel, *supra* note 3, at 1113 (explaining why “CICs are not necessarily the product of well-functioning market forces”).



community, as Professor Clayton Gillette observes.<sup>224</sup> Even if she experiences initial resident discontent with the rules before turning the subdivision over to a POA,<sup>225</sup> consumers often may not notice or object to many rules until long after the sale, when the developer has moved on. Future consumers of other subdivisions built by the same developer, similarly fooled by rules that initially seem beneficial (or simply unaware of the rules), may once again agree to the rules only to discover after the departure of the developer that they dislike them.

A second signaling problem at the point of purchase, as noted by Professor Fennell, occurs as a result of the large set of rules in subdivisions.<sup>226</sup> Even if consumers can express displeasure with rules at the point of purchase by refusing to buy in a particular subdivision, these are blunt signals. Many private subdivisions have numerous pages of rules;<sup>227</sup> unless the consumer communicates her specific reasons for refusing to buy, the developer will not know which rules the consumer dislikes. Consumers also vote for elements other than rules in choosing or refusing to buy; a refusal to buy may, unbeknownst to the developer, represent an objection to the condition of the golf course, the design of the houses in the community, or the quality of the common pool—not a rejection of the rules.

In addition to responding to potentially inaccurate consumer signals at the point of purchase, developers might also offer an inadequate diversity of rules out of legal caution, or perhaps, sheer laziness.<sup>228</sup> Alternatively, assiduous developers often believe that they must offer an unusually comprehensive set of rules to attract the first risk-averse residents who move in.<sup>229</sup> Without a wide diversity of rules to choose from, or with blunt signals, many potential rule preferences may remain unexplored.

(b) *Renters*

Landlords, like developers, receive primary rule preference signals at the point of resident entry into the private community during the signing of the lease. Like buyers in a private subdivision, tenants who are not fully informed of the rules may provide inaccurate signals for rule preferences, and tenants' "votes" for a full package of rules (by refusing or accepting a lease) are, as in subdivisions,

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<sup>224</sup> Gillette, *supra* note 13, at 1429.

<sup>225</sup> For a detailed discussion of developer's responses to consumer signals, see *id.* at 1429–30.

<sup>226</sup> See Fennell, *supra* note 13, at 857–58, 873 (describing how rules are bundled not only within one package but also with a physical home and subdivision).

<sup>227</sup> See Wiseman, *supra* note 3, at 747 (describing contents of subdivision declarations).

<sup>228</sup> See, e.g., Fennell, *supra* note 13, at 875 (noting that “the developer might adopt a suboptimal set of servitudes if doing so would save her money”); Winokur, *supra* note 119, at 4 (noting increasing uniformity of servitudes).

<sup>229</sup> See Fennell, *supra* note 13, at 869 (explaining that early homebuyers “are likely to desire a high level of protection against uncertainty in the form of restrictive servitudes”).

blunt. The landlord, responding to these imperfect signals, may continue to write leases with unwanted rules.

Despite the signaling issues in leases, tenants may have more opportunities than homeowners to voice preferences for rules, although the extent to which landlords respond to these preferences will vary substantially. Unlike a subdivision developer, a landlord sees the full lifecycle of a community. Because the landlord maintains control—although not possession—of the property throughout the term of the lease, tenants who discover rules several months into the lease may complain to the landlord about the content of rules and her enforcement of them; these complaints send direct signals about specific rule preferences. Further, the landlord, who writes relatively temporary rules, has more opportunities than does a subdivision developer to change the rules in response to these signals. Rather than building a new subdivision, she need only redraft the lease for each unit upon the termination of the prior lease. If there is an adequate supply of rentals in the area and tenants are mobile,<sup>230</sup> the landlord may be concerned that the complaining tenants will not renew their leases if she does not change the rules, and she may experiment with new rules in attempting to attract renewals and new, happier tenants. Although these modifications cannot typically occur midlease, the fixed term of the lease offers readier relief for tenants who live under unwanted rules.

