Liberty and Separation of Powers in Judicial Review of Privatized Governance Regimes

Jeffrey Kleeger
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By Dr. Jeffrey Kleeger

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I. PRIVATE EXERCISE OF PUBLIC POWER WITHOUT PUBLIC LAW CONSTRAINTS

The Auburn Greens Unit 1 Homeowner’s Association (HOA), in Placer County California, taped a notice on residents’ doors informing them that as of January 1, 2018, a new Garage Door Policy would be effective. The policy would require all garage doors be kept open between the hours of eight and four, Monday to Friday. The reason for the rule was illegal tenants were found in the community. The board believed the new policy was necessary to identify illegal tenants. The punishment for violating the rule would be a $200 fine. A nine-year-old boy in the community noted with concern, “I don’t think it’s a good idea because they are going to steal my bike”.1 While it’s unclear who he thought would steal his bike, it is clear he thought that leaving it unattended in his open garage was ill-advised.

There are several legal tools that may be borrowed from administrative law to ensure homeowner associations (HOAs) exercise delegated administrative powers lawfully. HOAs are an innovative solution to the challenges that arise in residential property ownership. It is acknowledged that boards, in the course of managing associations, may intrude on fundamental constitutional freedoms.2 This article considers how the benefits of co-ownership of property can be derived with minimal burden on private rights. The trick is using flexible privatized governance to achieve collective good while avoiding unnecessary burdens on private rights. The popular perception of the power imbalance between members and boards is accurate. Power is concentrated in boards and individuals have little

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* Jeffrey Kleeger, Ph.D., Associate Professor Criminal Justice Law at Florida Gulf Coast University is a lawyer with real property law transactional experience whose research interest is in exploring the public and private law impacts on personal liberty. The author is grateful for the insight of peer reviewers and efforts of the NAALJ editorial staff in producing this article.


recourse to resist decisions they disfavor. However, a system that would require private boards to produce a fully developed information-gathering record on which decisions are based is one that would promote better governance because it would be more accountable for its actions. Life in the HOA-world is managed by private individuals exercising public control in a private realm. Official actions reflect public authority although safeguards of state action doctrine are not available to protect private rights. Courts struggle with how to characterize such private governance activity as HOAs do not fit neatly within the public governance model but share many of the features of public governance form. It is appropriate in this context to welcome judicial skepticism of HOA decisions and limit deference characteristic of a watered-down, minimally-searching degree of judicial review.

HOAs are nonprofit corporations organized under state law to manage common interest communities (CICs). Owners voluntarily join when they purchase membership. Some theorists argue actual consent is lacking and unknowing waiver of rights occurs\(^3\) but consensual waiver\(^4\) is an insufficient defense because there is a growing scarcity of residential property not subject to community association governance and some rights and privileges cannot be waived.\(^5\) The fact is HOAs have legally existed in the United States (US) since the colonial era\(^6\) and are a popular ownership form that provides tangible benefits. While board officers are not here intended to be characterized as bad actors who go out of their way to abuse authority—there are instances in which individual liberty is unnecessarily limited by excessive enforcement action. The question is how might HOA governance be better regulated? The answer lies in enabling legislation. Statutes provide for uniform governance rules to better regulate HOA performance. Courts, however, have yet to find a way to effectively limit HOA exercise of authority. Administrative law provides a possible solution to this problem of


\(^4\) Gott, *supra* note 2, at 211, n.71.

\(^5\) *Id.* at 212.

delegation lacking legal protection. Despite the elements in common between company-owned towns and HOAs in terms of organizational structure and systemic functionality that permit the exercise of broad regulatory power over residents' conduct and property; courts avoid applying state action doctrine against HOAs treating them as autonomous private entities licensed to operate extrajudicially. While it is true HOAs are private contracting parties, that does not entitle them to be inadequately supervised in respect to public functionality. The threat of a meaningful judicial review could resolve this deficiency in oversight. A more effective judicial review is the only real safeguard to protect private, individual rights. Board decisions about how to regulate life within the walls ought not to be conclusive upon the judiciary—it is suggested here that it is appropriate for courts to engage in a more active and searching degree of review than presently in general use.

Judicial review would be more effective if it were based on a comprehensive, fully developed record on which decisions are made. This is often not the case in judicial review and courts are limited by the facts available to them. For example, the Fourteenth Amendment to the US Constitution is understood to prohibit actions by a state and its agents that deny equal protection. The underlying question is whether the state has acted. In the context of HOAs, to answer that question, it must first be determined whether HOAs are government entities. Because of how they function, HOAs may be thought of as sufficiently government-like to trigger application of constitutional law safeguards. It matters that property in an HOA regime is affected with a public interest. If state action doctrine is inapplicable to HOA governance, however, it is entirely possible for a state to achieve what would otherwise be unconstitutional by using an HOA surreptitiously. According to the law, persons cannot be deprived of constitutional rights by the delegation of public authority to private agents. In the context of takings, for example, the state cannot

7 Gott, supra note 2, at 203 (citing Reichman, infra note 135, at 267–68).
8 Id. at 204–205 (citing The Civil Rights Cases, 109 U.S. 3 (1883) (Harlan dissent argued the federal government ought to possess authority under the 14th Amendment to correct private actor wrongs against individuals and should not be limited to regulating state action only despite the understanding that the amendment prohibits only acts of a state and its agents).
delegate its taking power to a private party. To avoid such a result, heightened judicial review is necessary to void ultra vires action.

It is possible to achieve better rights protections by establishing a uniform property rights code that all state legislatures could adopt. Equal protection and due process rights are more secure when information about rules that limit rights is communicated prospectively. A uniform set of standards could scaffold HOAs with threshold protected rights built into the framework of governance thereby reducing potential conflict between boards and members. Private rights may be better protected by promoting a system of community association that requires rigorous external oversight based on a record that documents support for decisions reached.

City-fortresses erected to protect villages from invasion are the original HOAs. People associated, pooling interests and resources to achieve security. Gates and walls with sentries thereon were established to protect and serve the community. These benefits came at the cost of fees and dues paid in arms and services. The vestiges of medieval property law relationships survive today in gated communities, high-rise towers, condominium and cooperative apartments, homes and other units of divisible ownership, relics of a collectively organized past form of governance operating as a quasi-state privatized public form to manage resources, enhance service-provision and maintain a sense of community. Privately performed public goods might include policing, security, maintenance, and other government services. While some HOAs do not provide formal security, depending instead on community watches, it is important to note that some do engage sophisticated systems of technology and policing. The fact is, there is no standard operating procedure for HOAs to follow. Enfeoffed interests have one thing in common though which is they incorporate privatized functionality. Private provision of public goods can be more efficient and maintain quality at less cost compared with public provision.

The prevailing libertarian view favoring HOAs over owners in disputes produces unintended negative consequences. It is not uncommon for public actors, private developers and real estate agents

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to “talk up the idea” that when people buy into HOAs they purchase land; but it is closer to the truth that purchasers of collective ownership buy into co-ownership with rights, benefits, burdens, and privileges of same. The problem is co-owners may have divergent interests which can generate conflict. When individuals challenge HOA action, by what standard are such challenges to be reviewed? Answering this question is important to fully comprehend the proprietary structure of HOAs. Failure of judicial review to adequately protect private rights points to the need to enhance the rigor or modify the standards of judicial review. Private rights hang in the balance. The objective of protecting them needs to be legislatively mandated and effectively enforced to ensure democratic principles of good governance are maintained.

A. Why Administrative Law ‘Heightened Scrutiny’ Is Necessary

A heightened degree of judicial review is not a distinct standard of review but is a judicially-identified modification to evaluate challenged action. In the context of HOA governance, private rights would be better protected if heightened scrutiny were required. If HOA members are dissatisfied or damaged by agency action, what recourse is available? Boards operate free of government constraints and the burden of proof is on the dissatisfied member claiming board malfeasance. The parties begin with pre-suit mediation after administrative remedies are exhausted. A commonly-held assumption is that boards responsibly exercise authority and fairly represent all members. Board action is measured against the arbitrary and capricious standard of review with the burden of proof of malfeasance required of the complaining member. It is assumed because the board is organized to serve the collective good it will execute its duties lawfully. A challenge to the lawfulness of board action begins with the filing of a petition for review. If an agreement is reached between the parties it will be reduced to a

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12 *Id.*

writing. Failure to reach agreement results in a mediator-declared impasse under which the aggrieved party may proceed to court.\textsuperscript{14} Administrative adjudication favors boards. The board enacts, manages, exercises and adjudicates community rules and creates or neglects to create the record upon which its action is based and will be reviewed. Thus, boards are clothed in the legitimacy of state authority, and review of board action is measured against a standard that places the burden on the aggrieved to demonstrate the challenged action was unreasonable, arbitrary or capricious, which is a difficult burden to meet when the board creates the record on which its actions are judged. Often there is minimal evidence and a scant record of facts to review board decisions. The degree and meaningfulness of review are limited which is why the creation of a complete record is necessary for meaningful judicial review.

Meanwhile, board action is viewed with substantial deference. While action in law or equity may be brought to address alleged failure or refusal to comply with community rules\textsuperscript{15} unless an omission of adherence to process is apparent, the association is free to levy reasonable fines for violations by members of bylaws, provisions, rules or regulations. When a member is in jeopardy of having adverse action taken against her interest, she must be afforded notice and an opportunity to be heard. Pursuant to Florida Statutes, a member is entitled to a hearing before a committee of at least three appointed by the board. Such a committee is charged with confirming or rejecting the penalty to be levied.\textsuperscript{16} However, the odds a homeowner will be successful in resisting adverse board decisions are remote so long as the board has complied with a formalized administrative process. The thesis of the proposal developed here is that a more searching judicial review analysis is appropriate to safeguard personal liberty in privatized governance regimes. Such an enhanced degree of review, it is suggested, must begin with the premise that the absence of a meaningful judicial review standard contributes to the power imbalance between boards and members. Board decisions are deemed lawful unless the board violates the law or its own rules. Thus, boards appear to be authorized by law to

\textsuperscript{14} Fla. Stat. § 720.311(2)(a)-(c) (2017).
\textsuperscript{15} Fla. Stat. § 720.305(1), (2) (2017).
administratively violate the Separation of Powers doctrine effectively concentrating public governance authority in privatized form without traditional constitutional law constraints expressed in a concentration of powers in that boards may write and amend community rules, enforce those rules, adjudicate alleged violations of said rules and impose penalties on association members for violations of the same, (arguably) in violation of the good governance tenets of a separation of powers framework. With respect to lawmaker, Article I of the Constitution allows Congress clear supremacy, but because land use is historically a reserved State Police Power sourced in the 10th Amendment, local law governs HOA rulemaking. HOA enabling legislation (Article II power) is diffused or delegated without reservation to an executive authority. When a dispute arises, courts are consequently constrained by the prevailing standards of judicial review that trend deferential to executive authority and in the case of HOAs, governing boards. Part of the reason for this result is there is no fully developed record thus, creating a requirement that there be one, might resolve this problem. Similarly, board action in compliance with the Fourteenth Amendment due process is more likely to be upheld because it would appear to be legitimate. The appearance of propriety is essential in legal process. The Court has defined due process to mean the legal process appropriate to the case as adapted to safeguard the parties’ due process rights. Therein rests is justification. Whether the HOA action falls within the state action doctrine is relevant to the analysis in dispute resolution and so is discussed below.

18 John R. Nolan, Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control, lawweb.pace.edu/files/landuse/Land_use_System.pdf.
19 Cox, supra note 17, at 1674 (citing Eric A. Posner and Adrian Vermeule in Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1722 (2002), for the proposition that nondelegation principles in constitutional law prohibiting Congress from delegating lawmakers power to the executive is essentially a dead letter, if it ever really existed).
20 Cox, supra note 17, at 1671 (citing Allentown Mack Sales and Service, Inc v NLRB, 522 U.S. 359, 366 (1998) requiring judicial deference to findings supported by substantial evidence on the record).
B. HOA-World — Is Kindness in Governance Possible?

How might administrative state legal adjudication principles be borrowed and used to correct the power imbalance between boards and members? One means is to provide due process notice, opportunity to be heard to defend one’s interests and assurance that a full and complete record will be developed so that meaningful review of evidence-gathered and decisions reached is possible. State action taken in the context of Fourteenth Amendment due process rights for a swampland reclamation district is an example of how administrative adjudication might function.22 In late 1860s California, the legislature sought to reclaim certain swampland.23 A system was established for districts to be formed by voluntary association of owners who by majority vote could voluntarily petition for inclusion.24 By-laws were established for reclamation work, and a board of trustees selected from among owners to manage it. The board was authorized to do all organizational work necessary, estimate costs, contract out work, manage repairs and serve as a fiduciary for monies collected. The board acted much as a modern HOA would do in managing assets, enforcing rules and supervising activity on behalf of a community association. The trustees made an initial assessment of estimated costs but later found the calculations fell short. Assessments to cover expenses were deemed necessary but a dispute arose over the added costs. The board authorized liens on owner lands to satisfy the obligations. On review of a challenge to the board action, the Court held when a burden is imposed on land for public use, and the law provides a process to contest burdens intended, it cannot be said that the later-burdened individual was deprived of property without due process25 because due process was followed. Thus, board action is upheld when due process is adhered to.

Dissatisfied owners may appeal to the board as a first-step requesting redress of grievances, but such action is not likely to succeed. Exit is costly as owners tend to be highly invested in their

22 Id.
23 Id.
24 Id.
25 Id. at 711.
purchase; complaining is likely to fail as self-governance is representative, not democratic; advocacy for change is ineffective as boards are constituted of members largely untrained for administrative roles and it is illogical to presume their readiness to govern professionally will ever improve. How then is power imbalance to be remedied? The answer lies in institutionalizing a more rigorous standard of judicial review based on a comprehensive record that documents the justification for decision-making. Evidence of rational decision-making is necessary to defend against claims of arbitrary or capricious action. Use of administrative tools to more efficiently manage privatized land use regimes makes sense—concentrating power produces more effective results; but equity is equally important, and to ensure it survives decision-making, it is necessary to require transparency, accountability, and freedom from conflicts of interest in due process. The way to ensure lawful due process is to have meaningful review of board action. A party negatively impacted by an administrative act must have recourse to secure its cessation. The opportunity for review without a possibility of achieving desired results is no review at all.

