

Winter 1998

Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary, 31 J. Marshall L. Rev. 397 (1998)

Evan McKenzie

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#), [Contracts Commons](#), [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Evan McKenzie, Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary, 31 J. Marshall L. Rev. 397 (1998)

<https://repository.law.uic.edu/lawreview/vol31/iss2/3>

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

REINVENTING COMMON INTEREST DEVELOPMENTS: REFLECTIONS ON A POLICY ROLE FOR THE JUDICIARY

EVAN MCKENZIE*

[T]he return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.¹

I. INTRODUCTION

Please consider the following dispute: The plaintiff is a non-profit corporation with voluntary membership, and it is dedicated to the improvement of property values and the quality of life in the community. The corporation is suing one of its members to enforce the terms of a contractual agreement to which all the members are parties. Regularly elected corporate directors approved filing this lawsuit. The plaintiff's articles of incorporation and bylaws plainly state that it was created to enforce the contract. State law authorizes the activities of the corporation. There is substantial evidence that the defendant's actions constituted a breach of the terms of the contract.

Is there anything useful for society to do in this situation,

* Associate Professor of Political Science, University of Illinois at Chicago; J.D. 1972, University of California at Los Angeles; Ph.D. 1989, University of Southern California. This paper was delivered at the John Marshall Law School as part of the 1997 Robert Kratovil Memorial Seminar in Real Estate Law, entitled "Reinventing America's Master Planned Communities," and has been subsequently revised for publication purposes. I have made every effort to present essential points in the text, rather than in footnotes. I hope in this way to retain some of the character of the original public address and maximize the accessibility of the article to non-lawyer readers who might be involved or interested in the policy area. I would like to acknowledge the able legal research assistance provided by Gus Sparagis, The John Marshall Law School, J.D. Candidate 1998, which was made possible by Professor Celeste Hammond, Director of the Center for Real Estate Law at the John Marshall Law School. I am also grateful to the Office of Social Science Research and the Great Cities Institute at the University of Illinois at Chicago, whose support has enabled me to consider some of the public policy issues discussed herein.

1. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 641 (1943).

acting in its collective capacity through public policy, other than providing a court to ensure that the terms of the contract are enforced? Most judges, lawyers and legal scholars would answer the question "no." But what if the following facts are added?

1) The "community" is not a town or village, but a corporation representing all the people who own housing units in a master-planned private subdivision. Resident participation in the affairs of the corporation is minimal, and an elected, uncompensated board of owner-directors operates the association. Absentee owners, who rent their units and live elsewhere, can vote, but the people who rent their units and live in the development cannot.

2) The association provides some services to the members that would otherwise be provided by local government.

3) The "contract" is in fact a 200-page adhesion contract, which is merely a stack of non-negotiable, standardized boilerplate provisions. The majority of property owners have not read it, but if they had, it is doubtful that many of them would have understood it without legal advice. Lawyers drafted the contract for a real estate developer who no longer has any financial interest in the properties, and all the terms were recorded with the deeds at the time of subdivision. To prevent residents from changing the developer's rules, the drafters included virtually insurmountable super-majority requirements.

4) The "voluntary membership" of each resident in the corporation started automatically at the moment of purchase and can only be ended by selling the home and leaving the community.

5) Many of the terms of the contract seem perfectly reasonable, but others seem oppressive, and a few even seem to violate fundamental liberties or the ordinary expectations of homeowners like the defendant.

6) The defendant's actions, although constituting technical violations of the rules, did not harm any resident's quality of life or property values. The corporate directors were advised that they should prosecute all violations, no matter how trivial, or risk being sued themselves.

7) A few interest groups, and mainly a single trade association, representing those who make their living working for organizations like the plaintiff, influenced the state laws under which the association operates. There is no significant interest group representation of the residents, who are dis-aggregated consumers of a mass produced commodity. There is no regulatory agency overseeing the activities of organizations like this corporation.

8) The dispute is repeated in virtually identical form thousands of times in courts across the country, because millions of Americans are parties to similar contracts.

These additional facts transform the situation from a private

dispute to one that raises significant public policy questions.² In other situations where the widespread use of contracts to structure private relationships seemed to implicate important public values, government has become involved. Examples of this include areas such as product liability, worker safety, child labor, race restrictive covenants and landlord-tenant relationships.

In some of these cases, legislatures have conducted investigations, enacted protective legislation and even created regulatory agencies. But where legislatures have not responded, courts have sometimes gone beyond passively enforcing the terms of standardized contracts, and have become more assertively involved in structuring contractual relationships that implicate significant public values. This involvement has included interpretation and application of constitutional principles, ordinary legislation, common law doctrines of contract and tort, and principles of equity. Please consider these observations:

First, the rise of common interest housing has created a situation in which private contracts are being used to structure relationships involving important public³ values, institutions, consequences and issues. This phenomenon is a form of privatization which, taken as a whole, would justify a substantial degree of government involvement, although there is no simple answer as to what forms that involvement should take in particular circumstances.⁴

2. Because the study of public policy is not the monopoly of any discipline, the term "public policy" has come to be defined and understood somewhat differently by economists, legal scholars, political scientists, urban planners and others. Sometimes the term is used relatively narrowly, such as when judges employ "public policy" considerations in resolving particular issues. One example of this is the "public policy exception" to freedom of contract, as discussed in *Hurd v. Hodge*, 334 U.S. 24, 35-6 (1948). But, when political scientists use the term, it has a much broader meaning, and can encompass almost any purposive course of action taken through any level of government, such as when Deborah Stone says, "[p]ublic policy is about communities trying to achieve something as communities." DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 18 (2d ed. 1997). Political scientists with legal training and experience feel some obligation to acknowledge this as a potential source of confusion, which will be outweighed by the benefits of bringing some of the concepts of political science to bear on a legal issue. The term "public policy" will be used in a broad sense to refer to actions by executive, legislative or judicial branches at the national, state, or local level. Below, however, when speaking of what courts might do in the absence of legislative action, the term will be used in a judicial context.

3. The terms "private" and "public" when reaching this conclusion will be explained in the text below.

4. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 29-55 (1994) (advancing this argument in detail). This article does not address the interesting question of whether homeowner associations are, or should be considered "governments" for some or all purposes. Instead this article confines itself to arguing that,

Second, for three decades, the rapid proliferation of common interest housing has far outpaced the development of public policy approaches that would address the public issues it presents. As early as 1964, scholars were raising what have proven to be legitimate, and even critical concerns. However limited, present policy approaches at the federal and state levels have only promoted common interest development (CID) construction. Public agencies typically scrutinize developers until the units are sold to consumers. Thereafter, associations and residents merely finance the civil court system by litigating the enforcement of process-based regulations, such as requirements for disclosure, meetings, record keeping and elections. There is little substantive regulation of the contractual agreements. In forty-nine states, no government agency is charged with enforcing the regulations after the developer relinquishes control of the project to the homeowners.

Third, legislatures have been, and will probably continue to be, essentially unresponsive in this issue area, in large part because of collective action problems inherent in the relationship between the parties to the contracts in question.

Fourth, if this dis-juncture between public policy issues and responses continues, at least three possible sets of adverse consequences could befall the CID housing sector.⁵ These scenarios are called "emergence of an adversarial relationship with government," "failure from within," and "failure of demand."

Fifth, the unresponsiveness of legislatures and the absence of regulatory agencies, coupled with the increasing likelihood of adverse consequences, justify increased judicial involvement in structuring the relationships among the parties to CID contracts. One form of that involvement can be implemented. One argument is that CID governing documents are a particularly troublesome variety of adhesion contracts, and that proposals which have been made for the judicial handling of adhesion contracts in general would be especially appropriate for CID contracts, regardless of whether such proposals were employed more generally. This ap-

regardless of one's position on the "private government" question, the activities of homeowner associations raise issues of legitimate public concern, and that courts could and should address these issues. See *Id.* 122-49 (discussing homeowner associations as private governments).

