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# THE REGULATION OF COMMON INTEREST DEVELOPMENTS AS IT RELATES TO POLITICAL EXPRESSION: THE ARGUMENT FOR LIBERTY AND ECONOMIC EFFICIENCY

## INTRODUCTION

*Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds—religious, moral, serious, futile, extensive or restricted, enormous or diminutive.*

—Alexis de Tocqueville<sup>1</sup>

In 1962 there were five hundred homeowners associations (“HOAs”) in the United States.<sup>2</sup> Thirty years later there were 150,000

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<sup>1</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 472 (Bruce Frohnen ed., Henry Reeve, C.B. trans., Regnery Gateway 2003) (1835).

<sup>2</sup> SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* 177 (2003). In this Note the term “homeowners association,” or “HOA,” will be used to refer to several different kinds of associations that are very similar (though not identical in nature). See, e.g., Community Associations Institute, *About Community Associations*, <http://www.caionline.org/info/help/associations/Pages/default.aspx> (last visited Mar. 17, 2009) (choosing to use the umbrella term “community association”). The term residential private government, or “RPG,” is also commonly used to refer to HOAs. Evan McKenzie, *The Dynamics of Privatopia: Private Residential Governance in the USA*, in *PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES* 9, 11 (Georg Glasze, Chris Webster & Klaus Franz eds., 2006) [hereinafter McKenzie, *Dynamics*]. With condominiums the HOA is generally called a “condominium association”; with stock cooperatives the residents form what is usually simply called a “corporation.” Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation not Termination*, 1990 WIS. L. REV. 513, 513 n.4 (citing Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM.

HOAs with over 32 million residents.<sup>3</sup> In 2008 there were 300,800 HOAs, containing 24.1 million housing units and 59.5 million residents.<sup>4</sup> It is quite evident that a large portion of American citizens, approximately 20 percent, live in common interest developments (“CIDs”) governed by some form of HOA.<sup>5</sup>

The private property controlled by HOAs is subject to many different types of rules and regulations that are typically written into the deeds of the property in the form of equitable servitudes, real covenants that run with the land, and other contractual restrictions.<sup>6</sup> These restrictions, which are various limitations on private land use, generally are referred to in the real estate industry as “covenants, contracts, and deed restrictions,” or “CC&Rs.”<sup>7</sup> These restrictions do not simply prescribe the color of one’s front door, or even the shade of the underside of the drapes visible from the street, but quite often regulate behavior.<sup>8</sup> Some of the more expansive restrictions imposed by HOAs regulate political speech and expression.<sup>9</sup> Such restrictions can take many forms. Some examples include banning political signs, political gatherings in common areas, newspaper distribution, and

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L. REV. 987 (1963) (regarding condominiums); N.Y. REAL PROP. LAW §§ 339-d to 339-ii (McKinney 1989) (regarding condominiums); Edwin Youman, *Some Legal Aspects of Cooperative Housing*, 12 LAW & CONTEMP. PROBS. 126 (1947) (regarding stock cooperatives)).

<sup>3</sup> LOW, *supra* note 2, at 177.

<sup>4</sup> Community Associations Institute, Industry Data, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Mar. 8, 2009).

<sup>5</sup> This figure is based on a population of 281,421,906, as counted in the 2000 national census. Bureau of the Census, U.S. Dep’t of Commerce, United States Census 2000, <http://www.census.gov/main/www/cen2000.html> (last visited Oct. 28, 2007). This percentage is only an approximate figure used for illustrative purposes as the total population used was the figure from the 2000 Census, and the CID population was a 2008 figure. Also note the term common interest community, or “CIC,” is also commonly used to refer to CIDs. McKenzie, *Dynamics*, *supra* note 2, at 11.

<sup>6</sup> Korngold, *supra* note 2, at 513–14. The servitudes, which the property is subject to, create the HOA. *Id.* at 513 (citing 5011 Cmty. Org. v. Harris, 548 A.2d 9 (Conn. App. Ct. 1988); Travis Heights Improvement Ass’n v. Small, 662 S.W.2d 406 (Tex. Ct. App. 1983)); *see also* LOW, *supra* note 2, at 176–77. *See generally* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 408–15, 418–24 (2d ed. 2004) (discussing background and general enforceability of covenants as they relate to building, use, aesthetic, and architectural controls) [hereinafter KORNGOLD, PRIVATE LAND USE].

<sup>7</sup> LOW, *supra* note 2, at 19; *see* Community Association Institute, About Community Associations, <http://www.caionline.org/info/help/associations/Pages/default.aspx> (last visited Mar. 8, 2009) (defining “CC&Rs” as “covenants, conditions and restrictions”).

<sup>8</sup> LOW, *supra* note 2, at 158. For example, the Chartwell community, near Philadelphia, has a restriction banning all offensive conduct: “[any activity that is] ‘noxious or offensive to other home lot owners.’” EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 17 (1994) (citing Marie McCullough, *It’s a Swing Set! There Goes the Neighborhood*, PHILA. INQUIRER, Oct. 9, 1991, at 1). In response, “[o]ne homeowner asked, ‘Who are these little Hitlers making these rules?’” *Id.*

<sup>9</sup> MCKENZIE, *supra* note 8, at 15.

leafleting.<sup>10</sup> In many CIDs the limitations imposed by the CC&Rs could even be viewed as a blanket restriction on the historical forms of political expression.

Many have complained that the severe restriction imposed by CC&Rs on political expression amounts to a severe erosion of expression rights, including First Amendment rights, for millions of Americans.<sup>11</sup> One need only compare the restrictions put on life outside a CID with those sometimes placed on life inside to see the possibility of that conclusion.<sup>12</sup> Political speech is often regarded as the most protected and significant form of free expression.<sup>13</sup> This has led some to the conclusion that HOAs should be treated as municipalities, or the functional equivalent of municipalities, and held to a similar constitutional standard.<sup>14</sup> However, this conclusion seems wholly inappropriate when one takes into account the classically liberal values surrounding the paramount place that private property,

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<sup>10</sup> *Id.* (citing *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*, 182 Cal. Rptr. 813 (Ct. App. 1982); RICHARD LOUV, *AMERICA II* 128 (1983); Ralph C. Meyer, *The Dictatorship Syndrome* (1977) (paper presented at the Fourteenth Annual Conference of the Community Associations Institute)).

<sup>11</sup> 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, 264 (2006).

<sup>12</sup> Despite the fact that municipalities have the ability to enforce certain restrictions on forms of communication through their police powers, blanket or near-blanket restrictions violate the Free Speech Clause of the First Amendment. See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In *City of Ladue v. Gilleo* the City of Ladue banned all signs that did not fall within any of ten exceptions. *Id.* at 46. The Court held that the restrictions violated the free speech rights of the residents of Ladue. *Id.* at 58. Although signs pose unique problems that are subject to the police powers of municipalities, such as visual clutter, the Court found that Ladue “completely foreclosed a venerable means of communication . . . [of] political, religious, or personal messages.” *Id.* at 54. Further, the attempt to impose “time, place, or manner” restrictions was too restrictive because alternatives such as handbills and newspaper advertisements were inadequate substitutes for the “important medium of speech that Ladue has closed off.” *Id.* at 56; see *United States v. Grace*, 461 U.S. 171, 180–81 (1983) (holding unconstitutional a statute that prohibited the display of flags, signs, and placards of a political nature in a public forum—on the sidewalk *in front of the United States Supreme Court building* (of all places)—because it was not a reasonable restriction regarding time, place, and manner of speech).

<sup>13</sup> See, e.g., Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 SAN DIEGO L. REV. 129, 176 (2005). See generally *Marsh v. Alabama*, 326 U.S. 501, 508–10 (1946) (lead case imposing constitutional restrictions on a private entity through “state action” because of its functional equivalence to a government). However, it should be noted that this “most sacred” type of speech may be becoming less so. Garry, *supra*, at 176; see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (both upholding *and* striking down portions of the Bipartisan Campaign Reform Act of 2002).

<sup>14</sup> See, e.g., MCKENZIE, *supra* note 8, at 122–24; Chadderdon, *supra* note 11, at 234–35; David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763, 778–79 (1995); Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322, 322–23 (2001); see also *Ladue*, 512 U.S. 43 (holding that a municipality’s restrictions on political speech ran afoul of the Free Speech Clause). HOAs that govern CIDs can be treated as subject to constitutional restrictions on government through the doctrine of state action. See *Marsh*, 326 U.S. 501.

and the regulation thereof, has historically held in the development of our republic and jurisprudence.<sup>15</sup> Furthermore, the choices and rational expectations of individuals combined with the benefits and economic efficiency of CIDs point to the continued private ordering of HOAs.<sup>16</sup>

This Note will focus on the restriction on political expression in CIDs in light of the Anglo-American normative notions surrounding private property rights, as well as the economic efficiency and market realities of CIDs.<sup>17</sup> With this understanding, it is my contention that the predominant view of HOAs as private arrangements, governed by private law, should be maintained when considering efforts to have HOAs regulated by public law or treated as the functional equivalents of municipalities through a constitutional framework.<sup>18</sup>

#### I. THE HOMEOWNERS ASSOCIATION AND THE COMMON INTEREST DEVELOPMENT

There are four general types of CIDs: condominiums, stock cooperatives, community apartments, and “planned developments,” which are most often associated with “gated communities.”<sup>19</sup> Stock

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<sup>15</sup> See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998) (discussing the importance of private property rights in America); see also TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA* 1–2, 10 (2006); John Locke, *The Second Treatise of Government*, in *THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* 17, §§ 26, 27, 32, at 28–31 (Paul E. Sigmund ed., W.W. Norton & Co. 2005).