Administrative adjudication permits adversaries to negotiate a reallocation of benefits and burdens according to public policy and market efficiency while encouraging equitable accommodation. Law and economics theorists applaud the possibility of achieving more socially productive allocations to encourage utility and a meaningful participation of individuals in the life of the community, but those interests must not come at the cost of inordinately burdening private rights. The law governing associations vests plenary power to regulate land use in boards empowered to craft and enforce rules that

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27 Id. at 862.
28 Id. at 868.
30 Nelson, supra note 29.
may justifiably interfere with individual freedom.\textsuperscript{31} Sometimes, boards impose useful restrictions on private liberties; but sometimes restrictions imposed are not the least drastic means available. While boards are authorized to subordinate private rights to promote the public good,\textsuperscript{32} burdens imposed must be reasonable.\textsuperscript{33} Additionally, courts will not substitute the judgment of jurists for those of lawfully authorized decision-making agents under administrative law principles. Instead, they will defer to reasonable decisions made by such persons supported by a fully developed record. This article suggests boards be required to produce a comprehensive record on which their decisions are based to ensure courts may exercise meaningful judicial review of their acts and decisions. The state condones discretionary authority in boards to enact and enforce rules, judge and punish transgressions and gives broad license to regulate member behavior. Expansive, discretionary authority must be limited by rules of reason and good business judgment to ensure against unreasonable, discriminatory or contrary to collective good\textsuperscript{34} applications.

Privatized governance effectively facilitates the low-cost provision of public goods and services. Its purpose is to enhance customer satisfaction and efficiency in operations by unleashing profit-seeking behavior that focuses on creating an environment for flexible, minimally regulated operations by reducing the role of government.\textsuperscript{35} This is consistent with the view of the Florida Legislature that government regulation burdens rather than benefits private activity. This is not to say a measure of regulation of boards is inappropriate because government serves the purpose of promoting

\textsuperscript{31} For example, FS Chapter 720.302 declares the Florida State Legislature recognizes it is not in the best interest of HOAs or association members that it establish a regulatory framework for managing the affairs of HOAs and so it only provides statutory recognition to such corporations and authorizes them to operate declining to set forth in detail how they ought to perform their functions. XL FL. LEG. 720.302 (2014).

\textsuperscript{32} Stern, \textit{supra} note 29, at 151.


\textsuperscript{34} Stern, \textit{supra} note 29, at 150.

safety and fairness but is to say boards are less effective when restrictions on their authority to govern are more burdensome.\textsuperscript{36} Responsible application of discretionary authority presupposes that administrators are capable of exercising managerial expertise and govern wisely; but when there is no required training to hold office, and oversight of board action is minimal, there is cause for concern about protecting individual rights.\textsuperscript{37} Private governance regimes are said to be more effective than public forms\textsuperscript{38} because boards can better provide a sense of security, reduce crime, enhance property value, and promote community values\textsuperscript{39} for members compared to local government. The negative spill-over effect of privatization that is described in the literature as spatial inequality-producing fragmentation, is capable of remedy by creating associations to eliminate disadvantaged spaces. HOAs serve the Goldilocks function of bridging the gap between no governance and too much governance; while courts serve as standard-bearer or gate-keeper to ensure that unlawful discrimination and risk of harm to personal autonomy are mitigated inequities capable of correction after being brought to light by a more rigorous judicial review.\textsuperscript{40} Courts ought to delve beyond the inquiry minimally required—that the rule under review is in fact reasonably related to a lawful public purpose—and determine further that a certain rule it is properly limited in scope and lawfully enforced to ensure decisions reached and actions taken in reliance on it are reasonable, remain in the collective interest and are as equitable\textsuperscript{41} as possible under the circumstances. To better safeguard member rights, boards ought to carry the burden of proof

\footnotesize{\textsuperscript{36} Nelson, supra note 29, at 855.  
\textsuperscript{37} Id. at 857, 860.  
\textsuperscript{38} Nelson, supra note 29, at 861.  
\textsuperscript{39} B. Doucet & E. Smit, Building an Urban ‘Renaissance’: Fragmented Services and the Production of Inequality in Greater Downtown Detroit, 31 Journal of Housing and the Built Environment 635 (2016).  
\textsuperscript{40} Steve Sanders, Mini-Domas as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments, 109 Northwestern U. L. Rev. 12, 14 (2014) (explaining that a searching, skeptical judicial review of substance is justified when rules or decisions are the products of a constitutionally suspect lawmaking process).  
to ensure official action is indeed necessary, sufficient and is the least drastic means available to secure lawful, reasonable and public interest-oriented ends. At risk of being viewed of having it both ways, this article proposes that it is, in fact, within reach for decisions to produce maximum public gain along with minimum private burden. What is necessary is a more meaningful judicial review.

II. ADMINISTRATIVE LAW STANDARDS OF REVIEW

A more meaningful judicial review could result by applying administrative law principles to private governance forms. Federal judicial review of administrative law rulemaking, enforcement and adjudication have led to the development of diverse strains of deference relevant to the thesis of this article. Typically, an agency rule, regulation or order is deemed lawful and deference is accorded when rules and orders issued reasonably relate to a legitimate entity purpose and are not applied in an arbitrary or unreasonable manner. The Court has outlined several standards of review available for adaptation to the HOA context. These would have the effect of improving board actions. The standards are referred to in the literature as Auer,\textsuperscript{43} Chevron\textsuperscript{44} and Skidmore\textsuperscript{45} deference. Each varies in degree and asks distinct questions about the form of administrative action, its purpose and the source of authority on which it is based. Auer deference asks whether the agency interpretation is plainly erroneous or inconsistent with the rule in question;\textsuperscript{46} Chevron asks whether the interpretation is reasonable,\textsuperscript{47} and Skidmore asks whether the interpretation is persuasive.\textsuperscript{48}


\textsuperscript{43} Auer v. Robbins, 519 U.S. 452 (1997).


\textsuperscript{46} Auer, 519 U.S. at 461–463 (holding that because the test is a creature of the agency’s own regulation, its interpretation is controlling unless the interpretation it offers is plainly erroneous or inconsistent with the regulation). In Auer, the Court found the agency position was in no sense a post hoc rationalization or that there was any reason to suspect that the interpretation did not reflect the agency’s fair and considered judgment on the matter. \textit{Id.}
The Court has indicated that in reviewing agency decisions in administrative law cases, judges ought not to substitute their own opinions on what the law should say for that of the agency. Each deference form is applicable in different scenarios. Auer applies to agency interpretations of its own ambiguous regulations; Chevron to agency actions that carry out an express or implied delegation by Congress to the agency to interpret an ambiguous statute through rules that carry the force of law; and Skidmore when a regulation does not warrant Auer or Chevron deference entitling the administrative interpretation to vary weight depending on its capacity to persuade the reviewing party. These three forms may be borrowed for application in private governance to permit HOAs to retain greater flexibility while also ensuring that individual rights are adequately protected. The traditional approach in analyzing deference is to categorize administrative action as a rule or order and whether the action is formal or informal. According to the federal APA, 5

47 *Chevron*, 467 U.S. at 865–866 (holding that an agency’s reasonable interpretation of an ambiguity or gap left open by an enabling statute, when made in furtherance of administering its lawful charge, is entitled to deference).

48 *Skidmore*, 323 U.S. at 140 (holding that agency interpretations are a guide for courts to weigh the validity of reasoning and the weight of a judgment depends on the thoroughness of consideration, consistency with other pronouncements and validity of reasoning which impacts the power to persuade). In the instant case the Court concluded that the conclusion reached was consistent with similar decisions and should otherwise be upheld. *Id.*

49 Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 414 (1971) (holding that the reviewing court shall set aside agency action that is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law or failed to meet statutory, procedural or constitutional requirements and otherwise, may only set aside agency action when such action is not supported by substantial evidence or is unwarranted by the facts).

50 Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, 100 MINN. L. REV. (2015), www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/ (arguing Skidmore deference is preferable to Auer because it would permit a court left unpersuaded by an agency interpretation to conduct its own interpretation). I would caution against proposing activist court activity and recommend instead that a rogue agency seeking to adopt vague regulations to comply with notice and comment requisites only to expand its authority through interpretive rules be remanded to create a meaningful and comprehensive record that demonstrates it actions are in lawful furtherance of its charge.
U.S.C. §§ 500 et seq., and Florida APA, FS 120, a rule is a statement of application for future effect intended to implement or prescribe law or policy; an order is a disposition that is not a rule; formal rulemaking is subject to the notice and comment requirements as outlined in 5 U.S.C. § 553 and FS 120.54, Rulemaking; and informal rulemaking includes interpretative rules and general statements of policy that do not require such process. Courts may consider the administrative interpretation of rules, regulations, and orders looking to the authority under which the rule was made. Accord is given to the different levels of judicial deference and varying standards or degree of scrutiny that goes to the binding or persuasive effect of deference. Courts should remain skeptical of administrative-like behavior that appears manipulative or seems in some manner to condone exercise of authority in excess of that properly delegated.

A. Auer Deference

Auer deference arose out of an agency interpretation of the Fair Labor Standards Act (FLSA)\(^{51}\) exempting professional employees from overtime. The case turned on whether the agency’s salary-basis test for determining exempt status is lawful.\(^ {52}\) More to the point, officers sought overtime while the city argued they were not eligible for the same.\(^ {53}\) The Court observed Congress granted broad authority to the agency to exempt certain employees and the agency clearly identified an exception for the employees in question.\(^ {54}\) The Court noted that because the legislature was silent on the issue the agency interpretation was valid as long as it was based on a permissible construction of the statute.\(^ {55}\) The Court observed salary-basis was an


\(\text{\textsuperscript{52}}\) Auer, 519 U.S. at 454.

\(\text{\textsuperscript{53}}\) Id. at 455 (explaining the agency viewed employees earning a specified minimum on salary not subject to reduction exempt. The officers claimed the salary-basis test inapplicable as their pay could be reduced by discipline-specific penalties related to quality or quantity of work).

\(\text{\textsuperscript{54}}\) Id. at 456 (explaining that the agency interpretation of its own regulation indicates that an exception was carved out that embraces reductions in pay for disciplinary violations and that employees whose pay is so adjusted are not entitled to exempt status).

\(\text{\textsuperscript{55}}\) Id. at 457.
agency rule and agency interpretations of its rules control unless they are in plain error.\textsuperscript{56} The Court concluded an agency’s power to resolve ambiguities in its rules is broad\textsuperscript{57} and its action lawful if the ruling or practice is consistent with the interpretation offered. The Court reinforced the reading suggested in this article that interpretations lacking force of law do not fall within Chevron (as formal rulemaking on the issue was absent in the formulation of the regulation). Deference to the decision of the agency in Auer was appropriate, according to the Court, because the remedy for failing to conduct amendatory rulemaking is, as set forth explicitly in the Administrative Procedure Act, Section 553, to petition the agency for rulemaking rather than to litigate the fact of its absence.\textsuperscript{58}

B. \textit{Chevron Deference}

Chevron deference is different from that of Auer and applies to formal rules\textsuperscript{59} as opposed to informal policy implementation. Otherwise the degree of deference is the same. Administrative interpretation of express delegated authority is upheld under circumstances of ambiguity unless a reviewing court finds the action inconsistent with the agency interpretation of the delegated authority.\textsuperscript{60} Having a comprehensive and fully developed record for review is critical because without it there can be no full and fair basis to review the legitimacy of the action taken by the agency. The Court explained that if the enabling legislation is clear but does not address the specific issue in question, then a court must affirm reasonable administrative action taken to address ambiguity.\textsuperscript{61} Thus, Chevron


\textsuperscript{57} \textit{Id.} at 461–463.

\textsuperscript{58} \textit{Id.} at 459.

\textsuperscript{59} Chevron v NRDC 467 U.S. 837 (1984) at 843.

\textsuperscript{60} \textit{Id.} at 843 (explaining how if Congressional intent is clear then that ends the matter; but if Congress has not directly addressed the issue in question then before the Court may impose its own interpretation, it must first consider whether the agency’s construction is based on a permissible construction of the statute, and if it is then that interpretation must be upheld).

\textsuperscript{61} \textit{Id.} at 844 (explaining that a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency).
deference signifies that administrative action is valid as long as it appears to have been reasonably taken. To gain the greatest possible insight from Chevron, it is useful to consider how the Court reviewed the Clean Air Act Amendments\(^{62}\) to encourage nonattainment states to achieve air quality standards using a permit program regulating stationary sources of pollution.\(^{63}\) The Court concluded the agency interpretation was a reasonable accommodation of competing interests and so entitled to deference.

\*C. Skidmore Deference\*

Administrative interpretations that do not qualify for Auer or Chevron deference are analyzed according to the standard set forth in Skidmore. This approach considers the extent to which the agency conclusion is persuasive. The weight courts permit an agency interpretation depends on the thoroughness of the agency’s consideration, the validity of its reasoning and its consistency with other pronouncements and factors that would warrant recognition. Skidmore reviewed a FLSA petition on behalf of salaried employees to recover overtime, damages and attorney fees.\(^{64}\) The Court noted the agency produced standards and examples to guide its decision-making\(^{65}\) but nothing in the record suggested the exact degree of deference courts should pay to the agency interpretation. It found the administrative ruling was not reached as a result of hearing adversary proceedings based on finding of facts from evidence, but the policy was made in accordance with official duty based on experience and investigation and was intended to guide enforcement consistent with

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\(^{63}\) *Chevron*, 467 U.S. at 840–844 (citing Morton v. Ruiz, 415 U.S. 199 (1974)) (explaining the issue as whether the regulation allowed a plantwide definition of stationary source rather than by device to measure total emissions; holding because the legislature had not clearly defined the term the agency could fill in gaps). According to the Court, its task was to consider whether the agency’s interpretation was a permissible construction, not to substitute its judgment therefor. *Id.*

\(^{64}\) *Skidmore*, 323 U.S. at 135–138 (explaining employees worked extra hours and were not required to perform specific tasks other than being on call).

