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Harvey Rishikof

Alexander Wohl

PRIVATE COMMUNITIES OR PUBLIC GOVERNMENTS: "THE STATE WILL MAKE THE CALL"

BY HARVEY RISHIKOF*
AND
ALEXANDER WOHL**

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* Administrative Assistant to the Chief Justice, Supreme Court of the United States. McGill University (B.A. 1975); Brandeis University (M.A. 1978); New York University School of Law (J.D. 1986).

** Judicial Fellow, Supreme Court of the United States (1995-96). Brandeis University (B.A. 1983); American University, Washington College of Law (J.D. 1990).

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"Good fences make good neighbors."

Justice Antonin Scalia[1]

"Before I built a wall I'd ask to know
What I was walling in or walling out."

Justice Steven Breyer[2]

One of the most prominent issues in economic as well as political and legal discussion today is "privatization," a term used generally to describe efforts to transform traditional governmental functions into privately owned and operated businesses.[3] While this debate has taken place under increasing scrutiny, another type of privatization, one occurring within the nation's residential communities, has been less studied. This has transpired even though it has been causing dramatic changes in our society for nearly thirty years. This transformation has helped to modify the character of our communities, alter the dynamics of our political system, and challenge legal constitutional analyses at both the federal and state levels.

Increasingly, state courts will have to confront this development because it involves not only federal, but state and local concerns: local citizens fulfilling their political role; state legislatures and state courts interpreting state constitutions and statutes; and federal courts interpreting federal constitutional provisions as well as state issues under diversity jurisdiction. This Article will explore the phenomenon and dynamics of this movement, some of the social, legal, and constitutional questions posed by these private communities and offer three dominant legal approaches. This Article will pay special attention to state courts interpreting state constitutions, a development once referred to as "the

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1. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1463 (1995).

2. *Id.* at 1466 (Breyer, J., concurring) (quoting Robert Frost, *Mending Wall, in* THE NEW OXFORD BOOK OF AMERICAN VERSE 395-96 (Richard Ellmann ed., 1976)).

3. *See, e.g., Hearing Before the Senate Committee on Energy and Natural Resources concerning the privatization of the U.S. Enrichment Corporation*, 104th Cong., 1st Sess. 1 (1995); JOHN DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS (1989); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT - HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992); Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 45 (Advisory Commission on Intergovernmental Relations ed., 1989); Robert A. Rosenblatt, *Ex-chief of Social Security Calls for Privatizing Fund*, L.A. TIMES, Aug. 15, 1995, at A13. *But see* Agis Salpukas, *The Rebellion in Pole City*, N.Y. TIMES, Oct. 10, 1995, at D1 (discussing minor countertrend toward municipalization of services).

New Judicial Federalism,"[4] but what today could more properly be characterized as "The Third Century" of the State Courts in American law.[5]

Sections I and II of this Article outline and discuss the background and basic structure of these communities. Section III provides a framework for the discussion of the legal issues involved, specifically the nature of the relationship between cities and citizens, and the distinctions between what is considered "private" or "public." Section IV covers the legal precedent in this area and outlines three possible interpretations: a purely private contractual approach; a public "state action" analysis; or a fact-based determination requiring the application of a balancing test.

We then examine each of these approaches in terms of some existing analogies, the company town and the shopping mall, in order to draw relevant distinctions. These cases serve as a particularly valuable model because federal precedent has undergone significant changes in modern times. Central to this change is the development of the shopping mall in our society and its role as a privately owned entity where large numbers of people may publicly congregate. The Supreme Court originally equated the company town model with the privately owned shopping mall; it then restricted the holding and finally acknowledged the view that state courts could interpret their own state constitutions more expansively than the federal Constitution in this arena.

Because of the potentially expanding role that state courts may play in this developing area of the law, the final Section offers a closer look at some of the current legal analysis of several states that have addressed this issue: a fact-based determination that reaches competing conclusions; a state constitutional-based determination; and a holding that applies the federal standard.

I. INTRODUCTION

The United States was founded in part on the idea of a tension between the prerogatives of the government (federal, state, and local) and the rights of private individuals. Private markets, though, have always had an important

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4. *See, e.g.*, Ronald K.L. Collins, *Foreward: The New Judicial Federalism and Its Critics, Symposium on State Constitutional Law*, 64 WASH. L. REV. 5 (1989); *Symposium on the Revolution in State Constitution Law*, 13 VT. L. REV. 11 (1988); *Symposium on State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (1988). *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Alexander Wohl, *New Life For Old Liberties – The Massachusetts Declaration of Rights: A State Constitutional Law Case Study*, 25 NEW ENG. L. REV. 177 (1990).

5. THE STATE COURTS IN AMERICAN LAW: THE THIRD CENTURY (B. Schwartz ed., 1976). The title comes from California Supreme Court Justice Stanley Mosk.

effect on the public sector[6] because of the belief that entire communities, privately organized, created, built, and run, would function more profitably and pleasantly than publicly organized and run cities and towns.[7]

From the few progressive and utopian communities of the late nineteenth century, to the early suburbanite developments at the beginning of the twentieth century, to the growing popularization of organized community development in the middle of this century,[8] experiments in urban planning and building private communities have existed in some form, albeit generally as a small percentage of cities or towns.[9] Homeowner's associations, for instance, have a long history in this country and abroad.[10] More recently, particularly in the last thirty years, amidst the fear of spiralling crime and the dual developments of urban decay and urban gentrification, Americans have turned increasingly to the security and style of life offered by private communities, neighborhoods, and living associations.[11]

These communities have been classified variously over the years as "new towns,"[12] "new communities,"[13] "edge cities,"[14] "condominium

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6. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 7 (1994). *See also* Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 262-63 (1976).

7. This idea finds significant support in the Progressive movement and efforts to remove politics from the management of cities. *See* RICHARD HOFSTADTER, THE PROGRESSIVE MOVEMENT, 1900-1915 (1963); ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962).

8. MCKENZIE, *supra* note 6, at 9; Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 95, 97 (Advisory Commission on Intergovernmental Relations ed., 1989).

9. Weiss & Watts, *supra* note 8, at 97.

10. Reichman, *supra* note 6, at 257.

11. Timothy Egan, *Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at A1; Nelson, *supra* note 3, at 97-102. *See also* Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16. Another movement, known as the "New Urbanism," has concentrated on bringing affluent homeowners back to formerly abandoned and now rebuilt inner city neighborhoods. These neighborhoods offer planned, pleasant, and diverse communities that ensure that housing, jobs, and daily needs are within walking distance of each other and mass transit. *See* PETER KATZ, THE NEW URBANISM - TOWARD AN ARCHITECTURE OF COMMUNITY (1994); Stefan Fatsis, *Cities Remodel to Lure Upscale Buyers*, WALL ST. J., Dec. 8, 1995, at B10; *Paved Paradise*, NEWSWEEK, May 15, 1995, at 42.

12. *See, e.g.*, 'NEW TOWNS' WHY - AND FOR WHOM? (Harvey S. Perloff & Neil C. Sandberg eds., 1973); Albert A. Foer, *Democracy in the New Towns: The Limits of Private Government*, 36 U. CHI. L. REV. 379 (1963).

13. *See generally* Foer, *supra* note 12.

14. JOEL GARREAU, EDGE CITY - LIFE ON THE NEW FRONTIER (1991).

associations,"[15] "planned communities,"[16] "common interest developments (CIDs),"[17] "planned unit developments (PUDs),"[18] "cohousing,"[19] "gated communities,"[20] and "walled cities or communities."[21] Even though they may have different legal structures, purposes, and types of residents, these communities nonetheless share a number of underlying characteristics.

At their core, these associations provide a complete living package and the simplicity and convenience that comes with private control or ownership. They offer residents common emotional, psychological, social, and financial advantages,[22] such as enhanced property values, long-term security,[23] and the broader aesthetic goal of developing and maintaining open space with clean, attractive living areas.[24]

On a more elementary level, these associations help assure residents that basic local needs and community services such as sewage, garbage, plumbing, and road care are fulfilled.[25] Established rules regarding the use of common

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15. Brian L. Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPP. L. REV. 297 (1986).

16. MCKENZIE, *supra* note 6, at 3.

17. *See* Carol J. Barton & Stephen E. Silverman, *The Political Life of Mandatory Homeowners Associations*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 31, 32 (Advisory Commission on Intergovernmental Relations ed., 1989); Dennis R. Judd, *The Rise of the New Walled Cities*, *in* SPATIAL PRACTICES 144, 155 (Helen Liggett & David C. Perry eds., 1995).

18. RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9 (Advisory Commission on Intergovernmental Relations ed., 1989) [hereinafter RESIDENTIAL COMMUNITY ASSOCIATIONS].

19. Stefan Fatsis, *'Cohousing' Mixes 60's Ideals, 90's Realities*, WALL ST. J., Feb. 16, 1996, at B8.

20. Egan, *supra* note 11, at 22.

21. Judd, *supra* note 17, at 144.

22. *See* A. Dan Tarlock, *Residential Community Associations and Land Use Controls*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 75 (Advisory Commission on Intergovernmental Relations ed., 1989).

23. *See* Nelson, *supra* note 3, at 47; Weiss & Watts, *supra* note 8, at 96-97 (citing the example of the Levittown developments of the late 1940s as not only mass-produced affordable housing, but "an attractive investment for young families precisely because of the planning, construction, and long-term maintenance of a complete community."); MCKENZIE, *supra* note 6, at 128-29; *see also* Richard Briffault, *Our Localism II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 372 (1990).

24. Weiss & Watts, *supra* note 8, at 95.

25. *Id.* The association provides to its members essential services such as garbage collection and security through its work as "a vehicle for individual unit owners to work together" and its function "as a quasi-governmental entity." Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 917-18 (1976). These qualities are not necessarily restricted to private communities. One landmark work observed in detail an individual anonymous town, culling

areas, as well as restrictions on what the residents are allowed to display or include in their individual homes,[26] provide conformity that many find comforting, particularly in terms of the legal "mechanism [to] effectively enforc[e] and adapt[] [these] deed restrictions over the long term."[27]

But perhaps the most important reason for the dramatic growth of these planned and protected communities today are the controls and barriers that these communities can offer their residents: an answer to the growing sense of vulnerability and insecurity that many increasingly feel.[28] These associations, as one commentator noted, are comparable to the "walled cities of the medieval world, constructed to keep the hordes at bay."[29]

It is no surprise then, that millions of Americans have in recent years been attracted to this style of living. One recent report indicates that about twenty-eight million people, or over one tenth of our population, now live in private community associations.[30] This number includes both condominiums and cooperatives and is expected to double within ten years.[31] Another study suggests that in 1992 there were as many as 150,000 homeowner associations privately governing an estimated thirty-two million Americans.[32] By the next century, these common interest developments in one form or another may become the primary organization of new home ownership in most metropolitan areas.[33]

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specific observations about its residents, work habits, family lives, governmental activities, education, religion, and general community interaction, and found many of the same qualities that residents of private communities today seek. *See generally* ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN (1956).

26. Hyatt & Rhoads, *supra* note 25, at 918-19.

27. Weiss & Watts, *supra* note 8, at 95.

28. *See* Egan, *supra* note 11, at A1; Reich, *supra* note 11, at 16.

