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(UN)COMMON INTEREST COMMUNITIES: SEARCHING FOR A WORKABLE EXTENSION OF FREE SPEECH RIGHTS TO CICS

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"No sign of any kind except a small nameplate on a lamppost or affixed to the front of a house shall be displayed to the public view on any lot. . . . No sign of any type may be displayed from the window of any home."[1]

I. INTRODUCTION

Governing documents of condominiums, cooperatives, and homeowners associations ("HOAs")[2] around the United States are replete with restrictive covenants like the one above. These common interest communities ("CICs") are created to provide owners or tenants with quiet, manicured, and aesthetically pleasing environments;[3] hence the frequent imposition of outright bans on

* J.D., *magna cum laude*, 2015, Seton Hall University School of Law; B.A., 2012, University of Notre Dame. I would like to thank my family, friends, and Rebecca Salk for their love and support in law school and while writing this Comment. I would also like to thank my advisor Professor Angela C. Carmella, as well as Judge Robert Contillo, Professor Paula A. Franzese, Ronald L. Perl, and Michael S. Karpoff for their helpful perspectives. Finally, a special thanks to my father, who surely never would have suggested this topic had he known how much I would bother him about it.

[1] *First Amended and Restated Declaration of Covenants and Restrictions*, FALMOUTH AIRPARK, *available at* http://falmouthairpark.net/wp-content/uploads/2013/12/Covenants.doc (last visited May 14, 2015).

[2] Each of these kinds of developments is included under the umbrella term "common interest communities," but exhibit markedly different characteristics. For a survey of the differences, see Paula A. Franzese & Steven Siegel, *The* Twin Rivers *Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J.L. & PUB. POL'Y 729, 730 n.3 (2008). In general though, "[c]ommon-interest communities are those in which the property is burdened by servitudes requiring property owners to contribute to maintenance of commonly held property or to pay dues or assessments to an owners association that provides services or facilities to the community." RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 6, intro. note (2000).

[3] A Florida state appellate court cogently described this purpose, remarking that:

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub

things such as pets,[4] satellite dishes,[5] and political signs and activity.[6]

For better or worse, the number of Americans living in CICs has grown tremendously in the last few decades, and CICs now occupy a significant percentage of home ownership in the United States.[7] For many, the increase in prevalence of CICs has created attendant confusion with the extent to which communities can restrict individual rights.[8] In response, courts and legislatures have slowly given more free speech rights to residents of CICs.[9] For others though, this recent trend towards individual rights has come at the expense of the collective interest.[10] This inescapable clash between expressional

> society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 181–82 (Fla. Dist. Ct. App. 1975); *see also* Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation not Termination*, 1990 WIS. L. REV. 513, 513 (1990) ("Residential developers often impose servitude schemes on tract and high-rise developments to increase the desirability of the housing units."); *2012 Public Policies of Community Associations Institute, Aesthetics as an Economic Issue*, at 9, http://www.caionline.org/govt/policies/Documents/public%20policies-April%202012%20update.pdf (last visited Oct. 15, 2014) ("When aesthetics of any one development look clean, well maintained, properly proportioned and part of an overall design or compatible color scheme, owner expectations are met and property values are sustained and improved.").

[4] Mark S. Dennison, *Enforcement of Restrictive Covenant or Lease Provision Limiting the Keeping of Animals or Pets on Residential Property*, 93 AM. JUR. TRIALS 193 (2004).

[5] Alois Valerian Gross, Annotation, *Radio or Television Aerials, Antennas, Towers, or Satellite Dishes or Discs as Within Terms of Covenant Restricting Use, Erection, or Maintenance of Such Structures Upon Residential Property*, 76 A.L.R.4th 498 (1989).

[6] Monique C.M. Leahy, Annotation, *Homeowners' Association Defense: Free Speech*, 93 AM. JUR. TRIALS 293, at § 7 (2004).

[7] *Statistical Review 2013*, FOUND. FOR CMTY. ASS'N RES., at 3, http://www.cairf.org/research/factbook/2013_statistical_review.pdf (last visited Sept. 15, 2014) (noting that CICs now represent a staggering twenty-four percent of U.S. homes); *see also National Statistics on U.S. Community Associations*, CMTY. ASS'N INST., http://www.caionline.org/info/research/Pages/default.aspx (last visited Mar. 10, 2015) (illustrating that CICs now house almost sixty-six million Americans).

[8] *See, e.g.*, Edward R. Hannaman, *State and Municipal Perspectives - Homeowners Associations*, presented to Rutgers University Center for Government Services Conference, at 3 (Mar. 19, 2002) ("It is obvious from the complaints [to DCA] that that [home]owners did not realize the extent association rules could govern their lives."); Susan F. French, *The Constitution of A Private Residential Government Should Include A Bill of Rights*, 27 WAKE FOREST L. REV. 345, 349 (1992) ("Dreams of homeownership can turn sour for people whose building or landscaping plans are not approved and for people who learn too late that they will not be permitted to put up political signs, for sale signs, or holiday decorations.").

[9] *See infra* Part IV.

[10] *2012 Public Policies of Community Associations Institute*, *supra* note 3, at 9 (noting that attempts to interfere with "community-crafted aesthetic controls" undermines the "lifestyle expectations of the collective ownership").

versus property and contractual rights[11] has led to a host of suggested and implemented solutions,[12] but no more clarity in this realm.[13] Such an inconsistency of treatment thwarts the goals of predictability and deterrence from litigation,[14] and it is clear that there is a need for a workable method of extending more free speech rights to CICs.[15]

Although this area of the law has seen a significant number of illuminating publications,[16] this Comment adds to the discussion in two ways. First, although a variety of proposals have been offered for extending free speech rights to CICs over the past two decades,[17]

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[11] The Restatement acknowledges the tension between the two competing interests, saying that

> The law of residential common-interest communities reflects these tensions between protecting freedom of contract, protecting private and public interests in security of the home both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of common-interest communities. It also reflects the tensions between protecting the democratic process at work in common-interest communities and protecting the interests of individual community members from imposition by those who control the association.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 6, intro. note (2000).

[12] *See infra* Part IV.

[13] *See, e.g.*, Peter Applebome, *My House, My Rules. Or So One Might Think*, N.Y. TIMES, July 29, 2007, at A25 ("This is not an entirely new world, but it's still a vexing one, where the rules are still being sorted out . . . .").

[14] *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 808 (Cal. 2001) (quoting Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. KAN. L. REV. 305, 318 (1985)) ("The notion that free expression can, and potentially does, mean something slightly different in each state even when provisions read identically is not fully supportable.").

[15] *See infra* Part III (discussing why CICs should not be "speech free" zones).

[16] *See, e.g.*, Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233 (2006); Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "The Nice"*, 37 URB. LAW. 335 (2005); Franzese & Siegel, *supra* note 2; Aaron R. Gott, *Ticky Tacky Little Governments? A More Faithful Approach to Community Associations Under the State Action Doctrine*, 40 FLA. ST. U. L. REV. 201 (2012); David J. Kennedy, *Residential Associations As State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995); Evelyn C. Lombardo, *A Better* Twin Rivers*: A Revised Approach to State Action by Common-Interest Communities*, 57 CATH. U. L. Rev. 1151 (2008); Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . On Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739 (2006).

[17] The major suggestions have been to: (1) treat CIC boards as "state actors" and thus apply state constitutional free speech protections to CICs, *see infra* Part IV.A; (2) rely on legislative action to protect free expression, *see infra* Part IV.B; (3) push homeowners to pass a residents' bill of rights, *see infra* Part IV.C; (4) apply a constitutional test that analyzes the reasonableness of restrictive covenants (the New Jersey approach), *see infra* Part IV.D; and (5) strike down covenants that are found to be against public policy (the Restatement approach), *see infra* Part V.

further analysis of each of these theories is needed in light of some important recent developments around the United States.[18] Second, few if any commentators have scrutinized the practical implications of each of the major proposals to extend free speech to CICs, as most have been largely theoretical. In reality, the application of some of these theories could make, and in some instances already have made,[19] the treatment of free speech in CICs even more confusing and inconsistent. Therefore, the merits and disadvantages of each theory must be analyzed to determine which actually presents the best opportunity to extend reasonable free speech rights to CICs around the country.[20]

In Part II, this Comment describes how the "state action" requirement has insulated CICs from constitutional scrutiny. In Part III, this Comment explains why CICs should not create "speech free" zones, but should instead reasonably embrace the uncommon interests of its residents. Part IV presents the prevailing theories for application of free speech principles to CICs, analyzes their efficacy, and explains why each is not an ideal solution to the problem. In Part V, this Comment argues that state courts should adopt the policy of judicial non-enforcement of servitudes that violate public policy, in line with the Restatement (Third) of Servitudes. In Part VI, this Comment suggests that no matter which solution courts adopt around the country, boards should proactively amend their governing documents to better reflect reasonable restrictions on expressional freedoms.

II. STATE ACTION: WHY THE FIRST AMENDMENT TO THE U.S.

[18] There are several important recent developments. First, one state has further developed its unique adoption of a major theory. *See infra* Part IV.D (discussing New Jersey's extension and clarification of its unique constitutional test in *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71 (2014)). In addition, another state has extended free speech rights into a more conservative region of the country, utilizing a constitutional test never before used outside of the state that created it. *See infra* note 169 and accompanying text (discussing a Missouri state court's adoption of New Jersey's constitutional test in *Lamprecht v. Tiara at the Abbey Homeowners Association*, No. 12-JE CC0027, 2013 WL 6144144 (Mo. Cir. Oct. 3, 2013)). And finally, two other states have recently revived a major theory and applied it to CICs for the first time. *See infra* note 42 (discussing *Shelley v. Kraemer*'s application in *Bd. of Managers of Old Colony Vill. Condo. v. Preu*, 80 Mass. App. Ct. 728, 732 (2011), *review denied*, 964 N.E.2d 985 (Mass. 2012) and *Lamprecht*, 2013 WL 6144144).

[19] *See, e.g.*, Franzese & Siegel, *supra* note 2, at 742 ("The *Twin Rivers* decision is not a model of clarity."); *Golden Gateway Ctr.*, 29 P.3d at 801 (citation omitted) ("*Robins* was less than clear 'as to the scope of the free speech rights it was recognizing.'").

[20] *See infra* Part IV (describing and assessing the viability of each of the major proposed theories).

CONSTITUTION DOES NOT APPLY TO CICS

Over the last few decades, and with increasing frequency, residents have challenged the regulations in their communities.[21] These residents have argued, inter alia, that their constitutional rights of free speech and association are infringed under the United States Constitution and state constitutions. Until recently, these suits have been relatively fruitless, with residents having little success in subjecting CICs to First Amendment protections. This failure can be largely attributed to the "state action" requirement under the federal and state constitutions, which establishes that violations of constitutional rights are redressable only if committed by governmental entities.[22]

A. U.S. Constitution

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[23] Flowing naturally from this language is that the Constitution prohibits only *government* interference with constitutional rights, not actions by *private* entities.[24]

There has only been one instance in which the U.S. Supreme Court has addressed residential restrictions on political expression under the First Amendment. In *City of Ladue v. Gilleo*,[25] the Supreme

[21] For example, in New Jersey alone there has been a clear uptick in the number of cases the New Jersey Supreme Court has addressed on this issue in recent years. *See* State v. Schmid, 84 N.J. 535 (1980); N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994); Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 367 (2007); Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, (2012); *Dublirer*, 220 N.J. 71 (2014).

[22] The genesis of the state action doctrine was in the *Civil Rights Cases*, where the Supreme Court held that "until some State law has been passed, or some State action through its officers or agents has been taken, . . . no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority." Civil Rights Cases, 109 U.S. 3, 13 (1883).

[23] U.S. CONST. amend. I.

[24] Despite this logical conclusion, the state action doctrine has remained in flux since its inception, and is still considered a "conceptual disaster area." Charles L. Black, Jr., Foreword: *State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see also State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010) ("In the years following [the *Civil Rights Cases*], the Court transformed the state action doctrine into one of the most complex and discordant doctrines in American jurisprudence.").

[25] 512 U.S. 43 (1994).

