

Restricted Area: A Tocquevillian Critique of Homeowners Associations\*

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Nearly one out of every five Americans--about fifty-five million people--now lives in a private residence subject to the governance of a residential community association, the vast majority of which are homeowners associations (HOAs). HOAs are typically non-profit corporations organized by the developers of common interest developments (CIDs) to manage the property and administer the rules of these developments, which offer the promise of affordable housing in safe and secure communities free from the crime, decay, and alienation of the world outside. This type of housing has grown so rapidly over the past few decades that the total number of HOAs has increased dramatically from fewer than 500 in the early 1960s to around 250,000 today, with nearly all new residential developments in some places coming under their jurisdiction. But even more remarkable than the sheer growth of these HOAs, which currently regulate about 20 million out of 106 million total homes in the United States, is the extraordinary power that they wield over the lives of residents. Living in one of these developments often involves a surrender of personal freedom to a form of private government that can exercise substantial coercive powers beyond the reach of constitutional limitations that apply to ordinary public governments.

There are few areas of residential life that HOAs have not tried to regulate. According to Evan McKenzie, CIDs "have become a regulatory Frankenstein's monster, seeking to eradicate any behavior that might conceivably pose a threat to property values." HOAs generally show little patience for the messiness of freedom. They have the power to prohibit, compel, and carry out activities in relatively trivial and substantial matters alike. Not only can they prohibit residents from drying their laundry on a clothesline, painting their homes the color of their choice, hanging

certain kinds of drapes in windows, making public displays of affection, 4 possessing pornographic materials, 5 displaying the American flag and other political symbols, distributing newspapers, holding political meetings on common property, and living with their own spouses, 6 but they can also maintain constant surveillance on vehicular and pedestrian traffic, employ inspectors to look for infractions of the rules, demand access to one's home "for repairs at any time," 7 require residents to "carry their identity tags at all times," 8 compel residents to water their lawns during droughts, 9 impose special assessments that could exceed tens of thousands of dollars, fine residents for violating rules, put a lien on one's property, and even foreclose on one's home. 10 Since courts have generally ruled that HOAs are private, voluntary associations, HOAs are not subject to the constitutional limitations that restrict the ability of state actors to abridge the freedom of speech, intrude on the right of privacy, or restrict the right of suffrage in local elections, even though they often perform many of the basic functions of municipal governments. 11

In practice, the rule of most HOAs has been pretty mild, but the absence of juridical guarantees leaves residents vulnerable to invasive regulations. Some homeowners have revolted against such regulations, but the vast majority of homeowners express general satisfaction with their HOAs. <sup>12</sup> Critics may decry this system of private government as "a form of contracted facism," <sup>13</sup> but many homeowners endorse the expanding web of behavioral restrictions spun by developers and HOAs as a necessary means of preserving property values. For homeowners seeking the personal and financial security that life in a common interest development seems to provide, giving up some personal freedoms is considered a worthwhile trade-off. And assuming that membership in these associations is truly voluntary, as their defenders claim, it is difficult to criticize exercises of associational freedom that entail restrictions on other forms of one's own freedom, at least on liberal grounds. Arguably, the liberal distinction between the public and the private is designed to insulate each sphere from unwarranted interference by the other in the belief that this separation generally works to prevent those concentrations and abuses of (primarily state) power that constitute the greatest threats to overall freedom. <sup>14</sup>

However, such ready acquiescence to restrictions on one's own freedom has serious implications for the freedom of other citizens in the long run. The expanding regulation of residential spaces is a deeply alarming trend that threatens to undermine that general tolerance for inconvenient, disruptive, and unruly activities which is essential to the long-term preservation of

freedom. HOAs are likely to transform--if not deform--those values that are supposed to make civil society a "space of uncoerced human association." 15 As more and more of this space becomes colonized by HOAs, civil society begins to take on and reinforce those coercive tendencies it is supposed to counteract. And the more that Americans get used to living in developments that dictate behavior in more and more areas of everyday life, the more likely it is that the conformist values and habits of control fostered there will exert themselves in other spheres, including the realm of public policy decision-making.

Ironically, it may be Alexis de Tocqueville, whose famous writings on New England townships and voluntary associations are cited most frequently by advocates proposing normative justifications for HOAs, who actually help us best understand why the supposedly self-imposed restrictions enforced by HOAs constitutes such a grave threat to freedom in general. Tocqueville championed the New England townships and voluntary associations not just because they trained citizens in the practice of democratic self-government, but because they also inculcated those habits and values indispensable to the preservation of freedom throughout society. These decentralized systems of local self-government were thought to provide an "apprenticeship" in the difficult "art of being free," 16 which includes tolerance for the inconveniences that necessarily attend exercises of freedom.

In contrast to the decentralized systems of self-government described (and idealized) by Tocqueville, HOAs tend to inculcate values inimical to the unfettered cultivation and expression of freedom and individuality. The danger is that Americans used to living under the restrictive rules of these residential regimes will steadily lose--or simply fail to develop--those "mores" and "habits" that Tocqueville suggested were vital to the preservation of a free way of life. Without

the proper "mores" to sustain them, formal institutions and legal rules designed to protect individual freedom may ultimately prove to be inadequate, particularly when certain restrictions on freedom become accepted as normal. If "the reign of freedom cannot be established without that of mores," it cannot be preserved for long without that of mores, either. <sup>17</sup> With membership in other types of associations declining in the United States, <sup>18</sup> there are fewer opportunities for individuals to cultivate mores that could offset those acquired where they live and generally spend the most time.

If membership in associations has a "formative" effect on the development of those "moral dispositions" that individuals display elsewhere, <sup>19</sup> then the illiberal practices and conformist values promoted in HOAs are likely to have a significant impact on the long-term sustainability of a free society. As increasing numbers of Americans grow accustomed to restrictions on their own activities in residential life, they may become more accepting of restrictions on the activities of others outside of these residences, as well, when those activities seem to conflict with their interests in order, stability, or material well-being. **The argument that these are private, as opposed to public, restrictions on freedom is irrelevant if, as Tocqueville notes, "Habits of private life are continued into public life."** <sup>20</sup> Successful attempts to privatize and gate formerly public spaces and roads indicate that HOAs are already beginning to satisfy and promote an impulse to control that is incompatible with the respect for diversity and spirit of tolerance

that a free society needs to thrive. 21 Since the ability to exercise certain kinds of freedom is being severely curtailed by the growing privatization of shopping centers and other traditionally public spaces, 22 the restriction of personal freedom in private residential spaces means that individuals are increasingly left with fewer and fewer opportunities to exercise vital freedoms. As Tocqueville understood, freedom exists only as an active and ongoing practice. 23 Without adequate opportunities to practice freedom oneself, the value of freedom for oneself and for others may diminish in the long run. 24

### **The Rise and Operation of Common Interest Housing Developments**

Common Interest Developments (CIDs) began to proliferate in the 1960s in response to pent-up consumer demands for affordable single-family unit housing. 25 As land became more expensive, housing developers resorted to CIDs as a way to squeeze more homes on smaller spaces with the encouragement and assistance of the federal government. Builders were able to overcome Americans' cultural expectations for large plots of private land that afforded a sense of privacy and independence by offering prospective homebuyers amenities such as swimming pools, parks, tennis

courts, clubhouses, security guards, and golf courses, which they would not be able to afford on their own. Local governments often greeted the construction of CIDs with enthusiasm because they added new property-tax payers without having to assume the cost of providing and maintaining certain services. The resulting creation of a homogeneous environment that effectively excluded racial and economic differences worked to restore a sense of control to residents seeking refuge from the apparent inconveniences and dangers of urban life.