5. For analytical purposes, "micropolitics," or the internal working of common interest developments (CIDs) and the CID housing sector, is distinguished from "macropolitics," or the effects of CIDs on the larger society. An example of the former would be the relationship between CID residents and their board of directors. The impact of CIDs on the economic, political, or social workings of cities would be an issue of macro-politics, under this analytical distinction. MCKENZIE, *supra* note 4, at 18-23. However, there are many ways in which these issue areas overlap. *Id.* This article considers the scenarios that emanate from the complex interactions that are occurring in the area of overlap. *Id.* These areas are where the relationships are still being constructed. *Id.*

proach is an improvement over the current process regulations, but less dramatic than proposals to use constitutionalism to regulate CIDs on the theory that they are governments or are engaging in governmental activity.⁶

This reform project is approached with some reluctance, because the value of making specific proposals for change is doubtful. There are several reasons for this reluctance. First, for over three decades perceptive observers have advanced arguments and made proposals, attempting to persuade public policy makers of the need to address this issue area. Yet, during this time, the gap between what political scientists call the "systemic policy agenda," which is the list of matters that concern people in the society, and the "institutional policy agenda," which is the narrower list of issues actually considered by policy-makers, has grown larger.⁷ This policy gap exists because policy-makers respond to organized interests. In this issue area, the organized interests have been resistant to outside voices and deeply skeptical of government.

Second, making specific reform proposals can distract attention away from a valid general critique, to the merits and shortcomings of the specific solutions proposed, at a time when it might be more productive to enlarge the conversation over the "need" for reform, rather than debating any single solution.

Third, from a pragmatic and democratic standpoint, there is much to be said for being cautious about reform proposals that might disturb the operation of any social institution, such as the CID, that has been functioning for decades. Any government intervention carries the risk of unintended consequences. But CIDs are themselves a type of reform, offered as an improvement over conventional local government, and the law of unintended consequences also applies to CIDs as presently conceived.

Moreover, it can be argued that the residents of CID communities need to go through a problem solving process collectively in order to strengthen their civil society institutions. Additionally, CID residents feel compelled to develop group history and identity, and arrive at resolutions, if not solutions, they are comfortable

6. See MCKENZIE, *supra* note 4, at 155-57 (addressing the constitutional debate). Some CIDs are indistinguishable from the company town which was held subject to constitutional scrutiny in *Marsh v. Alabama*, 326 U.S. 501, 502-05 (1946). Based on *Marsh*, there is a role for constitutionalism in this policy area. However, another way to address the problem without answering the question asked is carefully considered by Professor Katherine Rosenberry. Katherine Rosenberry, *Condominium and Homeowner Associations: Should They Be Treated Like Mini-Governments?*, ZONING AND PLANNING LAW REPORT, May 1985, reprinted in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 69-74 (Advisory Commission on Intergovernmental Relations eds., 1989).

7. ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA BUILDING 14 (2d ed. 1983).

with. Now, government involvement might hinder that process.⁸

Yet, on balance, the role for the judiciary that is proposed would benefit at least some of those concerned without significantly harming others. While this may fall short of genuine or even potential "Pareto optimality," the risks of continued inaction are substantial and increasing. Nothing proposed in this article would call into question the continued existence of CID housing. Indeed, the contrary is true: it would be a stronger institution if judges took a firmer hand on behalf of sounder public policy. To argue for a more assertive policy is not to disparage the non-governmental actors involved, but is a natural result of the complex and ambiguous nature of CIDs, the tasks they were created to perform, and the ways they carry out these tasks.

II. CID HOUSING AS A PUBLIC POLICY CONCERN

Common interest housing is one example of a more general trend toward privatization of government functions.⁹ Deciding whether or not to privatize any government activity is fundamentally a matter of public concern, although it raises many difficult questions regarding how the relationships should be constructed.¹⁰ Yet, where CIDs are concerned, it is often argued to the contrary. There is something essentially "private" about decisions to construct, sell, purchase, and operate CIDs. Government should presumptively remain uninvolved in the contractual relationships. In short, it is contended that CIDs should be in some fashion insulated from government, so that in general their activities should be presumptively deemed not to raise public policy issues.

It is critical to address these claims at the outset, because they are the rhetorical subtext of the specific policy arguments used to keep legislatures and courts from intervening, and to keep the discourse about CIDs as privatized as their activities. The claims take three general forms, which could be presented in terms of philosophy, theory, law, or morality, but which will simply be rendered here in rhetorical terms, because that is the form they most often take. One is called "defensible space"; a second is thought of as the "reinventing government" argument; and the third is the "liberty of contract" claim, which is addressed in more detail below. Each of these arguments is premised to some degree on the notion that there is a distinction to be made between what is "private" and what is "public," so discussion will be prefaced

8. See, e.g., SARA M. EVANS & HARRY C. BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA*, 187-90 (1986).

9. See MCKENZIE, *supra* note 4, at 122-49 (addressing this issue in detail).

10. See generally EMANUEL S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* (1987) (describing four different ways to privatize). See also JOHN D. DONAHUE, *THE PRIVATIZATION DECISION—PUBLIC ENDS, PRIVATE MEANS* 10 (1989) (discussing privatization).

upon the three arguments by briefly considering the so-called "public-private" distinction.

Few rhetorical devices are more often used, or misused, than the supposed distinction between public and private. Yet, rarely do people who use the terms as adjectives explain what they understand them to mean. This omission may rest on the assumption that the meanings are simple and generally known. But those who have taken the time to study these concepts understand their complexity.

One of the most thorough treatments of the subject argues that the quality spoken of as "publicness" and "privateness" has three different dimensions or meanings.¹¹ One of these, called "agency," relates to whether and to what degree the actor, or agent, in question is governmental.¹² A second, "access," deals with the relative openness or restrictiveness of the subject.¹³ The third, "interest," addresses the issue of how many people are concerned with or affected by the subject.¹⁴ A thing may be relatively public on one dimension and relatively private on another. For example, if the agency criterion is used, one may say that a shopping mall is "private" because it is not owned by government, but if we use the access criterion one might say it is a "public" place because of the high degree of openness. On the "interest" dimension, questions might be asked about how many people are concerned with particular mall activities, which would depend on the types of activities.¹⁵

So, to be fully "public" something would be governmental, open to all, and of concern to all. To be fully private, a thing would be non-governmental, closed and of no concern to any, but one or a few. But two things are clear: few things are either fully "public" or "private;" and the distinction between public and private is not a dichotomy, nor even a continuum, but instead a set of continua.

These meanings are derived from the ways in which we use these words, so they are widely understood, if not often articulated. But in practice, we rarely specify which meaning we are

11. Stanley I. Benn & Gerald F. Gaus, *The Public and the Private: Concepts and Action*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 7-12 (Stanley I. Benn & Gerald F. Gaus eds., 1983).

12. See *id.* at 9-10 (discussing the agency dimension of the quality referred to as "publicness" and "privateness").

13. See *id.* at 7-9 (discussing the access dimension of the quality referred to as "publicness" and "privateness").

14. See *id.* 7-9 (discussing the interest dimension of the quality referred to as "publicness" and "privateness").

15. There have been several judicial attempts to address the activities of shopping malls in terms of constitutional theory, perhaps the most significant being the United States Supreme Court's ruling in *Pruneyard Shopping Center v. Robins*. 447 U.S. 74, 80-88 (1980). See MCKENZIE, *supra* note 4, at 157-62 (discussing this decision and others).

speaking of when we use the words "public" and "private" in communication. Sometimes the parties know which meaning the speaker intends; other times there may be an inadvertent miscommunication and the speaker and listener may have different meanings in mind; and it is also possible to deliberately manipulate, or innocently confuse, the meanings for rhetorical purposes or when making claims. For example, consider the statement, "This is my property (agency), and I do not let anybody enter it (access), so what goes on here is nobody else's business (interest), and therefore, 'private,'" which is a "non sequitur," masquerading as a sensible and moral pronouncement. If the speaker is manufacturing high explosives in his basement, the confusion among the various meanings becomes obvious.