<sup>16</sup> See Korngold, *supra* note 2, at 516–19 (discussing economic efficiency, contract rights, and personal choice). See generally ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (4th ed. 2004) (providing an analysis of economics applied to law (and *vice versa*) and a basic explanation of microeconomic theory).

<sup>17</sup> While the rule of law is paramount, we cannot lose sight of the factors that shape, and have shaped, our legal doctrine. This Note in no way advocates disregarding the law as it is written in favor of extrinsic normative notions. In fact, the normative considerations contained herein have historical applicability to the founding of our republic and our jurisprudence when originally founded and developed.

<sup>18</sup> See generally *Marsh*, 326 U.S. 501 (treating a corporation that owned and ran “company town” as a state actor); Chadderdon, *supra* note 11, at 247–48 (discussing *Marsh v. Alabama* state action doctrine as applied to HOAs). “Public law” is being used here to refer to laws, primarily constitutional but also common and statutory, that are designed to regulate governments, or private conduct through governments. Please note that political expression on public property, or in legitimate public forums, is a completely different subject. The Author in no way argues for the curtailment of political expression in true, legitimate, public forums. See generally *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 754–63 (Cal. 2007) (Chin, J., dissenting) (recognizing the importance of expression in legitimate public forums and arguing for the court to overrule *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff’d* 447 U.S. 74 (1980), despite the majority’s re-affirmation of the holding in *Pruneyard* case), *cert. denied*, 129 S. Ct. 94 (2008); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1212, 1214 n.5 (N.Y. 1985) (rejecting California Supreme Court opinion in *Pruneyard*).

<sup>19</sup> MCKENZIE, *supra* note 8, at 126; McKenzie, *Dynamics*, *supra* note 2, at 11. These are terms that are commonly used in the real estate industry. As a legal matter, the key issue is that

cooperatives, or “co-ops,” are commonly-owned buildings in which owners buy shares that entitle them to possession of one residential unit as well as the use of common areas.<sup>20</sup> In condominiums and planned developments, residents own fee title to their units and have common ownership of their community’s common areas.<sup>21</sup> The only general difference between the two is that planned developments often contain single-family homes, and condominiums usually are comprised of multi-family or conjoined homes.<sup>22</sup>

However, this is only a generalization, as there are many different types of living arrangements, structures, and styles of condominiums and planned developments. The Community Associations Institute provides a tidy general definition of CIDs:

Three features make community association homes different from traditional forms of homeownership. One is that you share ownership of common land and have access to facilities such as swimming pools that often are not affordable any other way. The second is that you automatically become a member of a community association and typically must abide by covenants, conditions and restrictions (CC&Rs). The third feature is that you will pay an “assessment” (a regular fee, often monthly, that is used for upkeep of the common areas and other services and amenities).<sup>23</sup>

The definition offered by Evan McKenzie, the author of *Privatopia*, has a slightly different tone: CIDs share the features of “common ownership of property, mandatory membership in the homeowners association, and the requirement of living under a private regime of restrictive covenants enforced by fellow residents.”<sup>24</sup> Nonetheless, the ownership characteristics of CIDs

there is some form of common ownership, which depends on the structure of the CID and applies to certain areas within a development that are governed by an HOA or similar organization. *See id.* at 11–14.

<sup>20</sup> MCKENZIE, *supra* note 8, at 127; *see also* McKenzie, *Dynamics*, *supra* note 2, at 11–14.

<sup>21</sup> *See* LOW, *supra* note 2, at 182; McKenzie, *Dynamics*, *supra* note 2, at 11–12.

<sup>22</sup> *See* MCKENZIE, *supra* note 8, at 19; McKenzie, *Dynamics*, *supra* note 2, at 12–14.

<sup>23</sup> Community Associations Institute, About Community Associations, <http://www.caionline.org/info/help/associations/Pages/default.aspx> (last visited Mar. 8, 2009). The Community Associations Institute is a national industry association, comprised of HOA board members and professional HOA managers and management firms, that promotes “fostering vibrant, competent, harmonious community associations,” as well as advocating “for legislative and regulatory policies that support responsible governance and effective management.” Community Associations Institute, Who We Are, <http://www.caionline.org/about/who/Pages/default.aspx> (last visited Mar. 8, 2009).

<sup>24</sup> MCKENZIE, *supra* note 8, at 19. Depending on the agreed to situation, sometimes only

include the common ownership of a CID's common areas and individual possession and ownership of some form of residential unit.<sup>25</sup>

The common areas of a CID can be quite expansive, including not only those things usually associated with common areas, like pools and community rooms in a "club house," but also structures like the walls and roofs of condominiums and cooperatives, or the streets, sidewalks, and sewers of planned developments.<sup>26</sup> Further, commonly owned property of a CID may also provide services to the residents, such as television stations, security forces, and bus routes.<sup>27</sup> The last general feature of a CID—one that is quite important—is that membership in the HOA is required of all CID residents.<sup>28</sup>

The HOA, sometimes referred to as a "private government," is the organization that collects fees for the administration and upkeep of the common areas (in some cases holding fee title to the common areas), and maintains and enforces the CC&Rs.<sup>29</sup> HOAs are generally "mutual-benefit corporations" or some other type of non-profit corporation created by a CID's real estate developer.<sup>30</sup> The

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the HOA can enforce infractions. KORNGOLD, PRIVATE LAND USE, *supra* note 6, at 431–32.

<sup>25</sup> MCKENZIE, *supra* note 8, at 19. "[The servitude schemes (CC&Rs)] may also grant reciprocal rights in common facilities serving the development, such as parks, roads, utilities and recreational amenities . . ." Korngold, *supra* note 2, at 513 (citing *Maddox v. Katzman*, 332 N.W.2d 347 (Iowa Ct. App. 1982); *Beech Mountain Prop. Owners' Ass'n v. Seifart*, 269 S.E.2d 178 (N.C. Ct. App. 1980)). However, the right to possession and 'quiet enjoyment' of one's unit is not always absolute, as agents of some HOAs are permitted to enter homes to protect the common investment. MCKENZIE, *supra* note 8, at 142.

<sup>26</sup> MCKENZIE, *supra* note 8, at 129. In fact, with condominiums, the resident owner only has fee title to the air-space and interior finished walls of his unit; the rest of the structure and the grounds around it are owned in common. McKenzie, *Dynamics*, *supra* note 2, at 12. "Ownership" of a condominium is really more like a permanent right to occupy the residential unit. *Id.*

<sup>27</sup> MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM 30–31 (2001); Korngold, *supra* note 2, at 514 (stating that HOAs may provide services such as rubbish collection and security).

<sup>28</sup> MCKENZIE, *supra* note 8, at 127.

<sup>29</sup> Korngold, *supra* note 2, at 513–14 (citing *Perry v. Bridgetown Cmty. Ass'n*, 486 So.2d 1230 (Miss. 1986) (regarding subdivision dues); *Gosnay v. Big Sky Owners Ass'n*, 666 P.2d 1247 (Mont. 1983) (HOA's rules and regulations power); *Smith v. Butler Mountain Estates Prop. Owners Ass'n*, 367 S.E.2d 401 (N.C. Ct. App. 1988) (HOA's power to approve building plans), *aff'd*, 375 S.E.2d 905 (N.C. 1989); *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938) (HOA administering common areas); *Garrison Apartments, Inc. v. Sabourin*, 449 N.Y.S.2d 629 (N.Y. Civ. Ct. 1982) (regarding providing security)); *see also* MCKENZIE, *supra* note 8, at 129; Fred E. Foldvary, *The Economic Case for Private Residential Government*, in PRIVATE CITIES: GLOBAL AND LOCAL PERSPECTIVES, *supra* note 2, at 31, 42. *See generally* KORNGOLD, PRIVATE LAND USE, *supra* note 6, at 424 (regarding the power of HOAs).

<sup>30</sup> MCKENZIE, *supra* note 8, at 20, 142. The HOA is generally set up through a scheme of servitudes. Korngold, *supra* note 2, at 513 (citing Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976)).

developer generally has control over the drafting of the certificate of incorporation and by-laws; consequently, the developer has control over the CC&Rs that govern what type of community a CID will be, such as a seniors-only community, or a community that prohibits pets or renters.<sup>31</sup> Essentially, since the CC&Rs are generally equitable servitudes, real covenants that run with the land, and other restrictions that the HOAs maintain, when residential units are sold, the buyer is also bound by the same restrictions as the seller.<sup>32</sup> Originally, these restrictions applied to a somewhat limited realm, such as restricting structures to single-family homes or prohibiting slaughterhouses and noisome factories on the property.<sup>33</sup> Today, however, the CC&Rs in CIDs set specific standards and can restrict anything from the condition of the unit and the number and age of occupants to the lifestyle of the residents, such as forbidding the operation of businesses from units.<sup>34</sup>

Most relevant to this Note, HOAs enforce and create CC&Rs dealing with political expression.<sup>35</sup> Generally, again, this includes banning political signs, political gatherings in common areas, and newspaper distribution.<sup>36</sup> A specific example of a CID imposing political speech restrictions is the community of Rancho Bernardo<sup>37</sup> north of San Diego, which bans all signs.<sup>38</sup> These restrictions are far

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<sup>31</sup> MCKENZIE, *supra* note 8, at 127–28. Some restrictions, such as senior housing, that might seem to run afoul of federal housing discrimination law are actually exempted. *See, e.g.*, 42 U.S.C. § 3607 (2000) (stating that nothing in the subchapter dealing with the Federal Fair Housing Act that relates to discrimination based on familial status shall be applied to “housing for older persons”). *See generally* KORNGOLD, PRIVATE LAND USE, *supra* note 6, at 408–15, 417–24 (discussing types and enforceability of covenants, including age restrictions).

