Cornell Law Review

Volume 75
Issue 1 *November 1989*

Article 1

Dilemmas of Group Autonomy: Residential Associations and Community

Gregory S. Alexander

DILEMMAS OF GROUP AUTONOMY: RESIDENTIAL ASSOCIATIONS AND COMMUNITY

Gregory S. Alexander†

We are a society of groups. De Tocqueville's observation that the principle of association shapes American society remains as valid today as it was in the mid-nineteenth century.[1] For us, as for others, the *vita activa*[2] is participation in a seemingly limitless variety of groups.

The importance of group activity in our national character has strongly influenced the agenda of political questions that recur in American political and legal theory. One of the fundamental normative questions on this agenda concerns the proper relationship between groups and the polity. To what extent should the polity foster connections between associations and the larger community?[3] Alternatively, what degree of autonomy ought the polity, in our "segmented society," recognize for social groups, "each presuming autonomy in its own domain, each requiring homogeneity of its

---

† Professor of Law, Cornell University. I am grateful to colleagues and friends at Cornell and elsewhere for their reactions to earlier drafts of this article: Drucilla Cornell, Alan Freeman, William Fisher, Gerald Frug, David Lyons, Mari Matsuda, Harold McDougall, Elizabeth Mensch, Frank Michelman, Russell Osgood, Carol Rose, Bernard Rudden, Steven Shiffrin, Joseph Singer, David Williams, Joan Williams, and Susan Williams. Through their suggestions and criticisms, they have given me a deeper understanding of community.

1 In a repeatedly cited passage, de Tocqueville states:

> Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds. . . . Wherever, at the head of some new undertaking, you see the Government in France, or a man of rank in England, in the United States you will be sure to find an association.

2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 128-29 (Schocken ed. 1961). *See also* 1 *id.* at 216 (America uses and applies the principle of association more successfully and widely than any other country).

2 *See* HANNAH W. ARENDT, THE HUMAN CONDITION: A STUDY OF THE CENTRAL DILEMMAS FACING MODERN MAN 12-17 (1958).

3 I do not mean to suggest that fostering connection between groups and the larger community invariably denies group autonomy. Much depends on what meaning one attaches to autonomy. This Article represents an attempt to define both group life and community in a way that breaks out of the deadlock that some meanings create. By "alternatively," my purpose is to acknowledge that the vision of fostering connections between groups and the larger community will often be viewed as intruding on autonomy—individual or group.

membership, and each demanding the right to fulfill its destiny without interference"?[4]

This Article considers two approaches to the question of group autonomy in the context of residential associations and examines the implications of each for the standard of review that courts should apply to the rules and regulations of residential associations. One approach is based on the theories of interest-group pluralism and public choice; the other, on communitarianism. On the surface, both of these approaches share a commitment to the importance of groups in social and political life, but they envision the relationship between the individual, the group, and the polity in strikingly different ways. The theory of interest-group pluralism[5] and its cognate, public-choice theory,[6] in their normative moments seek to secure for social groups a strong form of autonomy from collective intervention. Their commitment to strong group autonomy ultimately derives, however, from a commitment to individual autonomy.[7] Pluralist and public-choice theorists believe that individuals associate with each other only to achieve specific ends coincidentally shared. For pluralist theory, group autonomy is rooted in the political vision that seeks radically to separate the public and private realms and to define for the latter an expansive scope.

Communitarian theory similarly emphasizes the desirability of group forms of life.[8] But, in strong contrast to pluralist and public-

---

4 *See* ROBERT H. WIEBE, THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA (1975).

5 Prominent examples of interest-group pluralist theory include ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1972); EARL LATHAM, THE GROUP BASIS OF POLITICS (1952); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1953), J. David Greenstone, *Group Theories*, in MICROPOLITICAL THEORY 243 (Fred I. Greenstein & Nelson W. Polsby eds. 1975) provides a useful overview of the literature.

6 The following have made important contributions to public choice theory: MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

7 *See infra* Part III(A)(1).

8 Some of the important recent contributions to communitarian political and legal theory include BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY & CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT (1986); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); Drucilla L. Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985) [hereinafter Cornell, *Reconstruction*]; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); 2 CHARLES TAYLOR, PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES (1985).

Communitarians share with modern republicans the task of developing new vocabularies that are appropriate for our modern culture. Their common challenge is to transform a past rhetoric by purging it of its exclusionary features. As political traditions, republicanism and communitarianism carry a lot of the same baggage. Skeptics of the attempts to develop both traditions into a politics for the late twentieth century have

choice theories, communitarian theory understands group activity and individuality as simultaneously present aspects of the human personality, or self. The central problem with which much recent communitarian theory struggles is how the polity may harmonize the dual aspects—social and individual—of the self, encouraging group life without sacrificing individual identity. The polity's harmonizing responsibility requires that it recognize the principle of group autonomy, but not in the form defined by pluralist theory.

Communitarianism's opposition to strong group autonomy seems paradoxical at first. One might expect that its normative commitment to the view that humans thrive only when they interact with others in environments of shared values favors a mode of social organization in which nomic clusters, replacing the individual as the basic unit, are free to pursue their conceptions of the good, just as classical liberalism promotes the autonomy of the individual. A central purpose of this Article is to insist that the rhetoric of community, strategically used for the purpose of securing a strong form of group autonomy[9] for residential groups,[10] undermines, rather than

---

emphasized that historically both republican and communitarian rhetoric have been used in the service of overtly exclusionary social practices.

The strategy for republicans and communitarians in meeting that challenge must be historicist and pragmatic. Appropriating a past political rhetoric involves transformation. Those who appropriate the vocabulary of a political tradition seek to make it their own, to recreate it. They attempt to tap the tradition's unrealized potential for creating a different politics. *See* Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1204-1212 (1988) [hereinafter Cornell, *Institutionalization*].

At the same time, recollective imagination does not mean that traditions are infinitely malleable. If working within a tradition means anything at all, it means that there are constraints on what we can say. Recollective imagination is constrained to the extent that society has a well-defined understanding of the political tradition. Particular traditions may differ in this respect, and those traditions that are more specifically defined may be less malleable than those that have less settled meanings. Recent writings by feminists and minority scholars have given those who wish to appropriate the rhetoric of civic republicanism and the rhetoric of community to create a politics of inclusion good reasons for concern about whether either tradition can be so transformed. We can discover the limits of both traditions, however, only through attempts at transformation. What I offer here is an attempt to indicate how, in one context, community might be recreated as a politics of inclusion.

9 By "strong autonomy," I mean the power of groups to govern their affairs with minimal interference from the legal system—that is, a largely non-interventionist resolution to what might be called the "inside-outside" problem. Group autonomy is invariably a matter of degree. Precisely because they are social, groups cannot immunize themselves entirely from collective constraints. At the same time, political regimes could not entirely eliminate groups as a mode of social activity even if they wanted to do so. Contemporary arguments for strong group autonomy concede the necessity for certain minimal legal restrictions on group self-governance, such as proscriptions of exclusionary practices based on race. Beyond tbese constraints, however, they resolve the inside-outside problem by permitting groups to create walls between themselves and the outside world.

10 While I am skeptical that all—perhaps even most—common unit developments

advances, community as a regulative ideal. Public-choice and pluralist theorists frequently have used the rhetoric of community to promote their contractarian vision, but their very contractarianism reinforces the core dilemma of community, namely, the problem of exclusion. Unlike pluralist/public choice theory, communitarian theory recognizes that the very values to be gained by group autonomy may require that the polity intervene in the affairs of groups—all groups—to address the problem of exclusion.

Precisely for this reason, communitarians object to contractarians using communitarian rhetoric. Contractarians' use of that rhetoric perverts the ideal of community.[11] Interpreting community as an ethic of inclusion, communitarians regard social intervention as sometimes necessary to prevent groups from practicing unacceptable forms of exclusion. Just what exclusionary social practices should be considered unacceptable is, of course, an enormously controversial question. It is just because that question is open-ended and intensely political, however, that we cannot permit groups to isolate themselves from dialogue with the rest of society. Strong group autonomy would enable groups to end all public dialogue, in effect imposing their answers to questions of exclusion and privileging their interpretation of "community." In the end, such an interpretation transforms community into a strategy for domination.

At the same time, however, the form that such intervention takes matters a great deal, for collective social intervention itself runs the risk of perpetuating domination under the guise of community. Several commentators have argued that adjudication is an odd

---

can plausibly be described as communities, I do think that at least some of them exhibit communitarian characteristics. Just what proportion of them can plausibly be so described I am in no position to say. My view is that common unit developments are best understood as mixtures of contractarian and communitarian outlooks. *See infra* text accompanying notes 138-48.

11 I want to clarify my meaning of community as both a rhetoric and as a "regulative ideal." Both communitarians and their critics have used the term "community" in many different (and sometimes contradictory) senses. (This practice itself is a larger and important story of the rhetoric of community.) My own rhetoric of community is not essentialist. To the contrary, it is altogether pragmatic, as my focus on the *rhetoric* of community suggests. Agnostic (or, better, uninterested) in metaphysical questions as I am, I do not mean to claim that that there is some irreducible core to human nature that must include community. This interpretation puts some distance between me and many of the texts that I have labelled communitarian. In discussing community as a regulative ideal, I mean to appeal to the rhetoric of community as, to borrow James Boyle's language, "a source of aspirational stories through which we can explain our own local moral and political struggles." James Boyle, *Modernist Social Theory: Robert Unger's Passion*, 98 HARV. L. REV. 1066, 1082 (1985). Community as a regulative ideal is a vision of a society that is worth striving to create, even if it can be created only incompletely. My enterprise here, then, is perhaps best described as using the rhetoric of community as both a "discursive strategy" and a "strategic discourse."

means of implementing communitarian ideals of participation, dialogue, and reciprocity.[12] They favor more direct forms of social interaction, like local institutions, as means for practicing community.[13] But "localities have a disturbing history of intolerance toward non-conforming groups" and individuals.[14] Furthermore, while it is desirable to encourage direct civic participation through small-scale institutions, recourse to adjudication is sometimes unavoidable, as when excluded persons claim legal entitlement to participate in group life,[15] or when dissident group members claim an entitlement to deviate from group requirements. In these situations, the question is what judicial practices maintain interaction between competing visions of desirable modes of life without sacrificing the integrity of groups.

As a vehicle for discussing the problem of autonomy for groups in general, I will examine the status of residential groups in American society, specifically, the question of legal intervention into the affairs of residential associations.[16] Residential associations, the membership of which consists of all purchasers of property in so-called common or planned unit developments, have proliferated so much in the past two decades that they may represent the dominant aspect of the late twentieth century contribution to American residential group life. The normative canon of these residential arrangements consists of expressly stated rules in purchasers' deeds that impose a wide variety of restrictions on members' use of their property interests within the development. These rules range from provisions that prohibit owners from selling their interests without the express consent of the residential association's governing board,[17] to restrictions on the minimum or maximum age of resi-

---

12 *See, e.g.*, Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988); Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986).

13 For some of the work specifically discussing local institutions as mechanisms for implementing communal values, see B. BARBER, *supra* note 8; JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); Frug, *supra* note 8; and Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839 (1983).

14 Abrams, *supra* note 12, at 1607.

15 *See* Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989).

16 The most significant theoretical discussion of residential groups in the legal literature is the exchange between Robert Ellickson and Gerald Frug concerning the types of intermediate groups that offer the greatest opportunity for robust forms of civic participation. *See* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) [hereinafter Ellickson, *Cities*]; Robert C. Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982) [hereinafter Ellickson, *A Reply*]; Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982); Frug, *supra* note 8.

17 *E.g.*, Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967) (disabling restraint valid if reasonable under the circumstances); Gale v. York Center Community Coop., 21 Ill. 2d 86, 171 N.E.2d 30 (1960) (right of preemption sustained); 68

dent members, to restrictions on decor and architectural design.[18] Developers also commonly have restricted occupants of units to a "single family."[19]

Legal challenges to these internal group rules in recent years directly pose the question of the appropriate relationship between self-governing groups and the collective polity.[20] Courts have tended substantively to review these rules, applying a standard of reasonableness that requires the rules of the group to conform not only to the association's own internal values but to external values as well—*i.e.*, values that, in the court's judgment, are widely shared throughout the rest of the polity.[21]

This judicial practice—and the status of residential associations generally—has attracted considerable opposition in recent years.[22]

Beacon St., Inc. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935) (disabling restraint on alienation sustained); Sanders v. Tropicana, Inc., 31 N.C. App. 276, 229 S.E.2d 304 (1976). *See* text accompanying notes 59-60 *infra*; Metropolitan Transp. Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986); Weisner v. 791 Park Ave. Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959) (disabling restraint on alienation sustained).

18 *See, e.g.*, Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 449 P.2d 361 (1969); Syrian Antiochian Orthodox Archdiocese v. Palisades Assocs., 110 N.J. Super. 34, 264 A.2d 257 (Ch. Div. 1970).

19 *See, e.g.*, Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978); London v. Handicapped Facilities Bd., 637 S.W.2d 212 (Mo. Ct. App. 1982); Knudtson v. Trainor, 216 Neb. 653, 345 N.W.2d 4 (1984); Crane Neck Ass'n v. New York City/Long Island County Serv. Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 469 U.S. 804 (1984); Jackson v. Williams, 714 P.2d 1017 (Okla. 1985); Omega Corp. v. Malloy, 288 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985); *see also* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). *See generally* Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989).

20 Common unit developments are organized as condominiums, cooperatives, or planned developments. For my purposes, the differences among these forms are not important. What is important are their shared characteristics. "Common interest developments are defined by shared property, by restrictions built into their deeds limiting the uses of property, and by a mandatory homeowners' association which administers the property and enforces the restrictions on its use." Stephen E. Barton & Carol J. Silverman, Public Life in Private Governments: Neighborhoods with Shared Property 4 (Nov. 1987) (unpublished manuscript) (forthcoming in ANN. REV. URB. SOC.) [hereinafter Public Life].

21 For examples of cases applying the reasonableness requirement to internal condominium or cooperative regulations other than restrictions on transfer, see Amoruso v. Board of Managers of Westchester Hills Condominium, 38 A.D.2d 845, 846, 330 N.Y.S.2d 107, 109 (1972); Justice Court Mut. Hous. Coop. v. Sandow, 50 Misc. 2d 541, 544, 270 N.Y.S.2d 829, 832 (Sup. Ct. 1966); Forest Park Coop. v. Hellman, 2 Misc. 2d 183, 184, 152 N.Y.S.2d 685, 687 (Sup Ct. 1956).

22 *See, e.g.*, Ellickson, *Cities, supra* note 16; Uriel Reichman, *Judicial Review of Servitudes*, 7 J. LEGAL STUD. 139 (1978) [hereinafter Reichman, *Servitudes Review*]; Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976) [hereinafter Reichman, *Residential Governments*]; Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981) [hereinafter Note, *Judicial Review*]; Note, *The*

Several commentators have criticized reasonableness review on the basis of familiar notions of private ordering.[23] In effect, they seek to secure a strong form of autonomy for these residential groups, requiring only that groups govern themselves consistently with their own internal scheme of values and preferences.[24] Their arguments for strong autonomy reflect the pluralist/public choice approach to the nature and status of groups.[25] With respect to the specific debate over residential associations, I argue that communitarian theory justifies substantive judicial review under the reasonableness standard as a dialogic form of legal intervention. The experience with residential associations indicates why we should reject strong group autonomy for social groups in general as a social condition that would pervert, rather than advance, the ideal of community.

I
TWO VISIONS OF RESIDENTIAL LIFE

This section places the group character of common unit developments in a broader context by sketching two historical visions of residential life in American culture. These sketches synthesize and necessarily simplify—hopefully without distorting—ideas about the desirablity of modes of living that various historians have pieced together in recent years.[26]

Rule of Law in Residential Associations, 99 HARV. L. REV. 472 (1985) [hereinafter Note, *Rule of Law*].

23 *See, e.g.*, Ellickson, *Cities, supra* note 16; Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667 (1986) [hereinafter Epstein, *Past and Future*]; Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) [hereinafter Epstein, *Why Restrain*].

24 For purposes of determining what degree of autonomy from legal intervention residential associations ought to enjoy, Ellickson distinguishes between the association's original rules and subsequent amendments. While courts should strongly defer to tbe former individual, owners should be given much greater control over the actions of association boards in amending association rules that, unlike adoption of the original rules, would have redistributive effects. *See* Ellickson, *Cities, supra* note 16, at 1530-39.

25 *See* Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 317 (1984):

> [L]iberal theorists preached and practiced an art of separation. They drew lines, marked off different realms, and created the sociopolitical map with which we are still familiar. . . . Liberalism is a world of walls, and each one creates a new liberty.

Focusing on the last sentence in this excerpt, I argue in this paper that Walzer is right in his first claim but wrong, or at least radically incomplete, in his second. Liberal social and political theories *are* theories of walls, between public and private, self and other, family and market, and, as I discuss in this paper, groups and community. But for every liberty created by a liberal wall, tbere is a concomitant relationship of domination. That is the central dilemma of liberal group autonomy. It can be addressed by replacing walls with boundaries, connecting group and community. *Cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-63 (1983).

