ESSAY

THE COMMUNITY IN THE PLANNED COMMUNITY

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This Essay explores, and analyzes the long-term effects of, the turn in the 1980s towards a more communitarian-oriented analysis of planned communities. It shows that until late in the twentieth century property law commentators grounded the rule-making powers of condominiums and homeowners associations in the alleged consent of individual unit owners. The Essay argues that this approach, focused on a supposedly clear-cut dichotomy between consent and coercion, echoed arcane concepts characteristic of legal thinking in the late nineteenth century—concepts which realist thinkers had discredited long ago. Thus, abandoning this account of planned communities’ power in favor of an explanation founded on the nature of these bodies as communities was a welcome development. However, this shift’s impacts on court decisions were often unduly far-reaching and thus counterproductive. Over the past few decades, courts have too readily equated planned communities with stronger, and truly close-knit, communities, and accordingly deemed them worthy of great autonomy. Consequently, much more so than commentators often believe—and in complete defiance of the communitarian writers’ original prescriptions—the standard of review judges apply to the decisions of planned communities has been growing ever more permissive.

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* Professor of Law, Northwestern University Pritzker School of Law. This Essay was prepared for the Annual Progressive Property Conference held at Cornell University Law School in May 2019 and celebrating the work of Gregory Alexander at the occasion of his retirement. I am grateful to all the participants for their input, to David Dana for his comments, and to David Stage and Elliot Louthen for help in research. I am especially thankful to Gregory Alexander for his articles that generated this Essay—and for all his other many works that have aided me and others in developing our thinking about property.
INTRODUCTION

In 2018, 73.5 million Americans, representing more than a quarter of the nation’s population, lived in planned communities.¹ These communities, consisting mostly of homeowners associations and condominiums, first appeared in the early twentieth century, but their explosive growth owed to the demographic, economic, and geographic transformations following the conclusion of World War II.² Shifts in property law were similarly vital to this housing revolution. Since planned communities are a form of housing grounded in restricting the individual owner’s uses and transfer of her land, legal reforms inevitably played a key role in facilitating their spectacular spread. Planned communities could not have proliferated had servitudes law—the property law tool for creating and enforcing restrictions on an owner’s powers to use and transfer her land—not been drastically liberalized during the relevant decades. Both courts and legislatures contributed to this transformation. Courts supported the rise of planned communities by admitting servitudes that the common law beforehand did not recognize.³ Legislatures in all states promoted planned communities by adopting, starting in the 1960s, condominium statutes inducting that specific form of building and living into American law.⁴

³ Perhaps the most important breakthrough was the decision in Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938), which allowed an association to enforce restrictions on owners and to collect fees from them. See also McKenzie, supra note 2, at 36–51 (providing the story of the first developers to employ restrictive covenants to establish the original planned communities in the U.S.).
⁴ The concept of the condominium is old and can be traced to ancient times in Babylon, Egypt and Greece. 1 Alberto Ferrer & Karl Stecher, Law of Condominium § 31, at 15 (1967). It was also widespread in medieval Europe, J. Leyser, The Ownership of Flats—A Comparative Study, 7 Int’l & Comp. L.Q. 31, 33 (1958), and was already regulated in article 664 of the original Code Napoleon of 1804. Still, in American law, the condominium form of ownership is grounded in modern statutes. David A. Thomas, Thompson on Real Property § 36.06(a), at 237 (2d Thomas ed. 2004). Though the common law might have provided sufficient support for legally establishing a condominium, only few attempts at creating one were made before the adoption of a statute, probably due to the difficulty in lining up lenders willing to assume the risk. Curtis J. Berger, Condominium: Shelter on a Statutory Foundation, 63 Colum. L. Rev. 987, 1002–03 (1963). The first condominium statute was passed in the territory of Puerto Rico. There, the legality of this form of ownership was first established in 1951, and a comprehensive statute—the “Horizontal Property Act”—adopted in 1958. P.R. Laws Ann. tit. 31, § 1291 (2003). In 1961, thanks to the lobbying of a Puerto Rican delegation, Congress adopted the National Housing Act of 1961, Pub. L. No. 87–70, 75 Stat. 149 (1961), which extended the Federal Housing Administration’s mortgage benefits to condominiums. See Karen Christensen & David Levinson, Encyclopedia of Community: From the Village to the Virtual World 317 (2003). As title insurance companies were now also willing
Following these social and legal developments of the postwar decades, by the closing decades of the twentieth century few could have seriously questioned that planned communities were the most salient phenomenon in the American housing market. Political scientists, sociologists, and anthropologists were accordingly conducting important research into these communities’ internal dynamics and their broader meaning for American society. Yet, for their part, property law thinkers did not seem to be particularly preoccupied with planned communities, at least not as a theoretical concern. In the 1980s commentators did note the doctrinal confusions and incoherence in the common law of servitudes. The field, they argued, was replete with outdated distinctions and an abundance of technicalities; even the naming scheme it employed to define itself was unclear; as a legal field, it was an “unspeakable quagmire.” Prodded by these commentators, the American Law Institute embarked on a project to produce a new Restatement for the law of


9 EDWARD H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 489 (1974) (“The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.”).
servitudes. But, as its Reporter stressed at the outset, the Restatement’s goal was doctrinal house-keeping—clarifying the law—rather than normative assessment. Indeed, by that point, legal scholars’ theoretical reckoning with planned communities was largely limited to a prominent and mostly ideological—and also, rather testy—debate between dueling law review articles respecting these communities’ standing as an alternative to traditional governments. How property law rules should contend with planned communities as a normative matter, and how the presence of these communities, in turn, should inform the law’s notion of property were, at most, issues lurking in the background of the narrow calls for technical-doctrinal reform and the broad ideological debates about the role of government.