<sup>32</sup> MCKENZIE, *supra* note 8, at 20. Real covenants that “run with the land” were first recognized in *Packenhams Case*, Y.B. Hil. 42 Edw. 3, pl. 14 (1368). MCKENZIE, *supra* note 8, at 204 n.74. *See generally* *Packenhams Case*, Y.B. Hil. 42 Edw. 3, pl. 14.

<sup>33</sup> MCKENZIE, *supra* note 8, at 21.

<sup>34</sup> *Id.* at 129.

<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.*; *see* McKenzie, *Dynamics*, *supra* note 2, at 16 (stating that HOAs are largely unrestricted and are not generally considered “governments” for constitutional analysis). A particularly troubling example of the restrictions regarding political expression that CC&Rs can impose on residents was that a Vietnam War veteran was prohibited from flying the American Flag on Flag Day. MCKENZIE, *supra* note 8, at 15 (citing William K. Stevens, *Condominium Associations: New Form of Local Government*, L.A. DAILY J., Sept. 8, 1988, at 22). Today this restriction would be prohibited by the Freedom to Display the American Flag Act of 2005. 4 U.S.C.A. § 5 (West 2005 & Supp. 2008) (prohibiting HOA restrictions on displaying the flag of the United States of America).

<sup>37</sup> Note that this community was recently devastated by a rash of wildfires in Southern California during October 2007. *Fire Deaths, Damage Come into Focus as Evacuees Cope*, CNN, Oct. 29, 2007, <http://www.cnn.com/2007/US/10/26/fire.wildfire.ca/index.html?iref=newssearch>.

<sup>38</sup> MCKENZIE, *supra* note 8, at 12–13 (citing LOUV, *supra* note 10, at 93). Rancho Bernardo is a very large mixed-use CID containing single-family homes, condominiums, apartments, commercial districts, and light industrial areas. *Id.* This type of restriction would be



from illusory, as many CID residents, as well as HOA board members, “survey the community daily looking for infractions.”<sup>39</sup> This way of life, which is already lived by approximately 20 percent of American citizens, will continue to spread in the coming years as roughly 50 percent of the new housing that is currently being built in metropolitan areas will be subject to HOAs.<sup>40</sup>

## II. NORMATIVE PRIVATE PROPERTY RIGHTS: “TO HIS HEIRS AND ASSIGNS, TO HAVE AND TO HOLD FOREVER”

Many commentators have argued that the private ordering of CID governance through HOAs, especially regarding political expression, is undesirable due to the restrictions that CC&Rs often impose on the expression of residents, as well as non-members.<sup>41</sup> Further, many have argued, *inter alia*, that a possible method available to impose a public, constitutional regulatory apparatus on HOAs is through the state action doctrine.<sup>42</sup> It is my contention that this type of thinking—regulating the private by turning it into a *de facto* public—is antithetical to the normative values at the root of the Anglo-American system of private property and limited constitutional government.<sup>43</sup> While Anglo-American property rights could be the subject of an entire article, the following is a brief overview of the classically liberal political philosophy that our republic and jurisprudence have at their roots, and which guides much of the legal analysis to follow.

Property rights have always been at the core of our republic. In fact, the opportunity to own “new land” was one of the principal inducements for Englishmen (and others who followed) to settle on this continent.<sup>44</sup> Further, the new colonists’ view of property rights

banned by *City of Ladue v. Gilleo* if the HOA was a municipal government. 512 U.S. 43 (1994). See discussion *supra* note 12.

<sup>39</sup> Low, *supra* note 2, at 158. See generally KORNGOLD, PRIVATE LAND USE, *supra* note 6, at 431–34 (regarding enforcement in general).

<sup>40</sup> Low, *supra* note 2, at 177. As noted in 2001, an astounding 80 percent of new home sales in the metropolitan Washington, D.C. area were of property that is a part of a CID. DERTHICK, *supra* note 27, at 30.

<sup>41</sup> See, e.g., Chadderdon, *supra* note 11, at 234–35; Kennedy, *supra* note 14, at 763, 778–79; Womack & Timmons, *supra* note 14, at 322–23.

<sup>42</sup> See Chadderdon, *supra* note 11, at 234–35; see also *Marsh v. Alabama*, 326 U.S. 501 (1946) (imposing public constitutional restrictions on a private entity through the “state action” doctrine).

<sup>43</sup> See, e.g., ELY, *supra* note 15; SANDEFUR, *supra* note 15, at 1–2, 10; Locke, *supra* note 15, § 87, at 53–54.

<sup>44</sup> ELY, *supra* note 15, at 10. “[In order to] exploit these favorable circumstances, the (British) Crown granted charters conveying vast tracts of land to trading companies [such as the Virginia Company of London] and individual proprietors, such as William Penn. Both Virginia

was shaped by English constitutional law and tradition: "Americans associated property rights with the time-honored guarantees of Magna Carta (1215)."<sup>45</sup> Magna Carta, which was originally (forcibly) signed by King John to protect the English nobility's property and privileges, "became a celebrated safeguard against arbitrary government. . . . The colonists venerated Magna Carta as part of their *birthright* as English subjects."<sup>46</sup> Several important provisions of Magna Carta drove right to the protection of private property rights: consent of a body of representatives (e.g., Parliament, or Congress) was needed to raise revenue or levy taxes, and "[n]o freeman [could] be taken, imprisoned, [or] *disseised* [(i.e., deprived of property)] . . . except by the lawful judgment of his peers or by the law of land.' With this provision, Magna Carta secured the rights of owners against arbitrary deprivation of property without due process of law."<sup>47</sup>

Further, the view of private property rights in the American colonies was deeply influenced by the "intellectual currents in the mother country."<sup>48</sup> The seventeenth century was a time of "political and religious upheaval" in England, from the Civil Wars, through the Interregnum, the Restoration, and finally to the Glorious Revolution.<sup>49</sup> The Glorious, or Bloodless, Revolution of 1688, in

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and Massachusetts, for instance, were founded by business ventures seeking a profit from colonization. The investors in the Virginia Company of London and the Massachusetts Bay Company were keenly interested in commercial gain. They anticipated revenue derived from annual rents imposed on land grants and from trade with the colonies." *Id.* It is interesting to note that even though many colonists themselves may have also been driven by religious concerns, "many colonists hoped to improve their economic position by migration. For instance, John Winthrop, later the governor of Massachusetts, was impelled to leave England by both religious zeal and the hope of financial reward. . . . [T]he 'acquisition and cultivation of land was the very raison d'être for the colonies.'" *Id.* (quoting WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 191 (1980)).

<sup>45</sup> *Id.* at 13.

<sup>46</sup> *Id.* (emphasis added). "Down through ages of intrigue, conflict and revolution, of attempts on the one side to evade it and on the other to re-affirm it, bearing various appropriate names, none dearer to the English than 'The Great Charter,' it has come to us intact, still defining in its brief, general, simple and easily understood language, the rights of [a great] people . . ." Thornton M. Hinkle, *Magna Charta: The History of an Evolution*, 8 *YALE L.J.* 262, 269 (1899) (emphasis added).

<sup>47</sup> ELY, *supra* note 15, at 13 (emphasis added) (omission in original). The Maryland assembly passed similar language regarding due process in 1639; Massachusetts also has a similar provision in its *Laws and Liberties* (1648). *Id.* Further, William Penn urged the publication of a commentary on Magna Carta in 1687. *Id.* "Colonial judges also were influenced by the Charter. In *Giddings v. Brown* (1657), a Massachusetts county court recognized as 'a fundamental law' that property cannot be taken 'to the use or to be made the right or property of another man, without his owne free consent.'" *Id.* at 14 (emphasis added).

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 16-17; see also DAVID L. SMITH, *A HISTORY OF THE MODERN BRITISH ISLES, 1603-1707: THE DOUBLE CROWN* (1998).

which William of Orange and his wife Mary were installed as monarchs (William III and Mary II, or if you prefer “William & Mary”), in many ways was the climax of the age.<sup>50</sup> During this period “English political thinkers analyzed the nature of government. The most significant of these Whig theorists was John Locke . . . .”<sup>51</sup>

John Locke, an English political philosopher of the seventeenth and early eighteenth centuries, laid down many principals that became part of the core of the Anglo-American common law tradition of private property and limited government.<sup>52</sup> Locke’s view of

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<sup>50</sup> ELY, *supra* note 15, at 16–17; MICHAEL BARONE, OUR FIRST REVOLUTION: THE REMARKABLE BRITISH UPHEAVAL THAT INSPIRED AMERICA’S FOUNDING FATHERS 1–3 (2007). The Glorious Revolution was of paramount importance:

Absolutism, seemingly modern and efficient, seemed the way of the future.

Yet in the long run absolutism did not prevail. Out of one corner of Europe, in the British Isles, an alternative emerged, constitutional monarchy with limits on government, guaranteed rights, relatively benign religious toleration, and free market global capitalism. After the Glorious Revolution the merchant class as well as the nobility successful [sic] cabined in the power of king and prince. The nobility did not totally dominate the life of society, and merchants and entrepreneurs were left free to trade and innovate. And here the key event was the First Revolution [i.e., the Glorious Revolution], in which the . . . stadholder of the Netherlands[, William of Orange,] supplanted the . . . king of England, Scotland, and Ireland, and ensured that those countries would continue on a course very different from that of France and its continental imitators. This First Revolution was thus a long step forward toward the kind of society we take for granted now. It provided the backdrop for the amazing growth, prosperity, and military success of eighteenth- and nineteenth-century Britain—and for the American Revolution and the even more amazing growth, prosperity, and military success of the United States.