Even before a single resident moves into one of these developments, developers legally establish homeowners associations to be led by a corporate board of directors that will oversee and maintain the common areas and facilities. The responsibilities of the board of directors, which is comprised of volunteers who have been elected by the other owners in the CID, include the management of the common property and interests of the CID, the collection of periodic and special assessments, and the enforcement of rules and regulations. From the point of view of the developer, HOAs reduce operating costs and allow them to sever all ties to the development once the project is complete. From the point of view of homeowners, HOAs provide some assurance that the common properties will be managed efficiently and without interruption after the developer leaves. 26 Membership in a development's HOA is automatic and mandatory for anyone who buys a home in a CID. Participation in the HOA is open only to property-owners, though all residents and their guests are subject to the rules and regulations of the CID. Membership terminates only when one's property is sold.

One of the primary responsibilities of an HOA is to enforce the rules and regulations of the development. The most important set of rules is contained in deed restrictions that bind the original purchaser and all future owners. Devised by developers to maintain control over their investment until the project is complete, these deed restrictions, also known as Category One



restrictions, establish a set of binding rules known as "covenants, conditions, and restrictions" (CC&Rs) as a system of private law that "runs with the land." According to Evan McKenzie, developers "have lawyers draft a fat package many pages long and full of elaborate restrictions, that, taken as a whole, dictate to a large extent the lifestyle of everybody in the project." 27 Although the US Supreme Court struck down racially restrictive covenants that prohibited the sale of homes to non-whites as unconstitutional in *Shelley v. Kraemer* (334 U.S. 1 [1948]), almost all other restrictive covenants are judicially enforceable, including those that discriminate on the basis of class or income or that restrict the exercise of constitutional freedoms. These deed restrictions receive an extraordinary degree of judicial deference because courts have generally ruled that they are voluntarily accepted by anyone who chooses to join the association. 28 The notion that these rules are based on the "consent of the governed" has become a received dogma in much of the legal community.

Boards of directors are also responsible for enforcing what are sometimes known as Category Two restrictions, which are subject to change by the board itself. Such regulations include architectural restrictions on remodeling projects, construction of new additions, and exterior colors, which are enforced by architectural control committees that enjoy an enormous degree of discretion in the application of often vaguely defined rules. Like Category One restrictions, these rules and regulations are also enforceable in the courts, but they are subject to more exacting standards of judicial scrutiny than the deed restrictions. Courts typically apply either a "reasonableness" or a "business judgment" standard in reviewing the actions of HOAs. When the reasonableness standard is used, the burden of proof rests with the challenger to show that the rules are unreasonable. Regulations that promote the safety, health, or well-being of the CID--by maintaining

property values, for instance--are ordinarily upheld by judges as long as they are not arbitrary or capricious. Courts applying the business judgment standard uphold the decisions of boards as long as they act in good faith to further the interests of the HOA and as long as there is no evidence of fraud or breach of trust. Even when they have strong cases, homeowners are often deterred from suing by rules stipulating that they must pay the legal expenses of the association if they lose. These expenses can run as high as \$75,000 or more. 29

It is extremely difficult to alter the rules and regulations since a supermajority is often required. Changes in the rules typically require the agreement of 75% of all owners in the CID, not just those who happen to be voting. Since voting is based on property ownership, the rule is one vote per unit, just as it is with shares in a corporation. However, developers are able to maintain control over the development until 75% of all units have been bought since they get three votes for each unsold home for every one that homeowners have.

Lawyers advise association boards to enforce the CC&Rs as strictly as possible because the HOA may be sued by other association members for lax enforcement or non-enforcement of the rules, even when an exception to the rule may be justified for reasons of safety or compassion. 30 The governing boards of HOAs have several powerful tools at their disposal to enforce

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the rules and regulations. They may issue warnings and impose fines on residents for non-compliance with the rules. If homeowners fail to pay these fines, the regular assessments used for the regular upkeep of the development, or the special assessments used to cover emergency or un-foreseen expenses, boards are empowered to sue them in court, put a lien on their property, and even foreclose on their homes. 31 In some instances, HOAs have garnished the wages or business earnings of recalcitrant homeowners, driving some of them out of business. 32

The amazing growth of these private governments has resulted in the proliferation of homeowners association lawyers, whose "staple is the occasional outburst of individuality that transgresses 'architectural' controls." 33 Despite the intrusiveness of these regimes, most property-owners in associations approve of these restrictions. Two-thirds of respondents in a 1999 Gallup poll stated that "their community's rules and restrictions are very or extremely well enforced," and 40% said they were so satisfied with their associations that they "would not consider selling their houses even if given 15% above the market value." 34 Current developers report that the demand

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for such housing is sustained by a pervasive belief that submitting to association governance is "the best way to safeguard property values." 35

### **The Normative Case for Homeowners Associations**

The primary justification offered by homeowners and industry experts in defense of the restrictive rules enforced by HOAs, is that they have a positive effect on property values. 36 Many home owners also insist that it is imperative to control the activities of their neighbors to maintain high property values. 37 In its response to a "frequently asked question" about the obligation of home owners to abide by association rules, the Community Association Institute (CAI), which was organized by developers concerned about "excessive homeowner control" as a way to "keep them in check," 38 invoked a common interest in maintaining property values. 39 **It is also claimed that strict enforcement of the rules fosters a stable and predictable environment, which is an attractive feature to many prospective buyers seeking greater control over their environments.** 40 A deep abhorrence of flamboyant colors and flashy décors seems to underlie many homeowners' support

for tight architectural and aesthetic restrictions in their neighborhoods. As one homeowner in California put it, "It would be scary not to have an association. I wouldn't want to see broken down cars on front lawns or a hot pink house." 41

In addition to these appeals to material self-interest and well-being, some scholars and industry professionals make more high-minded political arguments in support of HOAs. The most common normative justifications invoke Tocquevillean political principles. According to these arguments, the strict enforcement of rules that curtail individual freedom is legitimate because 1) HOAs are voluntary associations formed by the consent of individuals 2) who want to maintain a particular way of life in a communal setting 3) that maximizes opportunities for participation and democratic self-government.

