

Ramapo Looking Forward: Gated Communities, Covenants, and Concerns

David L. Callies*

Paula A. Franzese**

Heidi Kai Guth†

IN 1972, WHEN THE NEW YORK COURT OF APPEALS decided *Golden v. Planning Board of Town of Ramapo*,¹ local and state government regulations largely determined the shape and form of community growth and development, local zoning ordinances controlled the use of land, and local and development regulations, mainly in the form of subdivision regulations, controlled the development itself, indeed, it was the merging of the two in the landmark Ramapo ordinance² that made *Ramapo* famous.

No longer. Private land use controls in the form of the ubiquitous conditions, covenants and restrictions (CC&Rs) increasingly control the form, if not the pace, of development. Attached for decades to the plat of subdivision filed with local government authorities for public subdivision approval,³ CC&Rs form the basis for the land use controls—indeed governance—of nearly all common interest communities, whose numbers grow exponentially with each passing year.⁴ This article sketches the outlines of such communities, then concentrates on their most controversial mutation: the gated community, its problems and its opportunities. It concludes with the observation that such a government-like entity, mimicking as it does so many aspects of local government, needs to be subject to many of the same rules as local

*Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, University of Hawaii. LL.M., Nottingham University; J.D., University of Michigan; A.B., DePauw University. An altered version of this article will appear in *CIUDAD Y TERRITORIO* for which it was first solicited in early 2002.

**Professor of Law, Seton Hall University School of Law. J.D., Columbia University School of Law; B.A., Barnard College, Columbia University. Prof. Franzese wishes to thank Joseph Chang, Colin Nash, Katherine Bierwas, and Vedat Gashi for their valuable research assistance.

†J.D., William S. Richardson School of Law, University of Hawaii M.A., University of Montana School of Journalism; B.A., Yale University.

1. 285 N.E.2d 291 (N.Y. 1972).

2. RAMAPO, N.Y., ZONING ORDINANCE § 46-13.1 (1969).

3. ROBERT H. FREILICH & MICHAEL M. SHULTZ, MODEL SUBDIVISION REGULATIONS, PLANNING AND LAW 1-6 (2d ed., Am. Planning Ass'n 1995).

4. See EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994).

governments, particularly in the areas of governance, design control, and financing. In many parts of the country, it is increasingly difficult for prospective homeowners to find housing outside such communities, severely limiting, if not destroying, the choice-of-location option that underlies the freedom to privately enforce the elements of such CC&Rs without public oversight.

The gated community in the United States raises a host of concerns about exclusion, social fabric, and the like.⁵ At bottom, however, it is a permutation and extension of the private covenant relationship between private landowners, designed to ensure (or guard against) certain uses of land that public land use controls in the form of zoning, land development, and building controls fail to address. This results in a private contractual relationship affecting land between a promisor (usually a buyer of an interest in land) and a promisee (usually a seller of an interest in land). The so-called "real" covenant lasts (is enforceable) beyond the lives or ownership interests of the original parties to the covenant, "running with the land" on both the burden and benefit side, with the interests of the land as they are transferred by the original parties to subsequent buyers, devisees, and other transferees.⁶ Thus, for example, if A, the owner of a 2-acre parcel, sells 1-acre to B on condition that B build only a single-family residence not to exceed one story or 4 meters in height, colored only some shade of white and only with a red-tile roof, then that is the only use which B can make of that 1-acre parcel unless prevented from doing so by public laws that may restrict the use even further. Moreover, anyone buying the 1-acre parcel so restricted is bound by B's promise, and anyone purchasing A's remaining 1-acre parcel may enforce it, even though neither of these parties so promised each other.

A major user of such real covenants is the property developer of large residential communities who wishes to guarantee a certain measure of uniformity (or difference) in the houses that make up the projected community. Commonly known as "covenants, conditions and restrictions" (CC&Rs), the land developer will append a list of covenants dealing with homeowner assessments, design controls, and use and upkeep of common areas such as private roads, parks, and recreational facilities both to whatever plan or plat of subdivision local government authorities require to be filed as a condition of land develop-

5. See EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 1-3 (1997).

6. See GERALD KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES* (1990).

ment, as well as to the deed to each lot or house sold. Some time following the selling of the last lot (or the construction of the last home if the developer is building them) the developer transfers the enforcement function to some sort of association of homeowners, thus forming a homeowner association, a variety of what the American Law Institute's *Restatement (Third) of Property: Servitudes* calls a "common interest community" or CIC and others have called a "common interest development" or CID.⁷ The elected board of directors of that common interest community then sees to the enforcement of the CC&Rs in accordance with their terms and the bylaws of the association.

The greatest proportion of homeowner associations can be found in Florida, California, and Texas.⁸ This trend does not necessarily portray a regional consumer preference, rather represents the culmination of building in the Sunbelt during the past few decades.⁹ Many of the communities built in this region are "lifestyle communities," which include retirement communities and golf and leisure communities.¹⁰ While the retirement communities generally have homeowners who are closely involved in the internal politics and workings of the homeowner associations, the leisure communities often hire outsiders to take care of property management, security, and maintenance so that they do not have to be bothered and can enjoy the facilities, which are the principal reasons why they bought into the community in the first place.¹¹

In all areas experiencing an increase in residential construction, CICs are growing in number.¹² The second tier of states with many CICs includes New Jersey, New York, Virginia, Pennsylvania, Maryland, and Hawai'i.¹³ "[M]ore than thirty million Americans," or 12 percent of the country's population, live in approximately 150,000 CICs.¹⁴ Of all developments built during the last half of the 1990s, one-third were gated and regulated by the equivalent of private governments: homeowner associations.¹⁵

As a form of common interest community, gated and walled communities represent a type of residential development that also includes

7. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (1998).

8. MCKENZIE, *supra* note 4, at 11.

9. *Id.*

10. BLAKELY & SNYDER, *supra* note 5, at 39.

11. *Id.* at 59–60.

12. MCKENZIE, *supra* note 4, at 11.

13. *Id.*

14. *Id.* at 12.

15. Michael Halberg, *Gated Communities: Do They Raise Residents' Expectations and Increase Liability for Associations?*, 4 J. COMMUNITY ASS'N L. 5, 6 (CAI 2001).

condominiums,¹⁶ cooperatives,¹⁷ and planned communities.¹⁸ They closely approximate in many ways small municipal governments as they maintain private streets and parks, provide homeowner security, collect homeowner assessments for the purpose of financing the aforesaid activities, and, by means of walls and gates, keep all but homeowners and their invited guests from the precincts of the community.¹⁹ Once considered the domain only of the most affluent,²⁰ today CICs represent the main staple of suburban and metropolitan residential development.²¹ In particular, the demand for gated and walled communities has risen both in suburban and urban areas across diverse economic strata.²²

In the United States, the latter part of the twentieth century witnessed the growth of gated and walled communities in record numbers.²³ More than 8 million Americans now live in over 20,000 gated communities,²⁴

16. Condominiums are a type of housing organized so that residents own their respective units in fee simple and own common areas as tenants in common. See WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 14 (2d ed. 1988).

17. The cooperative form of housing vests title in a corporate structure, with each resident owning stock in the corporation. See PATRICK J. ROHAN & MELVIN A. RESKIN, *COOPERATIVE HOUSING LAW AND PRACTICE* § 9.01 (2001).

18. WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 6–14 (1981). See generally ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987) (tracing origin of suburban housing trends).

19. MCKENZIE, *supra* note 4, at 122–49.

20. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1136 (1998).

21. *Id.* at 1138. “In the largest United States metropolitan areas, a majority of all new housing sold is now in common interest communities.” *Id.*

22. See Rebecca J. Schwartz, Comment, *Public Gated Residential Communities: The Rosemont, Illinois Approach and Its Constitutional Implications*, 29 URB. LAW. 123, 124 (1997) (“Long considered the domain of wealthy subdivisions on each coast, demand for gated communities . . . has increased dramatically since the early 1980s.”).