\(^{65}\) *Id.* at 137–39.
good administration.\textsuperscript{66} The Court upheld the rule because the agency acted in accordance with law and its decision, based on administrator expertise, provided a reasonable, consistent and persuasive interpretation entitled to deference.\textsuperscript{67}

III. APPLYING ADMINISTRATIVE LAW CONCEPTS IN THE HOA CONTEXT

Auer, Chevron and Skidmore deference provide a wealth of insight to guide judicial review in the context of privatized governance. For this reason, the administrative law precepts discussed above are adopted for analysis and application in the context of HOA privatized governance to attempt to resolve the problematic risk of unrestricted private governance authority and its potential for negative impacts on personal autonomy and individualized civil liberties. HOA boards, similar to administrative agencies, are delegated broad authority to make, exercise and adjudicate in the realm they are empowered to control. By virtue of that delegated authority, agencies (boards) are licensed to decide matters in the best health, safety and welfare interest of those they serve. Developers brand their HOA lifestyle product as a beneficial public use available for private consumption. Agencies (boards) are permitted to operate with flexibility but are subject to limitations and a meaningful judicial review which is a powerful constraint on authority. The only substantive difference between privatized governance (HOA boards) and administrative agency rulemaking, enforcement and adjudication processes, is the requirement that agencies create a comprehensive record of facts and evidence gathered and relied on for decision-making made available for courts to review; while HOA boards are not held to any corresponding or similar duty, obligation or requirement. Absent a strict information-gathering and record retention obligation, as recommended in this

\textsuperscript{66} Id. at 139–40 (explaining agency rulings, interpretations and opinions while not controlling by reason of authority, constitute a body of experience and informed judgment to which courts and litigants may resort for guidance).

\textsuperscript{67} Id. at 140 (explaining that while not controlling, upon the courts by reason of their authority, rulings, interpretations and opinions of agencies offer good guidance and are entitled to respect).
article, no comprehensive record supporting decisions reached under HOA board governance will ever be created. There is simply no motivation for boards to enhance the burden of self-regulation, and imposing costs on doing business would militate against such enforcement. But this view is short-sighted as comprehensive evidence-gathering and better decision-making will more likely than not lead to a cost savings for boards in the long-run, optimistically in the formulation of better decisions but minimally in the minimization of litigation with unhappy members seeking to undo decisions deemed against their personal or financial interest. The simple fact remains—where no comprehensive record is available, then no meaningful review is possible, and poor decisions will stand. This article proposes that such a requirement be codified into HOA enabling legislation to promote accountability, transparency and better governance.

Under presently-in-use standards of review of privatized governance forms the reasonableness of HOA action is measured against community well-being. Little weight is placed on possible negative impacts to persons.68 Some theorists focus on specific offending behaviors to determine whether an act is reasonably related to advancing a lawful administrative purpose.69 Typically, a restriction is presumptively held to be valid unless a challenger satisfies the burden of proving it is unreasonable, with reasonableness focused on regard for promoting collective good.70 This approach favors board decisions, devalues personal autonomy and ignores equity. However, if the law is to be fairly applied, and personal autonomy meaningfully safeguarded, then the facts in each case need to be weighed against the sought-after public good interest.71 This article proposes a balancing test for judicial review of HOA board actions that would consider the impact of decisions on individual rights. As the HOA administrative system is presently constituted, governing boards possess the benefit of significant deference applied in judicial review of their decisions without any corresponding burden of producing a comprehensive record on which courts may

68 Kress, supra note 41, at 845–47.
69 Id. at 849.
70 Id. at 858–59.
71 Id. at 860.
evaluate the reasonableness of board action. With respect to burdens, the business judgment rule applied in some jurisdictions requires the member to provide proof the challenged act is a breach of duty; alternatively, and a slight improvement, the reasonableness standard applied in other jurisdictions places the burden of proof on the board to demonstrate its decision was reasonable.72 While the reasonableness standard affords individuals with better protection for individual rights in comparison to the business judgment rule, it is nevertheless still insufficient. This article argues for a requirement of creating a comprehensive record on which governing board decisions are based and making that record available for judicial review. Only the threat of a meaningful judicial review can correct the relationship imbalance that presently exists between boards and members. The presently-in-effect form of judicial review is deficient because too much deference is afforded on too scant a record. Requiring a comprehensive record will improve HOA governing board decision-making and better safeguard individual rights.

A. Reasonableness on No Record Is Inadequate

The thesis of this article is that reasonableness on no record offers inadequate legal protection to the right of the people to be secure in their persons, houses, papers and effects. It is proposed here that while life in HOA-world permits judicial deference in administrative adjudication intended to encourage efficiency and flexibility in privatized governance; that flexibility comes at a cost because it requires less regulatory oversight and personal autonomy is at greater risk as private rights are not secure. Less oversight does not automatically translate into damaged rights, but one means to safeguard private rights is to require governing boards to construct a comprehensive record justifying actions taken. The threat of a meaningful review could curtail the potential for abuse of authority. Boards would be encouraged to more deliberately consider least drastic means to achieve desired, lawful ends. The creation and existence of a comprehensive record that would in all respects be

subject to what might be characterized as a hard-look review would promote better decision-making. Legitimacy of corporate action requires the entity in question conduct its operations within the boundaries of delegated authority consistent with due process. As discussed above, administrative law standards hold the same. Boards may retain essential flexibility to ensure effective exercise of managerial tasks while adequately documenting action taken. HOAs are quasi-governmental entities organized to function using administrative law forms—they are delegated authority to govern, concentrate executive, legislative and judicial powers to more efficiently operate and their charge is to regulate in the interest of facilitating collective good. HOAs appear to function as if they were administrative agencies and so their actions ought to be reviewed under the standards applicable to the same.

In its present form the reasonableness test used to determine legal sufficiency of board action is inadequate because the standard uses business judgment language to focus review analysis on whether the board acted with arbitrary, capricious or discriminatory intent.\textsuperscript{73} This standard is woefully subpar—what a disaster it is on multiple fronts. There is no close case analysis of a comprehensive record because there is no requirement that such a record need exist, and so one often doesn’t. Under presently-in-use standards, boards lack internal constraints on authority, insufficiently systematize accountability,\textsuperscript{74} fail to consider unique facts, focus too much on promoting collective good and are reviewed without a sufficiently developed board record.\textsuperscript{75} This fatal flaw in privatized governance urges application of state action doctrine to provide greater accountability and transparency in board decision and rule-making processes. But enhanced protections won’t materialize on their own and placing the burden of proof on members coupled with the lack of a requirement for a comprehensive record to be created makes it difficult for members to successfully challenge allegedly improper board actions. To ensure a more level playing field, the burden of proof should in all instances be shifted to the board to demonstrate it conducted itself

\textsuperscript{73} Bollinger, supra note 42, at 284, 287, Nichols, supra note 72.

\textsuperscript{74} Pollack, supra note 26, at 874.

\textsuperscript{75} Kress, supra note 41, at 862–63.
lawfully—after all it is clearly within board province to prove that is the case.

A requirement to construct a comprehensive record supporting board decision-making will represent a positive step toward better protecting private rights and individual liberties. The board should also be required to produce evidence that the balance of equities favors the challenged rule, that the collective need or interest to be furthered is substantial and that achieving it requires imposing more burdensome but reasonable restrictions on personal freedoms. Individual autonomy may lawfully be sacrificed to promote collective good. The sacrifices demanded however, ought to be the least drastic necessary to achieve lawful objectives  

76  and should not be overbroad or otherwise excessive in terms of bringing about otherwise lawful ends.

For example, in the Florida case, Hidden Harbour Estates, Inc. v. Norman, 77 the governing board there relied on its articles of incorporation for authority to make and amend rules respecting land use. Pursuant to its rule-making authority, it prohibited alcoholic beverages in common areas. Members sought to prohibit enforcement of the rule but were defeated on appeal  

78  with the court finding the rule to be lawful because HOAs are intended to promote the health, happiness, and peace of mind of the majority of unit owners and individuals must relinquish freedoms they might otherwise enjoy in privately owned property. The court applied a test of reasonableness. A problem with the decision is the lower court appeared to have substituted its own judgment for that of the administrative entity and the appellate court based its decision on a largely empty record of board information-gathering in support of its decision. The court cursorily concluded that if a rule appears reasonable an association can adopt it. The court determined that because restrictions on the use of alcohol are widespread in society, there is nothing unreasonable about a group prohibiting the use of

76 Stem, supra note 29, at 158.
77 Hidden Harbor Estates, Inc. v. Norman, 309 So.2d 180, 181 (Fla. Dist. Ct. App. 1975) (holding that a condominium board may adopt a rule prohibiting use of alcoholic beverages in common areas to promote its reasonable objective of protecting the community).
78 Id. at 181.
alcohol in commonly owned areas\textsuperscript{79} to ostensibly promote the collective good. The court, however, did not reach its conclusions having reviewed a comprehensive record of administrative entity fact-finding because none existed thus its concurrence was based on supposition rather than evidence in support of a fact-based conclusion.

In economics, a negative externality exists when a cost is imposed on a party who did not choose to incur it. Restrictions on behavior and fines to coerce compliance are costs of association. The imposition of a negative externality is a sign of market failure,\textsuperscript{80} just as a remedial action imposed on the market is a sign of market correction. The reasonableness of any act must be reviewed on a comprehensive record of evidence gathered in support of the action taken. In 1860s New Orleans, for example, a market failure required just such a correction. The Slaughterhouse Cases\textsuperscript{81} reveal how a corrective action favoring public good to curtail a market-failing exercise of private rights was implemented to cure a potential tragedy of the commons.\textsuperscript{82} HOAs are an associational form based on the incidents of centralized authority. The framework they operationalize both creates and reduces externalities, permitting individuals in the association to select the externalities they prefer.\textsuperscript{83} In point of fact, members are free to create rule preferences to better serve their common interests, but the decisions they reach must be justifiable if they are to merit enforcement. HOAs rest on the foundation of a vision to facilitate collective good.\textsuperscript{84} This view is predicated on the

\textsuperscript{79} Id. at 181–82.
nevagoodwin_dec07eng.pdf.
\textsuperscript{81} Slaughterhouse Cases, 83 U.S. 36 (1873).
\textsuperscript{82} Nelson, supra note 29, at 844 (those who imposed the damaging externality were forced to internalize the cost of its remedy—because public drinking water was dangerously compromised the exigency justified application of public force to ensure private internalization).
\textsuperscript{83} Hannah J. Wiseman, Rethinking the Renter/Owner Divide in Private Governance, 4 Utah L. Rev. 2067, 2090 (2012).
belief that humans are social, interdependent creatures.\textsuperscript{85} Acceptance of this premise explains why HOAs, despite rare instances of extreme abuse with respect to individual rights, consistently remain popular land use forms—they promote a sense of sociality and public good in exchange for limits on individual freedom. This means rules restricting property rights must be justifiable\textsuperscript{86} and individuals are unlikely to succeed with challenges to presumptively valid rules even if they can show that the rules they seek to overturn are arguably unreasonable \textit{as applied} to them.\textsuperscript{87}

The threat of courts taking a hard-look review of a comprehensive record is an appropriate safeguard for personal autonomy in privatized governance. This approach would provide a more rigorous review than alternative approaches can do. A hard-look review requires a comprehensive analysis prior to decision-making that forces entities to put additional procedural steps into place in the process of creating a substantive record reflective of a structured approach to fact-finding supported by reasoned decision-making. The objective is to encourage better-informed, more well-considered and thought-through choices. The hard-look standard requires decision-makers to produce detailed explanations of decision-making rationales, specification of policy choices, factual support for reasoning and clear descriptions of the basis on which decisions are reached following an exhaustively comprehensive examination of all relevant factors and reasonable alternatives to a proposed course of action.\textsuperscript{88} Hard-look means a reviewing court will have sufficient information to enable it to intervene to correct errors.\textsuperscript{89} It means boards must explain their decisions, consult with,

\textsuperscript{85} Id.


\textsuperscript{87} Boudreaux, \textit{supra} note 3, at 507–08.


\textsuperscript{89} \textit{Rationalizing Hard Look Review After the Fact}, 122 HARV. L. REV. 1909, 1913 (2009) (arguing that while more stringent judicial review can minimize costs by reducing the risk that agencies will make errors or otherwise implement unwise policies; the approach produces an opportunity cost insofar as it may encourage extended proceedings that delay and discourage agencies from adopting possibly beneficial regulations, thereby creating ossification defined as a damaging bias in favor of the status quo).
inform and obtain feedback from members, examine all objections and consider all reasonably possible alternatives. This method would encourage a more meaningful and developed decision-making process making it more likely the means selected is truly reasonable and quite possibly the highest and best available under the circumstances. I favor the conclusion that hard look supplies a legitimating function in that it protects citizen participation and deliberative government despite the fact that judicial review is possibly subject to political maneuvering.

The difference between what is genuinely or acceptably reasonable may be viewed in the distinction between decisions reached based on a comprehensive record of facts in support of a rationally considered conclusion compared to a summarily-determined outcome objective reached that was based on a hunch or perhaps experience, as the case may be. True, hard look review may require more effort, but such effort and possible delay is well worth the associated costs if enhanced accountability and transparency in governance, coupled with better decision-making results. This dichotomy is expressed in the case Hollywood Towers Condominium Association, Inc., v. Hampton. While the case is not the typical governing board member dispute in which the board seeks to expand enforcement of developer rules against members in spite of resistance to the same; it demonstrates the genuine need for a more comprehensive record-building requirement to ensure the adequacy of judicial review. In Hampton, the association sought an injunction to require a unit owner to grant access for repair work to be performed. The trial court denied the board an injunction due to conflicting evidence concerning whether internal access was

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90 Id. at 1910, 1914 (describing Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company 463 U.S. 29 (1983) as requiring agencies to provide detailed explanations of their behavior, consider viable alternatives, explain departures from past practices and make policy choices that are reasonable on the merits); see also Garry, supra note 88, at 154, n. 19.

