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Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium

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INTRODUCTION

There is tension in the universe of entity property forms—tension between the traditional conception of the residential leasehold interest and the expanding property form known as the common-interest community. Common-interest communities, a mix of both fee simple and tenancy in common property, are distinguished by collective governance regimes that impose restrictions on property owners through the use of ever-evolving covenants. These restrictions are determined, amended, and enforced through majoritarian governance, such that these communities effectively form “private governments.”¹ Condominiums, the subject of this Note, are among the fastest growing forms of these private governments.

Today, over 2.1 million condominium units are occupied by renters.² Unlike a traditional leasehold interest, whereby the lessee contracts with the lessor to secure an interest in the latter’s property subject to the terms of a *static* lease agreement, lessees in a condominium are bound by the *evolving* decisions of the ownership class. Renters, therefore, do not enjoy the “gatekeeper” role, traditionally understood, when renting a unit in a condominium. Ownership of real property necessarily involves “decisions about resource use [that] are delegated to an owner who acts as the manager or *gatekeeper* of the resource.”³ Instead, prospective lessees contract with the individual owner to lease only the space within the four walls of a given unit. Renters then are subject to the varying

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1. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 29 (1994); see also UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102 cmt. 5 (1994) (stating that the condominium association’s ability to levy fines against unit owners and lessees “reflect[s] the need to provide the association with sufficient powers to exercise its ‘governmental’ functions as the ruling body of the common interest community”).
 2. DEP’T OF HOUS. & URBAN DEV., *AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007*, at 1-2 tbl.1A-1 (2008) [hereinafter *AMERICAN HOUSING SURVEY*], available at <http://www.census.gov/prod/2008pubs/h150-07.pdf>.
 3. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 29 (2007) (emphasis added).

rules and interests governing the common areas of the condominium, such as lobbies, hallways, pools, and even the property allowing them access to the unit, like stairways and elevators. This is not problematic per se. When renters are given inadequate notice regarding the covenants and governance regime to which they will be subject, however—a regime in which they have no voice—tensions arise.

This Note argues that tensions between residential leasehold interests and ownership interests in condominium communities are exacerbated by the increasing number of condominium units occupied by renters. It argues, in particular, that insufficient notice for renters regarding covenants, governance regimes, and the legal treatment of condominium associations leads to an inefficient allocation of renter preferences and an opportunity for associations to impose exploitative covenants that disproportionately tax renters. This Note advocates a robust statutory notice requirement to ensure that renters better understand the implications of renting in a condominium, allowing them to adjust their market preferences accordingly. It is unacceptable for a statistically significant percentage of Americans to enter into leases without knowing how the condominium form, in comparison to the traditional leasehold interest, restricts the use and enjoyment of their property and subjects them to the authority and unpredictable preferences of their neighbors.

The scholarly literature concerning common-interest communities has not focused on the challenges identified by this Note. Research instead has centered on fundamental fairness and the constitutional implications of common-interest communities as private governments, particularly the restriction of individual owners' rights.⁴ Robert Ellickson is among the few scholars to have considered common-interest communities from an efficiency perspective;⁵ however, his work does not center on the tensions between the residential leasehold and common-interest community property forms that are examined here.

The issues identified in this Note are particularly important in light of current developments in the housing market. Americans increasingly purchase condominium units as a supplement to their primary residence—a trend that catalyzed the collapse of the recent housing bubble.⁶ As a result, roughly one-

4. See Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345 (1992); 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 (1998).

5. See, e.g., Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

6. See, e.g., Edmund L. Andrews, *Greenspan Is Concerned About 'Froth' in Housing*, N.Y. TIMES, May 21, 2005, at C1 (finding that the rapid increase in the purchase of condominiums and houses as investment properties, as opposed to second homes, precipitated the mortgage crisis because people were "reaching" to finance

third of American condominium units are occupied by renters.⁷ This Note advances the understanding of this under-theorized, but substantial, segment of the American housing market: a segment with an inadequate understanding of the unique legal constructs of condominium property results in inefficiencies and, potentially, abuse.

Part I introduces the definitions, principles, governing law, and modern history of the condominium property form. Part II presents the Note's thesis by introducing the traditional conception of a residential leasehold property interest as compared to the experience of renters in modern condominiums. Part II also explains how these two property interests are in tension and how that tension can result in the inefficient allocation of renter preferences and the introduction of exploitative policies on the part of the ownership class. Finally, Part II argues that *ex ante* notice standards for prospective lessees currently are insufficient. Part III examines the statutory landscape and locates the insufficiency with which relevant legislation currently addresses the unique problems presented by renters, particularly with respect to notice requirements. The Conclusion argues for a statutory notice requirement on behalf of prospective condominium renters.

I. CONDOMINIUMS: BACKGROUND PRINCIPLES AND GOVERNING LAW

Condominiums are a relatively new property form. Although a limited number of condominiums were built immediately after World War II, the property form began to take root only after passage of the first condominium-enabling statutes and the provision of federally backed mortgage insurance.⁸ After Arkansas passed the nation's first enabling legislation in 1961,⁹ the condominium form of property ownership rapidly expanded across the country. By 1963, thirty-three more states had enacted condominium-enabling statutes, and by 1967, forty-nine states had similar legislation.¹⁰ The expansion of common-interest communities, of which condominiums are the most common form, was prodigious. Between 1970 and 1990, the number of common-interest communities increased from 10,000 to 150,000,¹¹ with other statistics revealing a

their investments through the use of interest-only loans and adjustable-rate mortgages).

7. AMERICAN HOUSING SURVEY, *supra* note 2, at 1-2 tbl.1A-1.
8. See Michael H. Schill, Ioan Voicu & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 278 (2007).
9. 1 GARY A. POLIAKOFF, *THE LAW OF CONDOMINIUM OPERATIONS* § 1.08 (1988).
10. Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 28 (1991).
11. See Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in *COMMON INTEREST COMMUNITIES: PRIVATE GOVERN-*

growth from fewer than 500 such communities in the early 1960s to an estimated 249,000 in 2003.¹² Condominium units, virtually nonexistent in the early 1960s, numbered over 4.2 million in 1987,¹³ with over 7 million in existence today.¹⁴

This Part briefly introduces the basic principles of the condominium form, how condominiums are created, how they are governed, and the powers of governing bodies to enforce covenants upon unit owners. This Part also outlines various sources of law that govern common-interest communities generally, and condominiums specifically. It concludes with a discussion of the benefits of the condominium form.

A. *Basic Principles of the Condominium Form*

The Restatement (Third) of Property defines a common-interest community as “a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal.”¹⁵ “All common interest developments share several essential characteristics: common ownership of residential property, mandatory membership of all owners in an association that governs the use of the common property, and governing documents that provide a ‘constitution’ by which the association and its members are governed.”¹⁶ Condominiums are among the most common forms of these communities in America.

Although condominiums can differ in many respects,¹⁷ they all share certain common characteristics. In a condominium, individuals own their respective units in fee simple, but they enjoy collective ownership in the common areas of the property—such as a hallway, lobby, or elevator—as tenants in common.¹⁸ Owners individually finance their property through traditional means (e.g., a mortgage) and are personally responsible for property taxes as-

MENTS AND THE PUBLIC INTEREST 3, 10 (Stephen E. Barton & Carol J. Silverman eds., 1994).

12. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 835.

13. MCKENZIE, *supra* note 1, at 96.

14. See AMERICAN HOUSING SURVEY, *supra* note 2, at 1-2 tbl.1A-1.

15. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (2000).

16. Barton & Silverman, *supra* note 11, at 3.

17. The physical attributes and use of a condominium structure determine the varieties of condominiums. Condominiums may be high-rise buildings that are indistinguishable from apartment complexes, a common feature of urban environments, or they may be detached, single-family homes organized as a condominium community. See POLIAKOFF, *supra* note 9, § 1.05.

18. See *id.* § 1.1.

essed against the value of their ownership in the community.¹⁹ But they pay collectively to maintain the common areas and provide for condominium-wide services.²⁰ The condominium form is particularly prevalent in metropolitan areas where land is at premium²¹ because it provides the “smallest tangible ownership interest of any form of housing. It is essentially a legal way for people to own, buy, and sell units in an apartment building.”²²

Condominiums, like all common-interest communities, are distinguished by their complex system of servitudes and the governance structure designed to amend and enforce the applicable covenants. Condominiums are governed by an association, membership in which is a mandatory condition of purchasing a unit in the condominium community.²³ Unlike a single-family homeowner who exercises complete control over her real property, owners in a condominium are subject in many respects to the collective will of the association.²⁴ Condominium associations have the power to assess fees, set restrictions on the use and enjoyment of property, and enforce community rules and standards. In these respects condominium associations operate much like private, local governments.²⁵ As one scholar has observed: “The owner of a condominium typically has an individual ownership interest that is a legal fiction, consisting of just the ‘airspace’ inside the unit. The entire building and the ground on which it sits are owned in common.”²⁶

1. Creating a Condominium

Common-interest communities often are created when a real estate developer constructs a residential property development that includes both individual lots or units *and* common property.²⁷ The developer, prior to selling individual units, will impose a system of servitudes on the property and create a

19. Christopher S. Brennan, Note, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 *FORDHAM L. REV.* 3041, 3046 (1999).