These assumptions of greater flexibility for rule modification may all fall flat, however, in many rental scenarios. As described in Part II, landlords may not be willing to negotiate, thus offering tenants few opportunities for exercising the voice option, as opposed to voting homeowners' association members. Many tenants—particularly low-income ones—also are immobile due to jobs, income, limitations imposed by government-subsidized housing, or simply the considerable inconvenience and expense of moving.<sup>231</sup> Others, like homeowners, may simply be too attached to their community to express displeasure with rules by moving.<sup>232</sup> If tenants use voice rather than exit strategies to complain about rules, landlords may find ways to deny lease renewal or otherwise retaliate,<sup>233</sup> and they often may be unwilling to bargain for new lease language.<sup>234</sup> Where landlords have monopoly powers within a municipal area or where rental housing supply is low, they may have few incentives to modify rules in response to consumer signals.

The private community literature has, once again, not considered these factors in the rental context—typically describing producer failures only in the creation of private subdivisions. This is partially justified by the structural differences

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<sup>230</sup> See Ellickson, *supra* note 14, at 1551–52 (noting that “contrary to one of Tiebout’s simplifying assumptions, the out-of-pocket and aggravation costs of moving are not trivial”).

<sup>231</sup> See *id.* at 1552.

<sup>232</sup> See *id.* at 1551–52.

<sup>233</sup> *But see* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 533–34 (1984) (describing how, after the court in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), prohibited retaliatory eviction, many states followed suit).

<sup>234</sup> See *supra* note 141 (describing landlords’ unwillingness to bargain).

described in Part II. This is not to say, however, that rentals should be excluded from the sphere of private governance concerns, including incentives for the production of private rules. The rules being created in both rented and owned private communities may have content that is misaligned with resident preferences for a variety of reasons, and lessons from owned communities could transfer well to rented ones. Landlords might do well to ask prospective tenants about their preferences for rules, for example; at minimum, they could easily consult with existing tenants who plan to renew their leases in future years—thus offering an opportunity for a new rule set.

### *C. Rule Modification*

#### *1. Homeowners*

If consumers unknowingly agree to rules that they dislike, or if governments are causing the overproduction of rules by requiring developers to form private subdivisions,<sup>235</sup> residents of these communities must have means of modifying despised rules. Unfortunately, residents attempting to modify rules in private subdivisions often face insurmountable barriers, as briefly introduced above. Many POA bylaws require a supermajority vote for residents to change original servitudes.<sup>236</sup> There are good reasons for this requirement. As Professor Ellickson has observed, individuals often select communities for their rules and the property value protection provided by rules. These individuals will face high costs if the rules to which they have committed change, and they prefer high barriers to rule modification.<sup>237</sup> Nonetheless, these barriers raise the stakes for getting the initial rules “right.” If consumers are not aware of the rules, know of them but have not read them in full, or have read them but do not fully understand their import, then consumers’ consent to the rules may be illusory.

#### *2. Renters*

Although POA bylaws tend to place high bars on rule modification, they provide formal, albeit difficult, procedures for changing despised rules, as described in Part II. Residents may lobby their neighbors for a rule change, and if enough of the residents strongly dislike a rule, they might manage to garner the supermajority of votes needed for the rule change. Leases do not typically offer these types of options for modification once a tenant has signed. A tenant may threaten that she will not renew a lease if the landlord refuses to modify it, but low-income tenants or tenants in areas with insufficient rental supply may lack this bargaining power. And although mobile tenants with short-term leases could rid themselves of hated rules within a year by moving out, some rules may have

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<sup>235</sup> See Franzese & Siegel, *supra* note 3, at 1119.

<sup>236</sup> See *supra* note 183 and accompanying text.

<sup>237</sup> Ellickson, *supra* note 14, at 1558.

serious short-term effects. A tenant who may not place a political sign or religious symbol in her window, for example, is barred from engaging in an essential expressive act.

The omission of renters from the modification critique may impliedly result from differences in the duration of property use and assumptions about exit. As already described, however, options for rule modification are important for both renters and owners, and the differences in exit considerations for owners and renters should not bar a more careful analysis in both contexts.