91 Garry, supra note 88, at 157, n. 41.

92 Rationalizing Hard Look Review After the Fact, supra note 89, at 1914, n. 36.


94 Id. at 785.
necessary.\textsuperscript{95} On appeal the court considered whether the lower court applied the proper standard of review.\textsuperscript{96} The board argued that the trial court was required to defer to the association under the business judgment rule unless there was proof of fraud, self-dealing, dishonesty or incompetency in the decision.\textsuperscript{97} The member argued the rule is applicable only in matters of fiduciary nature\textsuperscript{98} and so ought to be inapplicable in the instant case. The court acknowledged its duty should not be to second-guess management decisions.\textsuperscript{99} It afforded slightly more personal autonomy protection when it followed the reasonableness test set forth in \textit{Lamden v. La Jolla Shores}\textsuperscript{100} finding unresolved questions of fact needed to be resolved concerning whether the association had proper authority to access the unit, whether it acted reasonably under the circumstances and whether it established that the board would suffer irreparable harm absent the measure of relief that it sought.\textsuperscript{101} It was an improvement that the court remanded with direction that the trial court review the record of the board’s decision-making process to answer those questions.\textsuperscript{102} But the problem not acknowledged by the court was how extensive was the record that had been created? If minimally extensive, that fact should come as no surprise.

Privatized collective ownership and transfer of attributes of public governance to the private sphere manifests privatization of the state. The ultimate goal is fostering a sense of community by reducing crime and improving quality of life, while cutting costs and eliminating inefficiencies in service provision. The ownership right to exclude requires a socially-created enforcement mechanism—a collective system of rules established by social cooperation\textsuperscript{103} that all can agree to be bound by. Such a system demands suppression of

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 786.
\item \textsuperscript{96} \textit{Id.} at 787.
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} \textit{Lamden v. La Jolla Shores Clubdinium Homeowners Ass'n}, 21 Cal.4th 249 (1999).
\item \textsuperscript{101} \textit{Hollywood Towers}, 40 So. 3d at 788.
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} Alexander, \textit{supra} note 84, at 1287.
\end{itemize}
individuality that might in some instances deny freedom of choice. A
system of checks and balances is necessary to ensure good
governance, meaning individual rights are abridged only with good
cause. Using the hard look standard would better encourage good
governance compared with use of less rigorous and searching judicial
review approaches. Boards are administratively-structured entities
that function bureaucratically. Judicial review of agency actions is for
the most part deferential to derive the benefit of agency expertise and
efficiency that comes of having flexible, streamlined problem-solving
opportunities; but agencies must still be held accountable to
constituents and stakeholders and their decision-making must in all
respects be as transparent, open and subject to full and fair review as
possible, which is more possible when review is based on a
comprehensive and substantial record of facts and findings.

Hard-look review requires examining relevant issues in
accordance with the proper scope of authority, such that the review
occurs in good faith and is consistent with proper process.
Administrative decisions may be set aside if they are arbitrary,
capricious or not in accordance with the law. For a decision to stand,
there must be reasoned, defensible support for it. Courts must
carefully look into the underlying reasoning in, of and for a board’s
decision-making.104 The use of hard-look review in the HOA context
would require boards to seek input from all potentially impacted
parties before establishing any new rule. Such a requirement would
encourage creation of a meaningful, comprehensive record to
establish a rational justification in support of selected policies and
proposals. This would demonstrate that HOAs are accommodating
and responsive to member interests and that they seek to promote the
collective good105 in minimally burdensome ways.

For example, a restriction barring pets from a community could serve
a collective good of controlling noise, eliminating pests and avoiding
damage; but because pets are an accepted part of modern social life,
an absolute ban on their possession, use and enjoyment could
arguably amount to a damaging over-broad restriction that reasonable
people might view as unreasonable. As with all property rights, use
ought to only be restricted to promote public good leaving

104 Pollack, supra note 26, at 885–88.
105 Id. at 890–91.
individuals free to enjoy the fruits of their labor as long as they do no harm to others. Restricting freedom with minimal beneficial gain, however, would be inefficient, inequitable and antithetical to the concept of ordered liberty which encourages a fair balance between social welfare and individual rights. Consistent with promoting efficiency and equity, a blanket ban can in some instances be reasonable as long as it adheres to reasonable application of necessary public safeguards and protections of private rights. Such a ban may save the community certain expenses related to not having such a ban but evidence of the same should be provided in advance of and in support for promulgating the rule in question. Restrictions that excessively limit freedom without creating meaningful, quantifiable, and beneficial results are difficult to justify. While some degree of over-inclusion reduces the cost of regulation; burdens must be clearly identified to avoid unnecessary, unjustifiable damage to personal interests and private liberties. As with all balancing tests, boards must determine whether a total ban is necessary, or whether a less burdensome alternative is sufficient; keeping in mind the objective is to achieve collective good while minimizing unnecessary restrictions. In The Slaughterhouse Cases for example as Justice Field explained in dissent, the law is intended to protect individual rights and promote public good and to that end Field argued in favor of improving the relationship between the centralized public authority and its individual constituents to promote both lawful objects.

IV. RESEARCH METHODOLOGY—REFORM OF PRIVATIZED GOVERNANCE

The crux of this article is that judicial review, in its present form, is inadequate to safeguard personal autonomy in the privatized governance of collective ownership forms. This section of the article describes data collected to focus the thesis to close case study and to determine whether cases reviewed support the thesis developed. It is hypothesized in this article that an administrative law-based model

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106 Kress, supra note 41, at 881.
107 Id. at 882.
108 Slaughterhouse Cases, 83 U.S. 36 (1873).
would better direct judicial review of decisions reached by HOA governing boards. To support this thesis, or to reject it, searches in case law databases were conducted. The threat of a meaningful judicial review based on a fully developed comprehensive record with sanitizing light should encourage boards to take the time necessary to craft better, more deliberate decisions and avoid unnecessary restrictions on private interests. This research was guided by the premise that personal autonomy is worth preserving, better decision-making is socially useful, and because men are not angels; checks and balances on power are appropriate to promote good governance.109 The legal system favors boards over members because judicial review is not searching. If entities are permitted to operate without effective external checks and balances, they will be emboldened, it is here surmised, to more aggressively enforce rules that penalize non-compliant members. James Madison observed in Federalist No. 51 that because government is constituted of men not angels, controls on power and a meaningful judicial review are necessary to safeguard private rights.

A. Empirical Data Collection

Data collection in the form of law database search query returns were analyzed considering the thesis of the identified power differential between HOA board members and owners. Queries were launched such as “HOA Member-Owner Disputes” to establish a sense of what litigation arises in that context. A good deal of the data collected was not used in this article however, because it was deemed unmanageable and not useful for purposes of the thesis formulated here; but in the process of collecting the data, useful insight was gained from the results in terms of reinforcing the thesis of this article. A data sample of 200 or so cases was used for analysis here, and the results of those searches are displayed in the graphs below.

In the course of data collection, search queries were modified to better test the thesis of inadequate supervision (by courts) of HOA board decision-making. Admittedly, the study is subject to selection bias, but that concern was reduced by random selection—essentially,

the study requires consideration of certain types of cases, but no predisposition in terms of what cases might be collected was intended (therefore the study is effectively bias-free). Thus, there is admittedly some ineffaceable bias, but random selection mitigates the effect and any remaining bias is acceptable for purposes of the data analysis incorporated in this article. For example, keyword “HOA” returned 10,000 cases, of which a number were randomly sampled to reduce the population size. Alternative queries to limit n included “Common Interest Communities” (CICs), “Constitutional Law Protections”, “Covenant Enforcement”, “Covenants & Restrictions”, “Dues, Fees & Fines”, “Individual Liberty” and “Restrictive Covenants” each generating many thousands of returns most of which were jettisoned. The sheer volume of pertinent cases was overwhelming and their use not manageable for purposes of this study. Specifically-crafted searches, although subject to the bias previously identified, were necessary to limit the sample size to permit focus on the type of HOA acts (in the opinion of this researcher) that could be most likely to restrict personal autonomy. The study’s objective was to explore how the enabling legislation HOAs are bound by, and the way courts presently review board action, have the potential to significantly impact individual rights. Case queries were therefore modified to include categories such as “Civil”, “Commercial”, “Construction”, “Corporate Governance” and “Real Property” in the context of HOA and owner-member disputes but even then the data collection returns were unmanageable. The research methodology was thereupon further revised to focus on the keywords “CIC’s” and “Covenants & Restrictions” to narrow the results. Of the 10,000 cases returned, the majority were at the state level with legal reasoning developed in a number of jurisdictions. In Florida, several fourth district court of appeal cases were identified as significant and several were closely examined and are discussed in this article. While it is true intermediate state court decisions are not binding state-wide, the majority of real property law cases in Florida appear to occur in the fourth district and the law that has developed in that region of the State has largely been followed in other districts.

Close case study and analysis of the data in all jurisdictions considered leads to the reasoned conclusion that California’s more strict reasonableness test reflects the smallest number of cases in which fees, fines and owner rights are contested; New York’s least-exacting business judgment rule presents the largest number of cases
where contested issues arise. These results are consistent with the premise that when HOAs possess enhanced and seemingly unbridled authority, they tend to more readily encroach on member rights (which conclusion is consistent with the thesis of this article and apparently is reinforced by the data collected). It is conventionally accepted that power must be responsibly exercised, and this sentiment is the source of the need for checks and balances (to reverse the unbridled concentration of power in HOA boards) and implementation of separation of powers with effective judicial review for good governance. It is noteworthy that Florida’s blended hybrid approach on judicial review of HOA board decisions returned the largest number of cases contesting covenant enforcement and restrictions on personal autonomy which seems to be the result of a developing culture or sentiment in judges. It is evident that predispositions impact deference afforded and is capable of influencing the development of the law. In sum, the data collection approach used here applied search queries that varied over multiple iterations. One such query returned 8,000 cases, the majority of which arose in California, Florida, New York and Texas which led this author to conclude that the law in those jurisdictions was predominant in this field of inquiry justifying closer inquiry. After more closely reviewing all the results, a strategic decision was reached to narrow the focus of study to California, New York and Florida, omitting cases from Texas because although the courts in Texas formulated useful theoretical points of departure to analyze the problematic, the former set of jurisdictions seemed to introduce three distinct standards of judicial review relevant to this study while the courts in Texas did not. From a review of the cases collected, the conclusion was then reached that California endorses a reasonableness test modified following Florida interpretations; New York employs a minimally-burdensome business judgment rule test incorporating California’s reasonableness test to strengthen it; and Florida uses a hybrid blend of the two approaches to more purposefully focus on governing board accountability. Although for purposes of the data collected and used in this study as set forth on the graph below the Texas cases were omitted, the Texas judicial review approach is interesting and is incorporated into the analysis developed here (with regard to the importance of accountability in
governing board action) as the discussion in City of Keller\textsuperscript{110} below in the case study section makes clear.\textsuperscript{111}

\textbf{B. Summary of Legal Analysis}

Judicial review of HOA acts and decisions in Florida, compared with cases from other jurisdictions, is consistent with the reform policy recommendations proposed in this article. Florida is a pioneer in developing a modern approach for review of board actions, beginning with the rule in Hidden Harbor Estates, Inc., v. Norman\textsuperscript{112} that indicates action should be reviewed on the facts of each case and suggests that the burden of proof should be placed on the board to demonstrate its decision reasonably relates to its purpose.\textsuperscript{113} Florida courts typically begin their analysis of board action with the premise that one's home is one's castle; yet this modified form of castle-doctrine precept is limited by the sovereign fiat that owner-use privileges must yield to conflicting pressures built into common ownership because cooperating with others in the governing

\textsuperscript{110} City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).

\textsuperscript{111} See infra notes 214–231.

\textsuperscript{112} Hidden Harbor Estates, Inc. v. Norman, 309 So.2d 180, 181 (Fla. Dist. Ct. App. 1975). More recently, Florida courts have modified the business judgment rule following Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 21 Cal.4th 249 (1999); See also, Nichols, supra note 72. Florida's holding in Hidden Harbor Estates, Inc., v. Basso, 393 So. 2d 637 (Fla. 4th Distr. Ct. App. 1981) placed the burden on the HOA to demonstrate its decision is reasonably related to its purpose. In Papalexio v. Tower West Condominium, 401 A.2d 280 (N.J. Super. 1979) (citing Hidden Harbor Estates, Inc., v. Norman) New Jersey applied the reasonableness standard but shifted its focus to the less burdensome business judgment requisites of fraud and absence of good faith. There, the court declined to rule citing absence of necessary elements. Id. The Florida court in Hollywood Towers Condominium Association, Inc., v. Hampton, 40 So. 3d 784 (2010) adopted the business judgment standard of Lamden weakening the rigor of its review holding a HOA decision valid if the action taken is not arbitrary, capricious or in bad faith. But see Matter of Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (N.Y. 1990) (reflecting on New York's ineffectiveness of the standards, initially holding the decision should be overturned because arbitrary then withdrawing decision based on absence of requisites).

\textsuperscript{113} Basso, 393 So. 2d at 637 (citing Hidden Harbor Estates, Inc. v. Norman, 309 So.2d 180, 181 (Fla. Dist. Ct. App. 1975)).
association is the basis for the form.\textsuperscript{114} In \textit{Norman}, the court found the test for reasonableness is whether the rule was designed to promote the common good for the majority of members. This variation on reasonableness shifts the burden of proof after distinguishing between the validity of restrictions found in the HOA’s declaration as compared with rules promulgated by the board. The court held the former hold a stronger presumption of validity than the latter as owners purchase with notice of rules that run with the land and even if those rules are unreasonable they may still withstand attack because owners voluntarily agree (as part of their association into membership) to be bound by them.\textsuperscript{115} The court explained the result ought to be different with regard to restrictions created by boards. The validity of such rules must be tested against a rule of reason to ensure a reasonable relationship between the rule as promulgated and the health, happiness and peace of mind of all owners in the association. For example, in \textit{Hidden Harbor Estates, Inc., v. Basso},\textsuperscript{116} the court held that decisions to allow certain uses are within the discretion of boards, and courts must uphold them unless they are clearly antagonistic to legitimate association objectives\textsuperscript{117} which are ostensibly promulgated to serve the collective good.

