Griffith University Strata and Community Title for the 21st Century Conference 2013
Privacy and personal autonomy: the social and political implications of by-laws

Introduction

> 'Property concerns things needed for human life. At the most elemental level, property gives us a place to be: a place to work. It gives us the means to thrive: food to eat, clothing to wear. It gives us things that make life enjoyable, meaningful, and fun. But property does not only provide our material needs. It enables us to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others, to live a human life. We cannot live our lives without the means to do so.'[1]

Property law is the collection of rules that regulate the rights of multiple people to the limited resource of land. When a person owns land, they own from the centre of the earth to the 'heavens', (the Latin maxim "cuis est solum eius est usque ad coelom et ad inferos"). Strata and community title legislation regulates the rights of people to both land and airspace, *ergo*, it is clearly property law.

Because strata and community title differ from non-strata and community title, there is a temptation to separate it from ordinary property law. For example, some real estate agents

[1]Joseph William Singer, *The edges of the field : lessons on the obligations of ownership* (Beacon Press, 2000), 56-78.

habitually refer to non-strata townhouses as "Torrens title" townhouses, as if strata were *not* Torrens title. This is wrong and the strata industry needs to stop using the term Torrens title incorrectly. Torrens title is the system of registered title that is used in all Australian states. The only alternative to Torrens title is Old System title, which was the method of transferring land title by deeds. There is no Old System title left in Queensland and it is negligible in all other states. All strata and community title in Australia is Torrens title.

Strata and community title is also invariably freehold title. The only alternative to a freehold title is a leasehold title. There are a small number of leasehold strata and community title developments, for example around Sydney Harbour[2] or on the Queensland islands, but the overwhelming majority of strata properties are freehold. In NSW, they are subdivisions under the *Strata Schemes (Freehold Development) Act* 1973; the word "freehold" in the Act's title is a bit of a give-away: it creates "freehold" titles. There are two freehold estates in property law: the fee simple and life estate, the latter obviously not being relevant. The upshot of this is that when someone buys a strata or community title property, they are buying *a Torrens title freehold fee simple.*

This does not mean that strata and community title are identical to non-strata titled properties. The existence of a body corporate and by-laws, as well as the ownership of common property make them different. However, they are only as different as they need to be. There is no need to throw the baby out with the bathwater, severing all connection between the rules that regulate land and air in strata properties and the rules which for centuries have regulated land and air in all other properties. Put simply, there is no need to reinvent the wheel.

[2] These are created under the *Strata Schemes (Leasehold Development) Act* 1986 (NSW), and are typically on 99 year leases from a State government authority.

Fundamental principles of property law

There are a number of difficult issues that come up in strata and community title, in particular in relation to by-laws, and there is sometimes no clear answer to questions about by-law validity. The intense litigation over pet by-laws in Queensland is a good example. However, with difficult questions in law, as in philosophy, science, economics or even life, it helps to go back to fundamental principles. What are the basic principles that underlie rules that regulate land and do the strata rules we are creating comply with them? If not, is the divergence justified?

There are four fundamental aspects of all property law. First, property law does not regulate land, it regulates people's rights to land with respect to each other. In other words, it creates relationships between people by reference to land. When creating those relationships we must be mindful of their effects. As Joseph Singer says,

> Every legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers.[3]

While property law sets great store by voluntary relationships, for example that a landlord and tenant have voluntarily agreed to the provisions in a lease, not all voluntarily agreed arrangements are acceptable. '[S]ome relationships are out of bounds...some contract terms

[3] Singer, 'Democratic Estates', above n **Error! Bookmark not defined.**, 1047.

are off the table...[and] there are some things you should not ask of others; there are some demands that cannot justly be made in a free and democratic society.'[4]

Secondly, property law creates "externalities". This is when the law allows some people to have certain rights to land, by definition that will mean that other people are excluded from land or their rights to use that land are reduced. We need to be attentive to these externalities. Some externalities will be acceptable, for example that my neighbor cannot use my backyard; some will not be acceptable, for example that an entire community cannot access Surfers Paradise beach because the state government has sold it to a developer for the common property in a community title estate.

Thirdly, property law does not simply create rights between individuals with reference to a single piece of land, those individual rights multiplied thousands of times across a physical landscape and through time create a social, economic and political regime.

> Property law is part of the way we define a legitimate social order....[and] we cannot conclude that a particular set of property rules or institutions is acceptable unless we attend to the systemic effects of exercising those property rights.[5]

Finally, because property law helps to create our social order, most property law is consistent with the values of our social order. Put another way, property law is both informed by common morality and helps to create common morality. While new laws can be used to push people in a new direction and create a new norm (for example, seat belt laws), as a general rule law only requires people to do things we all already agree are correct and

[4] Singer, 'Democratic Estates', above n **Error! Bookmark not defined.**, 1048.

[5] Singer, 'Democratic Estates', above n **Error! Bookmark not defined.**, 1049-50.

prevents people from doing this we all agree are wrong. When law is out of step with common morality with no defensible reason, resistance to law and dispute will ensue.

The best concrete example that can be given to illustrate these three points about property law is one of the great aberrations of modern property law, the United States' racially restrictive covenant. Throughout the 20th century, it was commonplace in the United States to impose covenants on residential subdivisions which restricted ownership or occupation of the land to Caucasian people. [6] Legally, these covenants began life as voluntary contractual agreements between a vendor and purchaser that the purchaser would agree to their land being burdened by the restriction. With the appropriate formality, the contractual agreement would become a property right that burdened the land and benefited the other land in the subdivision in perpetuity.

Firstly, if we consider this right "not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers" it should be obvious that the property right created racially discriminatory relationships between people. It allowed white people to collude with each other in order to exclude African-American, Hispanic and Asian-American citizens from valuable residential land, homes and entire neighbourhoods. Secondly, the "externality" is equally obvious; the property right excluded all non-Caucasian people from vast tracts of residential land, harming their quality of life and personal dignity. Residential land, like all land, is a limited resource

[6] McKenzie, *Privatopia*, above n **Error! Bookmark not defined.**, 56-78; James A. Kushner, 'Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States' (1979) 22 *Howard Law Journal* 547; Stephanie M Stern, 'The Dark Side of Town: The Social Capital Revolution in Residential Property ' *(Working Paper, Chicago-Kent College of Law, April 2013) http://ssrn.com/abstract=2243134 or http://dx.doi.org/10.2139/ssrn.2243134*

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and there were no comparable neighbourhoods in which non-Caucasian citizens could live. This brings to mind the "Lockean proviso" that private property is justified only so long as there "there is enough, and as good left in common for others".[7] Locke's theory of property is of course fundamental to modern property law.

Finally, the right to exclude all non-Caucasian people from land did not just affect individual vendors and potential purchasers, (those excluding and those excluded), it affected the entire American community who remained part of racially segregated cities and societies, whether they wanted to or not. The contractual/property agreements between individual vendors and purchasers multiplied thousands of times across a physical landscape and through time created a social and political apartheid which endures to this day. Many suburban areas, their schools,[8] and other essential services are enjoyed by predominantly white citizens, while African American and Hispanic citizens often remain in under-resourced, inner urban neighbourhoods. This phenomenon should demonstrate that we must never view property rights in a myopic, individualistic way; we must lift up our eyes from the transaction and consider its systemic effect when multiplied thousands of times in our community. When assessing property law, which includes strata and community title, we must remember that,

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[7] *Second Treatise of Government*, (1670), reprinted in *On Sovereignty*, (The Collector's Library of Essential Thinkers, London, 2005), 396.

[8] Stephen E Asher, 'Interdistrict Remedies for Segregated Schools' (1979) 79 *Columbia Law Review* 1170; Jonathan Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* (Crown Publishers, 2005).Gary Orfield and Chungmei Lee, 'Why Segregation Matters: Poverty and Educational Inequality' (CIvil Rights Project, Harvard University, 2005). The Civil Rights Project, originally at Harvard University and now at UCLA, has been researching racial segregation in American schools for almost two decades. There are multiple reports available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity>.