Although barriers to rule modification may be problematic both in rented and owned communities, they also may have benefits that should be further explored. The predictability of a private “contract” for rules allows both tenants and homeowners to rely on the rules, knowing that a variance or rezoning, for example, will not change them—as could occur in public property governance. And while POAs and landlords can grant exceptions to rules, they may be wary of doing so. It is relatively difficult to abandon a covenant through lack of enforcement,<sup>238</sup> but there is evidence that POA members are worried about this possibility and thus strictly enforce rules to avoid abandonment or estoppel against future enforcement.<sup>239</sup> Landlords, too, could potentially face estoppel arguments, and they may have even more incentives to maintain rules than would POAs due to their value interest in the property. Both tenants and owners, therefore, may prefer the relative certainty offered by rules that are difficult to modify.

#### *D. Rule Enforcement*

##### *1. Homeowners*

Even if we assume that the accounts of consumer and production distortions suggested in Part III.A are overstated, perfectly good rules selected by knowing consumers may still cause problems. Neighbors—not detached government officers—enforce covenants, and neighbors monitoring others’ land uses may become suspicious of each other.<sup>240</sup> When board meetings about rule enforcement are held in living rooms,<sup>241</sup> decisions can appear closed and “clubby.”

In addition to inspiring neighborly distrust, private subdivisions endow an “official” group of neighbors, the elected homeowners association, with strong enforcement powers.<sup>242</sup> These neighbors are tasked with enforcing servitudes,

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<sup>238</sup> See Wiseman, *supra* note 3, at 753 (briefly describing the requirements for abandonment through nonenforcement).

<sup>239</sup> *Id.* (describing warnings by the Community Association Institute to its board members, advising them to enforce rules to avoid abandonment).

<sup>240</sup> See Franzese & Siegel, *supra* note 3, at 1132–33 (noting that “miscommunication, acrimony and abuse of power . . . have arisen in virtually all States with large numbers of CICs”).

<sup>241</sup> See ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 46, at 16.

<sup>242</sup> See Franzese & Siegel, *supra* note 3, at 1132.

providing community services such as trash removal and common-area maintenance, and collecting fees to support these functions. Although these associations must follow minimal procedural requirements contained in the community association bylaws, and in some states they must follow additional requirements like holding open meetings,<sup>243</sup> they have broad discretionary powers. These powers operate against a backdrop of the equally powerful threat of foreclosure. In many states, a resident's failure to comply with association servitudes or rules, including a failure to pay association fees, can lead to foreclosure by the association.<sup>244</sup> Wielding these broad discretionary powers backed up by a substantial threat, POA boards comprised of neighbors may unevenly or even spitefully enforce servitudes against individuals whom they dislike.<sup>245</sup>

## 2. Renters

Rental communities are, like private subdivisions, cultures of rules. Particularly in apartment buildings with shared common space, landlords include rules in leases that look identical to servitudes in private subdivisions. These rules govern the use of individual units as well as common areas, prohibiting tenants from, for example, placing signs in windows, hanging flags on units, hanging decorative lights, or allowing pets on the premises. The rules, like those in a private subdivision, are also enforced by a private entity in the form of the landlord, but the enforcement mechanism may not inspire as much distrust and neighborly angst as that identified by Professors Franzese and Siegel in private subdivisions. Tenants generally cannot sue each other for lease violations.

The landlord's relationship with the tenant, however—similar to a POA's relationship with an owner—can be strained and, in the worst scenarios, bordering on dictatorial.<sup>246</sup> Even if the landlord does not ultimately initiate eviction proceedings, she may threaten eviction to force a tenant to comply with a host of unreasonable or unevenly enforced rules. Indeed, some standard leases allow eviction for seemingly inconsequential tenant noncompliance, such as the failure to change a light bulb.<sup>247</sup>

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<sup>243</sup> See Hyatt & Stubblefield, *supra* note 57, at 615 (citing FLA. STAT. § 617.303(2) (1993), which has been renumbered and amended as FLA. STAT. ANN. § 720.303 (Supp. 2012)) (requiring POA meetings to be open).

<sup>244</sup> See *supra* note 21 and accompanying text.

<sup>245</sup> See, e.g., Wiseman, *supra* note 3, at 738 n.270 (describing private community residents' experiences with allegedly retaliatory enforcement of servitudes).