29. Judd, *supra* note 17, at 160. One observer has criticized these developments as "communalistic, even cultlike," developments that "often emphasize security measures to a chilling degree." MCKENZIE, *supra* note 6, at 141. The author cited one study which noted that 92 percent of the home buyers in a private senior citizens community rated security as "very important," and described the development as one "surrounded by 'six-foot block walls topped with two-foot-high bands of barbed wire,'" and "more than three hundred private security officers patrol[ling] the grounds." *Id.*

30. *See* Egan, *supra* note 11, at A1 (citing a Community Associations Institute study). The article distinguishes between this number and the smaller total of four million individuals who live in "closed-off, gated communities." *Id.*

31. *Id.*

32. MCKENZIE, *supra* note 6, at 11. The number of homeowner associations has also risen dramatically, from fewer than 500 in 1964; to 10,000 in 1970; to 20,000 in 1975; to 55,000 in 1980; and 130,000 in 1990. *Id.*

33. Judd, *supra* note 17, at 155.

This dramatic change in the dynamics of community living presents the possibility not only of physically reshaping neighborhoods and towns, but also restructuring systems of community and interpersonal interaction, legal rights, and personal responsibilities. At best, these communities may seem like idyllic living locales, which serve to "enhanc[e] the sense of neighborhood identity and community."[34] These efforts to achieve utopia, however, may also support communities which spur the development of an "us versus them" mentality—keeping distance (and walls) between those who are perceived as either economically, socially, or racially different.[35]

The purpose of this Article is not to address the voluminous history of intra-community conflicts:[36] the legal battles based on the frequent regulations that govern the residents of the communities, which themselves have generated significant legislation[37] and litigation[38] among members of the communities

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34. Nelson, *supra* note 3, at 50.

35. *See* Egan, *supra* note 11, at A1. *See also* MCKENZIE, *supra* note 6, at 22 (noting that this privatization "carries with it the possibility that those affluent enough to live in CIDs will become increasingly segregated from the rest of society."); Judd, *supra* note 17, at 155 ("[I]t is clear that CIDs [common interest developments] did become the means of continuing the housing industry's and the federal government's decades-old policies that segregated residential areas by income, social class, and race."); Reich, *supra* note 11 (discussing the secession from society of the "fortunate fifth"); Malcom Gladwell, *Symbol of Suburban Death*, WASH. POST, Feb. 6, 1996, at A1 (discussing the case of a suburban New York mall that banned public bus service "from the inner-city, minority neighborhoods of nearby Buffalo" until a protest following the death of a young woman who was killed after being forced to cross a street outside mall property). *But see* David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 767 n.34 (1995) (explaining "that even poor minority communities may have residential associations" in order to have protections from crime).

36. *See, e.g.*, N.R. Kleinfield, *In Flat Market, Co-op Life Has Steep Ups and Downs*, N.Y. TIMES, Oct. 30, 1995, at A1 (describing a number of regulations for co-op residents, including "poorly dressed guests must ride service elevator," "residents cannot sit in lobby chairs when dressed in flippers," and "no wok cooking," each of which can lead to intra-co-op disputes.)

37. *See* Tarlock, *supra* note 22, at 75-76 ("As internal conflicts have become more widespread, state legislatures have intervened in the name of consumer protections. State legislation governs issues such as RCA [Residential Community Association] and member tort liability, association self-dealing, and the required disclosure of the RCA structure and powers."). *See also* Judd, *supra* note 17, at 158.

> Residents' associations have a tendency toward autocratic rule making, all the more so because they are not required to observe rights of self-expression, free association, and free speech. . . . One study of 600 home owners associations found that more than 44% of the boards had been threatened with lawsuits in a year's time.

Id.

38. *See, e.g.*, Weakland, *supra* note 15, at 301, 310-26 (noting the case of the "litigation-plagued" status of the Village Green condominium project in Los Angeles and discussing a number of intra-development cases involving constitutional analysis); Judd, *supra* note 17, at 158 (discussing the frequent legal battles on issues including "the mounting of a basketball hoop, the picking up of dog droppings, untrimmed bushes blocking ocean views, for-sale notices, and flying of the American flag.") (citations omitted). *See also* Robert C. Ellickson, *Cities and Homeowners Associations*, 130

and the boards. Instead, this Article explores the relations of these bodies to the essential rights of citizens who live beyond the boundaries of these communities and have neither consented to their rules, nor received their benefits.[39] It does so through an examination of the current state of constitutional analyses in this field, in both the federal sphere and the more fluid arena of state jurisprudence. It also places this analysis within the context of some of the relevant current legal, sociological, and economic research that has been conducted in this area.

To date, the number of documented infringements of rights of non-resident citizens are minimal. Potential questions include: the right of non-residents to travel the roads freely;[40] the extent of constitutional protections for criminal suspects as a result of communities' private police forces that may stop, search, or simply detain individuals who are perceived as threatening to the private community;[41] the conflict between the rights of listeners versus protesters;[42] and even the potential impairment to the right of exercise of religious freedom in situations in which a place of historical religious significance is affected by the actions of a private development or developer.[43]

U. PA. L. REV. 1519, 1526-63 (1982); Hyatt & Rhoads, *supra* note 25; Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472 (1985).

39. *See* Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1, 2-6 (1984).

40. *See, e.g.*, Citizens Against Gated Enclaves v. Whitley Heights Civic Assoc., 28 Cal. Rptr. 2d 451 (Cal. Ct. App. 1994) (denying city the power to limit public access to streets in private communities, arguing that the public has a fundamental right to access to streets regardless of their location).

41. *See* WAYNE R. LEFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 151-53 (1984) (discussing the exclusionary rule and "private" searches).

42. *See* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding city ordinance banning picketing "before or about" any residence but rejecting the suggestion that the streets, simply because of their residential character, are not a public forum); Boos v. Barry, 485 U.S. 312 (1988) (holding that a Washington D.C. statute prohibiting picketing in front of embassies violated the First Amendment because it was a content-based restriction); Carey v. Brown, 447 U.S. 455 (1980) (holding unconstitutional under the Equal Protection Clause of the Fourteenth Amendment an Illinois statute prohibiting picketing of residences or dwellings but exempting peaceful picketing of a place of employment involved in a labor dispute).

43. *See* Lyng v. Northwest Indian Cemetery Protection Assoc., 485 U.S. 439 (1988) (holding that government was not prevented from building a roadway on government owned lands even when that roadway passes through areas deemed by Native Americans to be sacred religious sites); Christopher Kincade, *Indians Seek to Acquire Dobbs Ferry Dig Site*, N.Y. TIMES, Dec. 10, 1995, at C21. *But see* United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993) (holding that federal law criminalizing the taking of Indian relics from ancient burial sites applies to private as well as government property); West Hill Baptist Church v. Abbate, 261 N.E.2d 196 (Ohio 1969) (striking down covenants as unenforceable under the doctrine that judicial enforcement of covenant constitutes state action).

II. THE STRUCTURE OF PRIVATE COMMUNITIES

Although any list of how private living arrangements are codified demonstrates the broad variety of specific classifications, most of the arrangements can be categorized broadly under the technical term of *Residential Community Associations* (RCAs), mandatory membership organizations that usually involve one of three types of residential ownership: condominiums, homeowners' associations, and cooperatives.[44] An important distinction in terms of community dynamics also exists between the single building association and the territorial association, which involves more than one building on a site and can include "common open spaces, recreational facilities, streets, and facilities for other services provided by the association."[45]

In a condominium association, the resident, in addition to owning his own living space, is a common owner, in common interest, of all other areas in the association territory, not including the individual units.[46] In this situation, the RCA owns no property but is responsible for the maintenance and regulation of the common areas, which often include common hallways, parking lots, garages, lobbies, and even the exteriors of buildings.[47] The condominium form of ownership is "a creature of state statutes," and associations are generally afforded expansive powers.[48]

A member in a homeowners' association owns an entire individual home and the lot on which it sits.[49] The RCA is responsible for the management of common properties of the neighborhood such as roads, open areas, and recreational facilities.[50] However, unlike the condominium arrangement, it is the homeowners' association, not the residents collectively, that owns the common areas and the association itself is subject to taxation on the property.[51]

In a cooperative residential association, members do not own actual property, but buy into a corporation that manages all buildings, facilities, and common properties.[52] Cooperatives are less common and comprise only about one to two percent of all RCAs.[53]

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44. RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 3.
45. *Id.*
46. *Id.* at 10.
47. *Id.*
48. Weakland, *supra* note 15, at 299.
49. RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 10.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 4, 11.

The legal and contractual power that developers use to realize their vision of a community, as well as to ensure continued maintenance of that vision, is through *conditions, covenants and restrictions* ("CC&Rs"), agreements between the individual buyers and sellers of the lots.[54] Written by developers and normally subject only to modification by a super-majority of all members, the CC&Rs are in essence permanent[55] and offer developers a great deal of power to create a lifestyle within a development. They also confer upon the association the ability to impose behavioral standards on visitors of the residents as well as the residents themselves.[56]

Through the establishment of an RCA and its board of directors, developers are also able to assure prospective home buyers that an entity will vigorously enforce the CC&Rs after all of the property has been sold or leased and the developer has moved on. The directors are typically elected from unit owners whose votes are apportioned on the basis of property holding.[57] Typical CC&Rs provide that the board of directors has the authority to make rules and to establish penalties for violations.[58]

The development of the RCA also has a foundation in consumer protection law, since it helps to ensure that there will be a commitment on the part of planned communities to create open spaces, as well as recreational and other facilities that guarantee quality of life as well as increased investment value.[59] Additionally, because these new facilities, which may include parks, roads, ponds, or swimming pools, may not be under the control of the local or city government, public standards of construction do not necessarily have to be met. The RCA can fulfill the role of inspector of these facilities, a particularly important function in today's world of frequent litigation for tortious injuries.[60]

Beyond their regulatory and administrative functions, RCAs allow developers to offer a multitude of services that historically were the

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54. Weiss & Watts, *supra* note 8, at 97; MCKENZIE, *supra* note 6, at 127-28 (noting that these regulations give a developer "the power to create a distinct lifestyle in a development, which the developer can use as a powerful marketing tool.").

55. MCKENZIE, *supra* note 6, at 127.

56. *Id.* at 129.

57. Weiss & Watts, *supra* note 8, at 96. Most RCAs are governed by a board of directors elected from the unit owners whose votes are apportioned on the basis of property holding. In homeowners' associations, each unit or lot usually has one vote regardless of the number of residents in the unit. In condominium associations, votes are often apportioned on the basis of the size of the individual unit, with larger units receiving greater weight. *Id.*

58. Hyatt & Rhoads, *supra* note 25, at 919. The association usually enforces these rules through fines and uses a relatively informal judicial process. MCKENZIE, *supra* note 6, at 129.

59. RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 9-10.

60. *Id.*

responsibility of municipal governments. These commonly include utility services, street maintenance, lighting, and trash removal. RCAs also allow developers to offer extra amenities, such as tennis courts and clubhouses. Perhaps most importantly, the RCA is the vehicle through which the developer can maintain such services and facilities after the subdivision is completed, an example of the long-lasting nature of the regulations of the association, the modern equivalent of a covenant that runs with the land.[61]

Upon purchase, the new homeowner's consent to the covenants and other regulations contained in the CC&Rs, as well as the reasonable exercise of the association's enforcement powers, is implied.[62] Though covenants have their basis in the pre-constitutional property restrictions of equitable servitude,[63] over the years the Supreme Court and individual state courts have interpreted and set some constitutional limits for some covenants by these "private" associations. The leading precedent in this field is *Shelley v. Kraemer*,[64] in which the Supreme Court refused to enforce a racially restrictive covenant on a piece of private property that was for sale. The Court held that even though the transaction was between two private parties, state action existed because a court was asked to enforce the deed restriction.[65] The holding of *Shelley*, as it relates to the relationship between state action and the constitutionality of restrictive covenants, has been followed and expanded at both the federal and state level,[66] but some courts have demonstrated that there are clear limits to this analysis.[67] Not surprisingly, *Shelley* and its progeny continue to generate

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61. *Id.*

62. Weakland, *supra* note 15, at 299-300.

63. MCKENZIE, *supra* note 6, at 147-48; Reichman, *supra* note 6, at 279-80.

64. 334 U.S. 1 (1948).

65. *Id.* at 20. The covenant stated in pertinent part:

> [T]he said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date . . . that hereafter no part of said property or any portion thereof shall be . . . occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian race.

Id. at 4-5.

66. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (following *Shelley* and holding that petitioners' request of a state court for sanctions against party who breached covenant constituted state action); West Hill Baptist Church v. Abbate, 261 N.E.2d 196 (Ohio Ct. C.P. 1969) (applying *Shelley* to religious issues).

67. *See* Franklin v. Spadafora, 447 N.E.2d 1244 (Mass. 1983) (holding that a development's condominium bylaw amendment limiting the number of deeds each individual could possess did not violate any rights of due process and equal protection because the bylaw did not impinge on any fundamental rights and hence did not require state action); Shaver v. Hunter, 626 S.W.2d 574 (Tex. 1971) (rejecting plaintiff's request that it strike down defendants' restrictive covenant limiting the residents to single family housing on the basis that it undermined current federal legislation

significant conflicting legal analysis.[68]

III. A FRAMEWORK FOR ANALYSIS

It seems appropriate, when examining a creature of the modern state such as private communities, to scrutinize precisely what we mean by the term "community." One authoritative source includes in its definition the following: "a body of individuals organized into a unit or manifesting usually with awareness some unifying trait" and "the people living in a particular place or region and usually linked by common interest."[69]

It seems clear, and not particularly surprising in light of the nature of these communities, that whatever the definitional source, the terminology invariably will include words and concepts such as "interaction," "association," and "shared experience." The idea of interaction in our work and our living environments has been essential to human development. Residential gatherings traditionally have been "free-flowing networks of human relationships centered in home and family."[70] Throughout history, societies have thrived on

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promoting de-institutionalization of the disabled and dismissing argument that disabled individuals merited special consideration, therefore eliminating issue of state action). In Welsh v. Goswick, 181 Cal. Rptr. 703 (Cal. Ct. App. 1982), a California appellate court did not reach the constitutional issue concerning whether the operation of a nursing home for six elderly people violated a planned development covenant requiring property be used for "single family residential purposes only." *Id.* at 705. But in a concurring opinion, one justice, citing *Shelley*, concluded that the covenant violated the residents' right to privacy under the California Constitution. *Id.* at 710. (Staniforth, J., concurring).

68. *See, e.g.*, Francis A. Allen, *Remembering* Shelley v. Kraemer: *Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 710-12 (1989); Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 787 (1989); Clyde W. Summers, *Commentary*, 67 WASH. U. L.Q. 799 (1989); Mark V. Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

69. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1986). *See also* Reich, *supra* note 11, at 6 (discussing the "idea of community" and its special attraction for Americans). The notion that a community could serve as the archetype for civil society has roots in Puritan thought. In the New World, the Puritans did not merely wish to settle, they wanted to root in its soil their vision of a holy commonwealth. *See* DAVID HAWKE, THE COLONIAL EXPERIENCE 132-54 (1966). Professor Hawke points to the leader of the Massachusetts' Bay Company, John Winthrop, who stated his vision of "a city upon a hill," where "the eyes of all people are upon us." *Id.* at 133.

Dissenters to the dogmatic tenets of Puritanism were similarly inclined to see the community not simply as a place of dwelling, but as part of a grand experiment. *Id.* at 142. To leave the fold of the Bay Company and to create a new settlement was a political statement. *Id.* Towns became worlds unto themselves, which created an ad hoc, decentralized pattern of governance. *Id.* at 149. Prominent Puritan dissenter Thomas Hooker, who created Cambridge, Massachusetts as a response to the arbitrary system of government instituted by the colonies' leaders, had a vision of a commonwealth founded in "the free consent of the people (who) set the bounds and limitations of . . . power." *Id.* at 148-50.

70. Judd, *supra* note 17, at 145.

unhindered association, voluntary interchange, and the strength of public marketplaces and gathering points that bring communities together to talk, barter, and trade.[71]

The United States, in particular, has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[72] and that our streets and other public areas are equally sacrosanct from government proscription. Justice Owen Roberts once noted: "[w]here ever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[73] Today's private communities and the rules they operate under may challenge this traditional commitment to individual rights and open space embedded in our legal tradition.[74] While those who become part of these communities do so willingly,[75] there are many who live outside of these communities who have not, either contractually or otherwise, agreed to these restrictions, yet may have their rights impaired. An equally important impact of these private communities is the reduction and gradual elimination of traditional public areas of uninhibited exchange. "[O]ur current society has become so adept at creating and fetishizing those things which are private," at the expense of "the public realm . . . that shared space in society which brings people to gather together, to relate to one another, and/or to be separate."[76]

This movement away from traditional, dynamic city structures and gathering places involving shared streets and common areas has not gone entirely unnoticed or uncriticized.[77] Critics include not only lawyers and policy makers, but also city designers and architects. Their view is based on both the

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71. *See id.* at 144-45.

72. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

73. Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

74. *See, e.g.*, Park Redlands Covenant Control Comm. v. Simon, 226 Cal. Rptr. 199 (Cal. Ct. App. 1986) (striking down restriction on occupancy of a homeowners' association under state action doctrine because agents of the state facilitated the restrictions); Franklin v. Spadafora, 447 N.E.2d 1244 (Mass. 1983) (upholding on non-constitutional grounds a condominium bylaw restricting the number of units a single individual could own).

75. See Ellickson, *supra* note 38, at 1526-30.

76. Elizabeth Moule & Stefanos Polyzoides, *The Street, the Block and the Building*, *in* THE NEW URBANISM - TOWARD AN ARCHITECTURE OF COMMUNITY at xxi (Peter Katz ed., 1994). As another critic suggested, we run the grave risk of creating a segment of our population that is little more than a "privatopia, in which the dominant ideology is privatism; where contract law is the supreme authority; where property rights and property values are the focus of community life; and where homogeneity, exclusiveness, and exclusion are the foundation of social organization." MCKENZIE, *supra* note 6, at 177.

77. *See, e.g.*, STREETS, CRITICAL PERSPECTIVES ON PUBLIC SPACE 5-6 (Zeynep Celik & Diane Favro eds., 1994); Jerry Adler, *Bye Bye Suburban Dream*, NEWSWEEK, May 15, 1995, at 40.

aesthetic and the practical:

> Our basic public space, the street, is given over to the car and its accommodation, while our private world becomes more and more isolated behind garage doors and walled compounds. Our public space lacks identity and is largely anonymous, while our private space strains toward a narcissistic autonomy. Our communities are zoned black and white, private or public, my space or nobody's.[78]

The privatization of our world is even beginning to reach into our daily interpersonal communications. With the onset of the modern information age and the rapidly expanding use of technologies such as the internet, the number of individuals who operate from the privacy of their computer terminals behind the walls of their offices or in their homes secreted behind the walls of their private communities is growing.[79]

This conflict between public and private power is at the heart of "state action analysis," but it also plays an important and related role in the legal inquiry in several other areas of the law. In contract law, for instance, there is the principle of third party beneficiary: the idea that a party not privy to a contractual agreement, including city governments, can be the beneficiary of that agreement and have a source of protection in that interest.[80] This concept may have direct implications for private residential communities, particularly as it relates to conflicts over beachfront access between titleholders to land abutting the coast and the public, who traditionally have enjoyed the recreational value

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78. PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS 23 (1993). Another commentator offered the following description of the development of private communities:

> In the suburbs of Los Angeles, the urban future can already be read into the landscape; vast, sprawling clusters of gated communities are connected to one another and to fortress buildings, enclosed malls, and sports stadiums by a web of freeways and interchanges. Urban dwellers learn to negotiate the labyrinth of walls like rats in a maze.

Judd, *supra* note 17, at 162.

79. *See* Robert Cervero, *Why Go Anywhere?*, SCI. AM., Sept. 1995, at 118. (discussing self-contained towns built without the need for vehicles and due in part to advances in telecommunications); Don Lee, *Home Court Advantage—More Female Lawyers in O.C. Go Part Time By Telecommuting*, L.A. TIMES, Dec. 29, 1995, at D1; Timothy L. O'Brien, *The Home War: On-Line Banking Has Bankers Fretting PCs May Replace Branches*, WALL ST. J., Oct. 25, 1995, at A1 (discussing increasing use of computer banking from home); Bart Ziegler, *On-Line Shops· Lots to See, Little to Buy*, WALL ST. J., Dec. 20, 1995, at B1 (describing increasing use of internet shopping).

80. BLACK'S LAW DICTIONARY 1480 (6th ed. 1990). *See* United States v. Capps, 348 U.S. 296 (1955); United States v. United Serv. Auto. Assoc., 431 F.2d 735 (5th Cir. 1970); Town of Moriah v. Cole-Layer-Trumble Co., 606 N.Y.S.2d 822 (N.Y. App. Div. 1994); Town of Islip v. S. Zara & Sons Contracting, 615 N.Y.S.2d 428 (N.Y. App. Div. 1994); Town of Babylon v. Lizza Indus., 593 N.Y.S.2d 1001 (N.Y. App. Div. 1993).

of the shore. Similarly, legal questions involving the Takings Clause, easements, and property reserved for the public trust have implications for the relationship between private property and the rights and interests of public citizens.[81] At the very least, changes in our social and community structure such as the increasing privatization of our communities call upon us to begin to address the underlying concept of cities and communities and their relationships to the individuals within them.

A. Cities and Citizens

One of the dynamics built into the unique federalist structure of our nation is the tension among national power, state power, city jurisdiction, and the individual. This is particularly true for city residents, who are under the authority of each of these governmental entities. How residents cope with and adapt to these pressures, and how local autonomy and the development of private associations or governments contribute to this adjustment is the source of much debate and several schools of thought, including "private contract," "public-spirited," and "pragmatic".

Some theorists believe that constitutional and statutory law applied to cities works to protect the rights of individual citizens from the heavy hand of the local government and to limit the power of cities.[82] At the same time, these state-created and state-empowered domains can be especially responsive to the concerns of local residents, helping them to represent and defend the values of home and family,[83] and offering individuals the opportunity to control their own lives.[84]

A general theory of increased local autonomy and political participation in local government, framed in terms of the benefits to the individual citizen,[85]

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81. The Takings Clause states in pertinent part: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. *See, e.g.*, Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (holding that publicly mandated easement for fishing, fowling, and navigation did not include public recreational use and was a regulatory taking).

82. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062-67 (1980).

83. *See* Briffault, *supra* note 23, at 382, 389. Professor Briffault cites the Supreme Court's decision in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), as evidence of the interpretation of the local government as "an extension of the home, not an arm of the state, a defender of the family rather than an oppressor of individual liberty." *Id.* at 383.