> the legitimacy of the exercise of a property right depends on the consequences of exercising the right. Those consequences are historical events; they take place in time. Thus the time that matters is not the magical moments of acquisition and transfer. Rather, what matters are the continuing moments in which property rights are exercised. The tensions that are a necessary component of the institution of private property affect not only choices about initial acquisition and transfer but also the proper moral and legal response to exercises of rights as they happen over time.[9]

Most importantly, we must remember that the fact that a property right was voluntarily created, does not necessarily make it legitimate.

Strata and community title by-law

Strata and community title allow private citizens to write by-laws that regulate the use of both common property and lot property. In relation to the use of common property by current owners, the by-law making power is a statutory formalization of the existing rights co-owners have to regulate their own land. Co-owners can make contractual agreements about the use of co-owned land (for example, joint venture agreements, agreements to pay occupation rent or to divide rents and profits) and courts will enforce them. However, the by-law making power differs from these agreements because by-laws are not contracts. They bind people who have not agreed to them, including minority owners and all subsequent owners, (who may or may not have agreed to them depending on how much weight we give to the notion of consent to by-laws by notice and purchase). In this sense, the by-law making power in relation to common property is novel.

[9] Singer, *Entitlement*, above n **Error! Bookmark not defined.**, 174.

In relation to individually owned lots, the by-law making power is completely novel. By granting bodies corporate the power to make by-laws, the legislature has authorised private citizens to make rules regulating other people's homes, investment properties and work places. This is extremely unusual. In liberal democracies, the power to regulate land is invariably a public function performed by elected representatives, at municipal, state and federal level. Private organizations like companies, universities and voluntary organizations have the power to write by-laws,[10] but they rarely relate to land, at least on any scale.

The by-law making power in most states is extremely broad. In New South Wales it is found in s47 *Strata Schemes Management Act* 1996 and s14 *Community Land Management Act* 1989 which provide that by-laws or management statements must simply relate to the "control, management, administration, use and enjoyment" of the lots or common property to be valid. In Queensland, the by-law making power extends to the administration, management and control of common property and body corporate assets, as well as the regulation of the use and enjoyment of lots, common property, body corporate assets and services and amenities supplied by the body corporate.[11]

The legislation typically bans particular by-laws outright. In NSW, strata legislation bans by-laws that prohibit leasing or transfer, guide dogs or children,[12] as well as by-laws that are inconsistent with the SSMA, any other Act or law.[13] In a community scheme, while by-laws can limit "occupancy under the scheme to persons of a particular description",[14] by-laws

[10] For example, under s27 *University of New South Wales Act* 1989 (NSW), the University Council has the power to make by-laws in relation to listed matters.

[11] *Body Corporate and Community Management Act* 1987 (Qld), s169.

[12] SSMA, s49.

[13] SSMA, s43(4)

[14] CLMA, s17(1)(a). This raises a question about the relationship between community management statements and strata by-laws in strata schemes that are inside a community scheme. Strata schemes

must not be based on race, creed, ethnic or socio-economic grouping or exclude public housing.[15] These provisions evidence a recognition of the potentially socially and economically destructive effect of by-laws.[16] Like racially restrict covenants, by-laws have the potential to exclude people from land on grounds that our community would consider illegitimate or discriminatory. If those kinds of by-laws were used widely by strata schemes, they would alter the very fabric of our community.

The prohibition on by-laws based on "creed" avoids many difficult but interesting questions about the power people have to use private property law to create their own "sub-societies". A "creed" is defined by the Macquarie Dictionary to include "any system of belief or of opinion". Community title is popular in the Northern Rivers region of New South Wales where there are a number of communes or "intentional communities" formed by people with common beliefs, who want to live communally and "intentionally" with reference to those beliefs.[17] By allowing land (for example, bushland or gardens) to be defined as common property in a plan of subdivision, community title creates a clear *collective* title to land; by allowing for the creation of individual lots, it also creates individual titles which are

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and their members are bound by the management statements of precinct or community associations of which the strata scheme is a member: CLMA, s13. If there is an inconsistency between strata by-laws and management statement, the management statement prevails: SSMA, s58. Thus a community management statement could restrict the community to people of a particular description and it would exclude people who did not match that description from owning or residing in the strata scheme.

[15] Schedule 3, cl 5, CLDA.

[16] The Schedule 3, cl 5, CLDA prohibitions were expressly included to eliminate discriminatory by-laws: New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November, 1989, 12920 (Mr Causley, Minister for Natural Resources)

[17] John Page, 'Common Property and the Age of Acquarius' (2010) 19(2) *Griffith Law Review* 172; Warwick Fisher, 'The Future of Rural Land Sharing Communities in Far North Coast New South Wales' (2004) 8 *Southern Cross University Law Review* 51. Many existing Byron Shire communes have recently converted to community title: Byron Shire Council, "Multiple Occupancies to Community Title", February, 2009, http://www.byron.nsw.gov.au/multiple-occupancies-to-community-title, accessed 13 May, 2013.

transferrable. Both the collective and individual ownership of land have proved a problem for intentional communities in the past, particularly when members wanted to leave and take some of the value they had invested in the property with them. In addition to clarifying ownership, community title allows for the creation of by-laws that can mandate the use of land, both individual and collective, in accordance with ecologically sound land management principles; for example everyone can be required to recycle water or only garden in accordance with permaculture principles. However, many intentional communities are set up by people who have common beliefs beyond land management, typically spiritual or philosophical, and those people might want to limit their community to like-minded individuals.[18] While communities might have a "vision statement", even recorded on the Torrens register,[19] they cannot exclude people on the basis of philosophical or religious belief because of the prohibition on by-laws based on "creed".[20]

While it would be unusual to see an attempt to exclude people from strata and community title developments on the basis of religion, race or ethnicity, it is possible for by-laws to be indirectly discriminatory. For example, some strata schemes in Sydney are experiencing intense problems with overcrowding, specifically, large numbers of overseas students from south east Asia sharing two bedroom apartments, either through hot-bedding or the illegal

[18] ABC Radio National, 'Sanctuary', *360documentaries*, 30 September, 2012, http://www.abc.net.au/radionational/programs/360/sanctuary/4268164

[19] One recently converted community title community does not seek to limit members, but rather has a "vision statement" at the beginning of their management statement, which presumably encourages people to self-select into the community without expressly prohibiting purchase or occupation, eg DP286220, Management Statement for Jindibah. The Crossroads community outside Yass intends to use the legislation to create a medieval community: http://crossroads.org.au/the-future/buying-a-block/, accessed 15 April, 2013.

[20] It is also possible that by-laws based on religion would fall foul of state anti-dsicrimination legislation.

division of rooms.[21] The problem is a consequence of both Federal and State governments wanting to exploit the earning capacity of our education system, without providing the necessary housing for students. Overcrowding is a fire risk, and results in overuse of common property; both are a source of legitimate complaint from other owners. Some strata lawyers seem to think that by-laws limiting occupancy of apartments would be invalid, although it is unclear why they have come to this conclusion as the number of occupants clearly relates to the use and enjoyment of lot property, consistent with s47 SSMA. However, if such by-laws were enacted, they would have a disproportionate effect on the Asian student community, many of whom might not consider their living conditions overcrowded, or even if they do, have no alternative. It might also have a similar effect on migrant families. There is no easy answer to this dilemma, except to suggest that this kind of regulation is arguably better done by government, for example via planning laws or fire regulations, highlighting the inherent risks in the private regulation of land.