26 This section draws on several excellent recent histories of residential life in America, including ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUB-

A. The Nineteenth-Century Vision

We can express the popular American attitudes toward the available forms of residential life during the nineteenth century, especially after 1850, in terms of two sets of ideas:

owned (detached) house	vs.	leased apartment
suburban		urban
family		commerce
exclusion through isolation (separateness as good)		congestion/lack of privacy

Increasingly during the nineteenth century, popular writings idealized residential life outside the city and, specifically, the single-family dwelling.[27] People associated city life with congestion, and congestion connoted danger, disease, and loss of individual privacy. Writers like Catherine Beecher,[28] Andrew Jackson Downing,[29] and Calvert Vaux[30] romanticized the values associated with semi-rural living—harmonious family life, escape from the rigors of the business world, personal tranquility, and uniqueness in housing and landscape.[31] These values, in turn, grew out of the rise of the cult of domesticity and the segregation of the world of the family from the world of work in popular consciousness throughout the first half of the nineteenth century, congealing later in the current understanding of the dichotomy between the public and private spheres.[32]

Central to realizing the benefits of suburban living was private

---

URBIA (1987); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); JOHN STILGOE, BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939 (1988); MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987); GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA (1981). The standard work linking the development of American residential life to technological changes, particularly in transportation, is SAM BASS WARNER, STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900 (1962).

Robert Fishman's *Bourgeois Utopias: The Rise and Fall of Suburbia, supra*, represents a break with this instrumental tradition in urban historiography. He argues that Anglo-American suburbanization was a cultural development, specifically, that it was the expression of the cultural values—domesticity, leisure, an artificial union with nature, and, above all, exclusivity.

27 R. FISHMAN, *supra* note 26, at 50, 52, 58, 68-72.

28 *See* CATHERINE BEECHER, TREATISE ON DOMESTIC ECONOMY, FOR THE USE OF YOUNG LADIES AT HOME AND AT SCHOOL (n.p. 1841).

29 *See* ANDREW JACKSON DOWNING, THE ARCHITECTURE OF COUNTRY HOUSES (1850) (Da Capo Press Reprint ed. 1968); ADREW JACKSON DOWNING, RURAL ESSAYS (George William Curtis ed. 1853).

30 *See* CALVERT VAUX, VILLAS AND COTTAGES (1857).

31 Lewis Mumford emphasizes this last benefit of suburban life in mid-nineteenth century thought in LEWIS MUMFORD, THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS 485-86 (1961).

32 *See, e.g.*, NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 at 63-100 (1977); Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

ownership of a single-family, detached house. As Kenneth Jackson has stated, "[t]he single-family dwelling became the paragon of middle-class housing, the most visible symbol of having arrived at a fixed place in society, the goal to which every decent family aspired."[33] It was not solely the architecture that mattered, but the mode of ownership as well—individual ownership. Leasing produced rootlessness and what modern social theorists call social alienation. Ownership of a detached house created the necessary environment within which the individual could flourish. Indeed, the isolated house came to represent the individual.[34] Its separateness, both spatially and legally,[35] unambiguously expressed the dominant social vision of individualism.

Perhaps the most important meaning that ownership of the detached house siguified was exclusion. The middle class increasingly sought to escape from the social heterogeneity of urban life. The detached dwelling in semi-rural settings represented living, as opposed to working, in an environment that excluded all of the dissonant elements of the city, *i.e.*, the crowd. Exclusion, in other words, required relative isolation.

B. The Mid-Twentieth Century Vision: Search for Community

By the middle of this century, popular attitudes concerning the ideal forms of living arrangements had changed. The following scheme captures the sense of our modern notions:

detached house	vs.	owned project unit with shared areas
sense of alienation		shared values
isolation/loss of community		exclusion through connectedness

Common unit developments reflect the strengthening of a group mentality among homebuyers in the second half of the twentieth century. The romance of life in the suburbs has diminished in modern culture, or at least it has substantially changed. For many people, the detached house has come to imply alienation from

---

33 K. JACKSON, *supra* note 26, at 50; *see also* G. WRIGHT, *supra* note 26, at 193-214.

34 K. JACKSON, *supra* note 26, at 52; *see also* Clare Cooper, *The House as Symbol of the Self*, in DESIGNING FOR HUMAN BEHAVIOR: ARCHITECTURE AND THE BEHAVIORAL SCIENCES 130-46 (1974).

35 In fact, as Kenneth Jackson points out, not all elements of nineteenth-century society wanted to promote outright individual ownership. Business and political interests preferred mortgaged ownership, which is in a sense a form of shared ownership. Mortgages, they hoped, would tie employees to their jobs and their towns. K. JACKSON, *supra* note 26, at 51. The imprisoning effect of mortgages was precisely the focus of the radical left's attack on individual ownership of houses. *See* FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE 73-75 (1977).

others, a fragmentation of one's life, one's identity.[36]

The conception of the detached house itself has changed in the post-modern era. Various aspects of housing design reflect this shift in popular consciousness. Common unit developments typically include commonly-owned areas, including recreational facilities as well as open space and walkways. Certain planning features also underscore the sense of groupness. For example, many post-1960 developments situate houses together in a pattern that creates a sense of insularity. As one planner recently observed, "People are reacting against privatism. They want the feeling of a shared community."[37] Another commented, "The movement back to living in neighborhoods is similar to the idea of belonging to a club. It gives people an instant feeling of identity."[38] Common unit developments, including many condominiums and cooperatives, stress the club-like quality of their living experience. They explicitly emphasize their group character. It is no coincidence that developers advertise their projects as "communities" or "villages."

The conventional wisdom is that tax considerations have driven the rise in popularity of condominiums. There is little doubt that tax and other financial considerations have greatly influenced popular attitudes towards condominiums and similar forms of group housing. But explaining the proliferation of common unit developments on the basis of tax considerations alone overlooks an important aspect of the story of this form of residential life—the attraction of many people to group living.

The self-image that common unit developments create in their literature is one of connectedness—the resident as belonging to something, rather than detached and alienated. The public meanings of connectedness and isolation, however, have now reversed their ninteenth-century meanings to a considerable extent. Connectedness now commonly signifies what isolation did then with respect to the detached single-family house, *i.e.*, exclusion. The comparison drawn in popular discourse between common unit developments and clubs represents not simply the availability of shared facilities in common unit developments, but the association of those developments with the deeper public meaning of club—the sense of exclusion that results from the organization of social

---

36 Gwendolyn Wright has traced this shift to the 1960s: "[P]eople . . . recognized that there had to be some middle ground between suburban sprawl and urban high-rise, between isolation in the suburbs and anonymity in the cities. The architectural result was a concept called cluster housing." G. WRIGHT, *supra* note 26, at 259.

37 Carol Vogel, *Clustered for Leisure*, N.Y. Times, June 28, 1987, § 6 (magazine), at 46 (quoting Jacqueline Leavitt, associate professor of urban planning at UCLA).

38 *Id.* at 46, 64 (Stan Eckstut, architect and urban planner, designed the master plan for Battery Park City in Manhattan.).

groups explicitly on the basis of discrete purposes and values shared only by certain segments of society.

Recent cases reflect judicial awareness of the group character of residential life in common unit developments.[39] The sense that emerges from these cases is that courts regard these arrangements as new forms of residency, fundamentally different from both traditional fee ownership of the detached house and apartment living. Common unit developments represent attempts to infuse a social experience of groupness into modern ownership of residential property. Accepting that vision of common unit developments has led some courts to accept various restrictions, including restraints on alienation, as positive devices for creating and maintaining groups. That is, the courts' sense of the novelty of this mode of residential life has influenced their understanding of the special role of property restrictions in creating and maintaining group identity.

Social groups are sometimes constituted, at least in part, by their connection to land or other resources.[40] If a particular asset constitutes a group, then the group must have some measure of control over the transferability of that asset to maintain its very existence. The group risks disintegration if it permits all of its members freely to transfer their individual interest in relevant items of property with no control by the group as a whole.

The ability of groups constituted by property to maintain their existence does not require a communal form of ownership.[41] Main-

---

39 *See, e.g.*, Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981); White Egret Condominium v. Franklin, 379 So. 2d 346 (Fla. 1979); Seagate Condominium Ass'n v. Duffy, 330 So. 2d 484 (Fla. Dist. Ct. App. 1976); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975); Franklin v. Spadafore, 388 Mass. 764, 447 N.E.2d 1244 (1983).

40 The notion that property, whether in land or other forms, functions to define the cultural identity of groups is an extension of the personality theory of property. The most important recent scholar developing the personhood theory with respect to individuals is Margaret Jane Radin. *See, e.g.*, Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Less work has been done extending the theory to groups. For an early attempt, see Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1988) (authored by John Moustakas). More obvious examples of property as a foundation of groups and the disastrous consequences upon group cohesiveness when group-foundational property is expropriated by conquest are provided by the claims for reparations made in recent years by Native Alaskans and Native Hawaiians. For discussions of the former, see Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507 (1987) (authored by Rachel San Kronowitz, Joanne Lichtman, Steven Paul McSloy, and Matthew G. Olsen); Note, *American Indian Land Claims: Land Versus Money as a Remedy*, 25 U. FLA. L. REV. 308 (1973) (authored by Richard Nielson). *See also* Alaskan Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1982). On the latter, see Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 368-373 (1987).

41 Michael Taylor points out that "property rights economists tend to see only two

taining the group's existence is compatible with individual ownership, although not the classical liberal conception of individual ownership. Basing group existence on property requires a form of individual ownership in which individual control is sacrificed to the group to the extent that individual control is inconsistent with maintenance of the group.[42] But ownership, because it is a social practice, always involves some sacrifice of individual control in this sense. It is only in the mythology of classical liberalism that ownership is absolute.

Residential associations are a contemporary setting for this group-constitutive role of property and of restrictions on property use.[43] Residential associations are the governance entities for territorial groups that are constituted with respect to particular assets, some of which are individually owned, others owned in common by group members. In this sense, these property restrictions are tied to group existence, for maintaining the character of the group requires that the association be able to enforce these property restrictions. This interpretation of residential association restrictions has guided the judicial reaction to recent challenges to these restrictions.

II
THE LEGAL BACKGROUND: REGULATION OF RESIDENTIAL ASSOCIATION RULES

In determining the validity of restrictions that residential associations have imposed on their members, courts have applied a test of "reasonableness." Several commentators have objected to this judicial practice, labelling it a form of "Lochnerian activism."[44]

---

or three possibilities: open access and private property, to which is sometimes added state ownership." Taylor goes on to distinguish group property from these alternatives. He further points out that there is no reason why transaction costs should be greater in the case of group property than in the case of individual property. MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 28-29 (1987).

42 Such a "diluted" form of individual ownership will turn out to be the classical liberal form of individual ownership if we treat the entire society as the relevant group. Some measure of individual control simply has to be sacrificed to society, even in the purest forms of liberal property. *See* KARL POLANYI, THE GREAT TRANSFORMATION (1944); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3 (1982). The conception of property that was held by several theorists in the classical republican tradition is one example of such a conception of individual ownership existing within and subordinate to the group as a whole.

43 *See* JAMES GREVILLE AGARD POCOCK, VIRTUE, COMMERCE, AND HISTORY 103-23 (1985); JAMES GREVILLE AGARD POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 386-91, 423-67 (1975).

44 Ellickson, *Cities*, *supra* note 16, at 1526; *see also* Reichman, *Servitudes Review*, *supra* note 22; Note, *Judicial Review*, *supra* note 22; Note, *Rule of Law*, *supra* note 22. Professor Ellickson's criticism of judicial review of residential association rules as "Lochnerian" is ironic. As Cass Sunstein has pointed out, *Lochner*'s symbolic meaning is not judicial ac-

They have interpreted the reasonableness standard as inviting review of residential association restrictions for consistency with norms that are exogenous to the development. Comparing the reasonableness standard with the familiar constitutional test applied to analogous public rules (*i.e.*, whether the regulation is rationally related to a legitimate state interest), critics have argued that courts are more demanding of private restraints than they are of public regulations. Constitutional rationality review imposes minimal constraints on public government,[45] requiring only a credible instrumental fit between the regulation and a legitimate internal goal of the public agency. Why then, critics ask, should the standard of review be more intrusive with respect to private governmental regulations?

The character of judicial review of residential association restrictions under the reasonableness requirement is far less clear than these critics recognize. There simply is no general pattern or model that emerges from the cases applying the reasonableness standard. While some decisions appear to involve substantive review,[46] courts in other cases have followed just the sort of inquiry that critics of reasonableness review endorse, a minimalist review of instrumental fit with the development's internal goals.[47] Moreover, even where courts apparently have evaluated a restraint's reasonableness on the basis of exogenous social norms, they sometimes have sustained the restriction.[48] Conversely, when courts have struck down restrictions, claiming to confine their attention to the development's own purposes rather than external social norms, the actual basis of decision is usually uncertain because the development's goals are expressed so broadly that it is virtually impossible for a restriction not to fit within their scope. Minimal rationality review under these circumstances is an empty gesture.

Another point overlooked by critics of the reasonableness standard is that the effect of the shift to a reasonableness test, however

---

tivism in the abstract, but protection of the existing distribution of wealth and entitlements. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987). In this sense, it is Ellickson who is the Lochnerian, not the courts which strike down "unreasonable" restrictions.

45 *See generally* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979).

46 *See, e.g.*, Bernardo Villas Management Corp. Number Two v. Black, 190 Cal. App. 3d 153, 235 Cal. Rptr. 509 (1987); Gale v. York Center Community Coop., Inc., 21 Ill. 2d 86, 171 N.E.2d 30 (1960); Baum v. Ryerson Towers, 55 Misc. 2d 1045, 287 N.Y.S.2d 791 (Sup. Ct. 1968); Justice Court Mut. Hous. Coop., Inc. v. Sandow, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (Sup. Ct. 1966).

47 *See, e.g.*, Laguna Royal Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981); Holleman v. Mission Trace Homeowners Ass'n, 556 S.W.2d 632 (Tex. Civ. App. 1977).

48 *E.g.*, *York Center*, 21 Ill. 2d 86, 171 N.E.2d 30.

defined, may be precisely what they seek—to increase the likelihood that residential association rules will be sustained. The reasonableness standard replaces traditional common-law and statutory rules governing restraints on alienation and land-use servitudes. Those rules generally are hostile to restrictions on property transfer or use. For example, common-law doctrine declares restraints on the alienation of fee interests *per se* void. Assuming that this common-law rule were otherwise applicable to residential association restraints on transfer of individual interests in common unit developments, then replacing that rule with the open-ended reasonableness standard represents a shift toward a legal attitude that is substantively more tolerant of such restrictions, even though it involves a greater degree of explicit judicial discretion over the affairs of the association.

It is unclear whether the reasonableness standard in fact signifies such a change in attitude. The legal rule that would otherwise apply to a given restriction in a residential association frequently is uncertain. Residential association restrictions may take any one of a number of different forms, including direct restraints on alienation,[49] rights of pre-emption,[50] and property servitudes.[51] More often than not, the specific type of restriction involved is unclear,[52] thus making the applicable legal norm uncertain. Under the traditional structure of property rules, form, not practical effect, controls a property restriction's validity. For example, at common law so-called disabling restraints, provisions that purport to deny the transferability of an asset, are *per se* void as to freehold estates,[53] but *per se* valid as to leasehold interests.[54] If a disabling restraint is imposed on a condominium or cooperative ownership interest,[55] it is unclear

---

49 *See, e.g.*, Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967) (reasonableness requirement imposed); Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981) (reasonableness requirement imposed); Weisner v. 791 Park Ave. Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959) (cooperative disabling restraint *per se* valid).

50 *See, e.g.*, *York Center*, 21 Ill. 2d 86, 171 N.E.2d 30 (reasonableness requirement imposed).

51 *See, e.g.*, Franklin v. Spadafora, 388 Mass. 764, 447 N.E.2d 1244 (1983) (reasonableness requirement imposed).

52 *See infra* note 60.

53 Restraints may be imposed on voluntary or involuntary alienation or both. The validity of provisions restraining involuntary alienation (*i.e.*, creditor access) but permitting voluntary alienation is more controversial, particularly as to disabling restraints. *See* 6 AMERICAN LAW OF PROPERTY § 26.108 (James A. Casner ed. 1952).

54 *See, e.g.*, Jacobs v. Klawans, 225 Md. 147, 169 A.2d 677 (1961). Recently, several courts have departed from the traditional doctrine that a lessor may restrain a lessee from transferring her interest for any reason. They have imposed an obligation on lessors not to withhold consent to assigu or sublease arbitrarily. *E.g.*, Funk v. Funk, 102 Idaho 521, 633 P.2d 586 (1981).

55 *See, e.g.*, 68 Beacon St., Inc. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935) (sus-

which of these two rules would apply since condominium and cooperative housing interests share some of the characteristics of both the traditional fee and leasehold estates.[56]

Probably the more common forms of restrictions in modern residential associations are preemption rights[57] and servitudes. A major issue in recent years has been whether the Rule Against Perpetuities or the doctrines concerning direct restraints on alienation should regulate preemption rights. A number of courts have held that preemption rights, particularly when included in condominium or cooperative agreements, are not subject to the Rule Against Perpetuities but only to the doctrines on direct restraints on alienation.[58] These courts have treated the choice as one between a fixed Rule Against Perpetuities and an open-ended doctrine against unreasonable restraints on alienation. Other courts upholding condo-

---

taining disabling restraint imposed on cooperative proprietary leasehold); Weisner v. 791 Park Ave. Corp., 6 N.Y.2d 426, 160 N.E.2d 720 (1959) (same); Penthouse Properties v. 1158 Fifth Ave., Inc., 256 A.D. 685, 11 N.Y.S.2d 417 (1939) (same).

56 *See, e.g.*, Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 137 (7th Cir. 1967) (disabling restraint on cooperative housing development sustained under the reasonableness test despite the fact that the "lease" was for a 99-year term). *See generally* Olin L. Browder, Jr., *Restraints on the Alienation of Condominium Units*, 1970 U. ILL. L.F. 231, 232 (noting that the factors that justify leasehold restraints seem to apply to condominim owners).