Upon review of the above cases, a research decision was made to more closely consider the 200 some-odd cases returned on revised query “HOA Board Action Restrictions on Individual Rights” set forth in Table 1. While it was somewhat difficult to distinguish the cases based on each particular case’s main issue because most contained overlapping questions, it was decided as a matter of research methodology in researching for this article to create the categories presented below in Table 1 based on predominate type to map a visual graph of results. The majority of cases were disposed of on appeal which is as expected given that much of HOA litigation is recent and develops on appeal. The fact that so many appeals are taken demonstrates significant dissatisfaction with trial court resolutions, but it is also observed that actual dissatisfaction is likely

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 638–39.
\item \textsuperscript{115} \textit{Id.} at 640.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.}
\end{itemize}
greater than the identified case-volume suggests as the cost of litigation prohibitively discourages appeals.

Table 1: State Court Cases by Litigated Issue: CA, FL & NY

<table>
<thead>
<tr>
<th>Issue</th>
<th>Fees &amp; Fines</th>
<th>Enforcement</th>
<th>Owner Rights</th>
<th>Board Power</th>
<th>Restrictions</th>
</tr>
</thead>
<tbody>
<tr>
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<td>10—12%</td>
<td>10—32%</td>
<td>2—14%</td>
<td>6—33%</td>
<td>10—32%</td>
</tr>
<tr>
<td>Florida</td>
<td>35—42%</td>
<td>13—42%</td>
<td>4—29%</td>
<td>6—33%</td>
<td>17—55%</td>
</tr>
<tr>
<td>New York</td>
<td>38—46%</td>
<td>8—26%</td>
<td>8—57%</td>
<td>6—33%</td>
<td>4—13%</td>
</tr>
<tr>
<td>Totals</td>
<td>83—47%</td>
<td>31—18%</td>
<td>14—8%</td>
<td>18—10%</td>
<td>31—18%</td>
</tr>
</tbody>
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Graph 1: State Court Cases by Litigated Issue: CA, FL & NY

C. Hard-Look Review Improves Private Governance

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118 This is the data collected that is cited in the chart and table included.  
119 This is the data collected that is cited in the chart and table included.
The research engaged in for this article highlights the risk of harm to personal autonomy present in CICs. It is evident that judicial review standards need to be more robust—the absence of a fully-developed record in support of governing board action is a deficiency in need of correction, and regulatory protections should be added to buttress constitutional freedoms in the context of privatized governance. These deficiencies are easily remedied by implementing enhanced judicial review standards and requiring a meaningful record in support of decisions. Without stronger judicial review standards, regulatory thresholds for good governance, and a fully-developed record for review, otherwise strong arguments to give deference to the board seem to fall apart. This article recommends reform of judicial review in the context of HOA board governance as a necessary refutation of, and response to, beliefs that individual autonomy is adequately protected by HOA regimes. This project began with the expectation that judicial review standards are inadequate to protect personal liberties in the HOA context. Based on conclusions drawn from data analysis and literature review the null hypothesis is rejected and it is noted that limitations of this study do not invalidate the findings as case resolutions are subject to multiple variables and interpretations and a searching judicial scrutiny by its very nature reduces deference. Similar case studies in the final section of this article reinforce the conclusions suggested here. It is argued here that because the degree of deference and rigor of review are detectably significant to litigation outcomes, as indicated in cases closely read, reform toward more rigorous review is appropriate. When the record for review is scant and burdens of proof are placed on the party least able to gather evidence to contest a decision, then deference only reinforces the initial error made. Judicial review standards in their present form are therefore inadequate to safeguard private rights.120 The only hope available to sufficiently protect individual rights in private governance is hope the suggestion proposed here—of subjecting boards to meaningful judicial review—is adopted.

The *Nahrstedt* and *Terifaj* cases illustrate the above conclusions. In each case, individuals purchased ownership in CICs agreeing (implicitly by association) to be bound by collectively imposed rules of communal. Included in the covenants, conditions and restrictions (CC&Rs) was language restricting the right to possess pets.\(^1\)\(^2\) It is colloquially accepted that when one agrees to join an association, one implicitly agrees to abide by its rules. In Inwood, a homeowner lost his home when a court equated lien rights with covenant and servitude rights allowing foreclosure\(^1\)\(^2\) but certainly, the homeowner did not make the initial purchase (investing in a home) intending for such a result. In Keller, the government permitted a private party to escape liability for damages arguably caused by the government regulatory system as applied against the land owner.\(^1\)\(^2\) Such cases remind us that while the benefits of communal life generally appear abundant and bountiful, corresponding burdens are equally, and quite possibly can be more precisely damaging. It is argued here that the administrative state was created to improve public health, safety and welfare and in that process, greater care needs to be taken to avoid damage to individual liberties. Adding a new layer of governance that operates beyond separation of powers creates a largely unaccountable power capable of producing inequitable burdens incapable of redress—a seemingly unintended consequence of creating the administrative state. Courts have struck an appropriate balance between allowing administrative agencies the necessary flexibility to operate efficiently in the public interest while nevertheless still holding them accountable for their actions under the more searching hard-look judicial review standard. HOA governing boards ought to be subject to a similar higher degree of scrutiny with respect to their actions to better safeguard private rights.

V. PRIVATE GOVERNANCE, STATE ACTION AND ADMINISTRATIVE LAW

\(^1\)\(^2\) *Nahrstedt*, 11 Cal. Rptr. 2d at 299; *Terifaj*, 14 Cal. Rptr. 3d at 67.
\(^1\)\(^2\) Shoked, *supra* note 86, at 762–63.
\(^1\)\(^2\) City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).
HOA-world operates using siloed-thinking patterns—these can occur when information within a group is not freely shared among all members. The consequence of this can be avoidable inefficiencies, redundancies and errors in judgment brought on by the failure to recognize the value of diverse opinions. The apparently overwhelming desire for conformity and conflict-avoidance in a group can produce a failure of critical debate on alternative options available as members root out and destroy dissenting opinion. HOA governing boards can fall into this decision-making trap when a small group of officers take the position that they “know what policies and practices are best for the community” and thereupon reject differences of opinion. Despite this problem, HOA non-profit corporations are permitted to function freely so long as the board appears to adhere to due process requisites.124 Does this mean a board will respect individual rights as it discharges its functions? Not necessarily. Boards exercise public power but are not constrained by rules that limit public institutions.125 State action principles are inapplicable to boards because they are private entities supposedly more appropriately considered through a contract law lens. Owners voluntarily submit to a centralized, collectivized quasi-governmental authority by way of membership.126 Boards are entrusted with the charge of improving members’ quality of life by maintaining a cultural community of shared values, opinions, and beliefs. In practice, however, they are more akin to private, exclusionary social constructs designed to further a purposefully-crafted vision of pursuing the collective public good;127 but, this idealized vision fails to account for the fact that what is good for some is not necessarily good for all.128 Some argue that none of this matters and that those

125 Id. at 304–310.
126 Id. at 299–300.
128 For example, a rule banning children from amenities when unsupervised may appear reasonable at first glance to promote safety, avoid injury, damage and noise but it may be an over-broad, inefficient prescription because not all minors require direct supervision and badly-worded prohibitions equally limit the rights of those who do and do not require supervision.
who don’t recognize the value of collective ownership are free to leave it. While facially accurate, that option is not practical for many who, like the boy worried about the security of his bicycle, has no choice but to accept the hand he was dealt. The fact is, judicial review standards are presently inadequate to protect private rights. Boards could do better but will not unless they are held accountable for their actions. For example, tenants may be forced out of their homes by absentee-owners making collective, economically-motivated decisions about regulating life in the community\textsuperscript{129} to serve their interests alone.

The private law structure of HOAs\textsuperscript{130} should not, does not and cannot exempt boards from public law oversight. Without oversight there can be no meaningful monitoring and correction of market failures and there is little regard for good governance. True, officers as elected officials will respond to popular sentiment, but that is the very reason for concern as discrete and insular minorities in the community have no voice and their interests are neglected. This is an unfortunate cost of government necessitated by constitutional law concepts. As a society we strive to achieve excellence and equity. A step in that direction is to require board action be based on a full and fair record of decision-making that outlines how alternatives were considered before decisions were reached and is available for and subject to review. Such a record would better achieve transparency and accountability. HOAs are private associations with public, government-like characteristics.\textsuperscript{131} They are a hybrid form of governance that requires oversight. The problem of how to supervise an entity that consists of a mix of public and private forms was solved for administrative agencies in the APA with hard look review. HOA governing boards need to be brought within this ambit of consideration to reconcile the inapplicability of state action doctrine limitations to privatized regimes. This article suggests a more rigorous judicial review, coupled with a requirement of a fully developed record in support of decision-making are necessary reforms critical to good privatized governance. Any less a degree of

\textsuperscript{129} Easthope, et al., \textit{supra} note 10, at 1429.


\textsuperscript{131} These include providing services, rulemaking and state police power-like enforcement.
oversight would constitute unacceptable abdication of judicial review. Private provision of public goods permits members to directly impact the character of their neighborhood. To the extent HOA-world conveys a culture and a lifestyle, it is a brand, a name, design or symbol reflective of collectively-held values and beliefs. HOAs must comply with rules of good governance reversing the market failure of inadequate safeguards for private rights if they are to remain attractive and beneficial (financially and personally), alternative lifestyle choices.

A. Private Provision of Public Goods & Services

The modern rise in popularity of the HOA lifestyle and sheer volume of new home sales in HOA form is remarkable. So too is the fact that boards manage 25 million plus units, with 60 million or more individuals living in them, representing over 20% of the population. This is not quite the projected 50% target once thought inevitable, but demonstrates a significant rise in common ownership over the years. In fact, the number of operating associations increased by 2,500% between 1970 and 2003. This heightened popularity is related to the privatization trend in which owners seek to combine efficiency with security and willingly sacrifice private rights for those ends. It is worth considering whether the benefits achieved by private provision justify the costs that correspondingly follow. The literature is replete with examples of how HOAs more efficiently provide public goods compared with

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132 Many jurisdictions use the business judgment or a reasonableness standard of review or some combination of the two as the concepts blend or overlap. Weakland, supra note 124, at 302, 328. Both are inadequate to safeguard personal autonomy. Id.

133 Nelson, supra note 29, at 829.


135 Pollack, supra note 26, at 841.

136 Reichman, supra note 135, at 256.

137 Easthope, et al., supra note 10, at 1422.

local government. Proponents downplay the harm caused by restrictive collectivized limits on private autonomy coupled with absent public law safeguards.

There is consensus in the literature that HOAs provide good governance and improve service-provision overall and on balance, but, because examples of inequitable extreme behavior of boards persist, there is agreement on the need to enhance judicial review of board action. Enhancing judicial review is possible by better documenting decision-making. Limits on deference may be employed by more clearly prescribing its application within administrative law requisites. In cases where boards behave badly, the legal system is said to be complicit in the privatization of social functions. This can change by implementing hard-look administrative law review. The cases in which courts strike down rules that damage personal autonomy tend to be instances of extreme, unwarranted acts. Promoting good governance could eliminate this problem and better represent member interests by enhancing accountability, encouraging positive social change, embracing stakeholders, aspiring to achieve environmental and social benefit, opening up governance to public scrutiny, and voluntarily adhering to a system of compliance with rule of law sufficient to bring about positive economic and social change.

The modern attraction to gating began when developers sought to create competitive advantage by distinguishing product characteristics to inflate the perceived value of offerings. Developer-created rules are the by-laws and declarations established initially to

139 Bollinger, supra note 42, at 271.
141 For example, husband and wife non-resident owners placed an elderly parent in their unit. Their children would visit their grandmother and use the amenities. The HOA fined owners because the grandmother failed to supervise amenity usage. In rejecting application of the rule to the members the court held board action must be within the scope of authority and reasonable. See Major v. Miraverde Homeowners Association, 7 Cal. App. 4th 618 (1992).
142 Peter Frankental, Corporate Social Responsibility – A PR Invention?, CORP. COMM. 18 (2001).
143 Id.
promote the developer interest in selling units by attracting consumers to its product—essentially, the association is created to manage business functions (landlord burdens in the form of desirable amenities) in a community. Association marketing involves prioritizing certain goods to make a community appear more appealing. The literature on marketing includes creative communication strategies to promote a respectable image and to reinforce symbolic facets in consumers’ minds. In this regard, the virtues of products may be highlighted, but deceptive practices that inaccurately exaggerate value are unethical and quite possibly fraudulent. Socially responsible marketing requires advertising messages comply with customarily-acceptable, ethical, moral, and legal standards to ensure buyers are not hoodwinked into purchasing something they do not understand or even want. Ethics, based on conventional rules of what is good and just, provide a useful starting point in messaging that include precepts such as doing no harm, aspiring to do good, communicating truth, respecting peers, and acting confidentially and sensibly. An argument may be made that if a board fails to enforce covenants over time it can equitably be estopped from doing so, which would alleviate concerns of selective enforcement and is consistent with due process. In exploring the literature, it is apparent that boards behave as if they represent public authority and yet escape appropriate oversight. This unchecked concentration of power works just fine until it does not. To remedy this deficiency of supervision and enhance accountability, we should require that boards be properly regulated, meaning they ought to be treated as if they were the public entities they are.

Boards need to be brought within the administrative law system. Administrative law offers entities the ability to use concentrated power to achieve efficiency. It requires adherence to the limitations of enabling legislation and due process. To ensure compliance, administrative law threatens agencies with the possibility of an effective and meaningful judicial review. It requires agencies to

144 Weakland, supra note 124, at 301-302; see also, French infra, at 347.
146 Id. at 273-74.
147 This problem is avoided by including non-waiver language. Failure of covenant enforcement over time can lead to equitable estoppel.
create a record and undertake deliberate fact-finding and information-gathering prior to completing a process of reasoned discussion and critical-rational debate and only then to enter into decisions. This, in a nutshell is the administrative law process and applying it to HOA governing boards would improve their functionality and protect individual rights. Today, boards operate in violation of separation of powers principles as do administrative agencies, but boards are not effectively similarly regulated. This needs to change. HOAs enjoy flexibility in governance coupled with the absence of correspondingly heightened levels of accountability, transparency, and review. If HOAs are to be permitted to behave as if they were administrative agencies, they ought to be judged accordingly.\textsuperscript{148} Public governance is structured in such a way as to promote security, reduce nuisances, and efficiently provide public services,\textsuperscript{149} yet rules restricting personal behavior in HOA-world are intolerably overbroad and excessive\textsuperscript{150} – to the detriment of individual liberty. To improve board governance, ensure better decisions result and private rights are respected, judges need to have clearer guidelines and more evidence available for a meaningful and effective judicial review. The task of a judge is to disinterestedly apply law to facts. Today, judges are faced with the choice of applying one of two highly deferential standards that equally fail to safeguard private rights.\textsuperscript{151} Under public law, persons injured by state action have remedies unavailable under private law.\textsuperscript{152} Public law standards need to be applied to regulate the private use of public law. Despite the claim that a clear division between public law restraints and private government regulation in

\textsuperscript{148} Weakland, supra note 124, at 326.