Regulation of self-regarding acts

One of the most troublesome aspect of by-laws in many states is their ability to regulate behaviour that does not affect other people. This is crux of the issue in the Queensland pet litigationIn Chapter 1 we saw that the progress of land law gradually eradicating doctrines that limited possessors' control and use of land promoted more than economic freedom; it promoted one of the most cherished principles of liberal democracy, negative liberty. The

[21] NSW Fair Trading, 'Making NSW No 1 Again: Shaping Future Communities: Strata and Community Title Law Reform Discussion Paper' (2012); 32-33; Esther Han and Natalie O'Brien**,** **"**Living on the edge in danger high-rises", September 30, 2012, *Sydney Morning Herald*, http://news.domain.com.au/domain/real-estate-news/living-on-the-edge-in-danger-highrises-20120929-26s6i.html, accessed 13 May, 2103. The problem is not restricted to strata properties, but includes many freestanding houses around Macquarie University as well.

classic exposition of negative liberty is found in John Stuart Mill's *On Liberty*, in which he said that,

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. [22]

We noted that while many have argued that negative liberty is insufficient for human flourishing, no one actually argues we should be *needlessly* interfered with by government or others.[23] The concept of negative liberty is fundamental to modern land law.[24] Today, it is axiomatic that our land-use will be regulated, but only so far as our activities have the potential to harm others, for example immediate neighbours or the wider community. As

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[22] John Stewart Mill, *On Liberty*, Chapter 1, Introductory, cited at http://www.bartleby.com/130/1.html. Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (Oxford University Press, 2002) 167. Rudden explores Hegel's philosophy in "Economic Theory v Property Law", above n **Error! Bookmark not defined.**, 250, concluding that "for Hegel, we are fully free only when our property is (relatively) free."

[23] See discussion of Martha C. Nussbaum, 'Deliberation and Insight: Bloch v Frischholz and the Chicago School of Judicial Behavior Essay' (2010) 77 *University of Chicago Law Review* 1139 in Singer Chapter.

[24] Phillip Booth argues that comprehensive public regulation of private land through planning law was not possible until an ideological justification for regulation was found: Philip Booth, *Planning by Consent: the Origins and Nature of British Developmental Control* (Routledge, 2003). While the Great Fire of London in 1666 had provided limited justification for regulation of building materials, building heights and street widths, it was 19th century medical discoveries about the spread of disease which ultimately provided the rationale for a comprehensive public planning system. European cities had been afflicted by cholera epidemics through the early19th century, and while the medical profession suspected that over-crowded housing and poor sanitation might be to blame, it was not until Dr John Snow's famous removal of the Broad Street pump handle that the water-borne nature of cholera was definitively proven: Howard Brody et al, 'Map-making and myth-making in Broad Street: the London cholera epidemic, 1854' (2000) 356 *The Lancet* 64. This led to a realisation that while a man's home might be his castle, if what he did on it could kill his neighbour, (for example by leeching sewage from a cesspit in the yard into the drinking water supply), he should be regulated in that regard.

noted at the beginning of the chapter, this regulation is usually public, enacted by local, state, and more rarely, Federal government.

Consequently, if we are not harming or affecting others in any meaningful way, there is a sphere of private property that remains free from the interference of government, neighbours, landlords and family. This is why ownership of land in a democratic community enables us "to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others".[25] Property secures the freedom to "live one's life on one's own terms".[26] While these principles are important for the land on which people work, in particular, run their own businesses, it is most obviously significant for the properties that are our homes.

As others have noted, Margaret Jane Radin's personhood theory of property is relevant in this context.[27] Radin argues that as people can be bound up with "things" in a constitutive and not necessarily negative or "fetishist" sense, those things that are closest to personhood should be accorded the greatest legal protection.[28] She argues that as a matter of morality, different rules must apply to different kinds of property. Not surprisingly, Radin identifies the home is a prime example of property which is inextricably bound up with a person's sense of themselves. Radin describes the home as the "moral nexus between liberty, privacy, and freedom of association."[29] She argues that,

> [i]t would be an insult for the state to invade one's home, because it is the scene of one's history and future, one's life and growth....one embodies or constitutes oneself there. The

[25] Joseph William Singer, *The edges of the field: lessons on the obligations of ownership* (Beacon Press, 2000), 27.

[26] Greogry S Alexander et al, 'Statement of Progressive Property' (2008) 94 *Cornell Law Review* 743, 743.

[27] Winokur, above n **Error! Bookmark not defined.**, discussed in Chapter 2.

[28] Margaret Jane Radin, 'Property and Personhood' (1981-1982) 34(5) *Stanford Law Review* 957, 986.

[29] Ibid, 991.

> home is affirmatively part of oneself – property for personhood- and not just the agreed-on locale for protection from outside interference.[30]

Radin argues that a personhood theory demonstrates why protecting people's expectations of continuing control over objects is so important. She says that if "an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your own personhood depends on the realization of these expectations."[31] If it is "an insult for the state to invade one's home", presumably, it is would be an equal insult for the "mini-state" of a strata scheme to do the same.

Consistent with a theory like Radin's, strata and community title legislation make some effort to differentiate between residential, commercial, industrial, tourist or retirement property, but those efforts are relatively ineffectual. This is because the differentiation only exists in the model by-laws,[32] which do not apply to community schemes at all, and are optional in strata schemes.[33] The provisions that are compulsory, namely those in the Acts, apply equally to all schemes. This includes the broad by-law making power, which is no different for a home than an industrial site. The paradox of placing "model" provisions in optional by-laws that can then be excluded, demonstrates a tendency by the legislature, (from which courts have taken their lead), to fall back on the concept of freedom of contract, despite the ultimate inappropriateness of freedom of contract in relation to land. This will be picked up again at the end of the following chapter in relation to optional by-laws and children's safety.

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[30] Ibid, 992.

[31] Ibid, 968.

[32] *Strata Schemes Management Regulation* 2010 (NSW)

[33] The flawed notion of making "model" by-laws optional, will be explored further below in relation to children's safety and well-being.

The core problem with the universally applicable by-law making power is that it violates the principle of negative liberty and the sanctity of the home by allowing the regulation of behaviour inside people's homes which does not affect others at all, or does not affect them in any meaningful way. The collective is allowed to control what property theorists would call "self-regarding", as opposed to "other regarding" acts.[34] Section 47 SSMA and s14 CLDA allow the creation of by-laws which relate to the "control, management, administration, use and enjoyment" of lots and common property without any requirement that the behaviour or acts being regulated affect others in some way.[35]

In high density schemes, there are activities or behaviour that people can engage in *inside* their own homes that will adversely affect others. The most obvious is the creation of noise, particularly persistent noise from the laying of inappropriate flooring. Most strata schemes, and the model by-laws, prohibit floor covering that is likely to disturb others, such as wooden floorboards without insulation.[36] This novel right of private citizens to regulate "other regarding" behaviour on private property amounts to "justificatory practice". It helps to "construct and reflect the ideal ways in which people interact in a given category of social contexts [a strata community]…… with respect to a given category of resources, [high density residential housing]"[37] In other words, the existence of rules against disturbing activity not only stops specific activity but helps to create a culture in which it is understood

[34] Singer, 'How property norms construct the externalities of ownership', above n **Error! Bookmark not defined.**.

[35] In Victoria, the by-law making power is limited a list of matters set out in the Act. This includes the behaviour of owners, occupiers and visitors, but only on common property. Rules can be made for noise and nuisance control, which could apply to individual lots, but obviously only if their use were affecting others: Owners Corporation Act 2006, s138 and schedule 1.

[36] "An owner of a lot must ensure that all floor space within the lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot", *SSM Reg* 2010, sched 2, cl 15.

[37] Dagan, 'Limited Autonomy', above n **Error! Bookmark not defined.**, 815.

that potentially disturbing activity is unacceptable to one's neighbours, (a significant gain in strata schemes in a country where people have been accustomed to living on quarter acre blocks).