Court analyzed sign restrictions imposed by a municipality in a Missouri town.[26] After a resident posted a sign protesting the war, the resident was notified that these signs were prohibited in the city.[27] After denying the resident a variance, the city passed an ordinance with a blanket prohibition on signs.[28] The Supreme Court ruled that while a "time, place and manner" restriction was permissible, a ban on an entire unique medium of expression was an overreach of the state's police power, and therefore unconstitutional under the First Amendment.[29]

Despite *City of Ladue*'s promising ruling, it is of limited applicability in the context of private community associations. In *City of Ladue*, the state action requirement was clearly met, because the sign restrictions had been created and enforced by a municipality.[30] To the contrary, because the boards of CICs are not government entities, their actions are insulated from the restrictions imposed by the First Amendment, and thus are not subject to the same constitutional protections as the Supreme Court extended in *City of Ladue*.[31]

There have been several other important Supreme Court cases that have hinted at possible alternate methods of enforcement of First Amendment rights against private entities. The seminal case is *Marsh v. Alabama*,[32] which held that the actions of a private company town were constrained by constitutional protections because the town functioned as a governmental entity.[33] Initially, the Court extended this holding, applying the same reasoning to other private entities like shopping centers;[34] but this holding has since been rolled back,[35] and

[26] *Id.* at 43.

[27] *Id.* at 45.

[28] *Id.* at 46.

[29] *Id.* at 56.

[30] The Court explained that although municipalities could regulate signs under their police power, these forms of expression were still protected under the Free Speech Clause, and thus the municipality's powers were not unlimited. *Id.* at 48.

[31] *But see infra* Part IV.A (discussing the argument, advanced by several scholars, that HOAs should be treated as state actors because modern CICs perform many of the functions of local governments).

[32] 326 U.S. 501 (1946).

[33] *Id.* at 508 ("[T]he town of Chickasaw does not function differently from any other town.").

[34] Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315, 318 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976) (finding that "[t]he shopping center [at issue was] clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*").

[35] *See Hudgens*, 424 U.S. at 507 (holding that property does not "lose its private character merely because the public is generally invited to use it for designated purposes," and that "[t]he essentially private character of a store and its privately

the Court's now long-standing position has been that the First Amendment does not apply to private actors.[36] In the words of the Supreme Court: "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. . . . This elementary proposition is little more than a truism."[37] Therefore, individuals generally may not seek recourse for First Amendment violations by private entities, including homeowners associations, by claiming that they are "quasi-governmental" entities like the company town in *Marsh*.[38]

Another method frequently cited as a possible means of applying state action to traditionally private actors is through the doctrine espoused by the Supreme Court in *Shelley v. Kraemer*.[39] In *Shelley*, the Court noted that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment."[40] Some scholars believed that this holding would and should be extended to other fundamental rights like free speech,[41] but courts have generally limited

owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center"); Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

[36] *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980); *Hudgens*, 424 U.S. at 513. Constitutional scholar Frank Askin has succinctly described the Court's change in heart and current state action doctrine:

> [B]ecause of decisions of the United States Supreme Court that post-date the Earl Warren era, plaintiffs in these cases can claim no rights under the First Amendment of the U.S. Constitution. With the change in the make-up of the Court following the election of Richard Nixon as president in 1968, earlier decisions generally labeled as public-function cases were overruled either overtly or *sub silentio*, and private property recovered its legal sanctity when it came into conflict with fundamental individual rights.

Frank Askin, Twin Rivers*: Why the Appellate Division Got it Right*, N.J. LAWYER, Oct. 2006, at 9.

[37] *Hudgens*, 424 U.S. at 513.

[38] *See, e.g.*, Kalian at Poconos, LLC v. Saw Creek Estates Community Ass'n, Inc., 275 F. Supp. 2d 578, 589 n.14, 590 (M.D. Penn 2003) (holding that the association's public functions do not "deem the Association a state actor" and that "the holdings of *Marsh* and subsequent cases are [] limited"); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 449 Pa. Super. 124, 128 (1996) (holding that a private organization "cannot abridge the rights of the First Amendment of the Constitution"); Snowdon v. Preferred RV Resort Owners Ass'n, 379 F. App'x 636, 637 (9th Cir. 2010) (holding that the association had not assumed the attributes and functions of a municipality).

[39] 334 U.S. 1 (1948).

[40] *Id.* at 14.

[41] *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) (describing the varying readings of *Shelley* by scholars and courts: (1) there is state action if the state takes any action to enforce even privately made covenants; (2) *Shelley*

this holding to racially restrictive covenants.[42]

Thus, applying the First Amendment to private entities has not been fruitful, despite numerous initially promising avenues. As a result, those seeking recourse for the actions of private entities have increasingly relied instead on the free speech protections offered by state constitutions.

B. State Constitutions

As an initial matter, state courts are generally the ultimate arbiters of their state's own laws and constitution.[43] Therefore, even though the federal government requires state action under the U.S. Constitution, states are free to impose their own requirements for seeking the protections of state constitutions.[44] Moreover, state courts usually have more latitude in analyzing the state action requirement, as most state constitutions do not contain express language referencing state action.[45]

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is limited to racial covenants; (3) an intermediate position that holds that *Shelley* prohibits enforcement of covenants denying fundamental rights, which is one many state courts adopt).

[42] *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n., 29 P.3d 797, 810 (Cal. 2001) (citing Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 353 (1990)) ("Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action . . . it has largely limited this holding to the facts of those cases."). *But see* Lamprecht v. Tiara at the Abbey Homeowners Association, No. 12-JE CC0027, 2013 WL 6144144 (Mo. Cir. Oct. 3, 2013) (holding that judicial enforcement of a private covenant restricting free speech through political signage violated the Missouri constitution pursuant to *Shelley*); Bd. of Managers of Old Colony Vill. Condo. v. Preu, 80 Mass. App. Ct. 728, 732 (2011), *review denied*, 461 Mass. 1110 (2012) (holding that state action arose from a civil lawsuit over a covenant, where costs were allocated under a state statute); *see also generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000).

[43] *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law."); Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 57 (1980).

[44] The right for a state to recognize broad free speech rights on some private property under its *own* constitution was affirmed by the U.S. Supreme Court in the seminal *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) decision ("Pruneyard"). After *Pruneyard*, only a handful of states took the Supreme Court up on its offer, including the California Supreme Court on remand ("Robins"). *See* Jon Golinger, *Shopping in the Marketplace of Ideas: Why Fashion Valley Mall Means Target and Trader Joe's Are the New Town Squares*, 39 GOLDEN GATE U. L. REV. 261, 268–69 (2009) ("In the wake of *Pruneyard*, high courts in five other states - Colorado, Massachusetts, New Jersey, Oregon and Washington - eventually followed California's lead in interpreting their state constitutions to protect at least some free-speech activities in privately owned shopping centers.").

[45] *Compare* CALIF. CONST. art. I, § 2, pt. a ("Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of

Despite that, state courts have nonetheless almost always found state action requirements in their own constitutions.[46] This language, from the Washington Supreme Court, is indicative of the treatment of missing state action language in state constitutions:

> It is a 2–foot leap across a 10–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. To do so would not be to "interpret" our constitution, but to deny its very nature.[47]

Therefore, although states sometimes discuss and adjust the boundaries of state action under their state constitutions,[48] virtually all have declined to impose substantial state constitutional obligations on

this right. A law may not restrain or abridge liberty of speech or press."), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."); *see also, e.g.*, Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 160 (1978) ("Conspicuously absent from the State Constitution is any language requiring State action before an individual may find refuge in its protections.").

[46] *See* Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 363 (2007) ("[T]he vast majority of other jurisdictions that have interpreted a state constitutional provision with language similar to our constitution's free speech provision require 'state action' as a precondition to imposing constitutional obligations on private property owners."). Although this has been the case for decades, there is a recent, albeit limited, trend towards finding state action by private entities under state constitutions. *See infra* Part IV.

[47] Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 424 (1989). Indeed, some state courts have brutally criticized the reasoning of state courts that have circumvented the state action doctrine to extend free speech rights to residents of CICs, including California in *Robins*. *See, e.g.*, SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 501 (1985) (citation omitted) ("[In *Robins*] [t]here is not much analysis and only tangential discussion, if it can be called that, of the State action question. It is evident that the result in *Robins* was dictated by 'the accident of a change of personalities in the Judges of [the] court,' which this court has correctly condemned as 'a shallow basis for jurisprudential evolution.'"); Jacobs v. Major, 139 Wis. 2d 492, 514, 520 (1987) ("It is significant that the majority did not analyze the constitutional sections, but rather summarily stated the protections granted by those sections. It appears to be more a decision of desire rather than analytical conviction. . . . Our constitution defines and limits the powers of state government; it is not a license for the judiciary to convert what the judiciary perceives to be desirable social policies into constitutional law.").

[48] *See, e.g.*, *Sharrock*, 45 N.Y.2d at 160 ("[T]he absence of any express State action language [in the New York constitution] simply provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision.").

private property owners.[49]

As a result, both the federal and most state constitutions do not provide any protection to individuals seeking to engage in speech within the CICs they call their home. This leaves protection of those liberty interests to private law, where individuals are left with the ability to either select residences that permit their desired free speech or push for greater protections within their existing communities. This reality raises the question: do residents in private communities need additional free speech protections?

III. WHY CICS SHOULD NOT BE "SPEECH FREE" ZONES

Covenants, conditions, and restrictions ("CC&R") serve a legitimate purpose. Developers generally put CC&Rs into place before selling any units in an attempt to provide uniform, aesthetically pleasing environments for people to live and socialize.[50] CC&Rs enforce this relative uniformity, ensuring that no singular unit owner's tastes or practices trump the values of the community.[51] While some commentators decry the abuses of associations and board members,[52] many insiders instead paint a vivid picture of demanding, erratic, and difficult owners[53] who force boards to be more authoritative in an effort

[49] The major notable exception to this is New Jersey, which does not require state action as a prerequisite for extending the protections of the state constitution. *See infra* Part IV.D.

[50] *See supra* note 3.

[51] *See* Evan J. Rosenthal, *Letting the Sunshine In: Protecting Residential Access to Solar Energy in Common Interest Developments*, 40 FLA. ST. U. L. REV. 995, 997 (2013) ("CC&Rs are aesthetic in nature, designed to ensure uniformity in appearance and protect property values."); *see also Declaration of Aspen Heights Protective Covenants, Conditions, and Restrictions*, VALDE FINE HOMES LLC, http://www.valdehomes.com/pdf/valde_ccrs.pdf (last visited May 16, 2015) ("In considering whether to approve applications, the Committee shall consider and give great weight to protection of views of other Owners and considerations of aesthetics and uniformity of appearance in Aspen Heights."); *Welcome New Residents*, BENEDICT HILL ESTATES HOMEOWNERS ASS'N, http://benedicthillsestates.org/benedicthillsestates/page.html?pf=yes&page_id=30#PA1 (last visited Oct. 16, 2014) ("BHEA is a 'planned community' of 229 lots for the benefit of all members to ensure consistency, uniformity, aesthetically pleasing conditions and environment . . . .").

[52] *See infra* notes 63–67.

[53] These types of actions are exhibited in *Preu*, where the owner engaged in a variety of confrontational, and even dangerous, activities that required board intervention (including placing bags with feces in common areas, obstructing common areas, and interfering with fire doors). Bd. of Managers of Old Colony Vill. Condo. v. Preu, 80 Mass. App. Ct. 728, 730 (2011). The court noted that "[t]here was evidence at trial of a history of erratic and disruptive behavior by Preu at the condominium, and of a growing strain in relations between Preu on the one hand and the board and condominium manager on the other." *Id.*

to rein them in.[54] Arguably, if we begin to erode the power of CC&Rs, we may stand to lose some of the *common* in common interest communities.

In addition, there are legitimate arguments made by HOAs that residents in these communities have waived some of their rights by voluntarily living in communities subject to CC&Rs.[55] The freedom to contract is a right that runs deep in the United States,[56] and courts are extremely reluctant to intercede when private parties willingly enter into agreements with certain rights and restrictions.[57] As owners accept the provisions included in their CC&Rs when they move into the community, some argue that they should be contractually barred from challenging them.[58] These and other factors militate in favor of robust CC&Rs.

On the other hand, there are compelling reasons to extend more free speech rights to common interest communities. With the increasing prevalence of CICs,[59] some scholars argue that there is little opportunity for prospective homeowners to actually seek out homes that are not burdened by association regulations.[60] Moreover, many

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[54] *Id.* Indeed, difficult behavior by residents is allegedly common practice in many CICs. *See* Robert J. Galvin, *Residential Condominiums—Drafting Management and Operational Provisions*, CONDI MA-CLE 4-1 (2013) ("This sort of behavior will be familiar to those with experience in representing condominium associations.").