Where organizations are concerned, especially those, which impact the lives of many people, the case that there is always some degree of "publicness" is especially strong. In his perceptive treatment of this subject, Bozeman says, "[a]ny organization, whether government, business or some mix of the two, can be viewed in terms of 'publicness dimensions.'"¹⁶ Certainly this may be said of CIDs. On the dimension of agency, there is a large body of scholarship and policy writing concerning the relative "governmentality" of CIDs and their activities.¹⁷ At the very least, CIDs are neither fully private nor public on this dimension. CIDs are more governmental than the typical business enterprise and less governmental than the United States Department of Defense. On the question of access, CIDs have varying degrees of publicness. Some are open, but others, an increasing number, are gated, walled or otherwise fortified to control entry.¹⁸ As to the dimension of interest, CIDs appear to have many public aspects. The spread of CIDs has a whole range of effects on local taxation, public safety, the sense of community, and politics, all of which are of wide concern.¹⁹

Insofar as CIDs represent a form of social organization affect-

16. See generally BARRY BOZEMAN, *ALL ORGANIZATIONS ARE PUBLIC: BRIDGING PUBLIC AND PRIVATE ORGANIZATIONAL THEORIES* (1987).

17. See MCKENZIE, *supra* note 4, at 22 (discussing the governmentality of CIDs). See also Rosenberry, *supra* note 6, at 69-74; WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATIONS LAW 6-7* (2d ed. 1988).

18. EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 1-2* (1997).

19. See, e.g., COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST xi (Stephen E. Barton & Carol J. Silverman eds., 1994); *RCA Characteristics and Issues*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 9-23 (Advisory Commission on Governmental Relations eds., 1989); ROBERT J. DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS AND AMERICAN GOVERNANCE 28-36* (1992).

ing the “home,” the rhetorical consequences of labeling their activities “private” are especially significant. Feminist scholars have emphasized that dichotomizing public and private, placing the activities of the “home” in the private sphere and thus beyond the reach of government, and relegating women to the home, effectively excluded them from political and economic power.²⁰

In short, CIDs and their activities should not be considered “private” and thus presumptively beyond the reach of “public” policy.²¹ However, there are at least three common arguments against public policy involvement in the activities of CIDs, each of which is premised to some degree on the false dichotomization of public and private.²² These are in the nature of “conversation-stoppers” that serve to narrow the discourse concerning CIDs. Each of these arguments merits consideration before proceeding further.

One of these is the “defensible space” argument.²³ Many CID proponents contend that this form of social organization is a way for people to protect their homes, their families, their property, and their lives against predatory criminals.²⁴ This argument has a strong natural law component and invokes images of the American frontier. The underlying notion is that of using territoriality, or control of space, to protect oneself.²⁵ The work of Oscar Newman on “defensible space”²⁶ is often used to buttress this perspective.²⁷

Political scientist John DiIulio, originator of the label “super-predator” to describe certain contemporary juvenile delinquents, and co-author of a recent book on criminal justice policy,²⁸ suggests that recently declining crime rates may be partly attributable to the spread of CIDs, particularly those of the gated variety.²⁹

20. See, e.g., DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE* 62-63 (1984). See also ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* x (1987) (discussing “suburbia” as a part of the private sphere).

21. To clarify, “public” policy refers to the agency dimension, which is policy emanating from government.

22. Benn & Gauss, *supra* note 11, at 7-12.

23. See OSCAR NEWMAN, *DEFENSIBLE SPACE* (1973) [hereinafter *DEFENSIBLE SPACE*].

24. *Id.*

25. *Id.*

26. OSCAR NEWMAN, *COMMUNITY OF INTEREST* 5-6 (1980) [hereinafter *COMMUNITY OF INTEREST*].

27. Robert Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 45-9 (Advisory Commission on Intergovernmental Relations eds., 1989)

28. See generally WILLIAM BENNETT ET AL, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* (1996).

29. John DiIulio, Jr., *A More Gated Union*, *THE WKLY. STANDARD*, Jul. 7, 1997, at 13-15.

This possibility has yet to be systematically tested. On the other hand, there is empirical evidence to support the "broken windows" theory put forth by James Q. Wilson and George L. Kelling.³⁰ This approach emphasizes the need to distinguish between the fear of crime and "the fear of being bothered by disorderly people," and argues that policing practices aimed at maintaining order in public places reduce crime, because "[t]he essence of the police role in maintaining order is to reinforce the informal control mechanisms of the community itself."³¹ That is, when people feel safe in public places, believing that obnoxious strangers will not likely accost them, they use or occupy these places, which reduces actual crime rates.³² When people feel unsafe, anticipating being bothered by unsavory characters, they avoid public places, which leads to occupation by criminals, and thus rising crime rates.³³

In short, the "broken windows" theory militates in favor of policies that would make the middle class feel safe in reclaiming public places, rather than retreating into fortified enclaves. Consequently, there is no reason for CIDs to be insulated against public policy on the grounds that they are creating "defensible space," because it is at least possible that they are contributing to less safe public places. In any event, the possibility that CIDs are related to variation in overall crime rates, in any way, is a matter of general concern, not an argument against public policy.

The argument thought of as the "reinventing government" view evokes the image of CIDs as part of a "new" way of organizing society that has emerged in post-industrial, post-modern America.³⁴ This line of argument is premised on the entirely plausible assertion that society is undergoing a broad restructuring of the relationships between state, market and civil society. One then proceeds to argue that an essential part of this restructuring is for governments to function more like businesses.³⁵ Accordingly, criticizing CID government is tantamount to standing in the way of progress and the inevitable forces of history, and is virtually a form of Luddite protest.

One can see this line of thought in some CID literature with a libertarian bent. The CID can be seen as Lockean, socialistic, individualistic, communalistic, or even anarchistic. But to date, libertarians have been most enthusiastic about the possibilities of

30. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, Mar. 1982, at 29-38 (discussing the broken window theory).

31. *Id.* at 29-30, 34.

32. *Id.* at 29.

33. *Id.* at 32.

34. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT xvi (1992).

35. See generally *id.* at 76-107.

CIDs. In a sense, CIDs epitomize the libertarian public policy cycle of the early 1980s, representing the notion that there was a better way to do things outside of government. CIDs were, in this view, a collaboration between the market and civil society, harnessing the economic energies of real estate developers and the volunteer spirit of small town America to create a new institution. This new institution would be privately owned and governed communities for the middle class, that would come to replace cities. In 1989, economist Robert H. Nelson urged that CIDs be promoted in existing neighborhoods as a replacement for local government, so that "[t]he RCA might in significant part replace the small municipality as an institution for managing and controlling the immediate surrounding [neighborhood]."³⁶ Nelson points out that societies have the choice of organizing their business activities publicly or privately, and that nations which had nationalized business activities were now privatizing them.³⁷ In much the same way, Nelson then argues, "[e]ach society has the option of organizing its local residential communities on a public or private basis."³⁸ To date, in the United States:

[t]he overwhelming choice . . . has been to organize local governments publicly, creating municipal and other local governments; however, the emergence of the RCA creates an important new private alternative. If RCAs were to become the prevailing mode of social organization for the local community, this development could be as important as the adoption in the United States of the private corporate form of business ownership. We would have two basic collective forms of private property ownership—the condominium (or RCA) form for residential property and the corporate form for business property.³⁹

This proposal, Nelson observes, amounts to going beyond "piecemeal and incremental privatization occurring in many municipalities," and realizing "a more systematic and comprehensive privatization."⁴⁰

However, the American idea that government would be better if it functioned like businesses is not new, but virtually an American perennial. Much of the "wave of the future" rhetoric of CID advocates, as well as the standard form of CID governance itself, are excellent examples of what political scientist Deborah Stone calls "the rationality project."⁴¹ Stone argues:

[t]he fields of political science, public administration, law, and policy analysis have shared a common mission of rescuing public policy

36. Nelson, *supra* note 27, at 49-50.

37. *Id.* at 51.