Alternatively, it is possible that the power of the body corporate to regulate even other regarding behaviour inside lots is otiose because of the existence of s117(1)(a) SSMA. This section prohibits owners and occupiers from using their lots in any way that causes a nuisance or a hazard to others, (the only use of lots that should be the subject of regulation). It has been used to prevent tenants smoking in their apartment in circumstances in which the smoke was seeping into other lots.[38] Interestingly, even though there is case law clearly confirming the power of bodies corporate to write by-laws banning smoking,[39] these by-laws are rare, presumably because most owners, as citizens of a liberal democracy, baulk at violating the privacy of others' homes.[40]

Even if private by-laws prohibiting other-regarding behaviour are justifiable, those that prohibit self-regarding behaviour are not. The best example are by-laws that implement blanket restrictions on pets or pet restrictions based on size or weight.[41] If readers will

[38] *Owners Corporation SP 49822 v May & Ors* (Strata & Community Schemes) [2006] NSWCTTT 739

[39] *Salerno v Proprietors of Strata Plan No 42724*, (Unreported Judgment, Supreme Court of New South Wales, Windeyer J, 1 April 1997, 8 April 1997) (in which the Supreme Court upheld a by-law prohibiting smoking in a commercial strata scheme, irrespective of whether the by-law might reduce the pool of potential tenants.)

[40] I have also heard lot owners express the concern that a by-law banning smoking would reduce the value of apartments, demostrating a clear lay appreciation of the potential of by-laws to not be value-enhancing.

[41] The most recent model by-laws for residential schemes have three options for pets. Option C bans pets outright, option B requires body corporate consent for all animals, except cats, small dogs, caged birds and fish, and option A requires consent for all animals except fish: *SSM Reg*, sched 2, cl 17. Of course schemes do not have to use the model by-laws at all. Many schemes, particularly in Queensland where there has been considerably litigation, have extraordinarily detailed pet by-laws, eg the original by-law in *Pivotal Point Residential* [2008] QBCCMCmr 55 stated that,

excuse the pun, pets are not a petty issue. The freedom to keep a companion animal is central

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16.1 Subject to this By-Law and the provisions of the Act, a Lot Owner or occupier is not to bring or keep an animal on the lot or on the Common Property without the Body Corporate's written approval.
16.2 A Lot Owner of a Lot as at three (3) months following the date of establishment of the Scheme , or a Lot Owner, having purchased the Lot after the date of establishment of the Scheme, such Lot being owned by the original owner and not previously registered or owned by another owner may keep one (1) dog in the lot, so long as:

16.2.1 Not less than seven (7) days prior to bringing the dog into the Lot, the Lot Owner must:-

16.2.1.1 Provide to the satisfaction of the Body Corporate, evidence of past ownership of the dog, exceeding one (1) year prior to the earlier of the date of establishment of the Scheme or occupancy of their Lot;

16.2.1.2 Register with the Body Corporate, particulars of the dog, including name, sex, weight, description, breed and two coloured photographs, one showing the face, and one the side of the animal;

16.2.1.3 The dog be registered with the Gold Coast City Council and provide a copy of that registration to the Body Corporate, each year on renewal.

16.2.2 Is dry and free of sand, dirt or garden material;

16.2.3 Weighs less than ten (10) kilograms;

16.2.4 Does not disturb others;

16.2.5 Is a domesticated pet ;

16.2.6 Is toilet trained;

16.2.7 Only passes over or through the Common Property for the purposes of ingress and egress to a lot and at all times kept on a lead which is no more than 1 meter in length;

16.2.8 Is kept healthy and free of parasites;

16.2.9 Where a lot is owned by one or more owners, only one animal per Lot is permitted;

16.2.10 No owner or joint owner of more than one Lot in the Scheme is permitted to keep a second or subsequent animal in their second or subsequent Lot;

16.2.11 This By-Law is for the personal benefit of a owner as defined in By-Law 16.2 above and lapses immediately upon the death of the dog or upon the sale of the Lot.

16.3 The Body Corporate may order an animal to be removed from the Scheme if the animal does not comply with all of the criteria set out in this By-Law.

16.4 However, a deaf or blind person, shall be permitted to keep or bring into a lot or onto the Common Property, a guide dog, as referred to in the Guide Dogs Act 1971.

16.5 The owner indemnifies and shall keep indemnified the Body Corporate against any loss, damage, injury or claim whatsoever made against the Body Corporate regarding any act on the part of the dog.

to many people's lives and well being, and the inability to keep a pet is a source of significant distress and subsequent litigation in strata schemes.[42] In the leading US case on a condominium rule banning pets, Justice Arabian, (in dissent) said that,

> the value of pets in daily life is a matter of common knowledge and understanding as well as extensive documentation. People of all ages, but particularly the elderly and the young, enjoy their companionship. Those who suffer from serious disease or injury and are confined to their home or bed experience a therapeutic, even spiritual, benefit from their presence. Animals provide comfort at the death of a family member or dear friend, and for the lonely can offer a reason for living when life seems to have lost its meaning.....Not only have children and animals always been natural companions, children learn responsibility and discipline from pet ownership while developing an important sense of kindness and protection for animals. Single adults may find certain pets can afford a feeling of security. Families benefit from the experience of sharing that having a pet encourages. While pet ownership may not be a fundamental right as such, unquestionably it is an integral aspect of our daily existence, which cannot be lightly dismissed and should not suffer unwarranted intrusion into its circle of privacy. [43]

Even if we do not accept Justice Arabian's reasoning about the value of pets, if we are committed to the values of liberal democracy we must concede that our own view of pets is

[42] The following is a small section of the considerbale case law on pets, in particular on the power of a body corporate to grant permission to keep a pet: *Ms - Owner of lot 3 Strata Plan SP12963 v Owners corporation of Strata Plan No. SP12963* [1999] NSWSSB 40; *Corporation of Owners Strata Plan No. 31471 v Neave, Mrs M*. [1999] NSWSSB 43; *Paris, Arthur v The Owners Strata Plan 16973* [1998] NSWSSB 12; *Richardson v OC SP 56695* (Strata and Community Schemes) [2008] NSWCTTT 928; *Engelman v Owners Corporation* (Strata & Community Schemes) [2003] NSWCTTT 778; *Montagna v Owners Corporation* (Strata & Community Schemes) [2003] NSWCTTT 783; *Drexler v The Owners Corp SP 56117* (Strata and Community Schemes) [2012] NSWCTTT 338; The Owners of Strata Plan 56117 v Drexler [2013] NSWDC 67.

[43] *Nahrstedt v Lakeside Village Condominium Association, Inc*, 8 Cal 4th 361 (1994), 392-94.

irrelevant to the question of whether someone else is allowed to keep one. What others do in their own home is their business. The only way that it will become our business is if what they do disturbs us. So, if their dog barks continually, this is an other-regarding act that we can legitimately regulate, but if they have a goldfish, a cat that never leaves the house, or even a Labrador who lies comatose on the sofa all day, it is no concern of ours. As a tenant, keeping a pet would be a use of property that affects the landlord's reversion and could rightly be regulated in a lease, but it is not automatically a use of property that affects the apartment next door, or the common property in any meaningful way.

To illustrate the problem with the current power to ban all animals, let's just imagine that a local council banned all pets in residential areas on the grounds that as some pets are a nuisance, it is easier and more certain to ban all.[44] This decision would not be tolerated. In keeping with time-honoured liberal principles, people would argue that regulation of land-use is only justifiable to prevent harm to others, and must not sloppily scoop up harmless behaviour as well. Not surprisingly, current public animal regulation is consistent with liberal principles. I can exclude my neighbour's cat from my house, but I cannot legally exclude him or her from my yard unless the cat meets the description of a "nuisance" cat; one that makes "a noise that persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any other premises, or repeatedly damages anything outside the property on which it is ordinarily kept".[45] As a member of a community, I am expected to tolerate roaming cats. I do not have to tolerate my neighbour's dog repeatedly barking at 3 am,[46] but his cat sunning itself on my

[44] This was the argument accepted by the Adjudicator in *Beattie Place South* [2009] QBCCMCmr 27 to justify a blanket ban on pets. See also *Pivotal Point Residential* [2008] QBCCMCmr 55.

[45] *Companion Animals Act* 1998 (NSW), s31.

[46] For example, section 21(1)(b) of the *Companion Animals Act* 1998 (NSW).

lawn, and even less picturesque activities,[47] I am required to accept. The ludicrous nature of strata by-laws that permit blanket bans on pets is illustrated by the fact that a body corporate can ban an owner from keep a cat which never leaves the apartment, but can do nothing about neighbourhood felines using the common property garden to their heart's content.