84. *See* GERALD E. FRUG, LOCAL GOVERNMENT LAW 538 (2d ed. 1994).

85. Frug, *supra* note 82, at 1067-70. Professor Frug lists Hannah Arendt's concept of "'public freedom'—the ability to participate actively in the basic societal decisions that affect one's life" as an important part of any local society. *Id.*

has its basis in the traditional democratic Greek city-state.[86] At the core of this ethos is the understanding that responsible local decision-making requires small communities in which individuals are knowledgeable of, involved in, and committed to the issues about which they are making decisions.[87] It is this theory upon which local private communities, acting as private governments and standing as a private alternative to the city, are in part founded, created as a vehicle for shared responsibilities, decentralized power, a common good, the reinforced sense of community, and a defense against the crises facing our society today.[88] "Like a city, an association enables households that have clustered their activities in a territorially defined area to enforce rules of conduct, to provide 'public goods' (such as open space), and to pursue other common goals they could not achieve without some form of potentially coercive central authority."[89]

Certainly, Alexis de Toqueville would appreciate this approach. Although few discussions of American government or community structure occur today without at least symbolic reference to Toqueville's monumental work *Democracy in America*,[90] this reference and application is particularly compelling when discussing private communities and associations. One of Toqueville's central themes concerns the principle of association, and his belief that nowhere else in the world has it "been more successfully used, or more unsparingly applied to a multitude of different objects, than in America."[91] Among the powers identified by Toqueville in the association were those uniting electoral bodies, "constitut[ing] a separate nation in the midst of the nation, a government within the Government."[92]

But there is no consensus of opinion that local cohesion or participation helps transform local governments into beneficial utopias, nor is there unequivocal evidence of a significant connection between the size of government and increased participation of the populace.[93] In fact, critics suggest quite the opposite, "the vision of common-unit developments as laboratories of small-scale

86. *See* Briffault, *supra* note 23, at 395.

87. *See* Frug, *supra* note 82, at 1069. *See also* Briffault, *supra* note 23, at 396 (discussing other political science and economic theories on the relation of size to political participation).

88. *See* Ellickson, *supra* note 38, at 1519-20.

89. *Id.*

90. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Reeve Translation 1900). For an example of the use of this powerful work, see Nelson, *supra* note 3, at 47.

91. TOCQUEVILLE, *supra* note 90, at 191.

92. *Id.* at 192-93. *See also* Robert D. Putnam, *Bowling Alone*, 6 J. DEMOCRACY 65 (1995), in which the author suggests that community involvement helps strengthen democracy by encouraging people to talk to one another.

93. Briffault, *supra* note 23, at 401-35; Reichman, *supra* note 6, at 263-64.

democracy and civil participation . . . distorts social reality."[94] In this view, cities "can be and have been, formed by the voluntary association of their citizens, while the original constitution of a homeowners association might well be the work of a developer without the participation of a single person who becomes a resident of the community."[95]

Ultimately, any conclusions that are drawn with regard to the individual decisions of the community concerning the residents requires further investigation into the motivation behind the establishment of the community and the nature of the social relations that binds these communities together, whether it is shared values, convenience, or something else entirely.[96] This leads, however, to the broader question: what really makes a community private? Or in other words, what allows individuals to withdraw from the broader local or national society, particularly when that withdrawal may affect the rights of others who are not part of their "community?"

B. Public and Private

The issue undergirding any discussion of "private" communities, both legally and conceptually, is the meaning of the concept of "private." At what point does the community become public enough so that it should be held accountable for its actions as would any public official or governmental entity?[97] By any standard, these associations clearly strain the distinction between public and private.[98] The challenge comes in determining where the

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94. Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community* 75 CORNELL L. REV. 1, 46 (1989).

95. Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1589 (1982). *See also* Alexander, *supra* note 94, at 56 (noting that even if the words governing the association are meaningful and literal in what they aim to define, they may be shortsighted in that they fail to differentiate the many possible reasons for association). *See also* Reichman, *supra* note 6, at 255 ("A home buyer cannot possibly know in advance what regulations he will face in the future.").

96. Alexander, *supra* note 94, at 41-42.

97. The protections enumerated in the Bill of Rights apply to citizens of the states through the Fourteenth Amendment's Due Process clause, and require a finding of state action. *See* Weakland, *supra* note 15, at 320. *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

98. Tarlock, *supra* note 22, at 76. The Advisory Commission on Intergovernmental Relations explained:

> Clearly, RCAs cannot be regarded as local governments in the same sense as a municipality, nor can they be regarded as full-fledged partners in the intergovernmental system. Nevertheless, for the purpose of understanding the place and role of RCAs in local governance, as well as the costs and benefits of RCAs for both citizens and governments, an intergovernmental perspective on RCAs is more useful than a traditional corporate or neighborhood association perspective.

RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 13.

line should be drawn. As our discussion illustrates, different theories emphasize different characteristics to support classifications of public and private.

Perhaps the best way to begin to analyze private residential communities or associations is to appreciate their inherent dual nature: that they are "private communities within public communities."[99] As one commentator has noted, "the words *public* and *private* may seem distinct enough—and they are used in popular and political discourse as if they were—but they are not."[100]

1. The "Public" Argument

The Advisory Commission on Intergovernmental Relations (ACIR) Report on Residential Community Associations notes that RCAs "exist simultaneously within and outside of the governmental system."[101] But the report continues that "because RCAs are communities of people that perform public functions, they are necessarily actors in interlocal intergovernmental relations."[102] By regulating the use of property, owning and maintaining common property, and providing traditionally public services, the RCAs are, or closely resemble, quasi-governmental entities paralleling in almost every case the powers, duties, and responsibilities of a municipal government. "As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community."[103] Moreover, the RCAs' functions are financed through assessments, much like taxes, levied upon members of the community, with power vested in the board of directors or another body analogous to the governing body of a municipality.[104] The articles of incorporation, bylaws, and other rules and regulations are executed in the same way as are the laws of public governments.[105] These boards have sanctioning power and can impose fines or restrict common facility use privileges, which also represents a quasi-governmental power directly affecting individual property rights.[106]

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99. Tarlock, *supra* note 22, at 75. There is a long history of private associations as "governments within a government." *See* MCKENZIE, *supra* note 6, at 123 (citing the writings of Thomas Hobbes and others).

100. *Id.* at 123-24.

101. RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 13.

102. *Id.*

103. Hyatt & Rhoads, *supra* note 25, at 918 (citations omitted).

104. *Id.*

105. MCKENZIE, *supra* note 6, at 127.

106. Hyatt & Rhoads, *supra* note 25, at 919.

In many ways, local governments are both partners that encourage RCAs as well as beneficiaries of their activities.[107] For example, cities have an interest in helping RCAs to remain financially solvent and well managed so that they do not dissolve and shift their responsibilities to the local city government.[108] This type of "interconnected relation" has led some to go so far as to suggest that homeowners' associations are privately owned and operated "shadow governments" that "can rigidly control immense residential areas."[109] Under this view, virtually any action taken by the community would constitute governmental or state action. Others have described the relationship between the association and the local government as an interdependent one that "transforms its basic nature from private to public."[110]

Community associations and developments have been equated with private governments because of their similarity with large corporate structures.[111] Some of the scholars who advocate this theory have suggested a checklist to help determine whether a corporation, and by analogy a residential association, is a private government, and therefore required to honor constitutional protection for individuals interacting with those communities.[112] One model outlines five elements which, if present in some combination, would indicate that the association is a private government: "(1) an authoritative allocation of principal functions; (2) a symbolic system for the ratification of collective decisions; (3) an operating system of command; (4) a system of rewards and punishments; and (5) institutions for the enforcement of the common rules."[113] Many of these characteristics are represented in the private residential association through the governing documents, the election of board members, and the ability to enforce CC&Rs.[114]

As additional support for the proposition that associations act as private governments, it has been noted that the board of directors:

[E]xhibit, to a significant extent, certain fundamental political

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107. There is an additional quasi-governmental power exerted by residential associations in the form of political pressure and influence on local governments, as well as specific "interlocal agreements" between residential associations and local governments. Nelson, *supra* note 3, at 10.

108. *See* RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 5.

109. GARREAU, *supra* note 14, at 187.

110. Kennedy, *supra* note 35, at 778.

111. *See* MCKENZIE, *supra* note 6, at 133; Weakland, *supra* note 15, at 302-07 (discussing in particular the potential quasi-governmental nature of condominiums). The Supreme Court in Trenton v. New Jersey, 262 U.S. 182, 189 (1923), defined a municipal corporation as a political subdivision of the state.

112. MCKENZIE, *supra* note 6, at 133-36.

113. *Id.* at 133 (citation omitted).

114. *Id.* at 133-34.

> characteristics. In ways circumscribed by the ultimate coercive sanctions of public governments, private governments exercise power over both members and non-members, often in vital areas of individuals and social concern. They make and apply rules affecting and limiting the behavior of members. Often they have well-developed systems of legislation, adjudications and execution, and at least rudimentary electoral and federal systems. In organizational form, they run the gamut from authoritarian to populist.[115]

Another persuasive source for the view that associations are private governments is the evidence culled from historical studies of the early literature that was generated by proponents of common interest developments and homeowners associations. Such studies and commentaries demonstrate that these pioneers in the field understood that "they were creating residential private governments."[116]

2. The Private Approach

While not disputing the largely public aspects or "governmental" features of homeowner associations, some observers still reach the conclusion that "these entities are nevertheless of a 'private' nature," because they are "based on private initiative, private money, private property and private law concepts."[117] "The mandatory homeowners' association in a common interest development is a privately owned political entity—a private government," but one that needs government support and regulation to function successfully.[118]

Furthermore, under this view, RCAs "are private organizations governed by real estate contract law and are not bound by some of the rules of conduct which, of necessity, bind public organizations."[119] In short, this interpretation relies on the traditions of private contracts and property law in which landowners have dominion to their property.

3. The Middle Approach

There are clearly both public and private features to residential associations. Even many who support the conclusion that homeowners organizations should be viewed as private, rather than "public" cities, find numerous features that the

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115. *Id.* at 134-35 (citation omitted).

116. *Id.* at 136 (citation omitted).

117. Reichman, *supra* note 6, at 255-56.

118. Barton & Silverman, *supra* note 17, at 31. The authors caution against using these associations to carry out traditional public functions. *Id.*

119. RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 18, at 1.

two share,[120] including control of territory, providing security and facilities, determining how homes are physically transfigured and how people conduct themselves, property assessments that are virtually identical to taxes, and governmental qualities of their boards of directors.[121] This "mixed bag" leads some theorists, either explicitly or implicitly, to characterize these governments as neither fully public nor private, but of an "intermediate" status.[122]

Because RCAs have characteristics of both private and public organizations, the middle approach may be yet another area of the law in which a "balancing test" could become the chosen method of adjudication.[123] While there are many similarities between residential associations and municipal governments, "these similarities are not, in themselves, sufficient to constitute state action," but rather depend on the presence of a number of different factors.[124]

One possible interpretation of this "intermediate" view is to distinguish between the intra-community and inter-community effects. To this end, while it may be argued that "the legal devices employed to bind homeowners to the observance of the necessary rules are private law devices,"[125] this would not be so for those outsiders who may have some need to interact with a member or representative of the community from outside.