[55] *See, e.g.*, Kennedy, *supra* note 16, at 779–80 (citation omitted) ("At the root of the presumption of legitimacy accorded an association's CC&Rs is consent. Residents who complain about any provision of the association's CC&Rs or bylaws must counter the argument that they read these restrictions, considered them, and signed anyway. In contrast to one's membership in the broader society, it is asserted, one's membership in an association may be regarded as 'wholly voluntary.'"); Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 511–12 (2012) (Wefing, J., dissenting) (arguing that owners should be bound if they have "agreed freely" to live in a community with restrictions on free speech and "there is no showing of overreaching or coercion"). *But see* Kennedy, *supra* note 16, at 793 n.106 (discussing several problems with this position).

[56] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 406 (1937) ("[F]reedom of contract [is] the general rule and restraint the exception; and that the power to abridge that freedom [can] only be justified by the existence of exceptional circumstances.").

[57] *See, e.g.*, Almers v. South Carolina Nat. Bank of Charleston, 265 S.C. 48, 60 (1975); Taminco NV v. Gulf Power Co., 322 F. App'x 732, 734 (11th Cir. 2009).

[58] *See* Mark Cantora, *Increasing Freedom by Restricting Speech: Why the First Amendment Does Not and Should Not Apply in Common Interest Communities*, 39 REAL EST. L.J. 409, 424 (2011) ("[P]eople living in common interest communities voluntarily expand some set of preferred benefits by contracting some set of less-favored rights. This happens every day outside of the CIC context in a democratic society, and is the very essence of democratic freedom."); Grant J. Levine, *This Is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners' Associations As State Action*, 36 NOVA L. REV. 555 (2012); Kennedy, *supra* note 55, at 779–80.

[59] *See supra* note 7.

[60] *See* Gott, *supra* note 16, at 220 ("[T]he growing proportion of properties

residents in CICs are arguably not given sufficient notice that their free speech rights will be severely restricted merely by moving into a certain community.[61] And even for those who *are* aware of burdensome restrictions in their communities, most are nonetheless unable to bargain for different terms.[62]

Additionally, HOA boards have been known to abuse their power, subjecting the residents of their communities to restrictions that seem intrinsically unreasonable.[63] There are countless horror stories in this

encumbered with covenants that provide for community association governance has made it increasingly difficult for a prospective home buyer to avoid."); Franzese, *supra* note 2, at 755 (same); Askin, *supra* note 35, at 15 (discussing that in *Twin Rivers*, many people purchasing encumbered homes were merely looking for affordable housing, not the restrictions present in CC&Rs).

[61] Of course, recordation of CC&Rs usually gives constructive notice to owners and binds them. Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 REAL PROP. PROB. & TR. J. 17, 38–39 (2003). There is good reason to believe, however, that residents do not actually read every sentence of the CC&Rs, and even if they do, that they do not understand the significance and breadth of every restriction. *See id.*; *see also supra* note 8 and accompanying text. Professor Winokur has suggested that:

> [m]ost prospective owners do not intelligently review the restrictions to which they subject themselves upon acceptance of a deed to land burdened by servitudes. The documentation typically makes long, boring reading for laypersons, who rarely retain counsel to review the documentation involved in home purchases. Even those who read the restrictions in advance may miscalculate their own future attitudes toward servitude restrictions, perhaps inaccurately expecting that friendly relations with neighbors will eliminate hostile disagreements between residents. Such optimistic expectations are often disappointed.

James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 59 (1989).

[62] Franzese, *supra* note 61, at 31 (citing Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL. L. REV. 397, 398 (1998)) ("Typically, purchasers do not have the freedom or bargaining power to barter over terms contained in the declaration, described as 'a 200-page adhesion contract, which is merely a stack of non-negotiable, standardized boilerplate provisions.'").

[63] *See, e.g.*, Franzese & Siegel, *supra* note 2, at 761–65 (quoting Hannaman, *supra* note 8, at 2) (discussing the "undemocratic" conditions of CICs and severe abuses of power articulated in the Hannaman report, as well as other horror stories); Aldo Svaldi, *Horror Stories Prompt Industry Group to Ask Colorado to Regulate HOA Managers*, DENVER POST (Feb. 13, 2012, 1:00 AM), http://www.denverpost.com/ci_19951732 (presenting the story of an elderly couple on the verge of losing their home over fines that started with a misplaced trash can); Paul Bannister, *Homeowner Horror Stories: Associations are Heaven or Hell*, BANKRATE, http://www.bankrate.com/ finance/real-estate/homeowner-horror-stories-associations-are-heaven-or-hell.aspx (last visited Feb. 7, 2015) (profiling numerous HOA horror stories, many which result in liens and/or foreclosure for the homeowner). In fact, there is even an extensive comment feed on the popular social news site Reddit, where users post their own HOA horror stories. *See What are Your Home-Owners Association (HOA) Horror Stories?*, REDDIT, http://www.reddit.com/r/AskReddit/comments/17v1fx/ what_are_your_homeowners_association_hoa_horror/ (last visited Feb. 7, 2015).

vein, ranging from an HOA's decision to ban all recreation in common areas[64] to an elderly woman who was fined every time she walked her dog through the lobby, even though she could not physically carry the dog as required by the CC&Rs.[65] In fact, so many associations banned residents from flying the American flag outside of their homes that Congress actually passed a statute to protect this right.[66] But even federal law has not stopped HOAs from engaging in this practice, even when the flag is so small that it fits in a flower pot.[67]

In sum, although CC&Rs undoubtedly serve the legitimate purpose of ensuring comfortable uniformity within a community, many HOAs take this command too far. By often enacting outright bans on virtually all kinds of free expression,[68] HOAs are effectively attempting to turn CICs into "speech free" zones. This intolerance is repugnant to the American tradition of vibrant discourse,[69] especially

[64] Anna Bakalis, *Stonegate Villas Owners Say New Rules Unneighborly*, VENTURA CNTY. STAR (July 12, 2008), http://www.vcstar.com/news/2008/jul/12/stonegate-villas-owners-say-new-rules-i-feel-im/ (causing some residents to remark: "Sometimes it feels like jail here . . . .").

[65] Debora Vrana, *The Runaway Power of Homeowners Associations*, MSN REAL ESTATE (July 30, 2006), *available at* http://www.ccfj.net/HOArunawaypower.html.

[66] The Freedom to Display the American Flag Act of 2005 reads:

> A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

Pub. L. No. 109–243, 120 Stat. 572 (2006). There are also state analogs to this law. *See, e.g.*, Fla. Stat. Ann. § 720.304 (2010) (guaranteeing the right of CIC residents to fly a flag "regardless of any covenants, restrictions, bylaws, rules, or requirements of the association"). In reality, the fact that legislatures around the country, including Congress, have independently concluded that homeowners associations often pass overburdensome regulations is reason enough to conclude that more free speech rights should be extended to CICs.

[67] *Florida Man May Lose Home Over Display of American Flag*, AOL (June 24, 2014, 2:28 PM), http://www.aol.com/article/2014/06/24/florida-man-may-lose-home-over-display-of-american-flag/20919158/ (describing a situation where a Florida veteran was fined $100 for every day that he kept a miniature American flag in his flower pot).

[68] *See, e.g.*, Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) (where the Board left a small bulletin board as the only means of expression within the community).

[69] Setha M. Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, AM. ANTHROPOLOGIST 45 (2001) ("This retreat to secured enclaves with walls, gates, and guards materially and symbolically contradicts American ethos and values, threatens public access to open space, and creates yet another barrier to social interaction, building of social networks, as well as increased tolerance of diverse cultural/racial/social groups."). Indeed, the Supreme Court has always stressed the

when it is increasingly difficult for individuals to find residences that are unburdened by these types of restrictions.[70] Therefore, it is vital for the preservation of free speech to identify methods to extend greater expressional rights to CICs.

IV. METHODS PROMULGATED TO EXTEND FREE SPEECH PROTECTIONS TO CICS

Many different theories have been proposed to extend free speech rights to CICs. The most popular of these suggestions have been to: (1) treat CICs as state actors, and thus subject them to constitutional obligations;[71] (2) encourage legislatures to pass statutory protections for expressional rights in CICs;[72] (3) push communities themselves to adopt CIC bills of rights to protect their own speech;[73] or (4) persuade courts around the country to follow the New Jersey Supreme Court's lead in finding that unreasonable restrictions are offensive to their state constitutions.[74] While none of these theories has yet been widely adopted, each provides an opportunity to analyze and weigh the competing interests in an attempt to fashion the best possible solution.

A. Treat CICs as State Actors, thus Subjecting Them to First Amendment Obligations

Experts worry that those looking for new homes are increasingly unable to find properties without accompanying restrictions on free speech.[75] Therefore, one of the most popular proposed solutions argues that CICs have become the *de facto* governmental entity in

vital role of free speech and public discourse, remarking:

> The safeguarding of [free speech] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Thornhill v. State of Alabama, 310 U.S. 88, 95 (1940).

[70] *See supra* note 60 and accompanying text.

[71] *See infra* Part IV.A.

[72] *See infra* Part IV.B.

[73] *See infra* Part IV.C.

[74] *See infra* Part IV.D.

[75] *See supra* note 60 and accompanying text.

substantial portions of the country, and should be treated as such.[76] Under this line of reasoning, if CICs fulfill many of the functions of municipalities, their actions should qualify as state action, opening them up to constitutional obligations.[77]

There is no arguing with the fact that CICs provide services traditionally delivered by municipalities. In fact, even the Community Association Institute, which represents the interests of community associations, describes the phenomena as such:

> Newly created community associations are increasingly required to provide their members with what have historically been considered "municipal" services. Association members must then typically pay the same local taxes as other neighboring homeowners even though trash collection, road and sidewalks maintenance and repair, street lighting, disposal of sewage, storm, flood and erosion control systems, shade and ornamental tree maintenance, security patrols for crime, disorder and public safety and other forms of public services are not made available to them.[78]

Because these are traditional municipal services, some scholars argue that associations effectively operate as "quasi-governmental" entities, entitling residents to the same protections that are afforded to those living under normal government oversight.[79] In practice, though, this

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[76] There is also a separate but related argument that extensive regulation and protection provided by state laws qualify associations as state actors. Nevertheless, this idea has not caught on and is unlikely to succeed as a rationale for a state action designation on its own. *See, e.g.*, Yan Sui v. 2176 Pac. Homeowners Ass'n, SACV 11-1340 JAK AJW, 2012 WL 6632758, at *11 (C.D. Cal. Aug. 30, 2012) ("[T]he fact that state law governs the formation and operation of the HOA does not make the HOA a state actor.").

[77] Although this argument is an extension of the *Marsh* principle, *see supra* notes 32–38 and accompanying text, it has since taken on a life of its own.

[78] *2012 Public Policies of Community Associations Institute, Local Taxation and Public Services for Community Associations*, *supra* note 3, at 54.

[79] *See, e.g.*, Kennedy, *supra* note 16, at 763 ("Since the ability to wield such power is largely associated with the state, only by recognizing the quasi-governmental nature of these associations and their actions can the unique conflicts they engender be adequately addressed."). A particularly cogent recitation of this analysis is provided by Franzese and Siegel, who note:

> Presently, homeowners associations: (1) are assuming many functions and services traditionally provided by municipalities; (2) are often performing those functions and services with the use of taxpayer funds; (3) are often the product of conscious and deliberate municipal land-use policy; (4) represent the standard template for new community development in many parts of this State; and (5) own networks of streets and open space that, if owned by a municipality, would have served as . . . traditional public forums for speech and assembly. In the face of these

notion may be untenable, a sentiment that is borne out in the lack of support it has received by courts throughout the United States.[80]

The initial resistance to this theory was that functions performed by associations do not supplant those essential services traditionally provided by municipalities,[81] or that such claims were greatly exaggerated.[82] Others argued forcefully that although associations perform some functions of government, such an attribute does not necessarily qualify them as governmental entities.[83] Although these arguments are still discussed by commentators and courts,[84] there seems to be a more fundamental disagreement with such a solution.

The modern hesitation to implement this solution appears to be that it works too broad and monumental of a change to American jurisprudence by eviscerating the state action doctrine.[85] A holding

> realities, it is simply untenable to continue a laissez-fare regime that presupposes that homeowners associations are wholly private organizations.

Franzese & Siegel, *supra* note 2, at 765–66.

[80] *See, e.g.*, *supra* notes 46–47 and accompanying text; *see also infra* notes 81 & 83.