23. BLAKELY & SNYDER, *supra* note 5, at 4–7. See also MCKENZIE, *supra* note 4, at 11 (chronicling growth of privatized residential housing); See also Community Associations Institute, *Facts About Community Associations* [hereinafter Community Associations Institute] (“There are 231,000 community associations in the United States. In 1965, there were only 500. Approximately 50% of all new homes built in major metropolitan areas fall within community associations.”), available at <http://www.caionline.org/about/facts.cfm>. The Community Associations Institute, a national amalgam of developers, homeowners’ association leaders, residents and lawyers, takes as its self-declared aim the education and representation of America’s residential homeowners’ associations and service providers. See *id.*; Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 81 (1998) (“Residential community associations . . . have been greeted with resounding approval in new real estate developments.”); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1183 (1999) (describing common interest communities as “perhaps the most significant form of social reorganization of late twentieth-century America.”).

24. Douglas S. Bible & Chengho Hsieh, *Gated Communities and Residential Property Values*, 69 APPRAISAL J. 140, 145 (Apr. 2001) (“It is estimated that eight million Americans are now living in over 20,000 gated communities that restrict access to

citing safety, status, lifestyle enhancement, and the preservation of property values as prime motivators.²⁵ It is estimated that eight out of ten new residential housing developments in urban centers are gated.²⁶ They are proliferating in suburban areas as well, across all regions and price ranges, from New York to California.²⁷ New homes in more than 40 percent of planned developments are gated throughout the South, the West, and the Southeastern United States.²⁸ The desire for safe, secure housing has only intensified in the wake of the tragic events of September 11, 2001.²⁹

Notwithstanding their proliferation, gated and walled communities have been a source of controversy in many American cities and towns.³⁰ Questions abound about the priorities and values reflected by gates that separate one section of a neighborhood from another. On the one hand, gates can provide security and at least the sense of enhanced safety, particularly in inner cities,³¹ but in suburban settings as well.³² Most notably in the last four decades, amidst the fear of escalating crime and urban decay, "Americans have turned increasingly to the security and style of life"³³ promised by many gated communities. Significantly, "[t]he growth of the private security industry mirrors the explosion in gated communities: Since 1980, the number of security guards has risen

residents and their guests."); Lois M. Baron, *The Great Gate Debate*, 21 BUILDER 92 (Mar. 1998) (chronicling rise of gated communities "everywhere").

25. Edward J. Blakely & Mary Gail Snyder, *Forting Up: Gated Communities in the United States*, 15 J. ARCHITECTURAL & PLANNING RES. 61 (1998); Edward J. Blakely & Mary Gail Snyder, *Places to Hide*, 19 AM. DEMOGRAPHICS 22 (May 1997); Carol Tucker, *Gated Communities: The Barriers Go Up*, 80 PUB. MGMT. 22 (May 1998).

26. BLAKELY & SNYDER, *supra* note 5, at 7.

27. *Id.* at vii; Baron, *supra* note 24, at 92-96.

28. BLAKELY & SNYDER, *supra* note 5, at vii.

29. Maria Burnham, *Gated Homes a Trend, Expert Declares*, THE COMM. APPEAL, March 10, 2002. "Even before the Sept. 11 terror attacks, Americans were leaning toward home and health security. . . . Since then, that trend has only amplified." *Id.*

30. See BLAKELY & SNYDER, *supra* note 5, at vii.

31. See John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1136 (1997) (examining increase in gated communities and private security measures as response to rising crime rates); Sue Ellen Christian, *Tiny Rosemont Puts Its Guard Up: Gated Enclaves Stir Controversy*, CHI. TRIB., June 23, 1995, at 1 (reporting on residents' belief that walls and gates are barriers to crime in a suburban setting).

32. See, e.g., Ann Spivak, *Gated Suburbs Reach Area: Desire for Security Pushes Demand*, K.C. STAR, Sept. 22, 1994, at A1; Carolyn Pesce, *Minnesota Community Joins Others in Fencing Out Crime*, USA TODAY, Sept. 30, 1994, at 9A.

33. David Dillon, *Security for Sale: Gated Communities Prosper in Fearful Society; Critics Say They Foster Segregation, Isolationism*, DALLAS MORNING NEWS, June 19, 1994, at 1A; Lorraine Mirabella, *Fear of Crime Boosts Sales of Gated Complexes Selling Security*, BALT. SUN, Dec. 11, 1994, at 1L; Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: The State Will Make the Call*, 30 VAL. U. L. REV. 509, 512 (1996); See Taylor Ward, *Neighborhoods Are Shutting Gates on Crime*, ST. PETERSBURG TIMES, Aug. 27, 1995, at 1A.

sixty-four percent to 1.6 million, and it will reach 1.9 million by the year 2000.³⁴ Currently, private officers outnumber public police officers three to one.”³⁵

I. The History of Gated Communities in America

Gated and walled communities have been described as being “as old as city-building itself.”³⁶ Still, the first “purely residential gated neighborhoods” did not appear in the United States until the latter half of the nineteenth century.³⁷

Upper-income gated developments like New York’s Tuxedo Park and the private streets of St. Louis were built in the late 1800s by wealthy citizens to insulate themselves from the troublesome aspects of rapidly industrializing cities. During the twentieth century more gated, fenced compounds were built by members of the East Coast and Hollywood aristocracies for privacy, protection, and prestige. But these early gated preserves were different from the gated subdivisions of today. They were uncommon places for uncommon people.³⁸

Gated communities became more commonplace in the 1960s, as retirement communities allowed “average Americans to wall themselves off.”³⁹ These retirement areas were located predominantly in the Southeast and Southwest. Later, “[i]n the 1980s, upscale real estate speculation and the trend to conspicuous consumption saw the proliferation of gated communities around golf courses that were designed for exclusivity, prestige, and leisure.”⁴⁰ At the same time, gated communities became accessible to the middle class, and emerged in urban and suburban settings throughout the Northeast, Midwest, and Northwest, largely as a response to rising crime rates.⁴¹ “In absolute numbers, California and Florida are home to the most gated communities, with Texas running a distant third. Gated communities are also common around

34. Owens, *supra* note 31, at 1129 (citing Peter Fimrite, *Private Security Business Booms*, S.F. CHRON., Dec. 8 1994, at A1 (detailing a study of The National Institute of Justice)).

35. *Id.*

36. BLAKELY & SNYDER, *supra* note 5, at 3.

37. BLAKELY & SNYDER, *supra* note 5, at 4.

38. BLAKELY & SNYDER, *supra* note 5, at 4.

39. BLAKELY & SNYDER, *supra* note 5, at 4. See also David Dillon, *Fortress America: More and More of Us Are Living Behind Locked Gates*, 60 PLANNING 8 (June 1994).

40. BLAKELY & SNYDER, *supra* note 5, at 4.

41. Georjeanna Wilson-Doenges, *An Exploration of Sense of Community and Fear of Crime in Gated Communities*, 32 ENV'T & BEHAV. 597 (Sept. 2000); Robert Atlas & W.G. LeBlanc, *The Impact on Crime of Street Closures and Barricades*, 5 SECURITY J. 140 (1994).