*Id.* at 7–8 (footnotes omitted); *see id.* at 229–37 (describing the political and economic reverberations after the Glorious Revolution). Also with the Glorious Revolution came the English Bill of Rights, which further elaborated on the principles contained in Magna Carta and reigned in the absolutist abuses of James II. *See* VERNON BOGDANOR, THE MONARCHY AND THE CONSTITUTION 5 (1995); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 20 (2001).

<sup>51</sup> ELY, *supra* note 15, at 17.

<sup>52</sup> *Id.* “The common law” is emphasized here and throughout, because the legal traditions of England and the rest of the English speaking world are fundamentally different from “Code [or civil] law” countries. The common law (or law that developed over centuries of traditional use) that existed in France was extinguished along with the king when he was summarily executed during the French Revolution. COOTER & ULEN, *supra* note 16, at 60. This was the case because the courts were seen “as [equally] corrupt and worthless as the king.” *Id.* The void was filled by a comprehensive set of bureaucratic statutes promulgated in 1804 by Napoleon known as the *Code Napoleon*. *Id.* The *Code* was based heavily on the *Corpus Juris Civilis* (or “The Body of the Civil Law”) codified at the order of the Eastern Roman/Byzantine Emperor Justinian in AD 528–534. *Id.* at 60–61. As Napoleon’s armies marched through Europe, bringing a new brand of civic absolutism, so too they brought the *Code*. *Id.* at 61. Thus, the nations of continental Europe, Central and South America, parts of Asia and Africa, and pockets in common law jurisdictions (Quebec, Louisiana, and Puerto Rico) are “Code law” jurisdictions. *Id.* This is where many of the colonies of continental imperial powers were located. *Id.* The United Kingdom, United States, Canada, Australia, New Zealand, Ireland, and other parts of Africa and Asia are common law jurisdictions—essentially the extent of the British Empire. *Id.*

government begins with the state of nature—the original “private sphere”<sup>53</sup>:

To understand political power right . . . we must consider what state all men are naturally in, and that is, *a state of perfect freedom to order their actions and dispose of their possessions and person, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.*<sup>54</sup>

In the state of nature, property rights are God-given—literally—through the fruits of one’s labor, which encloses property from the “common(s)”:

God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience.<sup>55</sup> The earth, and all that is therein, is given to men for the support and comfort of their being. . . .

. . . Through the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. . . . [and] *excludes* the common right of other men. . . .

. . . And the taking of this or that part does not depend on the express consent of all the commoners. . . .

. . . .

. . . *But the chief matter of property being now not the fruits of the earth, and the beasts that subsist on it, but the earth itself*. . . I think it is plain, that property in that too is acquired as the former. *As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is*

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<sup>53</sup> MCKENZIE, *supra* note 8, at 146.

<sup>54</sup> Locke, *supra* note 15, § 4, at 18.

<sup>55</sup> That goods should ultimately reach their highest and best use is also a hallmark of modern neoclassical economic theory. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 16, 27 (1960); see also COOTER & ULEN, *supra* note 16, at 15–17 (regarding equilibrium, maximization, and efficiency).

*his property. He by his labour does, as it were, enclose it from the common.*<sup>56</sup>

Thus, Locke stated that property existed under natural right before the creation of civic government.<sup>57</sup>

Locke is one of the first voices that advocated for a limited government; he believed that government should only be strong enough to protect its citizens' natural rights and warned of a strong centralized government<sup>58</sup>:

I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing other; and hence nothing but confusion and disorder will follow: and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant, that civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great, where men may be judges in their own case; since it is easy to be imagined, that he who was so unjust as to do brother an injury, will scarce be so just as to condemn himself for it: but I shall desire those who make this objection to remember, that *absolute monarchs are but men; and if government is to be the remedy of those evils, which necessarily follow from men's being judges in their own cases, and the state of nature is therefore to be endured; I desire to know what kind of government that is, and how much better it is than the state of nature, where one man, commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to anyone to question or control those*

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<sup>56</sup> Locke, *supra* note 15, §§ 26, 27, 28, 32, at 28–30 (emphasis added) (footnote added); see also MCKENZIE, *supra* note 8, at 145–46. See generally CURTIS J. BERGER AND JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE § 1.4, at 65–66 (4th ed. 1997).

<sup>57</sup> ELY, *supra* note 15, at 17.

<sup>58</sup> “Limited” here is being used to refer to a form of government that is far more reduced in its scope of control over the natural liberties of the governed, as opposed to an “absolutist” or “statist” model of government. The classical, historical example of absolutist government would be the *Ancien Régime* in France; a modern example would be socialist and communistic totalitarian governments. See, e.g., ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION (Stuart Gilbert, trans., Doubleday 1983) (1856); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–9 (40th anniversary ed. 2002).

who execute his pleasure and whatsoever he doth, whether led by reason, mistake, or passion, must be submitted to?<sup>59</sup>

Locke viewed government as based on the consent of the governed and necessitated by the inconveniences of the state of nature.<sup>60</sup> Therefore, government existed to protect property rights, which Locke intertwined with liberty itself: citizens would agree to be subjects of the government if the government protected their inherent natural rights.<sup>61</sup> “[H]e asserted that people organized government to preserve ‘their Lives, Liberties and *Estates*.’”<sup>62</sup> Locke also harkened back to Magna Carta by stating that the government could not arbitrarily seize property and that “the levy of taxes without popular consent ‘invades the *Fundamental Law of Property*, and subverts the end of Government.’”<sup>63</sup> Consequently property, like liberty, is inherently under the purview of the private sphere—for the state to arbitrarily exact control of an individual’s private property would be overreaching from its limited purpose.<sup>64</sup> Thus, property rights became almost synonymous with liberty itself.<sup>65</sup> Lockean thinking also began to percolate throughout the English common law.<sup>66</sup> William Blackstone, in his *Commentaries on the Laws of England*, wrote that “[s]o great moreover . . . is the regard of the law for private property, that it will not authorize the *least* violation of it.”<sup>67</sup> Government, or more generally law, was therefore established to prevent or punish those who would violate another’s property.<sup>68</sup> In fact, it can be argued that the common law system “approximate[d] a legal system of *maximum liberty*, which allows owners to do anything with their property that does not interfere with other peoples’ property.”<sup>69</sup> Locke emphasized that “freedom is not the absence of law; on the contrary, freedom is the goal to be preserved through law.”<sup>70</sup>

<sup>59</sup> Locke, *supra* note 15, § 13, at 22 (emphasis added).

<sup>60</sup> *Id.*; see MCKENZIE, *supra* note 8, at 146; Locke, *supra* note 15, § 4, at 18. In drafting the Declaration of Independence, Thomas Jefferson borrowed heavily from this Lockean style of the social compact. ELY, *supra* note 15, at 28–29.

<sup>61</sup> ELY, *supra* note 15, at 17.

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *Id.* (quoting John Locke, *The Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT 285, 380 (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (University of Chicago Press 1979) (1765)) (emphasis added).

<sup>68</sup> SANDEFUR, *supra* note 15, at 54.

<sup>69</sup> COOTER & ULEN, *supra* note 16, at 110.

<sup>70</sup> *Id.* (citing JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 57, at 18 (Peter Laslett ed., rev. ed., Oxford Univ. Press 1963)).

This type of thinking was also espoused and supported by the great thinkers Adam Smith and Edmund Burke.<sup>71</sup> Smith, often regarded as the father of modern free-market *laissez-faire* ideas, forms many of his economic deductions using natural law.<sup>72</sup> Further, Burke, who today is often regarded as a “political conservative,” viewed history as the bulwark of social order and “always believed in a higher law . . . to which nations as well as individuals are eternally subject.”<sup>73</sup> James Madison summed up this position well in his essay *Property*: “[g]overnment is *instituted to protect property* of every sort . . . . This being the end of government, that alone is a *just* government, which impartially secures to every man, whatever is his *own*.”<sup>74</sup>

### III. ECONOMIC EFFICIENCY OF CIDS AND THE FREE-MARKET

The economic efficiencies of, and market forces that affect, CIDs also point to the continued private ordering of HOAs through CC&Rs, despite restrictions on political expression. To use public ordering—public regulation—of HOAs by treating them as state actors is not only antithetical to classical liberalism and natural law, but also leads to economic inefficiency and waste.<sup>75</sup> If HOAs were treated like municipalities, much of the economic efficiencies associated with CIDs would be lost, and market forces that attract residents to CIDs would be frustrated.

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<sup>71</sup> See William Clyde Dunn, *Adam Smith and Edmund Burke: Complementary Contemporaries*, 7 S. ECON. J. 330, 342 (1941).

<sup>72</sup> *Id.* at 343. See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Regnery Publishing 1998) (1776).

<sup>73</sup> Dunn, *supra* note 71, at 331, 337, 339 (quoting JOHN MACCUNN, *THE POLITICAL PHILOSOPHY OF BURKE* 24 (1913)). In fact, in many ways Burke and Smith borrow from one another: the theses of Burke’s *Thoughts and Details on Scarcity* and Smith’s *The Wealth of Nations* are very similar. *Id.* at 344. Burke’s view on property and economic theory meshes with his view that the social order of things, like the common law, evolves over time. COOTER & ULEN, *supra* note 16, at 118. This view was also espoused by the later-day philosopher Friedrich August von Hayek in his defense of classical liberalism and the free market from attacks by collectivist and socialist thought in the twentieth century. See *id.* at 118. See generally F. A. HAYEK, *THE ROAD TO SERFDOM* (Bruce Caldwell ed., University of Chicago Press 2007) (1944) (defending classical liberalism and warning that the dangers of collectivism and socialism lead to totalitarianism). This work heavily influenced President Ronald Reagan and Prime Minister Margaret Thatcher; also, this work was published in comic book form by *Look Magazine* in 1950, which was distributed by General Motors to its employees. See Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 9–17, 26 n.89, 31–32 (2004) (citing Ludvig von Mises Institute, *The Illustrated Road to Serfdom*, <http://www.mises.org/books/TRTS/> (last visited Mar. 8, 2009)).