[81] *See, e.g.*, Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 449 Pa. Super. 124, 128 (1996) ("While there is sewer service, private streets, and private maintenance, Midlake provides no facilities for community public use that are typically found in a municipality, such as schools, libraries, and other public functions."); Brock v. Watergate Mobile Home Park Ass'n, Inc., 502 So. 2d 1380, 1382 (Fla. Dist. Ct. App. 1987) ("[T]he services provided by a homeowners association, unlike those provided in a company town, are merely a supplement to, rather than a replacement for, those provided by local government."); Ross v. Hatfield, 640 F. Supp. 708, 711 (D. Kan. 1986) (finding that the community was not "sufficiently similar to the company-owned town in *Marsh*" because it did not have its own police or firemen, its own schools, independent trash collection, or public spaces serving the business needs of its residents, nor did the Board of Managers have the powers and rights of a town's governing body).

[82] Gott, *supra* note 16, at 207 ("Some [scholars] engage in a disingenuous inquiry into the services an association provides.").

[83] One court, citing Judge Richard Posner, used an analogy to explain why associations should not be considered government actors:

> There are two problems with this line of reasoning. First, it 'confuse[s] an entity and its attributes.' Dogs breathe, eat, sleep, run, and play, but they are not humans, who also do all of those things. And it is not as though the attributes [cited] are those which have been described by the Supreme Court as possibly *exclusive* state functions . . . . Demonstrating that condominiums do certain things that state governments also do doesn't show that condominiums are acting as the state or in the state's place.

Goldberg v. 400 E. Ohio Condo. Ass'n, 12 F. Supp. 2d 820, 823 (N.D. Ill. 1998) (citing RICHARD A. POSNER, OVERCOMING LAW 211 (1995)).

[84] *See, e.g.*, Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22, 43 (App. Div. 2006), *rev'd*, 192 N.J. 344 (2007).

[85] The state action doctrine is a bastion of American jurisprudence. Indeed, courts have said that "the fundamental nature of a constitution is to govern the

that any private entity which performs quasi-governmental functions could be held as a state actor would be unduly broad, likely capturing many community associations that may not function as quasi-governments,[86] as well as corporations,[87] unions,[88] and even sports leagues.[89] Any test articulated to help determine what would vault an entity into "state actor" distinction would undoubtedly be imprecise, wholly subjective, and unpredictable.[90] Such a test would do little to resolve the hodgepodge of seemingly contradictory judicial opinions on this issue around the country,[91] nor adequately apprise boards and owners of their rights before litigation hashed them out.

As the line between HOAs and local governments becomes even further blurred, especially as jurisdictions pass legislation mandating private associations for all new development,[92] the calls for treating HOAs as state actors will only get stronger.[93] But because the state

relationship between the people and their government, not to control the rights of the people vis-a-vis each other." Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 808 (Cal. 2001) (citation omitted). By chipping away the state action doctrine, the interactions between private entities would effectively be controlled by the government, reducing choice and eroding the separation of powers. For this reason, it is unlikely to ever be significantly curtailed. *See supra* Part 0.

[86] Ronald Perl, former president of the Community Associations Institute, inquired compellingly: "'Does that apply to your brownstone condo in Hoboken?' . . . 'Is your four-unit building a mini-municipality?'" Laura Mansnerus, *Chalk One Up for Homeowners*, N.Y. TIMES (Mar. 12, 2006), http://www.nytimes.com/2006/03/12/nyregion/nyregionspecial2/12njHOME.html?pagewanted=all&_r=0.

[87] *Goldberg*, 12 F. Supp. 2d at 823 (noting that "[t]he National Basketball Association makes rules, conducts hearings, issues decisions, and imposes fines, but it seems unlikely that the privately run sports league is a government actor," and discussing how such reasoning could apply to unions and corporations as well).

[88] *Id.*

[89] *Id.*

[90] For example, some have simply pegged it as a "fact-bound determination, requiring a variety of linkages between the actor and state authority." Kennedy, *supra* note 16, at 783. Such a test would subject every significant private entity to lawsuits to determine whether they are to be treated as state actors under this framework.

[91] *Id.* ("State courts have reached wildly different conclusions when faced with [this determination].").

[92] *See* Sharon Kolbet, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 TEX. WESLEYAN L. REV. 85, 108 (2008) (citing Dallas, Tex., Development Code, Ordinance 22477 ch. 51, § 2(j) (1995)); Chadderdon, *supra* note 16, at 237.

[93] Indeed, little by little, some courts have used language that seems to support such a position. *See, e.g.*, Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 479 (2000) (citations omitted) ("For many Californians, the homeowners association functions as a second municipal government . . . ."); Silk v. Feldman, 208 Cal. App. 4th 547, 553 (2012) (citing *Damon*, 85 Cal. App. 4th at 475) ("Courts have recognized a homeowners association functions as a quasi-governmental entity, paralleling the powers and duties of a municipal government."); Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22 (App. Div. 2006), *rev'd*, 192 N.J.

action impediment is such a large one, and because most states have already dug in their heels against such a proposition,[94] this proposal is likely more of an academic exercise than a realistic solution.

B. Legislative Extension of Free Speech Rights to CICs

Some state legislatures have recognized the shortfalls of suggested judicial remedies to this problem, and have taken it upon themselves to protect free speech rights through legislation.[95] California's experience is instructive.

Early on, the California judiciary led the way in extending constitutional protections to private settings, holding that free speech rights applied to private shopping centers.[96] As time wore on, with heavy criticism of its rationales[97] and a more conservative bench, the California Supreme Court sharply limited its extension of free speech rights,[98] and appellate courts followed suit.[99] With that, California's

344 (2007) ("The manner and extent to which functions undertaken by community associations have supplanted the role that only towns or villages once played in our polity mirrors the manner and extent to which regional shopping centers have become the functional equivalents of downtown business districts."); Cohen v. Kite Hill Cmty. Assn., 142 Cal. App. 3d 642, 651 (Cal. Ct. App. 1983) (citation omitted) (citing a law review article which noted "the increasingly 'quasi-governmental' nature of the responsibilities of . . . associations" and that "one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government"). It remains to be seen whether more courts will adopt this reasoning, but it is unlikely that a solution requiring such a substantial shift in this country's jurisprudence will ever command considerable support.

[94] *See supra* notes 47, 81, & 83 (surveying various courts that have rejected attempts to ascribe state action to private actors).

[95] For example, Illinois has passed a statute, 765 ILCS 605/18.4(h), providing that:

> [N]o rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit.

Many other states have passed legislation protecting free speech in CICs. *See, e.g.*, Suarez, *supra* note 16, at 759 n.116; Chadderdon, *supra* note 16, at 262–63 (discussing the legislative enactments of Arizona, Maryland, Florida, California, and Texas).

[96] Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899 (1979); *see supra* note 44 and accompanying text.

[97] *See supra* note 47 and accompanying text.

[98] *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797 (Cal. 2001) (holding that California's free speech right does not apply to private apartment complexes).

[99] Golinger, *supra* note 44, at 269 (noting that appellate courts further narrowed

judicial experiment came to a screeching halt.[100]

Recognizing the importance of certain free speech rights within CICs, and aware that attempted judicial remedies were untenable, the California legislature was forced to act on its own. In 2011, the legislature passed a statute specifically protecting free speech in CICs, with California Civil Code § 1940.4 guaranteeing the rights of residents to display political signs without ramifications from association boards.[101] There are some reasonable limitations on this right, but the legislation nonetheless codifies rights for residents that the California Supreme Court was ultimately unable or unwilling to extend.

California's experience offers a model for other state legislatures to safeguard the rights of those living in CICs, without disturbing the state action doctrine. Although some have suggested this as a viable solution,[102] there are undeniable problems with such a course of action. For one, there are questions regarding the ability of legislatures to micromanage private entities and subvert the state action doctrine through legislation. As "freedom of contract [is] the general rule and restraint the exception,"[103] some have suggested that a retroactive

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the doctrine, holding that stand-alone stores like Target and Trader Joe's were not subject to the same free speech restrictions).

[100] The California Supreme Court now holds that "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public." *Golden Gateway Ctr.*, 29 P.3d at 810; *see also* Cal. Prac. Guide Landlord-Tenant Ch. 4-D (2014).

[101] CAL. CIV. CODE § 1940.4 reads:

> (a) Except as provided in subdivision (c), a landlord shall not prohibit a tenant from posting or displaying political signs relating to any of the following:
> (1) An election or legislative vote, including an election of a candidate to public office.
> (2) The initiative, referendum, or recall process.
> (3) Issues that are before a public commission, public board, or elected local body for a vote.
> (b) Political signs may be posted or displayed in the window or on the door of the premises leased by the tenant in a multifamily dwelling, or from the yard, window, door, balcony, or outside wall of the premises leased by a tenant of a single-family dwelling.
> (c) A landlord may prohibit a tenant from posting or displaying political signs in the following circumstances:
> (1) The political sign is more than six square feet in size.
> (2) The posting or displaying would violate a local, state, or federal law.

[102] *See, e.g.*, Suarez, *supra* note 16, at 762.

[103] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 406 (1937); *see also In re* Brooklyn Bridge Sw. Urban Renewal Project (Project No. N.Y. R-67) Manhattan, New York, 46 Misc. 2d 558, 561 (Sup. Ct. 1965), *aff'd*, 24 A.D.2d 710 (1965) (citation omitted) ("While there is no absolute right of freedom of contract, the exercise of legislative authority to abridge it can be justified only where the enforcement of such a contract would conflict with dominant public interests. Otherwise a statutory restraint on the

application of a statute that strips associations of previously held rights might be struck down via the Contracts Clause.[104]

More fundamentally, the political will to pass legislation addressing each free speech issue may be lacking. And even if there was the political will, passing legislation is often reactive, not proactive, and would provide an extremely slow solution to this problem. Moreover, state legislatures likely vary widely in how they view the role of government in controlling private entities, and inconsistent protections offered in different parts of the country would do little to help the current situation. Therefore, although legislative enactments would do much to avoid the difficult state action question, it is unlikely that they would have the speed, uniformity, or predictability necessary to provide an adequate remedy.

C. CIC Bill of Rights

Similar to a reliance on legislative action to protect free speech in CICs, some scholars have suggested that residents themselves should take the initiative to protect free speech in their communities.[105] A Residents' Bill of Rights[106] would ostensibly "provide meaningful oversight of homeowners associations without unduly restricting the power of governing boards to carry out their duties and obligations."[107] This position is theoretically supported by advocates for community associations and boards, who argue that homeowners should shoulder the burden of setting aside the rights they wish to have in their communities.[108] Homeowners control the boards, and are therefore

freedom of the parties to contract is violative of the Fourteenth Amendment . . . .").

[104] *See* Ronald Perl and Brian Edlin, *The Constitutional Conundrum; The Application of State and Federal Constitutions to Planned Communities and Condominiums*, COLL. OF CMTY. ASS'N LAWYERS, §1.05 (Jan. 24–26, 2013).

[105] *See, e.g.*, Suarez, *supra* note 16, at 758.

[106] For potential wording of such a Homeowner's Bill of Rights, see French, *supra* note 8, at 351 ("Speech: The rights of residents to display political signs and symbols of the kinds normally displayed in or outside of residences located in single-family residential neighborhoods in their individually owned property shall not be abridged, except that the association may adopt reasonable time, place, and manner restrictions for the purpose of minimizing damage and disturbance to other owners and residents."); *see also* Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL'Y 479, 515–34 (2009).

[107] Franzese & Siegel, *supra* note 2, at 768 (discussing legislative enactments that would function similarly to a homeowner's "Bill of Rights").

[108] Chadderdon, *supra* note 16, at 260 ("HOA members do have the ability to change the covenants of the HOA through a vote of the members. Thus, there appears to be a political remedy built into the HOA structure: if enough homeowners want to make a change, they can vote to make that change."); *see also infra* Part 0 (suggesting that residents and boards should collaboratively change their CC&Rs to reflect reasonable allowances of free expression).

able to amend the associations' governing documents as they collectively see fit.

In reality, though, residents cannot be relied upon to protect free speech rights in their own communities. As an initial matter, CC&Rs are almost always set before the sale of any homes, and usually exist for good reasons.[109] In CICs, although select residents may be upset that their expression is limited, many more are thankful that there are restrictions to insulate the community from potentially disruptive speech.[110] More fundamentally, even if the will exists,[111] boards exercise significant control over the legislative process within associations and can greatly hinder any attempt to amend the CC&Rs to add such a bill of rights.[112] As the desire to extend free speech methods in CICs will often be a minority position, it is unlikely that it will ever command the majority necessary to pass a Bill of Rights.