<sup>246</sup> See, e.g., *supra* note 144 and accompanying text (describing retaliatory eviction).

<sup>247</sup> See, e.g., Residential Lease Contract, *supra* note 139 (“25. CONDITION OF THE PREMISES AND ALTERATIONS. . . . When you move in, we’ll supply light bulbs for fixtures we furnish, . . . after that, you’ll replace them at your expense with bulbs of the same type and wattage. . . . 32. DEFAULT BY RESIDENT. You’ll be in default if . . . you or any guest or occupant violates this Lease Contract . . . . Eviction. *If you default, we may end your right of occupancy by giving you a 24-hour written notice to vacate.*”).

Enforcement mechanisms in owned and rented private communities differ substantially, thus potentially supporting the failure of the private community literature to discuss tenants' experience with biased or unfair enforcement. Although landlords and POAs both have wide discretion in enforcing the rules, and this discretion is largely unchecked by courts, landlords act unilaterally, and associations must act by consensus (at least of the board), as described in the structural differences in Part II. But as Part II also noted, although landlords directly represent their own value interests in enforcing rules, they might not represent tenants' preferences, which are to avoid arbitrary and unfair rule enforcement.

*E. Rule Substance: Private Rules as Overly Intrusive*

*1. Homeowners*

In addition to identifying procedural problems with servitudes, a strong line within the public community literature has harshly critiqued rule substance. It has honed in most closely on rules that control owners' daily uses of property,<sup>248</sup> worrying that these rules unnecessarily constrain individual freedoms and interfere with owner expectations. Scholars' discomfort with these rules seems to be rooted in a belief that they run counter to core property expectations. When individuals cannot wear flip-flops in the park, install a swing set, grow a garden, or put a political sign in their window or yard, their enjoyment of life may indeed be meaningfully limited. As Professor James Winokur argues, "Servitude regimes have generated growing resident dissatisfaction with 'strait jacket' restrictions which invade aspects of home life previously left to personal choice,"<sup>249</sup> leading to litigation between residents and POAs.<sup>250</sup> Similarly, Professor Susan French observes that "[d]reams of homeownership can turn sour . . . for people who learn too late that they will not be permitted to put up political signs, for sale signs, or holiday decorations."<sup>251</sup>

As the "too late" language suggests, many of these concerns about substance must be tied intrinsically to notice, unless they are founded on some notion of inherent and unalterable property rights. If individuals entering a community are aware of the content of rules and fully understand the impacts of rules on their future lives, then they are purposefully choosing to live under intrusive restrictions. Others may not like all or some of the rules but may choose to live in the community because they prefer other aspects—the price, location, or amenities—

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<sup>248</sup> See *supra* notes 5–6 and accompanying text; *infra* text accompanying notes 249, 251.

<sup>249</sup> Winokur, *supra* note 119, at 4; see also *id.* at 5 (arguing that servitudes in private subdivisions have begun to "undercut . . . the personal liberties of existing residents and potential buyers").

<sup>250</sup> *Id.* at 4.

<sup>251</sup> Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 349 (1992).

more than they dislike the unpalatable rules. In any case, for residents who voluntarily agree to these rules, scholarly objections about rule substance should likely be limited to the impacts of these rules on society, unless we believe that individuals simply should not have the option to select certain types of freedom-constraining rules for their living spaces.

## 2. Renters

The largest hole in the private community literature is its tendency to omit renters from its concerns about rule substance—particularly because the literature focuses so closely on rules that constrain daily uses. A rule banning an individual’s placement of a political sign in her yard or window has the same effect on the individual whether it arises from a lease or servitude. Either way, the tenant or owner cannot express herself on election day. Indeed, the rule may have stronger adverse effects on the tenant, who has a smaller property and perhaps less space with which to express herself and engage in the other activities necessary to form her identity.

Overly intrusive rules that prohibit individuals’ freedoms to use property as they wish typically have reasons for being so intrusive. Even low-income tenants who lack much choice in selecting a rental community may potentially prefer certain private rules that could help to deter crime, for example, or ensure basic upkeep. To the extent that either homeowners or renters were unaware of these rules when they committed to them or did not fully understand their import, however, they may pose legitimate concerns that must be addressed in both rented and owned private communities.