\textsuperscript{149} Wiseman, supra note 83, at 2072.

\textsuperscript{150} Boudreaux, supra note 3 (describing a man jailed for failing to sod his lawn and a woman fined for displaying a “Support Our Troops” sign in her yard honoring her husband overseas).

\textsuperscript{151} The issue is whether state action triggers public law protection for private rights—the state cannot prohibit political endorsements (freedom of speech prohibits this), but boards can.

\textsuperscript{152} An argument can be made that public power cannot be exercised by a private entity and if it is attempted the state must answer for any damages so sustained. See City of Keller, 168 S.W.3d at 802.
boards is properly maintained, the modern increase in disputes between owners and boards, the evident power differential, and inability of courts to protect member rights point to the need to enhance oversight of board action. This article seeks to clarify the problem of inadequate supervision and proposes a solution in the form of enhanced judicial review based on a fully developed record.

VI. PRIVATE RIGHTS AND STATE ACTION DOCTRINE

Self-governing, private HOAs organized under state law are creatures of statute, arising when association documents are filed with the state. Association charters legislatively establish governing board administrative authority. Enabling legislation limits the scope and applicability of delegated powers. Elected officials exercise privatized public authority, write rules, monitor compliance, charge members with violations, hold hearings, sit in judgment, impose fines, and amend rules. This scheme of governance is limited only by rule of law. Associational voluntariness is used to defend board action. It is claimed as the singular element of economic, political, and social coherence that suspends otherwise unalterable truths based on socially-constructed arrangements. Voluntariness excuses deprivations of liberty, but if board action is not reasonably related to a collective good, or exceeds permitted authority, then burdened members ought to be able to challenge objectionable acts. As judicial review is the only means to challenge board action, courts cannot be too deferential or meaningful review is not possible. Some theorists argue use of courts to resolve disputes triggers state action. That view constitutes one of the three definitional forms of state action described below. Others disagree—

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153 Reichman, supra note 135, at 306 (arguing there is no demonstrated need to guarantee public law oversight on private governance activity).

154 Weakland, supra note 124, at 297–298.

155 Boudreaux, supra note 3, at 482.

156 Shelley v. Kraemer, 334 U.S. 1 (1948) (holding judicial enforcement of private, racially restrictive covenants was state action because persons used courts to enforce their rights; the Court weighed private contract rights against public constitutional guarantees and favored equal protection over the right to exclude; the Court did not limit itself to deferential review).
rejecting that private governance should in any way be associated
with public law.\footnote{Reichman, \textit{supra} note 135.} This view is outdated.

HOAs blur distinction between governance forms, taking on a
hybrid form by conducting themselves as if they were public entities
performing public functions; while in truth they are private
associations avoiding public law constraints and oversight.\footnote{Wiseman, \textit{supra} note 83, at 2075.}
Privatized governance is thought to be more effective at service-
 provision than its public law counterpart. Reinforcing that view is
talk of reorganizing traditional non-associative neighborhoods into
more privatized forms\footnote{Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (introducing
zoning rules to facilitate development using comprehensive organization to
rationally design efficiency and aesthetics as a social engineering solution to land
use conflict).} to capture its benefits. Municipal
government zoning serves many of the functions of private
associations but lacks the capacity to foster a sense of community,
hence privatization of public functionality is thought an
improvement.\footnote{Nelson, \textit{supra} note 29, at 835.} While privatization is more cost-effective and
fosters community engagement, an unintended consequence is it
increases risk of harm to personal autonomy. Private governance
lacks public oversight, accountability, transparency, and supervision.
Although the state is authorized to more closely regulate private
forms using administrative law regulatory schemes and heightened
judicial review, it typically avoids doing so. The result is privatized
forms remain free, flexible, and efficient, but unaccountable.

Law is a social planning device intended to improve the human
condition. The legal system offers a structured forum for enforcing
private agreements and public social contract rules.\footnote{Stern, \textit{supra} note 29, at 202.} Public
governance is cumbersome, limited by checks and balances, and in
its application is less flexible than private forms.\footnote{Nelson, \textit{supra} note 29, at 839.} Private
governance is less accountable, but better adept at creating desirable
connections between community, individuals and property which
touches on how communal living is understood. Private governance

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\footnotetext[157]{Reichman, \textit{supra} note 135.}
\footnotetext[158]{Wiseman, \textit{supra} note 83, at 2075.}
\footnotetext[159]{Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (introducing
zoning rules to facilitate development using comprehensive organization to
rationally design efficiency and aesthetics as a social engineering solution to land
use conflict).}
\footnotetext[160]{Nelson, \textit{supra} note 29, at 835.}
\footnotetext[161]{Stern, \textit{supra} note 29, at 202.}
\footnotetext[162]{Nelson, \textit{supra} note 29, at 839.
defines inclusiveness as security and belonging and is characterized by its use of covenant enforcement to coerce compliance. It promotes economic development through efficiency. Restrictions on member behavior include rules on conduct, access to amenities, and limits on freedom to promote collective good.

HOA authority remains subject to judicial review. The question is whether the review is meaningful. At first glance, developer-written rules recorded as servitudes that run with the land are lawful. These are enforced through due process. Although such rules are written by developers to serve their marketing interests, they can be amended by member votes. This may be difficult to achieve—obtaining supermajority consent is not easy, and so more often than not, the rules are likely to remain static, unchanged and unchangeable, perpetuating an antiquated land tenure system (of outdated and odd old rules) that reinforce the inaccurate tradition that owners have an interest in all their neighbors do and should possess the authority to coerce their neighbors to do what is required of them to remain good neighbors. The fact is that neighbors need to respect one another and comply with the law, to remain good neighbors, and that is all. The question becomes whether the “law” or applicable set of rules members agree to live by is proper. Conformity breeds tranquility. Some find satisfaction in rules that bind—shoes and plants that can’t be left at one’s front door avoid clutter, if one cannot paint one’s house without permission color choices won’t offend, and garage doors that must stay open on weekdays can possibly lead to the ferreting-out of illegal tenants. Others just put up with it, knowing most of it is nonsense. While the imagined idyllic community is an abstract, invented idea based on beliefs about what residents perceive is the good life, all recognize certain basic natural rights as enduring, desirable and worthy of protection. When governance interferes with reason, conflict arises. Generally, members can agree on what is

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164 Kress, supra note 41, at 838.

165 Id. at 840 (these include restrictions on children, pets, property, expression, maintenance, landscaping, architecture and so on).

166 Wiseman, supra note 83, at 2077.
acceptable and what is not. Law must not be made to be is complicit in a state of affairs that threaten private rights. The privatization of the state, by favoring a collective will over individual liberty and by allowing fines and foreclosure to serve as swords against noncompliance with unreasonable CC&Rs should be unacceptable.

A. Protecting Private Rights

Courts hesitate to interfere with HOA action taken in the reasonable, honest exercise of discretion to promote the desirable objectives of efficiency and utility. Following the business judgment or reasonableness standard, or a hybrid blend of the two, courts ask whether certain board action is reasonable without probing deeper. This is not an effective approach. An alternative is a hard look review that does not assume excellent decision-making and respect for individual rights are always present. Instead, this approach acknowledges that courts must operate under the assumption that decision-making needs to be justified by a fully developed record. Under a hard look review, courts also would not assume the corporate expertise that would reasonably justify deference in administrative agencies is present in boards that are constituted of citizens with no training in good governance. If judicial review of HOA private governance is to be meaningful, the standard of review applied must be so too. The literature reveals that the hybrid mix courts presently use, waters down the rigor of review and falls short of what is necessary to ensure good governance. HOA decision-making can be improved. It is possible to reconcile the communitarian perspective that values promoting collective good should be encouraged with the competing utilitarian focus on efficiency and safeguarding of private rights by facilitating harmonious alignment of individual preferences with the collective good. A more effective approach to enhance private interests would be to revise enabling statues to minimize the control

167 Pollack, supra note 26, at 849.
168 Nichols, supra note 72.
developers have on rule-creation\(^{170}\) and to implement a hard-look review at the inception of association establishment to ensure that individual protections are adequately effectuated.

Developer-crafted rules are established without member input, although it is assumed buyers would not purchase in a community with rules they disagree with. The fact that members do not establish the rules is problematic but made all the worse if members lack an understanding of the culture of the community they buy into. Buyers focus their due diligence on factors such as location, schools, work, shopping, space, style, price, and financing, with little thought given to the imagined social culture of a community’s branded lifestyle. This can lead to conflict as cultural distinctions have significant impact on daily life. The issue of voluntariness of association is relevant because it seemingly authorizes deference\(^{171}\) as does adherence to the social obligation norm\(^{172}\)—suggesting ownership is reciprocally privilege and burden-based. All citizens have a right to equal protection but are also bound to support the collective good. What this means is that individuals may take license to impose limiting costs on others and can be forced to internalize the cost of externalities they create. Taken a step further, HOAs are structured on the understanding that owners derive benefit from their status but owe reciprocal duties to the collective. It is error to assume the board will always conduct itself fairly, in the best interest of the collective whole, and also adequately protect individual rights. It is desirable to assume boards will always act reasonably, respectfully and responsibly as loyal agents of all members; but close case analysis demonstrates that this isn’t always what happens. Review of actions based on a comprehensive record accurately and in detail describing the process of fact-finding and decision-reaching is necessary if judicial review is to be meaningful and rights protected.

The Slaughterhouse Cases\(^{173}\) highlight a critical moment in the development of property rights. The state created a centralized authority to restrict private conduct in land use to promote a common


\(^{171}\) Boudreaux, *supra* note 3, at 496.

\(^{172}\) Alexander, *supra* note 84, at 1261.

\(^{173}\) Slaughterhouse Cases, 83 U.S. 36 (1873).
good. Private persons complained of unlawful restrictions on liberty when they were prohibited from making lawful use of land—but they were in fact prohibited from externalizing costs damaging to others.174 The regulations imposed to restrict externalization were necessary to preserve the resource of pure water and so avoid a tragedy of the commons. The tragedy of the anti-commons is also possible.175 In such a case, multiple owners are each endowed with the right to exclude all others from access to a resource thereby creating underutilization.176 Board members exercising concentrated power limit others’ ability to enjoy their lawful use-value of their assets. This restriction on liberty imposed by the collective on individuals is significantly damaging to personal autonomy.177

A hard look review could bifurcate standards boards are held to. For example, board action might be afforded enhanced discretionary flexibility in execution of ministerial tasks while remaining subject to more rigorous review in matters directly impacting personal autonomy. On issues of board purchases of routine supplies or authorizing minor repairs in the ordinary course, acts might be reviewed under the business judgment rule; but if the entity should ever engage in conflicts with members over behavior and compliance with covenant enforcement that has the potential to impact private rights, then board action could be held to higher standards of review.178 This bifurcating approach in review of decision-making would not excessively burden entity functionality, could improve decision-making by making entities more accountable for their actions, and would better secure private rights by producing more fully-developed decisions coupled with a comprehensive record available for review. Private entities such as a company, town, or shopping center performing traditionally public functions are not normally subject to constitutional limitations.179 When a private

174 Id.
176 Id.
177 Easthope, et al., supra note 10, at 1425.
178 Hannaman, supra note 170, at 724.
179 Marsh v. Alabama, 326 U.S. 501 (1946) (prohibiting a company town from restricting individual rights because the trespass statute denied freedom of religious expression and the public space in the private town served as public space); but see,
entity such as a governing board functions as a public agency in that regard, it should be treated as a public forum.

The shopping center cases offer insight.\textsuperscript{180} There, the Court augmented private property rights limiting freedom of speech protections. Private shopping center spaces were held exempt from free-speech protection despite the fact the entities behaved as if they were public because, following the close-nexus test applied to state-regulated utilities, there could be no state action when a private entity acts independently of the state. The counter-argument was state regulation and use of legal process triggers state action.\textsuperscript{181} This is important in deciding how to analyze HOAs. For example, \textit{Cruikshank}\textsuperscript{182} held constitutional safeguards ensure state action does not deprive individuals of fundamental rights, but those protections don’t extend to private acts of persons. \textit{Cruikshank} tolerated political disenfranchisement, but modern Civil Rights Era interpretations of state action expanded the characterization of private entities to treat them as public actors because they performed public functions.\textsuperscript{183} While there are exceptions because privatization carved out new territory in functionality, private entities generally remain private because they cannot exercise prosecutorial discretion, selectively enforce rules, or claim immunity.\textsuperscript{184} The \textit{Slaughterhouse Cases}\textsuperscript{185} confirmed the legitimacy of state law enacted to regulate and to promote public good in that it prioritized community interest over individual rights and required compliance with rules limiting private freedom to prohibit conduct harmful to the public good. Quite understandably, in moments of exigency (public health, safety or welfare is possibly at risk), the State is called upon to intervene and private rights are justifiably restricted. Are the circumstances within which HOAs govern equivalent?

\textsuperscript{180} \textit{Lloyd}, 407 U.S. at 551.

\textsuperscript{181} This can happen when acts of a private entity are fairly characterized as state action.

\textsuperscript{182} United States v. \textit{Cruikshank}, 92 U.S. 542 (1875).

\textsuperscript{183} Wiseman, \textit{supra} note 83, at 2081.

\textsuperscript{184} Boudreaux, \textit{supra} note 3, at 498.