38. *Id.*

39. *Id.*

40. *Id.*

41. STONE, *supra* note 2, at 6.

from the irrationalities and indignities of politics, hoping to make policy instead with rational, analytical, and scientific methods. This endeavor is what I call "the rationality project," and it has been a core part of American political culture almost since the beginning. The project began with James Madison's effort to "cure the mischiefs of faction" with proper constitutional design . . . In the 1870s, Christopher Columbus Langdell, dean of the Harvard Law School, undertook to take the politics out of law by reforming legal training . . . At the turn of the twentieth century, the rationality project was taken up in spades by the Progressive reformers . . .⁴²

In Stone's view, the rationality project has failed in all its incarnations, because "politics is a creative and valuable feature of social existence," and not a deviation from "hypothetical standards of good policy making."⁴³

As previously stated, the standard form of CID government is a Progressive era creation, not a post-modern one. Pro-business, anti-politics rhetoric was a staple of the Progressive era urban reformers and was the ideological basis for creating the city manager form of government. In other words, the business corporation was the model for the city manager system, and the city manager system then became the model for the CID's managerial government.⁴⁴

In sum, on its merits, the claim that history demands that government be pushed aside so that society can transcend politics and get straight to rationality through business planning is not only old, but at least questionable. The claim that CIDs are a part of such an inevitable historical process is equally doubtful, and should not dissuade policy makers from addressing otherwise legitimate concerns.

This is not to dispute either that an era of institutional restructuring is upon us, or that it is needed. Instead, it is a question of who is going to participate in the "reinvention" project. Who should make the threshold determinations whether CIDs need to be reinvented? Whose business is it to ask that question? Is it the business of real estate developers and their attorneys, with others involved merely as part of a market that may respond in various ways to the reinvented product? Or, as argued, is this reinvention project a matter in which public policy should be substantially involved?

Perhaps the most powerful argument advanced to limit government involvement in the governance of CIDs is the "liberty of contract" perspective. As one radio call-in show listener purportedly stated, from his cellular telephone, "Why don't you mind your own business? "Do you have something against a contract?" CID

42. *Id.* at 6-7.

43. *Id.* at 8

44. See MCKENZIE, *supra* note 4, at 45 (discussing this era).

governing documents in the context of contract law is dealt with below. However, there is a more general rhetorical argument that contractual relationships should be somehow beyond the reach of government. Of course, legal scholars know that this is not so, and that public policy regulates and even prohibits many types of contractual relationships, such as those involving slavery, controlled substances, child pornography, murder for hire and many other subjects. The fact of agreement on the terms of a transaction does not end the debate over the advisability of the underlying action.

Moreover, even in a specifically legal context, the "liberty of contract" argument has been made and rejected before with reference to the kinds of agreements used in CID housing. These arguments are referred to as race restrictive covenants, which the United States Supreme Court declared unenforceable in 1948, in *Shelley v. Kraemer*.⁴⁵ So, the fact that CIDs are based on contractual relationships should not place them beyond the reach of public policy.

The public policy dimensions of CID housing have not gone unnoticed, particularly during the last three decades. In the next section, some astute analyses of the subject are noted. However, policy makers have been reluctant to treat the rise of CID housing as a phenomenon over which they could and should be exercising considerable influence, beyond simply facilitating or actively promoting its construction. Instead, the tendency has been to presume that the market actors involved in the production and maintenance of this housing should be allowed to arrange matters as they saw fit. In part, this testifies to the power of policy arguments based on the private-public distinction. In addition to the rhetorical arguments emanating from the "public-private" dichotomy, there is also a practical consideration: a special collective action problem inherent in this form of social organization, which has forestalled a more comprehensive role for public policy.

III. COMMON INTEREST HOUSING AND THE POLICY AGENDA

A. *A Historical Perspective of Common Interest Housing*

An early social scientific analysis of CID housing was one of the most perceptive. In the early 1960s, while CIDs still numbered in the hundreds, and at the height of industry and government concern over the rising cost of land and the loss of open space, Stanley Scott, then Assistant Director of the Institute of Governmental Studies at the University of California, Berkeley, published several papers on the rise of CID housing and its relationship with local government. In the most systematic of these papers, he

45. 334 U.S. 1, 20-22 (1948).

framed his thoughts as a critique of Federal Housing Administration (FHA) policy regarding CIDs, which he saw as so thoroughly permeated with the views of the Urban Land Institute (ULI) that he called it the "FHA-ULI homes association policy."⁴⁶

Scott criticized the way CID ownership of common property "bypasses the local governments that could appropriately be designated as custodians of such property," and he decried the "policies of exclusiveness" that were "only thinly veiled as efforts to 'maintain high standards,' or 'insure property values,' or provide a 'private community.'"⁴⁷ With renters disenfranchised and FHA recommendations against mixing single family homes and apartments in the same development, he anticipated "'institutionalization' of segregated housing patterns."⁴⁸ He expressed concern that developers had too much control over homeowner associations, and that the difficulties in making them work effectively and responsibly had been understated.⁴⁹ Scott also felt that the emphasis on property values "may obscure other equally important goals," and that the ULI and FHA were promoting CIDs "despite their drawbacks . . . partly because there has been a failure to invent more desirable alternatives."⁵⁰

In a memorable and prescient passage, Scott tried to emphasize that the nation's housing policy was at a pivotal point. However praiseworthy, society has more important objectives than creating high quality, upper class, single-family, amenity-filled communities with stable property values.⁵¹ In the near future, residential patterns and features will be rearranged and set.⁵² The policies underlying these changes will determine the quality of urban life and the rule, strength, effectiveness, and perhaps even the survival of local government.⁵³

Scott recommended that homeowner associations be viewed as "a stop-gap alternative that should be employed cautiously until better arrangements can be worked out."⁵⁴ In their stead, he suggested the temporary use of special taxing districts to maintain the common open spaces and other facilities, or "an initial period of joining public-developer stewardship," with eventual transition to

46. Stanley Scott, *The Homes Association: Will 'Private Government' Serve the Public Interest?*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 19-29 (Stephan E. Barton & Carol J. Silverman eds., 1994).

47. *Id.* at 20.

48. *Id.* at 21.

49. *Id.* at 20-21.

50. *Id.* at 21.

51. *Id.* at 27.

52. Scott, *supra* note 46, at 27.

53. *Id.*

54. *Id.* at 28.

public ownership.⁵⁵ He felt the Advisory Commission on Intergovernmental Relations and other bodies interested in urban policy should examine the matter, and he urged, "[w]hatever is done, it should be done soon. Meanwhile the FHA and the developers, for lack of a superior prototype, are methodically seeding many of the best new urban communities with long-lasting automatic homes associations."⁵⁶

A 1994 retrospective analysis of Scott's early work on CID policy, which compared his list of concerns with recent empirical findings, found that his critique was remarkably accurate.⁵⁷ Yet Scott's recommendation to undertake comprehensive study of CIDs, and his view that developers should not be allowed to institute permanent private governments, were not heeded, and the spread of CID housing proceeded rapidly.

In 1971, the Twentieth Century Fund sponsored a thorough review of the way the new towns of which Scott wrote were being governed.⁵⁸ The study was premised on the idea that developers had paid a great deal of attention to perfecting the physical and financial aspects of new town development, but had "neglected the problem of governance."⁵⁹ To remedy this defect and also spur innovation for existing cities, the task force recommended that new towns become "laboratories for testing new forms and processes of local self-government."⁶⁰ This should involve experimentation with "different and novel means of broadening and strengthening participation by people in planning, developing and governing their urban environment."⁶¹ In order to help private community builders accomplish all this, state governments were urged to "adopt imaginative legislation to assure that new towns realize their full potential for self-government."⁶² Yet, public policy makers have not seen to it that these ambitions be realized.