Many proponents argue that HOAs provide an opportunity for the development of local forms of participatory politics because they permit direct and effective involvement in the governance of CIDs. Some promotional literature likens CIDs to the fabled New England townships, while advocates of HOAs claim that they are the contemporary incarnations of Tocquevillean voluntary associations. 42 According to advocates, HOAs are preferable to ordinary municipal governments because they are "effective providers of low-level public goods," make it easier for the "governed [to] observe and control the acts of governing officials" at higher levels of government,

43 and membership is "perfectly voluntary" and not coercive. 44 It is even said that such associations "might serve as incubators of local social capital" essential to the practice of "collective governance in neighborhoods. 45 Representatives of the Community Association Institute claim "that associations are more respectful of individual rights, not less" because those who disapprove of the rules in place have a more direct and effective opportunities to change them. 46

Advocates also make communitarian arguments in favor of HOAs. They claim that HOAs foster a sense of belonging and a spirit of neighborliness in communities committed to maintaining a particular lifestyle. The gates that surround many leisure communities seem to enhance this sense of community by establishing permanent physical boundaries that help to construct identities through the separation of insiders from outsiders. 47 The very homogeneity that critics denounce is cited by some as evidence that CIDs are more than just contractarian arrangements designed to promote property values to the exclusion of non-material values. Cornell Law professor Gregory Alexander has argued that some HOAs, which exhibit both communitarian and contractarian qualities, create a sense of belonging and cultural identity characteristic of "constitutive groups" defined by shared ends. He explains that "the experience of being tied together creates new, qualitatively different layers in [the residents'] personal relationship." 48

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The basis for the previous claims usually rests on the supposedly consensual nature of homeowners associations. 49 It is often claimed that, unlike the compulsory nature of local government, HOAs originate in and operate according to the principle of Lockean consent. Membership is completely voluntary since no one is forced to buy a home in a CID. Prospective buyers know what they are getting into because sales agents usually apprise prospective homebuyers of "the major existing regulations." 50 According to Yale Professor of Law Robert C. Ellickson, "the original documents [of the HOA]--which today typically include a declaration of covenants, articles of association (or incorporation), and by-laws--are a true social contract." 51

However, the history and current practice of CIDs belie this Panglossian view of home owners associations. As noted above, the CC&Rs are not created by prospective homeowners in a contemporary state of nature, but by builders interested in protecting their own investments and minimizing their own costs. Those who will actually reside in CIDs rarely, if ever, have an opportunity to participate in the formulation of the rules that will govern their lives. 52 The deed restrictions are non-negotiable, take-it-or-leave-it offers. Tocqueville's frequent use of "association" as a verb as well as a noun indicates that, for him at least, membership in such a group requires a certain degree of active involvement in its formation. There is also considerable evidence that many prospective homeowners are uninformed about the specific regulations to which

they are "consenting." The length of CC&Rs often deters residents from reading documents that may restrict their constitutional rights. 53 But even more concerning than the ignorance about (or perhaps indifference to) the rules that residents are accepting when they decide to live in a CID is the fact that membership in an HOA is sometimes virtually or literally compulsory. HOAs are growing so rapidly in some places that prospective homebuyers--and renters--are left with dwindling residential choices. 54 According to one report, the city government of Gilbert, Arizona, "the fastest growing city in the country [in 2002], according to the census, issues building permits only to developers who build within an association." 55

Communitarian arguments in favor of HOAs are just as problematic because they are often predicated on an exceedingly narrow and impoverished conception of community. Aside from the fact that homeowners rarely join these associations because of any preexisting sense of belonging or any constitutive ties to others in the development, the sense of identification that does emerge is defined almost exclusively in terms of shared economic interests. The ability to pay is usually the only requirement for membership. Since full membership and participation in these communities is limited to property-owners, renters remain disenfranchised outsiders no matter how long they may happen to reside in a particular CID. Social relations among residents in CIDs are mediated through an idea of community that is thoroughly commodified, from promotional literature promising secure returns on investments, to the rules and regulations that aim to maintain property values. "Regard for the community" is not measured by friendliness, charitableness,



or hospitality, but by how well trimmed they keep their lawns, how freshly painted their homes are, and how clean their porches are.

To the extent that a sense of community is engendered, it is often defined by what separates them from those outside rather than what unites those inside, resulting in a form of privatism that tends to undermine commitment to the larger public good. 56 The trend among HOAs is now to seek tax deductions or reimbursements from municipalities for the assessments that are used to provide traditionally public services such as trash and snow removal or the upkeep of parks. They claim that they should not have to pay "double" taxes for services that they pay for and provide privately, even though the residents of HOAs enjoy the direct and indirect benefits of public services provided to the larger community. When homeowners in CIDs do band together in solidarity, it is often to lobby or protest against the construction of schools, assisted living facilities, roads, or other projects that are intended to serve the greater public. 57 A resident in a Lee County, Florida development that took advantage of a state statute to privatize and gate formerly public roads opined that restricted access "generates a sense of community" rooted in "a common interest in maintaining and improving our property values." 58

Undoubtedly, some individuals and families do decide to live in particular communities because they offer an attractive lifestyle, the value of which cannot always be reduced to crass material considerations, but the "communal" life that develops is structured by a set of legalistic rules in tension with the spirit of community. The problem is not simply with the content of particular rules but the very reliance on rules as the preferred, if not exclusive, means of organizing

the life of these supposed communities. Genuine communities, which are characterized by mutual and constitutive commitments to shared ideals of the good life, rely on informal and sometimes unspoken norms to enforce a particular way of life. Even though such norms can be every bit as oppressive and tyrannical as explicit rules, a rigid regime of residential rules enforceable in the courts is inconsistent with the spirit of community life and inimical to the development of participatory ideals of self-government. As legal scholar Gregory Alexander observes, "Rules speak with an authority that inhibits, or indeed precludes, conversation. They are devices of dead hand control, attempting to appropriate human action. They purport to be imperial, constraining rather than initiating a dialectic." 59 Resolving disputes through the enforcement of legalistic rules obviates the need to compromise, negotiate differences, or adopt similar practices necessary for life in a genuine community or participation in democratic politics. The involvement of courts in cases litigated by HOAs is particularly pernicious, because, "by promoting conformity of conduct in the short term, state enforced rules may prevent residents from recognizing that certain rights have value." 60 On occasion, those who question or challenge particular rules can find themselves facing retaliation for their impertinence, sometimes through the manipulation or selective misapplication of the rules. 61

Contrary to claims that HOAs perform some of the positive functions that Tocqueville identified in his analysis of voluntary associations by stimulating higher levels of political participation and civic engagement, it turns out that very few homeowners actually get involved in official association business. Levels of participation at meetings are quite low and complaints of

apathy are rather frequent. According to some estimates, "only 11% of members participate in association governance in some form." Indeed, turnout at meetings is often so low that nearly a third of HOAs are unable to achieve a quorum. 62 By comparison, the average attendance at actual town meetings in Vermont--to which HOAs are often compared--is a little over 20%, in spite of the high costs of participation in terms of time and money. 63 Such low levels of participation seem endemic to HOAs, which encourage that retreat into privatism that Tocqueville worried could lead to despotism.