New York City, Chicago, and other major metropolitan areas, but they are found nearly everywhere.”⁴²

II. Gated Communities as Presently Structured and the Values That They Reflect

Today, gated communities in the United States fall into one of three categories: so-called “lifestyle communities, prestige communities, and security zone communities.”⁴³ Lifestyle communities include retirement communities, “developed for middle and upper-middle class retirees who want structure, recreation, and a built-in social life in their early retirement years.”⁴⁴ Prestige or elite communities flaunt social status, using gates to “symbolize distinction and prestige and create and protect a secure place on the social ladder. . . . The gates are motivated by a desire to project an image, protect current investments, and control housing values.”⁴⁵ In security zone communities, now proliferating in both metropolitan as well as suburban settings, residents erect the gates to protect against crime and enhance the sense of community and control in their neighborhood. “Security zone gatings and street closures occur at all income levels and in all areas. . . . Affluent neighborhoods in Los Angeles and public housing projects in Washington, D.C., among many others, have erected gates.”⁴⁶ All three categories of gated communities reflect several principal social values: (1) a sense of community, (2) exclusion, and (3) privatization.⁴⁷ They also raise issues relating to fixed responsibility, duplication of facilities, land use control and design of structures’ access, and tort liability. Each of these values will be explored in turn.

A. *Gated Communities and a Sense of Community*

The concept of “sense of community” has become important to understanding the motivations and aspirations of gated community residents. The term itself is taken from the field of community psychology and has been defined as “the feeling an individual has about belonging to a group and involves the strength of the attachment people feel for their communities or neighborhoods. It is primarily a psychological con-

42. BLAKELY & SNYDER, *supra* note 5, at 5.

43. BLAKELY & SNYDER, *supra* note 5, at 38.

44. *Id.* at 39. In the United States, nationwide chains such as Sun City are examples of these sorts of retirement communities. BLAKELY & SNYDER, *supra* note 5, at 39.

45. *Id.* at 40–41.

46. BLAKELY & SNYDER, *supra* note 5, at 42–43.

47. *Id.* at 44–45. Professors Blakely and Snyder add stability, or predictability, to the list of core values reflected by gated communities. BLAKELY & SNYDER, *supra* note 5, at 44–45.

struct: the presence or absence of a sense of community is experienced as an abstract concept in the human mind.”⁴⁸

In the United States, prior to the twentieth century phenomena of urbanization and industrialization, sense of community was an intrinsic and natural aspect of everyday life. Post-industrial changes eliminated many community building blocks,⁴⁹ so that the consensus from a myriad of disciplines is that today “sense of community is no longer a natural by-product of daily life; sense of community must be consciously defined and understood if it is to be maintained and enhanced in modern society.”⁵⁰

In the nineteenth century, new communities being built included many private subdivisions for the wealthy.⁵¹ These were “exclusive neighborhoods designed to be separate and shielded from their surroundings.”⁵² Developers created common ownership provisions that allowed for the community’s residents to pay for common amenities, such as lakes, private parks, and tennis courts.⁵³ The developers also attached restrictive covenants to the common ownership deeds, assuring that the property would retain its intended uses.⁵⁴

The creation of exclusive neighborhoods “carries with it the possibility that those affluent enough to live in CIDs will become increasingly segregated from the rest of society.”⁵⁵ When large groups of people remove themselves from the greater community, they fail to note their integral connection with that community, even on the external level of relying on public infrastructure and services beyond their gates.⁵⁶ Instead, they tend to focus on what they do pay for like services within their private infrastructures, and are thereby apt to feel overburdened by public taxes that benefit the general public.⁵⁷ Thus, gated community homeowners tend to further disassociate themselves from

48. Stephen E. Cochrun, *Understanding and Enhancing Neighborhood Sense of Community*, 9 J. PLAN. LITERATURE 92, 92–93 (Aug. 1994); see also W.J. Goudy, *The Ideal and the Actual Community: Evaluations from Small Town Residents*, 18 J. COMMUNITY PSYCHOLOGY 277, 285 (1990) (exploring results of study to support existence of psychological sense of ideal community).

49. See THOMAS BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 45 (Rutgers Univ. Press ed., 1978) (providing an historical examination of the changing sense of community in the United States).

50. Cochrun, *supra* note 48, at 92.

51. MCKENZIE, *supra* note 4, at 9.

52. MCKENZIE, *supra* note 4, at 9.

53. MCKENZIE, *supra* note 4, at 9.

54. MCKENZIE, *supra* note 4, at 9.

55. MCKENZIE, *supra* note 4, at 22.

56. Richard Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U. L. REV. 525, 538 (2001).

57. *Id.*

the general public through resentments rooted in the perception of having to “pay twice.”⁵⁸ This resentment can manifest itself through lower voter participation, less volunteerism, and a basic lack of interest in municipal concerns,⁵⁹ as private community homeowners come to see themselves more as beleaguered taxpayers than as citizens.⁶⁰

In this twenty-first century of increasing depersonalization and isolation, gated communities offer at least the promise of shared values, a shared destiny, connection, friendship, and cooperation. Sadly, gated communities, as presently designed, rarely fulfill these goals. They over-emphasize covenants, conditions and restrictions (CC&Rs) as a planning and control device, favoring regulation and enforcement to the detriment of social networks and leadership by consensus.⁶¹ Homeowner associations are formed and a governing board is elected to privately oversee and enforce the restrictions based in many instances on a corporate model of governance.⁶² Increasingly, these associations are described as rigid, uninspired, and excessively concerned with compliance and control.⁶³

In a significant indictment of gated and walled communities’ essential defect, it has been noted that:

They employ walls and guards to prevent crime rather than applying integrated, holistic solutions that encourage community participation to ward off destructive elements. Gated communities do not undertake strategies to acquire and maintain adequate education, jobs, and public services—fundamental civic goals that are the first crucial step in crime prevention. Instead of rich and vibrant public spaces, they contain, at best, private recreational facilities and clubhouses that serve a limited membership and offer a narrow range of activities rather than the entire spectrum of community needs.⁶⁴

These fundamental shortcomings have led to tensions within gated communities as members balk at overzealous restrictiveness and rules that are perceived to be heavy handed.⁶⁵ Outside the enclaves them-

58. Sheryll D. Cashin, *Privatized Communities and the “Secession of the Successful”*: Democracy and Fairness Beyond the Gate, 28 *FORDHAM URB. L.J.* 1675, 1677 (2001).

59. Damstra, *supra* note 56, at 539.

60. Cashin, *supra* note 58, at 1677.

61. See Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 *VILL. L. REV.* 553, 588 (2002) (discussing the predicates to community building, and concluding that common interest communities, as presently configured, tend to disappoint those seeking an authentic sense of community).

62. See *RCA Characteristics and Issues*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 9, 15 (U.S. Advisory Comm’n on Intergovernmental Relations ed., 1989).

63. See generally, e.g., Robert E. Lang & Karen A. Danielson, *Gated Communities in America: Walling Out the World?*, 8 *HOUSING POL’Y DEBATE* 867, 868 (1997).

64. BLAKELY & SNYDER, *supra* note 5, at 169.

65. See Dennis R. Judd, *The Rise of the New Walled Cities*, in *SPATIAL PRACTICES*

selves, gates and walls have engendered considerable resentment and protest.⁶⁶ Anti-gating organizations argue that gated communities inherently deepen divisions and differences, thereby escalating conflicts between the “haves” and the “have-nots.”⁶⁷

Whether neighborhoods segregate based on wealth, interest, or fear, the continued fragmentation of municipalities erodes the original concept of community.⁶⁸ Sadly, Americans have segregated themselves and have been segregated for centuries. “It might be argued that residential associations simply embody in design what high-priced suburbs achieve in practice. Yet while expensive housing markets may prevent certain individuals from living in certain areas, residential associations have the additional power to prevent such individuals from even entering these areas.”⁶⁹

B. *Gated Communities and the Politics of Exclusion*

Gated communities are, by definition, exclusionary, separating members from the outside. They are symbols of separation in a nation that increasingly finds itself divided along economic and racial lines.⁷⁰ One commentator has noted aptly that “[t]he problems we face as Americans

144, 158 (Helen Liggett & David C. Perry eds., 1995) (describing the sorts of restrictions to inspire discord and chronicling gated and walled communities’ governing homeowners’ associations “tendency toward autocratic rule,” prompting litigation as well as threats of litigation); Tim Vanderpool, *But Isn't This My Yard? Revolt Against Neighborhood Rules*, CHRISTIAN SCI. MONITOR, Aug. 18, 1999, at 2 (“Heavy handed rules and arbitrary enforcement are sometimes blamed for pitting neighbor against neighbor, and turning serene subdivisions into raucous battle zones. The result may be a budding national backlash.”); Harvey Rice, *Flurry of Lawsuits Divides Carriage Hill Neighbors*, HOUS. CHRON., Sept. 3, 2000, at A43 (describing dissension between neighbors); Maureen Feighan, *Fight Over Rights Gets Unneighborly, Lawsuits Grow as Homeowner Groups Enforce Rules*, DETROIT NEWS, Dec. 22, 2000, at A1.