B. Review of Current Policy Directions

All states have enacted some type of regulations concerning common interest developments in the predominate form of con-

55. *Id.* at 29.

56. *Id.*

57. Stephen E. Barton & Carol J. Silverman, *Common Interest Communities: Private Government and the Public Interest Revisited*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 31-40 (Stephen E. Barton & Carol J. Silverman eds., 1994) [hereinafter *Public Interest Revisited*].

58. THE TWENTIETH CENTURY FUND, NEW TOWNS: LABORATORIES FOR DEMOCRACY 3 (1971).

59. *Id.* at 6-7.

60. *Id.* at 8.

61. *Id.*

62. *Id.*

dominium enabling legislation.⁶³ These regulations are based on a contractual model that focuses on "process-based" controls.⁶⁴ Under this theory, state regulation of the contractual transaction renders substantive regulating of contractual terms unnecessary.⁶⁵ Legislation on disclosure, notice and voting requirements reflects this promise.⁶⁶ The ability to assess options and to voluntarily choose to enter the community affords the consumer adequate protection.⁶⁷ Therefore, "consumer preference" and "market pressure" supplement substantive regulation of these common interest developments.⁶⁸

This is fundamentally correct. However, the distinction between substantive and process regulation can be improved upon using Theodore Lowi's policy typology, which offers a convenient and analytically familiar way of categorizing the various typical state and federal process-based policies regarding CIDs.⁶⁹ In Lowi's framework, "distributive," or promotional, policy awards benefits, subsidies, insurance, or other reward for behavior the government wishes to encourage.⁷⁰ It works through individual behavior and the likelihood of coercion is remote.⁷¹ "Regulative," or regulatory, policy also tries to influence individual behavior, but does so by applying some form of direct coercion, or sanction, for behavior the government wishes to discourage, through administrative agencies or even the criminal courts.⁷² "Re-distributive" policy works through changing the environment of conduct rather than individual behavior directly, by means such as the system of taxation and the Federal Reserve's influence over interest rates.⁷³ "Constituent" policy changes the environment of conduct by changing the structure of government itself, such as by creating a new agency.⁷⁴

There are examples of all four types of policy to be found in the ways governments have responded to the rise of CID housing.⁷⁵

63. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 228 (1992).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 229.

68. *Id.*

69. Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298, 300 (1972).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See Evan McKenzie, *Homeowner Association Private Governments in the American Political System*, No. 75, PAPERS IN POL. ECON., May 1996, at 8-9 (discussing in further detail how Lowi's typology might apply to CID poli-

Distributive policies would include the Federal Housing Administration's decisions in the early 1960s to offer mortgage insurance for condominiums and planned unit developments, and later the Department of Housing and Urban Development's provision of insurance for New Town construction.⁷⁶

Regulatory policies are to be found in virtually all states, and include requirements for disclosure, record-keeping, financial accountability, and meetings, some applying to all non-profit corporations and others designed specifically for CIDs. However, in most states there is no state agency to enforce the requirements except during the period when the developer controls the project, when the department that regulates real estate transactions is responsible. This is in keeping with the theory that only the transaction of purchase needs significant monitoring. Once the CID is in the hands of the homeowner association, there is no state regulation except to the extent those requirements are enforced by private litigation. Only one state, Florida, has coupled its regulatory policy with constituent policy and created a regulatory agency, the Bureau of Condominiums, located in the Department of Business Regulation.⁷⁷ The Bureau enforces the process regulations contained in the Florida Condominium Act throughout the life of the association.⁷⁸

Perhaps the best example of a re-distributive policy is New Jersey's Municipal Services Act, which requires municipalities to reimburse CIDs for the costs of specified municipal services supported by tax revenues, if the CID owners are receiving parallel private services instead, paid for through their homeowner association assessments.⁷⁹ This policy was intended to prevent "double taxation" of CID homeowners.⁸⁰

IV. WHY LEGISLATURES WILL NOT ACT UNTIL IT IS TOO LATE

Public policy has been kept at a more-than-respectful distance from CIDs in part by the rhetorical claims described above, and also because there is a collective action problem in this policy area. The policy process in this subject area is dominated by organizations representing the economic interests that benefit from increasing CID housing without increasing government oversight of their activities. Developers, property managers, and lawyers, especially those who provide professional services necessary to the

cies).

76. See MCKENZIE, *supra* note 4, at 96-105 (setting forth the history of this policy decision).

77. *Id.* at 152.

78. FLA. STAT. ANN. § 718 (West 1988).

79. N.J. STAT. ANN. § 40:67-23.2 (West 1992); McKenzie, *supra* note 75, at 21-23.

80. McKenzie, *supra* note 75, at 21-23.

routine activities of CIDs, are able to pursue these policy objectives through the Community Associations Institute and other smaller organizations. However, individual homeowners, as distinct from association directors, are unorganized, except for small insurgent groups with little influence.⁸¹

The interest group imbalance is not unusual in our political system. Indeed, it is common for producers of a good or service to be organized for political activity while the consumers of that good or service are not. Mancur Olson argues that the reason for this situation is a collective action problem.⁸² Since individuals are expected to protect their personal interests, it often assumed that groups of individuals with common interests will likewise protect those common interests.⁸³ Logically, if a group has a common goal and all members of the group would benefit from the achievement of that goal, it is presumed that "rational" and "self-interested" members of that group would act to realize that goal.⁸⁴

However, this is not the case. In fact, Olson shows, "[u]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*"⁸⁵ Large, diffuse interests tend to remain "latent" groups, while small, oligarchic interests are much more likely to organize to achieve common objectives.⁸⁶ Among the "forgotten groups" who "suffer in silence" are consumers.⁸⁷ Olson says, "[t]he consumers are at least as numerous as any other group in the society, but they have no organization to countervail the power of organized or monopolistic producers."⁸⁸

In sum, it is easier to organize narrow oligarchic interests where a small number of actors have high stakes, than to organize broad, large, diffuse interests where many stakeholders have a relatively small stake, even if the diffuse stake is many times larger than the oligarchic one. The result is an imbalance in interest group politics. Just such an imbalance exists in the area of CID policy. The privatization of complex government functions and services that characterize CID housing creates a need for professionals to provide these services. These professionals are typical

81. See MCKENZIE, *supra* note 4, at 106-121 (discussing the interest group imbalance, including the Community Associations Institute and its prominent role in the political process where CIDs are concerned).

82. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1 (2d ed. 1971).

83. *Id.*

84. *Id.* at 2.

85. *Id.* (emphasis in original).

86. *Id.* at 2-3.

87. *Id.*

88. OLSON, *supra* note 82, at 165.

of Olson's small, oligarchic groups with strong economic incentives to organize to further their interests. But CID homeowners are simply consumers of a mass-produced commodity, and thus become another "forgotten" or "latent" group" which ends up suffering in silence. Consequently, the policy agenda regarding CIDs reflects the preferences of the organized producers of CID housing rather than the unorganized consumers.