57 Rights of preemption differ from options to purchase in that holders of preemptions have the right to buy only if the owner decides to sell, while options are unilaterally enforceable. That is, options obligate the owner of the property to sell at the optionee's volition, not the owner's. Generally, options are subject to the durational requirement of the Rule Against Perpetuities and are void if they can be exercised after the period of lives in being at the creation of the option plus twenty-one years. They are not subject to the doctrine concerning direct restraints on alienation, however. *See, e.g.*, Certified Corp. v. GTE Prods. Corp., 392 Mass. 821, 467 N.E.2d 1336 (1984). *See generally* OLIN L. BROWDER, JR. & LAWRENCE W. WAGGONER, FAMILY PROPERTY TRANSACTIONS: FUTURE INTERESTS 373-74 (3d ed. 1980) (further developing this analysis).

58 *See, e.g.*, Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537 (Colo. 1985); Anderson v. 50 E. 72nd St. Condominium, 129 Misc. 2d 295, 492 N.Y.S.2d 989 (1985) (applying rule against unreasonable restraints to preemptive rights); *see also* Metropolitan Transp. Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986). What is really at stake in these cases is whether and in what contexts preemption rights should be subject to a durational requirement. The Rule Against Perpetuities imposes a strict durational limit on the validity of preemptions, while the flexible standard of reasonableness enables courts to take context into account. In the context of condominiums and cooperatives, a durational requirement would frnstrate the association's interest in maintaining control over its membership. This consideration does not apply in other contexts, and under the reasonableness standard, courts can impose such a requirement. Nevertheless, some recent cases not involving residential association preemptions have held that the Rule Against Perpetuities applies to preemption rights, even those that require merely an offer at a prevailing market rate, as opposed to a fixed price, where the preemption has unlimited duration. *See, e.g.*, Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Ferrero Constr. Co. v. Dennis Rourke Corp., 311 Md. 560, 536 A.2d 1137 (1988); Robroy Land Co. v. Prather, 24 Wash. App. 511, 601 P.2d 992 (1979), *rev'd*, 95 Wash. 2d 366 (1980). *But see* Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903 (1983).

minium preemption rights as reasonable have assumed that the traditional rules prohibiting direct restraints on alienation would otherwise apply.[59]

Many residential association restrictions take the form of a covenant to comply with the by-laws of the development's residential association. The by-laws almost invariably provide that owners may not transfer their interests without the express prior approval of the association. Some also restrict the owner's power to sell without first offering the interest to the association. A provision of this latter sort, of course, is a restraint on alienation, seemingly subject to the strict prohibition. Nevertheless, courts in recent decisions have tended simply to assume, without discussion, that a reasonableness standard applies.[60]

If the prior legal regime regulating these restrictions was more or less one of *per se* invalidity, then the apparent effect of the shift to judicial "activism" under the reasonableness test is to increase the likelihood that any given restriction will be sustained. Even if we ignore (as we should not) critiques that have deconstructed the distinction between rules and standards, "crystals" and "mud,"[61] and concede for the sake of argument that the reasonableness standard requires more judicial discretion than do the traditional *per se* rules, and that courts sometimes exercise that greater discretion to strike down a restriction, it still remains the case that the reasonableness standard explicitly leaves open the possibility that particular restrictions may be sustained. That possibility does not explicitly exist under *per se* rules prohibiting restraints on alienation, although we need to recall the point that in practice crystals present as much discretion for judges as mud. Here, as elsewhere, the open-ended reasonableness standard is overtly more forgiving than its formal

---

59 *See, e.g.*, Chianese v. Culley, 397 F. Supp. 1344, 1345-46 (S.D. Fla. 1975); Gale v. York Center Community Coop., 21 Ill. 2d 86, 171 N.E.2d 30 (1960). The courts sustaining condominium and cooperative preemptions generally have done so if the preemption was limited in duration and gave the holder the right to buy at the market price rather than a fixed price. The Restatement (Second) of Property similarly provides that preemptions reasonable in duration and price are not restraints on alienation but that other preemptions are subject to the rules regulating direct restraints on alienation. RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 4.4 (1983).

60 *See, e.g.*, Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981); Franklin v. Spadafora, 388 Mass. 764, 447 N.E.2d 1244 (1983).

The failure of courts to distinguish among the various forms of restrictions may reflect their recognition of the fact that developers themselves pay no attention to the traditional legal categories. The industry language refers collectively to "CC&Rs"—conditions, covenants, and restrictions. *See* Weiss & Watts, *Community Builders and Community Associations: The Role of Large-Scale Developers in Private Residential Governance*, in RESIDENTIAL COMMUNITY ASSOCIATIONS IN THE INTERGOVERNMENTAL SYSTEM 7 (Washington, D.C.: U.S. Advisory Commission on Intergovernmental Relations, forthcoming 1989).

61 The metaphor of "crystal" and "mud" is developed in Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

alternative.[62] In this sense, the reasonableness standard is better suited to the critics' objective of maximizing the validity of privately-created property restrictions. Thus advocates of association restrictions should applaud the shift from "deference" to "activism."

They do not do so because their real objection is not merely to judicial activism in the sense of the exercise of discretion, but to legal interference in the affairs of private groups. The alternative to reasonableness review that critics of judicial activism want is not the traditional *per se* rules prohibiting restraints, but the reverse of those rules. They want a rule creating a strong presumption of validity, if not of *per se* validity, of association restrictions.[63] Such a rule would mean *both* judicial passivity and substantive validity, but passivity in this sense is valued only because it ensures validity. The rhetoric about "Lochnerian activism" should not obscure the point that the real thrust of the doctrinal regime that these critics prefer is strong group autonomy. The controversy over judicial review of residential association rules under the reasonableness standard, then, only opens the door to deeper questions concerning the normative basis and limits of group autonomy.

III
THEORIES OF GROUPS AND GROUP AUTONOMY

The task of developing and contrasting theories of voluntary groups[64] for purposes of evaluating arguments for group autonomy from legal intervention is complicated by the fact that the group perspective is largely absent from legal discourse. Legal scholarship has not provided a rich conceptual study of social groups. In recent years, however, several writers have suggested normative reasons

---

62 *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

63 Epstein, for example, concedes that exceptions to his principle of individual freedom to impose restrictions on transfer are needed to control externalities, such as overconsumption of common pool resources. *See* Epstein, *Why Restrain*, *supra* note 23, at 973-88. Moreover, both Epstein and Ellickson concede that residential association restrictions that discriminate on the basis of race are and should be void. *See* Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 918-19 (1988) [hereinafter Epstein, *Covenants*]; Ellickson, *Cities*, *supra* note 16, at 1528. I discuss their failure to reconcile this concession to legal interference with their commitment to contractarianism in Part IV. *See infra* text accompanying note 138.

64 Legal economists and other commentators who are committed to notions of private ordering classify all social groups as either voluntary or involuntary. *See, e.g.*, Ellickson, *Cities*, *supra* note 16; Epstein, *Covenants*, *supra* note 63. They draw no distinction among voluntary groups, supposing that private choice is the exclusive basis for all voluntary groups. An important objective of this Article is to provide a richer understanding of "voluntariness" than that provided by the strictly contractual conception of groups.

for recognizing the notions of group rights and group autonomy as distinct from individual rights and individual autonomy.[65] Ronald Garet, for example, has argned that "[g]roups have a fundamental right to respect for their communality, just as persons have a fundamental right to respect for their personhood."[66] The group claim to respect for their communality means that groups should have the power to organize themselves as they see fit and to enact and enforce internal rules that are necessary for their existence—that is, to maintain the existence of the group. This notion of group autonomy might provide a justification for restrictions imposed on residential association members in the use and disposition of their property, including restraints on transferability of owner property. The little legal writing that does focus on groups, for the most part, has not explicitly developed alternative conceptions of groups.[67] Various writings in economics, social theory, political science, and philosophy, however, have particularly strong relevance to legal thought and practice regarding groups, and I will draw on work in these disciplines to sketch two theories of groups and two lines of justification for group autonomy.

Two distinct theories have emerged in the literature on groups. One derives from the theory of public choice. Synthesizing economic theory and political science, it uses microeconomic concepts to explain, predict, and prescribe political behavior.[68] Public choice theory essentially is a variation on the twentieth-century theory of pluralist politics.[69] As such, it explicitly focuses on the role of groups in society, for pluralists posit that the key to understanding society is in the interplay between social groups.[70] Public choice theorists have developed a clear and distinct positive conception of social groups, and this conception in recent years has influenced many legal scholars, particularly those engaged in law-and-economics work.

The other theory of social groups is communitarianism. This theory is harder to describe because it is not as well-defined as public choice theory. To some extent, the communitarian theory of groups has developed in reaction to pluralist/public choice theory,

---

65 *See, e.g.*, Frug, *supra* note 8; Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

66 Garet, *supra* note 65, at 1017.

67 A notable exception is Garet, *supra* note 65.

68 *See, e.g.*, J. BUCHANAN & G. TULLOCK, *supra* note 6; DENNIS C. MUELLER, PUBLIC CHOICE (1979).

69 *See, e.g.*, ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT (1949); R. DAHL, *supra* note 5; ROBERT A. DAHL, WHO GOVERNS? (1961); D. TRUMAN, *supra* note 5; Greenstone, *supra* note 5.

70 *See* A. BENTLEY, *supra* note 69, at 208-09.

so it perhaps is easier to describe it by contrasting it with the public choice conception.

A. Two Theories of Groups

1. *The Public Choice/Pluralist Theory*

It seems paradoxical at first blush to discuss a conception of social groups held by public choice theory.[71] A basic premise of that theory, after all, is that the individual is the basic unit of all forms of social organization. All other modes of social organization are reduceable to individuals. James Buchanan and Gordon Tullock refer to this premise as "methodological individualism."[72] They contrast that notion with individualism as a *norm* for organizing social action. Buchanan and Tullock claim that their analysis carries no normative baggage because methodological individualism merely postulates that society makes political choices through the process of individuals choosing among available alternatives. The value scheme that guides individuals in making these choices—narrow egoism, altruism, or whatever—supposedly is irrelevant to the methodological commitment to individualism.

At the same time, however, public choice theory's methodology rejects certain other conceptions of society and state. Specifically, it implicitly rejects organic social and political theories, including versions such as that developed by Hegel,[73] and more recently, by Roberto Unger.[74] Notions of the general will or the public interest, in

---

71 *See* Drucilla L. Cornell, Book Review, *In Union: A Critical Review of Toward a Perfected State*, 135 U. PA. L. REV. 1089 (1987). Other writers recently have argued that this contrast is overdrawn, and that liberalism can be reconstructed in ways that correct its communitarian defects while preserving its core elements. Nancy Rosenblum, for example, has described three paths for recasting liberalism in a communitarian mold. *See* NANCY ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 152-86 (1987). Nevertheless, it is quite clear that liberals who do acknowledge the importance of community are willing to take community only so far. This is evident, for example, in several recent articles by John Rawls. Rawls distinguishes between the classical republican conception of the good and that held in the tradition of civic humanism. While viewing republicanism as consistent with liberalism insofar as it seeks to promote political participation "as itself one form of good among others," Rawls regards civic humanism as inconsistent with liberalism because civic humanism views "political participation in democratic politics . . . as the privileged locus of the good life." John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 273 (1988); *see also* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1 (1987); John Rawls, *Kantian Constructivism in Moral Theory*, 9 J. PHIL. 515 (1980).

72 J. BUCHANAN & G. TULLOCK, *supra* note 6, at vi; *see* Jon Elster, *Introduction*, in RATIONAL CHOICE 1, 3-4 (Jon Elster ed. 1986) (methodological individualism denies that there are collective desires or collective beliefs).

73 *See* G.W.F. HEGEL, SCIENCE OF LOGIC 761-77 (A. Miller trans. 1969); *see also* G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT (T. Knox trans. 1942).

74 *See* R. UNGER, *supra* note 8. As several (but not all) writers have noticed, Unger's later work, notably his recent multi-volume *Politics*, departs in several crucial senses from

any sense other than mere aggregations of individual choices, have no room in public choice theory.[75]

At this point, we can begin to see the conception of social groups that public choice theorists hold. All modes of social organization are invariably nothing more than collections of individuals. Public choice theory follows the premise of early twentieth-century political pluralists that groups are simply the organizational form through which individuals express their self-interest.[76] Individuals choose to join with others, forming social groups, in order to pursue certain objectives. As individuals pursue a variety of goals both over the course of their lives and at any one time, they belong to several groups simultaneously.[77]

The crucial aspect of this public choice/pluralist conception of groups is the criterion for membership. Public choice theory posits that membership in any voluntary group is based exclusively on in-

---

the communitarian project of *Knowledge and Politics*. *See, e.g.*, Cornell West, *CLS and a Liberal Critic*, 97 YALE L.J. 757, 758 (1988) (identifying Unger's epistemological shift from a foundationalist perspective to an anti-essentialist, or historicist, stance). Unger first shifted his epistemological assumptions in his essay, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983), and then in his book, PASSIONS (1984). Accompanying the epistemological shift was a movement away from the theory of organic groups, developed at length in *Knowledge and Politics*, toward a "superliberal" theory of "empowered democracy." *See* ROBERTO M. UNGER, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987). *Politics* is a profoundly Romantic text, as some reviewers have emphasized, though with substantially different reactions. *Compare* Richard Rorty, *Unger, Castoriadis, and the Romance of a National Future*, 82 NW. U.L. REV. 335 (1988) *with* Stephen Holmes, *The Professor of Smashing: The Preposterous Political Romanticism of Roberto Unger*, NEW REPUBLIC, Oct. 19, 1987, at 30. Its rhetoric is absorbed with images of "self-assertion" and "context-smashing." Those images appeal to the strand of Romantic thought that stresses "individuality, spontaneity, and expressivity." N. ROSENBLUM, *supra* note 71, at 2. For a forceful articulation of this interpretation of Romantic thought, see Steven H. Shiffrin, The First Amendment, Democracy, and Romance (May 12, 1989) (forthcoming Harvard University Press). This is not to suggest that Romanticism and communitarianism are mutually antagonistic—far from it. For one thing, a historically important strand of Romantic thought was associated with an organic conception of society (*see* PETER THORSLEVE, ROMANTIC CONTRARIES: FREEDOM VERSUS DESTINY 84-125 (1984)), and from the end of the eighteenth century to the present time that conception has commonly been associated with collectivist notions of community. *See* Steven Tonsor, *The Conservative Origins of Collectivism*, in LIBERTY AND THE RULE OF LAW 224 (R. Cunningham ed. 1979). Moreover, as Nancy Rosenblum's recent book, *Another Liberalism* indicates, contemporary theorists have appealed to Romantic sensibilities to push liberalism in a communitarian direction. N. ROSENBLUM, *supra* note 71. *Knowledge and Politics* reverses this vector between liberalism (or, better, individualism) and communitarianism by pushing community in the direction of self-assertion. R. UNGER, *supra* note 8.

75 There are some exceptions to pluralist theory's rejection of the public interest as a meaningful concept. Perhaps the most notable—and most emphatic—of the pluralists who affirm the concept is Grant McConnell. *See, e.g.*, GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 364-68 (1966). *See also* Greenstone, *supra* note 5, at 275-77.

76 *See, e.g.*, A. BENTLEY, *supra* note 69; D. TRUMAN, *supra* note 5.

77 *See* A. BENTLEY, *supra* note 69, at 208-09.

dividual choice.[78] Voluntary groups are contractarian in the sense that they are created by the express or implied mutual agreement of all members to associate with each other. Individual welfare is what motivates persons to associate with each other. Because of this exclusively contractarian model, pluralist and public choice writers pay no attention to the character or quality of social relationships within groups. Their model distinguishes only between consensual and coercive groups.

Although pluralist democratic public choice theory focuses on interest groups—that is, economic and political groups—its analysis applies to social groups that are not motivated simply by shared preferences on a limited number of issues. Expanding the public choice model into the broader social sphere, pluralist/public choice theory holds that all voluntary social groups essentially are voluntary associations. Clear examples of voluntary associations are clubs, fraternal organizations, religious societies, and the like. Membership in voluntary associations usually is determined in explicitly contractual ways. Individual members choose to be with each other for individual, instrumental reasons when they happen to hold what Charles Taylor calls "convergent," as opposed to "shared" goods.[79] Value is infused into the group only transactionally. The good for human individuals, and therefore for social groups, is properly defined by preferences, which are radically distinguished from substantive conceptions of the good. Voluntary associations, like public choice theory's political interest groups, come into being when individuals calculate that the costs of acting in concert with others to pursue some convergent good are lower than the costs of pursuing that goal individually.[80] A plurality of voluntary associations results as individuals pursue their own conceptions of the good in concert with others who share the same conception.

The aspect of the public choice/pluralist theory that needs to be emphasized here is its belief that *all* voluntary social groups are reduceable to collections of individuals. The corollary of this reductionist premise is that there is only one type of voluntary group, namely, the associative group.

2. *The Communitarian Theory*

Interest in community, as an ideal and as an institution, has in-

78 For a recent judicial example of this view, see Chief Justice Rehnquist's opinion in Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (analyzing political action committees in consensual terms). Gerald Frug recently has critiqued Rehnquist's consensualism in Gerald Frug, *Argument as Character*, 40 STAN. L. REV. 869, 900-07 (1988).

79 C. TAYLOR, *supra* note 8, at 96.

80 J. BUCHANAN & G. TULLOCK, *supra* note 6, at 57-62.

creased dramatically in the past several years. Communitarian theories have developed on at least two different levels. First, in normative political and moral theory, communitarian writers have focused on community as a regulative ideal. Their interest is in developing an alternative political and moral vision to that of atomist individualists,[81] like public choice theorists, whose preoccupation with individual autonomy leads them to develop only a thin conception of community, when they focus on community at all.