Does it really matter that strata schemes are out of step with the wider community? Yes, very much so. First, if as Smith and Merrill assert, property cannot survive without a connection to basic morality, or what is widely believed to be "right", [48] strata schemes will be subject to on-going dispute about pets, as owners rail against prohibitions they consider unjustifiable. Extensive pet litigation suggests that this is already the case.[49] Property entitlements are meant to be compatible with our way of life. In a democracy, most people do not expect to be able to control what their neighbours do in the privacy of their own home and so a property right that allows people do to that, *without adequate justification,* must be called into question. In Queensland, where pet bans have been the subject of considerable recent litigation, adjudicators and tribunal members have been turning themselves in knots to find ways around blanket bans. Earlier cases had upheld blanket pet bans,[50] but gradually decision makers began to find that they were "unreasonable" and thus contrary to s180(7) *Body Corporate and Community Management Act* 1997 (Qld).[51] The most recent decision held that as a body corporate only had the power to "regulate" lots, a blanket ban was beyond

[47] Interestingly, a dog is defined as a "nuisance" if it repeatedly defecates on property outside that which it is ordinary kept, (s21(1)(c)), but a cat is not.

[48] Smith and Merrill, 'The Morality of Property', above n **Error! Bookmark not defined.**.

[49] See above n 42.

[50] *Beattie Place South* [2009] QBCCMCmr 27

[51] *Tutton v Body Corporate for Pivotal Point Residential CTS 33550* [2008] QCCTBCCM 12; *212 on Margaret* [2011] QBCCMCmr 400; *Central Park Apartments Varsity Central* [2011] QBCCMCmr 107; *Scholars Cover* [2011] QBCCMCmr 310.

power because "prohibition" was not "regulation".[52] Reading the cases it is obvious that the essence of all disputes is negative liberty and the discomfort both residents and decision makers have with the regulation of self-regarding behaviour. Numerous cases quote Tribunal Member, Mr K Dorney QC, in *Tutton , W. & B. v Body Corporate For Pivotal Point Residential CTS 33550,*[53] who said at [35] that,

> [s]ince there is clearly no rational basis upon which it can be said that the keeping of a gold fish in a safe and healthy environment could be a matter *which could cause any difficulty to any other lot owner,* yet is the subject of an "absolute" ban, the conclusion is fairly open that such a by-law is "unreasonable", [my emphasis].[54]

Secondly, regulation of self-regarding acts effects not just those who are being regulated, but those who are regulating. As noted above, by *not* regulating animals who do not affect others in any significant way, state legislation requires citizens to be tolerant. We must be tolerant of dogs who occasionally bark, who might occasionally defecate on our property or who might jump up excitedly on us on the footpath.[55] We must be tolerant of cats which yowl at night, roam across our yards and sleep or defecate in our gardens.[56] To be sure, some cranky

[52] *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47, per Kenneth Barlow SC, Member, [49].

[53] [2008] QCCTBCCM 12.

[54] It should be noted that in the strange world of strata title, keeping fish has been a cause for legitimate communal concern. A family in NSW had an above ground pool in their apartment which they were using to fatten trout for their restaurant: Alexandra Smith, "Sydney's strata surprises: saga of horse next door, the trout farm and 'Niagara Falls', 21 March, 2012, *Sydney Morning Herald*, http://www.smh.com.au/business/property/sydneys-strata-surprises-saga-of--horse-next-door-the-trout-farm-and-niagara-falls-20120320-1vi2l.html.

[55] A council officer can make an order in relation to a "nuisance dog". However, a dog will only be a nuisance if, amongst other things, it "makes a noise, by barking or otherwise, that *persistently* occurs or continues to such a degree or extent that it *unreasonably interferes* with the peace, comfort or convenience of any person in any other premises"; it "*repeatedly* defecates on property (other than a public place) outside the property on which it is ordinarily kept"; it "*repeatedly* runs at or chases any person, animal"; or it "*repeatedly* causes *substantial* damage to anything outside the property on which it is ordinarily kept" (my emphasis): *Companion Animals Act* 1998 (NSW), s21(1)(b) and (c).

[56] Above n 45.

citizens struggle with such tolerance, but they are the exception rather than the rule. The state legislation dovetails with a community norm of tolerance and strengthens that norm in turn.

In contrast, strata and community title runs the very real risk of fostering intolerance. In *Ephraim Island - Subsidiary 105,*[57] lot owners who supported the body corporate's rejection of the applicant's request to keep their dog said, "we most definitely would not have purchased if we had known there was the possibility of sharing the elevator with a large dog." The dog was a golden retriever. When those lot owners leave their Island scheme and venture out into the wider community, they will be required to share footpaths, parks and other public spaces with multiple dogs; if they go into other people's homes, they might even find themselves in close quarters with a Rottweiler. Within their own home they can maintain a dog-free zone, but on their shared property, is it really too much to ask that they occasionally share a lift with a golden retriever?[58] As Justice Arabian said in *Nahrstedt*,

> [o]ur true task in this turmoil is to strike a balance between the governing rights accorded a condominium association and the individual freedom of its members. To fulfill that function, a reviewing court must view with a skeptic's eye restrictions driven by fear, anxiety, or intolerance. In any community, we do not exist in vacuo. There are many annoyances which we tolerate because not to do so would be repressive and place the freedom of others at risk.[59]

Remembering our discussion of property theory in Chapter 1, this is not simply a matter of one intolerant couple. Property entitlements, multiplied thousands of times across a physical

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[57] [2007] QBCCMCmr 205.

[58] It is perhaps necessary to stress that this argument is not motivated by a personal love of dogs. I do not really like dogs much, but am aware that whether I like them is irrelevant to whether other people keep them, so long as they do not unreasonably disturb me.

[59] *Nahrstedt* 8 Cal 4th 361, 396 (1994).

landscape and through time create social and political systems. If thousands of bodies corporate have the power to prevent fellow citizens keeping pets within their own home in circumstances in which the pet has minimal or no effect on others, we are creating a community of control and intolerance. As Singer says,

> [a] change in legal rules will bring about changes in the character of social relations over time, regardless of whether any immediate effects are visible. This in turn will influence public perceptions about what kinds of conduct are allowable and appropriate and what kinds are not. It may even effect beliefs about right and wrong.[60]

McKenzie suggests in the US context, "[i]t is conceivable that children raised in CID housing may be undergoing a form of differential political socialization", in which they are learning that it is legitimate to regulate the traditionally autonomous acts of their neighbours.[61] The failure to limit by-law making power in relation to individual lots to activities that have some meaningful effect on others is a serious flaw in the NSW strata and community title legislation.

Problem 2: Borderline self-regarding acts

One of the most problematic areas of strata and community title are by-laws that regulate behaviour on private lots that is not readily classifiable as "self-regarding" or "other

[60] Singer, *Entitlement*, 136-137.

[61] McKenzie, Privatopia, above n **Error! Bookmark not defined.**, 143-144.

regarding". These include by-laws that regulate blind colour, balcony furniture, building materials,

plant types, paint colours, car parking, window washing and lawn mowing.[62] They are most common in community title developments, many of which are modeled on US HOAs, (see Figure 2).[63] In the US, by-laws and "C, C & Rs" operate as a "sort of privatized zoning smorgasbord",[64] from which developers can pick and mix restrictions and conditions to mould the character of the development.

The rationale for this regulation is generally overtly liberal and economic, although paradoxically, it can also be communitarian, (a good example of the horseshoe theory of the political spectrum). As we saw in the US literature chapter, theorists like Reichman[65] and Ellickson[66] argue that individuals should be free to create or join the kind of communities that they, not we, believe are desirable, and the law should support them in this regard. Public and rational choice theorists argue that communities with private associations and regulations allow developers to offer purchasers a range of housing "products", so that residents can "shop" between neighbourhoods choosing the housing and community style appropriate for them.[67] Further, unlike local government controls, private regulations are extremely detailed and ensure residents can maintain the environment they purchased, leading to increased

[62] For example, the Management Statement for Breakfast Point, DP270347, cl 59.2, requires owners or occupiers to mow their lawn every two weeks in spring and summer and every four weeks in autumn and winter.