66. See *Citizens Against Gated Enclaves v. Whitley Heights Civic Ass’n*, 28 Cal. Rptr. 2d 451, 453 (Cal. Ct. App. 1994) (involving challenge brought by Citizens Against Gated Enclaves (CAGE), a nonresident action group opposed to gating a California subdivision); see also Sacha Pfeiffer, *Fence Called a Barrier to Community, But Inside Complex, It's a Non-Issue*, BOSTON GLOBE, Nov. 8, 1998, at B1 (describing formation of anti-gated community group in Massachusetts).

67. See Bob Campbell, *Subdivision Security Plan is Critiqued*, St. Petersburg Times, March 11, 1992, § 1, at 1 (quoting opponent of gating as stating: “The idea is divisive. This proposal is to gate a city within a city. I am not separate from the rest of Plant City, and I don't want to be.”); Ina Jaffe, *Gated Communities Controversy in Los Angeles*, ALL THINGS CONSIDERED, National Public Radio, Aug. 11, 1992 (describing a member of an anti-gating activist group who opined that the gate “says ‘stay out’ and it also says, ‘We are wealthy and you guys are not, and this gate shall establish the difference.’”), cited in BLAKELY & SNYDER, *supra* note 5, at 159.

68. Damstra, *supra* note 56, at 536–37.

69. David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 771 (1995).

70. See *id.* at 766–67 (exploring how gated communities can promote discrimination and segregation in housing).

cannot be legislated, walled, or willed away. If we are to be the democracy we set out to be, we have to do more to reach one another, not through walls or gates but across the street we live on.”⁷¹ Such exclusivity is characterized by the establishment of boundaries that delineate and mark the given community as separate and distinct from the world at large.⁷² Boundaries can contribute to a sense of community or shared destiny within the delineated area. However, boundaries alone cannot build neighborhood attachment among those inside the development without the additional presence of “social bonding and behavioral rootedness.” In general, gated communities do not actively cultivate these determinants of community.

Those outside the gates assail gated and walled communities precisely because of their exclusionary practices in staking out boundaries and rendering access physically as well as economically prohibitive. Walled communities are “the means of continuing the housing industry’s and the federal government’s decades-old policies that segregated residential areas by income, social class, and race.”⁷³ Gates and walls have been compared to the “walled cities of the medieval world, constructed to keep the hordes at bay.”⁷⁴ Some argue that their very existence “cause[s] harms to nonmembers by developing exclusive communities, by gating formerly public streets and neighborhoods, and by increasing the fiscal burdens of cities and states.”⁷⁵

Exclusionary measures breed distrust on both sides of the gate. Those inside tend to accentuate their fear of the outside, while those outside may assume a discriminatory distrust of those inside. When private security agencies decide who is allowed inside the gates, the chance of what would normally be considered illegal segregation increases.⁷⁶ Such isolation, protection, and fragmentation does little to promote social and economic opportunity, solve problems facing today’s municipalities, or work toward healthy societies.⁷⁷

Several appellate courts have found that local zoning restrictions, whether overtly intentional or not, can result in segregating effects that harm minority communities.⁷⁸ The Second and Seventh Circuits have

71. BLAKELY & SNYDER, *supra* note 5, at ix.

72. See David W. McMillan & David M. Chavis, *Sense of Community: A Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 6, 9–11 (1986).

73. Judd, *supra* note 65, at 155.

74. Judd, *supra* note 65, at 160.

75. Kennedy, *supra* note 69, at 763.

76. Kennedy, *supra* note 69, at 771.

77. Damstra, *supra* note 56, at 537.

78. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) (“The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation

applied a disparate impact analysis, under a statutory cause of action of the Federal Fair Housing Act,⁷⁹ to a facially neutral rule, meaning that plaintiffs do not have to prove discriminatory intent.⁸⁰ Applying the same analysis to gated communities, those charging 20 percent more for housing than the rest of the comparable residential areas may be effectively excluding Blacks and Hispanics who generally earn 20 to 30 percent less than whites in the area.⁸¹

Instead, the homogeneity of private communities leads to an enforced isolation that does not promote interest in, or understanding of, surrounding municipalities.⁸² The isolation of such communities lowers interaction among various ethnic, racial, social, and economic groups, and thus lessens the experience level of one with the other, together with any sense of empathy.⁸³ Some have argued that the large number of people choosing the gated or private community lifestyle proves that it has much to offer, and that such communities should be opened to a variety of other, typically disenfranchised, groups.⁸⁴ They do not argue that private communities should be forced to open their gates to a wider variety of people, but that a wider variety of private communities should be made available, including some in the inner city.⁸⁵

C. *Gated Communities and the Phenomenon of Privatization: Constitutional Implications and Judicial Standards of Review*

The phenomenon of "privatization" describes the "shift of government functions from the public to the private sector."⁸⁶ In many ways, gated communities and their governing homeowners' associations function as "private governments."⁸⁷ Still, in order to wage a constitutional chal-

of segregation."); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977).

79. 42 U.S.C. §§ 3601-3619 (1999) (the Federal Fair Housing Act prohibits racially discriminatory practices in the sale or lease of residences).

80. *Huntington*, 844 F.2d at 935; *Arlington Heights*, 558 F.2d at 1290.

81. Angel M. Traub, *The Wall Is Down, Now We Build More: The Exclusionary Effects of Gated Communities Demand Stricter Burdens Under the FHA*, 34 J. MARSHALL L. REV. 379, 400 (2000) (citing U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing).

82. Cashin, *supra* note 58, at 1682-83.

83. Cashin, *supra* note 58, at 1682-83.

84. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 865 (1999).

85. *Id.*

86. George L. Priest, *Introduction: The Aims of Privatization*, 6 YALE L. & POL'Y REV. 1, 5 (1988).

87. MCKENZIE, *supra* note 4, at 122; *see also* Nelson, *supra* note 84, at 828-29 (suggesting legislation to allow public neighborhood developments to be recast as private neighborhood associations); Rishikoff & Wohl, *supra* note 33, at 511-516

lenge against a gated community for discrimination, exclusion, or a violation of civil rights and liberties, the gated community must be deemed a "state actor." Some scholars have argued that, because gated communities are virtual governments, they should qualify as *de facto* state actors.⁸⁸ Therefore, the analysis proceeds, they should be required to satisfy the Constitution's due process, equal protection, and First and Fourth Amendment guarantees.⁸⁹

Although this contention has not been squarely litigated before the United States Supreme Court, lower courts have for the most part resisted applying constitutional safeguards to common interest community functions and are ambivalent, if not somewhat confused, on the question of whether to characterize privately owned gated communities as the sort of state actors that would be subject to certain constitutional requirements.⁹⁰ Overall, courts have yet to develop a cohesive jurisprudential framework in the larger setting of resolving conflicts between gated community members and nonmembers over the use of space and resources, exclusionary practices and alleged deprivations of civil liberties.