The second level at which modern writers have discussed community is social theory. At this level, scholars focus on community as an institution rather than as a concept or an ideal. The concern here is with the conditions under which community as a norm can be or has been realized as a concrete social practice and experience.

While distinct from each other, these two levels are intimately related, and scholarship at one level informs scholarship at the other. Social theories that inquire about the conditions under which the ideal of community can be or has been realized must draw on some normative theory that elaborates communitarian conceptions of the self, the polity, and the just. Conversely, in elaborating community as a regulative ideal, normative political theory cannot ignore questions about the concrete conditions under which that ideal can be realized as a social praxis.[82] While the focus of this Article is directed primarily at social theory, we still need first to sketch an account of the moral vision that communitarians have described in recent years.

It is notoriously difficult to articulate exactly what ideas separate moral individualists from contemporary communitarians. At the risk of oversimplication, however, one can say that much of their dispute concerns the structure of moral justification. Moral individ-

---

81 Charles Taylor has defined "atomism" as that set of doctrines which express "a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual." C. TAYLOR, *supra* note 8, at 187. The central doctrine in the tradition of political atomism is what Taylor calls "the primacy of rights," *i.e.*, the view that accepts "a principle ascribing rights to men as binding unconditionally . . . [b]ut . . . do[es] not accept as similarly unconditional a principle of belonging or obligation." *Id.* at 188. In the discussion that follows, I will use the term "individualists" to refer to writers who hold that view.

82 *See, e.g.*, MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY (1982).

The discussion of scale in recent communitarian writings indicates that communitarian theorists have not ignored questions about the requisite social conditions for realization of community. *See, e.g.*, B. BARBER, *supra* note 8, at 245-51, 267-73; R. UNGER, *supra* note 8, at 221, 262-67. This concern can be connected with the prominent place that the problem of scale had in eighteenth century American republican discourse. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 281-82, 288 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 at 499-506, 527 (1969); Morton J. Horwitz, *The Warren Court: Rediscovering the Link between Law and Culture*, 55 U. CHI. L. REV. 450, 453 (1988).

ualism ordinarily asserts that the ultimate basis for claims that an action is right or a state of affairs good "is always some normative premise about autonomous individuals or their preferences or choices."[83] Much recent communitarian moral theory attempts to establish that autonomous individuals are not the sole, or even a main, source of obligation and value. Rather, it posits that the main sources of obligation and value are collective social entities. Communitarians have argued for shifting the individualist's normative priority on the basis of certain claims about the relationship between self and society. These claims all converge on the denial of the individual's independence from society, but it is not always clear whether the dependency is understood in a causal, conceptual, or ontological sense.[84] For our purposes, it is sufficient to note that moral communitarians understand each person's identity to be inextricably connected, in some sense, not only with one or more discrete groups, but with society as a whole. Communitarians deny that the self is autonomous. Rather, they conceive of a person's community as inextricably connected with that person's identity. Community is related to the self in a constitutive sense.[85]

This conception of the self, which sees individuals constitutively connected to society, leads communitarians to define the well-ordered society, in which individuals are enabled fully to realize their own identities, as a community.[86] A society which took the form of a confederation of discrete social unions would perpetuate the problem of atomism by substituting discrete groups for individuals in the theory of social organization. In such a non-communitarian society, groups would deal with each other in the same manner as individualists imagine people behave toward each other—instrumentally and always with a certain stance of reserve. Individuals within communitarian groups, in turn, would retain the same detachment toward members of other groups, frustrating the ideal of community itself. Realizing that ideal requires that societies strive to create themselves as communities. The question, then, becomes what institutional arrangements are required for societies to move toward that ideal.[87]

---

83 George Sher, *Three Grades of Social Involvement*, 18 PHIL. & PUB. AFF. 133, 136 (1989).

84 For a discussion that identifies and critiques these separate claims, see *id.*

85 C. TAYLOR, *supra* note 8, at 8.

86 M. SANDEL, *supra* note 8, at 150; *see also* B. BARBER, *supra* note 8, at 213-60 (developing a dialectical conception of the relationship between the self and the community).

87 *See* M. SANDEL, *supra* note 8, at 173. Sandel explicitly acknowledges the fundamental importance of the question of institutions in a normative theory of community.

3. *Community and Social Institutions*

Since the middle of this century, an evolutionary model of social change and theory of society has dominated American social theory.[88] According to the social change model, twentieth-century urbanization and social mobility have so transformed the character of social relations within the United States that community as a social phenomenon has disappeared. The death-of-community thesis is based on a territorialist conception of community.[89] Modernity has destroyed the physical conditions under which the intimate relationships that characterize communities may develop. As a result voluntary associations, in which solidarity is based on transitory convergences of instrumental objectives, have replaced community as the dominant mode of group life in moderu America.

Talcott Parsons and Louis Wirth, the principle architects of this theory, expressed the transformation in terms of Tönnies' famous contrast between *gemeinschaft* and *gesellshaft*,[90] that is, intimate group solidarity and impersonal social aggregation.[91] Following Tönnies, Parsons and Wirth associated *gemeinschaft* with neighborhood, village, and small town life, and *gesellshaft* with urban life. Parsons described social relations in urban environments, which demographically have replaced village and small town life, in terms of his famous "pattern variables": "neutrality" rather than "affectivity," "universalism" rather than "particularism," "achievement" rather than "ascription," and "specificity" rather than "diffuseness."[92] He claimed that this model of social change and its territorial conception of community were scientifically and logically deduced from the structure of society itself.

Parsons's death-of-community thesis not only has dominated American sociological discussions of community, but also has influenced American historiography. Historians have borrowed both the social change model and the territorial conception of community, uncritically assuming the validity of both.[93] They, like Parsons and

88 For a brief introduction to this Durkheimian tradition of sociology and anthropology, widely-known as the "Chicago school," see ANTHONY P. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 21-38 (1985).

89 *See* THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 15-43 (1978).

90 FERDINAND TÖNNIES, COMMUNITY AND SOCIETY 33, 64, 65 (1963).

91 *See* TALCOTT PARSONS & EDWARD A. SHILS, TOWARD A GENERAL THEORY OF ACTION (1962); TALCOTT PARSONS, THE SOCIAL SYSTEM (1951); Talcott Parsons, Robert F. Bales & Edward A. Shils, *Working Papers*, in THE THEORY OF ACTION (1953) [hereinafter *Working Papers*]; Louis Wirth, *Urbanism as a Way of Life*, 44 AM. J. SOC. 1 (1938), *reprinted in* LOUIS WIRTH ON CITIES AND SOCIAL LIFE 60 (Albert J. Reiss, Jr. ed. 1964).

92 *See Working Papers*, *supra* note 91.

93 *See, e.g.*, CYRIL EDWIN BLACK, THE DYNAMICS OF MODERNIZATION: A STUDY IN COMPARATIVE HISTORY (1967); RICHARD D. BROWN, MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE 1600-1865 (1976); Louis Galambos, *Parsonian Sociology and Post-*

Wirth, have identified community exclusively with locality, specifically with small-town life. From this association, they have developed a linear model of the historical development of community that supplements and validates the ideal types model of social change. The shift from rural to urban life, beginning in the late nineteenth century, was not simply accompanied by the decline of community in America; it caused it. The ultimate effect of this historiography is to support not only the Parsonian thesis, but, more importantly, the pluralist view that voluntary group life in modern America is definable only in contractarian terms with the voluntary association as the paradigm.

Within the past several years, a very different conception of community has emerged in historical writing—one that challenges the Parsons-Wirth assumption regarding the conditions and institutional arrangements required for the existence of community.[94] This emerging conception shifts the focus of attention from the territorial context of community to the quality of social relationships within groups. That is, it locates community, both as a concept and as a social practice, in a particular kind of social experience rather than in a particular territorial environment.[95] According to this experiential conception, community is a network of social relationships marked by mutuality and reciprocity.[96] There is a sense of

---

Progressive History, 50 SOC. SCI. Q. 25 (1969). Thomas Bender's excellent book, COMMUNITY AND SOCIAL CHANGE IN AMERICA, initiated an important revision of this historiography. *See* T. BENDER, *supra* note 89.

94 *See, e.g.*, T. BENDER, *supra* note 89; LAURENCE VEYSEY, THE COMMUNAL EXPERIENCE: ANARCHIST AND MYSTICAL COMMUNITIES IN TWENTIETH-CENTURY AMERICA (1973).

95 *See, e.g.*, T. BENDER, *supra* note 89; L. VEYSEY, *supra* note 94.

96 *See* T. BENDER, *supra* note 89, at 122-28, 143-49; *see also* Drucilla L. Cornell, *Two Lectures on the Normative Dimensions of Community in the Law*, 54 TENN. L. REV. 327, 330-32, 340-41 (1987). Unlike most communitarian political and moral theorists (including Drucilla Cornell, Charles Taylor, Benjamin Barber, and Michael Sandel), Bender distinguishes between community and commonweal as a basis for political order. "A commonwealth," he states, "is based upon shared public ideals, rather than upon acquaintance or affection." T. BENDER, *supra* note 89, at 148. His distinction, however, rests upon the sort of sentimentalized conception of community that Burkean communitarians like Robert Nisbet hold. According to Nisbet, communities are held together by "affection, friendship, prestige, [and] recoguition" and are strengthened by "work, love, prayer, and devotion to freedom and order." ROBERT A. NISBET, THE QUEST FOR COMMUNITY 50 (1953). As Barber indicates, this conception fails to resolve the fundamental problem facing all communitarians: reconciling community with the free self. It commits what Barber calls "the fallacy of organicism, presupposing that a community represents *none* of the characteristics of its constituent parts." B. BARBER, *supra* note 8, at 231. By contrast, left communitarians conceive of community not in terms of intimate, face-to-face relations, but in terms of what Drucilla Cornell calls "relations of reciprocal symmetry." Cornell, *supra*, at 330-31, 340-41. Reciprocity is not identical to liberal formal equality. The latter focuses on vertical relations between state and citizen. Reciprocity focuses on horizontal relations among citizens. Unlike liberal equality, reciprocity cannot be realized through actions by the state. Rather, it is realized only as relations among citizens shift from impersonal abstraction to empathetic

sharing among members of communities, which gives rise to a further experience that is characteristic of communities, the experience of belonging.

Two important consequences follow from this experiential conception of community. First, by uncoupling community from village and small-town society, it enables communitarians to refute the death-of-community thesis. Second, by focusing attention on the quality of social relationships rather than their intentional or non-intentional character, it permits communitarians to distinguish, as public-choice theorists do not, between different types of intentional groups.[97]

Communitarians recognize a distinction between two sorts of intentional groups: voluntary associations and communities.[98] Unlike public choice theorists, who distinguish only between intentional and ascriptive (or non-intentional) groups, they focus not only on the basis of membership, but also on the character and quality of relationships among members of groups. Indeed, communitarian group theorists do not sharply distinguish between these factors. Individuals become members of voluntary associations exclusively through contract, and they do so for instrumental purposes. The sense of detachment within voluntary associations makes it appropriate to characterize them as mere aggregations of self-seeking individuals. By contrast, members of communities are drawn together by shared visions that constitute for each of them their personal identity. Although at a formal level communities may be created intially through contract, they neither are created nor maintained strictly by contract. Within intentional communities, individuals participate in group life out of a sense of belonging. The community expresses their very self identity.

The distinction between voluntary associations and communities is not strictly categorical. In practice, groups commonly have characteristics of both so that categorizing them as one or the other sometimes is difficult. Similarly, a group's character can change over time, beginning as a voluntary association but evolving into a community or vice versa. For communitarians, the crucial question is whether social relationships within the group are based on more than an instrumental convergence of individual ends—on reciprocal empathy.

---

imagination. Defined according to the conception of reciprocally symmetrical relations, community as a basis for political order is not distinct from commonweal or the civic humanist notion of participatory democracy.

97 *See* B. BARBER, *supra* note 8, at 217-33.

98 *See, e.g., id.* at 213-33; PAUL WEISS, TOWARD A PERFECTED STATE 19, 24 (1986); Cornell, *supra* note 71.

Public choice theorists generally suppose that the distinction between voluntary associations and communities translates into the distinction between intentional and non-intentional groups. Communitarian theorists concede that there is a dimension of choicelessness in communities, but they deny that these two types of groups can be reduced to the distinction between intentional and non-intentional groups. A couple of examples demonstrate the weakness of a distinction based on intentionality. The family is one.[99] It is, of course, difficult to analyze families in contractarian terms,[100] but it also is misleading to characterize family membership as exclusively involuntary. Ordinary conceptions of the family include, for example, persons related by marriage, adoption, and other non-biological means. Thus, while individuals usually are born into families, family membership has a mixture of voluntary and involuntary sources.

Looking beyond the family, there are other examples of communities that are even more obviously intentional. The example that I want to use here, because it is also a true residential community, is a monastery.

Monasteries are ascriptive groups in the sense that their members feel deeply involved with them. In fact, monks have expressed their experience as feeling incomplete or totally unfulfilled until they joined their order.[101] Participation in the life of the monastic group is essential to the realization of their very self identity. Their need to live within the monastic community is so strong that the act of joining the monastery, as individual monks have experienced it, is an act of choicelessness. They have felt that they were, in a profound sense, born monks.[102]

At the same time, the decision to join a monastery is deliberate and not compelled, at least not from external sources. Membership within a monastery has a very different basis from, say, that of a prison, which is a particularly clear example of an involuntary group. Affective ties draw together individuals within ascriptive groups, but choice still plays an important role in their formation and maintenance.

---

99 *See, e.g.*, STANLEY I. BENN & RICHARD S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT: SOCIAL FOUNDATIONS OF THE DEMOCRATIC STATE 286-89 (1959); ROBERT A. NISBET, THE SOCIOLOGICAL TRADITION 47-48 (1966).

100 For an example of an attempt to do just that, however, see GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976). *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 101-18 (2d ed. 1977) ("The marital relationship is fundamentally contractual in character.").

101 The most powerful account of this experience is Thomas Merton's autobiography, THE SEVEN STOREY MOUNTAIN (1948).

102 *See id.*

The important point to bear in mind about the communitarian theory of groups is the very fact that it recognizes the distinction between two types of intentional groups—contractarian (*i.e.*, voluntary associations) and non-contractarian (*i.e.*, communities) groups. Its refusal to reduce all voluntary social groups to a contractarian basis is what distinguishes it from the public choice theory of groups. In this sense, then, the communitarian theory is, ironically, more pluralist than the nominally pluralist public choice theory.

B. Two Theories of Group Autonomy

Different normative arguments—instrumental and non-instrumental—for the freedom of social groups to regulate their own affairs with little or no collective or legal intervention follow from the communitarian and pluralist/public choice conceptions of social groups. It is more accurate to consider each of these two theories as clusters of normative arguments, for important differences exist within both, but especially within what I have lumped together as pluralist.

While pluralist theory traditionally has included both instrumental and non-instrumental arguments for group autonomy, public-choice arguments are exclusively instrumental. One strand of pluralist theory argnes for group autonomy on the basis of a non-instrument conception of the freedom of association principle. The right of individuals freely to associate with each other implies, according to this strand, that they are free to establish whatever terms or conditions for their relationships they wish. So long as those conditions were freely agreed upon, they should be fully enforceable, save that individuals should always be free to leave associations.[103] In effect, then, the associational autonomy principle is simply an extension of the non-instrumental principle of freedom of contract.[104]

More commonly perhaps, pluralist and public choice theorists have argued that the presence of diverse groups within society promotes general social welfare in various ways, some quite vaguely expressed.[105] Pluralist writings articulate two lines of argument that define a political conception of welfare. First, the proliferation of diverse voluntary groups in society is a way of dividing power outside of government to limit the coerciveness of centralized

103 *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 299-306 (1974).

104 *See infra* text accompanying notes 127-37.

105 *See, e.g.*, Zechariah Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1027 (1930) ("The health of society will usually be promoted if the groups within it which serve the industrial, mental, and spiritual needs of citizens are genuinely alive. Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future.").

power within government. Michael Walzer, for example, argues that "[t]he citizen is safer, it seems to me, in his groups, safer from bureaucratic neglect or abuse, safer also . . . from social oppression."[106]

Second, empowering groups multiplies opportunities for participation in the political process. Pluralists value increased participation within group life both because it may enhance participation within public life and because it promotes personal development and self-realization.[107] Robert Dahl's early work on pluralism, for example, while acknowledging that power among social groups is itself unevenly distributed, nevertheless concluded that active groups help to assure that all individuals have some access to the political decision making process. That achievement, Dahl observed, is "no mean thing in a political system."[108]

Public choice theorists define social welfare in economic (*i.e.*, wealth-maximizing), rather than political terms, although many of these writers see the two aspects of social welfare as mutually reinforcing.[109] Groups provide individuals with certain goods or services, and the existence of multiple, diverse groups in a society means that competition among groups will lead them to provide any given good or service efficiently.

Applying this general analysis to residential groups, Robert Ellickson has argued that residential associations are able to supply quasi-public goods, such as parks or security services, more efficiently than cities. Ellickson draws upon the model of municipal government competition developed by Charles Tiebout.[110] Tiebout conceptualized municipalities as competing with each other in a market for residents. Municipalities try to attract residents by offering an appealing package of services and public financing programs.

---

106 MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 224 (1970). David Nicholls has lucidly articulated the argument for group autonomy in this way:

> A free society, as opposed to totalitarianism, is characterized, and is protected, by the existence of semi-autonomous groups with overlapping membership; there is thus no single centre of power, no monolithic body, attempting to impose upon the country some total way of life, but rather a benevolent umpire ensuring that all groups are able to have a foot in the political door.