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120. Ellickson, *supra* note 38, at 1520.

121. *Id.* at 1522-25.

122. *Id.* Professor Ellickson quotes Professor Frank Michelman's one sentence suggestion to help calculate whether a community is public or private:

> We know perfectly well, granting that there are intermediate hard cases, how to distinguish governmental from non-governmental *powers* and *forms of organization*: governments are distinguished by their acknowledged, lawful authority—not dependent on property ownership—to coerce a territorially defined and imperfectly voluntary membership by acts of regulation, taxation, and condemnation, the exercise of which authority is determined by majoritarian and representative procedures.

Id. at 1521-22 (quoting Frank I. Michelman, *States' Rights and States' Role: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167 (1977)). While Ellickson realizes that this interpretation is not definitive, and that it actually helps to identify or point to many "public" indicia of private organizations, it also leads him to the conclusion that there is only one essential quality to create a public organization, which itself is a source of explanation for the different treatment of public and private organizations—the presence of involuntary members in public organizations versus the wholly voluntary membership in a private organization. *Id.* at 1523.

123. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585 (1988). The balancing test "directs a judge to eschew the application of formal rules in deciding a case, and instead to balance the competing interests of the litigants (or the competing interests of society more generally), and to give judgment for the side with the weightier interests." *Id.* at 586. The author offers an examination of the broad range of legal areas in which the balancing test is used, providing examples from several states. *Id.* at 606-11.

124. Rosenberry, *supra* note 39, at 22-25.

125. Reichman, *supra* note 6, at 255.

Several commentators have suggested a multi-tiered process of review, which recognizes the limitations of defining such associations as strictly private or strictly public.[126] One theory suggests applying different standards of review based specifically on whether the challenge is from a resident or a non-resident.[127] Others have suggested a multi-tiered test based not on membership in the association, but on: a) the reasonableness of the action, b) the extent of the involvement of the State, and c) whether the association exceeded its powers granted by the state, or d) takes on additional governmental roles.[128] In virtually every case, however, the ultimate question seems to be factually based, with state action being applied when "the facts warrant such a finding."[129] Each result will be fact driven, a conclusion that has important implications for legal analysis at both the federal and state levels.

IV. THE LEGAL PRECEDENT

Whether residential associations and their accompanying CC&Rs are created as an alternative to local government and thus assume many of the functions normally associated with local government begs the question of whether RCA policies and board of directors' actions constitute "state action." If such policies and actions do constitute state action, then the question becomes what consequence will varying constitutional standards have on a party's cause of action. What follows is first, a general outline of the federal precedent with special attention to two analogies that are particularly pertinent: cases involving company towns and shopping centers.[130] Second, is a brief look at how several individual states have interpreted their state constitutions on the question of state action.

The early 1980s set the stage in both federal and state courts in this area of the law. In this period, the Supreme Court handed down several important rulings that outlined how and whether the state action determination would be

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126. *See* Weakland, *supra* note 15, at 329-31; Ellickson, *supra* note 38, at 1520-23; Kennedy, *supra* note 35, at 789-93.

127. Kennedy, *supra* note 35, at 782. The author suggests that with respect to claims by non-members, the associations should be treated as state actors, assuming the facts warrant such a finding, and with respect to claims made by members, so long as prior consent was given to the restrictions or rules in question, a "reasonableness" test would apply. *Id.* at 782-83.

128. Weakland, *supra* note 15, at 330.

129. Kennedy, *supra* note 35, at 782.

130. Federal constitutional interpretation in this area, discussed below, has seen little change in recent years. Developments in this field are coming more in the state arena as state courts interpret their state constitutions more broadly than comparable federal provisions. Section V of this article, which summarizes a number of recent state decisions, offers a taste of the developments in this area.

applied,[131] and whether the "company town" analysis or its modern analogy, the shopping center, would be used for determining what factors establish the parameters of the public/private distinction.[132] These holdings, and more specifically the divided nature of the Court in addressing this question, illustrate the struggle that has taken place. The debate points to the significant challenges facing all courts interpreting these rulings and applying state constitutional provisions.

A. The Federal Constitutional Analysis

In 1982, in *Lugar v. Edmonson Oil Company*,[133] the Supreme Court set forth a two part test for determining if the deprivation of a federal right may be fairly attributed to the state.

> First, the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor [either] because he is a state official, or because he has acted together with or has obtained significant aid from state officials, because his conduct is otherwise chargeable to the state.[134]

Over time, the determination of whether state action exists has fallen under two distinct forms of analyses: the symbiotic relationship theory and the public function/company town theory.[135]

1. The Symbiotic Relationship Test

The symbiotic relationship test predated the analysis of *Lugar*. The Supreme Court identified a symbiotic relationship between a private party and the state in the 1961 decision in *Burton v. Wilmington Parking Authority*.[136] In *Burton*, the Court held that a restaurant located in a publicly owned and operated automobile parking building which refused to serve a black patron was a state actor because the restaurant's leasing of the property "constituted a

131. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).
132. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
133. 457 U.S. 922 (1982).
134. *Id.* at 937.
135. *See, e.g.*, Brock v. Watergate Mobile Home Park Assoc., 502 So. 2d 1380, 1381 (Fla. 1984). *See also* Rosenberry, *supra* note 39, at 11-25; Lino S. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777 (1989) (critiquing the state action doctrine and "judicial activism").
136. 365 U.S. 715 (1961).

physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit . . . . [Their] peculiar relationship . . . confers on each an incidental variety of mutual benefits."[137] Though the test is somewhat vague, it is clear that the level of involvement requires more than simply state regulation of the private party.[138]

Whether a residential association should be considered a state actor must be based on the specific facts of the case, no matter which analysis prevails: purely private, purely public, or intermediate. In general, however, under the symbiotic relationship analysis, the greater burden would seem to be on the association to prove that it is not a state actor. This could be either, as an initial step, a demonstration that the state was not involved *per se* in the association's creation, or that the specific actions, location or regulations of the association did not interfere with a non-resident's constitutional rights. For example, it would be up to the association to demonstrate why its control of a public street takes precedence over the free speech rights of an individual trying to picket a resident of the private development from one of those streets. Interdependence seems to arise when the private entity makes an unconstitutional choice and relies upon the state to effectuate that choice.[139] This approach may lead to the implementation of a balancing test.[140]

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137. *Id.* at 723-24.

138. *See, e.g.*, Rendell Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yartesky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

139. Tulsa Professional Collection Serv. Inc. v. Pope, 485 U.S. 478 (1988). *See* Kennedy, *supra* note 35 at 787.

140. The balancing test, which has been applied in a variety of legal areas, has attracted both supporters and critics. *See, e.g.*, Vincent Luizzi, *Balancing of Interests in Courts*, 20 JURIMETRICS J. 373 (1980); McFadden, *supra* note 123, at 622-43. Some argue that balancing allows for greater simplicity, as courts are able to reduce disagreement among parties to a single variable, i.e., the factor that is being weighed. Luizzi, *supra* at 376. But others have cautioned that this test may be deceptively simple. *See* McFadden, *supra* note 123, at 623. Professor McFadden argues that courts are likely to find that applying some sort of utilitarian calculus to a particular case can be at least as difficult as it would be to use the more traditional method of legal analysis. *See id.* at 622-25.

A significant appeal of the balancing test is that it allows for more ease and flexibility in reaching a just result. *See, e.g.*, Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978). Professor Henkin has written that "[balancing] bespeaks moderation and reasonableness, the Golden Mean . . . . It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree." *Id.* at 1047. Opponents, however, counter that this flexibility may threaten fundamental liberties. *See* McFadden, *supra* note 123, at 636-40. To this end, Justice Hugo Black has written that:

> Constitutional adjudication under the balancing method becomes simply a matter of this Court's deciding for itself which result in a particular case seems in the circumstances the more acceptable governmental policy and then stating the facts in such a way that the considerations in the balance lead to the result.

El Paso v. Simmons, 379 U.S. 497, 533 (1965) (Black, J., dissenting). *See also* Barenblatt v. United States, 360 U.S. 109, 140-144 (1959) (Black, J., dissenting).

2. The Public Function or Company Town Test

The other test for whether state action exists is known as the public function or "functional equivalent of a municipality"[141] theory, which found its primary annunciation in the early post-World War II case of *Marsh v. Alabama*,[142] which examined the issue of state action in the context of a "company town." In *Marsh*, the Supreme Court held that citizens of Chicasaw, Alabama, a town wholly owned (including the buildings, commercial establishments, streets, and sewers) by Gulf Ship-building Corporation, could not be denied the liberties guaranteed by the Bill of Rights to citizens of the states.[143]

The case involved a challenge by a Jehovah's Witness to a town prohibition on distributing religious literature. The Court held that there was state action because the town "ha[d] all the characteristics of any other American town,"[144] and because it did "not function differently from any other town."[145] The Court noted that the "'business block' [of the town] serves as the community shopping center and is freely accessible and open to the people in the area and those passing through."[146] The Court further noted:

> [T]hat the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.[147]

The Court did not explicitly endorse the direct correlation between private government and corporation, choosing instead a more graduated approach: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[148] In a concurring opinion, however, Justice Frankfurter took the next step, noting: "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property

141. *See* Rosenberry, *supra* note 39, at 20-25.
142. Marsh v. Alabama, 326 U.S. 501 (1946).
143. *Id.* at 508-09.
144. *Id.* at 502.
145. *Id.* at 508.
146. Marsh v. Alabama, 326 U.S. 501, 508 (1946).
147. *Id.* at 509.
148. *Id.* at 506.

relations."[149]

a. Pullman: A Model Company Town

The concept of the company town offers a fruitful model with which to compare today's private communities. The first company towns emerged in New England Textile manufacturing regions shortly after the War of 1812.[150] In these towns, which were generally owned and operated by large corporations, citizens earned their salary through their work at the town factory while the manufacturing interests "benefit[ed] substantially by a contented, skilled labor force drawn by a policy of intelligent and careful attention to employee welfare and comfort."[151]

One such town that serves as an "ideal type," both for the successes and the potential dangers of this form of development, is Pullman, built just outside Chicago and opened for residents in 1881.[152] Although the Pullman Company was not the first to build an urban industrial community, it thrived because it promised to, and, at least for a limited period, did remedy the needs and fears of working people. Unlike failed experimental towns that were based on ideas of communitarianism and socialism that had come before it,[153] Pullman was founded on the concrete principles and common sense ideas of "industry, sobriety, [and] economy," rather than fanciful, abstract philosophies.[154] Much like some of the newer private communities today, Pullman was a response to deeply rooted dissatisfaction about modern industrialization and urbanization, "the disorderly and unstable culture of the Chicagos of the world,"[155] which

149. *Id.* at 511 (Frankfurter, J., concurring).

150. LISTON EDGINGTON LEYENDECKER, PALACE CAR PRINCE — A BIOGRAPHY OF GEORGE MORTIMER PULLMAN 165 (1992).

151. *Id.* at 171; DANIEL J. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE, 281-91 (1973).

152. STANLEY BUDER, PULLMAN — AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING 53 (1967). *See also* LEYENDECKER, *supra* note 150, at 168.