[63] See Chapter 3,

[64] Paula Franzese, 'Does It Take a Village? Privatization, Paterns of Restrictiveness and the Demise of Community' (2002) 47 *Villanova Law Review* 553, 555.

[65] Chapter 2

[66] Chapter 2

[67] Charles M. Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64(5) *Journal of Political Economy* 416. Tiebout was not writing about HOAs but his theory has been take up by their prononents. See Fred Foldvary, 'Proprietary Communities and Homeowner Associations' in David T Beito, Peter Gordon and Alexander Tabarrok (eds), *The Voluntary City: Choice, Community, and Civil Society* (University of Michigan Press, 2002) 258.

resident satisfaction and property values.[68] Some argue that this ability to control the physical environment and run one's own community also increases social capital,[69] an asset that has been at the forefront of sociologists' and urban planners' minds in recent years.[70] Theories of privatization dovetail with developments in urban theory, like New Urbanism, a neo-traditional approach to architecture and planning which promotes human-scale, resident-driven communities in which people can walk or ride between home, work and public spaces.[71] New Urbanism aims to create ecologically and socially sustainable communities, by sacrificing individual space for collective space (eg small individual yards and large, accessible "public" facilities[72]). With its focus on community, New Urbanism, in turn, dovetails with communitarianism. Communitarianism is skeptical of liberals' focus on the individual and insists that as individuals can never function outside society, their needs and desires must sometimes be subservient to the greater good. Paradoxically, some communitarians, like liberals, have adopted the private community form to further their ends.[73] Proponents of intentional communities and co-operatives see private legal structures as a "form of socialism by contract",[74] which allows them to restrict membership of

[68] Robert H. Nelson, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press, 2005).

[69] David T Beito, Peter Gordon and Alexander Tabarrok, *The Voluntary City: Choice, Community, and Civil Society* (University of Michigan Press, 2002); Nelson, above n .

[70] Robert Putman, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000) is the seminal work in this area. After an exhaustive review of empirical research, Putman finally concludes that the decline in social capital in America is attributable to increased time spent commuting in cars. This would suggest that HOAs, which are frequently on the urban fringe, actually contribute to social capital decline.

[71] Andres Duany, Elizabeth Plater-Zyberk and Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (Farrar, Straus, and Giroux, 2000). Duany and Plater-Zyberk's iconic New Urbanist community is Seaside, Florida: http://www.seasidefl.com/.

[72] In HOAs, these "public" facilities are of course privately owned common property.

[73] Eg community title is used by developers selling properties on the open market and by intentional communities in Northern NSW; see above n **Error! Bookmark not defined.**.

[74] McKenzie, *Beyond Privatopia*, above n **Error! Bookmark not defined.**, 35.

communities to like-minded individuals, to create collective living spaces[75] and to regulate activities that the group might consider ecologically or socially undesirable.[76]

Figure 1 Seaside Florida, New Urbansist community. Source: http://taxi-destin.com/portfolio-view/seaside-florida/#gallery/12/

[75] I was explaining the broad by-law making power in New South Wales to a friend one day. I pointed out that *White v Betalli*, see Chapter 3, would allow the creation of a by-law giving all owners access one lot owner's kitchen. My friend exclaimed, "That's what we want to do in our community!" She lives in a co-housing arrangement in San Francisco. What seemed highly undesirable to me, was clearly desirable to her.

[76] See above n **Error! Bookmark not defined.**.

Figure 2 Breakfast Point, Sydney, Country Club. Source:

http://www.breakfastpoint.com/

Breakfast Point, a Rosecorp development, is clearly modeled on US HOAs.

In contrast to these positive perceptions of the ability to privately regulate an unlimited range of activities on land, others do not have such a benign view. Sociologists have argued that privately regulated communities, in particular gated communities, promote intolerance and fear, dividing society into the privileged few inside the gates and the undesirable hoards outside.[77] Legal critics discussed in Chapter 2, like McKenzie and Winokur, suggest that the ability to control other residents' behaviour does not create harmonious communities of shared values, but rather fosters resentment, frustration and litigation among residents who neither understand nor accept the legitimacy of regulation by their neighbours. The limited research that has been conducted in Australia to date reveals similar findings. In their case study of a Victorian community title master planned estate (MPE), Goodman and Douglas concluded that,

[77] Edward J. Blakely and Mary Gail Snyder, *Fortress America: gated communities in the United States* (Brookings Institution Press, 1997); Setha M. Low, *Behind the gates: life, security, and the pursuit of happiness in fortress America* (Routledge, 2003).

> the lived experience of communal ownership is one of frustration and disappointment for a section of residents.....[and] that due to the long-term ramifications such legal entities in MPEs [bodies corporate] should be avoided where possible.[78]

Winokur and McKenzkie also argue that C, C and Rs controlling aesthetics are responsible for the spread of dull, homogenous, low-rise sprawl, which is architecturally valueless. More fundamentally, McKenzie challenges rational choice theory arguing that it has little empirical evidence to support its claims that people genuinely want private regulation of their homes.[79] Finally, others like Alexander, have focused on the darker side of private regulation, with its potential to inappropriately control, oppress and exclude.[80]

The first group of thinkers, with a positive view of private regulation, might argue that a wide range of behaviour is other-regarding. They might say that the non-conforming colour of the neighbour's blinds reduces property values or their lack of solar power harms the environment and undermines the community's agreed ecological aims. As such, both are the subject of legitimate regulation. They would argue that purchasers have voluntarily joined the community, knowing the existing restrictions and obligations, as well as the potential for new restrictions and obligations, and that people who flout them are harming those who bought on the promise that others would comply. The second group of thinkers, with a more critical view of private regulation, might argue that in reality, a choice of blind colour or solar panels are self-regarding acts that do not affect others at all, or at least in any way that should be legally meaningful. As we saw in Chapter 1, Singer argues that property law does not

[78] Goodman and Douglas, above n **Error! Bookmark not defined.**, 467.

[79] McKenzie, *Beyond Privatopia*, above n **Error! Bookmark not defined.**, 52.

[80] Alexander, above n . See discussion in Chapter 2. See also Stephanie M Stern, 'The Dark Side of Town: The Social Capital Revolution in Residential Property ' *(Working Paper, Chicago-Kent College of Law, April 2013) http://ssrn.com/abstract=2243134 or http://dx.doi.org/10.2139/ssrn.2243134*

prevent us from *ever affecting* others in the exercise of our rights, it just prevents us from harming them.[81] Complaints that we are affected by another's use of property can be divided into the legitimate and illegitimate, the latter being traditionally ignored by property law. Deciding what is or is not a self-regarding act comes back to a considered judgment about the legitimate and reasonable expectations of the parties in democratic society. Thus, those skeptical of private regulation would argue that, consistent with the principles of democratic society, in particular negative liberty, the choice of blind colour or the use of solar panels is legally harmless behaviour that should not be the subject of any regulation.

The first group might then counter that the principle of negative liberty in fact gives everyone the freedom to form or join communities with rules; that is, we are all free to voluntarily agree to be less free.[82] As Mill said, a person "cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right".[83] If some people want to live in communities where they are required to mow their lawn every two weeks and can compel others to do the same, who are we to decide they should not?

As it has become clear, the validity of private regulation of borderline other-regarding behaviour can cause us to turn endlessly in circles. As the discussion of Alexander and Ellickson in Chapter 2 demonstrated, private regulation produces strange paradoxes such as liberals arguing for less individual freedom and communitarians warning of the dangers of community. This thesis will not attempt to solve these dilemmas or decide definitely in

[81] Joseph William Singer, 'How property norms construct the externalities of ownership' in Gregory Alexander and Eduardo Penalver (ed), *Property and Community* (OUP, 2010) 57. See discussion in Chapter 1, 28-29.