Into this breach stepped Gregory Alexander, with two key articles published as the 1980s drew to a close. These pieces highlighted the shortcomings of the literature and the inevitable doctrinal costs of legal scholarship’s refusal to engage the actual property theory questions involved and to accommodate the findings of social scientists operating in the field.

The challenge planned communities presented to courts and commentators was always in their power to restrict an owner’s freedom to use, and even transfer, her property as she sees fit. The board of the

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10 See Restatement (Third) of Property: Servitudes (Am. Law Inst. 2000). The Restatement project began in the spring of 1986 after Susan French was named Reporter.

11 See Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, 73 Cornell L. Rev. 928, 930 (1988) ("[S]implification and clarification of the law are its major goals, . . . The project is . . . designed . . . to restate the law in modern, functional terms.").


13 Criticizing the legal attitude of the time for its ignorance of the normative concerns at play, Susan French thus explained the opening the new Restatement would create: “Once the obsolete and unnecessary controls on servitudes are eliminated, we will be faced with the formidable tasks of setting forth the doctrinal bases of the remaining controls and of laying the groundwork for development of new controls. In the process of examining what controls are needed and where, the restatement will make an important contribution by identifying clearly the problems that demand control and the conflicting values involved in determining whether to enforce servitude arrangements. Much servitudes doctrine was developed by courts that did neither, and some of the confusion in servitudes law can be blamed on that approach.” French, supra note 11, at 930–31.


16 On ownership as the right to do as one pleases with her land, see, e.g., Nadav Shoked, The Duty to Maintain, 64 Duke L.J. 437, 446–53 (2014).
planned community may mandate the aesthetic appearance of the individual owner’s property, the property’s size and number of occupants, the individual owner’s ability to lease the property or even sell it, and more. In their effort to understand the legal standing of, and devise the desirable judicial attitude towards, such intrusive regulation of a private owner’s rights, commentators had traditionally toiled to situate the planned community within the vaunted dichotomy between contract and government.17 Voluntarily-entered contracts were always deemed a legitimate ground for limiting an individual’s freedom, while government has always been conceived as a much more suspicious generator of such limits.18 Thus, allegedly, the determination whether planned communities’ rule-making function was a contractual construct or a governmental endeavor could dictate the legal attitude towards it.

Alexander showed just how wrong this approach was—and still is. Most apparently, it failed to produce a consistent judicial attitude towards planned communities’ disparate rules.19 Frustrating as this real-world result might have been to practitioners and residents, it was merely a symptom of the underlying theoretical problem: planned communities simply could not be neatly characterized as either contractual creations or government entities.20 The reductionist effort to fit them into one of those two categories ignored the most obvious element of planned communities’ nature. Planned communities are not just contracts or governments; planned communities are, well, communities. They should be analyzed as such because binary notions of consent, as associated with contract, versus coercion, as associated with government, fail to adequately describe communities and address their potential and threat.21

The planned communities and the anomaly they presented to traditional property thinking served as the beachhead through which Alexander introduced into property thinking the notion of community. At the time, communitarian theories were undergoing a renaissance in non-legal thinking,22 and also in specific fields of legal scholarship, such as constitutional law.23 In the following decades, through the work of Alexander—alone and with collaborators—communitarian theories became a

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17 See infra Part I.
18 Alexander, Dilemmas, supra note 14, at 34–35, 39.
19 Id. at 13; See also French, supra note 8, at 1303–04.
20 Alexander, Freedom, supra note 14, at 884.
21 Alexander, Dilemmas, supra note 14, at 34.
staple of modern property thinking as well. Communitarian property is now an established theory (though it might go by different names), employed to tackle the myriad questions and conflicts property law deals with daily.

Still, as I hope to show in this brief Essay, it is worthwhile to go back and explore the original vehicle Alexander used in order to introduce the communitarian theory into property law: the specific issues presented by the narrow case of planned communities. Planned communities are, after all, not only an inevitable component of American property reality in 2020, but also, and consequently, they are an inevitable meeting point for abstract theoretical thinking about communities in property on the one hand and the real-world lived experience of property on the other. Thus, perhaps more so than other property law institutions, planned communities provide effective testing grounds to assess the translation of theoretical ideas of community into the language of property doctrine.

Revisiting the introduction of community-focused thinking into the treatment of the property law institution that was, and remains, particularly amenable to such thinking allows us to evaluate the role played by community-focused thinking about property. With the benefit of hindsight, we can see just how unevolved the theoretical property thinking it supplemented or supplanted was, but also how unpredictable—and at times, counter-productive—were the doctrinal effects generated by the more community-focused theory.