153. CARL SMITH, URBAN DISORDER AND THE SHAPE OF DISBELIEF — THE GREAT CHICAGO FIRE, THE HAYMARKET BOMB, AND THE MODEL TOWN OF PULLMAN 189 (1995); BOORSTIN, *supra* note 151, at 281-83. One of the earliest and most influential sources for town planning was Ebenezer Howard's 1898 book, original published as *To-morrow: A Peaceful Path to Real Reform*, and reissued four years later as *Garden Cities of To-morrow*. EBENEZER HOWARD, GARDEN CITIES OF TO-MORROW (F.J. Osborn ed., 1965). Among these early towns were places like New Harmony, Indiana, and Brook Farm, in West Roxbury, Massachusetts, communal living experiments based on idyllic philosophies of well-being of mind, spirit, and body achieved through the rational thinking and honest, mental or physical work. Unfortunately, when finances dwindled in these communities, they were unable to sustain themselves and the communities collapsed. *See* 2 THE NEW ENCYCLOPEDIA BRITANNICA 549 (15th ed. 1985); 8 THE NEW ENCYCLOPEDIA BRITANNICA 637 (15th ed. 1985). *See also* 'NEW TOWNS' WHY - AND FOR WHOM? *supra* note 12.

154. SMITH, *supra* note 153, at 189.

155. *Id.* at 209.

bred hope and anticipation within the troubled, urban public.

The town of Pullman differed from Chicago and other municipalities not only because it was beyond the city limits, but also because it was private property.[156] The land was owned by the Pullman Company and run by an employee, designated as the town agent.[157] One journalist even headlined his story about the new town, "Visit to the Eighth Wonder of the World, the New City of Pullman."[158]

Amenities not easily accessible to the working class of Chicago were available to the residents of Pullman. When compared with the difficult conditions of Chicago, the public services of the Pullman town, gas, water, indoor plumbing, sewerage, and regular garbage removal, were particularly appealing.[159] Yet even though these benefits might have led some to view this and similar towns as potential havens, the town of Pullman was at its heart a business venture. George Pullman was a shrewd entrepreneur who understood the value of morale in the workplace. Ignoring the miserable working and living conditions of one's employees did not make good business sense. He believed the town of Pullman would confirm that "money could be safely invested in an elaboration of the utilitarian into the artistic and beautiful."[160]

This business-oriented approach to community led to many criticisms, the most prominent of which argued that these towns were little more than an exercise in paternalism, resulting in a loss of independence for the citizens.[161] It is an argument that continues to be echoed in modern discussions of today's private communities.[162] The manner in which George Pullman provided so completely for his employees included a great deal more than a profit-minded business mentality and came to be known as the "Pullman Idea."[163] This highly cooperative atmosphere was created by the lack of dissent which was built into the Pullman environment. "[W]hat enabled this polity to run without a government was the total authority of George Pullman."[164]

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156. *Id.* at 180.

157. *Id.*

158. *Id.* at 183.

159. *Id.* at 181.

160. *Id.* at 184. *See* BOORSTIN, *supra* note 151, at 282.

161. *See* BOORSTIN, *supra* note 151, at 283 (citing economist Richard Ely's observation at the time that "[t]he idea of Pullman is un-American . . . . It is benevolent, well-wishing feudalism, which desires the happiness of the people, but in such a way as shall please the authorities.").

162. *See* Foer, *supra* note 12, at 393 (noting that if a developer is too paternalistic, it will pose a danger in the construction and development of healthy private communities).

163. SMITH, *supra* note 153, at 185.

164. *Id.* at 188.

Despite the notion that the residents of Pullman lived in an urban utopia, residents had no property interest and therefore lacked long-term security. Moreover, the living habits of tenants were monitored by the company, and censorship was common, because a citizen's comments could be reported at any time. Without internal news, no independent political or moral voice existed. When a group of employees attempted a strike in 1885, the participants and anyone associated with the plan were labeled subversives. The opinion of one observer of that period, Richard Ely, an economics professor, was characterized by the statement: "Pullman was a city that paid a very high cost in human rights for its beauty and order."[165]

b. The Shopping Mall as a "Modern Private Fortress"

The Court's decision in *Marsh*, placing constitutional restrictions on company-owned towns like Pullman, led directly to a number of subsequent rulings concerning the shopping mall. Like the main thoroughfares of the traditional town, shopping malls today are more than simply an assembled collection of stores, but rather a centralized location for activities now interconnected, ranging from shopping to dining to residences to work environments and hotels.[166] On their surface, malls have precisely what the old medieval marketplace offered: the opportunity for unlimited interchange.

It is the concept of mall as modern public marketplace and forum for expression and the exchange of ideas that helped lead the Warren Court in 1968 to hold in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,[167] that a privately owned shopping center could not restrict speech by prohibiting individuals from picketing the employment practices of businesses within that shopping center.[168] The Court, by a six to three vote, noted that "[t]he similarities between the business block in *Marsh* and the shopping center in the present case are striking,"[169] and "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[170]

While holding that the mall, unlike the town owners in *Marsh*, did not have the power to totally deny the picketers access to the mall community, the Court

165. *Id.* at 206.
166. Judd, *supra* note 17, at 146-47.
167. 391 U.S. 308 (1968).
168. *Id.* at 325. *See also id.* at 324 (noting that the economic development of the United States in the 20 years since *Marsh* supports its opinion). The Court identified the significant change in shopping trends and the need to ensure that workers seeking to challenge business practices have direct access to those businesses for first amendment related purposes. *Id.* at 324-25.
169. *Id.* at 317.
170. *Id.* at 318.

reasoned this was not determinative because "[t]he shopping center premises are open to the public to the same extent as the commercial center of a normal town."[171] The *Logan Valley* majority also noted that the owners of such shopping centers can make reasonable regulations of First Amendment expression on their property.[172] The impact of *Logan Valley* was muted not only because of the narrowness of its holding, but because the dissent, raising the shield of the Fifth Amendment, was written by Justice Black, who had been the author of the majority opinion in *Marsh*.[173] Within four years of *Logan Valley*, the Court further restricted the holding, concluding in *Lloyd Corporation v. Tanner*[174] that a shopping center did have the authority as a "private entity" to prohibit five individuals who tried to distribute literature protesting the Vietnam War from doing so within their shopping center. The Court distinguished *Logan Valley* by noting that the First Amendment activity did not specifically concern any of the merchants within the shopping center.[175] The Court stated:

> *Logan Valley* extended *Marsh* to a shopping center situation in a

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171. Amalagated Food Employers Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318-19 (1968).

172. *Id.* at 320. The Court added:

> Certainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property. Thus, where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether . . . . Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State . . . [or] where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it.

Id. at 320-21.

173. *Id.* at 327 (Black, J., dissenting). Justice Black wrote that he could not accept the majority's opinion because:

> I believe that, whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of [the] property to give to the pickets for their use, the Court should also award [the property owner] just compensation for the property taken.

Id. at 330.

174. 407 U.S. 551 (1972).

175. *Id.* at 560-61.

> different context from the company town setting, but it did so only in a context where the First Amendment activity was related to the shopping center's operations. There is some language in *Logan Valley* unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the "business district," and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities. As Mr. Justice Black's dissent in *Logan Valley* emphasized, this would be an incorrect interpretation of the Court's decision in *Marsh*.[176]

While the majority acknowledged that "differences exist . . . with respect to government regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public," they explained that:

> [P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes . . . . The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.[177]

The four dissenting justices countered that the record overwhelmingly supported the district court's finding that "'the Mall is the functional equivalent of a public business district' within the meaning of *Marsh* and *Logan*. . . . In sum, the Lloyd Center is an integral part of the Portland community . . . [which,] [f]rom its inception, the city viewed . . . as a 'business district.'"[178] The dissent also argued that, as the district court found, the mall was open to first amendment activity, and therefore it could not discriminate against the non-disruptive distribution of the leaflets in this case.[179]

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176. *Id.* at 562. The Court also distinguished *Logan Valley* on the basis of physical layout, noting that "the Union pickets in that case would have been deprived of all reasonable opportunity to covey their message to patrons of the Weis store [they were picketing] had they been denied access to the shopping center," whereas at the Lloyd Center, "[a]ll persons . . . enter[ing] or leav[ing] the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles." *Id.* at 566.

177. *Id.* at 569-70. The Court noted that "[t]here will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes." *Id.* at 570.

178. Lloyd Corp. v. Tanner, 407 U.S. 551, 575-76 (1972) (Marshall, J., dissenting).

179. *Id.* at 579-83.

The third act in this post-*Marsh* Supreme Court trilogy was played out four years later in *Hudgens v. National Labor Relations Board.*[180] In *Hudgens*, the Court explicitly overruled *Logan Valley* and held that a shopping center could even prevent expression such as picketing against an individual business in the shopping center.[181] The Court reasoned that "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley.*"[182] The *Hudgens* Court further concluded that:

> [I]f the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike . . . . [I]n short, under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this . . . .[183]

c. The Federal Withdrawal: *Pruneyard*

The year 1980 also saw what might be termed an epilogue to the drama, or a new first act for the unfolding story of renewed judicial federalism. The United States Supreme Court, in *Pruneyard Shopping Center v. Robins*[184] declined to apply the Fourteenth or Fifth Amendments to the federal Constitution, instead upholding the California Supreme Court[185] decision which stated that the California Constitution gave individuals broader rights of expression than the federal Constitution.[186] The California court's decision stood in direct contrast to the Supreme Court's holding in *Hudgens*, and protected reasonably exercised speech and petitioning in privately owned shopping centers, in essence, adopting the reasoning of the majority in *Logan*

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180. 424 U.S. 507 (1976).

181. *Id.* at 518-21. The Court again was somewhat splintered in its vote, with five justices agreeing with the Court's opinion, another justice concurring, and two justices dissenting. (Justice Stevens did not participate in the case.) *Id.* at 523-25.

182. *Id.* at 518.

183. *Id.* at 520-21.

184. 447 U.S. 74 (1980).

185. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979).

186. *Pruneyard*, 447 U.S. at 81. The Court noted that the California Constitution offered specific affirmative rights for speech and petitioning. Article one, Section two of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article one, Section three of the California Constitution provides: "[P]eople have the right to . . . petition government for redress of grievances." *Id.* at 80 n.2.

Valley, but using a state constitutional analysis as the basis.[187] The *Pruneyard* Court also declined to find a "takings" violation in this broader interpretation of the law, denying the mall owners' claim that forcing the owners to permit all speech in the mall was a violation of the Fifth Amendment Takings Clause, thereby rejecting the dissent of Justice Black in *Logan Valley*.[188]

In the wake of *Pruneyard*, states have greater freedom, and a greater burden, in deciding cases involving issues of public, private, and constitutional rights. They must determine whether their constitutions are to be interpreted more broadly than the Supreme Court has interpreted the federal Constitution, and they must choose the legal analysis to apply: the public (*Marsh*/company

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187. In *Robins*, the California Supreme Court recognized that large retail shopping centers are today's suburban town's functional equivalent of the traditional town center business block where first amendment activity traditionally was conscientiously guarded. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 345-48 (Cal. 1979).