20. See WAYNE S. HYATT & SUSAN F. FRENCH, *COMMUNITY ASSOCIATION LAW* 271 (2d ed. 2008).

21. See *AMERICAN HOUSING SURVEY*, *supra* note 2, at 34-35 tbl.1D-1.

22. MCKENZIE, *supra* note 1, at 94.

23. See Barton & Silverman, *supra* note 11, at 3.

24. *Lallo v. Szabo*, No. 07-P-1513, 2009 WL 2516958, at *4 (Mass. App. Ct. Aug. 20, 2009) (“Condominium ownership is generally characterized by the relinquishment of some ‘personal choice’ in exchange for the benefits that may be derived from associating with other property owners.”).

25. See MCKENZIE, *supra* note 1, at 122-49.

26. *Id.* at 94.

27. See HYATT & FRENCH, *supra* note 20, at 19.

community association designed to govern and maintain the development in accordance with the servitude regime.²⁸ The developer, who at the outset controls the association and retains management and enforcement authority, transfers those responsibilities to the association at a designated time or when required by law.²⁹ Typically, the formal conveyance of the common property from the developer to the community association occurs when a certain percentage of lots or units have sold.³⁰ In this respect, community associations are an attractive investment exit strategy for developers. The developer can respond to market demands by providing common amenities and services without having to retain indefinite ownership or management responsibility over the property.

Three legal documents are needed to create a condominium. First, the “declaration” is the originating document of the condominium and its association. Prior to the sale of any lots or units, a developer must create and, importantly, publicly record a declaration. The declaration includes a description of the property, the servitude regime, the initial functions and powers of the association created pursuant to the declaration, and the obligation of unit purchasers to belong to the association.³¹ Recording the declaration serves an important notice function, as conveyances to initial purchasers “should specify that the conveyance is made subject to the recorded declaration. When the first lot or unit is sold subject to the declaration, all the property described in the declaration becomes bound by the terms”³²

Second, the Contract, Covenant, and Restrictions (CCR) document, usually created as part of the declaration, is the primary source of duties binding community members.³³ CCRs can be supplemented and amended over time in accordance with a community’s governance mechanism. CCRs, together with the third essential condominium document, the association bylaws, “set out restrictions on what the owners can and cannot do with their own and the common property.”³⁴ The topics covered by the CCRs and the bylaws, which are less formal and easier to amend than the CCRs, can be exceptionally broad and of-

28. See UNIF. COMMON INTEREST OWNERSHIP ACT § 1-105 cmt. 5, 7 U.L.A. 250 (2008).

29. HYATT & FRENCH, *supra* note 20, at 33.

30. Condominiums need not be created at the time of development. Apartment buildings and cooperatives can be “converted” into condominiums. *Id.* at 38.

31. *Id.* at 32.

32. *Id.* at 33.

33. See Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 47-48 (1990).

34. Barton & Silverman, *supra* note 11, at 6.

ten mirror the powers and duties of the condominium association and its management entity, the condominium board.³⁵

2. The Functions, Powers, and Governing Structure of a Condominium Association

Condominium associations exercise an enormous amount of control over the individual property units, common property, and the behavior of residents. Association covenants and use restrictions govern issues such as parking, alterations to individual units, pets, and even the outward appearance of units, such as the color of residents' front doors. The Restatement (Third) of Property offers an expansive definition of condominium association power predicated on the notion that associations have near-plenary authority unless otherwise specified by statute:

In addition to the powers granted by statute and the governing documents, a common-interest community has the powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in the declaration. . . . Except as otherwise specified by statute . . . the community's powers may be exercised by majority vote.³⁶

A famous case demonstrating the broad authority of an association is *Nahrstedt v. Lakeside Village Condo. Ass'n*,³⁷ in which a condominium resident was denied relief after the community association discovered cats in her unit in violation of a recorded covenant. In denying Nahrstedt's challenge to the restrictive covenant, the Supreme Court of California stated that "[g]enerally, courts will uphold decisions made by the governing board of an owners association so long as they represent good-faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy."³⁸ Association authorities may restrict relatively superficial aspects of unit ownership. Association powers also can impinge upon what some consider fundamental incidents of property ownership, such as the transfer of interests³⁹ or the right to privacy.⁴⁰

35. Condominium associations may be incorporated as nonprofit corporations, in which case they must file articles of incorporation with the Secretary of State of their jurisdiction detailing the general purposes and powers of their association. In general, such articles of incorporation are not as detailed as the CCRs. For a discussion of the distinction between articles of incorporation/declarations and bylaws, see HYATT & FRENCH, *supra* note 20, at 32-33.

36. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.4 (2000).

37. 878 P.2d 1275 (Cal. 1994).

38. *Id.* at 1282 (citation omitted).

39. See *Mission Shores Ass'n v. Pheil*, 83 Cal. Rptr. 3d 108 (Cal. Ct. App. 2008) (upholding a reduction of the percentage of votes necessary to amend a CCR and finding "reasonable" an amendment thereof that restricted a unit owner's ability

The day-to-day provision of services, collection of association dues, and enforcement of rules are managed by the “condominium board.” Board members are elected exclusively by and from among association members.⁴¹ Critical for purposes of this Note, votes to amend CCRs and bylaws, as well as to elect members of the board, are typically allocated on a basis proportional to *ownership* in the community,⁴² not residency. Renters do not have a vote in the election of board members and thus do not have a voice with respect to changes in the CCRs and bylaws or the day-to-day governance of the condominium and its common property.

3. Financing and Enforcement in a Condominium

A feature of all condominiums is the obligation of their owners to pay association dues. Condominium associations have “the power to raise the funds reasonably necessary to carry out [their] functions by levying assessments against the individually owned property in the community and by charging fees for services or for the use of common property.”⁴³ The power of community associations to levy such private taxes on their members is controversial and can lead to a variety of problems between individual unit owners and the collective association or board.⁴⁴

to lease her property for certain periods of time); *Villas West of Willowridge Homeowners Ass’n v. McGlothlin*, 885 N.E.2d 1274 (Ind. 2008) (upholding a covenant prohibiting the renting of individual units because the association asserted a legitimate, nondiscriminatory reason for the covenant, stating that the exclusion of renters helped maintain property values because renters did not maintain homes as well as owners).

40. See *Cohan v. Riverside Park Place Condo. Ass’n*, 365 N.W.2d 201 (Mich. Ct. App. 1985) (allowing members of a condominium association board to inspect the common and limited common elements of a unit).
41. See, e.g., FLA. STAT. § 718.112(2)(d)(1) (2008) (“Any *unit owner* desiring to be a candidate for board membership shall comply with subparagraph 3.”) (emphasis added); UNIF. COMMON INTEREST OWNERSHIP ACT § 2-107 cmt. 7, 7 U.L.A. 291 (2008) (“[T]he declaration might provide that *each unit owner would have an equal vote* for the election of the Board of Directors.”) (emphasis added); HYATT & FRENCH, *supra* note 20, at 172 (“Traditionally . . . tenants have not been given the right to vote, serve on committees or boards, or otherwise participate in community governance.”).
42. Votes are usually allocated on a one-to-one basis for every unit owned, but in certain circumstances voting rights are allocated by square footage or some other proportional metric of ownership. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.17 & cmt. a (2000).
43. *Id.* § 6.5. Certain statutes, furthermore, explicitly establish the obligation to pay assessment fees.
44. See, e.g., *Forest Villas Condo. Ass’n v. Camerio*, 422 S.E.2d 884 (Ga. Ct. App. 1992); *Rivers Edge Condo. Ass’n v. Rere*, 568 A.2d 261 (Pa. Super. Ct. 1990).

Condominium association dues are distinct from local property taxes, which each unit owner must pay based on the assessed value of her overall interest in the property. And, unlike property taxes, funds paid towards dues are not deductible from federal or state income tax.⁴⁵ Association dues typically are spent on maintenance and improvements to common property and a variety of services, such as private trash collection, window washing, or the installation of new amenities. The affirmative covenant to pay dues, established in the condominium declaration, is an independent covenant that runs with the land and is binding on all successors-in-title.⁴⁶ Condominium governing documents typically provide for both “regular” and “special” assessments; the latter are “used to deal with unanticipated expenses”⁴⁷

Condominium boards have the power to enforce association covenants and rules, including the payment of dues, through a variety of means. These bodies are authorized to place liens on unit owners’ property; however, less severe mechanisms, such as the suspension of amenity privileges or voting rights, are also available.⁴⁸

B. *The Benefits of Condominium Ownership*

The condominium form has at least four advantages for individuals who wish to own residential property in an urban environment, as opposed to purchasing a free-standing home—a limited and expensive commodity in most urban areas—or renting a unit in an apartment building. First, condominiums create efficiencies by allowing for specialization in management functions and the pooling of resources to provide “amenities and facilities . . . that are valued by the members . . . but which none of them would find it worthwhile to fund and manage on their own.”⁴⁹ Condominium owners combine resources to provide for community-wide services, such as pool maintenance, gardening, or the decoration of common areas. Economies of scale allow for the value maximization of the property interest.

Second, and closely related to efficiency maximization, condominium associations can be responsive to the local needs of their constituents. Ellickson, a proponent of localized governance,⁵⁰ views the rise of urban property owner-

45. HYATT & FRENCH, *supra* note 20, at 271.

46. See, e.g., *Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938); see also David E. Grassmick, *Minding the Neighbor’s Business: Just How Far Can Condominium Owners’ Associations Go in Deciding Who Can Move into the Building?*, 2002 U. ILL. L. REV. 185, 187-88.