The existing CID policies described above, promotion of the continued growth of CID housing, minimal process-based regulations, and no regulatory agency, is very much in keeping with the perceived interests of the groups that provide services to CID homeowner associations. Indeed, the stated policy positions of the Community Associations Institute (CAI) seek to reduce even the existing level of state involvement in one important respect: access to the courts.⁸⁹ The Institute is on record as calling for alternative dispute resolution in place of public courts, opposing the state licensing of community association property managers as real estate agents or brokers, advocating discontinuance of all HUD regulatory agreements with Federal Housing Association (FHA) approved condominiums and opposing Federal Home Loan Mortgage earthquake requirements for California condominiums.⁹⁰ In essence, the CAI opposes federal regulation, while accepting federal promotional policies such as FHA mortgage insurance, and advocating on behalf of new federal tax benefits that would make CIDs more desirable for consumers.⁹¹ CAI also opposes regulation by the communities in which CIDs are located.⁹² Rather, CAI supports the minimalist regime of process regulations that typify state-level regulation. The CAI considers local legislation over the creation or policing of community associations as "antithetical" to the balancing of the associations' interests and as promoting a "patchwork of regulations" within a state.⁹³ Therefore, CAI advocates for effective state regulation when it is required for consumer protection, conversion limitations, protections for ongoing operations or other additions to existing state statutes or common law, to ensure that community association housing is developed and maintained consistent with legitimate public policy objectives and standards that protect individual consumers, balancing the legitimate rights of the development community.⁹⁴

In the absence of strong state involvement, organized profes-

89. Community Associations Institute, *Taking a Stand: CAI Public Policy Positions* (visited Jan. 22, 1998) <<http://www.caionline.org/takingastant/positions/pubpol.htm>>.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

sionals are in a very powerful position with respect to CID residents, who by and large lack the specialized knowledge, time, staff, individual profit motivation, and other resources possessed by these professionals. These inequalities are further exacerbated to the extent that these organizations engage in practices that could reduce the level of competition still existing in their market. Such an allegation gave rise to hints of an emergent federal regulatory policy in June 1994, when the Federal Trade Commission issued a complaint against the CAI.⁹⁵ The complaint charged CAI with being a "combination" or "conspiracy" to restrain trade and competition in the provision of homeowner association management services.⁹⁶ The complaint was resolved with a consent order requiring the CAI to "cease and desist" from the particular activities involved, including other conditions, such as a five-year period of federal monitoring.⁹⁷

There is a cautionary message implied in Olson's analysis, because he reminds us that policy makers should be alert to the existence of latent groups with interests that are not represented by the actions of organized groups.⁹⁸ At times these groups find ways to express themselves outside of interest group politics. In the short run, perhaps the policy that results is distorted in favor of those with access to the institutional policy agenda. But in the longer run, the needs that are on the systemic agenda, which include the concerns of the latent groups, may be expressed in social movement politics, litigation, or other manifestations which are unexpected from the standpoint of the oligarchic interests. The American political system has been impacted by many such upheavals, including the Grange movement, the organized labor movement, the civil rights movement, the anti-war movement, the feminist movement, the environmental movement and the nuclear disarmament movement. These are examples of diffuse interests that somehow overcame the collective action problem and found a way to organize.⁹⁹ They are also examples of issue areas that have been characterized by lasting patterns of strongly adversarial, even openly conflictual politics.

V. POSSIBLE OUTCOMES OF THE "STATUS QUO"

The "status quo" of CID policy-making, then, is one in which producer interests dominate the policy agenda. In such circum-

95. *In re* Community Associations Institute, F.T.C. No. C-3498 (June 6, 1994).

96. *Id.*

97. *Id.*

98. OLSON, *supra* note 82, at 165-67.

99. There is a body of literature dealing with social movements and other means of overcoming collective action problems, including sponsorship of group activity by patrons.

stances, these interests are able to control the degree and type of state intervention in their industry. This has led to a situation in which the policy agenda regarding CIDs does not reflect many of the significant issues and concerns that actually exist and need attention.

This "status quo" has three possible negative outcomes, which are called "emergence of an adversarial relationship with the state," "failure from within" and "failure of demand." The word "possible" is used because it is difficult to estimate the probabilities of any one or combination of these scenarios. There are many variables involved in each, and this analysis will not go beyond stating how each might look.

A. Emergence of an Adversarial Relationship with the State

This scenario could result if significant numbers of CID owners overcome their collective action problem, if there is a hostile judicial reaction, or if other political forces emerge in reaction to overreaching by the CID industry that currently dominates the policy agenda. The issue areas mentioned above, which resulted from the activity of social movements, are replete with examples of such adversarial relationships between government agencies and particular economic interests. This scenario becomes more likely the longer CID producer interests prevent reform efforts that are actually needed.

B. Failure From Within

"Failure from within" is a scenario in which the CID industry collapses, or implodes, and loses its ability to function properly, because this privatized institution becomes overwhelmed by the challenges it faces. This kind of failure could lead to high levels of insolvency of homeowner associations, defunct associations, and abandonment of CID units and mortgages by their owners when financial burdens of ownership become too great. Contributing factors might include failure of participation by owners as volunteer directors; high rates of conflict and expensive litigation among the various participants in CID housing;¹⁰⁰ and, perhaps most significantly, physical deterioration of the physical infrastructure of CID communities.

As many authorities have noted, CID housing was a tiny per-

100. Assessment collection, suits for rule violations, construction defect suits, and other litigation are already a matter of concern in places with large numbers of CIDs. WARREN FREEDMAN & JONATHON B. ALTER, *THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS* 127-40 (1992). Other new conflicts may be emerging. For example, in Florida a dispute emerged recently between property managers and lawyers over whether property managers should be allowed to express opinions as to the meaning of CC&R provisions.

centage of the nation's housing stock before 1960, and still a small one as late as 1970, so that a line representing the growth of CID housing would show a relatively recent steep upward curve.¹⁰¹ Millions of housing units were constructed in the same brief time frame, much of it in newly developed areas that were heavily impacted by virtual "tsunamis" of housing construction.¹⁰² The prevalence of lawsuits over defective original construction testifies to the problems that occurred when many builders were rushing to get units to market. Available supplies of skilled laborers were exhausted and there were insufficient numbers of housing inspectors. Given this history, the possibility of premature deterioration of major building components must be considered.

To date, developers, who were sued by the homeowner associations they created; "third party" insurance carriers who insured developers and subcontractors against liability resulting from their construction projects; and the insurance carriers who underwrote "first party" property insurance for homeowner associations have borne major repair costs.¹⁰³ Those sources of revenue will be less available for aging CIDs, because statutes of limitation against allegedly responsible parties are more likely to have run, and because it is doubtful that there will be insurance coverage for the kinds of losses older CIDs will be facing over the next few decades. "Normal wear and tear" is not ordinarily a covered loss. First-party property insurance carriers have rewritten policies and fought in appellate courts to limit coverage for construction-related losses.¹⁰⁴ Companies issuing liability insurance to developers have done likewise.¹⁰⁵

Nonetheless, association boards of directors are required to maintain and repair common areas and enforce physical standards throughout the project.¹⁰⁶ Where there is no insurance carrier or responsible party, they are expected to use regular and special assessments of the unit owners to accomplish this. Owners of CID units are typically responsible for mortgage payments, property taxes, homeowner insurance on the individual unit, and regular monthly assessments, which include contributions to reserve funds for replacement of major building components in the normal course.¹⁰⁷ However, many associations are under-reserved, and in

101. McKenzie, *supra* note 75, at 1-2; Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 347-48 (1992).

102. McKenzie, *supra* note 75, at 1-2.

103. FREEDMAN & ALTER, *supra* note 100, at 115-17.

104. See Joseph G. Blute, *Analyzing Liability Insurance Coverage for Construction Industry Property Damage Claims*, 7 NO. 3 COVERAGE 1, 23-31 (1997) (outlining issues arising under insurance policy exclusions).

105. *Id.*

106. FREEDMAN & ALTER, *supra* note 100, at 115.

107. *Id.* at 81-91.

that case, or whenever components wear out prematurely, the homeowners must pay special assessments for those repairs.¹⁰⁸

Consequently, it is possible that increasing numbers of associations will face the prospect of needing to make major building repairs, and having inadequate reserves and no source of revenue, other than assessing their members, to pay for it. This kind of pressure, added to the existing level of conflict, and given the lack of public involvement and support, could strain many associations beyond the breaking point. This kind of institutional failure is not without recent or related precedent. The savings and loan industry collapsed over a short period of time, which was not foreseen by policy makers, and even in retrospect the disaster was difficult to fully explain.¹⁰⁹

C. Failure of Demand

The "failure of demand" scenario contemplates the possibility that the demand for CID housing could collapse. Negative press coverage of CIDs could contribute to this unfortunate situation, particularly to the extent that journalistic "conventional wisdom" reflects a critical view of CIDs and their residents. One example of this is the recent apparent tendency for CIDs to become subsumed into the popular discourse concerning "gated communities."¹¹⁰ As Robert Frost said, in his poem *Mending Wall*:

Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down.¹¹¹

It is impossible to predict the nature of future press coverage of this industry, or of future governmental regulatory action. But the example of the tobacco industry should be kept in mind as one instance of a group of producers who succeeded in forestalling regulatory action for many years, and who now find themselves heavily involved in adversarial politics, negative press coverage, litigation and declining domestic market acceptance.

108. Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 36 (Advisory Commission on Intergovernmental Relations eds. 1989) [hereinafter *Homeowners' Associations*].

109. CONGRESSIONAL BUDGET OFFICE, RESOLVING THE THRIFT CRISIS, x-xi (1983).

110. BLAKELY & SNYDER, *supra* note 18, at 135-40; David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995).

111. ROBERT FROST, SELECTED POEMS 88 (1992).

VI. A ROLE FOR THE COURTS: CREATIVE APPLICATION OF CONTRACT LAW

The issue of when courts should become involved in solving public policy problems is highly controversial and the subject of considerable scholarship. It has been previously explained that the legislative and executive branches cannot be expected to address CID issues adequately. However, it is possible that courts could make an important contribution in this policy area, beginning by recognizing the collective action problem. Appellate courts are sometimes faced with deciding whether to treat legislative inaction as democratic ratification, or considering the possibility that the legislature is paralyzed by the shortcomings of the political system, the structure by which citizens' concerns are translated into items on the policy agenda.¹¹² There is an approach that would allow courts to address troublesome issues relating to CIDs through contract law, without having to decide controversial constitutional questions.

For purposes of this article, there is difficulty and risk involved in making such determinations, but nonetheless judges and legal scholars should give serious consideration to the notion that such a situation may exist now, with respect to CID housing. If that is so, some courts may wish to consider the following approaches to judicial intervention. These approaches are: 1) that courts should not necessarily feel bound to enforce contractual provisions supported by only the standard objective manifestations of contractual assent; 2) that CID governing documents are contracts of adhesion and should be subject to certain remedies proposed for such contracts; and 3) that these documents should be viewed as part of the "product" for purposes of applying doctrines of product liability law.

A. *Assent and Consent*

As noted above in the section on "freedom of contract," it is often argued that government should not become more assertively involved in CID issues, because those who participate in such arrangements do so voluntarily. But the hybrid nature of CIDs, and their recent rapid growth and institutional evolution, have tended to conflate two different kinds of voluntary arrangements: "assent" to a contractual arrangement, and "consent" to be governed.

"Voluntariness" in the ordinary law of contracts requires simply that there be certain objective manifestations of assent to the agreement, such as a signature on a writing containing the

112. See *Baker v. Carr*, 369 U.S. 186, 208-36 (1962) (discussing the clearest example of this situation that led to this decision). This situation pertained to United States Supreme Court's internal struggle over whether to address the issue of mal-apportioned legislative districts. *Id.*

terms. A party who has signed an agreement is presumed to have read and understood its terms, and in general the other party can expect courts to enforce the terms of the agreement against the signatory.¹¹³ The signatures prove that these parties have structured the agreement as they chose, and the role of the courts is just to see to it that the promises are kept.

But the concept of consent in liberal democratic political theory is more complex and has more substantial consequences, because it is linked to the idea of legitimacy. The state is not just an enforcer of personal obligations, but is directly involved in the "social contract," either as a party or as the entity created by the parties.¹¹⁴ The contract is a constitution. Consent of the parties to that contract gives rise to the state, which, among its other duties, decides whether people have made objective manifestations of assent to contracts. Being governed involves delegating discretionary power over some aspects of one's life, but not others, to people who act through the state. Consent and its limits are often contested, generally as matters of constitutional law and even to the point of civil war. But in liberal democratic theory, when consent is present, its presence grants legitimacy to the enforcement of governmental decisions. When consent is absent, such actions are simply the use of superior force.

Because of these crucial differences, assent to a contract is, in an important sense, subordinate to the larger question of consent to be governed. Seeking enforcement of a contract based on assent is merely one claim among many that people make on a legitimate government, but consent is the very basis for the government's claim it is legitimate. In other words, the entire law of contract depends upon consent, but consent does not depend on any aspect of the law of contract.

However, because they are in certain respects privatized local governments, CIDs raise an unusual question: what if a contract amounts to an agreement by one person to be governed by another? In that circumstance, what should be the measure of "voluntariness?" Is the ordinary contract law standard of objectively manifested assent enough? Or should something more be required, in view of the fact that the agreement implicates issues that are normally adjudicated under constitutional law?

The current judicial practice with CIDs is to gauge

113. Kessler, *supra* note 1, at 630-31.

114. Hobbes argued that individuals in a state of nature agree among themselves to be governed by the state. Michael Rosenfield, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 791 (1985). But Lockean contract theory more closely resembles an agreement between society and the state in which the state agrees to limits on its powers. *Id.* at 787-90.

“voluntariness” by the low standard used for contractual assent.¹¹⁵ While this facilitates the enforcement of business promises, and thus promotes energetic commerce, when applied to CC&R promises it produces outraged homeowners and bitter litigation. Courts could legitimately require that government by a community contract¹¹⁶ be supported by something more substantial than the showing of assent one might offer to enforce the purchase of a truckload of chickens.

This could involve judging some covenants by the contractual standard of assent, and others by the higher standard of consent, and judges would make a threshold decision as to which standard to apply. Some basic CC&R provisions, such as the obligation to pay regular assessments, are straightforward, easily understood, and necessary to the association’s survival. Judges could enforce those provisions as they do now, based on a showing of assent. However, where associations seek to ban political activity or expression, limit communication, or otherwise intrude into areas of protected rights and liberties, courts would be justified in demanding that the association carry a heavier burden of proof. An example of this burden of proof includes proving that the defendant knowingly, voluntarily and expressly waived the rights or liberties in question. This could be implemented easily. Developers and associations seeking to enforce provisions that infringe basic liberties might develop waiver forms that could be used to prove such waivers. Criminal court judges make such determinations all over the country every day with respect to guilty pleas, time waivers, and other procedural steps.

As a second step in helping to reform CIDs, courts should also take into account the fact that the agreements in question are adhesion contracts.

B. Government by Adhesion Contract

The argument for judicial action regarding government by contract becomes stronger because the parties who create the contracts in question, such as real estate developers and their attorneys, are organized professionally and politically, and have standardized the terms of the governance agreement to a substantial degree. The result is that government by adhesion contract is now an institutionalized arrangement affecting millions of people.

Quite apart from any discussion of CC&Rs, some legal scholars have argued that all adhesion contracts should be given special treatment by judges. The model contract of adhesion (sometimes referred to as “standard form contract” or “standardized agree-

115. McKenzie, *supra* note 75, at 3-4.

116. Charles S. Ascher, *How Can a Section of Town Get What It is Prepared to Pay for?*, THE AMERICAN CITY, June 1929, at 98-99.

ment¹¹⁷ has the following seven characteristics:

(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract. (2) The form has been drafted by, or on behalf of, one party to the transaction. (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine. (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified terms (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document . . . (5) After the parties have dickered over whatever terms are open to bargaining, the adherent signs the document. (6) The adhering party enters into few transactions of the type represented by the form—few, at least, in comparison with the drafting party. (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.¹¹⁸

Adhesion contracts have become an integral, and some believe an essential, part of an economic system that is based on mass production and distribution. However, they are only useful because they contradict the basic assumption that the contract is the embodiment of a bargain. The efficiency gains of adhesion contracts come in large part from the elimination of bargaining over the terms of individual transactions. The Restatement of Contracts notes that usually a seller using a standardized form does not anticipate that his customers will read, let alone understand, the terms of the contract.¹¹⁹ Indeed, if customers retained counsel to review the terms, then the purpose of the standardized form to eliminate bargaining over details would be eliminated.¹²⁰ Employees who use the form may not understand the terms, and often have little authority to alter them.¹²¹ Customers rely on the “good faith” of the party and on the “tacit representation” that other customers in lieu of reading the terms regularly accept such contracts.¹²² Nonetheless, customers realize that they are agreeing to those standard terms, subject to any legal restrictions.¹²³

In some cases, both parties to the contract are producers, merchants, or other individuals engaged in commercial enterprise, and could reasonably be expected to be familiar with the industry’s standardized agreements. In other cases, as with CIDs, the drafter is in the real estate development business and the typical adherent is a consumer, who cannot reasonably be expected to

117. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

118. Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

119. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

know and understand all the terms of the standardized agreements or how they have been judicially interpreted.