Despite the potential need for protections from certain intrusive rules, private community scholars and the law often ignore the fact that renters are subject to the very types of rules that are criticized in the homeowner context, and often to more of these rules.<sup>252</sup> While many states have not implemented the Restatement’s suggestions for limiting community association rules, they have prohibited servitudes that restrict a wide array of homeowners’—but not renters’—property uses. North Carolina’s amendments to its laws governing POAs, which were intended “to provide greater protections for homeowners,” for example, prohibit restrictions on flying the North Carolina or U.S. flag.<sup>253</sup> Florida is similarly concerned about owners’ freedoms, providing that *servitude and association rules* in the state “may not preclude the display of one portable, removable United States flag by property owners.”<sup>254</sup> California, in turn, previously provided that

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<sup>252</sup> See Fennell, *supra* note 15, at 1056.

<sup>253</sup> 2005 N.C. Sess. Laws 1598, 1602 (codified at N.C. GEN. STAT. § 47C-3-121(1) (2011)); see also Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL’Y 479, 509 & n.172 (2009) (citing to this statute and, throughout the article, describing many state laws that constrain POA rules).

<sup>254</sup> FLA. STAT. ANN. § 720.3075(3) (West 2010).

association-governing documents may not prohibit common interest community residents from keeping “at least one pet.”<sup>255</sup>

Some states’ bars on use restrictions more sensibly apply to both servitudes and lease conditions. California, for example, prohibits “a written instrument entered into relating to real property” from restricting “the use or occupancy of the property as a family day care.”<sup>256</sup> The federal government, in turn, has recognized two use rights that tenants must have: the right to install a television antenna (which also applies to homeowners in subdivisions),<sup>257</sup> and, in federally assisted rental housing, to own a pet if the tenant is elderly or disabled.<sup>258</sup> Maryland also allows elderly tenants to keep pets “unless specifically prohibited in writing at the time occupancy took place.”<sup>259</sup> Hawaii, in turn, allows tenants to post political signs.<sup>260</sup> Most states, however, have focused more closely on the content of servitudes and community association rules.

The sole focus on homeowners in the context of rule substance is unjustified, and it finds little support in tenant-owner differences. As shown by the Restatement’s explicit reliance on “the traditional expectations of property owners” in opposing rules that restrain owners’ uses of property, tradition seems to be the primary justification.<sup>261</sup> As Part II discusses, however, there is now a long tradition of detailed rules in owned communities. And even if one attempted to justify more intrusive rules in rental communities simply because there has been a “tradition” of detailed rules in these communities, this fails to explain whether this tradition is beneficial to renters.

Other factors from Part II also could potentially support some of the focus on rule intrusiveness in the ownership context. California’s former guarantee that owners, but not renters, may keep a pet<sup>262</sup> appeared to recognize the value distinction. Landlords must keep value-disinterested tenants from damaging the unit, and pets may cause extensive damage. California did not cite this

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<sup>255</sup> CAL. CIV. CODE § 1360.5(a) (West 2007) (repealed 2012; repeal operative 2014); *see also* Boudreaux, *supra* note 253, at 508 n.169 (citing to this statute). *But see* CAL. HEALTH & SAFETY CODE § 1597.40(b) (West Supp. 2012) (prohibiting certain restrictions on the running of day cares and not limiting this use protection to owned properties).

<sup>256</sup> CAL. HEALTH & SAFETY CODE § 1597.40(b).

<sup>257</sup> *See* Restrictions Impairing Reception of Television Broadcast Signals, 47 C.F.R. § 1.4000(a)(1) (2011).

<sup>258</sup> Angela S. Robinson, *Pets & Community Housing*, MD. BAR J., Sept. 2007, at 30 (citing National Affordable Housing Act, 12 U.S.C. §1701r-1 (2006)).

<sup>259</sup> *Id.* (citing MD. CODE ANN., REAL PROP. § 8-214(c) (LexisNexis 2010)).