This Essay will take the moment of the theory’s introduction as a baseline from which to first look back—to contemplate what thinking the theory replaced—and then look forward—to see what the theory has wrought for today’s law. Part I—looking back—will underline the superficiality of the preexisting theoretical treatment of planned communities in the 1980s. The discussion’s key finding will be that in many of its aspects, scholarly discussions of the law of servitudes up to the closing decades of the twentieth century were of the exact kind that legal thinkers in other fields discarded during that century’s opening decades. Alexander’s work thus ushered thinking in the field of servitudes law into modernity.

This move inevitably bore fruits not only in scholarly thinking, but also in judicial decision-making. As is often the case, however, the long-term doctrinal results of the new theoretical concepts did not always align with the normative concerns animating those concepts and the commentators arguing for them. As Part II will indicate, courts are indeed

24 E.g., GREGORY ALEXANDER & EDUARDO PÉNÁLVER, PROPERTY AND COMMUNITY (2010).
much more likely today to think, as Alexander advocated, of planned communities in terms of community—rather than in the terms of contract versus government. At the same time, however, courts have, over the past three decades, grown much more accepting of planned communities’ rule-making powers—the inverse of Alexander’s doctrinal prescription. Interestingly, they have shifted to this lax attitude precisely because they came to view these entities as communities. In internalizing the descriptive element of the theory of communitarian property, courts have largely reversed its normative sensitivities. This new and surprising finding of the Essay should be of interest to all those working on property law, whether or not they find property theory, or the history of the theory’s development—the focus of the preceding Part I—compelling.

Through these two parts the Essay’s review of the turn to community in the law of planned communities, as envisioned by Alexander, should hopefully yield both doctrinal and theoretical returns. It should instruct us about transmutations in one of the most important elements of modern property law. Concurrently, it should generate lessons about the often-unpredictable interaction between theoretical thinking and ensuing doctrinal reforms. These lessons could help property law theory more generally.

I. THE FOLLY OF CONSENT: THE FAILINGS OF THE TRADITIONAL ANALYSIS

The board of the planned community enacts a by-law disallowing the placement of planters in yards. The owner of one of the community’s component properties would like to keep her planters regardless. She thus resorts to legal action hoping that a court will strike down the by-law. What should be the standard of review the court employs to scrutinize the board’s decision?

Traditional thinking respecting the regulation of property offers a seemingly intuitive and straightforward answer. The court must determine whether the owner had at some point, in some manner, consented to the by-law or to the board’s power to enact the by-law. If so, the court should adopt a deferential standard of review. If, conversely, the owner cannot be viewed as consenting to the by-law or to the power to enact it, then the ban on her planters is coercive. It must thus be subjected to a strict standard of review. This traditional emphasis on consent versus

27 See Alexander, Freedom, supra note 14, at 886–90.
28 Id. at 887.
coercion requires that the court categorize the board enacting the by-law: is the board a body whose powers are grounded in the consent of the owners (that is, in contracts between them) or in coercion (that is, the board is analogous to a government)?

Traditionally, until at least the 1980s, many observers argued that the planned community board falls into the first, the consent-grounded, category, and thus its decisions should be subjected to a lax standard of judicial review. Not all commentators concluded as much, but still, even those commentators arguing for a more searching standard of review tended to ground their position in the consent/coercion dichotomy: they simply viewed the planned community as operating in the realm of coercion (or at least, not doing so to a dramatically lesser extent than a traditional government).

Alexander, for his part, refused to engage the debate on these terms. His goal was specifically to upend the debate’s terms. He would not pick between the two options—consent or coercion. The planned community, he argued, could not be said to be based on either consent or coercion since it brought together elements of both. Indeed, probably not only planned communities, but all the collective entities property law deals with follow that pattern: consent and coercion are not two distinct options, but rather a spectrum.

If the claim seems obvious to a reader today, it is only because Alexander was right. Yet unfortunately, both commentators and courts still at times fall back on the consent/coercion dichotomy he was arguing against. The fallaciousness of that worldview, therefore, still bears expounding. To aid in exposing the logical flaws of the reliance on the concept of consent to determine the legitimacy of planned communities’ by-laws, tracing the lineage of the form of legal thinking it embodies could be helpful.

For that purpose, we must go back to the late nineteenth century. As legal historians have established, that era, of Classical Legal Thinking, 
was characterized by a deep attachment to formalism.\textsuperscript{37} Formalism’s rise owed to its association with appealing scientific and democratic notions.\textsuperscript{38} Modern scientific thinking, especially in the nascent fields of the social sciences, emerged in the late nineteenth century.\textsuperscript{39} In that intellectual environment, an appetite for a mode of legal decision-making aspiring at a science’s standards of objectivity naturally materialized.\textsuperscript{40} Similarly, an inclination to minimize random decision-making by officials and prioritize private action aligned with the liberal spirit of the time.\textsuperscript{41} Formalism harshly curbs the undesirable subjective discretion exercised by judges as it reduces legal decision-making to two stages: conceptualization and deduction.\textsuperscript{42} The world of legal issues is divided into clear concepts.\textsuperscript{43} Each dispute can then be categorized as falling into one of those concepts, and from that association alone a decision can objectively, almost mechanically, be derived, settling the dispute.\textsuperscript{44}