47. HYATT & FRENCH, *supra* note 20, at 273.

48. *Id.* at 303-04.

49. Fennell, *supra* note 12, at 841-42.

50. See e.g., Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 82 (1998) (finding that “[s]mall institutions may outperform larger ones for a

ship associations as a positive development analogous to the role of municipal governments. The voluntary nature of private condominium associations, in which unit owners consciously opt into the governance regime “enables households that have clustered their activities in a territorially defined area to enforce rules of conduct, to provide ‘public goods’ . . . and to pursue other common goals they could not achieve without some form of potentially coercive central authority.”⁵¹ This benefit can take the form of “social or associational” gains, achieved through covenants that “serve a population-screening function.”⁵²

Third, condominiums allow property owners to exhibit specialized preferences, enforcing idiosyncratic covenants that the majority deems optimal.⁵³ These specialized preferences may be relatively superficial in nature, such as requirements restricting the varieties of trees an owner may plant.⁵⁴ On the other hand, restrictions may implicate core incidents of ownership. For instance, as noted above, the CCR of a given condominium may restrict a unit owner’s right to keep pets⁵⁵ or allow association members to search a unit for CCR violations⁵⁶—activities that are considered part of the property owner’s gatekeeper authority.

Fourth, the condominium’s hybrid property form provides for community-wide services and aesthetic preferences while simultaneously allowing unit owners to enact their personal preferences within individual units. This “customization advantage” allows a unit owner to, for instance, remodel her kitchen while reaping the benefits of standardization in common areas. Renters in managed apartment complexes typically will be unable to make substantial changes to their individual units either because the terms of their leases prohibit the practice or because insufficient incentive exists for landlords to make customized changes due to the relatively short residency of the average tenant.

number of reasons. First, micro-institutions seem to be efficiently scaled to produce the most localized varieties of public goods.”).

51. Ellickson, *supra* note 5, at 1519-20.

52. Fennell, *supra* note 12, at 842.

53. *See id.* at 843 (referring to this concept as “premium ambience” and stating that “[r]esidents in private developments purchase premium ambience by ceding property rights of their own, both directly through acceptance of reciprocal restrictions on their own land, and indirectly through the installation of a governance regime with the power to alter and enforce the prevailing land use controls”).

54. *See, e.g.,* Ironwood Owners Ass’n IX v. Solomon, 224 Cal. Rptr. 18 (Cal. Ct. App. 1986) (finding that the removal of palm trees would have been reasonable if the association had followed its own procedures and processes).

55. *See* Nahrstedt v. Lakeside Vill. Condo. Ass’n, 878 P.2d 1275 (Cal. 1994) (upholding a covenant disallowing pets inside condominium units).

56. *See* Cohan v. Riverside Park Place Condo. Ass’n, 356 N.W.2d 201 (Mich. Ct. App. 1985).

C. Sources of Law Governing Condominiums

Common-interest communities exercise a great deal of control over their members, but this control is not limitless. The law of servitudes, state condominium statutes, and the promulgations of bodies such as the National Conference of Commissioner on Uniform State Laws all shape the legal framework within which condominium associations operate.⁵⁷ Condominium statutes are particularly significant because they may set specific limits on home owners' use of their property, the actions of condominium associations, and the governance structure of the association.⁵⁸

Condominiums are a blend of property and contract law. The declaration, CCR, and bylaws are the primary sources of law that govern the relationship among association members.⁵⁹ Courts typically enforce condominium covenants, viewing them as "an agreement to refrain from a particular use of land [that] is subject to contract principles, under which courts try to 'effectuate the legitimate desires of the covenanting parties.'"⁶⁰

Condominiums, furthermore, are subject to state statutes. Every state has at least one statute governing the practice of condominiums or common-interest communities. As a result, the National Conference of Commissioners on Uniform State Laws promulgated a number of model acts designed to bring uniformity to the statutes governing these property forms.⁶¹ The statutory treatment of condominium associations will be considered in Part III. For now, it suffices to say that as condominium ownership has increased across the country, so too has the substantive scope of condominium statutes.

Finally, despite the proliferation of statutes governing condominium associations, the common law has played an important role in determining the standards of judicial review applicable to association and board actions as well as the legality of condominium covenants. The courts, generally speaking, are highly deferential to certain decisions of condominium associations and boards. In determining whether an association has abused its power, courts analogize to other areas of law, the standards of which have been imported into the condominium context.⁶² Some courts have looked to public law or constitutional principles to guide their decision-making; however, because ownership in a

57. See Fennell, *supra* note 12, at 837.

58. *Id.*

59. HYATT & FRENCH, *supra* note 20, at 177.

60. *Nahrstedt*, 878 P.2d at 1286 (quoting *Hannula v. Hacienda Homes*, 211 P.2d 302 (Cal. 1949)).

61. See *infra* Section III.A.

62. See Natelson, *supra* note 33, at 48-49.

condominium complex is considered to be a reasoned choice, whereas membership in a body politic is not, public law standards largely are disregarded.⁶³

Instead, the courts have settled on two standards of review: the business judgment rule and a reasonableness standard. The business judgment rule⁶⁴ is commonly applied in “cases arising from the Board’s exercise of its business responsibilities.”⁶⁵ In *Levandusky v. One Fifth Avenue Apartment Corp.*, the New York Court of Appeals held that “the business judgment rule furnishes the correct standard of review”⁶⁶ when determining the legality of a use restriction imposed on an owner by the association. In *Levandusky*, a resident of a cooperative—a closely related form of community association property—sought to remodel his kitchen. The proposed remodeling required that the resident move a steam pipe in his unit, which, if done without association approval, would be in violation of Levandusky’s lease. Although informed by an engineer that moving the steam pipe would be technically feasible, the association issued a stop work order that led to litigation between the parties.⁶⁷

Initially, the trial court granted Levandusky’s petition and annulled the stop work order. After balancing the hardship of reversing the work completed on Levandusky’s kitchen against the harm to the building, the court determined that the association’s work stop request was “arbitrary and capricious.” The court reversed its decision on rehearing and Levandusky appealed.⁶⁸

Analogizing to the decisions of corporate directors, the Court of Appeals held that the decisions of association boards should be upheld so long as they were “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.”⁶⁹ In overruling the lower court’s decision, the court explicitly rejected a reasonableness standard for determining the validity of association actions. The court noted that “unlike the business judgment rule, which places on the owner seeking review the burden

63. See *id.* at 49 (“Precedents applicable to governmental decision-making do not apply very well . . . because submission . . . is ‘perfectly voluntary,’ while submission to government is imperfectly so.”).

64. The “business judgment rule” is a standard derived from the law of corporations, holding that the decisions of corporate directors and other governing officials will be upheld unless arbitrary and capricious. This rule requires the presence of fraud or lack of good faith in the conduct of a corporation’s internal affairs before the decisions of a board of directors can be questioned. See *Shlensky v. Wrigley*, 237 N.E.2d 776, 779-80 (Ill. App. Ct. 1968).

65. HYATT & FRENCH, *supra* note 20, at 217.

66. 553 N.E.2d 1317, 1318 (N.Y. 1990); see also UNIF. COMMON INTEREST OWNERSHIP ACT prefatory n.11, 17 U.L.A. 442 (1994).

67. *Levandusky*, 553 N.E.2d at 1319.

68. *Id.* at 1319-20.

69. *Id.* at 1321 (quoting *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979)).

to demonstrate a breach of the board's fiduciary duty—reasonableness review requires the board to demonstrate that its decision was reasonable.”⁷⁰

Despite its rejection in *Levandusky*, courts widely apply the reasonableness standard in evaluating association covenants.⁷¹ The applicability of a reasonableness standard to condominiums depends upon one's view of such communities.⁷² If one views entry into a condominium association as entirely voluntary, courts may find that the business judgment rule is appropriate. If, however, the covenant under consideration implicates a core value of personhood, such as the freedom of expression, or the covenant restricts what the court considers a fundamental incident of ownership, courts *may* subject the association to the higher reasonableness standard.⁷³ In determining when courts apply each rule, the business judgment rule is “most traditionally seen in cases arising from the board's exercise of its business responsibilities,” whereas the reasonableness standard is “seen in cases generally characterized as part of the ‘governmental’ powers of the community association.”⁷⁴ There are no bright line rules governing the application of these two standards.⁷⁵

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70. *Id.* at 1322. For further discussion of the application of the business judgment rule to community association decisions, see Jeffrey A. Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Rule*, 64 CHI.-KENT L. REV. 653 (1988).
71. See Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 348 (1998); see also *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (relying on the reasonableness standard to enforce a condominium covenant banning alcoholic beverages from certain common areas).
72. See Hyatt, *supra* note 71, at 343 (highlighting the debate between those who believe that although community associations resemble towns or municipalities, “they are neither and should not be analyzed from the governmental perspective but rather from the corporate perspective,” and those who believe that applying the corporate governance principles is detrimental to residential communities and will fail to protect “rights and political discourse within the community association”).
73. See *id.* at 350-51; see also *Hidden Harbour Estates*, 393 So. 2d at 637 (finding that a condominium's ban on dogs that exceed a certain height or weight requirement was unreasonable).
74. HYATT & FRENCH, *supra* note 20, at 217.
75. For additional material regarding the variety of defenses to the enforcement of CCRs, rules, and regulations, see HYATT & FRENCH, *supra* note 20, at 426-36.