<sup>260</sup> HAW. REV. STAT. ANN. § 521-52(c) (LexisNexis 2006).

<sup>261</sup> RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000).

<sup>262</sup> *See* CAL. CIV. CODE § 1360.5(a) (West 2007) (repealed 2012; repeal operative 2014).



consideration in passing its legislation, however, instead focusing on the emotional benefits that pets provide to homeowners.<sup>263</sup>

In sum, more explanation for the focus on the privilege of the home is needed. Eduardo Peñalver has observed that “ownership of a home constitutes a physical space for habitation and socializing that owners can (within limits) tailor to their own particular tastes and plans, something that is much more difficult for renters to do.”<sup>264</sup> It is not clear that we are justified in assuming that renters should not have these same opportunities of “habitation and socialization” within their physical space or freedom from rules that impede these opportunities.

### *F. Social Externalities of Private Community Contracting*

The private community literature, although forgetting the lowly tenement dweller and her experience with rental rules, has noted the many external effects of private, owned communities—including effects on low-income populations. As briefly introduced in Part II, scholars have explored the problematic exclusionary tendencies of subdivisions, for example. As individuals with a variety of incomes flock to apartments, the omission of rentals from this analysis becomes problematic.

#### *1. Homeowners*

Private POAs “can effectively segregate social classes,<sup>265</sup> and Professor Lior Strahilivetz has poignantly described how POAs, through proxies, might also exacerbate racial divisions.<sup>266</sup> Deeds that contain covenants to pay high monthly fees for the maintenance of a fancy golf course for association residents, for example, may not only keep out low-income residents from a private community; they also may send a signal that certain races are not welcome within the private “club.”<sup>267</sup> Public communities face serious, lingering challenges of race and class division,<sup>268</sup> but private subdivisions may allow for easier and more destructive

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<sup>263</sup> See S. Judiciary Comm., Bill Analysis, A.B. 860, 1999–2000 Leg., Reg. Sess., at 2–3 (Cal. 2000), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0851-0900/ab\\_860\\_cfa\\_20000809\\_102600\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0851-0900/ab_860_cfa_20000809_102600_sen_comm.html).

<sup>264</sup> Peñalver, *supra* note 156, at 836.

<sup>265</sup> Winokur, *supra* note 119, at 4; see also Franzese, *supra* note 13, at 578 n.176 (collecting the extensive literature on private community exclusion).

<sup>266</sup> See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 470–76 (2006).

<sup>267</sup> See *id.* at 472–73.

<sup>268</sup> Malcolm M. Feely, *The Personal and the Professional: Assessing the Ambivalent Commitment to Racial Justice in the United States*, 44 LAW & SOC’Y REV. 503, 511 (2010) (observing that “racial isolation in many areas has reached or is near all-time highs”); Leland Ware, *The Demographics of Desegregation: Residential Segregation Remains High 40 Years After the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1155, 1155 (2005)

separation, particularly when they are gated<sup>269</sup>—as they often are—or include unusually detailed rules or high fee requirements. A community that prohibits residents from parking trucks or vans in driveways may exclude as many groups as would a lavish fee requirement for golf course maintenance.

Related to concerns about divisions of race and class, Professor Sheryll Cashin worries that private subdivisions reduce residents' sense of obligation to the broader community.<sup>270</sup> Individuals move to a community governed by a homeowners' association in part to obtain quality services funded by a monthly fee. Residents sometimes then request tax breaks, arguing that they have paid for their own services and need not pay a second tax.<sup>271</sup> Professor Cashin worries that private communities thereby discourage redistribution and stifle an ethic of community-wide responsibility.<sup>272</sup> Professor Frug expresses similar concerns, criticizing the trend in private communities, schools, and other formerly public institutions toward viewing public services as efficient transactions that enhance individual welfare rather than supporting a collective group.<sup>273</sup> He also notes private communities' contribution to Americans' fear of crime and their attempts to isolate themselves from "strangers" and "different" people, pinpointing the flight to the suburbs as a problem.<sup>274</sup> Although Professor Frug blames both public and private communities for the perpetuation of fear,<sup>275</sup> private subdivisions are conducive to isolation; they allow individuals to build an exclusive suburban community within walls.<sup>276</sup>

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(observing that "many of . . . [the nation's] cities are more segregated today than they were in 1964").