DAVID NICHOLLS, THREE VARIETIES OF PLURALISM 25 (1974).

107 As Nancy Rosenblum has observed, pluralism's recognition of self-realization provides the basis for a reconciliation of pluralism and communitarianism. *See* N. ROSENBLUM, *supra* note 71, at 125-51. I discuss the role of pluralism in modern communitarian thought in Part V *infra*.

108 R. DAHL, *supra* note 5, at 150.

109 *See, e.g.*, J. BUCHANAN & G. TULLOCK, *supra* note 6; ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1956).

110 Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

Households express their preferences among these packages through their decisions concerning where to live. Similarly, Ellickson argues, developers of residential associations compete with each other, and potential residents shop around for the alternative that best satisfies their preferences. "The Tiebout analysis," Ellickson concludes, "suggests that this competition, and the related competition between cities and [residential] associations, tends to promote an efficient distribution of community types."[111]

The prescriptive message that emerges from this analysis is that the legal system should protect the integrity of residential associations. Courts should permit residential groups to adopt and enforce internal rules that each group deems necessary for its own existence. Specifically, this means that courts usually should enforce group restrictions on individual members' use and transfer of their property interests in the affected development. So long as there is a plausible instrumental connection between the restriction in question and the existence of the residential group in its desired character—that is, consistent with the values and objectives that it has defined for itself—then courts should enforce the group rule. Most importantly, the legal system should not demand compatibility between the internal rules of a residential group and external social or political values, not held by the group in question.

Before shifting from the pluralist/public choice cluster of arguments for group autonomy, we first need to note the fundamental characteristic that they all share and that, in turn, distinguishes them from communitarian arguments. Pluralist/public choice arguments for group autonomy, in effect, extend the familiar liberal arguments for individual autonomy to the group context. They simply substitute groups for individuals. This basic identity between arguments for individual and group autonomy in liberal theory flows directly from the conception of groups that pluralist and public choice theories hold. As we saw earlier, those theories see all social groups as simply the organizational form through which individuals express and pursue their own self-interest.[112] On this view, groups are inherently corporativist. Piercing the veil, all that we find involved in groups are preference-maximizing individuals.

The communitarian argument for group autonomy begins with basically the same initial claim that pluralists and public-choice theorists make, namely, that the flourishing of a rich variety of social groups contributes to the social good. But communitarian thought defines the good in fundamentally different terms than pluralist and public-choice theories. Both the libertarian and social welfare

111 Ellickson, *Cities, supra* note 16, at 1548.

112 *See supra* text accompanying notes 75-77.

strands rely on subjective theories of the good. The social welfare strand considers that the good consists solely in the satisfaction of individual preferences, while the libertarian strand defines the good in terms of preserving the free agency of individual actors. Instrumental welfare theories value group autonomy because the group mode of social organization enables individuals to pursue and meet their own personal desires. Non-instrumental libertarian arguments endorse group autonomy as a by-product of their conception of the good as consisting in uncoerced individual agency, rather than welfare theory's preference-satisfaction. Although free agency and preference-satisfaction are distinct from each other in important ways, each theory defines the good within a subjective, individualist framework.

Communitarians resist reducing the good to the satisfaction of individual preferences or confining it to free agency (though they are hardly indifferent to the problem of domination). The subjective conceptions of the good recoguize collectivity to the extent that individuals act within a social context. But the subjective, atomistic understanding of collective action contradicts the ideal of community. By focusing on the collective satisfaction of the desires of members of society, welfare theory does admit the importance of social interrelatedness. However, it confines intersubjectivity to the level of instrumental collaboration.[113] Communitarians insist that a thicker conception of the good is possible without lapsing into transcendentalism.

Roberto Unger's book *Knowledge and Politics* provides one such conception which he calls the "actualization of human nature."[114] Unger emphasizes, however, that human nature, though immutable, evolves in history as concrete persons confront concrete problems. He argues that we should think of human nature, and, therefore, the good, as having both universal and individual dimensions. The universal good is "the perfection of the species nature in which [each person] participates by virtue of his sociability and of his abstract selfhood."[115] The particular good is "the development of the unique set of talents and capacities through which the species nature of mankind takes a concrete form in him."[116]

While other communitarians disagree with other aspects of Unger's theory of the good, the common core of recent communitarian work holds, as Unger does, that the self must be defined in relation

---

113 *See* P. WEISS, *supra* note 98; Cornell, *supra* note 71, at 1097-98; Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 87 (1984).

114 R. UNGER, *supra* note 8, at 239.

115 *Id.*

116 *Id.*

to others and, further, that the good is the fulfillment of the self achieved through life within a community.[117] This communitarian conception of the good emphasizes the importance of the experience of participating as a member of a group (or groups) to individual identity and self-realization. Such an experience is, communitarians argue, intrinsically good, rather than, as pluralist and public choice theorists posit, valuable for its instrumental contribution to fulfilling some individual desire. A recurrent and crucial theme in communitarian thought is that community is valuable just because it is the only context in which individuals can discover and then fulfill their own identities.[118] It is only through the experience of community that individuals can begin to resolve the problem of the self, that is, the task of fulfilling one's individuality while expressing one's sociability.

The communitarian conceptions of the self and the good lay the groundwork for related normative arguments for group autonomy that differ significantly from the pluralist/public choice argument. Communal groups embody "the shared spirit of the [members] whose communal existence is an expression of who they really are."[119] As Drucilla Cornell has articulated the point: "For the state to refuse to protect the process of group self-definition is to deny human beings one of their most fundamental modes of expression—the process of joining together in a group."[120] Similarly, non-radical communitarians like Paul Weiss and Michael Sandel[121] have emphasized the importance of allowing small-scale communitarian groups—what Weiss somewhat misleadingly calls "limited communes"[122]—to flourish as vehicles for self-expression in an increasingly complex and depersonalized society.

Communitarians argue that for communities to flourish as realms of empathy and concrete personality, society must be willing to accede to them a substantial measure of immunity from external control. Subjecting communities to collective control would quickly transform them into just the mode of social organization to which they are to be the alternative. Denying communities self-govern-

---

117 *See* M. SANDEL, *supra* note 8; *see also* C. TAYLOR, *supra* note 8; Cornell, *supra* note 71; Cornell, *supra* note 96, at 335.

118 Depending on what one means by "instrumental," communitarianism can be considered an instrumental theory. It is instrumental in the sense that it understands community as an enabling realm, that is, as a realm in which self-fulfillment is possible. This conception is not reducible to the narrower sense of "instrumental," according to which community is strictly a device that individuals use to achieve certain self-defined ends.

119 Cornell, *supra* note 71, at 1101.

120 *Id.* at 1102.

121 *See* P. WEISS, *supra* note 98, at 5; M. SANDEL, *supra* note 8, at 17, 94-95.

122 P. WEISS, *supra* note 98, at 42-43, 51.

ance would extend, not resolve, the problem of dominance. The group would be subordinate to the will of the state as a second-order form of domination. Because individuals would lose the opportunity to flourish in highly integrated networks of intersubjectivity, relegated to bureaucratic life as the only available mode of social experience, the first-order form of domination would only become more entrenched.

Yet, recognizing that there will be different visions of shared goods which bind groups together, communitarians do concede an important regulatory role to the state, namely that of preserving communitarian pluralism.[123] The existence of each community requires that no one community gain power to control other communities. Domination is as intolerable in the third-order form, community-to-community, as it is in the other two forms. Only the state, as a coordinator of relationships among communities, is in a position to prevent the collapse of some communities to the will of others.[124] The basic principle of communitarian autonomy grants to the state regnlatory powers that are consistent with the existence of communal life.

At the same time, communitarians need to worry about the role of the state in group life. State power to regnlate group membership or particular group practices constitutes a potential threat to group existence. We should not try to define the appropriate limits to state regulatory power over groups in the abstract. We can only say in the abstract that while our society is basically committed to the integrity of group life, that commitment has limits. How to define those limits is a very large question which I cannot adequately address.[125]

IV
RESIDENTIAL ASSOCIATIONS IN PUBLIC CHOICE/PLURALIST THEORY

Before developing a communitarian theory that defines the lim-

123 *See infra* discussion in Part V; *see also* N. ROSENBLUM, *supra* note 71, at 125-51.

124 *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); R. UNGER, *supra* note 8, at 281-84.

125 *See infra* text accompanying notes 136-37. It is not hard to see that there *are* appropriate limits to group existence if we imagine a group whose avowed purpose is, for example, to kill Black people. Some groups simply should not exist. Beyond obvious examples like this one, it does not seem to me that there is any gain in the well-being of our society if we protect groups whose explicit nomos is domination of others on the basis of personal characteristics such as race, gender, or ethnic identity. I hasten to add that while this criterion directly threatens groups like the Ku Klux Klan, I do not intend that it jeopardize cultural or ethnic groups, such as, say, the Hibernian Society. *Cf.* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

its of group autonomy, we first need to see why public choice theory and similar contractarian arguments for strong group autonomy are inadequate. In this part I first criticize the contractarian foundation on which many public choice theorists and several courts have attempted to ground strong group autonomy.[126] I then argue that the contractarian model is inadequate for analyzing residential associations because it fails to capture the complex social and psychological experiences that these groups provide for their members. Finally, I consider the instrumental argument that residential associations ought to be immune from legal regulation because they constitute pockets of civic participation and self-governance which communitarians as well as public choice theorists ought to want to protect.

A. Contractarian Arguments for Associational Autonomy

Proponents of strong autonomy for intentional groups commonly base their arguments for associational autonomy on the principle of freedom of contract. Unsurprisingly, then, in debates over judicial review of residential associations, opponents of the reasonableness requirement have advanced familiar arguments for non-interference with voluntary transactions. They argue that because residential associations are created by private agreements, courts should enforce internal group rules, subject only to minimal review to assure that the rules were consensually created.[127] They have relied on either (sometimes both) of two related but distinct notions—individual autonomy and social welfare. The deficiences in these arguments are well known. Nevertheless, it seems necessary to repeat them here because opponents of legal regulation in residential associations develop individual autonomy and social welfare theories as though these notions were entirely unproblematic. We need to remind ourselves that individual autonomy and social welfare are not simply problematic, but are altogether inadequate grounds for immunizing residential associations from collective disruption.

The individual autonomy argument for securing strong autonomy for contractual groups begins with the proposition that concep-

126 *See, e.g.*, Gregory v. City of San Juan Capistrano, 142 Cal. App. 3d 72, 90, 191 Cal. Rptr. 47, 59 (1983) (affirming condominium rule giving right of first refusal to residential association on the ground that the residents voluntarily granted the right to the association), *overruled on other grounds*, Fisher v. City of Berkeley, 37 Cal. 3d 664, 693 P.2d 261, 209 Cal. Rptr. 682 (1984); Breene v. Plaza Tower Ass'n, 310 N.W.2d 730, 734 (N.D. 1981) (amendment procedure in condominium declaration construed as a contractual waiver of statutory rights); Ellickson, *Cities*, *supra* note 16, at 1527, 1527 n.31 (describing the proposed model as "contractarian"); Reichman, *Residential Governments*, *supra* note 22, at 275-79 (developing consent model); *see also* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).

127 *See supra* text accompanying notes 23-24.

tions of the good are mere preferences and, as such, are strictly subjective. The state should be neutral with respect to differing conceptions of the good. Recognizing and protecting individual autonomy means that people ought to be free to pursue their own life plans. Individuals who wish to participate in intentional group life should be free to do so. Neutrality and liberty, moreover, mean that the state must remain neutral with respect to groups, through which individuals pursue different shared life plans. Intentional groups should have the power to enforce, free from legal interference, obligations created by the internal rules to which their members have assented. Legal review of these internal group rules is justified only to the extent of assuring that the consent was genuine. Any legal involvement beyond this inquiry, including substantive judicial review, constitutes a form of collective coercion and deviates from the proper commitment to neutrality.

The collective welfare variation of this argument posits that since individuals know best what is in their self-interest, we maximize aggregate social welfare by effectuating private preferences, particularly as people reveal their preferences through consensual transactions. With respect to contractual groups, contractarians frequently argue that social welfare increases as individuals collaborate in groups, and that for voluntary groups to thrive, they must be permitted to practice self-governance. Social welfare advocates for group autonomy attach particular importance to membership rules, believing that groups cannot survive, let alone thrive, unless they control their own membership. Group existence entails group self-governance, at least as to those rules that are necessary to maintain internal compatibility among all members of the groups.[128]

Neither individual autonomy nor social welfare, however, provide adequate grounds for immunizing associational rules from legal review. Critics of both strands of contractarian theory have offered a variety of objections, but I want to stress two basic points emerging from these critiques. First, the conception of the self that is embedded in both versions of contractarianism is so thin that it it scarcely resembles our experienced reality. Second, even taken on its own terms, the contractarian argument is self-defeating. Both of these points critique contractarian arguments internally, that is, taking these arguments on their own terms. I leave the counter-vision of the self and social relationships that is the foundation of communitarian thought to Part V.

At the core of both individual autonomy and social welfare ar-

128 *See, e.g.*, Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 202 (1937) ("[T]he group as a corporate body [should] be given power to coerce under the sanction of law dissentient members of the group.").

guments for associational immunity is a conception of the self as autonomous, unitary, and integrated. Both arguments assume that individuals are by nature atomistic. This means that they form their preferences internally, not socially. It means further that the self-knowledge that is the basis for their preferences is, at least theoretically, complete, since self-knowledge is acquired internally. They further assume that this self-knowledge is consistent and definite. Since contractarians believe that people know themselves apart from their relationships with others, contractarians assume that people know what they want and act accordingly. In other words, people have complete, self-contained, and consistent life plans, and they form these life plans atomistically.

To describe this picture of the self is to reveal its inadequacy. To begin, the familiar problems of incomplete information, behavioral adaptation to what is available, weakness of will, and other forms of cognitive distortion bedevil the easy claims about autonomous preference-formation.[129] More fundamentally, even if we ignore problems posed by distorting influences, it is not at all clear what respect for personal autonomy requires. The very notion of the autonomous self is highly problematic. Several writers recently have argued that, in a meaningful and important sense, the self is not constant or fixed over time.[130] A person possesses different identities at different times; our later selves are not identical to our former selves. Our psychological connection with our past selves sometimes becomes so attenuated that we say, "I am not the same person that I was then." Moreover, we possess different, sometimes conflicting, identities at the same time. These conflicting and simultaneous personalities are manifested, for example, in the instances of stultifying ambivalence that each of us experiences at various times. These are not matters of weakness of will. Being weak-willed presupposes that a person has settled preferences, enabled by complete self-knowledge, but is unable to act upon those preferences for some reason. The phenomenon of the multiple self suggests that this picture of settled preferences and complete self-knowledge is chimerical; it just isn't us. People regularly experience ambivalence and regret,[131] not because their preferences conflict, but because

---

129 *See* JON ELSTER, SOUR GRAPES (1983); Cass R. Sunstein, *Disrupting Voluntary Transactions*, in NOMOS XXXI: MARKETS AND JUSTICE 279 (John W. Chapman & J. Roland Pennock eds. 1989).

130 *See* DEREK PARFIT, REASONS AND PERSONS (1984); THE MULTIPLE SELF (Jon Elster ed. 1986); Donald H. Regan, *Justifications for Paternalism*, in NOMOS XV: THE LIMITS OF LAW 189 (J. Roland Pennock & John W. Chapman eds. 1974). This conception rejects Kant's conception of the self as "fixed and abiding." IMMANUEL KANT, CRITIQUE OF PURE REASON 136 (Norman Kemp Smith trans. 1965).

131 *See* Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769.

their preferences are often incomplete, inconsistent, and externally generated. The contractarian argument, then, is premised on a picture of human personality that grossly distorts our experienced reality.

The second internal critique focuses on the self-defeating character of the contractarian approach to neutrality. Neutrality in its fullest sense represents a commitment to non-coercion—in all social spheres—and to mutual empowerment. It is not a synonym for legal deference. Contractarian writers themselves have tacitly admitted that neutrality, at least at times, requires legal intervention. They concede that the polity must impose some limitations on freedom to contract to prevent autonomy from destroying itself.[132] So, to take a particularly obvious example, freedom of contract by itself implies that individual owners could (and we know that some residential development dwellers in the past have done so) create a rule barring each of them from selling their property interests to anyone who is not white. Most contractarians,[133] however, expressly acknowledge the legitimacy of legal intervention to strike down such rules, even though those rules were consensually created.[134] The principle that contracting parties cannot be permitted to harm third persons requires collective prohibition of racially discriminatory restrictions.[135]

The harm principle acknowledges that legal non-interference, premised on the principle of contractual freedom, undermines contractarianism's very commitment to neutrality. Failure of the polity to regulate groups privileges one group's vision of the good over

---

132 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112-21 (1985). More recently, Professor Epstein has justified this exception exclusively in terms of the cost-oriented instrumental reasoning that is characteristic of pluralist and public choice writers. The problem of externalities—harms to third persons—requires that the legal system impose restrictions on freedom of contract and freedom of disposition whenever the original owner fails to internalize all of the possible third-person harms, despite her incentives to do so. *See* Epstein, *Covenants, supra* note 63. While the shift to economic reasoning avoids conceptualism's defects, it creates new dilemmas for contractarianism as a basis of grounding strong group autonomy. By explicitly socializing the basis for enforcement or non-enforcement of individual restrictions, it opens every group restriction to challenge as an "externality," a harm to third persons. In other words, there is no categorical basis for rejecting any given challenge. For a similar critique of Epstein's concession, see Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986).