Therefore, while it may certainly help the situation for residents and boards to seek out internal solutions to free speech problems,[113] a "Bill of Rights" cannot be relied on as the only, or even primary, method of safeguarding free speech rights in CICs.

D. Applying a Constitutional Analysis: The New Jersey Approach

The New Jersey Supreme Court has taken the matter into its own hands,[114] devising a unique test under its state constitution that extends free speech rights without deeming CICs state actors.[115] After the U.S. Supreme Court held in *Pruneyard*[116] that states could find greater free

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[109] *See supra* note 3 and accompanying text.

[110] *See supra* notes 53–54 and accompanying text.

[111] In addition to homeowners who actively support restrictions, apathy is also a major impediment to marshaling the will to amend the governing documents. Because many communities count non-votes as "no" votes, an indifferent owner is just as damaging as an owner who actually votes "no" on an amendment.

[112] Chadderdon, *supra* note 16, at 260 ("[T]he notion that homeowners can makes changes to CC&Rs once becoming home-owning members of HOAs is largely illusory.").

[113] *See infra* Part 0 (arguing that while a more significant solution is necessary, boards and residents would do well to preemptively modernize their CC&Rs to protect reasonable amounts of free expression).

[114] The only other court that has utilized the New Jersey approach was a Missouri state court in *Lamprecht v. Tiara at the Abbey Homeowners Ass'n*, 2013 No. 12-JE CC0027, WL 6144144 (Mo. Cir. Oct. 3, 2013). *See infra* note 169 and accompanying text.

[115] *See generally* Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 73 (2014).

[116] Robins v. Pruneyard Shopping Center, 447 U.S. 74 (1980); *see also supra* note 44.

speech protections under their own constitutions than the U.S. Constitution, and thus could extend free speech protections to certain kinds of private property,[117] New Jersey was one of the first states to take that leap.[118]

In its first post-*Pruneyard* foray into the issue of free speech in a traditionally private sphere, the New Jersey Supreme Court determined in *State v. Schmid*[119] that there are certain instances where the public nature of private property begets some constitutional protections.[120] The court recognized that "as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is . . . a counterbalancing between expressional and property rights."[121] In order to effectuate this understanding, the court developed a new test to determine the extent to which expression on privately-owned property can reasonably be restricted:

> 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. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.[122]

Utilizing this test, the court held that Schmid was entitled to enter the campus of Princeton University and distribute political materials, despite a lack of permission from the University.[123] This important holding opened the door slightly for those whose free speech was limited in other traditionally private spheres, and set the stage for New

[117] In *Pruneyard*, the Supreme Court had held that California could extend free speech guarantees to private shopping centers under its own state Constitution. 447 U.S. at 79–80.

[118] *See supra* note 44.

[119] 84 N.J. 535 (1980).

[120] *Id.* at 567.

[121] *Id.* at 561 (citing Marsh v. Alabama, 326 U.S. 501, 506 (1946)).

[122] *Id.* at 563.

[123] *Id.* at 567–68 ("[I]n the absence of a reasonable regulatory scheme, Princeton University did in fact violate defendant's State constitutional rights of expression in evicting him and securing his arrest . . . .").

Jersey's unique development of this constitutional framework.

More than a decade later, the New Jersey Supreme Court extended the ruling of *Schmid*, holding in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation*[124] that regional private shopping malls had to permit leafleting on societal issues.[125] In *Coalition*, the court added a new balancing test pitting expressional rights versus private property rights,[126] which stood for the proposition that the more private property is utilized for public purposes, the more expressional rights may be enjoyed upon it.[127] The court noted that the owners of the shopping mall had "intentionally transformed their property into a public square or market, a public gathering place, a downtown business district, a community,"[128] which meant that "[t]he sliding scale [could not] slide any farther in the direction of public use and diminished private property interests."[129] On the private property interest side of the balancing test, the court observed that the plaintiff's type of free speech was "substantial in [New Jersey's] constitutional scheme"[130] and that leafleting could be done without seriously infringing on the rights of other guests.[131] After considering these interests, the court determined that the *Schmid* factors, as well as the general balancing, tilted in favor of allowing leafleting.[132]

In its third major return to the question of free speech rights in private settings, the New Jersey Supreme Court reiterated in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*[133] that a lack of state action is not an impediment to invoking free speech protections in the New Jersey constitution.[134] For the first time, this

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[124] 138 N.J. 326 (1994).

[125] *Cf.* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979) (expanding free speech protections to shopping malls in California).

[126] *Coalition*, 138 N.J. at 362–63.

[127] *Id.* at 363 (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)) ("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.").

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Coalition*, 138 N.J. at 365 ("We are totally satisfied that on balance plaintiff's expressional rights prevail over defendants' private property interests. We are further satisfied that the interference by defendants with plaintiff's rights constitutes unreasonably restrictive or oppressive conduct.").

[133] 192 N.J. 344 (2007).

[134] The court stated that "the rights of free speech and assembly under our constitution are not only secure from interference by governmental or public bodies, but under certain circumstances from the interference by the owner of private

precedent was applied to the actions of a private residential entity;[135] specifically, a policy restricting the size, number, and placement of signs within the community.[136] Applying the *Schmid/Coalition* test, the court determined that the restrictions were not unreasonable and thus not unconstitutional, as they were merely time, place, and manner restrictions and residents had reasonable alternative opportunities to express themselves.[137] Although the court ultimately found for the association[138] and the opinion was somewhat "ambiguous and confusing,"[139] the *Twin Rivers* decision nonetheless appeared to open the door even more for the eventual extension of free speech rights into CICs.[140]

Just five years later, in *Mazdabrook Commons Homeowners Assn. v. Khan,*[141] the New Jersey Supreme Court delivered a resounding victory for free speech in CICs, becoming the first state to strike down signage restrictions of a private CIC as violative of the state constitution. The court again repeated that "[i]n New Jersey, an individual's affirmative right to speak freely 'is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities' in certain situations."[142] Yet the court noted that the facts of *Mazdabrook*, where a resident posted a political sign endorsing his own candidacy and was fined pursuant to the association's blanket sign restriction, required a different interpretation of the *Schmid/Coalition* test than the one conducted in

property as well." *Id.* at 364. The court also left no doubt about its departure from the state action doctrine, saying: "Simply stated, we have not followed the approach of other jurisdictions to require some state action before the free speech and assembly clauses under our constitution may be invoked." *Id.*

[135] Franzese & Siegel, *supra* note 2, at 733.

[136] *Twin Rivers*, 192 N.J. at 351 (The covenant held that "residents [could] post a sign in any window of their residence and outside in the flower beds so long as the sign was no more than three feet from the residence. . . . The policy also forb[ade] the posting of signs on utility poles and natural features within the community.").

[137] *Id.* at 368.

[138] *Id.*

[139] Franzese & Siegel, *supra* note 2, at 743.

[140] Franzese and Siegel stressed the subtle importance of the *Twin Rivers* decision:

> Although at first glance the *Twin Rivers* decision does not appear to constitute a bold proclamation of new doctrine, a more careful analysis of the Court's opinion reveals that the Court did indeed announce the framework of a new constitutional approach to CICs. That framework, although largely undefined in its details, provides a conceptual basis for a robust constitutional right of free speech and assembly applicable to CIC residents.

Id. at 733.

[141] Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482 (2012).

[142] *Id.* at 493 (citations omitted).

Twin Rivers.[143] Because the owner was not an outsider and actually owned the property on which the speech was expressed, a test that pitted expressional rights versus private property rights was an inadequate means to assess the tradeoff.[144] Therefore, the court focused on the third *Schmid* factor and engaged in a more general balancing of Khan's expressional rights versus the negative impact this speech had on the Association's property and common areas.[145] After observing that Khan held a legitimate right to free speech on his own residential property and that his speech had minimal interference with Association property,[146] the court concluded that his rights outweighed the aesthetic interests of the Association, and that the outright ban on signs was unconstitutional.[147]

Despite *Mazdabrook*'s win for free speech, the test for evaluating free speech rights in CICs had become significantly muddled,[148] and lower courts appeared unsure of how to apply the test to differing factual circumstances.[149] Seeking to clarify this standard, the New Jersey Supreme Court recently decided *Dublirer v. 2000 Linwood Ave. Owners, Inc.*,[150] in which it unanimously articulated a new test for analyzing restrictions on speech within CICs. In *Dublirer*, a community's "House Rule"[151] banned solicitation and distribution of

[143] *Id.* at 498–99.

[144] *Id.* The court explained that because Khan owned the property, "the first two *Schmid* factors [did] not favor near-absolute limits on placing a political sign inside [his] own home." *Id.* at 499.

[145] *Id.* at 501.

[146] *Id.* at 501–03.

[147] *Mazdabrook*, 210 N.J. at 503.

[148] Franzese & Siegel, *supra* note 2, at 747 (noting that the court had left "undefined the scope and application of this constitutional remedy," and remarking that there could be "many years of appellate litigation before the precise contours of this remedy are fully delineated").

[149] *See, e.g.*, Dublirer v. 2000 Linwood Ave. Owners, Inc., No. A-4800-08T3, 2011 WL 3586139 (App. Div. 2011), *aff'd*, 220 N.J. 71 (2014) (where the Appellate Division purported to apply the *Schmid* test but failed to address how each prong of the test is to be assessed and valued, and neglected to discuss how the test changed based on the type of property and nature of the restriction).

[150] 220 N.J. 71 (2014).

[151] Because the building in question was a private cooperative apartment building (often referred to as a "co-op"), which features residents who purchase shares of the building and hold leasehold interests in their units, the House Rule was enforced by a Board of Directors and not a Homeowners Association. Although this difference may implicate different concerns, *see* Oral Argument, Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) (No. A-125-11), *available*

literature in common areas of the property without board approval.[152] A resident in the building ran for the Board of Directors and sought to distribute campaign literature on the premises, but the Board denied his request.[153] The resident filed suit challenging the "House Rule," the trial judge found for the Board, and the plaintiff appealed.[154]

The Appellate Division applied the well-known *Schmid* three-factor test, and found that although the community was private and there was no public invitation to the property,[155] the restriction nonetheless failed the test because it was unreasonable.[156] The court noted that the policy was especially unreasonable because it did not allow for any alternative means of expression[157] and seemed to discriminate based on content.[158] But because of the "ambiguous and confusing"[159] nature of the New Jersey Supreme Court's previous discussions of free speech in CICs, many issues remained unaddressed in the decision: (1) specific Supreme Court language appeared to contradict the Appellate Division's holding;[160] (2) it was unclear how a covenant could fail the *Schmid* test when two of the three factors militated in its favor;[161] and (3) no court had addressed whether the

at http://165.230.71.5/query.php?var=A-125-11 (where various questions were asked about the distinctions between different communities), the New Jersey Supreme Court has not officially weighed in on this issue.

[152] The rule in question provided:

> There shall be no solicitation or distribution of any written materials anywhere upon the premises without authorization of the Board of Directors. Without prior consent of the Board of Directors, no sign or notice shall be placed upon the bulletin board, [in] the mail room, in the halls, lobby, elevators or on the doorways. A bulletin board for residents['] use is provided [near] the rear door.

Dublirer, 220 N.J. at 251–52.

[153] *Id.* at 252.

[154] *Dublirer*, 2011 WL 3586139, at *1.

[155] *Id.* at *4.

[156] *Id.* at *6.

[157] *Id.* at *5.

[158] *Id.* at *6. It is important to note here that the Board of Directors did not evenly-apply the rule. For one, there was evidence that that Board itself engaged in the exact type of speech it prohibited the residents to engage in, namely in distributing newsletters that attacked the Board's critics. *Id.* at *2. In addition, the Board permitted local police and firefighters to solicit donations by knocking on doors. *Id.* These facts tend to indicate that the Board discriminated based on content, and although the Appellate Division did not explicitly hold this, it undoubtedly influenced the perception of the reasonableness of the rule. *Id.* at *6; Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 88–89 (2014).

[159] Franzese & Siegel, *supra* note 2, at 743.

[160] *See infra* note 167.