<sup>74</sup> SANDEFUR, *supra* note 15, at 54 (quoting James Madison, *Property*, in JAMES MADISON: WRITINGS 515 (Jack Rakove ed., 1999)) (emphasis added, retained, and removed).

<sup>75</sup> *Id.* at 8–9.

### A. Economic Efficiency of CIDs

Economic efficiency can essentially be defined as the concept that an outcome, when reached, is efficient if: i) “it is not possible to produce more output using the same combination of inputs”; and ii) “it is not possible to produce the same amount of output using a lower-cost combination of inputs.”<sup>76</sup> Servitudes and other restrictions on the use of land can be, in and of themselves, economically efficient.<sup>77</sup> To prevent other fee owners from building or doing something undesirable on neighboring land,

one need not buy th[eir] fee [at high cost] but can purchase a restriction [at lower cost]. Moreover, the owner can liquidate a portion of her interest by selling a servitude, while retaining productive use of the property . . . . The law should encourage people to enter such efficiency-maximizing transactions by enforcing them without undue transaction costs.<sup>78</sup>

One could question whether an efficiency-based economic analysis of private restrictions put on land might contradict the principle that land should be freely alienable in order for it to be used efficiently. However, the first response to this is that the restriction, in the abstract, *is* freely alienable, despite encumbering the fee title of the underlying real estate. Further, when an entire community is encumbered by a system of reciprocal burdens, *additional* efficiency is the result.<sup>79</sup> “Although a specific parcel loses value when it is burdened by covenants, the loss may be offset by the benefits of identical restrictions binding neighboring lots, which create a valuable residential community.”<sup>80</sup> For example, all residents (and the market) assign a higher value to their interests when no one is permitted to burn rubbish in their back yard or paint the exterior of their unit fuchsia. Thus, CIDs effectuate a mutually-beneficial situation through efficiency.

An important part of the efficiency analysis of CIDs has to do with transaction costs.<sup>81</sup> Transaction costs can essentially be understood as the costs associated with any transaction—including the costs related

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<sup>76</sup> COOTER & ULEN, *supra* note 16, at 16.

<sup>77</sup> See Komgold, *supra* note 2, at 517.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citing *Adult Group Props., Ltd. v. Imler*, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987) (discussing how servitudes enhance value of land); *Rofe v. Robinson*, 329 N.W.2d 704, 707 (Mich. 1982) (discussing valuable “property rights”).

<sup>81</sup> *Id.*



to searching, bargaining, and enforcement.<sup>82</sup> This concept directly applies to choosing private means of ordering versus public: “Administrative efficiencies also result when decision making is delegated to private government. This arrangement prevents duplicative enforcement actions by individual owners, reduces transaction costs in the negotiation process, relieves the burden of obtaining consent from all owners, and may allow the community to take advantage of its members’ expertise.”<sup>83</sup>

Enforcement and management costs are also inherent in transaction costs.<sup>84</sup> Much of the politics inherent in the governing of a municipality (or any public government, for that matter) are removed with the private administration of HOAs. This is especially so when the HOA is managed by an HOA management company. It is now a common practice for HOA boards to hire experts and management firms to run the HOA as efficiently and cost-effectively as possible; this “emphasize[s business] management over member involvement.”<sup>85</sup> Thus, running an HOA comes down to “just good or bad business management practices.”<sup>86</sup> Moreover, in general, private ordering itself produces efficiency as opposed to public ordering.<sup>87</sup> Private ordering occurs in markets<sup>88</sup> and involves agreement between parties.<sup>89</sup> Contrast this to public ordering, where transactions occur in the context of bureaucratic regulation, inflexible procedures, and results in which many do not give their consent—truly an inefficient solution.<sup>90</sup>

The services that CIDs provide can also be viewed as being more efficient than their municipal counterparts due to the free-rider

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<sup>82</sup> COOTER & ULEN, *supra* note 16, at 92.

<sup>83</sup> Korngold, *supra* note 2, at 521. Also, clarity of CC&Rs versus constitutional doctrine reduces transactional costs and promotes efficiency. See COOTER & ULEN, *supra* note 16, at 94. See generally Coase, *supra* note 55, for more on transaction costs, property rights, and efficiency.

<sup>84</sup> COOTER & ULEN, *supra* note 16, at 92.

<sup>85</sup> MCKENZIE, *supra* note 8, at 143.

<sup>86</sup> *Id.* at 139.

<sup>87</sup> COOTER & ULEN, *supra* note 16, at 141–42.

<sup>88</sup> *Id.* at 141.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* An interesting empirical example of the efficiency gains associated with private versus public ordering is the scenario involving oyster fishing on the Atlantic and Gulf coasts. *Id.* (citing Richard J. Agnello & Lawrence P. Donnelley, *Property Rights and Efficiency in the Oyster Industry*, 18 J.L. & ECON. 521 (1975)). Some states have held oyster beds to be common property, while others have granted private fishing leases. *Id.* Using an efficiency analysis based on labor productivity, Professors Agnello and Donnelley found that if all oyster beds had been privately leased, income would have risen by 50 percent. *Id.* at 141–42. An associated concept is the “tragedy of the commons.” See Garrett Hardin, *The Tragedy of the Commons*, in ECONOMIC FOUNDATIONS OF PROPERTY LAW 2 (Bruce A. Ackerman ed., 1975).

problem that municipalities face.<sup>91</sup> The free-rider problem, at its essence, is the notion that there will be consumers of a “public good” who do not pay for their consumption.<sup>92</sup> In economic terms, a “public good” is a good where there is no “rivalry” or mutually-exclusive aspect to consumption.<sup>93</sup> A pertinent example would be law enforcement or security. In municipalities, the police force is a public good subject to free-riders—policemen maintain order for all people, even if some have not paid their taxes or are not residents of the area.<sup>94</sup> Those who have not paid their taxes or who do not pay taxes are free-riders, as are nonresidents passing through. The counterexample is security forces in CIDs. They only protect residents, guests, and invitees of the CID. To live in the CID, a resident must pay the assessed HOA fees.<sup>95</sup> In this way CIDs eliminate much of the free-rider problem that municipalities face; this promotes efficiency.<sup>96</sup>

CIDs also promote economic efficiency for non-residents. The municipal governments in rapidly growing areas may not be able to provide adequate services to their ever-increasing numbers of residents.<sup>97</sup> The inadequacy of city services is compounded by the fact that many municipalities significantly expanded in area during the later half of the twentieth century.<sup>98</sup> The Advisory Commission on Intergovernmental Relations has called HOAs “the most significant privatization of local government responsibilities in recent times.”<sup>99</sup> The creation and enforcement of CC&Rs have replaced the function of zoning laws in many areas.<sup>100</sup> Furthermore, CIDs can provide

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<sup>91</sup> LOW, *supra* note 2, at 187.

<sup>92</sup> COOTER & ULEN, *supra* note 16, at 107.

<sup>93</sup> *Id.* A private good, on the other hand, is a good where there is rivalry/mutual exclusivity in consumption: if I hold fee simple absolute in Blackacre, you do not. *See id.* at 108.

<sup>94</sup> *See id.* at 108.

<sup>95</sup> *Id.*

<sup>96</sup> Many HOAs and advocates of HOAs make the compelling argument that if residents are paying fees for services (such as rubbish removal) and for maintenance of common areas (e.g., repaving streets), then they are being doubly taxed if the CID they live in is within the boundaries of a municipality. MCKENZIE, *supra* note 8, at 165. This is the case because the residents are also paying for city services that they do not use, or use less of, either through property tax or some other form of local tax. *Id.* Using this logic, residents who are members of HOAs whose fees provide for substantial services should be allowed to deduct their HOA fees from their property taxes. *Id.*

<sup>97</sup> LOW, *supra* note 2, at 189–90.

<sup>98</sup> *See id.* at 190. An example of this trend is seen in the city of San Antonio, Texas, where 69 square miles were contained within the city limits in 1950; the city expanded to 253 square miles by 1973. *Id.*

<sup>99</sup> MCKENZIE, *supra* note 8, at 22 (quoting U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 18 (1989)).

<sup>100</sup> LOW, *supra* note 2, at 177. It is interesting to note that some land use planners and

services for residents, allowing the strained municipality to focus on its residents that do not live in a CID. In a way, municipalities transfer responsibilities that they may not be able to meet to real estate developers. Some recently fast-growing areas, such as Las Vegas, actually make it very difficult for new housing to be organized in any form *other than* CIDs (that are subject to HOAs).<sup>101</sup> In this way, many of the municipal “growing pains” can be avoided using private planning and ordering. Thus, instead of a municipality expanding through traditional means, it may transfer the costs of planning, development, and maintenance of new expansion to developers (whether the expansion is new structures on a block or a vast tract). The increased efficiency benefits not only the residents of the CIDs, but also residents of the surrounding municipality or political division, as well as neighboring populations.