The rules and regulations that residents receive when they move into common interest development do not necessarily encourage participation at meetings, either. What actually goes on in a CID (or anywhere else, for that matter) can never be fully explained by the formal rules, but they do convey the expectations and requirements that people often put into practice. When the rules do urge the participation of residents, it is often only to aid in the enforcement of the rules. The rules and regulations of a large development on the unincorporated outskirts of Miami-- where almost all new housing development is governed by an HOA--enlist residents as partners in its security network by urging them to "Report any suspicious or disturbing behavior to the security staff or property manager." 64

But even if HOAs were as consensual, communal or participatory as some of their proponents claim, they would still run afoul of Tocquevillean principles. Among the many positive political functions performed by nineteenth-century voluntary associations, their contribution to a political culture that values freedom ranked extremely high for the French thinker. For Tocqueville,

decentralized forms of local control are worthy of respect and imitation only if they promote respect for freedom, including its often unruly and unsettling consequences.

### A Tocquevillean Critique of Homeowners Associations

Criticisms of HOAs typically focus on the restrictions that they place on residents, but opponents have also pointed out that their highly in-egalitarian, exclusionary, privatistic, undemocratic, and racist origins and tendencies threaten the interests of non-residents, as well. Robert Reich has warned that the proliferation of HOAs reflects "a near obsessive concern with maintaining or up grading property values" that is resulting in the "secession of the successful" and the abdication of social responsibility.<sup>65</sup> Others point out that the supposedly consensual rules and regulations of HOAs often impinge directly or indirectly on the constitutional rights of solicitors and other non-residents who come into contact with developments. And as anyone who has attempted to enter a gated community knows, the privatization of spaces surrounding residential areas sends an unambiguous message of exclusion.<sup>66</sup>

At first glance, it might appear that liberal thinkers with a republican bent might provide the most compelling arguments for the untrammelled right of decentralized associations to govern themselves as they see fit. After all, such associations allow individuals to express and pursue their common interests and values directly instead of appealing to and possibly becoming dependent on the will of government officials. However, decentralized systems of local self-government were valued by liberal thinkers such as Tocqueville not just because they promoted the interests of participants, but because they were also expected to have valuable secondary effects on

the promotion of freedom and democracy throughout the rest of society. The political value that Tocqueville placed on voluntary associations and small townships is inseparable from the contribution they were believed to make to the advancement of freedom outside of these enclaves by cultivating the right personal qualities.

In explaining the origins and persistence of freedom and equality peculiar to democracy in America, Tocqueville gave primary importance to mores and social habits over institutions and laws, arguing that it is mores that give effect to the laws. <sup>67</sup> Juridical guarantees of individual freedom enshrined in the Bill of Rights and in state constitutions are virtually useless without the support of appropriate social attitudes. According to Tocqueville, "one must seek the causes of the mildness of government in circumstances and mores rather than in the laws." <sup>68</sup> His famous warnings about the "tyranny of the majority" in America also place greater stress on the dangers to freedom arising from illiberal "mores" than on the passage of illiberal laws. The social pressure to conform to the preferences or will of the majority can be so intense that it may be unnecessary for the majority to take legal measures to enforce its desires. <sup>69</sup> With the right mores in

place, formal protections for individual rights almost become superfluous; without them, those same protections can become hollow.

Tocqueville's great admiration for voluntary associations stemmed in part from the role that they ordinarily play in countering this cultural threat to freedom. Initially formed by individuals freely banding together to promote their private--and sometimes very narrow--self-interest, voluntary associations help create the conditions for the emergence and the preservation of a diverse civil society. Their ability to stimulate greater interest in and identification with the public interest by "recall[ing] to each citizen constantly and in a thousand ways that he [sic] lives in society" is the most appealing feature of voluntary associations to contemporary advocates of civil society, but Tocqueville also acclaimed their ability to preserve an appreciation for diversity. 70 A Romantic concern with protecting individuality from the stultifying effects of mass society featured prominently in the writings of other nineteenth-century champions of freedom (including Wilhelm von Humboldt, Henry David Thoreau, Ralph Waldo Emerson, and John Stuart Mill), but only Tocqueville believed that associations could provide a cure for the disease of mass conformity that they sometimes spread. "In our time," he observed, "freedom of association has become a necessary guarantee against the tyranny of the majority." 71 One of their chief virtues as "secondary powers" in mass democracies is that they make it more difficult for individuals to get "lost in the crowd." 72 Ideally, they expose their members to other individuals with diverse socio-economic backgrounds, ages, and interests in such a way that their minds are enlarged rather than homogenized. Even though voluntary associations spring from the universal human motive of self-interest, the identity of each association is unique to the particular set of circumstances

that drew its members together in the first place. Differences among associations provide some assurance that members in various associations will also be different. 73

In contrast to the accidental diversity that Tocquevillean voluntary associations promote, the use of legal boilerplate in restrictive covenants, standardized building materials, uniform aesthetic criteria, and universal appeals to property values in HOAs all work to create greater homogeneity among residents in CIDs. And unlike the tendency of voluntary associations to bring together individuals with different socioeconomic backgrounds, CIDs tend to attract individuals with similar incomes and breed suspicion of those who live in more disorderly (often poorer) neighborhoods. Uniformity within individual CIDs is replicated across them, as well. Since little is left to chance, surprises are uncommon. From even a cursory glance at the outside, there is a generic quality to many CIDs that makes them look like variations on the same predictable theme: tiny (but well-manicured) front lawns, homes in (freshly painted) earth-colored tones, and curved streets without sidewalks (or pedestrians) ending in circular cul-de-sacs. But even more striking than what is visible is what is usually not: structural signs of difference such as unique additions to homes, quirky lawn ornaments, or individualized mailboxes; political expressions of disagreement in the form of national flags, yellow ribbons, or lawn signs; and economic displays of disparity such as fences in disrepair, car repairs in driveways, or below-market vehicles. 74

Advocates of homeowners associations who liken them to Tocquevillean voluntary associations sometimes assert that HOAs foster freedom by providing viable alternatives to centralized state action. Tocqueville had suggested that voluntary associations serve as counterweights

to centralized bureaucratic administrations, which are all-too-easily turned into tools of tyrannical majorities. HOAs may promote the sort of vigilance necessary to protect freedom because they breed what might be considered a healthy suspicion of big, centralized government, especially when it is inefficient or incompetent. But that is not the same as cultivating a principled respect for freedom as a political value in its own right. Tocqueville's critique of administrative centralization in government makes it clear that the exercise of personal freedom through the expression of individuality is just as important as collective action against an overbearing majority or a despotic government. Indeed, his remarks on the "political advantages that Americans derive from the system of decentralization" reveal just how short HOAs fall of his ideal of personal freedom:

What does it matter to me, after all, that there should be an authority always on its feet, keeping watch that my pleasures are tranquil, flying ahead of my steps to turn away every danger without my even needing to think about it, if this authority, at the same time that it removes the least thorns on my path, is absolute master of my freedom and my life, if it monopolizes movement and existence to such a point that everything around it must languish when it languishes, that everything must sleep when it sleeps, that everything must perish if it dies? 75

By making it unnecessary--or even illegitimate--for residents to make certain kinds of choices (even seemingly trivial ones regarding the color of their homes, the height of their fences, or their ability to receive unsolicited periodicals), HOAs end up producing the very dependence that they were meant to neutralize.