[82] Larry Alexander, 'Illiberalism All the Way Down: Illiberal Grops and Two Conceptions of Liberalism' (2001-2002) 12(2) *Journal of Contemporary Legal Issues* 625, 627.

[83] Above n 22.

favour of either camp; there is some validity in both perspectives. I accept the importance of people having the freedom to form their own associations and live by their own values, and I certainly do not want to be guilty of hypocritically supporting some private regulation (eg solar panels and recycled water), while dismissing others, (eg lawn mowing and white blinds).[84] The satisfaction of individual preference and the facilitation of the "freedom to live one's life on one's own terms" are the proper purpose of property law.[85]

However, consistent Alexander, Underkuffler, Penalver and Singer, I would also argue that they are not the only purpose of property law. Both in theory and in practice, property law is much more complex than the satisfaction of individual preference. As we saw in Chapter 1, property entitlements affect not just parties to a transaction, but those outside it as well. As Singer says,

> Every legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers.[86]

We must attend to the systemic effect of those rights,[87] and judge them not solely with reference to the "the magical moments of acquisition and transfer", (ie the voluntary creation or joining of a community), but by "the continuing moments in which property rights are exercised.[88] We can only do this through reasoned deliberation with reference to both the real world and the plural values of our democratic community. This process is of necessity

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[84] See Clayton P. Gillette, 'Courts, Covenants, and Communities' (1994) 61 *University of Chicago Law Review* 1375, discussed in Chapter 2, footnote 156.

[85] Alexander et al, "A Statement of Progressive Property", above n **Error! Bookmark not defined.**, 743.

[86] "Democratic Estates", above note **Error! Bookmark not defined.**, p1047.

[87] Democratic Estates", above note **Error! Bookmark not defined.**, pp1049-1050.

[88] *Entitlement*, above note **Error! Bookmark not defined.**, p174

messy and will not yield a neat, universally applicable rule, however, it is the only way that we can determine if property institutions and their regulations are "compatible with our form of life."[89]

By way of example, we might consider the validity of the following commonly made by-laws:

- a by-law that restricts external paint colours: this might be acceptable because the impact on the rest of the community is significant and there are comparable provisions in some public regulation (eg heritage areas); alternatively, we may decide that we do not want to create a community like the US, in which we end up with "a generation….. that doesn't know you should be able to paint your house any color you want."[90]

- a by-law limiting blind colours: this might be considered a considerable intrusion into the private sphere that produces limited benefit for the community. If "[i]t would be an insult for the state to invade one's home, because it is the scene of one's history and future, one's life and growth",[91] then it must be as great, or even greater insult for other citizens to do the same. Professor French's Bill of Rights for HOAs included the provision that activities within the individually owned property should not be restricted except to the extent they interfered with other people.[92] While the colour of blinds has some impact on

[89] "Democratic Estates", above note **Error! Bookmark not defined.**, p1050.

[90] Richard Louv, cited McKenzie, *Privatopia*, 144.

[91] Radin, above n, 992.

[92] Susan F. French, 'Constitution of a Private Residential Government Should Include a Bill of Rights, The Symposium on the Uniform Real Property Acts' (1992) 27 *Wake Forest Law Review* 345

others, it is hard to say that it genuinely interferes with them; it is not difficult to conclude that it interferes with the people regulated.

- A by-law prohibiting trucks or commercial vehicles being parked on or near lots:[93] we might decide that this by-law is essentially classist, something that most democratic societies aspire not to be. Property law "can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society."[94] A by-law that prevents a tradesperson parking their truck outside their house because it supposedly lowers the neighbours' property values, does not create "ennobling and liberating" relationships between neighbours, but rather tends towards the "exploitative and humiliating".

- A by-law requiring people to be dressed "appropriately" on common property:[95] regulating the way someone dresses is a very significant intrusion into the personal sphere. The democratic state rarely attempts to regulate dress other than prohibiting indecent exposure.[96] Private clubs and restaurants have dress codes and so by analogy, a dress code in community title country club might be

[93] The Architectural Standards and Landscape Design Guidelines, Item 17, Macquarie Links Management Statement, DP270152, states that "no trucks or commerical vehicles exceeding 3 tonnes are to be kept within a lot, on a roadway or any communal area". No trailers and caravans are to be kept unless garaged. This is to "ensure the visual character and amenity of the neighbourhood is not prejudiced by the presence of large vehicles."

[94] Alexander et al, above n **Error! Bookmark not defined.**, 744.

[95] For example, by-law 9.6 in the Community Management Statement (CMS) for Liberty Grove (DP270137), in Sydney's west, purports to make the *Liberty Grove Community Policies Handbook* binding on all proprietors in the same way as the CMS. It is likely that under s43(4) SSMA this by-law is invalid, being contrary to the SSMA and SSFDA requirement that by-laws be recorded on the Torrens register, however, the Handbook attempts to require people on community property to be dressed appropriately at all times: *Liberty Grove Community Policies Handbook*, p7, https://docs.google.com/viewer?a=v&pid=sites&srcid=bGliZXJ0eWdyb3ZlLm5ldC5hdXxob21lfGd4OjdjOThmYzhmYjgxZTljODg, accessed 8 February, 2013.

[96] *Crimes Act* 1900 (NSW), s393.

acceptable, but any dress code for the park or streets may not be so. We may say that no by-law should exist that creates the power for an estate manager to order a teenage girl from a common property park for wearing a short skirt. While it is not necessarily likely that such a power would be abused, the very existence of such a power is incompatible with liberal democracy.[97]

- A by-law banning all signs: while this by-law is generally aimed at minimizing visual clutter on streetscapes, if it bans political signs, it has free speech implications, [98] particularly if the private community is the size of an entire suburb, (eg The New Rouse Hill). We may decide that a private rule that limits political signs is unacceptable because it compromises the democratic process.

As noted above, this process of reasoned deliberation is of necessity messy. It does not yield consistent, predictable results, but if we accept that property entitlements create social relations, and we value the quality of those relations, then we must endure the messiness. It must be remembered that in contrast to the US *Hidden Harbor* rule of "reasonableness" applied on a case by case basis, the current NSW statutory rule, that a by-law simply relate to lots or common property, does not allow any of this deliberation, either by the community

[97] In fairness to private communities, I should note that the the Community Handbook for Harrington Grove includes a Code of Conduct that prohibits conduct that "vilifies any person on the grounds of race, religion, ethnicity, sex, sexual orientation or physical appearance": Community Handbook, Harrington Park, http://grovelife.com.au/images/uploads/communitydocuments/Community%20Handbook%20April%202012.pdf., accessed 17 June, 2013.

[98] The free speech implications of sign bans has been the subject of litigation in the United States in *Committee for a Better Twin Rivers v Twin Rivers Homeowners' Association*, 890 A.2d 947 (N.J.Super.Ct.App.Div. 2006), *rev'd*, 929 A.2d 1060 (N.J.2007). The Court of Appeal decided in favour of the HOA on the grounds that it was a private entity and not subject to the constitutional limits of state actors. See Chapter 2, n 201. At Breakfast Point in Sydney, the approval of the Executive Committee must be obtained before any sign, banner or poster is put up, but this rule is limited to marketing or advertising signs which, depending on one's interpretation of "advertising", may not include political posters: Community Management Statement, DP 270347, cl 60.1. At Macquarie Links, under by-law 9, approval of the "Planning Committee" is needed to put up signs. The "Planning Committee" is made up of three members of the Executive Committee and nominees of the hotel and golf course owners, Management Statement, DP270152.

creating the by-law or by a court or tribunal reviewing it. While this might seem easy, avoiding the messy questions raised above, in reality it does not. Those questions are still there, (should we be able to determine the colour of our neighbours' blinds or how they dress?), but they have been given a blanket affirmative answer without any engagement with the content of the questions or the consequences of the answers. There is no opportunity for the kind of dialogue between the state and private groups which is possible in US adjudication, and which rightly Alexander insists is "a civic obligation [of groups] to maintain community within our society."[99]