A California appellate court, however, did set some guidelines for its jurisdiction. In *Cohen v. Kite Hill Community Ass'n*,⁹¹ a resident of a private community who had paid a premium price for his lot sued the homeowners' association because it had approved a nonconforming fence that would partially obstruct the resident's view.⁹² Plaintiff contended that the association had violated the CC&Rs, been negligent, and breached its fiduciary duty.⁹³ Plaintiff requested an injunction to stop the construction of the violating fence and damages.⁹⁴ The decla-

(1996) (exploring propriety of state action designation to homeowners' associations); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 634-41 (1993) (describing community association as quasi-government, with many of the powers and duties of municipal government).

88. See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 462 (1998) (suggesting various theories as to why homeowners' associations should be viewed as state actors); see also Kennedy, *supra* note 69.

89. See Kennedy, *supra* note 69, at 778-93.

90. See Kennedy, *supra* note 69, at 764. ("The question of whether to treat residential associations as state actors has been addressed by numerous state court decisions, producing little consensus. The difficulty of reconciling community with exclusion explains much of this ambivalence and confusion over how to treat these entities."); Siegel, *supra* note 88, at 466 (noting that although common interest communities possess many of the powers associated with local government, they are rarely recognized as "state actors").

91. 142 Cal. App. 3d 642 (1983).

92. *Id.* at 645.

93. *Id.* at 647.

94. *Id.*

ration of the homeowners' association listed the association's duties and responsibilities and contained an absolution clause that stated that the association had no affirmative duty to fulfill the CC&Rs.⁹⁵ The court held that this absolution clause was irrelevant because the association held a position of power over the homeowners⁹⁶ and the decision to allow a nonconforming fence was an administrative decision that is functionally equivalent to a zoning variance.⁹⁷ Therefore, the decision was reviewable "to protect neighboring property interests from arbitrary actions by homeowner associations."⁹⁸ The court also found that the association owed a duty of good faith to each individual member (and not just to the group of homeowners as a whole)⁹⁹ because the association owed a duty of good faith to anyone affected by its decisions.¹⁰⁰

In other contexts, the U.S. Supreme Court has long held that the Constitution's Fourth Amendment protections are not triggered by private party searches.¹⁰¹ Presumably then, the private security guards of gated and walled communities are not subject to the constitutional constraints that would be imposed upon public police officers.¹⁰² Similarly, the First Amendment would not seem to guarantee to nonresidents the right to speak on gated community property.¹⁰³

In response, one prominent academician has suggested that common interest community residents should be afforded their own privately drafted bill of rights.¹⁰⁴ Two states have adopted a homeowners' bill of rights that imposes upon homeowners' associations some of the same mandates (such as open-meeting rules) that would apply to local gov-

95. *Id.* at 649–650.

96. *Kite Hill*, 142 Cal. App. 3d at 655.

97. *Id.* at 652.

98. *Id.*

99. *Id.* at 652–653.

100. *Id.* at 653.

101. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (finding that a Federal Express employee's search of package did not violate Fourth Amendment, because Federal Express is a private company); *see also* *Debroux v. Virginia*, 528 S.E.2d 151, 154–55 (Va. Ct. App. 2000) (reaffirming rule that private security officers are not state actors).

102. *See* *Owens*, *supra* note 31, at 1142–49 (proposing that the Fourth Amendment should apply to private security forces).

103. *William G. Mulligan Found. v. Brooks*, 711 A.2d 961, 967 (N.J. Super Ct. App. Div. 1998) (the New Jersey Supreme Court held that a gated community does not have to afford a nonresident the opportunity to speak within its borders); *see* Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 960–61 (1998) (arguing that First Amendment protections should apply to gated communities).

104. *See* Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 350–52 (1992).

ernments.¹⁰⁵ Further, since homeowners' associations do function at least as quasi-governments, the argument has been advanced that they ought to be subject to stricter judicial review.¹⁰⁶ Courts continue to evolve guideposts for judicial review of association conduct.¹⁰⁷ Borrowing from models of corporate governance, some apply a business judgment rule that⁵ imposes the duty to act in good faith within the scope of granted authority.¹⁰⁸ Most courts have cast association obligations in terms of reasonableness, requiring that the given restriction or action only be rationally related to some legitimate association purpose, such as the protection and preservation of the health and quiet enjoyment of its residents.¹⁰⁹ With varying degrees of success, courts seek to balance concerns for stability and predictability with the need to protect against association abuse of power.

D. *Access (Privatization of Previous Public Spaces/Closing of Common Access)*

Those who seek security behind a gate cannot completely prohibit public access to their streets; they can only limit and deter it.¹¹⁰ In a sense, gated communities have privatized what was once public space.¹¹¹ Developers argue that all residences fill what used to be simply barren land, unencumbered by prior public claims and that private communities are no different.¹¹²

Even so, gated communities may violate the constitutional right to

105. See Matthew Benjamin, *Hi, Neighbor, Want to Get Together? Let's Meet in Court!*, 129 U.S. NEWS & WORLD REP., Oct. 30, 2000, at 56-57.

106. See, e.g., David C. Drewes, Note, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 349-50 (2001) (proposing that judiciary encourage participatory common interest community governance by varying standard of judicial review based upon presence or absence of participatory procedures in association's decision-making process); Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203 (1992) (arguing for stricter standard of judicial review).

107. Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663, 666-71 (2000) (detailing standards of review adopted by courts to review common interest community rules and governing board actions and proposing a multi-factored reasonableness test to honor resident expectations as well as best interests of collective).

108. See Hyatt & Stubblefield, *supra* note 87, at 694-704, for a discussion of the leading cases to apply the business judgment rule to common interest communities.

109. See, e.g., *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (upholding challenged restriction as reasonable and in good faith); *Riss v. Angel*, 934 P.2d 669, 684 (Wash. 1997) (striking down association decision because it was unreasonable and it lacked sufficient factual basis).

110. Andrew Stark, *America, The Gated?*, 22 WILSON Q. 58 (1998), available at 1998 WL 10985356.

111. Halberg, *supra* note 15, at 7.

112. Kennedy, *supra* note 69, at 769.

travel by preventing non-owners/members from access to what would have been or had been public streets.¹¹³ One appellate court has held that unless it has legislative authority, a city may not limit use of one of its streets to select residents.¹¹⁴ In another case, *Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n*,¹¹⁵ Whitley Heights homeowners tried to close off from public use a street lined with architecturally historic homes.¹¹⁶ Nonresidents challenged the attempt as excluding them from basic transportation and exercise and recreation venues. The court held that a street could only be removed from public use if it was not necessary for transit. The relevant streets were found to be necessary because of the use by Whitley Heights residents. "The streets of a city belong to the people of the state, and the use thereof is an inalienable right of every citizen. . . ."¹¹⁷ This became "the first and only case to reach a state appellate court where non-residents" of a gated community used state or federal law to successfully challenge the community's exclusionary methods.¹¹⁸

An increasingly common problem is blocking of access to a public resource by a gated community. Thus, for example, two hilltop communities in Hawaii found themselves in protracted negotiations and litigation over access to state-owned mountain trails. The trailheads were accessible only by passing through the private land and roads of the community.¹¹⁹ While both disputes were settled and limited public access is now available, the negotiations raised issues of public rights to traverse private land to reach public resources.

Other access issues include methods of free speech. As they grow in number and popularity, whether gated communities are private actors providing a traditionally public function, remains to be seen. If they are, however, the holding of *Robins v. Pruneyard Shopping Center*¹²⁰ may apply to private streets much as it did to a shopping mall.¹²¹ Pres-

113. Kennedy, *supra* note 69, at 770.

114. *City of Lafayette v. County of Contra Costa*, 91 Cal. App. 3d 749 (Cal. Ct. App. 1979).