II. THE INCOMPATIBILITY BETWEEN RESIDENTIAL LEASING AND MODERN CONDOMINIUMS

Despite increasingly common practice, there is no evidence to suggest that condominiums were designed as a secondary, income-generating property.⁷⁶ In fact, the condominium form is designed for the benefit of long-term owner-residents. Nevertheless, the Department of Housing and Urban Development notes that of the roughly 6.4 million occupied condominium units in America today, about 2.1 million are occupied by renters.⁷⁷ This statistic not only reflects increased reliance on condominiums as investment opportunities but also the general trend of new property being developed in the common-interest community form.⁷⁸ In short, it is increasingly difficult for urban renters to lease outside of the condominium form.⁷⁹

This Part argues that residential leasing in a condominium community is in conceptual tension with the “traditional” leasehold property interest. Today, about 2.1 million Americans are entering into residential leases—binding contracts—without an adequate appreciation for how their property rights will differ from more traditional rental agreements. After considering the nature of residential leases in a condominium, as opposed to other property environments, this Part critically examines the sufficiency of notice available to prospective condominium lessees. This Part further proposes both that renting in a condominium prevents the efficient allocation of renter preferences and that the legal regime provides associations the opportunity to institute exploitative covenants to the detriment of the renting class.

76. See generally Aaron M. Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1104-10 (1969) (“The growth of this blend of private and communal housing has been spurred by many causes. Foremost is the flight to the suburbs of affluent home buyers. . . . Only a small portion of these home buyers could, however, afford to purchase a house complete with its own extensive recreational facilities and green areas. . . . The feasibility of constructing attractive one family homes by use of the cluster concept and newer techniques of construction, at a cost which compares very favorably with multi-family housing, can bring closer to realization the goal of the Housing and Urban Development Act of 1968 and of the National Housing Act: to provide homes for moderate income groups which have heretofore been unable to afford to own their own homes.”).

77. AMERICAN HOUSING SURVEY, *supra* note 2, at 1.

78. See GARY W. ELDRÉD, *MAKING MONEY WITH CONDOMINIUMS AND TOWNHOUSES* 12 (2003).

79. See, e.g., Hyatt, *supra* note 71, at 351 (noting a “lack of alternative housing” due to the increased popularity of common-interest communities in the marketplace).

A. *The Traditional Leasehold Interest Versus Residential Leasing in Condominiums*

The property form has evolved considerably since its feudal origins;⁸⁰ nevertheless, fundamental characteristics remain. Lord Templeman's famous opinion in *Street v. Mountford*⁸¹ succinctly captures the essence of a "traditional" leasehold interest as "that arrangement which gives a person *the right of exclusive possession in land*, for a term, at a rent."⁸² Leaseholds, therefore, pass the gatekeeper function commonly associated with fee simple ownership from the lessor to the lessee for a period of time. Subject to the requirement that a lessee pay her rent, when a lessor rents a single-family detached home for a one-year period, the lessor transfers the gatekeeper right subject to certain restrictions provided, *in advance*, in the lease. This arrangement sounds in the traditional conception of a leasehold interest in real property: a contract between the two parties, and the two parties alone.

Leasing a unit in a managed apartment building or a single-family detached home differs considerably from leasing a unit in a condominium. These variations in rights and privileges matter considerably when the property regime provides insufficient notice to prospective lessees regarding differences that affect the use and enjoyment of the property. This Section highlights some of those distinctions.

1. The Duties and Privileges of Renters in a Condominium

Renters in a condominium complex are afforded some of the same rights and privileges of the ownership class but also are subject to many of the same duties and use restrictions. First, the covenants contained within the unit owner's deed generally run with the land,⁸³ which means that property use restrictions apply to the property itself, regardless of who lives in the unit. Therefore, in addition to the lease terms governing the lessee's rights and obligations within the "airspace of the unit," the lessee is subject to most, if not all, of the covenants governing the ownership class.⁸⁴ Second, renters in condominium asso-

80. See MERRILL & SMITH, *supra* note 3, at 546-48.

81. [1985] 1 A.C. 809 (H.L.) (appeal taken from Eng.).

82. MARTIN DIXON, *MODERN LAND LAW* 197 (2005) (emphasis added); see also MERRILL & SMITH, *supra* note 3, at 742 ("Under a lease, possession of the property . . . shifts from the lessor to the lessee. Thus, during the term of the lease, the lessee acts as the general gatekeeper of the property, and can exercise the in rem rights of exclusion that we associate with possession of property.").

83. WAYNE & HYATT, *supra* note 20, at 10.

84. See, e.g., FLA. STAT. § 718.303(1) (2008) ("[E]ach . . . tenant and other invitee . . . shall be governed by, and comply with the . . . declaration, the documents creating the association, and the association bylaws . . ."); see also UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102(d), 7 U.L.A. 335 (1994).

ciations are not members of the association and therefore do not typically have a voice in condominium governance or a vote on the covenants to which they are subject.⁸⁵ Whereas a landlord does not have the authority to unilaterally alter terms in the middle of a lease, Condominium Boards and Associations can pass binding CCR or bylaw amendments during a renter's residency term.

Third, not only do restrictive covenants apply to the lessee during his or her tenancy, but the enforcement authority of the association applies equally to tenants as to unit owners.⁸⁶ Enforcement mechanisms vary. For instance, condominium associations may hold a lessee liable for the damage caused to common area property.⁸⁷ Community associations also possess the power to evict lessees for violations of community CCRs.⁸⁸

The standards of judicial review⁸⁹ also are thought to apply to renters. Renters, therefore, are protected—just as unit owners are—from facially discriminatory or unreasonable covenants. Like the relatively low common law standard that often determines covenant legality in the context of individual unit owners, the business judgment rule standard may similarly govern the review of covenants imposed upon renters. This is particularly true if the covenant is cast as an exercise of the day-to-day business authority of the association board. In those situations covenant and/or condominium policy changes that affect the renter's interest in the property will be upheld regardless of whether the renter anticipated such a change when signing the original lease.

2. The Renter as a Circumscribed Gatekeeper

One critical difference between a lessee in a condominium and a lessee renting a single-family home is the former's circumscribed gatekeeper authority during the period of tenancy. The renter of a condominium unit is subject to the numerous covenants and bylaws of the association in addition to specific lease terms negotiated between the renter and the individual unit owner. The existence of a continuous, governing authority with the power to amend and enforce the rules governing the common property of the condominium necessarily limits a lessee's gatekeeper authority as understood in Lord Templeman's opinion. It is of course possible for a lessor outside the condominium domain to subject his or her lessee to numerous lease provisions that restrict gatekeeper

85. See UNIF. COMMON INTEREST OWNERSHIP ACT § 3-101, 7 U.L.A. 332 (1994) ("The membership of the association at all times consists exclusively of all unit owners.").

86. *Id.* § 3-102(d); see also HAW. REV. STAT. § 521-3(d) (2006); 765 ILL. COMP. STAT. 605/9.2(a) (2009).

87. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102(d), 7 U.L.A. 333 (1994).

88. See, e.g., *Carter v. Willowrun Condo. Ass'n*, 345 S.E.2d 924 (Ga. Ct. App. 1986) (finding that the condominium association had a statutory right to evict the tenant for violation of the governing documents or the association's rules).

89. See *supra* Section I.C.

authority. The four corners of the lease agreement, however, bound such provisions and provide explicit, *ex ante* notice.

This circumscribed gatekeeper authority results from a problem unique to renting in a condominium, namely that the lessee, in effect, enters into two agreements. Condominium owners hold their units in fee simple, but hold all common areas as tenants in common subject to the requirements of the CCR and the bylaws. Unit owners cannot transfer the *full* gatekeeper authority, because it is impossible for a lessee to gain a leasehold interest in the unit without also requiring an interest in the common areas. The simplest illustration of this idea is a lessee who rents a condominium unit on the second floor of the building. In order to access the unit the lessee must pass through the building lobby, ascend the stairs, and walk down a hallway, all of which are common areas under the control of the condominium board and association.

Thus, renters in a condominium do not negotiate a contract between A (the lessee) and B (the lessor) whereby the incidents of fee simple ownership are passed from B to A for a period of time. Instead, A negotiates a lease with B, but B is not empowered to transfer fully the ownership interest in the common property, property that must be accessed in order to enjoy the benefits of the unit. A therefore does not receive the “exclusive right of possession” to which Lord Templeman referred.

3. Multi-Party Contracting: Who Is My Landlord?

Another conceptual tension between traditional residential leasing and condominium leasing is that the identity of the landlord in the latter remains less clear. Traditionally, a renter leases property from the owner who in turn becomes the renter’s landlord. The owner transfers a possessory interest to the renter, complete with gatekeeper authority, but often provides ongoing managerial functions either directly or through an agent, such as a property management company. This arrangement is commonplace. A renter will call his or her landlord if, for instance, the sink malfunctions. The unique structure of condominium ownership as a blend of both fee simple and common ownership forms nevertheless obscures the notion of the unit owner as “landlord” in a condominium.