### B. CIDs and Market Forces

The private ordering of CIDs not only adds dramatically to their economic efficiency, but also allows for the effects of positive market forces that would be frustrated if HOAs were treated like municipalities. One of the most basic consequences of allowing market forces to act more freely on CIDs is that “property value” can be maximized. The maximization of property values has been a positive force for millions of Americans. Evan McKenzie has likened CIDs to a type of “hostile privatism,” where the preservation of property values is the highest social goal of the organization.<sup>102</sup> To me, this is entirely justified—even welcomed—as a large number of Americans (64 percent) put the majority of their wealth and savings into the purchase of a home.<sup>103</sup> In this desire to maintain values, physical appearance matters a great deal: residents “endeavor to keep

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developers believe that existing non-CID communities in municipalities should be given the option to switch from a zoning regime to a CC&R regime governed by HOAs, as they are more efficient. *Id.*

<sup>101</sup> Chadderdon, *supra* note 11, at 237–38. Las Vegas is one such city: “[t]he City of Las Vegas [has] virtually mandate[d] that new development be done with homeowner associations [through their zoning laws]’ . . . .” *Id.* (citing Evan McKenzie, Private Gated Communities in the American Urban Fabric: Emerging Trends in their Production, Practices, and Regulation, Keynote address at the University of Glasgow, Scotland, Conference: Gated Communities: Building Social Division or Safer Communities? 5 (Sept. 18–19, 2003), available at <http://www.bristol.ac.uk/sps/cnrpapersword/gated/mckenzie.pdf>) (first three modifications in original).

<sup>102</sup> MCKENZIE, *supra* note 8, at 18–19.

<sup>103</sup> LOW, *supra* note 2, at 159. The 64 percent figure is accurate as of 2004. *See id.* The point is that a huge percentage of Americans have the majority of their savings invested in their home.

their neighbors 'up to snuff.'"<sup>104</sup> Value-maximizing, rational homeowners will desire to live in communities subject to HOAs and restricted by CC&Rs in order to minimize neighborhood deterioration and unpleasantness.<sup>105</sup>

Thus, CC&Rs provide financial security through protecting and increasing property value.<sup>106</sup> An overriding purpose of the HOA is to protect property values through the maintenance and "preservation of the project's character and appearance. In carrying out this purpose the board of directors has all the powers of any non-profit corporation . . . . Beyond these basic requirements there is an enormous range of restrictions that the developer may have created as part of a target-marketing strategy."<sup>107</sup> Furthermore, the system of CC&Rs allows developers to create facilities, such as pools or tennis courts, that residents may not be able to afford if they lived outside of a CID.<sup>108</sup> Very simply, this also positively affects market value, as a house where the residents have access to a pool and tennis courts is worth more than the same house that does not. Moreover, "[r]eserving open space as a common amenity not only brings aesthetic benefits but also can lessen the developer's cost under planned unit development (PUD) zoning. . . . These savings and efficiencies can be passed on to residential consumers."<sup>109</sup>

The "aesthetic benefits" that CC&Rs create in CIDs, when combined with the protection of value that comes from efficiency maximization and increased market value, creates a socio-economic framework that Setha Low argues allows "middle-class families [to] imprint their residential landscapes with 'niceness,' reflecting their own landscape aesthetic of *orderliness, consistency, and control*."<sup>110</sup> Thus, the middle classes accept the excessive restrictions imposed through CC&Rs out of their anxiety to maintain hard-fought class distinctions and socio-economic positions.<sup>111</sup> The diminishing job market in the 1980s and 1990s created a trend of downward mobility in some classes due to the nation's partial move from an industrial economy to a more service-industry-oriented economy.<sup>112</sup> The

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 154.

<sup>106</sup> *Id.* at 159.

<sup>107</sup> MCKENZIE, *supra* note 8, at 128–29.

<sup>108</sup> See Korngold, *supra* note 2, at 513.

<sup>109</sup> *Id.* (citing U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 4 (1989)).

<sup>110</sup> LOW, *supra* note 2, at 167 (emphasis added).

<sup>111</sup> See *id.* at 172–73.

<sup>112</sup> *Id.*

CC&Rs in CIDs assured residents of their class distinctions when their previously class- and status-conveying suburbs (municipalities) began to decay.<sup>113</sup>

Thus, property values and “niceness” are the goals of many CIDs. This is what makes CIDs desirable to many Americans, even if they cannot post political signs in their windows or have political rallies—perhaps this actually adds to the desirability for some. In fact, many residents of CIDs are rationally apathetic to HOA decisions and CC&Rs as long as their home values are protected and increase.<sup>114</sup>

Currently, concerns relating to maintaining the value of property may be heightened due to what began as the “credit crunch,” or “mortgage meltdown,” and its effect on real estate. What had developed into a true financial crisis and world economic downturn by early 2009 started when financial institutions and private investors had crippling losses from different types of asset-backed securities that contained (in various ways) what ended up being “bad debt”—especially sub-prime mortgages that went into default.<sup>115</sup> Specifically,

<sup>113</sup> *Id.*

<sup>114</sup> MCKENZIE, *supra* note 8, at 142–43. In this way, many residents of CIDs could be considered rationally apathetic to HOA control, as shareholders of public companies tend to be rationally apathetic to corporate decisions as long as the stock price increases. See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 396–97 (1983) (discussing shareholder voting, the collective action problem, and the free-rider problem). “Shareholders express views by buying and selling shares.” *Id.* at 396. If shareholders are unhappy with corporate decisions and governance, they simply sell their stock. See *id.*

<sup>115</sup> To follow the current financial meltdown as chronicled in the news, see, for example, Greg Hitt & Jonathan Weisman, *Congress Strikes \$789 Billion Stimulus Deal*, WALL ST. J., Feb. 12, 2009, at A1; Deborah Solomon, John Hilsenrath & Damian Paletta, *U.S. Plots New Phase in Banking Bailout*, WALL ST. J., Jan. 17–18, 2009, at A1; Deborah Solomon, Damian Paletta & John Hilsenrath, *U.S. to Buy Stakes in Nation’s Largest Banks — Recipients Include Citi, Bank of America, Goldman; Government Pressures All to Accept Money as Part of Broadened Rescue Effort*, WALL ST. J., Oct. 14, 2008, at A1; Greg Hitt & Deborah Solomon, *Historic Bailout Passes as Economy Slips Further*, WALL ST. J., Oct. 4–5, 2008, at A1; Susanne Craig, Deborah Solomon, Carrick Mollenkamp & Matthew Karnitschnig, *Lehman Races Clock; Crisis Spreads*, WALL ST. J., Sept. 13–14, 2008, at A1; James R. Hagerty, Ruth Simon & Damian Paletta, *U.S. Seizes Mortgage Giants: Government Ousts CEOs of Fannie, Freddie; Promises Up to \$200 Billion in Capital*, WALL ST. J., Sept. 8, 2008, at A1; Robin Sidel, Dennis K. Berman & Kate Kelly, *J.P. Morgan Buys Bear in Fire Sale, as Fed Widens Credit to Avert Crisis: Ailing Firm Sold for Just \$2 a Share in U.S.-Backed Deal*, WALL ST. J., Mar. 17, 2008, at A1; Carrick Mollenkamp & Mark Whitehouse, *Banks Fear a Deepening of Turmoil*, WALL ST. J., Mar. 17, 2008, at A1; Damian Paletta, *U.S. to Revamp Credit Rules, Drawing From Crisis Lessons: Paulson Plan Seeks to Tame Excesses in Mortgage Market*, WALL ST. J., Mar. 13, 2008, at A1; Sudeep Reddy, *Jobs Data Suggest U.S. Is in Recession: Largest Payroll Fall in Five Years Spurs New Stimulus Talk*, WALL ST. J., Mar. 8–9, 2008, at A1; E. S. Browning, *Fed Moves to Curb Risk of Recession: Investors Flock to Gold as Metal Hits New High; Fans in the Mainstream*, WALL ST. J., Jan. 31, 2008, at A1; David Enrich, Robin Sidel & Susanne Craig, *World Rides to Wall Street’s Rescue: Citigroup, Merrill Tap Foreign-Aid Lifelines; Damage Tops \$90 Billion*, WALL ST. J., Jan. 16, 2008, at A1; Damian Paletta, Valerie Bauerlein & James R. Hagerty, *Countrywide Seeks Rescue Deal: Bank of America Eyes Stricken Home Lender as Crisis Grinds on*, WALL ST. J., Jan. 11, 2008, at A1; Greg Ip & Joellen Perry, *Fed Chief Opens the Door to ‘Substantive’ Rate Cuts*, WALL ST. J., Jan. 11, 2008, at A1; David Enrich, Randall

many home mortgages were securitized in the form of collateralized debt obligations or other types of mortgage-backed securities.<sup>116</sup> For the most part, the crisis was triggered by the *decrease* in property values in the areas of the country where they had been the highest.<sup>117</sup> Despite the fact that the current financial crisis began with sub-prime mortgages, it began to affect what had been the classically credit worthy as well, as a general lack of confidence developed in credit markets by 2008.<sup>118</sup> The credit crunch and its associated recession is certainly the most significant financial crisis in over a decade and has seriously effected foreign economies as well.<sup>119</sup> In this climate the protection of property values is all the more paramount, especially as