115. 28 Cal. Rptr. 2d 451 (Cal. Ct. App. 1994).

116. *Id.*

117. *Citizens Against Gated Enclaves v. Whitley Heights Civic Ass'n*, 28 Cal. Rptr. 2d 451, at 454 (Cal. Ct. App. 1994) (citing *City of Lafayette v. County of Contra Costa*, 91 Cal. App. 3d 749, 753 (Cal. Ct. App. 1979)).

118. Traub, *supra* note 81, at 390.

119. Interview with A. Joseph Fadrowski III, Vice President, Gentry Pacific Homes, in Honolulu, Haw. (July 31, 2002). Nonresidents sought access to the Honolulu gated communities of Hawaii Loa Ridge and Waialae Iki V, primarily on the basis of a Hawaii statute of dubious legality, which requires landowners to provide access to beaches and trails at no public cost, thus violating the Fifth Amendment to the U.S. Constitution.

120. 447 U.S. 74 (1980).

121. Damstra, *supra* note 56, at 541-42.

ently, private communities tend to hinder, rather than foster, communication with and from those outside their walls.¹²² For example, in *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*,¹²³ the appellate court found that a nonresident newspaper cannot be refused if another newspaper company was allowed on the property. In this case, the private community attempted to prevent promotional distribution of a newspaper only because it was not the community's in-house paper. This case followed that of *Marsh v. Alabama*,¹²⁴ which had upheld a Jehovah Witness's right to distribute leaflets in a company town.

However, in *William G. Mulligan Found. v. Brooks*,¹²⁵ the New Jersey Supreme Court found that a gated community is not required to allow a nonresident to speak on the property, as long as that common property is only set aside for nondiscriminatory private use. The court came to this conclusion after finding that a private community newspaper was not included in the term "free press" in the U.S. Constitution and that advertising was not necessarily protected speech.¹²⁶ Instead, the court relied on the New Jersey Constitution's protection of private property, and held that

Without considering the reasonableness of the restrictions or limitation defendants placed on plaintiff's "advertisement," we conclude that the normal uses of the property, the absence of invitation for public use, and the type of the speech involved here do not compel us to limit defendants' rights as owners of private property.¹²⁷

States must develop their own methods of interpreting the difference between public and private issues and how to preserve individual rights as well as private contractual agreements.¹²⁸ State legislatures have done little to help their courts in this arena, and so state courts are struggling with how to apply their state constitutions to national traditions and constitutional protections for free speech, private property rights, public access, equal rights, and limited search and seizure.¹²⁹

Surveying the states of California, Washington, Ohio, and New Jersey alone, one scholar has pointed out just how divergent methods of constitutional interpretation can be.¹³⁰ For example, in *Robins v. Pruneyard Shopping Center*,¹³¹ California has held that the private property

122. Damstra, *supra* note 56, at 542.

123. 182 Cal. Rptr. 813 (Cal. Ct. App. 1982).

124. 326 U.S. 501 (1946).

125. 711 A.2d 961 (N.J. Super. Ct. App. Div. 1998).

126. *Id.* at 964.

127. *Id.* at 967.

128. Rishikof & Wohl, *supra* note 33, at 549-50.

129. Rishikof & Wohl, *supra* note 33, at 550-51.

130. Rishikof & Wohl, *supra* note 33, at 542-49.

131. 592 P.2d 341 (Cal. 1979).

rights of a shopping mall were not immune from the state constitution. The court went so far as to say, “[a]s the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted.”¹³² On the other hand, Washington courts have decided not to use the “public function” test of *Marsh v. Alabama*,¹³³ and instead have employed the test set forth in *Lloyd Corp. v. Tanner*,¹³⁴ which held that shopping malls are easily distinguishable from company towns.¹³⁵ Ohio’s Supreme Court has held that the state constitution’s free speech provisions could be no broader than those of the U.S. Constitution, thereby holding that a shopping mall could expel someone collecting petition signatures.¹³⁶ New Jersey embraces the more flexible approach of allowing the state constitution to protect private persons demonstrating on private property.¹³⁷ The New Jersey Supreme Court’s three-part test balances the use and nature of the private property, the purpose and method of the individual’s expression, and the level of apparent invitation to the public that the private property has made.¹³⁸ Recently, that court found that private shopping malls must permit free speech because shopping malls are so similar to public property.¹³⁹

E. Security: Locking Out or Locking In?

Pervading national attitudes are that the government has not done enough to protect persons or property.¹⁴⁰ Whether or not residents actually are safer inside a gated and/or guarded community, a sense of security typically comes with the purchase price of the residence. Security comes in many forms: gates, walls, guards, security checks, surveillance cameras, motion detectors, helicopters, infrared sensors, and dog patrols.¹⁴¹ Retirement communities in particular seem to derive a sense of security from a gate,¹⁴² as do other homebuyers in certain parts of the nation where crime rates continue to climb. Thus, in a 1990 Southern California survey, 54 percent of future homebuyers said they

132. *Id.* at 345.

133. 326 U.S. 501 (1946); *see supra* note 123, and corresponding text.

134. 407 U.S. 551 (1972).

135. Rishikof & Wohl, *supra* note 33, at 545.

136. Rishikof & Wohl, *supra* note 33, at 547 (citing *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59 (Ohio 1994)).

137. Rishikof & Wohl, *supra* note 33, at 547.

138. Rishikof & Wohl, *supra* note 33, at 548.

139. Rishikof & Wohl, *supra* note 33, at 548 (citing *Middle East v. JMB Realty Corp.*, 650 A.2d 757 (N.J. 1994)).

140. Kennedy, *supra* note 69, at 766.

141. Kennedy, *supra* note 69, at 766.

142. Stuart Leavenworth, *Fenced Towns: Security, Exclusivity, and Now Taxing Power*, THE NEWS AND OBSERVER, May 30, 1999, at B1, available at 1999 WL 2753421.

sought a home in a gated or walled community for security purposes.¹⁴³

Other members of common interest communities are less concerned about security than they are about the prestige, status and wealth that come with living in certain communities.¹⁴⁴ In such cases, shared values of privacy and image are more important than preventing crime. The security gate adds to the image.¹⁴⁵ While even some believe that a gate or wall exudes exclusivity, others feel that they are living in or outside of a fortress.¹⁴⁶ And fortresses rarely come with welcome mats. However, gates and walls tend to add to and protect the value of the property.¹⁴⁷

Many studies bolster the conclusion that gated communities do not necessarily decrease crime rates. They may lower the amount of through traffic and solicitation, but provide more of a false sense of security to their inhabitants, thereby causing homeowners to be lax in their individual home protection.¹⁴⁸ Residents may carelessly leave doors and windows open, creating opportunities for more burglaries and other crimes than would have existed without the gates.¹⁴⁹ In fact, many developers will not use security as a marketing tool because they do not want to be held liable in the future.¹⁵⁰

The leading study of gated communities in the United States makes the point:

The notion that gates will bring total security is spurious. Murders have occurred in walled communities and problems of burglary and vandalism continue to exist. We suspect that many of these problems relate to the changing demographics of gated communities. As families increasingly seek walled security communities as a refuge, they bring in their own teenagers who become a source, both directly and indirectly, of the problems they fled.¹⁵¹

Sometimes the very rules that attend CIC living create dangerous situations.¹⁵² In one California CIC, a home was burglarized and the homeowner made many requests that more lights be provided.¹⁵³ The CC&Rs required that the association approve such an addition, but the association

143. Damstra, *supra* note 56, at 530.

144. BLAKELY & SNYDER, *supra* note 5, at 76–77.

145. Alan Scher Zagier, 'Gated' Living Inspires Debate, THE NEWS AND OBSERVER, June 7, 1998, at A1, available at 1998 WL 6141834.