As with economically undesirable by-laws, NSW needs an express legislative provision allowing higher courts to invalidate socially and politically undesirable by-laws. Such a provision would require by-laws to be judged with reference to a reasonableness standard, informed by the values of a plural democracy. This would not only allow individual lot owners to challenge specific by-laws, such as a by-law that prohibits a tradesman parking his truck outside his home, it would clarify that it is the proper role of courts to adjudicate on these privately created rules. It would establish that it is never appropriate for NSW citizens to have an almost unfettered quasi-legislative power in relation to land, but that the by-law making power is always subject to robust judicial review. An express legislative provision would engender a culture in which courts, developers, lot owners and bodies corporate engage in a dialogue about the social and political legitimacy of particular by-law entitlements. This dialogue would of necessity occur between developers and their lawyers at the point of writing initial by-laws, between members of a body corporate at the point of creating new by-laws, and in courts at the point a lot owner challenged a by-law. NSW should also have a default rule that by-laws cannot regulate activity inside lots unless the

[99] Alexander, 'Dilemmas of Group Autonomy', above n **Error! Bookmark not defined.**, 60.

activity has a meaningful and harmful effect on others. This default rule would be consistent with the most basic principles of liberal democracy.

Before moving to the next chapter two important points must be made. First, it is possible that in New South Wales, many attempts to regulate borderline self-regarding/other-regarding acts are potentially invalid. Many management statements provide that architectural or design guidelines, or behavioural rules that exist elsewhere, (in a "Community Handbook" or in the heads of the people on the Executive Committee or a "planning committee"), bind owners.[100] This is done because amendments of management statements and by-laws must be registered, costing time and money. Amendments of other documents do not need to be registered, and it is assumed that if a provision of a management statement states that owners are bound by the other document, this is effective. This is arguably not the case. Management statements and by-laws, as well as their amendments,[101] must be registered so that prospective purchasers can inform themselves of the restrictions and obligations on title. It is arguable that any attempt to bind people with rules that were not available on the publicly accessible Torrens register is contrary to both the SSMA and the CLMA requirements of registration. Further, under the Torrens system, owners are only bound by interests on the register, and thus any provision of a management statement or by-laws that states otherwise would be invalid as a result of inconsistency with the s42 *Real Property Act* 1900 (NSW).

[100] Eg Breakfast Point Management Statement, DP270347, cl 7; Fairwater Gardens Management Statement, DP270551, cl 4; Liberty Grove Management Statement DP270137, by-law 9.16.

[101] Amended strata by-laws must be registered within two years of making, (which seems far too long): SSMA, s48(2), while community management statement amendments must be registered within two months: CLMA, s14(5).

Legal technicality aside, most people have plans for their home the realisation of which is deeply personal. As Radin says in relation homes,

> [if] an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your own personhood depends on the realization of these expectations.[102]

Not being able to alter one's home as a result of rules that you have never read, either because they are not on the publicly accessible register or because they are largely discretionary and simply exist in a group of neighbours' heads,[103] is a sure recipe for resentment and dispute. In the US context, Professor French noted that, "[d]reams of homeownership can turn sour for people whose building or landscaping plans are not approved and for people who learn too late that they will not be permitted to put up political signs, for sale signs, or holiday decorations."[104] She recommended a Bill of Rights for HOAs that included a prohibition on regulation of activity within privately owned lots unless it harmed others or created "unsightly conditions" visible to the outside. Further, as Reporter for the Restatement, French included strict limits on implied design controls, echoing the judiciary's concern with the capacity of discretionary design controls to result in arbitrary and discriminatory exercise of power.[105] There is no reason to assume that unpredictable regulation would cause any less resentment and dispute in NSW than in the US.

Secondly, in addition to engaging with the question of what *kinds* of regulation we should accept in private communities, we should engage with a preliminary question of whether we

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[102] Radin, above n 28, 968.

[103] Eg the Architectural Standards and Landscape Design Guidelines for Macquarie Links, DP270152, are actually in the registered management, however, in relation to house paint colours, Item 10, the Standards simply say, "To be submitted with plans for approval". There is no prior notification of what colours might be approved.

[104] French, 'Constitution of a Private Residential Government', above n 92, 349.

[105] *Restatement*, above n **Error! Bookmark not defined.**, § 6.9.

should have private regulation at all. The private regulation of a strata scheme in a high rise building is both necessary and inevitable, but private regulation in a low rise subdivision is not. These developments could be done as ordinary residential subdivisions, with public, not private regulation. Consistent with the reasoning of McKenzie, I would argue that we must guard against inadvertently creating swathes of private communities for reasons that have nothing to do with the individual "consumers" wanting to live in private communities. There is a real risk that, like the United States, community title developments will spring up in response to other forces like increased land prices, policies of urban consolidation, real estate marketing, underfunded local councils, and an ideological shift towards privatization. As noted at the beginning of the preceding chapter, a shift in favour of privatization can be seen in the NSW government's White Paper *A New Planning System for New South Wales*.[106] In relation to residential development, this will mean community title in which roads, sewers, street lights, parks and even transport are privately built and owned in perpetuity. As this thesis hopefully demonstrates, the legislation and its implications are extremely complicated, and not unreasonably, many players involved in development, (eg the state government, local council, urban planners, architects, and developers), have a limited understanding of the legislation and appreciation of the complexity they are creating. Experienced lawyers certainly do, but they are often left with no choice but to structure a development with community title legislation because of the conditions of development consent, which may require the provision of private open space, facilities, and increasingly, "green utilities".[107]

[106] Department of Planning, 'A New Planning System for New South Wales: White Paper' (2013), 27.

[107] In discussions I have had with practising lawyers over the past five years, I have heard many descriptions of councils refusing to accept dedications of open space as public parks. While council officers may not be familiar with all of the detail of the legislation, they appreciate the potential for community title developments to minimise council costs. Barangaroo, the largest development site in Sydney CBD, is a good example of a development that will have extraordinarily expensive and complicated green utilities as a result of state governement conditions of development consent. It is leasehold land and will be a stratum subdivision under the *Conveyancing Act* 1919 (NSW), Part 23, Division 3B, with owneship of green utilities shared between commercial and residential owners: "Barangaroo: Inside a Deal", presentation by King, Wood and Mallesons, at the 8th Annual ACCAL Conference, Sydney, 21 March, 2003.

Most importantly, the limited research to date demonstrates that in Australia, like the US, many purchasers have limited or no understanding of the legal framework for their communities[108] and cannot be said to have actively "chosen" private regulation. This will be even more so if community title dominates new greenfields developments on the urban fringe, leaving purchasers no alternative. In these circumstances, as McKenzie argues in relation to the US, it is fanciful to use theories like rational or public choice, or even communitarianism to retrospectively attempt to justify the existence private regulation. Ideally, with a better understanding of community title,[109] its development will be in response to an informed demand for private communities, and not in response to a range of other extraneous factors.

[108] Goodman and Douglas, above n **Error! Bookmark not defined.**. A large survey of NSW owners and executive committees revealed that owners rated their own understanding of the legislation well, but not their fellow owners'; executive committees did not rate other owners' understanding well; and when asked whether the legislation was adequate in relation to management of schemes, half of all respondents said they did not know. The authors noted that, "[g]iven that those people who undertook the survey were likely a more engaged group than strata owners generally, the fact that half were not aware of the legislation to the extent that they felt they could answer this question is significant": Easthope, Judd and Randolph, 'Governing the Compact City", 48.

[109] A good example of education about community title can be found on the Bingara Gorge development's webiste. Bingara Gorge is in the south west growth sector of Sydney and will house 3,5000 people. There is country and leisure club, as well as 115 ha of bushland. The web site has a page explaining community title. It could more clearly state that the facilities are available to residents because they own them, but it at least includes links to Land and Property Information's web pages on community title: "Living in Bingara Gorge: Community Scheme", http://www.bingaragorge.com.au/Living-in-Bingara-Gorge/Community-Scheme.aspx, accessed 17 May, 2013.

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