[161] The Appellate Division neglected to discuss the nature of the interaction between the different prongs of the *Schmid* test. Do all prongs need to be satisfied for

analysis changed based on the identity of the speaker and type of community.[162]

Recognizing these deficiencies, the New Jersey Supreme Court issued somewhat of a *mea culpa* in *Dublirer*, admitting that

> the *Schmid/Coalition* test [is] not a perfect fit for private residential communities. The first prong of the *Schmid* test, for example, is largely subsumed by the issue itself. In the case of restrictions imposed by the board of a private common-interest community of dwellings, the primary nature and use of the property, by definition, is private. The second prong—the extent of the public's invitation to use the property—is even less relevant because residents do not need an invitation to use property in their own community.[163]

Thus, in an attempt to "clarify the standard,"[164] the court declared that the *Schmid* test should no longer be applied when the speaker is an owner, not a visitor.[165] In those situations, "courts should [instead] focus on 'the purpose of the expressional activity undertaken' in relation to the property's use . . . and should also consider the 'general balancing of expressional rights and private property rights.'"[166] Thus, in its clearest decision since *Schmid*, the New Jersey Supreme Court finally stated what the test really was all along: a balancing test between free expression and property rights.[167] Applying this new test to the

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a defendant to prevail? Must all prongs be satisfied for a plaintiff to win? The court decided that the first two prongs weighed in favor of the association, but found that the third factor, which weighed in favor of the resident, trumped the first two and necessitated a finding for the plaintiff. *Dublirer*, 2011 WL 3586139, at *4–5.

[162] *See supra* note 151.

[163] *Dublirer*, 220 N.J. at 84–85.

[164] *Id.* at 85. *See also* Frank Askin, *N.J. Supreme Court Decision Clarifies Rules for Condo Associations, Other Properties*, THE STAR-LEDGER (Dec. 11, 2014), http://www.nj.com/opinion/index.ssf/2014/12/nj_supreme_court_decision_clarifies_rules_for_condo_associations_other_properties_opinion.html (suggesting that "the Court took the occasion to clarify the law and end the confusion caused by the *Twin Rivers* opinion").

[165] *Dublirer*, 220 N.J. at 84–85.

[166] *Id.* at 85 (quoting State v. Schmid, 84 N.J. 535, 563 (1980); N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 362 (1994)).

[167] Although it shored up some of the problems with the previous test, *Dublirer* arguably raised as many questions as it answered. For one, express New Jersey Supreme Court language seems to directly contradict the holding in this case. In two different decisions, the New Jersey Supreme Court has explicitly said:

> The list of 'horribles' suggested by defendants as the inevitable consequence of our holding for other forms of private property should be dealt with now, rather than in some future litigation. No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of *Schmid* to warrant the constitutional

facts, the court held that the "House Rule" was unconstitutional because Dublirer's important interest in promoting his candidacy and communicating his views about community to governance "outweigh[ed] the minor interference that neighbors w[ould] face from a leaflet under their door."[168]

With this line of cases, New Jersey is unquestionably at the forefront of adopting a more flexible approach to extending free speech rights to CICs.[169] And this constitutional framework is likely a better solution than any of the aforementioned theories, such as treating CICs as state actors,[170] relying on legislative action,[171] or pushing residents to protect their own interests.[172] It is reasonable, faster than legislative action, and more reliable than depending on residents to fix the problem themselves. Yet the ongoing saga from *Schmid* to *Dublirer* underscores the difficulty other states will likely encounter if they choose to adopt New Jersey's approach to free

extension of free speech to those premises, and we so hold.

Coalition, 138 N.J. at 373; Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 361 (2007). The court never addressed this language in *Dublirer*. Second, it is still unclear whether slight factual differences fundamentally change the constitutional inquiry. For example, what if the building is a small, two-family building as opposed to a large condominium complex? Is there a difference between an HOA and a co-op? How does the inquiry change for requests by residents to express themselves through community newsletters or community websites? Is there less protection when the speech involved is political, as opposed to "political-like" in *Dublirer*? Third, the court has suggested that knowing and intelligent waiver might not be possible for free speech rights in the CIC context, Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 505–06 (2012), but it has not further explained this proposition, and it is still unclear whether waiver no longer applies. These and many more questions abound, and will seemingly require the court to return to this issue very soon.

[168] *Dublirer*, 220 N.J. at 89.

[169] As it stands, only one other court has followed the reasoning of the New Jersey Supreme Court and extended state constitutional protections to private CICs. The first and only extra-state extension of New Jersey's constitutional approach was by a Missouri state court in *Lamprecht v. Tiara at the Abbey Homeowners Ass'n*, 2013 No. 12-JE CC0027, WL 6144144 (Mo. Cir. Oct. 3, 2013), which involved facts "nearly identical" to *Mazdabrook*. *Id.* at *3. In *Tiara at the Abbey*, a covenant mandated that "no sign of any kind shall be displayed to the public view" but made exceptions for "for sale" signs and signs placed by the builder or remodeler to advertise the property. *Id.* at *1. In its analysis of the constitutionality of the covenant, the court engaged in an almost identical analysis as the New Jersey Supreme Court, complete with a discussion of the expansiveness of the Missouri state constitution, the fundamental importance of political speech, an analysis of the *Schmid* factors, and the *Coalition* balancing test. *Id.* at *2–4. Based on these considerations, the court determined, similarly to *Mazdabrook*, that a restriction on political signage is an unreasonable restriction and unconstitutional under Article I, § 8 of Missouri's constitution. *Id.*

[170] *See supra* Part IV.A.

[171] *See supra* Part IV.B.

[172] *See supra* Part IV.C.

speech in CICs. Therefore, as discussed in more detail in Part B, although the New Jersey test is noble for the results it commands, its complexity and unpredictability make it difficult to apply even in New Jersey, much less the rest of the country.

V. STRIKING COVENANTS AS UNREASONABLE AGAINST PUBLIC POLICY: WHY THE RESTATEMENT TEST PROVIDES THE MOST WORKABLE SOLUTION

This Comment argues that the position taken by the Restatement (Third) of Property ("Restatement") is the most viable method of extending free speech to CICs. The Restatement suggests that courts should find a servitude "invalid if it is illegal, unconstitutional, or violates public policy."[173] In this way, by allowing courts to strike free speech restrictions that contravene public policy, the Restatement provides a contract and property-based means of ensuring that residents in CICs are given reasonable freedom of expression. This attempts to shift the discussion from somewhat distracting constitutional arguments to more substantive and thoughtful ones like "whether the arrangement poses such risks to the social good that judicial modification or nullification is warranted."[174]

And since judicial non-enforcement of covenants as unreasonable against public policy is a "long-standing axiom of contract law,"[175] the Restatement's suggestion is not so much a novel suggestion as it is the modern application of a time-tested approach. In this way, the Restatement test provides a method of guaranteeing free expression in CICs that is simple, reliable, and replicable around the country.

A. Overview of the Restatement Test

The Restatement test closely resembles the test the New Jersey Supreme Court recently articulated in *Dublirer*,[176] in that it requires a balancing between the benefit derived from a covenant versus the harm of leaving the restriction in place.[177] The Restatement begins by commanding that a servitude:

> is valid unless it is illegal or unconstitutional or violates public policy. Servitudes that are invalid because they violate public policy include, but are not limited to:
> (1) a servitude that is arbitrary, spiteful, or capricious;

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[173] RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 3, intro. note (2000).
[174] *Id.*
[175] *In re* Village Homes of Colorado, Inc., 405 B.R. 479, 483 (2009).
[176] Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 84 (2014).
[177] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e (2000).

> (2) a servitude that unreasonably burdens a fundamental constitutional right;
> (3) a servitude imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;
> (4) a servitude that imposes an unreasonable restraint on trade or competition under § 3.6; and
> (5) a servitude that is unconscionable under § 3.7.[178]

If the servitude does not fall clearly into one of these prohibitions, the Restatement requires courts to weigh the "interests in enforcing the servitude" against the "public interests that would be adversely affected by leaving the servitude in force."[179]

As to the first element, which considers the interests served by the servitude, the Restatement test begins with the presumption that all covenants are valid.[180] This presumption recognizes that "policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate-expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes."[181] To accommodate this assumption, the Restatement shifts the burden to the party claiming that a servitude should be struck down as a violation of public policy,[182] and places strong reliance on waiver, though without mentioning it by name.[183] Courts may also look to the community benefits derived from the restriction, such as attempts to be free from offensive speech, freedom from litter, and freedom of privacy.[184]

As to the second half of the balancing test, courts must then consider what societal interests would be adversely affected if the servitude were left in place.[185] This hinges on what constitutes "public

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[178] *Id.* at § 3.1.

[179] RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 3, intro. note (2000).

[180] *Id.* at § 3.1 cmt. i.

[181] *Id.*

[182] *Id.*

[183] *Id.* ("If the principal costs of a servitude fall on the parties who have accepted the burdened property in circumstances in which they should have understood the costs, courts should be reluctant to invalidate the servitude, no matter how costly it turns out to be to one of the parties . . . .").

[184] *See generally* Brief for Community Associations Institute – New Jersey Chapter as Putative Amicus Curiae Supporting Petitioners at 20–25, Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) (No. A-125-11) (discussing, among other things, some of the bargained-for benefits of covenants restricting leafleting).

[185] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. i (2000).

policy," a definition courts have grappled with for decades.[186] The general concept of public policy in the servitudes context is that:

> An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals.[187]

At first glance, this seems an impossible task; such an undefined standard would be wholly subjective, unpredictable, and unfair.[188] But the Restatement addresses this issue head-on; it readily acknowledges that the concept of public policy is "somewhat amorphous"[189] and undertakes to simplify this judicial method through a set of standards to evaluate public policy.[190]

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[186] William Story remarked more than a century ago that

> [p]ublic policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy.

WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS, § 675 (1874); *see also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403–404 (1960) (noting that "[p]ublic policy is a term not easily defined" because "[i]ts significance varies as the habits and needs of a people may vary").

[187] Odatalla v. Odatalla, 355 N.J. Super. 305, 314 (Ch. Div. 2002) (quoting Garlinger v. Garlinger, 129 N.J. Super. 37, 40 (Ch. Div. 1974)).

[188] *Cf. supra* Part D (criticizing the New Jersey approach as being similarly undefined and unpredictable).

[189] RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 3, intro. note (2000).

[190] *Id.* at § 3.1 cmt. i. This entire portion of the comment reads:

> Resolving claims that a servitude violates public policy requires assessing the impact of the servitude, identifying the public interests that would be adversely affected by leaving the servitude in force, and weighing the predictable harm against the interests in enforcing the servitude. Only if the risks of social harm outweigh the benefits of enforcing the servitude is the servitude likely to be held invalid. The policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes. A host of other policies, too numerous to catalog, may be adversely impacted by servitudes. Policies favoring privacy and liberty in choice of lifestyle, freedom of religion, freedom of speech and expression, access to the legal system, discouraging bad faith and unfair dealing, encouraging free competition, and socially productive uses of land have been implicated by servitudes. Other policies that become involved may include those protecting family relationships from coercive attempts to

The Restatement offers that sources of public policy can be "the product of judicial development, or they may be based on legislation, or on the provisions of state or federal constitutions."[191] In considering the public policy interests espoused by state constitutions and legislative actions, the Restatement test is effectively a consolidation of multiple proposed solutions.[192] For example, even if the state constitution could not be applied to private actions due to the state action doctrine, it could nonetheless provide a basis for judges to strike down restrictions as violative of public policy.[193] And even if legislatures are not able to proactively protect every method of free expression through legislation, its existing pronouncements could be used by judges in considering whether the legislature would prefer to protect the type of expression in question.[194] As a result, courts may look to these and other sources to determine whether striking down the covenant in question implicates interests such as "privacy and liberty in choice of lifestyle, freedom of religion, [and] freedom of speech and expression."[195] If the court finds that these interests outweigh the benefits of enforcing the servitude, then the court may void the servitude as offensive to public policy.[196]

But the Restatement does not stop there. In order to give courts further guidance, the Restatement also puts forth various illustrations to describe types of covenants that would not survive the public policy

> disrupt them, and protecting weaker groups in society from servitudes that exclude them from opportunities enjoyed by more fortunate groups to acquire desirable property for housing or access to necessary services.

[191] *Id.* at § 3.1 cmt. f; *see also* Allen v. Commercial Cas. Ins. Co., 131 N.J.L. 475, 477–78 (N.J. 1944) (suggesting that "[t]he sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals, and general welfare of the people for whom government — with us — is factually established").