A famous application of this mode of analysis was to the realm of regulation and freedom of contract. For classical legal thinkers the law had two clear and wholly distinct categories: police power and contract (or, in other words, public and private).\textsuperscript{45} If an issue fell into the first category, government regulation was allowed. If it fell into the second, regulation was prohibited.\textsuperscript{46} Thus, by tagging a given case as involving the police power a result could automatically be deduced. The opposite result could be deduced—similarly automatically—by tagging the case as involving contracts, rather than the police power.\textsuperscript{47}

Within the formalistic worldview exemplified by the police power/contract dichotomy the concept of consent occupied a particularly im-


\textsuperscript{40} Cf. Christopher Langdell, Cases on Contracts viii–ix (1st ed. 1871) (“Law, considered as a science, consists of certain principles or doctrines. To have such mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . .”)

\textsuperscript{41} See Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,” 100 Colum. L. Rev. 94, 96 (2000).

\textsuperscript{42} See Kennedy, supra note 36, at 245–46.


\textsuperscript{44} See id.

\textsuperscript{45} See generally id. at 11, 19–20, 27–30.

\textsuperscript{46} See id. at 33–34.

\textsuperscript{47} The most famous example of this form of reasoning—and the results it tended to generate—is Lochner v. New York, 198 U.S. 45 (1905).
It played a key role in the law of contracts in restraint of trade—a body of law whose development foreshadowed that of the modern law of servitudes. The concern of this body of law was coercion, or attempts to extinguish noncontracting parties’ freedom to consent to a trade. If two producers agreed not to sell their product to a consumer, that consumer could bring a lawsuit against them for restraining trade. That consumer was viewed as having been affected by a contract she did not consent to. If, on the other hand, those two producers merely agreed on a price to be charged from the consumer—they engaged, that is, in “price fixing”—the consumer had no cognizable claim under the law of contracts in restraint of trade. The consumer’s freedom to consent to a deal was not impeded: she could choose to buy, or to not buy, the product for the fixed price. An argument against the price fixing could only be brought if a recalcitrant producer was being forced by the other producers to adhere to the price fixing terms (through, for example, a boycott). Only in such a situation would there be a party coerced, a party whose adherence to a contract was not based on free consent.

By the 1890s this distinction—and the limited notion of coercion that was at its heart—came under attack. Economists explained that market participants can be “coerced” even when technically they are wholly free to consent to deal or not to deal. A person is coerced when producers agree not to sell to her (or force her not to sell to others) as traditional law held, but she is also coerced when producers agree to not

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48 See generally Horwitz, supra note 43, at 160–210 (discussing the rise of the will theory of contract in American law); Patrick Atiyah, The Rise and Fall of Freedom of Contract (1979) (discussing the same in English law).


51 Id. at 1027.

52 Id. at 1026.

53 Id. at 1027.


55 See N. Sec. Co. v. United States, 193 U.S. 197, 405 (1904) (Holmes, J., dissenting) (“Combinations or conspiracies in restraint of trade . . . were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm . . . The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in.”).


57 See Hovenkamp, supra note 50, at 1038.
sell the product to her at a lower price. True, she is free in this case to choose not to buy the product at the fixed price, but she is not free to buy it at a lower price—perhaps not even at its market price. This economic theory of “market coercion” ran in stark contrast to the conceptual framework prevalent in the law, that drew a clean distinction between coercion and consent.

Within a short time however, the notion that coercion need not be literal, and that the market, even a free market, exercises at times a coercive effect, would revolutionize the law of competition. Modern antitrust law, as embodied in the courts’ interpretation of the Sherman Antitrust Act of 1890, wholly jettisoned coercion as a relevant criterion for analyzing restraints on competition. Thus, it views price fixing as no less problematic than agreements not to trade. All restrain the consumer’s options and thus interfere with competition.

Today, the original categorical distinction between the agreement not to sell and the agreement not to sell at a lower price strikes most as wholly senseless. Few would argue for it. But now consider again the argument that the planned community’s decision to ban planters should be upheld since no coercion was involved—the argument that dominated the field until the 1980s and is still heard today. Since the owner chose to buy a property in the planned community, so the argument goes, she consented to the board’s power to regulate her, and thus that power should not be challenged. No one coerced her to buy into the community and its regulations—she was just as free to choose not to buy that property governed by the community.