<sup>269</sup> *But see* Ron Levi, *Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 34 L. & SOC. INQUIRY 635, 651 (2009) (concluding, from the small set of cases that have addressed nonresidents' access to gated communities, that "nonresidents cannot be barred when there are continuing and empirically determinable relationships with the community"). This does not address, of course, the concern that certain classes of people are excluded from *living* within these communities.

<sup>270</sup> Cashin, *supra* note 12, at 1690–91.

<sup>271</sup> *See, e.g., id.* at 1677 ("Several states, including Maryland, Missouri, New Jersey, and Texas, already allow for adjustments in local taxes for residents of CIDs to reflect services provided by their residential associations."); Franzese & Siegel, *supra* note 3, at 1121 & n.53 (noting New Jersey's Municipal Services Act, which requires the state to either provide private communities with municipal services or reimburse the communities for their services costs incurred (citing N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992 & Supp. 2012))). Note that Franzese and Siegel worry about residents paying double taxes, whereas Cashin views the attempts to shirk taxes as another example of problematic secession.

<sup>272</sup> Cashin, *supra* note 12, at 1686.

<sup>273</sup> Frug, *supra* note 12, at 29–30.

<sup>274</sup> *Id.* at 76–77.

<sup>275</sup> *Id.* at 76.

<sup>276</sup> *Id.* at 71 ("Ask people why they want to build a wall around their neighborhood, and they'll say, 'security.'").

## 2. Renters

Just as homeowners choosing to live in a private subdivision collectively generate externalities, tenants do not solely bear the effects of the lease. Particularly around universities, developers increasingly offer upscale luxury rentals that have doormen and gates, promising students a safe living area with comfortable amenities.<sup>277</sup> These contribute to the same exclusion and anti-redistributive concerns that apply to subdivisions, yet the private community literature has ignored these problems.

To some extent, the focus in the private community literature on the social externalities of owned but not rented private communities is justified by the spatial differences described in Part II. Single-family homes have stronger social and environmental effects than do multiunit structures. Indeed, some state legislatures seem to have recognized this difference in the environmental context, at least indirectly—banning servitudes (but not leases) that prohibit the installation of solar panels or low-water landscaping. In Florida, for example, servitudes that would “prohibit any property owner from implementing Florida-friendly landscaping” (landscaping that “protects the state’s water resources”)<sup>278</sup> are banned. California similarly declares as void and unenforceable any provision of a community association governing document that “[p]rohibits, or includes conditions that have the effect of prohibiting, the use of low water-using plants as a group,” water use restrictions, or water-efficient landscapes.<sup>279</sup> At least one state has recognized (perhaps incidentally) that multiunit apartment buildings can have similar effects. Arizona’s ban on the prohibition of solar panels, for example, applies to “[a]ny covenant, restriction, or condition contained in any deed, *contract*, . . . or other instrument affecting the transfer or sale of, *or any interest in*, real property.”<sup>280</sup>

Beyond environmental concerns, single-family homes—particularly those in subdivisions—do have unique (and negative) social effects on individuals outside of private communities, as introduced in Part II. Although the gated luxury apartment has also become somewhat of a phenomenon,<sup>281</sup> new, creative rentals for low-income and other disadvantaged tenants are beginning to offset these externalities.<sup>282</sup>

Despite the legitimate differences between rented and owned communities in the context of social effects, the literature would do well to more closely

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<sup>277</sup> See, e.g., *supra* note 175.

<sup>278</sup> FLA. STAT. ANN. § 720.3075(4) (West 2010); see also Boudreaux, *supra* note 253, at 482 n.11 (citing to this statute).

<sup>279</sup> CAL. CIV. CODE § 1353.8(a) (West Supp. 2012).

<sup>280</sup> ARIZ. REV. STAT. ANN. § 33-439(A) (2007) (emphasis added). It is not clear, however, that a court would consider a lease provision a restriction or condition.