Tocqueville suggests that New England townships also cultivate mores conducive to freedom. In addition to its role in preserving the principle of local autonomy by checking those dangers to freedom arising from the consolidation of power in a centralized bureaucratic state, the



township also performs an important liberalizing function by schooling individuals in the difficult art of freedom. "The institutions of a township are to freedom what primary schools are to science." 76 The independence of each township from centralized forces of control and administration serves as a positive example to the individual, who learns that it is not only possible but also highly desirable to be inventive in thought and in action. Like a township that prizes its autonomy in matters of local concern, an individual who has developed this capacity for independence is likely to resist any attempt to enforce a standardized model of behavior as an illegitimate act of despotism. Interference with either the township's or the individual's autonomy is immediately regarded as an unwarranted act of hostility. 77

It is in the context of his discussion of townships that Tocqueville formulates a maxim that can serve as the precept of liberalism: "that the individual is the best as well as the only judge of his particular interest, and that society has the right to direct his actions only when it feels itself injured by his deed or when it needs to demand his cooperation." 78 There is a balance between the freedom of the individual and the interests of society that Tocqueville regularly acknowledged, but he believed that a wide scope for individual freedom was actually in the best interests of society, even when that freedom was exercised in ways that might seem disruptive, in convenient, or unruly to others. Tocqueville acknowledges that despotism is sometimes easier than freedom. Individuals will often prefer the complacent order and "temporary prosperity" of despotism to the turbulence of freedom, but in the end they will realize that "they are miserable." Freedom is exceedingly difficult, but it makes a society "great": it "is ordinarily born in the midst

of storms, it is established painfully among civil discords, and only when it is old can one know its benefits." 79

Tocqueville accorded great importance to the prevailing property laws in explaining the extraordinary equality and freedom that he observed in the United States. Property laws against primogeniture in America, which militate against the concentration of property in the hands of eldest sons, are conducive to the emergence and maintenance of equality and freedom in America because "the law of equal partition does not exert its influence only on the fate of goods; it acts on the very souls of property owners and calls their passions to its aid." 80 Tocqueville approvingly noted that, "Of all political effects that equality of conditions produces, it is this love of independence that first strikes one's regard and which most frightens timid spirits." He continues by removing any doubts about his position on the individual's "love of independence": "For me, far from reproaching equality for the intractability it inspires, I praise it principally for that." 81

The spirit of independence that individual ownership and control of private property might have fostered in Tocqueville's time is now giving way to a spirit of conformity and an impulse to control the behavior of others in the smallest details of residential life. "Subjection in [ostensibly] small affairs" is so insidious to Tocqueville because it tends to "enervate" the soul and "extinguish" the spirit of citizens, undermining their capacity for freedom in large affairs in the long run. It is in the supposedly little "details" that the greatest threat to freedom in a democracy lies. 82 Yet it is the details that many homeowners and association advocates seek to regulate most thoroughly. William Sklar, who served as the co-chair of a task force commissioned by

Florida Governor Jeb Bush to deal with the problem of association accountability, opined that "the more you have close-in living, the more you have to give up some of that liberty for the common good." 83 In a surprisingly common refrain that is often used to justify severe curbs on aesthetic choices that violate homeowners' sense of order or threaten their property values, one homeowner in Barrington, Illinois, worried that "you never know when you're going to get purple shutters across the street." 84 Remarks like these are indicative of a rampant impulse to reduce and even eliminate instances of the flamboyant and the eccentric rampant in many HOAs.

HOAs may be threatening the long-term prospects of a free society in yet more insidious ways by eliminating the diversity necessary for the cultivation and the exercise of freedom. Like the great nineteenth-century educational reformer and philosopher Wilhelm von Humboldt, Tocqueville believed that the absence of genuine diversity results in a serious diminution of freedom. Echoing Humboldt's claims that "variety of situations" is a necessary precondition of the freedom essential to the cultivation of individuality, 85 Tocqueville suggests that respect for freedom necessarily entails respect for the diversity that sustains and results from freedom. However, the architectural and stylistic monotony of many CIDs obviously diminishes diversity and even punishes displays of creativity. In time, residents accustomed to living in pleasant but bland physical environments may lose an appreciation for the odd, the bizarre, and the peculiar. As examples of

diversity get diminished, there is a danger that such diversity will get devalued. <sup>86</sup> One resident reports that even after the architectural control committee of his HOA loosened standards somewhat, homeowners continued to abide by the previous norms. He writes:

Most people . . . tolerate the restrictions, because while they say they cherish the ideal of untrammelled individuality, they're also frightened by it. Visual conformity conveniently masks the eccentricities that might dwell behind the drapes. Insofar as environment shapes character, neighborhoods like mine tend to dull the sharp edges of contrarian personalities. I suspect that's why nobody is pushing the envelope of exterior color: An implied social contact of conformity lingers even in the wake of relaxed rules. <sup>87</sup>

Repeated and unavoidable exposure to enforced sameness in one's own neighborhood may engender or reinforce the belief that there is a single standard or model of residential space that ought to be imposed elsewhere, as well.

One of Tocqueville's most important (if somewhat overblown) comments on the exceptional nature of political and social life in the United States is that it is a country that values equality because Americans are born equal. A similar point could be made about freedom in America. **But with increasing numbers of Americans being born and raised in residences governed by HOAs that are indifferent and sometimes even hostile to the exercise of basic constitutional freedoms in people's own homes, it is difficult to imagine where they might acquire and**

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cultivate those enduring habits that sustain a free society. As one observer wonders, "When you're raising your children in a neighborhood where the local government can take great liberties in how you express yourself, without the constitutional protection that we have come to expect, what is the next generation going to grow up to expect from their real government?"

88

## Conclusion

The growing restriction on all sorts of activities in private residential spaces is a deeply alarming trend that threatens to undermine that tolerance for the messiness of freedom that is essential to its preservation. In their efforts to minimize and eliminate the occasionally inconvenient, unruly, and obnoxious consequences of freedom, HOAs may be diminishing respect for the value of freedom among their residents. Unlike membership in most other associations, where temporary withdrawal or retreat is always possible, membership in a homeowners association requires nearly complete and constant subordination to inflexible rules and regulations with no possibility of reprieve short of relocating. As more and more Americans come to accept the notion that restrictions on political activity, creative self-expression, residential privacy, and freedom of movement are sometimes necessary to safeguard other interests, they may gradually lose a healthy respect and appreciation for exercises of freedom and expressions of individuality that conflict with those interests. As more and more individuals grow accustomed to living in residential regimes that restrict their choices, there is a growing danger that they will be willing to impose similar restrictions on non-members, as well. The likelihood is great that such restrictions will be perceived as legitimate exercises of authority as long as they promote the material well-being and comfort of communities. Rising attempts to gate and restrict access to public streets surrounding CIDs are the most visible manifestations of this propensity to control.