58 See generally Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (explaining that a person is damaged by unlawful anti-competitive practices “by being led to pay more than the worth of the [relevant product]”);
59 See Hovenkamp, supra note 50, at 1027, 1045–46;
60 Id.;
61 See Sherman Antitrust Act, 15 U.S.C. § 1 (2019) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”);
62 Even the most restrictive modern reading of the antitrust law’s mandate, as offered by Judge Bork, would never focus on that description. For Bork, the key—and only—consideration in antitrust law is maximization of consumer welfare, which could be interfered with through contracts to fix prices just as much as by contracts not to sell. Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7, 10 (1966);
63 See Wayne S. Hyatt, Condominium and Homeowner Association Practice: Community Association Law 49 (3d ed. 2000) (explaining how widely cited is the claim that owners consented to the limits placed on their freedom by moving into the community);
64 See Andrea J. Boyack, Common Interest Community Covenants and the Freedom of Contract Myth, 22 J.L. & Pol’y 767, 769 (2014) (“Courts reason that all members of a community have agreed to be contractually bound to this private governance scheme, and therefore judicial deference to community choices is mandated by freedom of contract policies”) (citations omitted).
tions in most, if not all, new residential developments, a property not covered by a planned community is unavailable in the relevant location and at the relevant price point, is impertinent. So too is the fact that the restriction is part of the overall bundled asset that the owner is purchasing and the developer/seller will not, and after the community is formed, cannot, negotiate any changes to it with the individual purchaser. Yet these are clearly instances of market coercion: the buyer might have “freely” chosen the property in the planned community, with all the accompanying restrictions, but in actuality other options were not readily available to her (at least not at the relevant location and price point) and she lacked an ability to negotiate any of the restrictions. The owner was not literally coerced into a choice, but the world of options she could choose from was strictly constrained. True, one cannot argue that no consent was involved. But arguing that no coercion was involved is an equally artificial move which leads, as it did in the old law of contracts in restraint of trade, to senseless distinctions. As in the context of the customer’s willingness to pay a price producers demand for a product, there can be no pure consent in the scenario of the move into a planned community. Consent and coercion are not mutually exclusive categories, but rather occupy a spectrum. Thus, every market decision respecting housing involves a degree of coercion.

This realization does not entail the conclusion that planned communities’ decisions are always dubious. The historical transformation in the law of contracts in restraint of trade is instructive here again. The late nineteenth century realization that market participants can be coerced through the agreements of others—that the market always, to a degree, coerces the consumer to pay a price—did not mean that antitrust law would strike down all market transactions. Rather, it simply meant that the question of coercion versus consent became irrelevant. The analysis was to be based on the reasonableness of the constraint the transaction placed on trade, in light of market effects, rather than on any metaphysical inquiries into degrees of freedom. Some agreements would be deemed an unreasonable constraint on trade and thus illegal, others would be found reasonable and accordingly enforceable—the fact that all agreements were understood to generate some coercion notwithstanding.

The same should apply to the analysis of planned communities’ restrictions, and this was the core of Alexander’s prescription. The question should be whether it is reasonable for a given community to, for

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66 *Id.* at 894–95.
67 The Supreme Court decision famously settled on this test in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).
example, ban planters, rather than whether we should view the individual property owner as somehow consenting to the ban.

The idea that consent and coercion never overlap in the market—that some transactions are wholly coerced while others are grounded in purely free consent, and that solely the former must be subject to regulation—is uber formalistic. Worse still, it is plainly wrong. And herein lies the problem with the traditional treatment of planned communities, against which Alexander wrote, but which somehow persists in some minds. Formalism survived the realist onslaught. It still counts adherents and normative arguments on its behalf still get made. Formalism as a mode of legal analysis is a legitimate—though contested—normative choice. Reliance on the specific formalistic categories popular in the late nineteenth century—of consent versus coercion—is not. Few would seriously argue for these categories in the context of antitrust laws today; irrespective of our current debates about the role of antitrust, we find the traditional thinking in that field laughably naïve. Yet somehow, that thinking has enjoyed a long afterlife in property. The insistence that the solution for the vexing challenge of the planned community’s power must be found in the contrast between consent and coercion rehashes, almost to the word, legal arguments whose heyday was in the nineteenth century. Housing patterns fashionable in 2020 are analyzed through the prism of concepts that went out of fashion alongside the horse and buggy.

II. THE MALLEABILITY OF COMMUNITY: THE EFFECTS OF THE NEW ANALYSIS

The owners in a planned community are consenting and being coerced at the same time. Thus, the power of the planned community over their freedom cannot, as just seen, rationally be founded simply on the owners’ consent—or, alternatively, denied since they are being coerced.

68 See, e.g., Patrick J. Rohan, Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions, 73 St. John’s L. Rev. 3 (1999).
69 See Frederick Schauer, Formalism, 97 Yale L.J. 509, 547 (1988).
70 Perhaps the most prominent modern exponent of formalism was Justice Antonin Scalia, E.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989) (arguing that the doctrine of popular sovereignty dictates a formalist approach to legal reasoning).
Some other grounds for assessing the legitimacy of the power—explaining its source and setting the test determining whether the planned community has misused it—must be identified. A perhaps natural candidate offers itself. Instead of on consent, the power of the planned community draws on it being a community.