<sup>281</sup> See *supra* note 175.

<sup>282</sup> See, e.g., Simon, *supra* note 110, at 377–78 (describing various apartment buildings for the elderly and low- and moderate-income residents in Jamaica Plain, Boston).

investigate the trend toward luxury rentals, particularly as residents of a variety of income levels choose the rental option.<sup>283</sup>

#### CONCLUSION

The rental community—and particularly the multiunit apartment building—falls so naturally within the private community sphere perhaps because its functions and purpose are nearly identical to those of the private subdivision, the classic private community. Landlords impose a set of uniform rules to, *inter alia*, reduce conflicts among property users in close proximity, thus ensuring short-term value for residents and long-term protection of property value.<sup>284</sup> POAs mimic this model, overcoming individual owners' temptations to use their property as they wish and imposing a uniform rule set that constrains all neighbors, again in an attempt to protect short- and long-term property values.

Despite rental properties' definitional fit within the private community and the fundamental similarities between rented and owned private communities, the literature has not defined rented property as a private community. Nor has it adequately explained why its extensive analyses of the benefits and flaws of these communities consistently omit tenants, aside from the occasional nod to tenants *within* private, owned communities, such as subdivisions.<sup>285</sup> As explored in this Article, the legitimate differences between rented and owned communities only weakly support private community scholars' omission of rentals from their specific critiques of private communities. Differences in the type of space occupied, for example, partially explain concerns about rule notice in the owner context, as prospective owners of single-family homes may not expect intrusive rules. So, too, might the duration of the stay expand concerns about owners who lack upfront understanding of the rules and have trouble modifying them. But renters of multiunit apartments and homeowners both occupy shared communities—whether they live on neighboring lots or in neighboring units—and develop strong if not identical ties to those communities. Ultimately, private community scholars' focus on homeowners' experiences with use-limiting rules seems primarily rooted in tradition, a justification that continues to lose force as subdivisions become more and more a part of modern life.

Importantly, however, the omission of rentals from private community critiques does not prove that the critiques lack merit, only that they have not been taken to their logical conclusion. Indeed, private community scholars may be pleased to explicitly include renters within the reach of their arguments. And as the number of renters continues to rise<sup>286</sup> in the wake of a real estate decline not seen

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<sup>283</sup> See Newcombe, *supra* note 18, at 27 (describing well-to-do individuals flocking to urban rentals).

<sup>284</sup> See *supra* Part I.C.1–2.

<sup>285</sup> See *supra* note 23.

<sup>286</sup> JOINT CENTER FOR HOUS. STUDIES, *supra* note 17, at 2 (“[A]lmost all Americans rent at some point in their lives. Among the population that reached adulthood around 1980, fully 95 percent lived in rentals sometime during the ensuing two decades . . .”).

since the Great Depression,<sup>287</sup> increased attention to the well-being of tenants would be welcome. Nonetheless, it must be acknowledged that the size of the task facing the critics of private governance has increased significantly: private governance of rental property is ubiquitous, and for better or worse, long accepted.

As this Article has demonstrated, whether private communities are good, bad, or some of both, rental communities must be counted among them. This opens the door to an exchange of concepts between landlord-tenant law and the law of private communities, exploring how creative mechanisms from both fields can improve rules and governance systems in apartments and homes alike. If tenants enjoy protections from arbitrary rule enforcement in some states, so, perhaps, should subdivision owners—keeping in mind the rental-owner variations that will require different types of protective rules for homeowners. If private bylaws, in turn, protect homeowners by constraining POA discretion, so, arguably, should similar laws apply to landlord decisions.

It is time for the paths of landlord-tenant and private community law and scholarship, which currently run a parallel course, to intersect. This Article embarked upon the first stage of this project, placing rentals solidly within the private community framework. Going forward, the debate must extend past the castle walls and into the tenements.

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<sup>287</sup> See Dickerson, *supra* note 188, at 189 (describing “one of the worst foreclosure crises since the Depression”); JOINT CENTER FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 17, at 2 (noting that “the housing bust and Great Recession have pushed up the share and number of renter households” and predicting that “further increases in the renter population are likely”).