[192] *See supra* Part B (discussing the suggestion that legislatures should take the lead on extending free speech rights); Part D (discussing New Jersey's approach of using the state constitution's expansive First Amendment to strike down restrictions on speech).

[193] *See, e.g.*, Kolbet, *supra* note 92, at 107 ("In Texas, because the state Constitution provides broad free speech protection, a Texas court could rightly hold that a total ban on political signs violated public policy, and was therefore unenforceable.").

[194] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) ("Courts may apply the policies manifested by legislation more broadly than the legislation provides, but they may not refuse to apply policies manifested by legislation in situations to which it clearly applies.").

[195] *Id.* § 3.1 cmt. i.

[196] *Id.*

analysis.[197] These include covenants that unreasonably restrict criticism of the community association,[198] the posting of political signs,[199] display of an American flag,[200] and door-to-door solicitation of signatures by an outside citizens group.[201] These illustrations give courts a useful framework for conducting the public policy balancing test and help to ensure that the test is conducted consistently by any court that applies it.

As with the other proposed theories, there are of course imperfections with the Restatement approach. As an initial matter, courts are extremely reluctant to interfere in the contractual relations of two private parties in the name of public policy.[202] This is bolstered by the fact that servitudes are now considered extremely valuable aspects of property.[203] Thus, declaring them void as against public policy might decrease the expected value of residents' properties.

In addition, how are courts to weigh competing public policy considerations, when each is compelling? Certainly, as stated poignantly by the Texas Supreme Court, one very important public

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[197] *Id.* at § 3.1 Illustrations.

[198] *Id.* § 3.1 illus. 5.

[199] *Id.* § 3.1 illus. 7 (noting that "the harm to the public interest in citizen participation in political debate outweighs the value of validating the servitude" because "reasonable alternative means of exercising the right are not available").

[200] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 illus. 8 (2000) (explaining that flag restrictions would be void because "[d]isplay of the flag has strong expressive value, ready alternatives are not available, and the adverse impacts on other subdivision lot owners are not likely to be substantial"). *But see id.* at illus. 9 (explaining that a size restriction on a displayed American flag is not voidable because smaller flags provide adequate means of expression and large or numerous flags may hurt aesthetics).

[201] *Id.* at illus. 18 (explaining that if a covenant denied access to anyone not a resident or his invitee, the "burden on the exercise of political speech rights of the Citizens group [would] outweigh[] the benefit to the residents of freedom from intrusion").

[202] *See, e.g.*, Lawrence v. CDB Servs., Inc., 44 S.W.3d 544, 553 (Tex. 2001), *superseded on other grounds by statute*, Tex. Lab. Code § 406.033(e) ("Courts must exercise judicial restraint in deciding whether to hold arm's-length contracts void on public policy grounds."); RSN Properties, Inc. v. Eng'g Consulting Servs., Ltd., 301 Ga. App. 52, 53 (2009) (quoting Emory Univ. v. Porubiansky, 248 Ga. 391, 393 (1981)) ("[T]he courts must exercise extreme caution in declaring a contract void as against public policy and should do so only in cases free from doubt.").

[203] Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1416–17 (2013) ("The modern approach recognizes that servitudes are not merely encumbrances on property that should be narrowly construed but that they are valuable property rights in themselves, precisely because of the stability they provide to the owners of dominant estates. That is why most courts have repudiated the traditional notion that ambiguous covenants should be interpreted narrowly in favor of free use of land, adopting instead the modern idea that they should be interpreted to achieve the intent of the grantor."); *see also supra* note 3 and accompanying text.

policy is the right to contract itself:

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.[204]

This quote illustrates the undeniable tension throughout the country between public free speech interests and the freedom to contract.[205] As a result, despite the Restatement's attempts to normalize its prescribed analysis, there is still sufficient wiggle room in the balancing test that might only further perpetuate the inconsistencies currently found in CICs throughout the country.

These imperfections raise the question: Why is the Restatement's balancing test any better than, say, New Jersey's balancing test?[206]

B. Why the Restatement Test is the Best Method of Extending Reasonable Free Speech Rights to CICs

Although the Restatement's prescribed test is by no means perfect, it nonetheless provides the best method of expanding free speech rights to CICs.

First, the Restatement provides a non-constitutional method of striking down unreasonable restrictions on speech, which should always be considered before a constitutional method of adjudication.[207] In general, courts are hesitant to "reach a constitutional question unless its resolution is imperative to the disposition of litigation."[208] This theme of constitutional avoidance was articulated years ago by

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[204] Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 664 (Tex. 2008) (quoting Wood Motor Co., Inc. v. Nebel, 150 Tex. 86, 93 (1951)).

[205] *See* Baugh v. Novak, 340 S.W.3d 372, 382 (Tenn. 2011) (quoting Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 7:3, at 732 (2006) ("The need for delicacy arises because exercising the authority 'to declare contracts as void as against public policy is in tension with freedom of contract and the need to bind parties to their voluntary agreements.'")).

[206] *See generally* Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014).

[207] *See generally* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

[208] Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 504 n.4 (2012) (quoting Randolph Town Ctr., L.P. v. Cnty. of Morris, 186 N.J. 78, 80 (2006)).

Frank Askin, one of the foremost advocates for the extension of free speech rights in the country:

> Because state courts always retain the common law power to strike down regulations they find unreasonable and against public policy, it is seldom necessary to fall back on constitutional principles when deciding disputes between the association and a member. Any rule that a court might find to be unconstitutional will probably be invalidated on common law principles—although it is true that several cases in Florida have referred to constitutional protections for free speech and family privacy to invalidate rules found to be unnecessarily restrictive of individual autonomy. However, the references to constitutional principles were unnecessary because those courts could have come to the exact same conclusions on common law grounds.[209]

Since this caution by Askin, New Jersey and other courts have nonetheless engaged in confusing, inconsistent, and unpredictable constitutional analyses.[210] Because voiding servitudes as violative of public policy is a separate and independent means of reaching the same result,[211] courts should never even reach the constitutional analysis.

Second, the constitutional analysis is far more complicated than

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[209] Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 955–56 (1998).

[210] Interestingly enough, Frank Askin recently argued for the ACLU in the *Dublirer* case, where he asked the New Jersey Supreme Court to strike down a restriction on leafleting as unconstitutional. He does not appear to have made any mention of non-constitutional methods of adjudication.

[211] For example, the Restatement's Illustration 5 poses almost the exact same factual situation as *Dublirer*. It reads:

> The declaration of servitudes for Harmony Village includes a provision prohibiting owners and residents from criticizing actions taken by the board of directors or the architectural-control committee except at regularly scheduled meetings of the board. A resident unhappy about a board decision to construct a new tennis court distributed a flyer to residents criticizing the board decision. Exercising its power to enforce the servitudes by fines, the board imposed a $1,000 fine on the resident. In the absence of other facts or circumstances, the conclusion would be justified that the prohibition on criticism of board actions is invalid because it unreasonably burdens freedom of speech.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 illus. 5 (2000); *cf.* Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) (where a co-op Board of Directors selectively enforced a prohibition on leafleting, such that criticized its opponents in a regular newsletter but prohibited its opponents from doing the same). Thus, in a jurisdiction that utilized the Restatement, the five-year litigation of *Dublirer* would likely have been completely unnecessary, either because the Board would have had constructive notice (through the Illustrations) that such a practice would be improper, or because this would have been an open-and-shut case in the trial court.

the Restatement's property-based test.[212] For example, in *Mazdabrook*, the New Jersey Supreme Court devoted over ten pages of legal analysis to the constitutional issues presented by a sign restriction, despite tackling an extremely similar case only five years earlier.[213] The court also briefly engaged in the type of property-based analysis that the Restatement suggests,[214] but came to the same conclusion in only two paragraphs.[215] Therefore, not only does it appear that the court was not forced to engage the constitutional question at all, but it also seems that the court chose the more difficult method.

Third, the property-based analysis is replicable throughout the United States. Unlike New Jersey, which stands alone in bypassing the state action doctrine and applying its state constitution to private communities,[216] most states are simply unable to follow that line of reasoning without undoing decades of case law[217] and ignoring the

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[212] *See supra* text accompanying note 139.

[213] *Mazdabrook*, 210 N.J. at 492–503. As if that was not enough complex, constitutional legal analysis on the issue, the court again returned to the issue just two years later. *See Dublirer*, 220 N.J. 71.

[214] *Mazdabrook*, 210 N.J. at 507 (holding that "[t]o the extent that Mazdabrook or the dissent relies on a restrictive covenants analysis, the Association's sign policy likewise fails").

[215] The court further stated:

> '[R]estrictive covenants on real property that violate public policy are void as unenforceable.' *Twin Rivers*, 192 N.J. at 370 (citations omitted). When courts evaluate whether a covenant burdening land is enforceable, they must determine whether the covenant is reasonable. *See Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, (1990). Among other factors that inform that decision is '[w]hether the covenant interferes with the public interest.' *Id.* at 211.
>
> This Court explained in *Twin Rivers* that 'restrictive covenants that unreasonably restrict speech—a right most substantial in our constitutional scheme—may be declared unenforceable as a matter of public policy.' *Twin Rivers*, 192 N.J. at 371. Because the restriction in question is unreasonable and violates the State's Constitution, the covenant that memorializes it is unenforceable.

Mazdabrook, 210 N.J. at 507 (parallel citations omitted). The court never stated why this simple property-based analysis was not sufficient to decide the case.

[216] New Jersey's constitutional guarantee of free expression has been described as "an affirmative right, broader than practically all others in the nation." Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000). This alone makes it highly unlikely that other states can replicate the New Jersey's constitutional test.

[217] *See, e.g.*, *supra* note 47 and accompanying text. Indeed, even states with almost identical free speech language in their constitutions as New Jersey's have declined to ignore the state action requirement. For example, Michigan's constitution is nearly the same as New Jersey's, but its courts have nonetheless held that "the federal and the Michigan constitutional provisions guaranteeing free speech do not extend to private conduct, but have been limited to protection against state action." Prysak v. R.L. Polk Co., 193 Mich. App. 1, 10 (1992).

fundamental doctrine of *stare decisis*.[218] To the contrary, every state would be able to adopt the Restatement's approach.[219] The practice of voiding contracts as against public policy is a long-standing mainstay of jurisprudence[220] and is well-established in courts around the country.[221] Thus, the Restatement shifts the discussion to *which* rights society believes should be protected, as opposed to complex constitutional discussions over how to extend *any* rights to otherwise private entities.

Fourth, the Restatement test is more predictable than a constitutional approach. Through its "Illustrations," the Restatement promulgates several types of expression that would not survive such a public policy analysis.[222] If each of these free speech rights is automatically protected in every state, a valuable uniformity of baseline free expression rights would be created in the United States. Moreover, because the Restatement's illustrations are proactive pronouncements, as opposed to limited constitutional court rulings that focus only on the case at hand,[223] boards and residents would not be forced to guess what speech is permitted and could often act before courts were forced to intermediate.[224]

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[218] The Supreme Court has clearly articulated the importance of an adherence to *stare decisis*. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991). Although the Supreme Court has also said that the reviewing court is not as constrained by the doctrine "when governing decisions are unworkable or are badly reasoned," *id.*at 828, the Court also notes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved," *id.* (citations omitted). Therefore, states with a strong history of disallowing free speech in private environments may find it difficult to overcome the reliance on *stare decisis* with such a new and unique constitutional test.

[219] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) ("Even though there may not be sufficient state action present to justify application of constitutional limitations to privately created servitudes, the servitude may be invalid as a matter of state or federal common law because it violates public policy.").

[220] *See supra* note 175 and accompanying text.

[221] *See supra* Part V.A.

[222] *See supra* notes 198–201 (suggesting that associations could not prohibit criticism of the community association, the posting of political signs, display of the American flag, and door-to-door solicitation of signatures by an outside citizens group).

[223] *See, e.g.*, Franzese & Siegel, *supra* note 2, at 747 ("Suffice it to say that it may well require many years of appellate litigation before the precise contours of this remedy are fully delineated."); *supra* note 211 (arguing that if New Jersey had simply adopted the Restatement test instead of making piecemeal pronouncements on the constitutionality of certain free speech restrictions in CICs, the *Dublirer* case would never have had to be litigated).