Community is a better way to conceptualize planned communities since the notion of community membership incorporates ideas of consent while acknowledging that more than mere consent might be involved.73 A community is not solely, as Alexander highlighted, the product of members’ consent to join.74 The discourse of community inevitably complicates notions of consent: the national community, the familial community, the religious community—none can be said to be based on consent alone. For while the members of a community constitute the community, they are also, to a degree, constituted by it.75

Unlike the nation, family, or religion, the residential community might not strike observers as truly defining its members’ identity: it might be more constituted by the members than constitutive of them. Still, it is a community. To qualify as a community for members, a given association need not be as intensive as the nation, the family, or the religious group. This important insight of the communitarian literature Alexander promoted has affected, as this Part will show, the way planned communities are conceived.76 As the ensuing discussion will also intimate, it has done so perhaps a tad too effectively: the distinction between planned communities and other, truly constitutive, communities has often been lost on courts who consequently now proceed to mechanically empower planned communities.77

The reason the argument that planned communities should count as communities was so innovative when it was first introduced is that these communities often do not fit common ideas of community.78 Community is a thick concept: it carries much descriptive heft and is normatively loaded. To many it implies meaningful interdependence, strong relationships, and a sense of belonging. While these elements are often associated with blood or cultural connections, they can undoubtedly also be

73 See Alexander, Dilemmas, supra note 14, at 41.
74 Id. at 26–27.
75 Id. at 23.
78 See, e.g., Thomas Bender, Community and Social Change in America 144 (1978) (arguing that the presentation and marketing of planned communities as communities is a “cynical manipulation of symbols of community”).
present within groups whose communal existence centers on a housing arrangement alone. But not all housing-based groups materialize as prime candidates for fostering such thick connections between members. If your idea of a housing-based community is a monastery, you might not readily detect a community in a suburban homeowners association. While a resident chooses to join either—both these associations are, unlike the nation or family, voluntary—each choice is animated by very disparate concerns. A member does not choose to assume a monastic lifestyle due to location or amenities (one would hope). Conversely, a member does not choose to embrace a homeowners association lifestyle due to spiritual considerations (one would hope). The motivations leading the member into a monastery appear much more closely associated with traditional communitarian sensibilities than those resulting in a member buying into a planned community.

The validity of this observation notwithstanding, an automatic resulting refusal to attach the tag “community” to the planned community would be too hasty. As Alexander underscored, irrespective of the practical reasons for joining a given group, that group might later, post-joining, exert constitutive influence on the joining member.79 The members of the planned community live in close proximity to each other, for a potentially long (and undefined) period of time. At the very least, they share many interests. Each member’s behavior might affect the daily quality of life of the others, and the quality of life of all members might be affected by the same external factors. As the home is the major financial asset most Americans own,80 the most important investment of each of the members is entangled with that of the others. Socially, the members inevitably interact in the community’s common spaces. These can include a pool, roof-deck, park, and more. But even if the common spaces consist of merely a hallway and mailboxes, members are destined to meet there often and randomly. The members must also manage the community together. A member can always choose to leave the community, but leaving is not easy: selling a home might be costly, especially if the community is, in one way or another, dysfunctional. In such situations, even when striving to leave, members might find themselves in the same boat. They perhaps shared nothing moving in, but they share quite a bit while in—and when trying to move out. The planned community ends up constituting—to an extent—the members once they are in.

79 See Alexander, Dilemmas, supra note 14, at 27.

80 See, e.g., Rakesh Kochhar et al., Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics, Pew Res. Ctr. (July 26, 2011), https://www.pewsocialtrends.org/2011/07/26/chapter-3-net-worth-by-type-of-asset/ (indicating that a home is one of the most commonly owned assets, and home equity is the single largest contributor to household wealth).
Further, and as Alexander also noted, it might not be wholly accurate to assume that the members shared nothing when moving in.\(^8^1\) It is not necessarily true that community-minded concerns are never, and to no extent whatsoever, involved in the decision to join a planned community.\(^8^2\) A retirement community is an easy example for a planned community residents join so as to live with others they think they can relate to. But to a certain degree, so is a prewar coop, a suburban homeowners association, a condominium in a “hip” neighborhood, or a new downtown supertall. Those moving in are choosing a certain lifestyle—and choosing to live with those whom they assume have a taste for a similar lifestyle. Of course, this does not imply the same strong dedication to a community’s homogeneity or spirit found in a monastery or even in a retirement community, but it does portend a certain attachment that cannot be reflexively dismissed.

Simply put, a residential entity need not be the equivalent of the family household or a monastery to qualify as a community. Community is not an all-or-nothing proposition. As a legal notion, it should not merely replace one formalist category—consent—with another—community. There are different degrees of community, and thus, perhaps despite first impressions, the planned community can, and should, be perceived in communitarian terms.

This position for which Alexander advocated is now broadly accepted. Evidence for its success can be found not only in the academic literature but in judicial attitudes towards planned communities as well.\(^8^3\) The extensive reliance on the terminology of consent that traditionally characterized the treatment of planned communities’ rule-making powers has now been supplemented, at times even supplanted, by the terminology of community.\(^8^4\) In disputes pertaining to the powers of a planned community, courts nowadays do not merely discuss the fact that owners bought their homes knowing that they are governed by the planned community board.\(^8^5\) Rather, courts stress that the planned community living

\(^8^1\) See, e.g., Alexander, Dilemmas, supra note 14, at 27 (describing how monks share a similar sense of incompleteness before entering monasteries).

\(^8^2\) Id. at 10.