Eminent legal scholars have discussed how judges and lawyers should regard adhesion contracts. In 1943, Friedrich Kessler wrote his seminal article on the subject,¹²⁴ in which he related the way such contracts evolved. Case law reveals that a contract is a private, not a social, transaction.¹²⁵ Therefore, the courts will only interpret contracts, not make them.¹²⁶ A party must agree to the contract to be legally bound, but only "objective manifestations of assent" are required.¹²⁷ A party is assumed to understand the contract he enters into and protect his own interests.¹²⁸ Oppressive terms can be "avoided by carefully shopping around."¹²⁹

Judicial deference to the substance of contracts is based on these factual predicates, because in such circumstances, "[t]here is no danger that freedom of contract will be a threat to the social order as a whole Influenced by this optimistic creed, courts are extremely hesitant to declare contracts void as against public policy"¹³⁰

However, Kessler explains, circumstances have changed. "The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract."¹³¹ Once these contracts were perfected and their usefulness demonstrated, they spread from transportation, insurance and banking into "all other fields of large scale enterprise," including labor relations, and now common interest housing.¹³² Indeed, Kessler could almost have had CIDs in mind when he wrote,

[f]reedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.¹³³

Judges could and should be involved in preserving fundamental social values against erosion by adhesion contracts. However, Kessler says, to date courts have approached that task in the

124. Kessler, *supra* note 1, at 629.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Kessler, *supra* note 1, at 630-31.

131. *Id.* at 631.

132. *Id.*

133. *Id.* at 640.

wrong way.¹³⁴ "Handicapped by the axiom that courts can only interpret but cannot make contracts for the parties, courts had to rely heavily on their prerogative of interpretation to protect a policy holder."¹³⁵ This practice helped them to reach "just" decisions and protect the weaker party, but also led to "highly contradictory and confusing law" in the interpretation of insurance contracts and other standardized agreements.¹³⁶ Instead, he argues that when interpreting adhesion contracts, courts must determine both the legitimate expectations of the weaker party for services and the extent to which the stronger party failed to meet those expectations based on "the typical life situation."¹³⁷ The resulting need to rewrite the terms of the contract does not introduce a new role for courts.¹³⁸ Judge made revisions of contracts have occurred in the area of constructive conditions.¹³⁹ This area of law has also refuted the argument that the sole difference between an express contract and a contract implied in fact is that the party's intention is "circumstantially proved."¹⁴⁰

However, this approach requires judges to overcome their in-built deference to the dogma of freedom of contract. Adapting the common law of contracts to contracts of adhesion must be solved through direct action.¹⁴¹ This cannot be accomplished unless courts confront their "emotional attitude" concerning freedom of contract.¹⁴² Judicial rationalization for this attitude is the "main obstacle of progress."¹⁴³ Courts insist that social desires must give way to "legal certainty" and "sound principles of contract law."¹⁴⁴ However, this dicta is unnecessary since the rules of common law afford courts the flexibility to consider a community's sense of justice.¹⁴⁵ Freedom of contract provides flexibility so parties may shape an individualized contract; the "rule and counter-rule" competition of the common law provides flexibility so courts may "follow the dictates of 'social desirability'".¹⁴⁶

Kessler argues that in doing this, judges should consider the "social importance of the type of contract" in question, and "the degree of monopoly enjoyed by the author."¹⁴⁷ But recently, Professor

134. *Id.*

135. *Id.* at 633.

136. Kessler, *supra* note 1, at 633.

137. *Id.* at 637.

138. *Id.* at 637-38.

139. *Id.*

140. *Id.*

141. *Id.*

142. Kessler, *supra* note 1, at 637-38.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 642.

Todd Rakoff of Harvard Law School has argued that Kessler's approach did not go far enough, because it was based on the notion that adhesion contracts were essentially an extension of monopoly power.¹⁴⁸ Instead, Rakoff urges, "the form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable."¹⁴⁹ This practice is justified because adhesion contracts are fundamentally a different social practice than "ordinary" contracts, and should be viewed as "a coherent social and legal institution" that requires a "new analysis."¹⁵⁰ Even an individual who reads and understands the terms of a contract may perceive himself to be essentially helpless, and rightfully so.¹⁵¹ The consumer does not experience freedom of contract propounded by traditional contract law.¹⁵² Instead the consumer experiences only the freedom to choose the organization by which he will be dominated.¹⁵³ The use of contracts of adhesion itself generates and allocates power, even though not market power.¹⁵⁴ Therefore, it is no longer enough to consider these contracts to be legal forms "operating as a transmission belt of monopoly power."¹⁵⁵ Contracts of adhesion give organizations freedom from legal restraint and power to control market relationships.¹⁵⁶ The legal support given to the use of adhesion contracts must be judged with this effect in mind.¹⁵⁷

This analysis would shift the burden to the drafter of the form agreement to prove that the term should be enforced. Rakoff proposes a particular set of steps for judges to follow that "can be employed not only to show grounds for non-enforcement of form terms, but also to establish appropriate, limited grounds for enforcement."¹⁵⁸ In short, "[t]he rule should thus be that to justify enforcement of any form term to the extent that it deviates from background law, cause must be shown."¹⁵⁹

It is not necessary to believe that all adhesion contracts, or even all consumer-as-adherent contracts, need special judicial treatment, in order to see that the CID government-by-adhesion-contract presents a particularly strong case for the remedies that have been proposed for such contracts. However, CID contracts can be seen as an example of why, as Rakoff puts it, judges need to

148. Rakoff, *supra* note 118, at 1217-20.

149. *Id.* at 1176.

150. *Id.*

151. *Id.* at 1229.

152. *Id.*

153. *Id.*

154. Rakoff, *supra* note 118, at 1229.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1242-43.

create "a new legal structure" that reflects "an open recognition that contracts of adhesion represent a different social practice from 'ordinary' contracts."¹⁶⁰ Rakoff concludes, that the judicial and legislative systems are now confronted with the task of creating this "new legal structure."¹⁶¹ To do this, they must stop apologizing for not adhering to traditional contract law.¹⁶² Only then will they begin to create "something of use, then perhaps of beauty."¹⁶³ While the past quarter-century has witnessed creativity in the field of adhesion contract, "it needs to be greater still."¹⁶⁴

VII. CONCLUSION

If courts became more involved in the substance of CID contracts, producers would be forced to justify their practices in ways they do not at present. These producers would be challenged to do better, and perhaps to live up to their democratic rhetoric. For example, the industry might voluntarily adopt "plain language" CC&Rs, as insurance companies began to write "plain language" insurance policies.¹⁶⁵

In any event, there is little risk involved in undertaking such a project. Indeed, as previously argued, the "policy gap" that has been described may lead to disastrous consequences. Restructuring CID private government would make it a stronger institution, more consistent with accepted social, legal and constitutional values, and probably would make such housing more acceptable to many residents and less generative of conflict and litigation.

160. Rakoff, *supra* note 118, at 1284.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See Charles Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 299-301 (1985) (discussing how plain language policies came into use through industry practice).