Condominium associations require, for the most part, that unit owners respond to the needs of their tenants with respect to problems arising from the unit, such as a leaky kitchen faucet. Associations, however, do not necessarily specify how the lessee should address problems that arise outside the unit’s four walls. This problem is exacerbated by the fact that many unit owners, particularly those who purchased condominiums as investment properties, are absentee landlords residing elsewhere, perhaps even in another jurisdiction. If a lessee wishes to rectify a problem regarding an aspect of the common property, the tenant may have to rely largely on the unit owner—the bona fide member of the association—unless there is a mechanism through which the lessee can in-

teract with the condominium board.⁹⁰ The ownership class certainly maintains a vested interest in correcting problems with the common property, because they use it alongside renters. If, however, certain common property areas are utilized more frequently by renters, the condominium board, which is comprised exclusively of owners living in the building, may be less inclined to resolve problems affecting that property relative to other areas.

4. Information Asymmetry

Related to the nebulous landlord-tenant relationship, lessees in a condominium have relatively less access to information *ex ante* than prospective renters in an apartment building. First, reputational information about the landlord is easily accessible in an apartment complex, as each resident shares the same landlord-tenant relationship. A prospective lessee may inquire about the building and services from current residents, all of whom have some experience with the singular landlord. In a condominium setting, however, prospective lessees gain little insight about their landlord by conferring with other tenants in the building, as the landlord-tenant relationship in a condominium is much more individual in nature. In a condominium building comprised of one hundred units, fifty of which are occupied by renters, each renter may have a different landlord. The unit owners, furthermore, may not live in close proximity to the condominium and may never meet their prospective tenants face-to-face.

Prospective lessees in an apartment can obtain informal clues that provide information about the likely characteristics of the building owner or manager as landlord. A prospective tenant can, in examining multiple units, better judge the responsiveness of the apartment owner and notice building-wide defects and in turn draw reasonable conclusions about the prospective lessee's renting experience if they were to choose that property.

B. *Insufficiency of Notice*

Notice is inextricably linked to one's understanding of consent. The substance and scope of a condominium association's powers are vast, and it often is the case that individuals who *purchase* condominiums are not fully aware of the governance structure and servitude regime in which they invest.⁹¹ This Section

90. See, e.g., *Frisch v. Bellmarc Mgmt., Inc.*, 597 N.Y.S.2d 962, 963 (App. Div. 1993) (holding that the lessee's warranty of habitability does not apply to condominium associations or boards because "condominium ownership is a form of fee ownership of property, and not a leasehold interest involving a landlord-tenant relationship").

91. See Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S L. REV. 75, 79 (1999) ("Unfortunately, purchasers often 'gloss over' restrictions that directly impact their private use and enjoyment of the unit and the common areas within the building or community.").

posits that renters, who are equally subject to the governance and servitude regime of the condominium, receive even less notice than purchasers.

There is reason to believe that considerable ignorance persists among purchasers in the marketplace.⁹² As Scott E. Mollen observes:

Many unit purchasers have previously lived in rental apartments or private homes and have never experienced the types of restrictions imposed upon them in a condo Accordingly, many purchasers do not focus upon such restrictions until after they have sold or vacated their prior residence . . . and settled into their new home.⁹³

Ignorance of the condominium form also follows from the fact that perhaps the “most common defense of nonpayment of assessments is the argument that the owner did not know about it, that she was not told of it when she purchased.”⁹⁴ These defenses typically fail on the grounds that, even in the absence of express notice of CCRs at the time of conveyance, purchasers have ample constructive notice, as common-interest community declarations and CCRs are recorded.⁹⁵

Relying on constructive notice to enforce servitudes against an “ignorance defense” makes legal and practical sense. Individuals purchasing homes in a condominium will, in the process of determining the status of title, come across the declaration and the CCR document. Although these documents together do not necessarily provide the entire picture (since, for example, bylaws need not be recorded),⁹⁶ they constitute a sufficient prompt for prospective owners to investigate the association and its property covenants in further detail. In this respect, purchasers consent to the rules and regulations that govern property owners in the community as well as the association’s enforcement authority. Notice is critical to the underlying legality of the rights and duties granted to

92. See Natelson, *supra* note 33, at 62 (citing Vivian Walker, *Striking the Balance: The Development of Social Control in Condominium Associations* (June 1984) (unpublished Ph.D. dissertation, Northwestern University) (on file with the Yale Law & Policy Review) (finding, based on an empirical study of the Illinois condominium market, that few condominium unit purchasers adequately understand the effects of governing documents prior to purchase). *But see* STEVEN WILLIAMSON & RONALD ADAMS, *DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA* (1987) (finding based, on an empirical study of the Florida condominium market, that knowledge of the servitude regime was a primary reason why unit owners purchased their condominiums).

93. Mollen, *supra* note 91, at 79-80.

94. HYATT & FRENCH, *supra* note 20, at 304.

95. See *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1328 (Cal. 1995) (“We merely reject the unexamined assumption that the intent of the purchaser, and therefore the agreement itself, must be expressed in the deed rather than be implied from the purchase with knowledge of the recorded restrictions.”).

96. HYATT & FRENCH, *supra* note 20, at 32.

condominium associations and their boards. Robert G. Natelson observes that “[m]odern courts often justify servitude provisions, including grants of discretionary power to associations, on the basis that members consented to those provisions when they purchased their units.”⁹⁷ The basic idea is that buyers should not be bound to the terms of a covenant of which they were not aware.

Scholars disagree as to whether the recordation system⁹⁸ provides adequate notice of servitudes to buyers. Gregory Alexander argues that the recordation system is an insufficient proxy for determining a buyer’s consent to property governed by servitudes. He states that “[s]everal reasons make notice alone an insufficient guarantee of choice. One immediate reason, the purchaser who acted without actual notice that the land she purchased was affected with an obligation may still be held to have had notice.”⁹⁹ Alexander is particularly wary of constructive notice: “If we base an inference of consent on this type of notice we greatly diminish the meaning, and the normative power, of consent.”¹⁰⁰

Richard Epstein, on the other hand, strongly supports the recordation system as a sufficient guarantee of notice regarding condominium covenants, stating that “[t]he system of recordation is an indispensable aid for the effective use of any form of covenant.”¹⁰¹ He believes, furthermore, that “the recording system renders unnecessary many of the arcane features of the law of covenants,” such as the requirement that they “touch and concern” the land.¹⁰² In considering the potential “gaps” in information that exist even when recordation is the norm, Epstein notes that in certain cases “the rules of ‘inquiry notice’ may re-

97. Natelson, *supra* note 33, at 54.

98. The “recordation system” is a term of art in property law that refers to the system of public records that provides the world with constructive notice regarding the transfer of title in real property. For a detailed discussion of the benefits and drawbacks of the recordation system, see Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 305-06 (1984) (“The recording system has the effect of reducing the uncertainty surrounding a transfer of real property without undermining the consensual nature of those transfers. . . . But not all types of property are equally suited to an informational system based on files.”).

99. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 892 (1988).

100. *Id.* at 893.

101. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 908 (1988).

102. *Id.* at 909. Covenants that “touch and concern” are either restrictive or affirmative covenants that burden or benefit subsequent owners. The covenant applies to the use of real property and attaches to that property so as to similarly affect all owners in the future.

quire purchasers under common building plans to draw inferences of covenants that are not recorded.”¹⁰³

Natelson criticizes the differing standards of adequate consent to a servitude regime as espoused by both Epstein and Alexander. Natelson believes that Alexander sets “unrealistic standards for acceptance,” whereas Epstein “overestimates the power of legal notice to bring facts to the attention of the unit purchaser.”¹⁰⁴ Natelson also describes many recordation systems as so “poorly organized,” “overloaded,” and “incompetently operated as to be of limited utility.”¹⁰⁵

More fundamentally, Natelson posits that one does not “assent” to a servitude regime merely because it was possible to learn that it exists. Rather, one assents to a situation or condition “when one affirmatively accepts it while knowing of it or, although ignorant of the details, makes a conscious decision to proceed without information that one knows to be available at little effort or cost.”¹⁰⁶ Natelson’s characterization is adopted here. Effective consent therefore requires actual notice of critical facts, including the existence of a scheme of land governance, the existence of a condominium association, the content of regulations on the date of purchase, and the scope of the association’s power to alter the regulatory regime in the future.¹⁰⁷

Whether or not recordation notice and inquiry notice provide prospective condominium *purchasers* with adequate notice remains an open question. These theories of notice clearly do not provide prospective *renters* with adequate notice. In an urban setting, for instance, distinguishing a high-rise apartment building from a condominium complex according to architectural style is an often fruitless exercise. Therefore, a prospective renter might not be subject to inquiry notice based on the design of the property. Renters also do not ordinarily comb the public record to examine the title of the individual from whom they lease the property. As a result, the argument that recordation provides constructive notice does not apply with equal force to renters.

In light of the uncertainty evidenced among buyers and the inapplicability of inquiry and recordation notice to renters, one might reasonably infer that the level of notice available to renters entering a condominium is less than that available to owners. This insufficiency of notice is a serious concern that extends beyond normative desires to ensure that people adequately consent to a servitude regime or the authority of private democracy.

103. *Id.* at 911; *see, e.g.*, *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (enforcing an implied covenant).

104. Natelson, *supra* note 33, at 56.

105. *Id.* at 59.

106. *Id.* at 59-60.

107. *Id.* at 61.