\(^8^4\) See, e.g., Villas West II of Willowridge Homeowners Ass’n, Inc. v. McGlothlin, 885 N.E.2d 1274, 1279 (Ind. 2008) (“Property owners who purchase their properties subject to such restrictions give up a certain degree of individual freedom in exchange for the protections from living in a community of reciprocal undertakings.”) (emphasis added); Armstrong, 633 S.E.2d at 88 (“[T]he court may ascertain reasonableness from the language of the original declaration of covenants, deeds, and plats, together with other objective circumstances surrounding the parties’ bargain, including the nature and character of the community.”) (emphasis added).

\(^8^5\) See, e.g., Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (“Each unit owner must give up a certain degree of freedom of choice which he
arrangement is typified by community control through which the members express themselves, and through which those members live their desired form of life.\textsuperscript{86} The power to limit owners’ land uses is constitutive of these communities, courts admit.\textsuperscript{87} The results of these communal limits offer a way of life the community members hold dear.\textsuperscript{88} As courts describe planned communities’ rules in these terms, the question whether the owner consented to, or even predicted, the board’s restriction on her freedom as an owner has become much less central doctrinally. This shift in form of analysis has been particularly apparent in cases involving bans on the leasing of units enacted by a planned community board years after the community was created and after the affected owners bought in.\textsuperscript{89}

These more recent decisions exhibit not only the degree to which the language of community—as distinct from that of consent—has finally permeated legal thinking about planned communities, but also the extent to which that language has come to dictate outcomes. Historically, the standard of review applicable to planned communities’ by-laws has been “reasonableness.”\textsuperscript{90} Ill-defined as it might unintentionally be, and lax as it might intentionally be, such a standard does, by definition, empower a court to substantively assess the merits of a by-law: ultimately, the court must determine whether the by-law was reasonable. But while textbooks still characterize the reasonableness standard as the default, or at least majority rule,\textsuperscript{91} a majority of states appear to have shifted to another, non-substantive, standard.\textsuperscript{92}

\textsuperscript{86} See, e.g., Hidden Harbor, 309 So. 2d at 181–82. See also Fennell, supra note 35, at 867 (describing how covenants signal “community member characteristics” such that those signals repel potential buyers who do not desire those characteristics and attract those who do).

\textsuperscript{87} Nahrstedt v. Lakeside Vill. Condo. Ass’n, 878 P.2d 1275, 1281 (Cal. 1994); Perry v. Bridgetown Cmty. Ass’n, 486 So. 2d 1230, 1233 (Miss. 1986).

\textsuperscript{88} See Armstrong, 633 S.E.2d at 88 (discussing how certain types of restrictions might be inappropriate given the nature of the community, such as “prohibit[ing] rentals in a mountain community during ski season or in a beach community during the summer.”).


\textsuperscript{90} Natelson, supra note 72, at 43 (“Most of the reported cases on [property owners association] decisionmaking focus on the reasonableness criterion.”); Armand Arabian, Condos, Cats, and CC&Rs: Invasion of the Castle Common, 23 Pepp. L. Rev. 1, 11 (1995).

\textsuperscript{91} E.g., Jesse Dukeminier et al., Property 959 (8th ed. 2014); Joseph Singer et al., Property Law 623–24 (7th ed. 2017); Restatement (Third) of Property, Servitudes § 3:1 (Am. Law Inst. 2000).

\textsuperscript{92} See George L. Blum, Annotation, Application of Business Judgment Rule to Decisions by Real Estate Condominium or Cooperative Corporations, 9 A.L.R. 7th 347 (2017).
Borrowed from Delaware corporate law, the “business judgment rule” has grown popular among courts confronted with the decisions of planned communities. Under this standard, a board’s decision is not to be second-guessed for its wisdom—or reasonableness. Instead, the court only scrutinizes the processes generating the decision, to verify that they were at least minimally adequate and informed. An unreasonable decision or by-law will not be struck down if it were reached through a reasonable decision-making process (for example, one involving some deliberation and contemplation of opposing views, and if necessary, outside expert input).

Many courts have couched the move to this laxer form of review in communitarian terms. Since the homeowners association or condominium is a community constitutive of its members, courts reason, judges, as outsiders, should not inject themselves to assess the wisdom of community decisions pertaining to members’ lifestyle. Since the regulations of the homeowners association or condominium express the community’s spirit, courts should not inspect them to verify that they align with some external standard of reasonableness or even with members’ earlier expectations. The legal transformation in courts’ attitude towards planned communities, and in the standard of review applied to those communities’ decisions, thus explicitly draws upon notions of community as advocated by the property and community theorists.

But it employs these communitarian notions in a manner that contorts the position of their original propagators. Alexander, for example, specifically argued in favor of the reasonableness standard and aimed to counter the efforts of other commentators who were advocating for a laxer form of review of planned communities’ decisions. He believed

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93 See Max Schanzenbach & Nadav Shoked, Reclaiming Fiduciary Law for the City, 70 STAN. L. REV. 565, 613 (2018) (explaining that Delaware “[c]orporate law has opted for a much lower fiduciary standard of care than the negligence standard prevalent in trust law”).
96 Id.
97 Id.
99 See Courts at Beachgate, 545 A.2d at 248 (“‘The business judgment rule’ applies. The rule requires that there be a showing of fraud or lack of good faith in the conduct of the affairs of a corporation in order to question decisions of its board of directors. If the board’s actions are authorized, fraud, self-dealing or unconscionable conduct must be shown to justify judicial action.”) (quoting Papalexiou v. Tower West Condo., 401 A.2d 280, 286 (N.J. Super. Ct. Ch. Div. 1979)).
that communities constitute members and hence they are important—but hence they are also potentially damaging to democratic notions. Overbearing communities represent a threat to the freedom of their members, and, maybe even more importantly, communities by definition discriminate against non-members. Therefore, communitarians like Alexander argued that all communities must be regulated.