146. *Id.*

147. See Kennedy, *supra* note 69, at 766.

148. BLAKELY & SNYDER, *supra* note 5, at 97.

149. BLAKELY & SNYDER, *supra* note 5, at 97.

150. BLAKELY & SNYDER, *supra* note 5, at 18.

151. BLAKELY & SNYDER, *supra* note 5, at ix; see also Kevin Davis & Cindy Elmore, *Behind the Walls: Crime Hits as Hard*, SUN SENTINEL (Ft. Lauderdale), Aug. 28, 1994, at 1B (describing spate of crimes committed inside gated communities); George Wilkens, *Attempted Rape of Jogger Shakes Suburban Security*, TAMPA TRIB., Feb. 13, 1999, at 8 (recounting attempted rape of jogger within gated community).

152. See, e.g., Francis T. v. Village Green Owners Ass'n, 723 P.2d 573 (Cal. 1986).

153. Francis, 723 P.2d at 575.

did not.¹⁵⁴ The homeowner installed the lights without the association's approval, but the association forced her to dismantle them and in the process she also was required to turn off all of her other approved, outdoor lights.¹⁵⁵ The night after she shut down the lights, a burglar broke into her home and raped and robbed her.¹⁵⁶ She sued the homeowner association for negligence.¹⁵⁷ The court remanded the case after finding that the association owed a landlord's duty of care to protect residents from crime and that the association may have been negligent.¹⁵⁸

Private guards and patrols represent a common form of security provided by many homeowners' associations. These private security forces now outnumber public ones, although as noted it has not been definitively decided whether private guards are state actors and thus subject to the U.S. Constitution's Fourth Amendment protections against unlawful search and seizures.¹⁵⁹ Although the residents' act of buying into a private community may have consented to the private policing, guests and workers in the community have not so consented.¹⁶⁰

The main function of private security forces is the protection of property, not the assistance of the public police force by apprehending criminals.¹⁶¹ Even so, those same private security forces advertise "as the solution to overburdened police departments with extremely slow response times."¹⁶² Sometimes overburdened police departments will request assistance or collaboration from private agencies.¹⁶³ Some worry that the blurring of public and private law enforcement "may eviscerate the Fourth Amendment."¹⁶⁴

F. *Gated Communities and Land Use Controls*

Homeowners association use covenants have been compared to local zoning ordinances.¹⁶⁵ Both include limitations on housing designs, densities, aesthetics, and uses (a source of considerable contention in their supervision by homeowners' association boards, particularly if still controlled by the project developer). Coupled with unlimited "vari-

154. *Id.* at 576.

155. *Id.*

156. *Id.*

157. *Francis*, 723 P.2d at 576.

158. *Id.* at 576-77.

159. *Damstra*, *supra* note 56, at 540-41.

160. *Damstra*, *supra* note 56, at 541.

161. *Owens*, *supra* note 31, at 1139-40.

162. *Owens*, *supra* note 31, at 1140.

163. *Owens*, *supra* note 31, at 1141.

164. *Owens*, *supra* note 31, at 1142.

165. *Nelson*, *supra* note 84, at 835.

ance” power, unbridled review and enforcement often leads to heated disputes pitting CICs against individual homeowners or small groups of homeowners over the conformity, or lack thereof, of a particular house design with those prevailing in the community. One scholar suggests that private community developers be allowed their own zoning powers, without any overlapping with the local zoning authorities or any role from people who will not be living in the community.¹⁶⁶ While zoning generally works as a planning tool for municipalities,¹⁶⁷ the purposes of a private community often include separation from the general municipality. Privatizing zoning would be yet another step for CIDs to take toward privatizing government functions.¹⁶⁸

However, each CIC privatized “zoning” effort itself results in uncoordinated land use planning of the area. One result may well be cumulative traffic impacts for all neighboring communities.¹⁶⁹ Air quality, property values, environmental preservation, efficient public services, and well-located schools all are better coordinated by a more regional government responsible for the region’s public services.¹⁷⁰

G. Fiscal Responsibility

Gated communities tend to lure the more affluent out of the cities, “siphoning off their tax dollars, their expertise and participation, and their sense of identification with a community,” in essence creating a “secession of the successful.”¹⁷¹ With enough of these communities, the surrounding cities and counties could find themselves bereft of much of their population and resources, so that “the city could become financially untenable for the many and socially unnecessary for the few.”¹⁷² Critics observe that by living in a gated community, residents are not supporting the public services that support the community at large.¹⁷³

Some cities have elected to pass ordinances banning such communities. Cary and Carrboro, North Carolina, passed ordinances banning gated communities because citizens expressed concern that gated com-

166. Nelson, *supra* note 84, at 835.

167. Nelson, *supra* note 84, at 837.

168. Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 402 (1998).

169. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2043 (2000).

170. *Id.*

171. MCKENZIE, *supra* note 4, at 23 (citing Robert Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 42).

172. MCKENZIE, *supra* note 4, at 23.

173. Baron, *supra* note 24.

munities within their city boundaries could delay the response times of emergency vehicles.¹⁷⁴ One alderman explained the dislike for walls and gates by saying: "We're a community of interconnected neighborhoods. Walls are unfriendly."¹⁷⁵

Homeowners in a community development must pay local property taxes for local government services, whether or not they use such services, and even though they already pay extra for their private community's services.¹⁷⁶ They, therefore, are an easily mobilized voting bloc that will vote to protect property values, lower property taxes, and seek tax equity.¹⁷⁷ Considering that more than 30 million Americans live in private communities,¹⁷⁸ with 8 million in gated communities,¹⁷⁹ such a large, local voting bloc can make a difference on close ballots.

Thus, members of homeowner associations have begun requesting tax deductions for their dues. They pay for their own public services and see no need to pay for others' as well, especially if they do not use them. Garbage collection, street maintenance, security, and recreation are examples of such duplicate services.¹⁸⁰ However, people living in private communities do use some public services and it would be difficult to determine exact percentages of what each homeowner uses.

In California, where Proposition 13 effectively limited the amount of public services provided by local government, those who sought certain amenities felt compelled to provide their own.¹⁸¹ Private developments began including their own streets, drainage, parks, recreation facilities, and streetlights.¹⁸² Where the communities are not gated, the general public has access to these privately funded facilities, for which the public paid nothing. Meanwhile, the relevant municipality still taxes private community homeowners to provide the same infrastructures for the public as well. Obtaining a rebate for providing their own segment of public services is a major political goal of homeowners living in planned communities.¹⁸³ The opposition argues that one rarely pays taxes only for what one uses or receives.¹⁸⁴ Also, when a private community provides some of its own public services, the municipality can

174. Zagier, *supra* note 145.

175. Zagier, *supra* note 145.

176. MCKENZIE, *supra* note 4, at 188.

177. MCKENZIE, *supra* note 4, at 192-93.

178. Stark, *supra* note 110.

179. Damstra, *supra* note 56, at 529.

180. Stark, *supra* note 110.

181. Stark, *supra* note 110.

182. Stark, *supra* note 110.

183. Stark, *supra* note 110.

184. Stark, *supra* note 110.

withdraw from those areas in an effort to save money and manpower,¹⁸⁵ thereby effectively lowering everyone's costs.