C. *The Impact of Insufficient Notice on Condominium Lessees*

The economic goals and preferences of the renter will not always coincide with the long-term interests of the unit owner. This is, in fact, one of the primary arguments made against extending association voting rights to tenants.¹⁰⁸ The critiques of common-interest community practices therefore focus on principles of fairness, equal representation, and constitutional rights by analogizing the rule-making and enforcement power of the condominium association to that of a local government.¹⁰⁹ This Section advances two additional critiques heretofore unexamined in the literature. First, due to insufficient notice, the ability of condominium associations to subject renters to a changing covenant regime over the course of their tenancy prevents renters from efficiently realizing their preferences in the housing market. Second, and more closely related to the equal representation and fairness critiques, the condominium governance regime, subject to the business judgment rule standard, allows unit owners to institute exploitative covenants against lessees.

1. Preference Inefficiency

Lessees are aware of the privileges, duties, restrictions, and amenities guaranteed by their lease contract when renting in an apartment complex. When choosing where to live, renters therefore can calculate how much they wish to pay in light of certain amenities, services, or use restrictions imposed by the lease agreement. Renters generally are assured by their lease agreement that their living conditions will remain constant, and, if the terms of the lease are breached, the renter reserves remedial options predicated on the model of dependent covenants. Renters in a condominium setting have no such ex ante guarantee. Even assuming that renters possess sufficient notice of all covenants and use restrictions at the time of lease signing, which, as argued in Section II.B, is an unrealistic assumption, “[c]hanges in the CC&Rs are possible . . . through amendment procedures set out in the declaration itself The result is a two-tiered set of restrictions: those initially contained in the CC&Rs that were part of the declaration and new restrictions adopted later.”¹¹⁰

Because renters in a condominium are subject to the same covenants and use restrictions as unit owners, the possibility that such restrictions will change during the period of tenancy—without renters having a vote in such change—makes it very difficult for renters to realize their preferences in the housing market. Obligation to altered property restrictions chosen by the ownership class is not problematic per se; however, without sufficient notice prospective

108. HYATT & FRENCH, *supra* note 20, at 172.

109. These critiques focus on individual unit owners under the authority of the condominium association; however, these critiques might apply equally to lessees within the condominium.

110. Fennell, *supra* note 12, at 838.

renters cannot factor covenant and amenity fluidity into their market calculation. In this respect, notice is very important. Natelson states that a purchaser of a condominium unit, *who has knowledge* of its owners association's discretionary powers, accepts "the risk that the power may be used in a way that benefits the commonality but harms the individual."¹¹¹ Notice that land use restrictions may change at any time allows purchasers to factor such risk into their decisions whether or not to purchase a unit. Although a tenant may be aware of certain land use restrictions at the date of signing, she nevertheless may be unaware that those restrictions can change halfway through the lease term.

Consider a simple example. T. Woods wishes to lease a unit in an urban, high-rise building for one year. Among the amenities that Woods prefers is a putting green. There are two buildings in the city that have rooftop putting greens: One is a traditional apartment complex, and the other is a condominium. Mr. Woods—an average, unsophisticated renter—is unaware of the covenant regime and governance structure of the condominium and leases a unit in the condominium as opposed to the apartment complex. The day after Mr. Woods moves into his unit the association votes to transform the rooftop putting green into a garden. In this case, the association's action is good business judgment, reasonable, and taken pursuant to the declaration and bylaws. Although Mr. Woods no longer derives nearly as much utility from the property, he nevertheless is bound to remain for the period of his tenancy.

Consider another tenant with specific amenity preferences. M. Phelps desires that his residence include a pool. All else equal, Phelps values a residential lease that includes pool access at \$1000 per month and a lease without pool access at \$500 per month. Mr. Phelps's rental market includes two leasing options with pools, one managed apartment building and one condominium, each leasing units for \$1000 per month. Without notice of the possibility that property uses, such as pool access, can be restricted or eliminated in a condominium, Mr. Phelps signs a one-year lease in the condominium. The next month the association votes to remove the pool to free space for additional parking, an amenity from which Mr. Phelps derives no measurable utility. Fifty percent of the property's subjective value has been eliminated immediately; meanwhile, Mr. Phelps is obligated to remain in the unit.

Prospective tenants who are fully informed regarding the governance structure and the potential for changes in the amenities, services, or covenant regime can more accurately factor into their valuation the risk associated with condominium association leasing. Thus, if Phelps is extremely risk averse, he always will choose an apartment complex in which amenities and property use restrictions remain static for the life of the lease. If, alternatively, he has an intermediate risk profile, Phelps may be willing to lease a unit in a condominium, if and only if the monthly rent is discounted to, say, \$750. From a renter's perspective, a condominium system without adequate notice is at best inefficient and at worst a scheme through which inadequately informed renters may be deprived

111. Natelson, *supra* note 33, at 67.

of the value of their investment while living subject to a governance structure in which they have no voice.

2. Rent-Seeking Activity

The inability of lessees to guarantee their preferences for the duration of their lease agreement is the lesser evil along the continuum of potential ills. Because the interests of lessees and unit owners often are not aligned, the power asymmetry—reinforced by insufficient notice—creates opportunities for condominium associations to extract economic rents¹¹² not explicitly stated in the lease between the lessee and the unit owner. As noted in Section II.C, the standards that govern the rules and regulations associations may impose on their members provide associations with significant latitude. A covenant may be struck down under a reasonableness standard if it is found to be unconscionable or implicative of a fundamental value of personhood or property ownership. Board decisions that are framed as an exercise of commercial or day-to-day business authority, however, generally are upheld pursuant to the business judgment rule whereby the association need only articulate a reasonable business justification for imposing the covenant.¹¹³

A common form of rent seeking is the imposition of a “move-in/out” fee. A revenue-generating device for condominium associations, move-in/out fees disproportionately target lessees because they have a higher rate of turnover in a condominium relative to unit owners. These fees may be instituted halfway through a renter’s lease agreement by amending the bylaws or by passing a regulatory judgment at the level of the condominium board.¹¹⁴ The renter’s lease agreement likely will contain a provision stating the renter’s obligation to abide by the changing rules of the association, without explicitly referencing such fees. Tenants often are unaware that they are liable for such payments at the end of their lease; however, “[i]n the same way that a tenant must dispose of his garbage in accordance with the condominium’s guidelines, or comply with the limitations on the use of the common areas, he would have to pay the move-out fee”¹¹⁵

112. “Economic rent” refers to “a payment for the services of an economic resource which is not necessary as an incentive for its production.” JOHN BLACK, A DICTIONARY OF ECONOMICS 137 (1997). In the context of condominiums it refers to the opportunistic charge of monies to renters that are unnecessary for the production of the service that the renters consume.

113. See *supra* Section II.C.

114. See, e.g., *Reynolds v. Gateway Georgetown Condo. Ass’n*, 482 A.2d 1248, 1249 (D.C. 1984) (“[T]he Association instituted a ‘move-in/move-out fee’ and levied it against several . . . tenants, [and the] appellant . . . asserted that the assessment was illegal. . .”).

115. Posting of Jay Romano to Real Estate Q&A, <http://realestateqa.blogs.nytimes.com/2008/07/18/paying-moving-out-fees-in-a-rental-in-a-condo> (July 18, 2008 13:52).

III. THE STATUTORY TREATMENT OF RENTERS IN CONDOMINIUM ASSOCIATIONS

Statutes are a critical source of law governing condominiums. The fifty states, the District of Columbia, and Puerto Rico all have enacted legislation designed to govern the establishment, management, and dissolution of common-interest communities, and most jurisdictions have passed condominium-specific legislation. These statutes govern the legal operation of common-interest communities, set boundaries on the types of use restrictions and covenants that associations may impose upon their members, regulate the conversion of other property forms into condominiums, and address a range of other topics. Despite the broadening scope of condominium legislation, these statutes largely ignore the role of lessees, and, in particular, lack a clear notice requirement for renters leasing condominium property. In fact, most references to renters in condominium units address covenants restricting the unit owner's ability to transfer possessory interest in their property. The perspective of the renter is almost non-existent.

This Part will briefly survey the statutory landscape, highlighting the inadequacy of current legislation. Beginning with the Uniform Common Interest Ownership Act of 1994 (UCIOA), the subsequent Section examines the condominium statutes of a limited number of additional states, considering the manner in which they address the role of lessees in condominium communities and what, if any, notice is required prior to leasing a unit. The findings in this Part further demonstrate the need for the statutory notice requirement proposed in the Conclusion.

A. *The Uniform Common Interest Ownership Act of 1994*

The UCIOA, drafted by the National Conference of Commissioners on Uniform State Laws, "is a comprehensive act that governs the formation, management, and termination of a common interest community, whether that community is a condominium, planned community, or real estate cooperative."¹¹⁶ The UCIOA, which has been adopted by eight states,¹¹⁷ superseded and

EDT); *see also Reynolds*, 482 A.2d at 1252 (upholding the imposition of a move-in/move-out fee upon tenants).

116. National Conference of Commissioners on Uniform State Laws, *Uniform Common Interest Ownership Act (1994): Summary*, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ucioa94.asp.

117. Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, Vermont, and West Virginia have all adopted the UCIOA. *See UNIF. COMMON INTEREST OWNERSHIP ACT (1994)*; National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Common Interest Ownership Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucioa.asp (last visited Dec. 3, 2009). In 2008, the National Conference of Commissioners on

subsumed many older uniform acts, including the Uniform Condominium Act (UCA).¹¹⁸ The UCIOA originated, in part, because developers evaded the requirements of the UCA. According to the chair of the UCIOA drafting committee, developers in UCA states were creating “planned communities” and “vesting title to the elements [of the community] in the Association since the definition of condominiums under the condominium act excluded that.”¹¹⁹ The Commission on Uniform State Laws responded by creating the Planned Community Act and the Real Estate Co-op Act.¹²⁰ Eventually, the disparate acts were combined to create the UCIOA, which is designed to govern all forms of community property.¹²¹

The UCIOA was drafted with the needs of unit owners and developers in mind and therefore largely ignores the problems associated with renters of condominium units. Section 3-110(c), one of the few sections pertaining to lessors, governs the allocation and casting of votes within the condominium association. That section states in pertinent part:

If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units: (i) the provisions of subsections (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners.¹²²

The comments state that “[s]ubsection (c) addresses an increasingly important matter in the governance of common interest communities: the role of tenants occupying units owned by investors or other persons.”¹²³ Interestingly, despite the fact that “most present statutes require voting by unit owners,” the UCIOA

Uniform State Laws passed a series of amendments to the UCIOA, which have been adopted by Delaware and are pending adoption in other states.

118. The Uniform Condominium Act of 1980 has been adopted by the following twelve states: Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, and Washington. National Conference of Commissioners on Uniform State Laws, A Few Facts About the Uniform Condominium Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uca.asp (last visited Dec. 3, 2009).
119. Carl Lisman, Chair of the Drafting Comm. of the Unif. Common Interest Ownership Act, Remarks Before the Maryland Task Force on Common Ownership Communities (Jan. 23, 2006) (transcript available at <http://www.ahrc.com/new/index.php/src/news/sub/article/action/ShowMedia/id/2929>).
120. *Id.*
121. *Id.*
122. UNIF. COMMON INTEREST OWNERSHIP ACT § 3-110(c) (1994).
123. *Id.* § 3-110 cmt.

implicitly maintains that providing lessees with the right to vote on certain matters affecting day-to-day operations is “desirable,” because lessees “may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.”¹²⁴ The possibility of providing condominium renters with complete voting rights is certainly a minority view that this Note does not advocate fully. The UCIOA nevertheless explicitly recognizes the potential for tensions between lessees and condominium associations: a recognition not present in any of the state statutes examined below.

The UCIOA reinforces the commonly understood authorities of the condominium association with respect to leasing and regulation of common areas, permitting the association to “grant easements, leases, licenses, and concessions through or over the common elements.”¹²⁵ The Act addresses the association’s enforcement authority with regard to renters, specifically stating that the association may “after giving notice to the tenant . . . and an opportunity to be heard, levy reasonable fines against the tenant for the violation” of the “declaration, bylaws, or rules and regulations of the association.”¹²⁶ It also states that the association may “enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.”¹²⁷

Unfortunately, the UCIOA does not require individual unit owners to notify prospective tenants expressly of these broad authorities, or even of the very existence of the association. The UCIOA reinforces the fact that, among unit owners, recordation serves as constructive notice of a unit owner’s rights.¹²⁸ The Act, however, provides neither a standard for transferring possessory interest to renters nor ex ante notice requirements regarding the declaration, CCRs, or bylaws.

Although the UCIOA does not address notice with regard to tenants, it clearly contemplates the difficulty of notice in the context of unit owners. In addressing purchaser protections, the Act, after requiring that a list of information be provided to prospective unit purchasers, states:

The best “consumer protection” that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the common inter-

124. *Id.*

125. *Id.* § 3-102(a)(9).

126. *Id.* § 3-102(d)(2).

127. *Id.* § 3-102(d)(3).

128. *Id.* § 1-105 cmt. 4.

est community purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains.¹²⁹

Most of the obligations of the unit owners are transferred to the lessee when renting. It is curious, therefore, that the UCOIA does not consider the provision of equal notice between the two classes of residents.

B. *Select State Condominium Statutes*

Section III.B analyzes the treatment (or non-treatment) of renters in four state condominium statutes. The states were selected due to their geographical diversity from one another and the existence of at least one major urban center—and various minor urban centers or suburban areas—that contain numerous condominium properties.

1. New York

The New York Condominium Act¹³⁰ (NYCA) explicitly references the disclosure requirements of leases for condominium units. According to the NYCA, deeds and leases must include a description of the land, a date and page reference to the recordation of the declaration, the unit number, a statement regarding the land's use, “[t]he common interest appertaining to the unit,” and “[a]ny further details which the grantor and grantee may deem desirable to set forth.”¹³¹ The Act also requires that the bylaws and any amendments to them be recorded as amendments to the declaration.¹³² New York is among the few states to reference lease documentation requirements at all in its condominium law. However, these limited requirements fail to provide prospective renters with sufficient information, other than the deed and declaration's location in the public record, which renters do not examine customarily.

With the exception of the minimalist lease disclosure requirements above, the NYCA does not provide much in the way of guidance as to the role of renters in condominiums. Like most state condominium statutes, one of the NYCA's few references to lessees is a provision addressing their duty to pay rents directly to the condominium association when the absentee unit owner defaults on his association dues.¹³³ Interestingly, in interpreting the NYCA, New York courts have clarified the landlord problem raised in Subsection III.B.3 by distinguishing the landlord-tenant relationship from the relationship between a

129. *Id.* § 4-103 cmt. 1.

130. N.Y. REAL PROP. LAW § 339-d (McKinney 2006).

131. *Id.* § 339-o.

132. *Id.* § 339-u.

133. *Id.* § 339-kk (“If a non-occupying owner rents any dwelling unit to a rental tenant and then fails to make payments due for common charges . . . all rental payments from the tenant shall be directly payable to the condominium association.”).

condominium lessee and the association. The court in *Frisch v. Bellmarc Management, Inc.*, held that duties under the warranty of habitability—a common law term for the presumptive guarantees that ensure certain standards of habitability be provided to renters by landlords—do not apply to condominium associations or boards because “condominium ownership is a form of fee ownership of property, and not a leasehold interest involving a landlord-tenant relationship.”¹³⁴

2. Georgia

The Georgia Condominium Act¹³⁵ (GCA) is the relevant statute governing the creation, operation, and termination of condominium property. The statute, however, does not contemplate the unique problems presented by lessees in the condominium setting. The GCA does provide a detailed description of the disclosure requirements that “shall apply only to the first bona fide sale of each residential condominium unit for residential occupancy,” ensuring that the “seller has furnished to the prospective buyer the documents specified in this subsection,” including the declaration, CCRs, bylaws, information relating to the governance regime, and a host of other relevant information.¹³⁶ Regrettably, the GCA does not mandate similar disclosure requirements to prospective tenants.

3. Illinois

The Illinois Condominium Property Act (ICPA) governs the “the ownership in and rights and responsibilities of parties under the condominium form of ownership of property.”¹³⁷ The ICPA does not require a detailed description of the declaration, covenants, or bylaws in conveyance documents such as deeds or leases. The law merely states that:

Every . . . lease . . . may legally describe a unit by its identifying number or symbol as shown on the plat and as set forth in the declaration, and every such description shall be deemed good and sufficient for all purposes, and shall be deemed to . . . transfer . . . the owner’s corresponding percentage of ownership in the common elements even though the same is not expressly mentioned or described therein.¹³⁸

Instead, the statute mandates that the disclosure of the declaration, CCR, and initial bylaws occurs only upon the first sale of a unit,¹³⁹ after which recordation

134. 597 N.Y.S.2d 962, 963 (App. Div. 1993).

135. GA. CODE ANN. § 44-3-70 (1991).

136. *Id.* § 44-3-111(a)-(b).

137. 765 ILL. COMP. STAT. ANN. 605/1 (2009).

138. *Id.* 605/7.

139. *See id.* 605/22.

requirements provide notice of this information to subsequent purchasers or lessees.¹⁴⁰

The ICPA's discussion of renters is limited to the applicability of the declaration, bylaws, and "rules and regulations that relate to the use of the individual unit or the common elements," specifically that the governing documents, rules, and regulations will apply "to any person leasing a unit and shall be deemed to be incorporated in any lease executed."¹⁴¹ The law requires in addition that a copy of any lease entered into by a unit owner be filed with the condominium board. It also describes the association's authority to prevent the lessee from occupying the unit, or to evict a tenant, if the owner fails to abide by the covenants and regulations of the condominium regarding the leasing of units.¹⁴² The association's authority over unit leasing is reinforced by language explicitly exempting the condominium property form from "the rule against perpetuities and the rule of property known as the rule restricting unreasonable restraints on alienation," which according to the statute "shall not be applied to defeat any of the provisions of this Act."¹⁴³

4. Florida

The Florida Condominium Act¹⁴⁴ (FCA) is among the most comprehensive in the United States. The law's stated purposes are, first, "[t]o give statutory recognition to the condominium form of ownership of real property" and, second, "[t]o establish procedures for the creation, sale, and operation of condominiums."¹⁴⁵ The FCA considers the role of lessees in condominiums in greater detail than the UCIOA. For instance, Florida's law *explicitly* transfers use rights of all common property: "[A] tenant shall have all use rights in the association property and those common elements otherwise readily available for use generally by unit owners and the unit owner shall not have such rights except as a guest, unless such rights are waived in writing by the tenant."¹⁴⁶

The FCA requires the condominium association to keep on record a copy of any lease agreement entered into by an association member.¹⁴⁷ The law also explicitly disfavors the application of a fee associated with the transfer of a property interest. In cases when a fee is allowed, the actions of the association are constrained and the fee must be recorded:

140. *See id.* 605/17.