\textsuperscript{185} \textit{Slaughterhouse Cases}, 83 U.S. 36 (1873).
B. Categorical Variables in State Action Doctrine

There are three categorical variables for how state action doctrine may be applied. The first concerns public function theory. It is necessary to clarify at the start however that a private entity engaged in functions that serve the public is not a state actor by definition of that performance—but where there is private performance of a traditional government function, the Court may find state action.\textsuperscript{186} Public function theory is described as private entity exercise of state power in a manner producing rights deprivation.\textsuperscript{187} For example, government functions cannot be delegated to private individuals: if the transfer of public functionality was to avoid constitutional limitations related to governance by delegating certain tasks to otherwise private individuals, then such a purpose would be is unlawful.\textsuperscript{188} State action doctrine essentially prohibits private entities from exercising public authority. This is precisely what transpired in the company town case \textit{Marsh}\textsuperscript{189} where a Jehovah’s Witness was arrested for trespass in the streets of a company-owned town after handing out religious pamphlets and refusing to depart. The private town was considered public because it performed traditional governmental functions, such as regulating conduct and property within a geographically defined jurisdiction; and because the owner opened up the land for use by the general public, its rights were limited by the statutory and constitutional rights of those of the public who used it.\textsuperscript{190} Thus, the Court ultimately held the woman’s first amendment rights had been violated by the property owner. The second categorical variable is entanglement theory, described as the private exercise of traditional government authority when a private actor is engaged in a mutually beneficial relationship with the state; and the third categorical variable is enforcement theory, described as the grant to private actors of enforcement authority from the state.

\textsuperscript{186} Weakland, \textit{supra} note 124, at 320.
\textsuperscript{187} Gott, \textit{supra} note 2, at 205.
\textsuperscript{188} \textit{Id.} at 206.
\textsuperscript{189} Marsh v. Alabama, 326 U.S. 501 (1946) (holding the town was like any other town and therefore subject to proscriptions set forth in the first and fourteenth amendments).
\textsuperscript{190} Weakland, \textit{supra} note 124, at 321, note 108 (citing \textit{Marsh}, 326 U.S. at 506).
Neither of these two alternative approaches is pertinent to a state action doctrine analysis in the context of HOAs\textsuperscript{191} and so, the analysis developed in this article is limited to the first approach.

The state action doctrine analysis relevant to HOAs concerns the public functionality variable that involves the state in what would otherwise be viewed as private conduct. It is difficult to construct a precise formula to define a nonobvious involvement of the state in private action, but in reviewing cases involving challenges against board action impacting private rights, it is necessary to ascertain the status of the actor responsible for limiting rights to determine how courts should proceed with an objective, unconditional review that appropriately considers facts and weighs circumstances to ensure constitutional rights are adequately protected. To be clear, state action doctrine analysis is useful in the context of analyzing HOA decision-making because it more appropriately labels the status of the actor—the fact is that boards cannot be said to be wholly private. Rather, board conduct can be said to properly fall within constitutional law mandates applicable to public administrative agency units, and as a result, HOA action should be reviewed in similar vein. When officials (persons with authority to govern in some sense), issue rules or adjudicate decisions on rule enforcement, reviewers of the decisions rendered must ask themselves whether the claimed deprivation that followed from the decision resulted from a genuine exercise of a lawful right or privilege having its source in state authority; and whether the private party charged with depriving another individual of her lawfully held rights or privileges is properly viewed as a state actor in the sense of relying on government authority, performing a public function, or otherwise being held to account as a state actor.\textsuperscript{192} In the HOA context, this question is answered affirmatively. To be certain, the argument can be made that HOA governing boards behave more like a municipality than a shopping center or mall.\textsuperscript{193} Further, associations make decisions that

\textsuperscript{191} Gott, \textit{supra} note 2, at 207–209.

\textsuperscript{192} \textit{Id}. at 214.

\textsuperscript{193} Weakland, \textit{supra} note 124, at 322 (noting the Court has repeatedly held shopping centers are better characterized as private property spaces with a focus on commercial objectives and so, owners should not be viewed as governmental actors with respect to their supervision of such space meaning the space is not the
directly affect the use of property and the conduct of residents and visitors.\textsuperscript{194} Thus, it is reasonable to conclude that when decisions are made affecting people in their homes (as opposed to public spaces), concern for privacy rights take on greater significance and fear of government intrusion into the same is rightly justified. This conclusion calls for a more searching judicial review of HOA board action that is more genuinely characterized as public governance (at least involving those decisions that concern personal autonomy; not those of financial decision-making).

The case for finding state action in the public functionality of governing boards is obvious. Boards clearly restrict individual liberties under color of traditional government when they take actions or make decisions that impact personal autonomy. Legislatures intentionally created HOAs in the image of administrative entities to facilitate their functionality and promote efficiency. Boards, like administrative agencies, exercise concentrated powers; but courts do not similarly review their acts and decisions using administrative law principles. They ought to. Courts should recognize associations for what they are—private governments exercising public functions with the potential to undermine fundamental individual rights (at least with respect to some of the decisions they enter into). The proper test for government functionality in the management and supervision of administrative authority is described in \textit{Edmonson v. Leesville Concrete Company},\textsuperscript{195} where the Court defined state action.\textsuperscript{196} The question becomes whether the state significantly involves itself with a private party (the governing board) such that the acts of that private party may be viewed as state action.\textsuperscript{197}

equivalent of public business districts in company towns and state action doctrine ought not to automatically adhere to such purely business entities).

\textsuperscript{194} Id.


\textsuperscript{196} Gott, \textit{supra} note 2, at 214–215 (whether the conduct was taken in accordance with state law is based on actor reliance on government assistance, actor performance of traditional government functions and whether the injury was exacerbated by use of government power).

\textsuperscript{197} Weakland, \textit{supra} note 124, at 323 (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972); and Jackson v. Metropolitan Edison Company 419 U.S. 365 (1974) for the proposition that state action is present when the state exercises a substantial, direct involvement with the privately-owned entity). Thus, the mere fact that associations
State involvement with associations, sufficient for state action purposes, can be found where the association seeks judicial enforcement of a challenged rule or regulation.198 The fact is, HOAs enjoy unique government-derived benefits and assistance pursuant to which the state creates a legal framework of governance.199 Nearly all states have enacted legislation to provide for the structure of HOAs and although legislative schemes vary from state to state, the relevant statutes are substantially the same. In each instance, authority is delegated to associations to enact and enforce rules governing aspects of daily life in their respective communities. Local governments often work with developers to approve zoning for and otherwise promote local development of new residential communities, deriving the benefit of an increased population and tax base without having to assume the obligations and costs of providing public services.200 This public-private partnership relationship is sufficiently interconnected, in my opinion, to justify imposition of the necessary joint-participant characterization of a symbiotic relationship between public and private governance forms.201

exist by virtue of state law is not sufficient cause to trigger state action and receipt of a benefit or service from the State or being subject to state regulation does not alone translate private discriminatory action into state action. Id.

198 Weakland, supra note 124, at 324 (citing Shelley v. Kraemer, 334 U.S. 1 (1948) for the proposition that judicial enforcement of a discriminatory restrictive covenant in a deed was state action and could serve to limit the powers of the association as the association relied on court action to achieve its intended ends (deemed unlawful)).

199 Gott, supra note 2, at 215.

200 Id. at 216.

201 Weakland, supra note 124, at 324, nn. 118, 119 (citing Burton at 725 and Judicial Control of Actions of Private Associations, 76 HARV. L. REV. 983, 1068 (1963)). Where in the latter reference, it is suggested that the theory might be stretched to cover all activities which the state has power to regulate. Id. While that idea has merit, I nevertheless argue that in the context of HOA private governance, the “business affected with a public interest” test should be viewed as sufficient to bring the private governance form within the ambit of state action because HOAs not only rely on public law for their creation, regulation and enforcement power but they perform traditional public functions that reduce such burdens on local municipal government to the degree financial burdens are transferred from the public to the private realm sufficient to rise to the level of a joint-participant/symbiotic relationship.
That this is so is demonstrated by the fact that developers recognize the value of fostering a symbiotic relationship with government and seek out private-public partnerships. Further, courts have elevated CICs to government status in all but name, giving broad deference to associations in their efforts to restrict member freedoms. 202 Thus, for each action a community association takes, it exercises (in some sense) state authority and performs many traditional governmental functions. The fact that the government delegates this power to private parties does not change the governmental character of the power conferred. 203 HOAs function as do local municipal governments—exercising responsibilities that take the form of administrative governance including budget, policy, and rule-making. 204 For these reasons, private governance requires review under public governance standards. Boards supervise operations, some employ security guards, all collect fees, dues and assessments to control infrastructure maintenance and repair work and fulfill managerial responsibilities. 205 It is true that some special interests resist labeling HOAs as private governments because doing so is to recognize that constitutional limitations on their authority is appropriate, but avoiding an appropriate label to maintain flexibility and authority extra-legal doesn’t alter the true character of what is occurring or that there exists a genuine threat to personal autonomy when acts and decisions of boards are not effectively regulated.

In the American legal system, courts are the final arbiters of constitutional questions and the conclusive instrumentality to safeguard against unlawful limits on liberty. 206 Legislatures empower

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202 Gott supra note 2, at 216 n.104.
203 Id. at 218 (citing Edmonson, 500 U.S. at 626).
204 Id. at 218.
205 Id.
206 Weakland, supra note 124, at 316–317, 325 (discussing Franklin v. White Egret Condominium Inc., 358 So. 2d 1084 (Fla Dist Ct App 1978) aff’d 379 So. 2d 346 (Fla 1979), where the lower court held that private enforcement of a restrictive covenant did not constitute state action, but recognized that because the association relied on judicial enforcement of the covenant, it invoked the sovereign powers of the state, and the court was therefore obligated to carefully scrutinize the covenant with a view toward forbidding its enforcement should it fail to pass constitutional muster). The state supreme court ultimately found the restriction to be reasonable and constitutional because it viewed the restriction not as a zoning ordinance adopted under the police power but as a mutual agreement voluntarily
CICs to act and courts enforce or decline to enforce such acts and
decisions when they defer to and uphold the results of board action
with minimal scrutiny, essentially abdicating their jurisprudential role
in that they give license to boards to exceed their proper authority when
they ineffectively review what is arguably a form of state action. This abdication of judicial responsibility may be reversed by
threatening boards with the possibility of hard-look review that could
lead to reversal of acts and decisions deemed excessive, improper
and potentially unlawful. Local governments must be adequately
supervised in their exercise of power be they public or private forms;
and none should possess the capacity to exceed the limits of their
delegated authority so long as they are subject to a meaningful and
effective judicial review.

C. Close Case Studies Support Hard-Look Review

State statutes create HOAs and set forth rules and procedures
boards must follow. For example, the Texas Residential Property
Owners Protection Act details methods for providing notice,
declares books and records must be accessible, meetings open, limits
action that can be taken outside noticed meetings, describes authority
to enter contracts, outlines voting, describes who may serve as an
officer, outlines enforcement action and limits board authority.
Statutory rules are comprehensive and ought to be sufficient to

entered into among all association members. The court further viewed the age
restriction as reasonable because it appeared to be intended to reinforce the private
property investment purpose of the condominium concept and constitutional
because restrictions on rights based on age need not pass the equal protection strict
scrutiny test in the context of housing complexes specifically designed for certain
age groups. Id.

207 Weakland, supra note 124, at 320 (citing Evans v. Newton, 382 U.S. 296,
299 (1966) for the proposition that when private individuals are endowed by the
State with powers or functions governmental in nature, they become agencies or
instrumentalities of the State and subject to its constitutional limitations).

208 Texas Residential Property Owners Protection Act. 11 Tex. Prop. Code
Ann. § 209.002 (West).

209 Id. (These requirements are listed to reinforce the point that regulatory
statutes offer a broad and generalized framework for managing HOA action.
Therefore, “strengthening the language in the statutes” will not have the effect of
better protecting private rights. Only more rigorous judicial review standards may
achieve that desirable result).
protect individual rights, but often they do not. To compensate for this deficiency, a bill of rights for land ownership could be ratified\textsuperscript{210} but unless judicial review of challenged acts and decisions is sufficient, a bill of rights safeguard would be ineffective. The only means to effectively protect private rights is to enhance judicial review. A bill of rights would protect individuals by restricting board authority, clarifying individual rights, establishing guidelines for oversight and enforcement, banning foreclosure of owner interests without heightened judicial review, limiting foreclosure by including redemption, adding a process for alternative dispute resolution (ADR), limiting the power to fine, enhancing notice and hearing protections and implementing other means to protect homeowners from streamlined processes that limit individual rights\textsuperscript{211} but without a proper enforcement mechanism, those supplemental protections would be incomplete. The objective of enhancing homeowner rights protections is to assure owners that as members of an association, they possess the right to may reside in their homes secure in their freedoms.\textsuperscript{212} These protections are only guaranteed by a meaningful process of judicial review and unless judicial review is based on a comprehensive and fully developed record that makes it possible to ascertain whether the process used was appropriately followed, the protections guaranteed in a bill of rights would be unenforceable. Having rights on paper only is a useless paper tiger when there is no method for enforcement. A HOA bill of rights proposed to ensure legislation more adequately safeguards personal autonomy in the


\textsuperscript{211} \textit{Id.} at 9. (These “safeguards” are listed to reinforce the point that a bill of rights might describe specific interests that cannot be infringed upon by boards to limit HOA action. But the practical reality is that “strengthening protections in the statutes” will not have the effect of better protecting private rights. Only application of more rigorous judicial review standards may achieve that desired result).

\textsuperscript{212} \textit{Id.} at 11–12.
realm of CICs\textsuperscript{213} is useless without a rigorous judicial review process in place to enforce it.

Private ownership interests can be limited by the impact of judicial review standards as the Texas Supreme Court case, \textit{City of Keller v. Wilson}\textsuperscript{214} reveals. There, the court clarified how review of a verdict for legal sufficiency might proceed. It explained how selectively crediting favorable evidence is proper if reasonable jurors could do so, as is disregarding contrary evidence unless reasonable jurors could not.\textsuperscript{215} In \textit{Keller}, a city-approved construction plan for storm water drainage included building a drainage ditch on plaintiff’s land to avoid water build-up.\textsuperscript{216} City codes required developers to provide drainage to avoid increasing the volume or speed of water discharged after new construction.\textsuperscript{217} The plan that was implemented ended drainage ditches before plaintiff’s property instead of inside it. Flooding to plaintiff’s land and damage resulted. Plaintiff claimed the city was responsible because it failed to authorize proper drainage.\textsuperscript{218} The city claimed it relied on experts in deciding which plan to implement and because it had no reason to believe there would be any damage, it was not responsible.\textsuperscript{219} The Texas high court rejected the lower appellate court ruling in its scope of legal-sufficiency review finding that the court it must credit all favorable evidence that reasonable jurors could believe, but disregard all contrary evidence except that which reasonable jurors could not ignore—and therefore, based on that standard, held there was no evidence the city’s approval of the revised drainage plan was an intentional taking.\textsuperscript{220} In applying that test, it found no intentional taking because the record indicated the plan that was implemented complied with the municipal regulations then in effect.\textsuperscript{221} The court explained its rationale

\textsuperscript{213} Kahne, supra note 210; see also, Armand Arabian, \textit{Condos, Cats, And CC&Rs: Invasion of The Castle Common}, 23 PEPP. L. REV. 1, 2 (1995).