133 For an indication of how contractarian premises can be extended beyond limits that even most contractarians regard as acceptable while remaining entirely consistent with those premises, see JAN NARVESON, THE LIBERTARIAN IDEA (1988).

134 *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

135 Epstein, *Covenants, supra* note 63, at 917-19; *see also* Ellickson, *Cities, supra* note 16, at 1528 ("External legal norms . . . in some instances should lead to the judicial invalidation of offensive [private] 'constitutional' provisions, such as those that would regulate the racial characteristics of association members.").

equally valid competing visions. Stated more directly, strong group autonomy empowers discrete groups to dominate others. There is no state neutrality when, in the name of freedom of contract, the legal system confers upon groups the power to coerce those who do not conform to their private preferences.[136] Neutrality exists only when the state has acted to assure that all groups and all individuals are mutually empowered, not merely formally, but in fact.[137]

Racially discriminatory group restrictions are not an exception. Precisely because there *are* competing visions, effectuating one group's preferences always means sacrificing someone else's. The problem of "private" coercion is ubiquitous, not localized. We know perfectly well that maintaining internal group compatibility—which is just another way of saying that difference is an acceptable ground for exclusion—comes at someone's expense. The nearly unanimous agreement in our society about the legitimacy of legal prohibitions against racially discriminatory group rules is a powerful indicator that we share the intuition that social well-being is often undermined, not advanced, by effectuating consensual agreements.

Legal interference with some group rules, particularly those controlling membership, undoubtedly does threaten the existence of the affected groups. But group existence is not an unqualified good. Two major questions, which I cannot address here, but which very much need full discussion, are whether our society should refuse its protection to certain groups, and if so, which groups, and by what criteria. Our commitment to group life should not prevent us from discussing whether groups whose ideologies legitimate exclusion and domination based on racial, gender, or ethnic differences should themselves be excluded. There simply are limits to our commitment to group life and to the contractual freedom to create groups, however difficult it may be to define those limits.

Nonetheless, we remain basically committed to group life, and this creates a dilemma. Somehow we must reconcile group life—our commitment to human thriving through group experiences—with our shared commitment not merely to neutrality but, stated more robustly, to difference as a basis for social connectedness rather than exclusion. That commitment is reflected, among other ways, in the meaning that we have created for the constitutional obligation to provide equal protection of law to all citizens. The meaning that

---

136 *Cf.* David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 731 (1942):

> [T]he very importance of groups in the democratic process means, if stratification is to be avoided and a dynamic social life retained, that each group must be subject to the scrutiny and criticism of opposing groups—and of its own membership.

137 *See supra* text accompanying note 124.

we attach to the constitutional requirement of equal protection reflects, in part, the balance that we have struck. Fully addressing that dilemma, however, requires that we, collectively and deliberately, determine which group practices are compatible with our commitment to creating an inclusionary society and which undermine it. Strong group autonomy does not respond to that dilemma; it assumes it away. It denies those who are outside the group but who are connected with the group by virtue of our common humanity and our common participation in society—the opportunity to make collective judgments about group practices. The vision of strong group autonomy, empowering discrete contractual groups to practice self-governance on terms that they and they alone establish, represents an incomplete realization of our social commitment—the flourishing of group life at the expense of inclusion. That vision certainly does not promote our collective welfare; it directly threatens it.

B. Modelling Residential Associations

The norm by which proposals of group autonomy seek to provide immunity for residential groups from legal interference depends on whether the specific conception of groups they apply is contractarian or communitarian. Therefore, we must determine whether residential groups are exclusively contractarian groups or whether, beneath their contractual veneer, they exhibit characteristics of communities as well as contractual aspects. Of course, pluralist/public choice theorists do not address this question because they do not recognize the distinction between contractarian and communitarian intentional groups. But communitarian theory does put the question before us. What is at stake in this section is public choice theory's view that all intentional social groups are appropriately modelled strictly within a contractarian framework. It is important to emphasize that for purposes of evaluating the public choice theory of groups it is only necessary to determine whether, as that theory claims, all residential groups, indeed all intentional social groups, are exclusively contractarian. For if we conclude that the categories of contractarian and communitarian groups are only ideal types and that groups in reality are best understood as mixtures of the two, then, because of its imperialist claim, the public choice theory fails. Public choice theory might still be useful even if groups turned out to be mixtures of the two types, but then its role would be reduced to that of a heuristic model rather than a description of concrete groups. Treating its theory of groups as a model would significantly change the character of both its descriptive claims, for models, as reductions of social reality, inevitably distort that reality

and its normative claims. A political theory for group autonomy would then have to take account of the non-contractual aspects of groups. Public choice theory does not do so.

On the surface, residential associations appear to be straightforward examples of voluntary associations rather than communities. Residential associations are created explicitly by contract. Membership is overtly based on consent, which members express by purchasing their property interest in the development. In this context, the social contract is not a metaphor; the legal documents, which typically include a declaration of covenants, articles of incorporation, and by-laws, all evidence agreement to the rules of the group.

At the same time, however, the contractarian model of residential associations is incomplete. Its focus on the formal mode of creation leads it to ignore the character of social relations within residential groups. As a result, it fails to distinguish between residential groups that are held together only by mutual collaboration and convenience,[138] and those in which individuals choose to live together because of more deeply shared values. That is, it ignores the distinction between *gemeinschaft* and *gesellschaft*. More specifically, its contractarian analysis overlooks the *combination* of these aspects, in the creation of a residential group. Some empirical work done on the character of social relations within residential associations suggests that this combination exists in modern American residential groups.[139]

Frances Fitzgerald's recent account of Sun City Center details the social experience of members of one residential association, an age-segregated retirement development in Florida.[140] Her study reveals that although some social differentiation does exist in within the group, the population of Sun City Center is strikingly homogeneous in virtually all respects. "They came to Sun City," Fitzgerald observes, "for all of the amenities spelled out in the advertising brochures and for a homogeneity that had little to do with age. In a country where class is rarely discussed, they had found their own niche like homing pigeons."[141] Because of that homogeneity, relationships form easily in Sun City, and the inhabitants feel quite comfortable with each other. They regularly socialize with each other,

---

138 *See* Sandel, *supra* note 113, at 87.

139 Findings that within at least some residential associations social relationships are affective and mutual does not imply the civic, or governmental, character of those associations is. The next section expresses skepticism about the prevalence of resident participation in governing residential associations, even in developments where social relationships are communal.

140 FRANCES FITZGERALD, CITIES ON A HILL (1986).

141 *Id.* at 220.

making isolation from other residents virtually non-existent. They are attracted to each other by their shared values and preferences, and they have created a mode of existence consciously based on that sharing of values and preferences. The effect is that residents of Sun City exhibit a deep sense of belonging there and belonging with each other.

Residential groups like Sun City Center are best understood as a type of constitutive group, that is, a community. The concept of a constitutive group implies an element of involuntariness.[142] What binds the group together is a shared characteristic that is unchosen, or chosen only in a weak sense, such as cultural identity. But it is erroneous to suppose that community contradicts voluntariness. Two crucial insights lay behind the notion of constitutive groups. First, individuals define themselves according to some shared good; second, that good gives to each member of the group a sense of belonging. The experience of belonging can be based on a shared good that individuals have chosen. Consider, again, my earlier example of a monastery.[143] Monasteries are residential communities based on shared characteristics that some people suppose individuals have the power to choose, *i.e.*, religious commitment.[144] Members of the monastery interpret their personal identities on the basis of that characteristic, which each defines as a good. The self-identity created by that interpretation virtually impels monks to live in close proximity with each other. In a similar, albeit, weaker, sense, Fitzgerald's account suggests the possibility that the residents of Sun City Center experience the need to live together with other older adults who have made the same life-style choices. Voluntariness and involuntariness are combined in the constitution of such groups.

To be sure, residential associations vary widely in the mixture of communal and contractarian ties that they exhibit. On the surface, many appear to be predominately contractarian aggregations of individuals who exhibit few affective ties with each other. One may react skeptically toward the typical promotional literature that advertises residential associations as "communities" on the basis of shared swimming pools and security patrols. Reliance on these factors alone as evidence of community is, as Thomas Bender states, a "cynical manipulation of symbols of community" that trivializes the very ideal of community.[145] But shared resources, like swimming

142 *See supra* text accompanying notes 84-86; *see also* Garet, *supra* note 65, at 1045.

143 *See supra* text accompanying note 102.

144 I am profoundly skeptical that one can meaningfully talk about *choosing* religious commitment, but I recognize that others think that choice applies here as in other matters.

145 T. BENDER, *supra* note 89, at 144.

pools, do affect the social relationships among users, shaping the character of those relationships into one that can be called communitarian. Residents of common unit developments have commented that their arrangements are "more friendly than in a single family home development . . . because we see each other more often at the pool, and we see each other a lot at board meetings, and we've had some problems that we've all had to work out together. I think there's a feeling of togetherness."[146] At the same time, as Constance Perin remarks in her study of the culture of condominium ownership, "Feelings of goodwill notwithstanding, condo owners act on the market-driven reciprocity expressly built into their relationship from the start."[147]

Perhaps more than in any other group in modern American society, residential associations overtly blend contractarian and communitarian dimensions of group relationships. Common ownership requires that residents sacrifice individual autonomy for sharing. They choose to be tied together, and, although that choice may initially have been motivated by instrumental reasons, the experience of being tied together creates new, qualitatively different layers in their personal relationships. While at one level sharing in common unit developments is explicitly collaborative, required by the residents' contracts, it generates other levels of sharing that transcend mere collaboration. Describing life within residential associations requires that we identify the multiple layers of the residents' relationships and understand how they can affect each other.

What studies like Fitzgerald's and Perin's reveal, then, is the inadequacy of the public-choice description of groups, both as applied to residential associations and generally. Its central weakness is its exclusive focus on the formal basis of group constitution. As a result, it fails to draw any distinctions among intentional groups on the basis of the character of social relations within them. A thicker account of social groups is needed to capture the distinction between sharing and collaboration and the different mixtures of those factors within various intentional groups.[148] By looking beyond the formal mode of creation to the character of relationships, communitarian theory is able to recognize both how intentional groups differ from one another in their mixtures of contractarian and communi-

146 Steven Jay Tulin, Residents' Use of Common Areas in Condominium Developments 192 (Jan. 1978) (M.S. thesis, Cornell University).

147 CONSTANCE PERIN, BELONGING IN AMERICA 76 (1988).

148 The clearest example of a residential group that evades description in contractarian terms—that is, one that is strongly characterized by *gemeinschaft*—is the residential commune. An excellent study of residential communes, giving close attention to the character of social relations, is L. VEYSEY, *supra* note 94.

tarian, and how they are alike in combining multiple levels of experience.

C. Associational Autonomy and Civic Participation

Since de Tocqueville, it has been common to praise voluntary associations for the "public values of the private association."[149] The claim is that voluntary associations represent pockets of participation and self-governance in a society otherwise characterized by powerlessness and indifference. This argument for ceding strong autonomy to voluntary associations deserves serious attention, especially in the context of residential associations. If there are good reasons to believe that residential associations represent laboratories of undominated participation and self-governance, then we ought to be very reluctant to interfere with them, not in the interest of freedom of contract, but out of a commitment to communitarian values. The crucial question is whether residential associations on the whole provide appropriate conditions for nurturing participatory governance.

Recent empirical studies on residential associations suggest that the vision of self-governance and participatory democracy within these groups often is illusory.[150] It indicates that in some common unit developments residents are at best uninvolved in their homeowners association, and at worst frustrated and disillusioned with their private governance structures. Apparently, association boards often make little effort to involve residents, in part because they want to avoid the increased likelihood of disagreement, but more fundamentally because board members do not view themselves as occupying authoritative roles. Rather, they perceive their function as a combination of property managers and neighbors. Neither the citizens nor the managers of these "private residential governments" display an awareness of their experience in overtly political terms.[151]

---

149 *See* Grant McConnell, *The Public Values of the Private Association*, in NOMOS XI: VOLUNTARY ASSOCIATIONS 147 (J. Pennock & J. Chapman eds. 1969).

150 *See* Stephen E. Barton & Carol S. Silverman, Common Interest Homeowners' Associations (August 1989) (forthcoming in PUB. AFF. REP.) [hereinafter *Common Interest*]; Public Life, *supra* note 20, at 14; Robert R. Werkele, Robert Dragicevie, Richard Jordan, Irene Kszyk Rszyk & Margaret Sorenson, *Contradictions in Ownership, Participation, and Control*, in THE CONSUMER EXPERIENCE OF HOUSING 170 (Clare Ungerson & Valerie Karn eds. 1980); James J. Scavo, *Dispute Resolution in a Community Association*, 17 URB. L. ANN. 295 (1979); Scott, *The Homes Association: Will 'Private Government' Serve the Public Interest?*, 8 PUB. AFF. REP. I (1967).

151 The prevalence of this experience is unclear and probably unknowable. The likely reality is that the level of participation, both among and within residential associations, is very uneven. No doubt, in some developments genuine opportunities exist for self-governance and civic participation. Even if we assumed, however, that widespread

The failure of residential associations to realize the image of participatory democracy is not due simply to a rational choice by owners to forego opportunities to participate in the association's civic affairs. The gap that exists between the Panglossian image of many residential associations and reality stems, at least in part, from the unequal allocation of power within these developments. Private residential governments too often represent a dominated mode of residential life in modern America.

Several factors undermine the participatory and self-governing character of some residential associations. One obvious source of domination is developer control.[152] Association by-laws enable developers to control crucial aspects of governance, not only at the inception of the project, but also after most of the units in the development have been sold.[153] A development's "constitution," initially provided by the developer, typically may be amended only with the concurrence of both mortgage lenders and owners or by super-majorities (*i.e.*, 75%) of owners. Developers also frequently remain on the association board for many years after it formally has passed to the control of homeowners. Their longevity gives them substantial clout within the nominally independent board.[154]

I do not suggest that all, or perhaps even most, residential associations are tainted by fraud or other distorting influences. The caricature of developers as villains dressed in black and twirling their mustaches while purchasers sign residential association agreements is, of course, only that—a caricature. But just as we ought to resist depicting common-unit developments as thoroughly tainted by duress or ill-considered choices, so we must reject portraits of residential associations as unqualified realms of enlightened individual preference-maximizing behavior. People buying into common-unit developments not infrequently have stated that they exper-

---

participation is the dominant experience, it would still be implausible to attribute the rise in popularity of common unit developments solely to purchaser's perceptions that this mode of housing offers a unique opportunity to practice self-governance. Common unit developments typically are marketed as "carefree living," not as self-governing residential enterprises. They also are marketed as "communities," and, as I have already indicated, some residents appear to be attracted by the group character in common unit developments. But the desire to live in close proximity with others and to establish some degree of affective bonds with one's neighbors does not translate into active self-governance. Individuals can experience social attachment with their neighbors and still remain unengaged in the civic life of the residential group.

152 I wish to emphasize again that while some common unit developments seem to be non-participatory and non-communitarian, this is not universally the case. Some do exhibit participatory and communitarian characteristics. The general point is that common unit developments are best understood as mixtures of contractarian and communitarian experience. *See supra* note 10 and text accompanying notes 158-67.

153 *See Common Interest*, *supra* note 150, at 9-11.

154 *See id.* at 10-11.

ienced coercion in agreeing to association rules and in joining the association itself.[155] A finding of no legal coercion cannot eliminate this experienced reality. That these individuals experienced coercion is itself a truth. We will move much closer to a full understanding of social experiences within common-unit developments if we say, at the risk of stating the obvious, that people's experiences in this context are extremely complex. The desire for communal ties accompanies financial motives; regret, ambivalence, and misunderstanding accompany rational choice; domination accompanies autonomy.

A second factor belying the participatory character of residential associations is the virtually standard restriction of voting rights to owners[156]—a practice that simultaneously disenfranchises renting residents and enhances the power of non-resident owners who own more than one unit in the development.[157] Theories of participatory democracy stress the importance of widely-held voting rights, not because of the economic value that individuals attach to that right, but to enable individuals to gain control over their lives by "distributing 'voice' through which individuals may have their say in the social determinations of the structure of coercion and restraint."[158] On this view, it is quite beside the point that renters do not value the franchise as much as owners, assuming for the moment that this assertion is justified. The rules of a residential association, a "structure of coercion and restraint,"[159] clearly affect renters, and the participatory objective of avoiding conditions of personal domination apply to these persons as fully as they do to owners.

One might attempt to use republican political theory to defend rules conditioning the franchise on ownership. The rule limiting voting rights in residential association to owners resembles early American state provisions restricting the franchise by various property qualifications—restrictions that grew out of one branch of republican political thought.[160] The republican rationale for

---

155 *See id.* at 12.

156 State statutes regulating condominiums generally direct that voting rights in residential associations be allocated on some ownership basis. *See, e.g.*, ALA. CODE § 35-8-7 (6)-(7) (1977); MD. REAL PROP. CODE ANN. §§ 11-101(h), 11-107 (1981). *See* Ellickson, *Cities, supra* note 16, at 1543-45; Note, *Democracy in the New Towns: The Limits of Private Government*, 36 U. CHI. L. REV. 379 (1969) (authored by Albert A. Foer).

157 One study estimates that renters occupy a median of twenty percent of all common interest development units in California. *Common Interest, supra* note 20, at 8.