188. Prunyard Shopping Ctr. v. Robins, 447 U.S. 74, 82-83 (1980). Although takings clause issues more traditionally involve formal government condemnation proceedings, there has been an increase in litigation involving what is known as regulatory takings, actions taken to fight allegedly excessive government regulation of private property. *See* Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 390 (1988); Jonathan B. Sallet, *Regulatory 'Takings' and Just Compensation: The Supreme Court's Search for a Solution Continues*, *in* REGULATORY TAKING - THE LIMITS OF LAND USE CONTROLS 155, 157-60 (G. Richard Hill ed., 1990). One early source for this jurisprudence is Justice Holmes comment in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In rejecting the "Takings" claim in *Pruneyard*, the Court agreed that one of the "essential sticks in the bundle of property rights is the right to exclude others." *Pruneyard*, 447 U.S. at 82. But the Court added that in reviewing an action for a takings clause violation, it must examine whether the restriction "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 83 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). In reaching this decision, the Court will look into a series of factors, including the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)). In *Pruneyard*, the Court concluded that "[t]here is nothing to suggest" that preventing the shopping center owners from prohibiting the "activity will unreasonably impair the value or use of their property as a shopping center." *Id.*

The Court distinguished its decision in *Pruneyard* from its earlier opinion in Kaiser Aetna v. United States, 444 U.S. 164 (1979), in which it held that the federal government's efforts to compel free public use of a private marina constituted a taking. *Pruneyard*, 447 U.S. at 84. In *Kaiser Aetna*, the government said it had the right to use of the marina on the ground that the marina became subject to federal navigational servitudes because of a channel dredged by the owners that connected it to "navigable water." *Kaiser Aetna*, 444 U.S. at 168-69. The marina had been converted from a private pond by the developer-owners, who had also built a surrounding marina community which paid a fee to use the marina and to "maintain the privacy and security of the pond." *Id.* at 168. The Court concluded that the Government's effort at creating a public right of access to the pond in its improved state interfered with the owner's "reasonable investment backed expectations" and went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking . . . ." *Id.* at 178.

town) approach, the extension of this to privately owned shopping centers (*Logan Valley*), or the private approach (*Hudgens*).

But, as the case law makes clear, it is difficult to state categorically that a quasi-public structure such as a residential association is either public or private. Although, at its core, this analysis can be applied to the interpretation of contracts between the parties, as would befit a purely private analysis, or the state action doctrine can be applied, as would befit a purely public analysis, there are very few instances in which either can be used strictly or uniformly.

Rather, state courts have begun to base their analysis within the context of the individual state constitutions, which balances the public features of each community such as roads, sewers, and security, with the private attributes, including the development's construction, legal system, and of course, the property ownership itself. As one state court would declare, in this area of the law, "[t]he definitive word was left to the state courts to write."[189]

B. The State Constitutional Analysis

The Supreme Court's decision in *Pruneyard* is one of the leading cases at both the state and federal level to identify the important, legitimate, and independent role that state courts play in protecting individual rights by interpreting a state constitution to provide protection beyond what is recognized by the Supreme Court's interpretation of the federal Constitution. It reaffirmed Justice Louis Brandeis' view of the obvious merits of our federal system, "that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[190]

Although the number of decisions that have applied state constitutional provisions to private communities and, more specifically, to the protection of the rights of non-members' is still limited, there are certain areas in which these principles have had more testing. Not surprisingly, the issue addressed by the Court in *Pruneyard*, the conflict between public speech at private businesses in shopping malls, is one such area[191]—and one in which state courts have taken

189. Bock v. Westminister Mall Co., 819 P.2d 55, 58 (Colo. 1991).

190. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also* Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

191. Although this brief survey focuses on public rights of expression in private shopping centers, there are other types of private property in which state courts have explored the conflict between public and private and applied their state constitutions. *See, e.g.*, Laguna Publishing Co. v. Golden Rain, 182 Cal. Rptr. 813 (Cal Ct. App. 1982) (finding violation of the California Constitution, not the federal Constitution, in case of planned, gated community barring distribution of outside newspaper); Isbister v. Boys Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. 1985) (holding

divergent paths in applying their state constitutions to this doctrine.[192]

This Section explores, through a review of the holdings of several state courts, how these courts are using their state constitutions to resolve the legal questions. The courts in California, Washington, Ohio, and New Jersey have proceeded in different ways along the continuum established by the Supreme Court to give a new interpretation to the public-private debate.

1. California: Fact-Based Private Interest Balancing

Although the ultimate issue decided by the California Supreme Court in *Pruneyard* was whether the California Constitution protected speech and petitioning at shopping centers, the threshold question was: did the Supreme Court's ruling in *Lloyd v. Tanner* "recognize federally protected property rights of such a nature that we now are barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution?"[193]

Previous state court rulings in California had suggested that a more expansive ruling under the California Constitution was barred by the federal Supremacy Clause because under *Lloyd*, "the due process clause of the United States Constitution protects the property interest of the shopping center owner from infringement,"[194] but in *Pruneyard*, the California Supreme Court found that property rights were not immune from state regulation.[195]

Rather, in language that offers support to state courts looking to balance property rights with individual or public rights, the Court stated:

> Property rights must yield to the public interest served by zoning laws, to environmental needs, and to many other public concerns. "We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was

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that private charitable organization's rejection of membership applications on basis of gender violated California law); State v. Elliott, 548 A.2d 28 (Del. Super. Ct. 1988) (holding no constitutional right to conduct anti-abortion demonstration on property of health organization); Fardig v. Anchorage, 785 P.2d 911 (Alaska Ct. App. 1990) (holding no right under state or federal constitution to protest in private health facility parking lot).

192. *See* New Jersey Coalition Against War v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994) (describing several different state constitutional interpretations).

193. Robins v. Pruneyard, 592 P.2d 341, 342 (Cal. 1979).

194. *Id.* at 343.

195. *Id.* at 344. The California courts had previously decided to expressly follow the holding in *Lloyd Corp. v. Tanner*. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 86-87 n.9 (1980) (discussing the changing history of this issue in California courts).

> already 'thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society . . . . As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted . . . . Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.'"[196]

The *Pruneyard* court then applied this analysis to the facts, concluding that "[t]o protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights."[197] Since *Pruneyard*, several states have followed California's lead in this area.[198]

2. Washington: A Path of State Constitutional Narrowing

In *Alderwood Assocociates v. Washington Environmental Council*,[199] a plurality of the Washington Supreme Court favorably compared the Washington Constitution's speech provision[200] with the California provision at issue in

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196. *Pruneyard*, 592 P.2d at 344-45 (citations omitted).

197. Robins v. Pruneyard, 592 P.2d 341, 346 (Cal. 1979).

198. *See* Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991); Batchelder v. Allied Stores Int'l Inc., 445 N.E.2d 590 (Mass. 1983); State v. Schmid, 423 A.2d 615 (N.J. 1980); State v. Dameron, 853 P.2d 1285 (Or. 1993); State v. Cargill, 786 P.2d 208 (Or. Ct. App. 1990); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108 (Wash. 1981).

199. 635 P.2d 108 (Wash. 1981).

200. The Washington Constitution states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 7. Washington also has a provision concerning eminent domain which expands upon the Fifth Amendment. That section states:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for

Pruneyard as well as with a decision by a New Jersey court.[201] The Court held that the speech and initiative provisions of the Washington State Constitution do not require the same "state action" as does the Fourteenth Amendment of the United States Constitution, and in light of this, seeking of signatures on a petition at a shopping mall by the environmentalists was a protected activity.

The court further noted that neither of those state constitutions expressly mention "state action," thus permitting the state court "to evaluate in each case the actual harm to the speech and property interests."[202] The Washington court explained that this does not mean all speech and initiative activities are protected because to do so "would deny private autonomy and property rights in the same way as the 'state action' requirement of the Fourteenth Amendment denies free speech."[203] Instead, the Washington court adopted a balancing test, but one that "is quite different from that used in Fourteenth Amendment analysis."[204]

Eight years later, however, in *Southcenter Joint Venture v. National Democratic Policy Committee*,[205] the Washington Supreme Court moved in a different direction, holding that a political organization had no right under the Washington Constitution's free speech provision to solicit contributions and sell literature at privately owned shopping centers. With regard to the "state action" issue, the court reaffirmed that the free speech provision affords protection to the individual actions of the state. It "does not protect an individual against the actions of other private individuals,"[206] concluding that although there is no express reference to "state action," this limitation is implicit in the constitution.[207]

The court explained that the Committee was:

> [N]ot just asking us to cast a more expansive interpretation of the state constitutional provision; in reality, it is asking us to declare that our

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public use.

WASH. CONST. art. I, § 16.

201. State v. Schmid, 423 A.2d 615 (N.J. 1980). *See* discussion *infra* notes 221-32 and accompanying text.

202. *Alderwood*, 635 P.2d at 115-16.

203. Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108, 116 (Wash. 1981).

204. *Id.* The Washington court, citing federal precedent, balanced "the use and nature of the private property;" the nature of the speech activity; and the potential for reasonable regulation of the speech. *Id.* at 116-17.

205. 780 P.2d 1282 (Wash. 1989).

206. *Id.* at 1285.

207. *Id.* at 1288.

> state constitution grants *an entirely new kind* of free speech right—one that can be used not only as a shield by private individuals against actions of the state but also as a sword against other private individuals.[208]

The court refused to adopt a "balancing test" to weigh the free speech interest of the two parties, stating that to do so would be legislating, not adjudicating.[209]

The court in *Southcenter* also rejected petitioner's argument that the state constitution's free speech provision applies to shopping malls under the "public function" doctrine articulated in *Marsh*. The court employed the United States Supreme Court's holding in *Lloyd* alone in rejecting this argument, distinguishing shopping malls from company towns.[210]

The rationale used by the Washington Supreme Court in *Southcenter* has been applied in a number of states, while still other state courts that also have not been as receptive to the "new federalism" have used other grounds for protecting private property rights, sometimes as basic as the statement that the state constitutional provision is no broader than the comparable federal section.[211]

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208. *Id.* at 1286. The Court further stated:

> It is a two foot leap across a ten foot ditch . . . to seize upon the absence of a reference to the State as the actor limited by the state free speech provision and conclude therefrom that the framers of our state constitution intended to create a bold new right that conflicts with the fundamental premise on which the entire constitution is based.

Id. at 1287-88.

209. Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1288-89 (Wash. 1989). Notwithstanding this new interpretation, the court held that this ruling was consistent with *Alderwood* because five members of that court (one concurring judge and four dissenters) agreed that the free speech provision of the state constitution required state action.

210. *Id.* at 1291-92.

211. *See* Wilhoite v. Melvin Simon and Assoc., 640 N.E.2d 382 (Ind. Ct. App. 1994); Iowa v. Lacey, 465 N.W.2d 537 (Iowa 1991); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); Shad Alliance v. Smith Haven Mall, 488 N.E.2d 211 (N.Y. 1985); Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986) (plurality opinion); Town of Barrington v. Blake, 568 A.2d 1015 (R.I. 1990); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992).