Furthermore, since the specific community at issue here—the planned community—might not represent the most constitutive form of community, it might not deserve the same level of presumptive autonomy accorded stronger, culturally-based, communities. Courts are understandably reluctant to interfere in the self-management of religious communities, for example. They would rather not decide what moves align with the original documents of the given faith, and which group best represents those documents in the case of a schism. Such deference is much less justified in the case of a planned community. A condo declaration is not scripture. Condo members, even board leaders, do not enjoy special insight into the founding document’s hidden meaning. Traditions and culture are not that central. Many of the usual reasons responsible for the strong judicial preference for non-interference in community affairs are missing in the context of the planned community.

So why have courts shown a tendency to be so respectful of planned communities as communities—in perfect contradiction to the operative recommendation of those who were first to advocate the view of planned communities as communities? One reason might be that scholars were employing a term that has an intuitive meaning in a sophisticated, and very distinct, fashion. The property and community movement was drawing on the work of social scientists and philosophers, such as Iris Young, Michael Sandel, and others, who endorsed a nuanced idea of community, which stressed inclusivity and diversity. These authors were explicitly attempting to displace the common notion of community popularized in postwar America, a notion that was grounded in ideas of shared identities and backgrounds. They envisioned the community as a bridge between different inhabitants rather than a wall between inhabitants of different identities and backgrounds. Yet people—laypeople, but also lawyers—tend to, often thoughtlessly, use a term to convey its popular meaning. “Community” evokes in most minds an image of a close-knit group of like-minded people whose autonomy and desire to maintain

100 See Alexander, Dilemmas, supra note 14, at 52.
101 Id. at 52–54.
103 See, e.g., Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969).
some separation from others ought to be respected. Once the moniker “community” was attached to the planned community, the same attitude was, almost automatically, accorded to that community as well. When employing the same term, “community,” to describe different entities, it was convenient to then proceed and treat all those entities in a common fashion, one following the model set by the most prevalent entity associated with the term community.

This unsound move was further facilitated by the presence of an industry group—the Community Association Institute (ACI)—that was busy propagating this identification so as to render the planned community more attractive and powerful.\textsuperscript{105} The ACI, an organization bringing together developers and managers of planned communities, naturally sought to persuade courts and legislatures to expand the latitude accorded to planned communities and to their decision-making powers. The equation of these communities with thicker communities, such as religious ones, served that interest—and thus the ACI promoted that association. All probably realize that as a community, the condominium is not the equivalent of the religious sect, but when both are dubbed “communities,” and when powerful actors hold a stake in sustaining the false equivalency, they are prone to be analyzed as equivalents.

Ironically, therefore, the turn to community-based thinking about planned communities might have limited the avenues for judicial review that were possible under the traditional (and misleading) consent-based thinking. The intuitive understanding of consent, misguided as it might have been when attached to the planned community, called on those reviewing a board’s decision to at least feign a search for owner consent. It thus did imagine some form of real review of a planned community’s decision. Conversely, the intuitive understanding of community as involving a strong sense of belonging and the accompanying case for community autonomy prescribes non-interference in the planned community’s affairs. Accordingly, as, and perhaps because, the law moved towards a more accurate understanding of the grounding and function of planned communities, it has shifted to a more troubling treatment of planned communities.

CONCLUSION

It is hard to overstate the impact of the property and community legal theory. Thanks to it, we now think of property law in terms that are much more reflective of people’s lived experience of property. In the specific context of planned communities, the underpinnings of the law

\textsuperscript{105} The ACI actually awarded Alexander’s article its annual award. On the ACI, see MCKENZIE, supra note 2, at 110–21.
have finally moved away from concepts appropriate, at best, for the late nineteenth century. This valuable transformation produced salutary ramifications not only for this specific body of property law. As Alexander noted more recently, alongside the extraordinary spread of planned communities, the better understanding of their legal workings has advanced property law thinking in general.¹⁰⁶ Once all can see that much of current property interests in America are “governance properties”—properties characterized by the need to regulate the relationship between multiple owners, such as properties held within planned communities—few can seriously contend that property is all about the individual owner’s right to exclude.¹⁰⁷

Yet while we contemplate this theoretical success of the property and community school of thought, we should also consider its doctrinal impacts. Courts now much more readily conceive of property arrangements in terms of community. Often, however, the community values those courts have in mind might diverge—dramatically—from the values with which property and community scholars are, rightly, concerned. The practical results of the judicial reliance on notions of community can, therefore, be hard to predict—and perhaps hard to embrace. We may find ourselves moving from a legal world where we worried that courts did not see enough communities, into one where we worry that they see too many.

¹⁰⁷ Id.