141. *Id.* 605/18-(n)(i).

142. *Id.* 605/18-(n)(ii).

143. *Id.* 605/20.

144. FLA. STAT. § 718 (2008).

145. *Id.* § 718.102.

146. *Id.* § 718.106(4).

147. *Id.* § 718.111(12)(a)(g).

No charge shall be made by the association . . . in connection with the . . . lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed \$100 per applicant . . .¹⁴⁸

Of course, like every statute concerning the condominium property form, the FCA applies the covenants and use regulations equally to owners and to lessees: “[E]ach tenant . . . shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit.”¹⁴⁹

The FCA envisions a greater degree of transparency in the transfer of condominium units generally, and it contains provisions that consider renters’ needs and preferences. The statute comes close to the solution advocated by this Note but for the omission of two words. The statute explicitly lists the disclosure requirements of a unit owner prior to the *sale* of his or her unit:

Each prospective purchaser . . . is entitled, at the seller’s expense, to a current copy of the declaration of condominium, articles of incorporation of the association, bylaws and rules of the association, financial information . . . and the document entitled “Frequently Asked Questions and Answers.” . . . [T]he prospective purchaser shall also be entitled to receive from the seller a copy of a governance form. Such form shall be provided by the division summarizing governance of condominium associations.¹⁵⁰

If the section above began with the language “[e]ach prospective purchaser *and renter* . . . is entitled,” renters in Florida would have significantly greater notice of their rights and obligations as residents in a condominium.

CONCLUSION

With over 2.1 million renter-occupied units in condominiums, many of which include multiple tenants and families, the problem of insufficient notice is neither theoretical nor trivial. Rental market goods are not easily transferable in every part of the country, and material and emotional costs associated with moving can be significant. If we believe that confusion and information asymmetry regarding the legal consequences of living in a condominium exists among prospective home owners, then we should infer that prospective renters are less aware of the details of the condominium form. Considering the ineffectiveness of inquiry or constructive notice of covenants and servitudes in the les-

148. *Id.* § 718.112(2)(i). The section further states that associations may require a prospective tenant to provide a security deposit not exceeding one month’s rent in order to cover damage to common property.

149. *Id.* § 718.303(1).

150. FLA. STAT. ANN. § 718.503(2)(a) (West 2009).

see context, ensuring a basic level of understanding about the rights and duties of a lessee in a condominium is critical if renters are to receive the full benefits of their bargains.

When remedying the problems identified in Section II.D, it is important not to undermine the many advantages of common-interest community property. It also is undesirable to constrain the transfer of possessory interests in real property. This Note, therefore, argues for a statutory notice requirement designed to ensure that prospective renters are explicitly informed of the following: the content of the declaration; the content of the CCR and bylaws at the time of lease execution; the legal rights and duties of the condo association and board; and the ways in which those entities can affect the renter's use and enjoyment of the property throughout the lease.

Part V of Florida's Condominium Act—"Regulation and Disclosure Prior to Sale of Residential Condominiums"—outlines the notice regime that ought to apply to prospective condominium renters.¹⁵¹ Part V of the Act, unfortunately, applies only to prospective purchasers of condominium units. State legislatures across the country should adopt the notice requirements of the Florida Act and apply them equally to prospective purchasers and prospective renters.

The Florida Condominium Act mandates that homeowners provide prospective buyers with all current information pertaining to the covenants, servitudes, and legal structure of the condominium in which they are selling their unit, including copies of the governance documents.¹⁵² Recognizing that first-time purchasers likely are unaware of the complex governance regime and legal duties outlined in Section I.A, the Act states that "the prospective purchaser shall also be entitled to receive from the seller a copy of a governance form. Such form shall be provided by the division summarizing governance of condominium associations."¹⁵³

Florida's law also requires sellers to provide buyers with a document—to be formatted and approved by the Division of Florida Condominiums, Timeshares, and Mobile Homes—entitled "Frequently Asked Questions and Answers" (FAQA). The Florida Act's FAQA requirement, among other provisions, must include, "*in readable language*," information regarding "voting rights and unit use restrictions, including restrictions on leasing the leasing of a unit."¹⁵⁴ Florida's FAQA requirement is useful because it provides prospective buyers with a plain-language understanding of the potentially technical or convoluted language of a servitude regime embodied in the declaration or CCR.

These notice requirements do not limit the types of covenants that condominium associations can impose on unit owners—assuming such covenants are otherwise legal. Rather, they simply ensure that prospective buyers are fully aware of how their obligations and rights differ in a condominium setting as

151. See FLA. STAT. §§ 718.501-718.509 (2008).

152. See *id.* §§ 718.503(1)(b), 718.504.

153. FLA. STAT. ANN. § 718.503(2)(a) (West 2009).

154. FLA. STAT. § 718.504 (2008) (emphasis added).

opposed to a single-family detached home owned in fee simple. The Florida Act recognizes the importance of adequate notice when buying condominium units. In addition to detailing what information sellers must provide prospective purchasers, the Act creates a “good faith obligation” to comply with the notice requirements.¹⁵⁵ The Act, furthermore, creates an explicit right of action for purchasers against sellers who publish “false or misleading information” about the condominium unit and common property.¹⁵⁶

The notice requirements in the Florida Act should be incorporated into the UCIOA and other state condominium statutes and should be applied equally to those renting condominium units. This robust, statutory notice requirement is the most efficient way to ensure renter preferences are realized while reserving the governance and servitude structure that accrues benefits to unit owners. The minimal *ex ante* costs associated with providing such notice presumably are much less than the costs of *ex post* dispute resolution or litigation resulting from an insufficient understanding of the legal regime governing condominium lessees. Less measurable are the costs of acrimony between ownership and rental classes that ensue when lessees move into a condominium unaware of the association’s authority over them.¹⁵⁷

Although the responsibility to provide notice must fall in part on the unit owner who contracts with the lessee, the condominium association’s authority with respect to the common property counsels in favor of the condominium association having a role in the leasing process. As described previously in Subsection II.A.3, the lessee’s obligations are split between the unit owner, with whom the lessee contracts to lease the unit, and the condominium association, the existence of which the lessee is sometimes unaware until after the lease has been signed. Condominiums may require that the association or the board approve prospective lessees, or at least require that the association is provided with notice of new lessee residents, before a unit owner may lease his or her property.¹⁵⁸ The prospective lessee, however, may not be aware that such approval was required and thus is not necessarily “on notice” regarding the existence of the association.

Prospective renters should therefore be required to sign a consent agreement produced by the condominium association. The agreement would ensure that the renter has received, read, and understood the various statutorily required documents, including the FAQA, while also forging direct contact be-

155. *See id.* § 718.505.

156. *Id.* § 718.506.

157. *See generally* Mollen, *supra* note 91 (cataloguing several areas of contestation between community associations and unit owners arising from insufficient understanding of covenants and governance regimes).

158. *See, e.g.,* Chianese v. Culley, 397 F. Supp. 1344 (S.D. Fla. 1975) (providing that the condominium association may not withhold approval of a unit owner’s proposed lease unless the association is able to provide an alternative lessee acceptable to the association and willing to lease on terms equally favorable to the unit owner).

tween the renter and the association. Designing small measures that advance understanding and dialogue between renters and associations can help ameliorate unforeseen disputes or problems. In fact, the Community Association Institute, a national nonprofit organization representing the interests of condominium developers and managers, has begun to advocate for greater communication between renters and condominium associations and for more rights for renters beyond those currently required by law.¹⁵⁹ Further empirical research—beyond the scope of this Note—is required to determine the extent to which norms or best practices have developed among community associations to ensure that prospective tenants are adequately informed and better integrated into the community. We know, for instance, that in certain cases renters are given voting rights, not because the law requires it, but because the association finds co-existence more pleasant with a renting class that is not disgruntled by the association's governance regime.¹⁶⁰

This Note does not argue for the discontinuation of condominium property, nor does it take the position that renters ought to receive power within association governance on par with unit owners. Renters, furthermore, should not be allowed to exit their leases every time the association votes to amend the governing documents in a way that affects the renter's use and enjoyment of the property. That would create an unhelpfully transient residential environment and serve as a pretext for renters who may wish to leave their leases for other reasons. It is, however, unrealistic to assume that the rental market in a given location is sufficiently diverse and liquid that renters can easily locate rental opportunities outside of condominiums or that they can move without incurring considerable costs.

Notice is the first and most important step in addressing the challenges identified in Part II of this Note. Under an explicit statutory notice regime, prospective renters will be aware of any servitude, fees, or land use restrictions in existence at the time of lease execution. Furthermore, prospective lessees can factor the uncertainty associated with the authorities of the governance regime into the price they are willing to pay for residence in a condominium. In addition to securing legitimate consent to covenants, increased information ensures that the market can more efficiently balance the residential preferences of renters in a market increasingly dominated by the condominium form.

159. See Press Release, Cmty. Ass'ns Inst., Prescription for Tenant/Owner Harmony Published by CAI (Oct. 21, 1999), available at <http://www.caionline.org/about/press/Pages/PrescriptionforTenantOwnerHarmonyPublishedbyCAI.aspx>.

160. See UNIF. COMMON INTEREST OWNERSHIP ACT § 3-110, 7 U.L.A. 557 (1994) (noting that common-interest community declarations may mandate that lessees vote on certain matters instead of the non-resident unit owner).