[224] In essence, because the New Jersey test does not give much in the way of guidance for *future* issues, as opposed to the Restatement, it leaves residents and boards with mere speculation as to the contours of free speech protections. *See also* Part 0 (suggesting that in the interim, Boards and residents should use the Restatement illustrations as guidelines to adopt their own reasonable free speech policies before

Yet at the same time, the property-based doctrine is necessarily flexible.[225] In a country with different types of CICs in varying environments, it is beneficial to give courts the opportunity to make calculations for their own communities.[226] The Restatement ensures that judicial determinations are not made on the most fundamental of expressional rights,[227] but allows individual communities to determine themselves where to draw the outer membrane of free speech rights in CICs.[228] These less fundamental free expression rights are likely more local in character, and the Restatement gives courts the flexibility to fashion their remedies as such.

Fifth, the Restatement test actually considers the important countervailing issues at stake on both sides of the issue. Although recent years have seen HOAs exceed reason with overburdensome free speech restrictions,[229] there are undoubtedly good reasons why CC&Rs are adopted in the first place.[230] By beginning with the presumption that all covenants are valid,[231] the Restatement does not make aesthetics the sacrificial lamb for unbridled free speech rights.[232] And in

they are challenged in court).

[225] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt i (2000); *id.* at § 3.1 cmt. f ("Because policies change to meet changing conditions of society, it is not practicable to predict the policy assessments judges will make in the future."); STORY, *supra* note 186 (describing that the concept of public policy "has been left loose and free of definition" because it is, by nature, "uncertain and fluctuating").

[226] For example, a CIC in rural Arkansas is likely to be different in structure and interests than one from New York City, so it would be improper to subject them to the same exact requirements. Since the public policies in each location will be different, local communities can decide themselves what is reasonable. Of course, this could result in harsher treatment of minority positions (like mezuzahs in Arkansas or college football flags in New York City); but the most important rights are likely protected by the Restatement's illustrations, and as discussed below, the ability of the U.S. Supreme Court to intercede might provide an additional safeguard.

[227] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 Illustrations (2000) (providing examples to inform the courts on what types of restrictive covenants should be struck down as violating public policy, effectively guaranteeing that those rights would be protected around the country and leaving only the less essential expressional rights to be determined by the courts).

[228] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403 (1960) ("Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another.").

[229] *See supra* notes 63–66.

[230] *See supra* note 3 and accompanying text.

[231] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. i (2000).

[232] *Id.* at § 3.1 cmt. j ("Absent extraordinary circumstances, if a servitude serves some purpose that the purchasers might rationally have agreed to, and its meaning should have been apparent to the purchasers, a court should not invalidate it simply because the court believes that most people would not have agreed to it, or that it

recognizing that a knowing and intelligent waiver may factor into the analysis,[233] the Restatement does not swing the pendulum towards residents quite as far as the New Jersey Supreme Court has.[234] In this way, the Restatement test is presumably a much more palatable method for advocates of private contract rights and the maintenance of uniformity and aesthetics in CICs.[235]

For those state courts potentially willing to consider the extension of free speech rights into CICs, it seems clear that the Restatement provides a method of adjudication that is relatively simple, replicable around the country, and does not eviscerate the state action doctrine. Therefore, in looking for ways to extend free speech rights to CICs, courts should first turn to the prescriptions of the Restatement and a property-based analysis, as opposed to the constitutional one advanced by the New Jersey Supreme Court.

VI. WHAT CAN BE DONE IN THE INTERIM?: PROACTIVE ACTION BY HOA BOARDS TO AMEND THEIR GOVERNING DOCUMENTS

The major difficulty with the Restatement's prescribed test is that it is non-binding–a mere recommendation of what the law should be.[236] Although Restatements have always been well-respected sources of

produces little benefit.").

[233] *Id.* at § 3.1 cmt. i.

[234] Indeed, the New Jersey Supreme Court has insinuated that residents may *never* waive their rights in a CIC. *See* Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 506 (2012) ("It is unclear that the approach in this case can result in a *knowing* and *intelligent* waiver of fundamental constitutional rights."). Yet the dissents in the Appellate Division and Supreme Court in *Mazdabrook* starkly disagreed with the inapplicability of waiver. *See* Mazdabrook Commons Homeowners' Ass'n v. Khan, A-6106-08T3, 2010 WL 3517030 (App. Div. 2010) (Miniman, J, concurring in part and dissenting in part), *aff'd*, 210 N.J. 482 (2012) ("The restriction on signs and the right to sue to enforce it are included in the bundle of rights, restrictions, encumbrances, and easements contained in the deed to defendant's unit. Thus, defendant and all other unit owners expressly agreed that they would not violate the prohibition on signs and each owner was empowered to enforce that restriction."); *Mazdabrook*, 210 N.J. at 511 (Wefing, J., dissenting) ("[I]ndividuals are equally entitled to seek shelter from political debate and division.").

[235] *See* Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right to Keep and Bear Arms*, 15 U. PA. J. CONST. L. 1003, 1012–13 (2013) ("While [the Restatement test's] imprecision may lead one to fear that a court may have too much leeway, the fact that servitudes are protected with a presumption of validity works against the potential bias or prejudice of a court applying the flexible public policy test to a servitude.").

[236] *See, e.g.*, Lou v. Otis Elevator Co., 77 Mass. App. Ct. 571, 580–81 (2010) (citing Bongaards v. Millen, 440 Mass. 10, 29 (2003)) (noting that "while this court often considers the various Restatements of the Law as prestigious sources of potentially persuasive authority, we have never taken the position that this court should abdicate to the views of the American Law Institute as set forth in its various Restatements").

legal authority,[237] courts around the country will have to buy into the Restatement's reasoning and apply its test faithfully. While this Comment argues that courts around the country should adopt the Restatement test and extend reasonable free speech rights to residents of CICs, it is unlikely that this will happen overnight. In the meantime, it would behoove both HOAs and residents to proactively amend the governing documents of their communities to reflect a reasonable allowance of free expression within CICs. Although boards are often hesitant to extend more rights to residents, and residents feel powerless to make changes themselves, working together to offer reasonable free speech rights in CICs makes sense for several reasons.

First, the tide is changing. HOAs may resist the extension of free speech into CICs, but the eventual protection of basic expressional rights in these communities is likely inevitable.[238] Given the force of the Third Restatement,[239] powerful and revolutionary court decisions,[240] and compelling scholarly suggestions,[241] it is only a matter of time before free speech protections are imposed on CICs. In order to have a hand in fashioning the remedies themselves, boards must act before they are forced by courts, legislatures, and/or residents.[242]

Second, in some states, boards are putting themselves in difficult situations by refusing to, or merely neglecting to, amend their

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[237] *See id.*; *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, and Treatises*, HARV. L. SCH. LIBR., http://guides.library.harvard.edu/content.php?pid=103327&sid=1036651 (last visited May 20, 2015) ("Restatements are highly regarded distillations of common law.").

[238] *See, e.g.*, Askin, *supra* note 209, at 956 (suggesting that "[it] is inevitable in a society as deeply committed to freedom of expression and communication as ours that more and more courts are going to" follow New Jersey's lead in extending free speech rights to CICs). In fact, even New Jersey's complex constitutional analysis was recently adopted elsewhere in the country. *See supra* note 169 (describing *Lamprecht v. Tiara at the Abbey Homeowners Ass'n*, No. 12 JE-CC00227, 2013 WL 6144144 (Mo. Cir. Oct. 3, 2013), where a Missouri state court appeared to adopt the New Jersey test in full).

[239] *See supra* Part 0.

[240] *See supra* Part D.

[241] *See supra* note 16; Part 0.

[242] For example, following the New Jersey Supreme Court's decision in *Dublirer*, a law firm that represents community associations released a client alert that stated bluntly: "[The decision] provides a clear message to common interest ownership community governing boards that they must allow adequate means for community residents to be able to inexpensively communicate with each other and with the board and should not try to prevent debate over association political issues or criticism of the board." Jonathan H. Katz, *Client Alert: N.J. Supreme Court Issues Important Decision Expanding Community Association Residents' Free Speech Rights*, CONDOLAWNJ (Dec. 8, 2014, 1:11 AM), http://www.condo.hillwallackblog.com/ client-alert-n-j-supreme-court-issues-important-decision-expanding-community-association-residents-free-speech-rights/.

governing documents. For one, associations that maintain unreasonable blanket restrictions on certain types of free expression may then find it difficult to police any types of expression, even offensive ones.[243] And from a practical standpoint, HOAs that choose not to amend their documents also run the risk of incurring substantial litigation costs when their CC&Rs are eventually challenged. The extension of free speech rights into private entities, and increasingly CICs, is a fast-growing area of litigation, and there is no sign of it abating.[244] To insulate themselves from the specter of costly litigation, HOAs would be wise to be proactive and adopt reasonable guidelines for speech within their communities.

Therefore, boards and residents should preemptively adopt reasonable free speech protections in their governing documents. Guidance should be drawn from the Restatement's "Illustrations,"[245] suggestions from the New Jersey Supreme Court,[246] and federal[247] and local[248] legislative actions. But there are several other animating principles that boards and residents should consider when amending and applying their CC&Rs. First, associations should ensure that if a method of free expression is entirely or mostly prohibited, there are reasonable alternative means of expression available to residents.[249] In addition, boards should be sure to avoid uneven application of rules; engaging in the same type of expression that residents are prohibited from may raise an inference that the board is unreasonably

[243] In other words, boards may find it difficult to enforce *any* restrictions on speech if they adopt only blanket restrictions, and not reasonable time, place, and manner restrictions. For example, if a resident in CIC puts neon signs saying "Obama sucks" in each one of his windows, what recourse does an HOA have if their entire sign restriction is declared invalid, but they have adopted no other time, place, and manner restrictions to prevent this seemingly distasteful display?

[244] *See supra* note 21 and accompanying text.

[245] RESTATEMENT (THIRD) OF PROP. SERVITUDES § 3.1 Illustrations (2000).

[246] *See, e.g.*, Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 87–88 (2014) (providing some examples of "reasonable time, place, and manner restrictions" that would "serve the community's interest" but "without unreasonably interfering with free speech rights").

[247] *See, e.g.*, *supra* note 66 (describing, among other things, a law passed by Congress prohibiting bans on flying American flags).

[248] Many states have passed legislation seeking to protect certain kinds of political speech. HOAs should ensure that their CC&Rs reflect these local legislative pronouncements. *See infra* Part B; *see also, e.g.*, TEX. PROP. CODE ANN. § 202.009 (prohibiting associations from banning political signs within 90 days preceding and 10 days following the election).

[249] *See, e.g.*, Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 358–59 (2007) (quoting State v. Schmid, 84 N.J. 535, 563 (1980)) (noting the importance of "whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity").

discriminating based on content.[250] And finally, boards should be particularly careful when attempting to regulate political speech.[251]

With the Restatement as a guide, boards' involvement in fashioning reasonable time, place, and manner restrictions would create a beneficial two-way street, where boards and homeowners could reach a compromise. Only then can this contentious system[252] become a collaborative one, where boards and homeowners work together to safeguard the best interests of the community and its residents.

VII. CONCLUSION

We live in a country that embraces diversity and celebrates it, yet too often, CICs seek to create homogenous zones free from various modes of expression.[253] Although time, place, and manner restrictions are unquestionably necessary to avoid offensive forms of speech, more stringent restrictions are antithetical to the embracing aspect of community life in the United States.[254]

In order to scale back these confining servitudes, there must be widespread implementation of the options above, but especially court adoption of the Restatement position. Only then will we be able to effect the profound change we want to see in CICs. Then, finally, we will ensure the protection of one of the most important interests in our CICs, which sits at the base of American democracy: the freedom of expression.

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[250] *See, e.g.*, *Dublirer*, 220 N.J. at 88 (citation omitted) ("Nothing in our case law permits a group in power to attack its opponents yet bar them from responding in the same way. 'As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.'").

[251] *See* RESTATEMENT (THIRD) OF PROP. SERVITUDES § 3.1 illus. 7 (2000) (suggesting that "application of [a] covenant to prohibit political yard signs is invalid because the harm to the public interest in citizen participation in political debate outweighs the value of validating the servitude"); *Dublirer*, 220 N.J. at 71 (suggesting that political speech is "entitled to the highest level of protection in our society").

[252] *See supra* notes 53–54 & 63–65 and accompanying text.

[253] *See generally supra* Part 0.

[254] *See* Low, *supra* note 69 (expressing that our "retreat to secured enclaves . . . materially and symbolically contradicts American ethos and values"); Kennedy, *supra* note 16, at 763 ("Residential associations cause harms to nonmembers by developing exclusive communities, by gating formerly public streets and neighborhoods, and by increasing the fiscal burdens of cities and states.").