\textsuperscript{214} City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).

\textsuperscript{215} Id. at 807.

\textsuperscript{216} Id. at 808.

\textsuperscript{217} Id. at 829.

\textsuperscript{218} Id. at 829–830.

\textsuperscript{219} Id. at 830.

\textsuperscript{220} Id.

\textsuperscript{221} Id. at 808.
indicating that courts may consider contrary evidence if reasonable jurors could, but where evidence to prove a vital fact is no more than a mere scintilla, courts must view the evidence in its most favorable light in support of the finding of fact considering only evidence and inferences that support the finding, and rejecting what does not.\textsuperscript{222} In applying the test, the court reversed the appellate decision that had affirmed the trial court’s verdict for plaintiffs based on a conclusion that sufficient evidence demonstrated the city knew increased flooding was substantially certain to occur and the city could not explain why the original plan requiring a drainage ditch across plaintiff’s land was not implemented, while a revised plan that omitted the additional work was used.\textsuperscript{223}

The appeals court acknowledged exculpatory (for the city) evidence existed indicating the city approved the revised plan only because engineers determined the omitted ditch was unnecessary; but said court felt it was compelled, by the scope of review rules to disregard that evidence.\textsuperscript{224} The appeals court explained that they were to consider only the evidence and inferences that tend to support the finding (of an intentional taking) and disregard all evidence and inferences to the contrary.\textsuperscript{225} On appeal to the State Supreme Court, the city challenged that omission as applying the wrong scope of review.\textsuperscript{226} The Texas Supreme Court concluded the appellate court had applied the scope of review analysis in error, as the critical question was what did the city know? and did it know flooding was certain?\textsuperscript{227} The court concluded the land owners did not prove the city disbelieved the expert’s opinion or that it approved the revised plan knowing flooding was certain to occur.\textsuperscript{228} The court explained that although plaintiffs presented some evidence that the city caused damage to their property, there was insufficient proof that the City knew the plan it approved was substantially certain to increase

\textsuperscript{222} Id. at 808 (citing Robert W. Calvert, “No Evidence” & “Insufficient Evidence” Points of Error, 38 TEX. L. REV. 361, 364 (1960)).

\textsuperscript{223} Id. at 828–29.

\textsuperscript{224} Id. at 808.

\textsuperscript{225} Id. at 808–809.

\textsuperscript{226} Id. at 809.

\textsuperscript{227} Id. at 829.

\textsuperscript{228} Id. at 829.
flooding.\textsuperscript{229} This seems to be too high a burden for plaintiff to carry because the court credited all favorable evidence reasonable jurors could believe and disregarded all contrary evidence except that which reasonable jurors could not ignore to find insufficient evidence that the city’s approval of the plan was a taking.\textsuperscript{230} The problem with this decision is it was too deferential in favor of government findings of fact, was limited to deciding the applicable standard for review and failed to address the important question of whether a governmental entity can be liable for damages resulting when it approved a developer’s construction plans.\textsuperscript{231}

Another case useful to review that demonstrates the need to enhance the rigor of judicial review to protect private property rights is \textit{Nahrstedt}.

\textsuperscript{232} There the California Supreme Court denied a woman the right to keep pet cats in her home. In \textit{Nahrstedt}, the board established a rule banning pets and effectively, as the court noted, all association members purchased their units with constructive notice of that rule. California follows the reasonableness standard in review of board actions and concluded the prohibition of cats was reasonable. Mrs. Nahrstedt argued it wasn’t, more particularly as it applied to her, because her cats created no nuisance in the community. The State Supreme Court disagreed and upheld the board decision based on its view that the question of reasonableness, \textit{as applied to her}, was irrelevant.\textsuperscript{233} Instead, it ruled that a blanket ban on certain, specified

\textsuperscript{229} \textit{Id.} at 830.

\textsuperscript{230} \textit{Id.} at 830. The court remanded to the lower court to address an alternative verdict under the Texas Water Code, but the case was subsequently dismissed pursuant to joint motion; see City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005) (two concurring judges disagreed with the majority holding that the decision as to whether the city did or did not know flooding was substantially certain to occur should have been left to the jury).

\textsuperscript{231} \textit{Id.} at 810. It is also noticeable in this case that the State delegated a traditionally governmental task to a private entity to perform and so the government can arguably be held to be ultimately responsible in some degree as a joint participant in a public-private partnership arrangement. \textit{Id.}


\textsuperscript{233} \textit{Id.} at 386 (explaining that the reasonableness of a use restriction is properly determined by reference to facts specific to the development as a whole and not by reference to facts that are specific to the objecting homeowner).
pets can be reasonable. The sole dissenting judge in the case observed the prohibition was excessively restrictive and its impact on unique factual circumstances ought to be considered because when governing board authority operates unrestrained by rationality, it poses a threat to fundamental liberty. The majority responded that the restriction was valid because it reasonably furthered the collective interest in fostering public health, happiness and peace of mind; but even more important than that, it found that purchasers of units in associations with knowledge of board enforcement authority accept, even welcome, the possibility that certain restrictions will apply and board power may be exercised for the benefit of the community and to the detriment of the individual as necessary. The court defined reasonableness by reference to the community as a whole, applied uniformly against all residents and valid unless a challenger could demonstrate a restriction is unreasonable because it is arbitrary, violates a fundamental public policy, or imposes burdens on property that substantially outweigh the identified benefit the restriction was established to promote. The case is, in my opinion, an example of legal system failure to adequately safeguard private rights because too great a degree of deference is applied. The pet restriction was found enforceable—because—reasonable and the board rule was presumed valid on a record that in truth did not fully consider information gathering in support of decision-making as hard-look review would require. The dissent observed that pets have come to play an extremely significant role in people’s lives such that an absolute prohibition on pets that create no nuisance is de facto unreasonable and creates an unacceptable burden on individuals

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234 Id. at 386 (holding that a restriction prohibiting cats or dogs but allowing some other pets is not arbitrary but instead is rationally related to health, sanitation and noise concerns legitimately held by residents of a high-density condominium project). The court further noted that a member could successfully prevent enforcement of a pet restriction by proving the restriction is arbitrary, substantially more burdensome than beneficial to the affected properties or that it violates a fundamental public policy. Id.

235 Arabian, supra note 213, at 2.

236 Id. at 6–7 (citing Nahrstedt, 878 P.2d at 1282).

237 Id. at 9.
depriving them of a private right without a corresponding counterweighting collective benefit.\textsuperscript{238}

Following \textit{Nahrstedt}, the legislature amended the relevant statute providing in part that no governing documents shall prospectively prohibit the owner of a HOA interest from keeping at least one pet, calling into question \textit{Nahrstedt}'s holding that the no-pet restriction was not unreasonable.\textsuperscript{239} Then, in a subsequent case, the same State Supreme Court again found in favor of the board noting the provision only applies prospectively to governing documents entered on or after January 1, 2001 and was therefore inapplicable to that case because the applicable declaration in the instant case was recorded one year prior to the operative date of the statutory amendment.\textsuperscript{240} The court in \textit{Terifaj}\textsuperscript{241} discussed the rationale in \textit{Hidden Harbor Estates v. Basso}\textsuperscript{242} embracing the reasonableness analysis that declarations possess a strong presumption of validity that arises from the fact that each unit owner purchases his unit knowing of and accepting the restrictions to be imposed. In \textit{Terifaj}, the \textit{Nahrstedt}\textsuperscript{243} court's highly deferential standard of review was applied with the court there concluding that the recorded restriction prohibiting pets was not unreasonable as a matter of law and the primary issue was whether subsequently enacted and recorded use restrictions may be enforced against a current homeowner—the court found they could be.

There are other examples of legal system failure to protect private rights significant enough to justify the need for reform of judicial

\textsuperscript{238} \textit{Id.} at 10 (explaining further that prohibiting animals cannot possibly foster health, happiness or peace of mind in those who do not see, hear or smell them and policy exceptions enumerated in the prohibition defied logic as birds and fish make noise, produce waste or risk leaks that can cause property damage and therefore would facilitate the type of harm that the rule was intended to prevent).


\textsuperscript{240} \textit{Id.} at 72.

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} Hidden Harbor Estates, Inc., v. Basso, 393 So. 2d 637 (Fla. 4th Distr. Ct. App. 1981)

review standards. The reasonableness test developed in *Norman*,\textsuperscript{244} where a restriction prohibiting alcohol in common areas was upheld as bearing a reasonable relationship to the health, happiness and enjoyment of life of the various unit owners could imply the HOA decision-making process is case-specific and therefore operates as applied. Another case, *Hidden Harbor Estates v. Basso*,\textsuperscript{245} was decided in favor of the member who requested permission to drill a well, was denied, drilled regardless and was thereafter pursued for a rules violation. The case is an example of how judicial review ought to proceed—that a reviewing court ought to carefully examine a fully developed record to determine whether the board followed its own rules and issued a decision that was based on a deliberate, purposeful process following careful study; but in fact because there was no fully developed record, the case was only decided in favor of the member because the board had no firm basis to reach the conclusion that it did.\textsuperscript{246} The *Basso*\textsuperscript{247} court would have been hard-pressed to rule in any other way than it did. What these two cases demonstrate is the fact-specific nature of how courts ought to review HOA acts and decisions. The problem is that presently-in-use judicial review standards are lax. The alternative to the reasonableness standard is the business judgment review approach typically used by New York and New Jersey courts that fares even less well (in terms of protecting individual liberties) than California's reasonableness test standard in terms of accuracy and fairness of judicial review. The New York rule treats HOAs as if they were corporate boards. In my opinion that approach is deficient because HOA governing boards are not held to equivalent accountability as corporate boards, and the state action doctrine and administrative law principles are not held applicable when those tests are used. The business judgment rule requires board malfeasance in decision-making such as a finding of fraud, self-dealing or unconscionable conduct before a court will

\textsuperscript{245} *Basso*, 393 So. 2d at 637.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
review board action. Such an approach, while of benefit to HOAs because it affords them with flexibility and shields them from liability, inadequately protects private rights.

In modern society, property is increasingly viewed not merely as a private right, but also as the basis for a social obligation. Ownership privilege is created simultaneously with corresponding duty. It is a license issued in exchange for a fee signifying a reciprocal relationship of rights and duties between the state’s obligation to protect its citizens and the obligation of citizens to serve their community—a mutual bond of feudal origin. These dual obligations license the privilege of ownership even as they burden ownership with duty. CICs play a valuable social role—they make lower-costing amenities more accessible to a greater number, provide more efficient maintenance, offer quality security and a sense of community to members. Some theorists have gone so far as to propose a bill of rights be appended to statutory regulations for CICs because they claim the blueprint describing powers and processes of HOA governance requires an added layer of checks and balances to better protect individual unit owners’ private rights; because, it is theorized, community associations are, after-all, essentially forms of democratic local government. It is even suggested that such rights protections can be tailored to specific interests because CICs are designed to appeal to various segments of the larger community—thus the contents of any proposed bill of rights might be tailored to the interests and fears of the group the developer intends to target.

In sum, this article concludes with the by now familiar theme that a better means to resolve the problem of protecting individual rights could be to reform judicial review standards entirely to minimize the

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248 See note 126 above, citing cases using the least rigorous business judgment rule that defers entirely to board acts and decisions and denies review unless there is clear evidence of fraud or arbitrary and capricious acts in the record.
249 Alexander, supra note 33.
250 Alexander, supra note 84, at 1270.
251 Id.
253 Id.
deference courts afford HOA board decisions by requiring that a comprehensive record of evidence be gathered in support of acts and decisions to be taken and that courts be charged with the task of carefully considering a comprehensively developed record of evidence gathered and studied prior to the reaching of decisions to ensure that a meaningful and effective review has in fact taken place with an eye toward safeguarding private, individual rights. An elaborate legislative scheme of rights protections would not be effective without a minimally sufficient degree of judicial review required. Therefore, the only genuine solution to the problem of ensuring sufficient protection for individual rights in the context of privatized governance is to adequately enhance the rigor of judicial review. A meaningful, comprehensive review of board action using a hard-look administrative law approach would suffice to achieve this objective.

VII. CONCLUSION

The rise in popularity of HOAs in recent years has led to a rise in litigation between governing boards and aggrieved owner/members. The expanded power of HOAs, coupled with a lack of protection for residents under a deferential regime of legal review demonstrates a better approach is necessary. A multitude of diverse standards to guide judicial review of HOA governing board acts and decisions has emerged. The close case study and review of the literature undertaken in this article leads to the conclusion that the two well-established judicial review standards currently in use are ill-suited to the task at hand of effectively reviewing private governing board actions, particularly those that negatively impact personal autonomy. The business judgment and reasonableness standards as applied fail to equitably allocate the burden of proof, effectively protect personal autonomy and appropriately review acts of a private entity that engages in the exercise of public authority. Concepts from those review standards that are useful to the analysis should be retained but the standard of review implemented by courts must be more searching. A better-suited alternative to review of governing board acts and decisions is an administrative law hard-look review model because it offers a less deferential and not overly burdensome alternative that would not negatively impact efficiencies created by private governance but would better safeguard private rights because
the approach would promote accountability, transparency and better decision-making by requiring the creation of a comprehensive, substantive and fully developed record on which to judge the basis for actions taken that have the potential of limiting private rights. At the same time, it would preserve administrative flexibility and lead to better decisions. The hard-look standard of review is a more effective approach because it would reduce the risk of harm to personal autonomy without surrendering the benefits of efficiency and flexibility that make private governance an attractive housing alternative in modern times.