H. Governance

Covenants, conditions, and restrictions often require homeowners to vote among themselves for a board of directors.¹⁸⁶ This means "neighbors will eventually be running one another's lives, without any minimum requirements of education, experience, or professional competence."¹⁸⁷ This board of directors, which can only be made up of homeowners,¹⁸⁸ must enforce the CC&Rs, manage the association's assets, and provide upkeep for the common areas.¹⁸⁹ The association can levy fines against those who do not comply with the CC&R provisions.¹⁹⁰ Homeowners' associations are allowed a quasi-adjudication process, wherein the board makes and hears the charges without an impartial jury. "In most states, failure to pay the fine authorizes the association to attach a lien interest to the individual unit, and, ultimately, to sell the unit at auction if the fine is not paid."¹⁹¹

People choosing to live in such communities at least partly choose where they live because of the restrictions placed upon their neighbors.¹⁹² "They place a high value on the restrictions, feeling that the infringement on one's own freedom is a small price to pay for protection from the potential misdeeds of one's neighbor."¹⁹³ Communities may outlaw flagpoles, satellite dishes, signs, clotheslines or certain house colors, and potential homebuyers have to accept those rules into their property, as well.¹⁹⁴ Developers argue that however draconian CC&Rs may seem to outsiders, they are consensual.¹⁹⁵ How accurate

185. Stark, *supra* note 110.

186. MCKENZIE, *supra* note 4, at 128.

187. MCKENZIE, *supra* note 4, at 128.

188. Homeowners compose the board except during the formative period of the development when such critical tasks as design review are performed by the developer or his hand-picked design committee. Indeed, some CC&Rs permit the developer to retain such contract years after all lots have been sold and some houses constructed, to the consternation and frustration of owners and residents.

189. MCKENZIE, *supra* note 4, at 128.

190. *Id.* at 129; see also *Members Can Be at Mercy of Owners Group*, SAN DIEGO UNION, March 11, 1990, at F3; United Press International, *Couple Sues to Lift Ban on Condo Door*, L.A. TIMES, Oct. 8, 1989, at part 8, p. 21.

191. MCKENZIE, *supra* note 4, at 129.

192. Halberg, *supra* note 15, at 6.

193. MCKENZIE, *supra* note 4, at 14.

194. See Steve Goldstein, *Don't Even Think About Pink Flamingos*, PHILADELPHIA INQUIRER, Oct. 27, 1991, at A1; Marie McCullough, *It's a Swing Set! There Goes the Neighborhood*, PHILADELPHIA INQUIRER, Oct. 9, 1991, at A1; John Singh, *Fat Dog Isn't Welcome in the Land of Fat Cats*, ORLANDO SENTINEL TRIB., March 13, 1992, at B4; United Press International, *Court Finds Wife Too Young For Retirement Condo*, SAN DIEGO DAILY TRANSCRIPT, Dec. 11, 1987.

195. Owens, *supra* note 31, at 1135.

that is in a world where buying a new home increasingly means buying in a planned, private community, is unclear.¹⁹⁶ There is, moreover, the issue of shifting control from the landowner-developer, which retains control during the marketing phase of the community, to the homeowners who have the ultimate interest and responsibility for its governance. Many common interest community documents provide for developer control well after the last lot is sold, leaving such "outside" control over the owner-residents well into the design and building process.¹⁹⁷ As an example, what happens when the new homeowners and the developer clash over appropriate housing design and construction? The idea that the homeowners "consented" to such continuing developer control appears inequitable, leading to legitimate questions of good faith, as the *Kite Hill* case demonstrates.¹⁹⁸

Eventually, some gated communities go so far as to incorporate themselves into independent, gated towns.¹⁹⁹ In such instances, the homeowners' association may be completely abandoned, morphed into a local government, or maintained as a private government, supplementary to the public one.²⁰⁰ In the latter case, the public government conducts such functions as garbage pick-up, building inspections, and adult education, while the private government continues to maintain the common areas.²⁰¹ Part of the financial logic includes the federal and state tax deductions allowable for property tax payments, which would not be allowed if those payments were made in the form of dues to a private homeowners' association.²⁰² By continuing to pay dues to the homeowners' association for their private amenities, however, residents can preserve that private, common ownership.²⁰³

I. *Liability Issues*

Some homeowners' associations have been found liable for torts in the communities' common areas. In such situations, the associations are equated to landlords and the homeowners to tenants who are owed a fiduciary duty from the landlord.²⁰⁴ In Hilton Head, South Carolina, a

196. *Id.*; see also *Nahrstedt v. Lakeside Vill. Condo. Ass'n Inc.*, 878 P.2d 1275 (Cal. 1994) (evidencing the nonconsensual nature of CC&Rs where a cat owner purchased a condominium unit not knowing that pets were not allowed, thus she had to give her pets away or face mounting fines and further legal action).

197. See, e.g., Declaration of Protective Covenants, Conditions and Restrictions for the Bluffs at Manua Kea, § 8.8, Standards of Review, made 2/19/97 and recorded 3/17/97, Honolulu, Haw.

198. *Cohen v. Kite Hill Comty Ass'n*, 142 Cal. App.3d 642 (1983).

199. Stark, *supra* note 110.

200. Stark, *supra* note 110.

201. Stark, *supra* note 110.

202. Stark, *supra* note 110.

203. Stark, *supra* note 110.

204. See, e.g., *Francis T. v. Village Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986);

resident of a gated community sued the homeowners' association because it had allowed a community sidewalk to fall into disrepair, and the resident broke her wrist in a fall caused by a hole in that sidewalk.²⁰⁵ The court found that the resident's \$500 annual assessment created a contractual duty that the association would maintain the common areas of the community at a safe level.²⁰⁶ On the safety question, a court found that foreseeable danger could make an association liable for guests of residents as well as residents themselves.²⁰⁷ The court found that an Arizona community could have taken reasonable precautionary measures to prevent the shooting of a guest as he ran from a gang of people from a nearby neighborhood.²⁰⁸

Obtaining damages from homeowners' associations is a different proposition. These associations rarely hold many assets in reserve and are not often fully insured.²⁰⁹ If the association is formed as a nonprofit corporation, only the property directly owned by the association will be available to the plaintiff.²¹⁰ In this way, the individual property owners are protected from suit in the same way as individual corporate shareholders.²¹¹ If, on the other hand, the association is unincorporated, the individual property owners may be found liable and may have to pay the plaintiff's award.²¹² Any unpaid portion is often collected by placing a lien on all the property within the community. Some state statutes allow individual property owners to pay their share and remove themselves from under the blanket lien.²¹³

In conclusion, the gated community as a private common interest community or development is an increasingly common and integral part of residential communities in the United States. While many of its features are common to all common interest communities (organization and governance, property held in common for streets and parks, assessment of fees for maintenance of such common property, design controls), the ubiquitous gate at the entrance adds to the sense of ex-

Landry v. Hilton Head Plantation Prop. Owners Ass'n, 452 S.E.2d 619 (S.C. Ct. App. 1994); Martinez v. Woodmar IV Condo. Homeowners Ass'n, Inc., 941 P.2d 218 (Ariz. 1997).

205. Landry v. Hilton Head Plantation Prop. Owners Ass'n, 452 S.E.2d 619 (S.C. Ct. App. 1994).

206. *Id.*

207. Martinez v. Woodmar IV Condo. Homeowners Ass'n, Inc., 941 P.2d 218 (Ariz. 1997).

208. *Id.*

209. See Halberg, *supra* note 15, at 10.

210. See Halberg, *supra* note 15, at 10.

211. See Halberg, *supra* note 15, at 10.

212. See Halberg, *supra* note 15, at 10.

213. See Halberg, *supra* note 15, at 10.

clusivity and separation from the rest of the community. While such separation generally provides more security for the residents of the gated community, it does little for the sense of general community that is at the heart of successful community-building. The gated community adds to the sense of exclusion, which is generally perceived by those outside any common interest community that is able to choose its residents on whatever basis. Within the community, problems of liability and enforcement often arise as a result of the exclusivity that makes gated communities attractive to its residents. Moreover, the accessibility of public resources like beaches and trails is sometimes foreclosed by the termination of public ways at the gate of the community and some distance from the resource itself. These problems bear continued monitoring and future investigation. The solutions will not come easily.