Smith & Damian Paletta, *Citigroup, Merrill Seek More Foreign Capital: Moves, Foreshadowing Further Write-Downs, Raise Regulatory Issues*, WALL ST. J., Jan. 10, 2008, at A1; Carrick Mollenkamp, Edward Taylor & Anita Raghavan, *UBS's Subprime Hit Deepens Credit Worries: Bank Gets \$11.5 Billion From Singapore, Others; 'Unknowable' Bottom?*, WALL ST. J., Dec. 11, 2007, at A1; James R. Hagerty, *Mortgage Crisis Extends Its Reach: Fannie, Freddie Regain Dominance as Investors Shrink From Housing*, WALL ST. J., Nov. 13, 2007, at A1; Robin Sidel, Monica Langley & David Enrich, *Two Weeks That Shook the Titans of Wall Street*, WALL ST. J., Nov. 9, 2007, at A1; Robin Sidel, Monica Langley & Gregory Zuckerman, *Citigroup CEO Plans to Resign as Losses Grow: Bank's Board to Meet With Prince on Sunday; SEC Queries Accounting*, WALL ST. J., Nov. 3-4, 2007, at A1; Serena Ng & Carrick Mollenkamp, *Fresh Credit Worries Grip Markets: Banks' Woes Spur Fear of Reluctance to Lend; Stocks React Sharply*, WALL ST. J., Nov. 2, 2007, at A1; *Another Notch Down: The Fed Cuts Interest Rates Again*, ECONOMIST, Nov. 3-9, 2007, at 86; Randall Smith, *O'Neal Out as Merrill Reels From Loss: Startled Board Ditches a Famously Aloof CEO; The Revenge of 'Mother,'* WALL ST. J., Oct. 29, 2007, at A1; *Spooking Investors: Financial Markets Remain on Edge Because the Credit Crunch Has Not Been Solved*, ECONOMIST, Oct. 27-Nov. 2, 2007, at 79-80; *Amid the Gloom: The Credit Crunch Has Cast a Cloud Over the World Economy. Thank Goodness It Started Out So Strong*, ECONOMIST, Oct. 20-26, 2007, at 34-37.

<sup>116</sup> Carrick Mollenkamp & Ian McDonald, *Behind Subprime Woes, A Cascade of Bad Bets: One Loan's Journey Shows Culture of Risk; The Fall of a Fund Whiz*, WALL ST. J., Oct. 17, 2007, at A1; Serena Ng & Carrick Mollenkamp, *Merrill Takes \$8.4 Billion Credit Hit: It Plunged into CDOs in '03, Hiring Pioneer of the Debt Securities*, WALL ST. J., Oct. 25, 2007, at A1.

<sup>117</sup> See Kelly Evans, Serena Ng & Ruth Simon, *Decline in Home Prices Accelerates: Fed's Efforts Have Only Muted Effect on Mortgage Rates*, WALL ST. J., Feb. 27, 2008, at A1; Sudeep Reddy & Sara Murray, *Housing, Bank Troubles Deepen: Foreclosures Reach a New Record; Home Equity Falls*, WALL ST. J., Mar. 7, 2008, at A1.

<sup>118</sup> See Jeffrey McCracken, *Lending Squeeze Hits Ailing Firms: Rescue Financing Is Getting Scarcer; Retailers on Brink*, WALL ST. J., Feb. 21, 2008, at A1; Serena Ng & Carrick Mollenkamp, *Fresh Credit Worries Grip Markets: Banks' Woes Spur Fear of Reluctance to Lend; Stocks React Sharply*, WALL ST. J., Nov. 2, 2007, at A1; see also Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans to a Broader Market*, WALL ST. J., Dec. 3, 2007, at A1.

<sup>119</sup> Greg Ip, Mark Whitehouse & Aaron Lucchetti, *U.S. Mortgage Crisis Rivals S&L Meltdown: Toll of Economic Shocks May Linger for Years; A Global Credit Crunch*, WALL ST. J., Dec. 10, 2007, at A1; see Timothy Aepfel, *Credit Scare Spreads in U.S., Abroad: Loan Terms Tighten for Smaller Businesses; Recipe for Slower Growth*, WALL ST. J., Jan. 22, 2008, at A1; Patrick Barta & Marcus Walker, *Developing Economies Face Reckoning as U.S. Stumbles: After Prolonged Boom, Emerging Markets Feel Downside of Global Ties*, WALL ST. J., Jan. 24, 2008, at A1; Alistair MacDonald & Mark Whitehouse, *London Fog: Credit Crunch Pounds U.K. Economy*, WALL ST. J., Feb. 7, 2008, at A1.

by mid-2009 homeowners continue to face fears of a broader recession and even stagflation<sup>120</sup>

Lastly, the continued private ordering of HOAs with respect to restrictions on political expression (or otherwise) protects the important ability to make personal choices and consent to transactions in a market economy. CC&Rs represent utility-maximizing choices that HOA participants make.<sup>121</sup> Consumers of goods make choices based on their own personal preferences and predilections in order to maximize their own personal utility (i.e., happiness, fulfillment, satisfaction).<sup>122</sup> This is the basis of utility maximization theory.<sup>123</sup> “In residential servitude regimes, an owner receives increased ‘health, happiness, and peace of mind’ in exchange for accepting community restrictions and power. The servitudes provide ‘character,’ ‘integrity[,] and tranquility’ for the neighborhood.”<sup>124</sup> Moreover, the concept of personal choice drives at consent. Residents consent to live by the CC&Rs, with all their restrictions on political expression, when they move into a CID and accept their deed on closing.<sup>125</sup>

Furthermore, the conventional wisdom—apart from the few state courts that have granted expansive expression rights on private property—is that individuals waive many of their public free speech rights on private property that is controlled by private entities, like the common areas of HOAs.<sup>126</sup> Residents “agree[] to be bound by [CC&Rs] every bit as much as contracting parties agree to be bound.”<sup>127</sup> This concept can be summed-up easily enough in the practical statement that:

If you do not like [living in a CID subject to CC&Rs and the authority of a HOA] you can buy a house across the street where the rules and rule-making procedures may be different

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<sup>120</sup> Greg Ip, *Fears of Stagflation Return as Price Increases Gain Pace: Fed Cuts Outlook for Economic Growth Amid Credit Crunch*, WALL ST. J., Feb. 21, 2008, at A1; George Melloan, *Why ‘Stimulus’ Will Mean Inflation*, WALL ST. J., Feb. 6, 2009, at A13.

<sup>121</sup> See Korngold, *supra* note 2, at 519.

<sup>122</sup> COOTER & ULEN, *supra* note 16, at 22. “Utility” could generally be described as a measure of consumer satisfaction arrived at through preference ordering. *Id.* at 22–23.

<sup>123</sup> *Id.* See generally *id.* at 23–25, for background on utility maximization theory.

<sup>124</sup> Korngold, *supra* note 2, at 519 (footnotes omitted) (quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. Dist. Ct. App. 1975); *Jackson v. Williams*, 714 P.2d 1017, 1024 (Okla. 1985); *Gregory v. State*, 495 A.2d 997 (R.I. 1985)).

<sup>125</sup> See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992). *But see* MCKENZIE, *supra* note 8, at 147 (contradicting the commonly accepted notion that moving in (and then not moving out) signifies consent).

<sup>126</sup> LOW, *supra* note 2, at 162.

<sup>127</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 41 (2004) [hereinafter BARNETT, *PRESUMPTION OF LIBERTY*]; see Korngold, *supra* note 2, at 516 (describing the benefits of servitudes as “contract benefits”).

and more to your liking. The cost of exit is quite low. . . . This applies when you make your initial decision of where to live as well as when you continue to remain within the jurisdiction [of the HOA].<sup>128</sup>

#### IV. STATE ACTION: THE PRIVATE BECOMES “PUBLIC”

The economic efficiency of CIDs, and market forces inherent in a system of private ordering of CIDs, need continued protection. The classically liberal notions of government upon which this republic was founded must continue to influence our decision-making regarding good and just governing, especially where property rights—one of the cornerstones of liberty itself—are concerned.<sup>129</sup>

Many CC&Rs do restrict political expression. An example is the community of Bear Creek, Washington,<sup>130</sup> a CID with 500 residents, and private sewers and streets.<sup>131</sup> The HOA prohibits satellite dishes, unkempt landscaping, and on-street parking.<sup>132</sup> Of special interest to this Note, the CC&Rs also prohibit firearms and flagpoles.<sup>133</sup> The president of the HOA actually “boasts that they have moved ahead of government by being able to enforce these restrictions through covenants that in the public sector might run afoul of constitutional restrictions and statutory limitations.”<sup>134</sup> Many commentators have

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<sup>128</sup> BARNETT, PRESUMPTION OF LIBERTY, *supra* note 127, at 41–42. By “cost of exit” Randy E. Barnett is referring to the financial cost of moving as well as other sacrifices, such as perhaps not having access to the CID pool anymore. *Id.* at 42 (citing Barnett, *supra* note 125, at 902–05 (defending the claim that there can be actual consent to “immutable” rules if the cost of exit is low enough)).

<sup>129</sup> See ELY, *supra* note 15; see also FRIEDMAN, *supra* note 58, at 26–27, 34; Locke, *supra* note 15, §§ 26, 27, 32, at 28–30; SANDEFUR, *supra* note 15, at 1–2, 10. Furthermore,

[i]t can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . [This] might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

THE FEDERALIST NO. 78, at 380–81 (Alexander Hamilton) (Terence Ball ed., Cambridge University Press 2003) (emphasis added; capitalization in original). See generally GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 39–42 (5th ed. 2005).

<sup>130</sup> LOW, *supra* note 2, at 162–63.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 163 (citing Mary Massaron Ross, Larry J. Smith & Robert D. Pritt, *The Zoning Process: Private Land-Use Controls and Gated Communities, the Impact of Private Property Rights Legislation, and Other Recent Developments in the Law*, 28 URB. LAW. 801 (1996)). It is interesting to note that in *Ladue* (the case prohibiting blanket restrictions on signs in municipal



observed that HOAs exercise this type of restrictive power over their residents as “pseudo-governments,” without the same constitutional restraints that apply to governments.<sup>135</sup> One must hold the above factors in mind to analyze the proposition that HOAs should be treated as municipalities, or state actors, with respect to, and because of, their restrictions on political expression—in essence transforming them into a public entity for the purposes of regulation.