158 Frank I. Michelman, *Universal Resident Suffrage*, 130 U. PA. L. REV. 1581, 1587 (1982).

159 *Id.*

160 *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 153 (1985).

qualifying the franchise on property ownership, however, was not, as it is for public choice theorists, protecting property rights as a means to maximizing aggregate wealth. Rather, the republican theory was that the polity had to condition the franchise on ownership of land, more particularly, fee-simple ownership, to create a secure foundation for citizenship. Ownership assured that citizens were immune from corruption and freed them to pursue civic virtue. For a republican like James Harrington, the way to mediate security of property with widespread civic participation was to redistribute property (especially non-feudal, "allodial" interests in land) broadly within society so that citizenship—and the opportunity to participate—would be widely available. That is, Harrington's commitment to participation fueled, rather than blocked, an egalitarian position on property distribution.[161]

The public choice scheme of government—and the scheme presently reflected in residential associations with their property-based franchise—in fact more nearly resembles what Joyce Appleby and other historians have labelled as the elitist version of republican political theory, or what Frank Michelman calls the "exclusionary strategy" of republicanism,[162] than they do participatory democracy. Classical republicans recoiled at the thought of widespread citizenship. Ordinary people, these republicans thought, lacked the basic intellectual capacity and judgment for virtuous self-rule, and no amount of property could remedy such deficiencies. Far from identifying republican governance with participatory democracy, this strand of republican theory is its antithesis.[163]

The vision of common-unit developments as laboratories of small-scale democracy and civic participation, then, distorts social reality. The American romance with voluntary associations that originated in de Tocqueville's discussion of voluntary groups dies hard.[164] There may well be voluntary groups within modern American society that still fit de Tocqueville's model—pockets of life

---

161 *See* James Harrington, *The Commonwealth of Oceana*, in THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J. Pocock ed. 1977). This is not to say that all republicans held egalitarian notions of property distribution. On elitist aspects of republicanism, see, *e.g.*, Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75 (1987); Frank I. Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

162 *See* Michelman, *supra* note 161, at 1330.

163 For discussions of the elitist strand of republicanism, see JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 8-19 (1984); Joyce Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson*, 39 WM. & MARY Q. 287, 297-301 (1982); Hutson, *Country, Court and Constitution: Antifederalism and the Historians*, 38 WM & MARY Q. 337, 356-68 (1981).

164 1 A. DE TOCQUEVILLE, *supra* note 1, at 222-26 (importance of "political" associations in America); 2 *id.* at 128-33, 138-44 (on "civil" associations). On the continuing strength of, but theoretical discontinuities within, the Tocquevillean celebration of vol-

within which one can experience in a full and meaningful way participatory self-governance undistorted by external forces. But I am profoundly skeptical that common unit developments represent a strong example of such places where the *vita activa* is actually experienced.

V

RESIDENTIAL ASSOCIATIONS AND THE LIMITS OF COMMUNAL AUTONOMY

In a very real sense, normative communitarian theories share with normative individualist theories a common animating vision, namely, allowing people "to live . . . as deeply satisfying a life as any of which [they are] capable."[165] The difference between the conceptions of the self that the communitarian and individualist traditions hold, however, lead them to define the conditions under which people live fulfilling lives in opposing ways. For individualists, either as a matter of human nature or as a matter of contingent cultural conditions, humans have most fulfilling lives under conditions of individual autonomy, that is, conditions in which individuals are free to pursue their own conceptions of the good without collective inhibitions (save those required to preserve individual autonomy for others). For communitarians, on the other hand, individuals must live in conditions in which their sociability is fully recognized and encouraged in order to develop their concrete personalities.

Modern communitarian theory aims at developing an alternative to both atomistic individualism and classical communitarianism. Both of these political traditions respond to the tension between self and others by choosing between the self and the other rather than fusing them. Atomistic individualism reduces the self-other relationship to a condition of instrumental servitude in which the role of the other is subordinated to individual desires. That conception of

---

untary associations, see FRANKLIN GAMWELL, BEYOND PREFERENCE: LIBERAL THEORIES OF INDEPENDENT ASSOCIATIONS (1984).

165 MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 19 (1988). Professor Perry labels this vision "human flourishing." I am not entirely comfortable with the notion of human flourishing. One problem is that it risks association with an individualist outlook based on the familiar self-interest conception of rationality, according to which individuals should aim at "the outcomes that would be best for [each person], and that would make his life go, for him, as well as possible." D. PARFIT, *supra* note 129, at 3. But this interpretation does not capture the political vision that underlies its use in communitarian discourse. The meaning that communitarians attach to it rejects the view that people by nature are, or ought to be, committed to only their own well-being. Another problem is that, unless it is used in so broad a sense as to lack any meaning, human fluorishing tends to slide into foundationalism, with the metaphysical view that there is some irreducible core to human nature and that there is an objective standard of right and wrong. For a discussion of some of the problems with Perry's project, see Joan C. Williams, *Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651 (1989).

the relationship assumes the ontological autonomy (*i.e.*, non-sociality) of the self. Hence, it begs the central question which is how the self and the other can be defined without giving priority to, or privileging, either. Classical communitarianism similarly defines away the problem by positing a unity (as distinguished from a fusion) of the self and the other, at the expense of individual autonomy.[166] Classical communitarianism attributes to groups all of the attributes of the self.[167] Its central error is to suppose that connecting self with other in a non-instrumental, non-atomistic way required collapsing the self into the other. Atomism and classical communitarianism share, then, the mistaken assumption that there is no way to avoid attaching ontological priority to either the self or the other. What is needed is a conception of the relationship in which the self is understood as socially constituted such that the self can never be defined independently of the other, but at the same time is understood as a free agent. As Nancy Rosenbaum has expressed the point, "The challenge of repairing the communitarian failings of liberal thought is somehow to conceive of community without appealing to examples of all-consuming public spirit such as ancient Greek citizenship or revolutionary republicanism with its Jacobin fervor, without idealizing primitive communities, and without resorting to organicism."[168]

It is just this conception that underlies the communitarian ideal of universal community. That ideal expresses the imaginative vision of a social order whose foundation replaces consensus with empathy. In its ethical aspect, universal community connects the self with the other through relationships of reciprocity. In its political aspect, universal community is an arrangement in which individuals equally and fully participate in the striving for shared values. Universal community is a regulative ideal only, but social practices may progress toward that ideal through processes and institutions that increasingly equalize individual participation in the public formulation of common values.

In elaborating the implications of this communitarian ideal, communitarians have been sensitive to the problem of scale.[169]

---

166 *See* B. BARBER, *supra* note 8, at 148-50, 230-32.

167 *See* G. HEGEL, *supra* note 73, at 37-40. Drucilla Cornell attributes Hegel's failure adequately to recognize the individual to his notion of *Geist*. *See* Cornell, *supra* note 71, at 1092 n.16.

168 N. ROSENBAUM, *supra* note 71, at 153.

169 *See, e.g.*, Frug, *supra* note 8. Modern communitarians, particularly those who emphasize participatory democracy, are well-aware of the significance of the problem of scale in classical republican theory and its successors. Eighteenth-century American republicans, for example, worried that western expansion would destroy the social conditions for civic participation. *See* R. WIEBE, *supra* note 3, at 27-46.

Sensitivity to the problem of scale for democratic government is not, of course,

Continuing a tradition that includes, among others, Rousseau, Montesquieu, and Aristotle, they have argued that the communitarian project of self-realization through participatory governance requires preservation of what Jürgen Habermas calls the "lifeworld"—a realm of social activity in which individuals interact with each other as concrete, not abstract, personalities, and in which they imagine each other with reciprocal empathy,[170] rather than with detached instrumental calculation. Many communitarians see localism as the path to maintaining (or, in a bureaucratic society, recreating) such spheres of activity. During the 1960s, Saul Alinsky,[171] Paul Goodman,[172] Tom Hayden,[173] and others[174] attempted to articulate "a theory of local sovereiguty."[175] Twenty years later, the same vision underlies Roberto Unger's theory of "organic groups,"[176] Benjamin Barber's "strong democracy,"[177] and Gerald Frug's empowered city.[178] All reflect a normative commitment to self-governance by groups as the basic form of communitarian praxis.

The scheme of small-scale communitarian governance suggests yet another argument for autonomous residential associations, Unlike the argument from individual autonomy, this argument from the norm of communal autonomy explicitly acknowledges the group character of residential associations. It also avoids the central weakness of the argument from associational autonomy by acknowledging the plurality of group types, specifically the non-contractarian, constitutive group. The question remains, then, whether strong deference to residential association rules is justified by the norm of communal autonomy. That question ushers in the more basic question of the appropriate limits of communitarian self-governance.

Initially, we need to recall that the appropriateness of characterizing residential associations, individually or generally, is inher-

---

limited to communitarians, including both the left and Burkean strands. Some pluralists as well as communitarians have paid close attention to scale. *See, e.g.*, ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VERSUS CONTROL 12-16, 140-146 (1982); ROBERT A. DAHL & EDWARD TUFTE, SIZE AND DEMOCRACY *passim* (1973).

170 *See* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOL. 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (T. McCarthy trans. 1987).

171 *See* SAUL ALINSKY, REVEILLE FOR RADICALS (1969).

172 *See* PERCIVAL GOODMAN & PAUL GOODMAN, COMMUNITAS (1960).

173 *See* JAMES E. MILLER, DEMOCRACY IS IN THE STREETS 93-98, 142-54 (1987).

174 *See, e.g.*, DAVID MORRIS & KARL HESS, NEIGHBORHOOD POWER: THE NEW LOCALISM (1975); MILTON KOTLER, NEIGHBORHOOD GOVERNMENT: THE LOCAL FOUNDATIONS OF POLITICAL LIFE (1969).

175 M. KOTLER, *supra* note 174, at 100.

176 R. UNGER, *supra* note 8, at 259-90.

177 B. BARBER, *supra* note 8, at 261-311.

178 *See* Frug, *supra* note 8.

ently an open question. As I indicated earlier,[179] contractarian and communitarian groups are only ideal types. Particular groups include both dimensions in different mixtures. Applying the label "community" is itself a political statement, originating in a particular political conception of community and constantly open to challenge from a different political conception. Nevertheless, for purposes of getting to the basic normative question, we will provisionally assume that it is not fanciful to regard at least some residential associations as communitarian groups.

The aspect of many residential associations that makes the communitarian characterization plausible is the very aspect that sows the seeds of deep ambivalence about communitarian self-governance. What connects the residents of many common-unit developments together is the shared desire to isolate themselves from others whom they perceive as different in some significant way. Restrictions on use or transfer of their property interests reflect this shared desire. These restrictions, including age restrictions, behavioral prohibitions, and the like, are not simply instrumental devices designed to realize the shared goal of homogeneity according to some specific social characteristic. Rather, they are powerful symbols of the existence of a consciously shared commitment to a particular mode of residential life.

The shared desire of a group to isolate itself—a shared need to acknowledge difference in a tangible and extreme manner—underscores the group's communitarian character. Intentional communities are characterized by psychological and often physical isolation, from the larger society. As Laurence Veysey reminds us, "Community building is no less than an act of internal secession."[180] Gabriel Garcia Marquez's justly celebrated novel *One Hundred Years of Solitude*[181] illustrates how a community can flourish within conditions of physical and psychological isolation, and how physical forms of isolation may be necessary for the community to maintain itself. Garcia Marquez's narrative fabulously (literally, through use of fable) depicts how the once-isolated jungle village of Macondo progressively loses its communal character with each new invasion of elements from the outside world. As the outside gradually integrates with the village, it increasingly corrupts and weakens the communal character of social relationships within Macondo.[182]

---

179 *See supra* Part IV(B).

180 L. VEYSEY, *supra* note 94, at 7.

181 GABRIEL GARCIA MARQUEZ, ONE HUNDRED YEARS OF SOLITUDE (1970).

182 The most extreme form of physical social isolation, hermitage, paradoxically may be entirely compatible with community. Thomas Merton's eventual hermitage within the Trappist monastery of Gethsemani in Kentucky illustrates how the thriving of the self as constituted by the community may require physical separation in order to main-

Community is created not only by physical isolation, but also by the group's symbology. "Isolation is not always a matter of geography or of special interest. It may also be the product of seclusion behind communal boundaries, such as those which communities contrive through symbolic means."[183] The same device may serve to create and maintain group isolation both instrumentally and symbolically. More specifically, the boundary-maintaining device's eventual failure to perform its instrumental function adequately, due to social or ideological changes, will intensify its symbolic work in maintaining the group's separate identity. A wall, for example, continues symbolically to mark the boundary of a territorial group even though it does not physically prevent outsiders from entering or insiders from exiting.

The symbolic and instrumental constitution of community boundaries, defining in consciousness the isolated space that characterizes the communitarian experience, provides a perspective from which to understand the significance of residential association restrictions on property transfers and specified forms of social behavior. These restrictions do not simply screen out social factors that the groups consider unassimilable. They have both internal and public meanings. Publicly, they constitute the "mask,"[184] or identity, that the community presents to the outside world. Internally, they are the objects of the residential community's internal discourse. In their private mode, the restrictions are symbolically complex and differentiated, with members attaching different meanings to the restrictions and to the group's identity constituted by those restrictions. The public face, however, must be simpler. That is, with respect to the inside-outside relationship, the restrictions must transmit a coherent message of group identity.[185] The group,

---

tain community. *See* MICHAEL MOTT, THE SEVEN MOUNTAINS OF THOMAS MERTON 337-468 (1984).

183 A. COHEN, *supra* note 88, at 35.

Meron Benvenisti, an Israeli historian who is currently director of the West Bank Data Project, recently observed how community boundary-creation shifts forms with social change. Commenting on the failure of the physical unification in Jerusalem (after the Six Day War) to end communitarian isolation, Benvenisti states:

> Indeed, the absence of physical barriers reinforced the need for emotional ones. Segregation and alienation cut across all levels of communal interactions, from nursery to graveyard, and cannot be explained merely as a product of disagreements about the political future of Jerusalem. So basic is the cleavage that a decisive component of the self-identity of Jews and Arabs alike is not who they are, but rather, who they are not.

Meron Benvenisti, *Two Generations: Growing Up in Jerusalem*, N.Y. Times, Oct. 16, 1988 (magazine), at 34, 36.

184 The notion of a community's boundary as its public "mask" is drawn from A. COHEN, *supra* note 88, at 73-74.

185 For a discussion of the analogous problem with fraternity, see WILSON CAREY MCWILLIAMS, THE IDEA OF FRATERNITY IN AMERICA 1-111 (1974). McWilliams points

therefore, will want to retain autonomous control of its internal restrictions to ensure that the public meaning of the restriction emphasizes the group's external differentiation.[186]

But it is just at this point that we experience a deep ambivalence about communities and communal autonomy. One of the central dilemmas of community concerns the relationship between the group and the rest of society, or what I will call the paradox of exclusion. Communities by their very nature exclude. Precisely because they are constituted by shared commitments to some specific good they must, in symbolic effect if not in conscious intention, exclude some members of the society, precluding those individuals from participating in the group's internal life.[187] But by excluding others, communitarian groups radically limit their capacity to develop sympathy for others and thereby contradict the communitarian ideal itself. The group must appeal to its shared values to justify its exclusiveness. In the communitarian tradition, groups ground their shared values in the ideal of community. But that ideal must be one that the communitarian groups regard as a universal ideal,[188]

---

out that fraternity, as an interpersonal bond that involves shared values, "implies a necessary tension with loyalty to society at large." *Id.* at 8.

186 The rhetoric of private ordering as an explanation and justification for legal nonintervention with residential group rules does not capture the symbolic meaning of such rules. The private ordering perspective ignores the distinction between the group's internal discourse and its public discourse, and, with respect to the latter, it misses the symbolic constitution of the group. Robert Cover appreciated the symbology of legal devices for social groups, stating:

> The point . . . is not only that private lawmaking takes place through . . . contract, property, and corporate law . . . but also that . . . various groups use these universally accepted and well-understood devices to create an entire *nomos*—an integrated world of obligation and reality from which the rest of the world is perceived. At that point of radical transformation of perspective, the boundary rule—whether it be contract, free exercise of religion, property, or corporation law—becomes more than a rule: it becomes a constitution of a world.

Cover, *supra* note 124, at 31.

187 Robert Cover discussed the need for what he called *paideic* communities (*i.e.*, communities constituted by a common narrative and education that is embedded in their internal, normative world) to exclude because new normative meanings of the group's basic narrative would create deviant *paideic* communities. *Id.* at 14-15. My point is that the need of communities to exclude is not limited to the intensely normative sorts of groups that Cover described as *paideic*, but extends to all groups consciously constituted by a shared commitment to particular visions of the good.

188 This is not to suggest that community, as an ideal, escapes the problem of exclusion. Iris Marion Young has recently pointed out that while "the excluding consequences of the universalist ideal of a public that embodies a common will are . . . subtle, . . . they still obtain." Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 253 (1989). Precisely for this reason, the use of community as a political ideal must be pragmatic, or stated differently, strategic. *See also* Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 ETHICS 275, 277 (1989) ("[C]ommunitarian philosophy as a whole is a perilous ally for feminist theory.").

that is, one that the group attempts to universalize even while recognizing that it is, after all, an ideal. If they define it according to their own shared values then their argument is merely circular and question-begging. Communitarian moral thought emphasizes the ideal of community as the basis for resolving the self-other problem, reconciling our individuality with our sociability. Particularized shared values reproduce rather than resolve that problem. But if the group does broaden its shared values so that it becomes increasingly inclusive rather than exclusive, what will remain of the group's identity?