In *Bock v. Westminster Mall Co.*, the Colorado Supreme Court noted Colorado's "tradition of ensuring a broader liberty of speech" than the federal Constitution. Bock v. Westminster Mall Co., 819 P.2d 55, 59-60 (Colo. 1991). The court explained that "[w]here governmental entities or public monies are shown by the facts to subsidize, approve of, or encourage private interests and such private interests happen also to restrict the liberty to speak and to dissent," the court had the right to find those actions unconstitutional. *Id.* at 60. The Colorado court concluded that a finding of "state action" according to federal doctrine was unnecessary. *Id.* at 61 n.7. Instead, the court

3. Ohio: The Federal Standard Revisited Within the Ohio Constitution

In Ohio, a state appellate court took one position in this area which was subsequently overriden by the Ohio Supreme Court in a later case. In *Ferner v. Toledo-Lucas County Convention and Visitors Bureau, Inc.*,[212] a candidate for the city council challenged a regulation that prohibited him from soliciting signatures for his nominating petition at the Seagate Convention Centre. The candidate conceded that he had no First Amendment right to solicit signatures in a private building and challenged the regulation solely on the provisions contained in the Ohio Constitution.[213]

The court explored the two relevant portions of the state constitution and concluded that unlike the First Amendment, the Ohio speech clause included an affirmative grant of the right of free speech, and it chose an expansive interpretation, allowing for "the limited assertion of that right on some forms of

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reasoned that "governmental involvement" exists as a result of several factors, including "the City's two million dollar purchase, financed through the sale of municipal bonds, of improvements which the Company made to adjacent streets and drainage systems." *Id.* at 61. The court also noted that the city operates a police substation in the mall, provided rent free; that the Army, Navy, and the Marine Corps maintain recruiting offices in the mall; and that the county clerk conducts voter registration in the mall. *Id.* at 61-62.

In Shad Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985), the New York Court of Appeals conducted a legal analysis of the history of the language in New York's Constitution and determined that there was a state action requirement. *Id.* at 1214-15. The court agreed with the dissent that "the willingness of courts to interpret constitutional provisions in light of changing conditions has safeguarded both our Constitutions and the freedom they protect," but it further noted that "[t]here is a profound difference . . . between interpreting constitutional provisions and dispensing with constitutional requirements." *Id.* at 1216. In explaining that the plaintiffs had neither alleged nor demonstrated any state action, the court noted that the shopping mall in question:

> [I]s not the functional equivalent of a government . . . . To be sure, the shopping mall has taken on many of the attributes and functions of a public forum . . . but the characterization or the use of property is immaterial to the issue of whether State action has been shown. Nor can the nature of property transform a private actor into a public one. Rather, the analysis must proceed from the other direction to show significant government participation in private conduct that limits free speech rights.

Id. at 1217-18 (citations omitted).

212. 610 N.E.2d 1158 (Ohio Ct. App. 1992).

213. *Id.* at 1161. Section 19 of the Ohio Constitution provides that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare." Section 11 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." *Id.* at 1161-62. Ironically, the issue of state action under the federal Constitution may have been particularly strong in this case, although it was not raised. The Centre was owned by the Toledo-Lucas County Convention and Visitors Bureau, Inc., a nonprofit corporation, with seemingly strong connections to the city and county; a portion of the building was used by the University of Toledo, a state sponsored school; and the building was located on land that was owned by Lucas County and leased from the county. *Id.* at 1160.

private property, so long as the infringement does not result in a 'taking' of property."[214] The Ohio court then used a balancing test to decide whether the rights of the public or the private property owner were controlling and found in favor of free speech.[215]

Although the court in *Ferner* noted that the Ohio Supreme Court had not addressed the issue, it subsequently did so, in *Eastwood Mall, Inc. v. Slanco*,[216] holding that the speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment.[217] In a dissenting opinion to that ruling, however, one justice stated that he did "not believe that the holding in [*Eastwood*] affects the decision . . . [in *Ferner*] because the facts of the two cases are distinguishable."[218] He suggested that "[a] county or municipal convention center, even if operated as a nonprofit corporation, has even more indicia of a public forum than a privately owned shopping mall."[219] He also offered the opinion that the right to collect signatures for a petition implicated more than just the free speech provision in the state constitution.[220]

4. New Jersey: A Broad and Consistent State Constitutional Interpretation

In contrast to some states, New Jersey has stuck consistently to its more expansive and flexible interpretation of the state constitutional protection afforded to individuals demonstrating on private property. In *New Jersey v. Schmid*,[221] the court was confronted with a trespassing conviction of Mr. Schmid who was engaged in the unauthorized distribution of political literature on the campus of Princeton University. Schmid claimed that he was not obliged to obtain the permission of Princeton officials to engage in the distribution of the literature, as such activity is protected by both the New Jersey Constitution and federal Constitution.[222] The court initially conducted a traditional First Amendment analysis. Ultimately, however, because of the lack of clarity in federal decisions, the New Jersey Supreme Court declined to resolve this issue

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214. *Id.* at 1162-63. The court in *Ferner* also looked at the "takings" issue but determined there was no regulatory taking because "[t]he economic impact is speculative at best [and] the government does not propose to physically occupy appellant's land, but only to prevent appellant from wholly prohibiting political speech." *Id.* at 1161.

215. *Id.* at 1163.

216. 626 N.E.2d 59 (Ohio 1994).

217. *Id.* at 61.

218. *Id.* at 65 n.8 (Wright, J., dissenting).

219. *Id.*

220. Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 65 n.8 (Ohio 1994) (Wright, J., dissenting).

221. 423 A.2d 615 (N.J. 1980).

222. *Id.* at 616.

or to determine whether "state action" was involved.[223] Instead, the court, citing *Pruneyard* for support, turned to the state constitution for resolution of the breakdown between public and private rights.[224]

The court noted New Jersey's history of interpreting this section of its constitution expansively, stating that the relevant constitutional language is "more sweeping in scope than the language of the First Amendment."[225] Citing both federal and state precedents, the *Schmid* court "balance[d] within a constitutional framework legitimate interest in private property with individual freedoms of speech and assembly."[226] It concluded:

> [T]he test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.[227]

Applying this standard to the facts of the case, the New Jersey court concluded that Schmid "suffered a constitutional impairment of his state constitutional rights of speech and assembly and his conviction for trespass must therefore be undone."[228]

In a more recent holding, the New Jersey Supreme Court reaffirmed the commitment to an expansive view of freedom of expression as defined in the state constitution. In *New Jersey Coalition Against War in the Middle East v. JMB Realty Corp.*,[229] the court applied the test developed in *Schmid* to hold that private shopping malls must allow free speech, specifically "leafletting and

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223. *Id.* at 624.

224. *Id.* at 628. The relevant portions of the state constitution state:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . . The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.

N.J. CONST. art. 1, ¶¶ 6, 18.

225. New Jersey v. Schmid, 423 A.2d 615, 626-27 (N.J. 1980).

226. *Id.* at 628.

227. *Id.* at 630.

228. *Id.* at 633.

229. 650 A.2d 757 (N.J. 1994).

associated speech in support of, or in opposition to, causes, candidates, and parties—political and societal free speech."[230] In reaching this decision, the court stated that it "know[s] of no private property that more closely resembles public property."[231] The New Jersey court reached its decision not only by applying the *Schmid* test, "but also by the general balancing of expressional rights and private property rights."[232]

This short survey of state court decisions in this area of the law indicates that there is a variety of legal analysis being employed in the setting of standards to determine the boundaries and the rights for what is public and what is private among the citizens of each state. This dual power is precisely as envisioned by a federalist system with differing state constitutional language protecting and balancing the public and private rights of their citizens.

V. CONCLUSION

Our nation has a long tradition of protecting individual rights while encouraging and protecting private contractual agreements and associations for the betterment of the individual parties and the commonweal. It is important to understand this historic tension and to ensure that when these two competing ideas intersect, both of the traditions are safeguarded.

State courts, however, are not necessarily finding it easy going as they work to interpret and apply these doctrines. The federal holdings in this area

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230. *Id.* at 781.

231. *Id.* at 761. The court spent a significant portion of the opinion discussing the growing importance of malls in our society and took judicial notice "of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline" of downtown business districts, a decline "accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs." *Id.* at 767. The court concluded by reiterating that it is an "indisputable fact of life" that "the privately held shopping center now serves as the public trading area for much of metropolitan America." *Id.* at 768.

232. *Id.* at 775. Another New Jersey case with potentially significant implications for private communities, involving a different issue, but with related legal analysis is Mathews v. Bay Head Improvement Assoc., 471 A.2d 355 (N.J. 1984). In *Mathews*, the New Jersey Supreme Court held that a nonprofit association which controlled access to a municipal beachfront was in violation of the "public trust" doctrine by denying the right of access to the public to the shorefront water. *Id.* at 362-68. The court held that the corporation that controlled the area was a quasi-public association, and that by limiting membership to residents of the municipality and foreclosing the public, the association was acting in conflict with public policy to encourage and expand public access to and use of shoreline areas and was frustrating the public's right under the public trust doctrine. *Id.* at 362-69. The court acknowledged that a private land owner is not equivalent to a municipality but said that the public's right to the shore is the most important factor and the ultimate conclusion will depend on the circumstances of each case. *Id.* at 365. *See* Charles M. Naselsky, Note, *Public Trust Doctrine*, 15 SETON HALL L. REV. 344 (1985) (discussing the *Mathews* case).

which outline the relationship, power, and rights of private property owners and public speech have evolved into a complex standard for states,[233] particularly when state courts may apply their own constitution's language to the facts at hand. As a result, the holdings offer a mixed bag, generating differences among the states.[234]

Which interpretation or balancing these courts use to reach their results, whether the federal holding of *Hudgens*, which grants increased rights to private property owners, or the opportunity for more expansive state constitutional interpretation of *Pruneyard*, which in turn requires a choice between some version of the *Marsh* company town approach or the *Logan Valley* application to shopping malls, remains to be seen. The legal analysis concerning shopping malls and individual liberties is an inquiry that highlights the conflicts between public and private which are occurring in the growing number of residential associations throughout the nation. Specifically, the courts, through adjudication, will define the rights of the private property owners and residents and those of the non-residents who may nonetheless be affected by those communities and their rules and regulations.

Moreover, the idea that states are able to either equate provisions of their state constitutions with the comparable provisions in the federal Constitution or, in the alternative, to interpret the language of those provisions more broadly and thus provide more expansive protections of individual rights, will likely have significant implications for private residential associations. For the future, state courts and legislatures will need to work to balance these interests, reconcile the differences in federal and state law, and ultimately delineate the line between public and private. This is an example of how *our Federalism* works, as both the state and federal powers define and protect our liberties.

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233. *See, e.g.*, State v. Schmid, 423 A.2d 615, 624 (N.J. 1980) (finding "strong crosscurrents of policy that must be navigated with extreme care" and ultimately turning to state constitutional analysis). The opinion in *Schmid* recognized these changing federal precedents as well as the many dissenting and concurring opinions within this line of cases. Among the more obvious of these is that of Justice Black, the author of *Marsh*, who wrote a strong dissenting opinion in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 327 (1968). Similarly, Justice Powell's concurrence in *Pruneyard*, joined by Justice White, in which he said he would limit the holding to the facts of that case, is a factor making application of this doctrine more difficult. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 96 (1980).

234. *See, e.g.*, Cologne v. Westfarms Assoc., 442 A.2d 471 (Conn. 1982); People v. Diguida, 576 N.E.2d 126 (Ill. Ct. App. 1991), *overruled by* 604 N.E.2d 336 (Ill. 1992); City of Jamestown v. Beneda, 477 N.W.2d 830 (N.D. 1991) (holding restriction on speech of abortion protesters outside a physician's office at a city-owned shopping mall violated the First Amendment); Ferner v. Toledo Lucas County Convention and Visitors Bureau, Inc., 610 N.E.2d 1158 (Ohio Ct. App. 1992); Jacobs v. Major, 390 N.W.2d 86 (Wis. Ct. App. 1986), *overruled in part* 407 N.W.2d 832 (Wis. 1987).