Comments made by many residents of CIDs suggest that large numbers of them already consider exercises of freedoms legitimate only if they do not inconvenience or disturb others. But the idea of freedom is meaningless if certain behaviors require the approval or permission of others. Freedom comes with responsibilities, but that does not mean that individuals should be held legally accountable or punished for actions simply because others disapprove on aesthetic or economic grounds. Like democracy, freedom is by its very nature "disturbing" and its capacity to unsettle established order understandably tends to make people feel "uneasy." 89 And like democracy, freedom is jeopardized when individuals are no longer willing to bear the costs that invariably go along with it.

There are indications that the restrictive regimes found in CIDs are already having an impact on recommendations for dealing with problems in traditional neighborhoods suffering from crime and other forms of urban blight. Governance in homeowners associations has become so appealing to some people that Yale Law Professor Robert C. Ellickson has recently recommended expanding their use in existing communities, even if that means passing enabling statutes that could be used to compel unwilling property-owners to join in order to prevent free-riders. Like the voting scheme in place in CIDs, Ellickson's communities would base voting rights on property-ownership, not on mere residence, since tenants are short-sighted due to their limited "stake" in the long term welfare of the community! 90 The final trump card in Ellickson's deck is that the "one-resident/one-vote" rule should be reconsidered in existing cities because its absence in HOAs demonstrates that it "does not have much consumer appeal"! 91

Since the practices of HOAs have serious implications for the freedom of those who could not possibly have given their consent to abide by constraints on their activities, the state

has an obligation to protect certain freedoms from further encroachment. Since associational freedom is important in a free society--even when it is used to constrain other forms of freedom-- state and local governments should be careful not to indulge their own impulse to control too much, either. Although the state would be overreaching its own authority if, say, it prevented HOAs from regulating the outside appearance of homes, it could begin by protecting the constitutional rights of residents and non-residents in CIDs. Some states have already passed legislation that gives homeowners some protection from the foreclosure powers of HOAs, but they could all do much more to ensure that First Amendment constitutional rights to free speech and free assembly, for instance, are protected so that solicitors would be able to distribute political literature, homeowners would be able to use common property to conduct political, religious, or cultural meetings, and residents would be able to display flags, stickers, and posters in their own windows.

A free society requires citizens who appreciate the fact that disagreements, annoyances, and inconveniences will arise as a result of others' exercise of freedom and expression of individuality. A free society must be willing to tolerate unruly or disagreeable outbursts of freedom and idiosyncratic or eccentric expressions of individuality if it is to preserve freedom in the long run. Even though some of the freedoms that HOAs restrict may seem trivial in comparison to most of the civil liberties and civil rights that residents still enjoy elsewhere, acquiescence to their regulation does not bode well for the future of more fundamental freedoms. The question Tocqueville asked about the status of freedom in the nineteenth century is even more pressing now than it was then: "How make a multitude support freedom in great things when it has not learned to make use of it in small ones?"

Reference:

All Academic Research, Restricted Area: A Tocquevillean Critique of Homeowners Associations, [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/3/9/9/3/pages39932/p39932-1.php](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/3/9/9/3/pages39932/p39932-1.php) (Dec. 11, 2011).

## Notes

1 Other forms of residential community associations include cooperative apartments and condominium associations.

2 Paul Bannister, "Homeowner associations: Devils or angels?" available at <http://www.bankrate.com/brm/news/realestate/HOAs1.asp>, last accessed on July 25, 2005. There are no official statistics on HOAs, but various sources confirm these figures with minor variations.

3 Evan McKenzie, "Welcome Home. Do as We Say," *The New York Times*, August 18, 1994, p. A23.

4 In a widely reported case, a fifty-one-year old Santa Clara woman was charged by her condominium association with "kissing and doing bad things" with a male friend while parked in a driveway one night. See Evan McKenzie, "Trouble in Privatopia: Residents check their rights at the gate," *The Progressive*, October 1993, p. 30.

5 Diana Jean Schemo, "Escape from Suburbia: Community Associations Thrive Amid Debate on Freedom, Privacy and Democracy," *The New York Times*, May 3, 1994, p. B6.

6 These examples are cited in McKenzie, "Trouble in Privatopia," p. 31.

7 Schemo, "Escape from Suburbia," p. B6.

8 "Government by the Nice, for the Nice," *The Economist*, July 25, 1992, p. 25.

9 Joey Bunch, "Homeowner Groups Ease up on Lawns," *The Denver Post*, July 25, 2003, B4.

10 For a survey of HOA powers upheld by courts, see Sharon L. Bush, "Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights!!", *Western State University Law Review*, Vol. 20, 2002-2003.

11 Courts have also upheld the authority of HOAs to enforce utterly subjective rules, such as prohibitions against "offensive conduct," which is defined in one association as "activity which in the judgment of the Board of Directors is noxious or offensive to other home lot owners." Quoted in McKenzie, *Privatopia*, p. 17.

12 A 1999 Gallup poll commissioned by the Community Associations Institute (CAI) found that 75% of respondents were "very or extremely satisfied with their community." A summary of these survey results is available on the CAI's official website at <http://www.caionline.org/about/inside.cfm>, last accessed on July 25, 2005.

13 P. Knox, "The Stealthy Tyranny of Community Spaces," *Environment & Planning*, Vol. 26, February 1994, p. 170.

14 See Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, MA: Harvard University Press, 1989) and Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, MA: Harvard University Press, 1993), pp. 206-210.

15 Michael Walzer, "The Idea of Civil Society," *Dissent*, Spring 1991, p. 293.

16 Alexis de Tocqueville, *Democracy in America*, eds. and trans. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: The University of Chicago Press, 2000), Vol. I, Part Two, Chapter Six, p. 229.

17 Tocqueville, *Democracy in America*, Vol. One, Introduction, p. 11.

18 Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, NY: Simon & Schuster, 2000).

19 Rosenblum, *Membership and Morals*, pp. 4-5.

20 Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Five, p. 206. Cf. Nancy Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, NJ: Princeton University Press, 1998), who argues that the "spillover" of "moral dispositions" from one sphere of life may be greatly exaggerated, pp. 19, 48-49.

21 On the sense of control that gates instill, see Edward J. Blakely and Mary Gail Snyder, *Fortress America: Gated Communities in the United States* (Washington, D.C.: Brookings Institution Press, 1997), pp. 30, 62, 106-108, 143.