A related problem of community concerns its internal relations. Restrictions are important for maintaining, symbolically and instrumentally, the community's identity not only in its public face but also within itself. Restrictions on specific forms of behavior—what religious or sexual practices are acceptable, what range of books may be read, or even more seemingly innocuous behavioral restrictions, like restrictions on the consumption of alcohol or tobacco—create the community's boundary in its own internal consciousness. Although members may give restrictions different meanings, the community cannot permit its members freely to opt out of all of its restrictions while remaining members of the community.[189] What Unger calls the "paradox of group cohesion"[190] exists because of communitarian theory's commitment to protect rather than subordinate the individual self. As Unger observes, "By its very nature, community is always on the verge of becoming oppression."[191] To prevent community from destroying individuality, groups must

---

189 Interestingly, Robert Nozick reaches the same conclusion about communities despite his commitment to the principle of individual liberty. In his ideal of libertarian utopia, the liberty principle applies to the state framework but not internally to communities. Thus he states:

> It is not a general principle that every community or group must allow internal opting out when that is feasible. For sometimes such internal opting out would itself change the character of the group from that desired. . . . Yet . . . a nation should offer this opportunity; people have a right to so opt out of a nation's requirements.

R. NOZICK, *supra* note 103, at 321. In Nozick's view, communities must be free to experiment in self-expression for individual humans to be free, for individuals work through communities to realize themselves. But, while Nozick recognizes the sociability of the self to this extent, he does not recognize the full extent of sociability. Nozick arbitrarily halts the principle of sociability at the community's boundary. Obligations that arise from connections with others do not extend to persons outside the community. At the same time, Nozick does not explain why individual freedom must be subordinated to communal solidarity within the community. His strategy defines away, rather than confronts, the problem of the self's relationship with others, within the community as well as without.

190 R. UNGER, *supra* note 8, at 266.

191 *Id.* Nancy Rosenblum has pointed out how feminism has been particularly sensitive to the risk of communitarianism:

> The feminist point of view reminds us that pluralist communitarianism can be limiting rather than liberating if it refers to conventional ex-

allow members to opt out. But communitarian theory's simultaneous commitment to individuality may at times require that the group not compel its members to choose between either participation in the group at the price of obedience to the group's interpretation of its internal restrictions, or freedom to behave according to one's own interpretation of the group's identity but at the cost of leaving the group. In the vocabulary popularized by Albert Hirschman,[192] to the two options of loyalty and exit, a third must be added, voice. Diversity, both of groups and within groups, must be protected in order that group life may serve as the condition under which individuals may simultaneously realize their individuality and their sociability.

The necessity of maintaining the voice option for group members, derived from the communitarian ideal itself, requires that communitarians reject the norm of strong communal autonomy. Rather, communitarianism requires limited communal autonomy, or open-ended autonomy. The notion of open-ended group autonomy is not oxymoronic. Strong communal autonomy would realize the risk of community becoming oppressive. No communal autonomy would realize the opposite risk, eliminating group life for the sake of the atomized individual. Open-ended autonomy strives to reconcile individuality with sociability, diversity with unity. It seeks, even if it does not succeed in doing so, to resolve the paradoxes of exclusion and group cohesion.

Putting the norm of open-ended autonomy into action requires state involvement. The role of the state is to maintain pluralism among communitarian groups. To this extent, pluralist and communitarian theories agree. But, unlike pluralist theory, which does not recognize community as a normative ideal, communitarian theory attaches significance to group pluralism and diversity because they protect individuality without sacrificing community. For communitarians, the politics of pluralism is not a politics of fear or moral relativism but a politics of progressive reformulations of the good. Unger expresses this politics in terms of a "spiral of domination and community."[193] As groups formulate their shared values under increasing conditions of equality of power, they progressively approach the ideal of community.

---

ternal structures, especially ones that are coercive and exploitative. "Embeddedness" can mean being stuck.

N. ROSENBLUM, *supra* note 71, at 156. It is precisely because residential associations are, or may be, coercive structures that the communitarian ideal of community requires that they be denied strong autonomy.

192 *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

193 R. UNGER, *supra* note 8, at 246; *see also id.* at 242-48, 278-79.

Communitarian thought, then, contemplates that society itself is what Robert Cover called an "imperialistic" community, *i.e.*, an "organization of distinct nomic entities."[194] It is composed of a multiplicity of groups having differing normative understandings. This mode of social organization inevitably carries with it limiting and coercive implications for discrete communities. Pluralism creates a tension between unity and diversity. As the basic framework for communities, pluralism implies that a multiplicity of diverse communities must be allowed to exist so that the good remains subject to reformulation through continual public conversations among the groups. But diversity requires a common commitment to maintain that framework. That is to say, to maintain space for new nomic groups to contribute to the conversation about the good, individual communities sometimes must be constrained from grabbing too much power.[195] No single group within a pluralistic communitarian society can be permitted to arrogate to itself unilateral control over the inside-outside problem. There must be some agency that is responsible for maintaining the basic framework within which a variety of groups can engage in a dynamic process of formulating and reformulating the good. Communitarians have properly insisted that this dialogic, participatory form of politics ultimately must involve unmediated conversations among groups and individuals.[196] So long as groups and individuals speak only through some filter, their autonomy is limited, and the problem of domination remains present. At the same time, though, the risk of domination is just as real if such conversations occur under conditions which provide no mechanism for preserving the basic social framework.

Courts are an appropriate institution to maintain that framework. Through the dialogic process of adjudication, courts can serve as a bridge between communities and society, preventing the former from lapsing into a solipsistic perspective that would pervert

---

194 Cover, *supra* note 124, at 13 n.36.

195 The problem of communities grabbing too much power—controlling the inside-outside problem—also occurs in the analogous context of municipalities. For example, one way of understanding the controversial *Mount Laurel II* decision, Southern Burlington NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983), is to see it as an attempt to prevent municipal communities from subverting community as an ideal of boundaries, as opposed to walls. The court objected to Mt. Laurel's behavior in effect because the municipality had unilaterally attempted to define the boundaries of its community, with substantial exclusionary consequences. The court imposed on the municipality a constitutional obligation "to provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing need" in an effort to prevent the municipality from perverting the ideal of community. *See generally* Alan David Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 MINN. L. REV. 883 (1976); Harold McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625 (1979).

196 *See, e.g.*, B. BARBER, *supra* note 8, at 261; Frug, *supra* note 8.

the ideal of community and, at the same time, inhibiting sheer majoritarianism from denying a community's opportunity to formulate a conception of the good.[197] As the bridge metaphor implies, the role of the legal system is to connect nomic groups with the rest of society even while recognizing their separateness. Disputes over the enforcement of group restrictions present opportunities for a dialogue about the group's shared values and the extent to which they advance the ideal of community or impede it by creating relations of domination.

This conception of the judicial role requires a form of legal involvement that is itself open-ended. This requirement suggests that standards should be preferred to rules. Rules speak with an authority that inhibits, or indeed precludes, conversation.[198] They are devices of dead hand control, attempting to appropriate human action. They purport to be imperial, constraining rather than initiating a dialectic. Concededly, the contrast between rules and standards can be overdrawn. Adjudication using standards is likely to lead to regularities concerning discrete legal issues, creating norms that strongly resemble rules. But the legal environment that exists in a regime of standards, even with such regular decisional patterns, is not identical to that of a regime of rules. Standards send out the message that the question is never closed and that decisional patterns are constantly vulnerable to challenge. By contrast, the symbolic meaning of rules is closure and constraint. That their constraining effect in practice is far from complete, making the effect of any given rule ultimately contingent upon a choice of underlying normative visions,[199] does not alter their anti-dialogic character, for their public meaning is to discourage dialogue. They strive for closure that makes it pointless to engage those outside one's nomic universe in conversation.

By contrast, open-ended legal norms, precisely because they do not purport to have achieved closure *ex ante*, create opportunities for those inside and those outside to engage each other in dialogue. They deny to both sides the apparently comforting message that their side is legally privileged. By informing the respective partici-

197 *See* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1532 (1988).

198 For similar critiques in the context of takings adjudications, see Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1772-73 (1988) (arguing for a fluid takings methodology in order to maintain public conversations about the political choices made in takings law); Frank I. Michelman, *Takings, 1987*, 88 COLUM L. REV. 1600, 1625-29 (1988) (arguing that *ad hoc* adjudication is compatible with the rule of law ideal); Margaret Jane Radin, *The Liberal Conception of Property*, 88 COLUM. L. REV. 1667, 1680-84 (1988) (same). *See also* Michelman, *supra* note 197, at 1493; Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989).

199 *See* M. KELMAN, *supra* note 62; Kennedy, *supra* note 62.

pants that the regulatory norm has not yet been created, they encourage the participants to create, through eventual consensus, that norm themselves.

Open-ended norms advance the communitarian ideal in another respect in addition to encouraging direct dialogue. When the locus of the disagreement shifts to a court, open-ended norms commit the court to a dialogic process. Frank Michelman expresses this communitarian conception of the judicial role as one of "resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit."[200] That communicative practice fulfills one of the indispensable requirements of the communitarian regulative ideal by committing the court to regard all of the affected persons not as remote role-occupants but as concrete persons. Standards require that the court contextually inquire into the interests of *these* individuals in *this* situation. Reconstructing their life-world is a path by which the court gains not merely familiarity with the affected individuals and groups, but the basis for its own communitarian connection with them—empathy.

Having articulated the court's task as one of gaining empathetic knowledge of the group, we must immediately acknowledge a fundamental problem of method that this task creates. The court's perspective must derive from some particular situation; the "view from nowhere"[201] is not available to us. This situation will not be that of the group, of which the court is to gain empathetic knowledge. How can the court, embedded in its own situation, gain such knowledge of a different culture without distorting the difference that constitutes the very identity of the group as a social other?

It is no coincidence that this problem is the same as that facing anthropology[202]—the problem of incommensurability.[203] The communitarian conception of the judicial role is anthropological. The court's task is to meet a different culture on its own terms, to translate, as it were, that culture's normative universe into terms intelligible by those outside the culture. The incommensurability of the

---

200 Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986).

201 *See* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

202 *See* CLIFFORD GEERTZ, *"From the Native's Point of View": On the Nature of Anthropological Understanding*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 55 (1983).

203 Although Geertz does not himself use the term "incommensurability," it is clear from his methodological essay *From the Native's Point of View*, *supra* note 202, that he understands the anthropologist's interpretive problem precisely in terms of incommensurability. The problem of incommensurability in the social sciences is lucidly discussed in RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 51-108 (1983).

cultures does not mean that this task is impossible. Incommensurability simply means, as Thomas Kuhn has explained, that there is "no common language within which both [cultures] could be fully expressed and which could therefore be used in a point-by-point comparison between them."[204] Translation does not require that the cultures be commensurable; it requires only an overlapping of horizons.[205] Such a sharing of experiences enables the translator to engage in what Clifford Geertz has called a "dialectical tacking"[206] between the culture's local details and the general experiences shared by the culture being studied and the translator. This means that the judicial role contemplated by communitarian theory remains plausible despite differences between the group and the rest of society (including the court).

Standards comport with the conception of community described here in a final sense, growing out of the experience of empathy for both sides that the court gains through its contextual inquiry. The open-ended character of standards allows the court to acknowledge and articulate the sense of ambivalence about communal autonomy that results from recognition of the dilemmas of group autonomy, especially community's dark side, *i.e.*, exclusion of others. The message that ambivalence communicates to the group is sympathy with their project, but a sympathy that is qualified by an insistence that the group continually must strive to realize the ideal of community by permitting dissenters both within and without the group continuously to attack its boundaries.[207]

With respect to the problem of residential association restrictions, this conception of the judicial role suggests that the recent decisional trend replacing *per se* rules with the norm of reasonableness is appropriate to the group-character of common interest developments. *Per se* rules, either sustaining or invalidating association restrictions, would preclude courts from the dialogic inquiry that the ideal of community demands. A rule of *per se* invalidity would deny group autonomy altogether; its polar opposite risks community becoming self-defeating. The reasonableness standard harmonizes with the communitarian conception by requiring that decisions concerning the enforceability of association restrictions be made deliberately and socially.

---

204 Thomas S. Kuhn, *Theory-Change as Structure-Change: Comments on the Sneed Formalism*, 10 ERKENNTNIS 178, 191 (1976).

205 Drucilla Cornell, *Taking Hegel Seriously*, 7 CARDOZO L. REV. 139, 150-51 (1985).

206 C. GEERTZ, *supra* note 202, at 69.

207 *See* R. UNGER, *supra* note 8, at 289 ("The community needs to remain a particular group, yet it must also become a universal one."). As Professor Shiffrin has pointed out, dissent, far from expressing an alienated attitude, is an act of socialization. *See* S. Shiffrin, *supra* note 74.

That the reasonableness norm is open-ended and conversation-inducing does not imply that it provides no direction. Reasonableness is to be judged within a particular normative context or culture. The relevant normative culture is not that of any specific group, but the culture of a society committed to the ideal of community. We can perhaps best understand the character of that culture through a metaphorical distinction between walls and boundaries. The normative culture that I am describing is one of boundaries, and not of walls.

Far from being synonyms for each other, "walls" and "boundaries" have very different semantic clusters. Looking to dictionary substitutes[208] for "wall," like "barrier," "fortification," and "enclosure,"[209] indicates that, when we speak of walls, we do not have in mind an act of merely neutral separation. There is a sense of defensiveness, suggesting fear or antagonism between what is being walled in and walled out. By contrast, substitutes for "boundary," like "border" or "mark,"[210] leave open the possibility of complementariness between the parts. The act of separation may suggest not only a neutral relationship between the parts, but also a relationship of compatibility. Boundaries join;[211] walls isolate.

Although the normative culture within which courts are to judge the reasonableness of group practices is one of boundaries, in practice, some walls must be created. We must recognize some rules prohibiting certain instances of exclusion for pragmatic reasons. In particular, we must carry forward the extant legal rule prohibiting exclusion based on race.[212] Such rules are pragmatically required in the sense that, so long as social practices and institutions have acted upon the ideal of community only partially, leaving many areas of social life vulnerable to domination, the risk that domination would pervert community by permitting certain exclusionary practices is too great for communitarians to tolerate, despite their basic commitment to maintaining public conversations.

In arguing that judicial review under the reasonableness standard comports with communitarian theory, I do not suggest that those courts which have shifted to that norm in reviewing residential association restrictions are themselves communitarian in outlook. My point is rather that the communitarian theory that I have described neither requires nor permits strong group autonomy. It re-

208 On the use of dictionaries in ordinary language analysis, see STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? (1969).

209 *See* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1642 (ed. 1966).

210 *Id.* at 172.

211 *See* NORMAN O. BROWN, LOVE'S BODY 141-61 (1966).

212 *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

quires that groups remain connected with others. The implication of this requirement for the legal system is a dialogic form of involvement. Judicial reasonableness review, which denies strong communal autonomy but also respects difference, is the legal response that best harmonizes with that requirement. Legal intervention in the form of an open-ended standard is not a matter of groups ceding autonomy to courts, but a matter of groups remaining open to a continuing public conversation that, by connecting and reconnecting groups and others, progressively reiterates and reinforces the ideal of community.

CONCLUSION

In arguing against strong forms of legal autonomy for groups—either through a complete prohibition of judicial review or a minimalist requirement of consistency with the group's internal objectives—I by no means intend to put groups in jeopardy. To the contrary, I consider it vital that group life be preserved and encouraged in American society. Group life offers a haven into which Americans may escape from the dehumanizing forms of social life that so clearly mark our post-modernist culture. It is only through group life that individuals can hope to avoid the experience of alienation that pervades our increasingly bureaucratic society. The longing to "huddle together with [one's] own kind"[213] reflects not some romantic vision of communal life, but a human instinct to be known concretely and to be accepted by others as a distinct personality.

But there is a constant risk that groups may develop into nomic bunkers. The experience of group life will exacerbate, rather than resolve, the problem of alienation if groups themselves exist as autonomous units, unconnected with others. To realize their potential for creating community, groups must be held to an obligation more demanding than mere compliance with their own internal aspirations. Groups must accept a civic obligation to maintain community within our society. Meeting that obligation requires a praxis of openness and dialogue.

As a final way of expressing the relationship between community and dialogue, I want to return to the metaphorical distinction drawn earlier between walls and boundaries. In Robert Frost's poem "Mending Wall," Frost narrates the experience of two neighbors ritualistically maintaining the wall that separates them and relates that experience to community and dialogue. While he does not reject boundaries or autonomy, Frost is uneasy with walls. More specifically, he is critical of individuals who maintain walls simply for

213 Benvenisti, *supra* note 183, at 71.

the sake of having walls, separating without purpose, and foreclosing the kind of dialogue that would allow individuals to discover their shared values. His narrator expresses this anxiety directly:[214]

> Before I built a wall I'd ask to know
> What I was walling in or walling out,
> And to whom I was like to give offense.

The consequence of unreflectively maintaining walls is social alienation. The neighbors are neighbors only in the barest, physical sense. Their capacity for community-creating dialogue has ended, as Frost indicates by describing his neighbor's remoteness:[215]

> He moves in darkness as it seems to me,
> Not of woods only and the shade of trees.
> He will not go behind his father's saying,
> And he likes having thought of it so well
> He says again, 'Good fences make good neighbors.'

Genuine community requires dialogue, robust and continuous. Such dialogue can occur even while boundaries are maintained; indeed it may require boundaries. But it cannot occur in the presence of walls. The challenge for legal intervention is to eliminate social walls by encouraging dialogue while simultaneously protecting the boundaries that make distinctive group life possible. Meeting that challenge requires the transformative capability of imagination. The imagination that we need must be chastened by humility to avoid hubris, but it must not be corroded by a cynicism masked as realism. My aim in this Article has been to show that the choice between communitarian theory and pluralist/public choice theory amounts to a choice between imagination and cynicism. Given these alternatives, we have no choice at all.

---

214 Robert Frost, *Mending Wall*, in SELECTED POEMS OF ROBERT FROST 23, 24 (Rinehart ed. 1963).

215 *Id.*