22 See Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York, NY: Routledge, 2004).

23 See Mark Reinhardt, *The Art of Being Free: Taking Liberties with Tocqueville, Marx, and Arendt* (Ithaca, NY: Cornell University Press, 1997), pp. 30-31.

24 To my knowledge, there is no empirical study that tests the specific argument developed here. One empirical study of the impact that homeownership as such has on political beliefs concerning civil liberties, women's rights, domestic spending, and other variables found no statistically significant relationship. However, that study did not distinguish between HOA and non-HOA property owners. See John I. Gilderbloom and John P. Markham, "The Impact of Homeownership on Political Beliefs," *Social Forces*, Vol. 73, No. 4, June 1995.

25 The following discussion of the history and organization of CIDs draws from McKenzie, *Privatopia*, pp. 7-21.



26 Uriel Reichman, "Residential Private Governments: An Introductory Survey," *The University of Chicago Law Review*, Vol. 43, 1976, p. 260.

27 McKenzie, *Privatopia*, p. 21. 28 Frank Askin, "Free Speech, Private Space, and the Constitution," *Rutgers Law Review*, Vol. 29, 1998, pp. 954- 955.

28 Frank Askin, "Free Speech, Private Space, and the Constitution," *Rutgers Law Review*, Vol. 29, 1998, pp. 954-955.

29 In one instance, an association succeeded in having a woman who insisted on displaying a POW/MIA flag on the association's flag pole pay for their enormous legal expenses and getting her committed to a mental institution because her behavior and dress (which included "lots of [Ross] Perot buttons") were so "bizarre." See William Vogeler, "Flag Dispute Leads to \$75K Fee Fight," *Los Angeles Daily Journal*, December 16, 1993.

30 An early community builder argued that the development would set a dangerous precedent that might lead to general disorder and lawlessness if it permitted a homeowner to enclose his porch in glass to protect the health of his sick wife. See McKenzie, *Privatopia*, p. 41. In a more recent case, a Philadelphia HOA ruled that only wooden swing sets were permissible despite Environmental Protection Agency studies demonstrating that the chemicals used to treat the wood in such swing sets are poisonous to children. McKenzie, "Trouble in Privatopia," pp. 31-32. In another case, a California woman was raped and robbed after her association refused her request to install exterior safety lights outside of her building. This woman prevailed in a lawsuit for negligence against her association, but industry lobbyists later succeeded in getting state legislatures to pass laws that gave individual board members a form of tort immunity similar to that enjoyed by municipal officials. See McKenzie, *Privatopia*, pp. 161-162.

31 On the foreclosure power of HOAs, see Gemma Giantomasi, "A Balancing Act: The Foreclosure Power of Home owners' Associations," *Fordham Law Review*, Vol. 72, 2004.

32 See, e.g., Motoko Rich, "Homeowner Boards Blur Lines of Just Who Rules the Roost," *The New York Times*, July 27, 2003.

33 P. Knox, "The Stealthy Tyranny of Community Spaces," p. 172.

34 The same survey also revealed that 85% of respondents believed "that property values in their community are rising." A summary of these survey results is available on the Community Association Institute's official website at <http://www.caionline.org/about/inside.cfm> , last accessed on July 25, 2005.

35 Andrée Brooks, "Flouting Rules Can Be Costly," *The New York Times*, September 5, 1993, p. 3. HOAs sometimes cite their interest in maintaining property values to justify their restrictions on constitutional freedoms in arguments before the courts. See Zelica Marie Grieve, "Latera v. Isle at Mission Bay Homeowners Ass'n: The Homeowner's First Amendment Right to Receive Information," *Nova Law Review*, Vol. 20, 1995, p. 542.

36 Cf. Mark Purcell, "Neighborhood Activism among Homeowners as a Politics of Space," *The Professional Geographer*, Vol. 53, No. 2, (May 2001), who contends that property values are not a high explicit priority for homeowners. He argues that political activism among homeowners can be better explained by a normative spatial vision for their neighborhoods rather than a narrow preoccupation with maintaining property values.

37 Mike Bowler and Evan McKenzie, "Invisible Kingdoms," *California Lawyer*, December 1985, p. 56.

38 On the history of the CAI, see McKenzie, *Privatopia*, pp. 110-121, quote at p. 111.

39 Their official website states: "Implied in the purchase of a home in a community association is the agreement to abide by the rules. However, these rules keep the community attractive and livable, and they help maintain property values." See <http://www.caionline.org/faq.cfm> , last accessed on March 26, 2005.

40 See Note, "Judicial Review of Condominium Rulemaking," *Harvard Law Review*, Vol. 94, 1981, p. 653; and Blakely and Snyder, *Fortress America*, p. 59.

41 Quoted in David Sterrett, "Homeowners Associations: Love Them or Leave Them," *North County Times*, July 5, 2003, available at <http://www.nctimes.com/articles/2003/07/06/export260.txt> , accessed on March 26, 2005.

42 E.g., Harvey Rishikof and Alexander Wohl, "Private Communities or Public Governments: 'The State Will Make the Call'," *Valparaiso University Law Review*, Vol. 30, 1996, p. 524.

43 Robert C. Ellickson, "New Institutions for Old Neighborhoods," *Duke Law Review*, Vol. 48, No. 1, October 1998, pp. 81, 90.

- 44 Robert C. Ellickson, "Cities and Homeowners Associations," *University of Pennsylvania Law Review*, Vol. 130, 1982, p. 1520. For a critique of the pervasive "free choice/coercion dichotomy" in legal scholarship on HOAs, see Gregory S. Alexander, "Freedom, Coercion, and the Law of Servitudes," *Cornell Law Review*, Vol. 73, 1988.
- 45 Ellickson, "New Institutions for Old Neighborhoods," p. 84.
- 46 Schemo, "Escape from Suburbia," p. B6.
- 47 See Blakely and Snyder, *Fortress America*, pp. 1, 63.
- 48 Gregory S. Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community," *Cornell Law Review*, Vol. 75, 1989, pp. 49-43, quote at p. 42.
- 49 The various theories of consent used by courts and scholars to defend HOAs are reviewed in "The Rule of Law in Residential Associations," *Harvard Law Review*, Vol. 99, 1985, pp. 478-481.
- 50 Robert G. Natelson, "Consent, Coercion, and 'Reasonableness' in Private Law: The Special Case of the Property Owners Association," *Ohio State Law Journal*, Vol. 51, 1990, p. 62.
- 51 Ellickson, "Cities and Homeowners Associations," p. 1527.
- 52 Harvard Law Professor Gerald Frug points out that "the original constitution of a homeowners association might well be the work of a developer without the participation of a single person who becomes a resident of the community." Gerald E. Frug, "Cities and Homeowners Associations: A Reply," *University of Pennsylvania Law Review*, Vol. 130, 1982, p. 1590.
- 53 This has become a particularly acute problem for those rights protected by the First Amendment. See Margaret Farrand Saxton, "Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities," *UCLA Law Review*, Vol. 51, No. 5, June 2004.
- 54 In places like Fairfax County, Virginia, residents have little choice but to join an association if they desire to live there. See William J. Mallett, "Private Government Formation in the DC Metropolitan Area," *Growth and Change*, Vol. 24, Summer 1993.
- 55 Rich, "Homeowner Boards Blur Lines of Just Who Rules the Roost."
- 56 Daniel A. Bell, "Civil Society Versus Civic Virtue," in *Freedom of Association*, ed. Any Gutmann (Princeton, NJ: Princeton University Press, 1998), pp. 240-246.
- 57 McKenzie, *Privatopia*, pp. 192-197.
- 58 Quoted in Christopher Durso, "Something There Is That Loves a Wall," *Common Ground Magazine*, March/April 2005, available at <http://www.caionline.org/features/index.cfm>, accessed on March 26, 2005.
- 59 Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community," p. 56.
- 60 "The Rule of Law in Residential Associations," p. 486.
- 61 In one case, a homeowner who was being sued by her HOA for allegedly repainting the exterior of her house a color that was "not consistent with the rest of the neighborhood" claimed that the board was manipulating this subjective rule against her since she had been a particularly "outspoken" critic of her HOA. See Mia Taylor, "Paint Colors Prompt Lawsuit," *The Atlanta-Journal Constitution*, Thursday, June 26, 2003, pp. J1, J5.
- 62 Rosenblum, *Membership and Morals*, p. 135.
- 63 Frank M. Bryan, *Real Democracy: The New England Town Meeting and How it Works* (Chicago, IL: The University of Chicago Press, 2004), pp. 57, 280.
- 64 Rules and Regulations for Pacifica at Imperial Lake Homeowners' Association, Inc., p. 2. On file with author.
- 65 Robert B. Reich, "Secession of the Successful," *The New York Times*, January 20, 1991, p. 42.
- 66 The "right to exclude" is explicitly defended by proponents of HOAs as a vital right "at the heart of property rights as understood by our legal tradition." Laura T. Rahe, "The Right to Exclude: Preserving the Autonomy of the Home owners' Association," *The Urban Lawyer*, Vol. 34, No. 2, Spring 2002, p. 522.
- 67 Tocqueville states that "mores" comprehend "the whole moral and intellectual state of a people," including "habits of the heart," "the different notions that men [sic] possess . . . the various opinions that are current in their midst, and . . . the sum of ideas of which the habits of the mind are formed." Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Nine, p. 275.
- 68 Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Seven, p. 242.

- 69 Tocqueville argued that tyranny is an ever present possibility in democracies because "the majority is vested with a force, at once material and moral, that acts on the wills as much as on actions, and which at the same time prevents the deed and the desire to do it." Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Seven, p. 243. Andrew Sabl describes this as "the problem of democratic servility, which leads individuals to doubt that their opinions are worth fighting for in the face of mass disapproval." See "Community Organizing as Tocquevillian Politics: The Art, Practices, and Ethos of Association," *American Journal of Political Science*, Vol. 46, No. 1, January 2002, p. 2.
- 70 See Tocqueville, *Democracy in America*, Vol. Two, Part Two, Ch. Four-Five, pp. 485-492, quote at p. 488.
- 71 Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Four, p. 183.
- 72 Tocqueville, *Democracy in America*, Vol. Two, Part Four, Ch. Two, p. 641.
- 73 For a critique of the common cultural preconditions of Tocqueville's pluralism, see William E. Connolly, *The Ethos of Pluralization* (Minneapolis, MN: University of Minnesota Press, 1995), pp. 163-198.
- 74 The rules of an association west of Miami stipulate that "All vehicles will be maintained in such a manner that the vehicle is worth the amount described in recognized automotive publications for 'Average' vehicles." Rules and Regulations for Pacifica at Imperial Lake Homeowners' Association, Inc., p. 5. On file with author.
- 75 Tocqueville, *Democracy in America*, Vol. One, Part One, Ch. Five, p. 88.
- 76 Tocqueville, *Democracy in America*, Vol. One, Part One, Ch. Five, p. 57.
- 77 On the connection between resistance and individuality in Tocqueville's conception of freedom, see Reinhardt, *The Art of Being Free*, pp. 30-31.
- 78 Tocqueville, *Democracy in America*, Vol. One, Part One, Ch. Five, p. 62.
- 79 Tocqueville, *Democracy in America*, Vol. One, Part Two, Ch. Six, p. 229.
- 80 Tocqueville, *Democracy in America*, Vol. One, Part One, Ch. Three, p. 48.
- 81 Tocqueville, *Democracy in America*, Vol. Two, Part Four, Ch. Two, pp. 639, 640.
- 82 Tocqueville, *Democracy in America*, Vol. Two, Part Four, Ch. Six, pp. 664-665.
- 83 Mark Sappenfield, "The backlash against homeowners' groups," p. 10.
- 84 Mitchell Pacelle, "Block Watch: Not in Your Backyard, say Community Panels in Suburban Enclaves," *The Wall Street Journal*, September 21, 1994, p. A1. Richard Louv suggests that the injunction to "Control thy neighbor" has become the Eleventh Commandment of the CID industry. Richard Louv, *America II* (New York, NY: Penguin Books, 1985), p. 127.
- 85 Wilhelm von Humboldt, *The Limits of State Action*, ed. J. W. Barrow (Indianapolis, IN: Liberty Fund, 1993). The similarities between Humboldt and Tocqueville are most readily evident in their critiques of standardized education, which both feared would stifle the development of originality and spontaneity in individuals.
- 86 Related to this is Hannah Arendt's claim that the public realm is predicated on a potentially agonistic engagement with difference fraught with risk and uncertainty. See the discussion of Arendt in Susan Bickford, "Constructing Inequality: City Spaces and the Architecture of Citizenship," *Political Theory*, Vol. 28, No. 3, June 2000. However, HOAs work so hard to create and enforce homogeneity in their "communities" that their residents' encounters with the outside public is often characterized by fear, suspicion, and distrust inimical to the preservation of a free society.
- 87 Lawrence W. Clark, "Homeowners Associations--All 249,000 of Them--Are Out of Control. Their Design Guide Lines Needlessly Homogenize Our Neighborhoods--And Our Neighbors," *Architecture*, Vol. 93, No. 3, March 2004, p. 88.
- 88 Pacelle, "Block Watch: Not in Your Backyard, say Community Panels in Suburban Enclaves."
- 89 Reinhardt, *The Art of Being Free*, p. 21. 90 Ellickson, "New Institutions for Old Neighborhoods," pp. 77, 94, 109.
- 90 Ellickson, "New Institutions for Old Neighborhoods," pp. 77, 94, 109. 91 Ellickson, "Cities and Homeowners Associations," p. 1544. 30
- 91 Ellickson, "Cities and Homeowners Associations," p. 1544.
- 92 Tocqueville, *Democracy in America*, Vol. One, Part One, Ch. Five, p. 91.