*A. The HOA as a Government: Marsh v. Alabama—First Amendment Expression and Fifth Amendment Takings*

Courts generally view HOAs as business entities rather than private governments.<sup>136</sup> Through the state action doctrine, however, HOAs could be viewed as the functional equivalent of a municipal government that is bound by the United States Constitution. This is because they act and function like municipalities and control areas resembling towns or cities.<sup>137</sup> The leading case dealing with this matter is *Marsh v. Alabama*,<sup>138</sup> which dealt with the religious expression of a Jehovah’s Witness who was convicted of a criminal trespass after handing out literature in the “company town” of Chickasaw, Alabama.<sup>139</sup> Justice Black reasoned that because the company town had characteristics similar to a municipality and functioned like a municipality, it should be held to the same constitutional standard as a municipality.<sup>140</sup> Further, he disagreed that property rights should be paramount:

ordinances) the court expressly states,

A special respect for individual liberty in the home has long been part of our culture and our law . . . ; that principle has a special resonance when the government seeks to constrain a person’s ability to *speak* there. . . .

. . . [I]ndividual residents themselves have strong incentives to keep their own property values up and to prevent ‘visual clutter’ in their own yards and neighborhoods—incentives markedly different from those of persons who erect signs on others’ land, in others’ neighborhoods, or on public property. Residents’ self-interest diminishes the danger of the ‘unlimited’ proliferation of residential signs that concerns the City of Ladue.

*City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (citing *Payton v. New York*, 445 U.S. 573, 596–97, nn.44–45 (1980); *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam)). While this may be so, an equally compelling statement might be that this very same liberty at home would allow people to choose what type of legal residential arrangement in which to live, and even more generally what type of neighborhood or community to live in.

<sup>135</sup> See, e.g., *LOW*, *supra* note 2, at 167; *Chadderdon*, *supra* note 11, at 234.

<sup>136</sup> *MCKENZIE*, *supra* note 8, at 21.

<sup>137</sup> See *Chadderdon*, *supra* note 11, at 234.

<sup>138</sup> 326 U.S. 501 (1946); see *MCKENZIE*, *supra* note 8, at 155–56.

<sup>139</sup> *Marsh*, 326 U.S. at 503–04.

<sup>140</sup> *Id.* at 507–08.

*We do not agree that the corporation's property interests settle the question.* The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes, and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated *primarily to benefit the public* and since their operation is essentially a public function, it is subject to state regulation.<sup>141</sup>

In an extension of this contention, the Court stated that since the company that owned the town acted like, or in the stead of, a municipal government, it should be treated as one:

The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.<sup>142</sup>

In the final paragraph of the majority opinion, the Court endorsed liberty for those residing in company towns; however, by doing this the Court restricted the private property rights—and consequently liberty—of the corporation (i.e., shareholders of the corporation) that owned the town:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, *we remain mindful of the fact that the latter occupy a preferred position.* As we have stated before, the right to exercise the liberties safeguarded by the First Amendment “lies at the foundation of free government

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<sup>141</sup> *Id.* at 505–06 (emphasis added) (citations and footnotes omitted). I would argue that no private facility is “built and operated *primarily* to benefit the public” whether it is a ferry, railroad, company town, or CID.

<sup>142</sup> *Id.* at 508.

by free men” and we must in all cases “weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of [those] rights.” In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.<sup>143</sup>

Thus, *Marsh* articulated one of the major theories attributing state action to private parties—a theory that prefers speech or expression over property rights. In this decision, the expressive rights of the public on private property were trumpeted. Consequently, however, private property rights, which are at least equally as important to a free society that prides itself on promoting liberty, became diluted.<sup>144</sup> Much of the evolution of the common law after *Marsh* focuses on political expression and free speech in privately-owned shopping centers, a somewhat analogous idea to a CID, as private shopping centers are the new “private equivalent of the *agora*,” whereas CIDs could be seen as the private equivalent of the municipality (not to mention that many large mixed-use CIDs contain shopping centers).<sup>145</sup> However, a recent Supreme Court of New Jersey case discussed *infra*, *Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association*,<sup>146</sup> brings the issue full circle and back to restrictions on political expression in CIDs.<sup>147</sup>

Nonetheless, it is useful from a doctrinal standpoint to examine the case law as it relates to private shopping centers, as the legal issues, from a property rights perspective, are very similar, if not analogous. The first lead “shopping center case” was *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,<sup>148</sup> which

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<sup>143</sup> *Id.* at 509 (citation and footnote omitted) (emphasis added) (ellipses in original).

<sup>144</sup> See FRIEDMAN, *supra* note 58, at 26–27, 34. *Contra* Curtis J. Berger, *PruneYard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991).

<sup>145</sup> MCKENZIE, *supra* note 8, at 157.

<sup>146</sup> 929 A.2d 1060 (N.J. 2007).

<sup>147</sup> Despite speech rights being somewhat broader in the New Jersey Constitution than in the United States Constitution, the New Jersey Supreme Court held that these rights are not absolute and can be waived or otherwise curtailed through private arrangement. *Id.* at 1063.

<sup>148</sup> 391 U.S. 308 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507, 512–21 (1976).

followed the approach taken in *Marsh*. Justice Marshall held that shopping centers were the functional equivalent of the business district of a town for the purposes of the First Amendment and that private ownership did not permit the owners to disallow peaceful picketing.<sup>149</sup> Interestingly, Justice Black, who spoke for the Court in *Marsh*, dissented in *Logan Valley* using a private property-conscious Fifth Amendment takings argument:

*[W]hether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government’s agent to take a part of [the owner’s] property to give to the pickets for their use, the Court should also award [him] just compensation for the property taken.<sup>150</sup>*

He went on to criticize the Court for relying on his opinion in *Marsh* as primary support for its reasoning allowing the picketing.<sup>151</sup> The majority somehow converted the private property into public property; however, Justice Black claimed that *Marsh* was never meant to apply to a scenario like the one at bar.<sup>152</sup> He stated, in essence, that the holding in *Marsh* is *extremely limited* because the town of Chickasaw was *identical* to any other American town in every way, except that it was entirely owned by the Gulf Shipping Corporation.<sup>153</sup> Justice Black noted the differences: “I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a ‘town.’”<sup>154</sup>

Irony aside, Justice Black insisted that the *Marsh* view of state action should not apply to a privately-owned shopping center. In

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<sup>149</sup> *Id.* at 325.

<sup>150</sup> *Id.* at 330–31 (Black, J., dissenting) (emphasis added).

<sup>151</sup> *Id.* at 331.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

1976, *Logan Valley* was overruled by *Hudgens v. NLRB*.<sup>155</sup> In a similar shopping center picketing dispute, the Court used the reasoning and language of Justice Black's *Logan Valley* dissent to state that the private property must assume nearly all the aspects and functions of a municipal government to be held to the same constitutional standard.<sup>156</sup> This much narrower reading of *Marsh* is still the test today for the type of state action required for an entity to "[step into] the shoes of the State" for the purposes of the United States Constitution.<sup>157</sup>

An antecedent case to *Hudgens* is *Lloyd Corp. v. Tanner*,<sup>158</sup> in which the Court said the entity must "perform[] the full spectrum of municipal powers [to stand] in the shoes of the State."<sup>159</sup> The Court further stated:

We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy.<sup>160</sup>

This statement by the Court seems to speak to the truth of the matter. The sanctity of private property rights, as well as that of freedom of expression (especially political speech) may be in tension, but are not fundamentally incompatible, especially with regard to expression in legitimate public forums. Interestingly, the opinion does not define the specific nature of the Fifth or Fourteenth Amendment rights of shopping center owners.<sup>161</sup>

Nonetheless, the takings argument used by Justice Black in *Logan Valley* is compelling. The taking of private property without just compensation by the government is prohibited by the Fifth Amendment.<sup>162</sup> The Founding Fathers proclaimed: "nor shall private

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<sup>155</sup> 424 U.S. 507 (1976).

<sup>156</sup> Chadderdon, *supra* note 11, at 250; see MCKENZIE, *supra* note 8, at 157.

<sup>157</sup> Chadderdon, *supra* note 11, at 250 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)) (emphasis removed).

<sup>158</sup> 407 U.S. 551 (1972).

<sup>159</sup> *Id.* at 569.

<sup>160</sup> *Id.* at 570.

<sup>161</sup> See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 343 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

<sup>162</sup> U.S. CONST. amend. V.

property be taken for public use without just compensation.”<sup>163</sup> That private property should at all times be protected from encroachment by the government is one of the founding principles of our republic.<sup>164</sup> Thus, federal precedent has rested since 1976 with *Hudgens*’ narrow and exacting test for state action of private entities on private property. While one can certainly make the argument that even a narrow standard for state action crosses the line when the protection of property rights is concerned, a narrow standard is certainly desirable over one that is expansive.

*B. State Constitutions: More Expansive Protection of Free Expression—The Possibility of Increased Regulation Through Broader Standards?*

The constitutions of many states contain more broadly defined and applied expressive rights.<sup>165</sup> This has allowed for the possibility of courts to apply much more expansive protections to expressive rights—even on private property—using state constitutions. While it is the minority position among states, several states, including California and New Jersey, have granted broad protection in various forms.<sup>166</sup>

The case that opened the door to this type of expansive state protection, and rejected a federal takings argument, is *PruneYard Shopping Center v. Robins*.<sup>167</sup> In *PruneYard*, several high school students were in the central courtyard of PruneYard shopping center attempting to solicit signatures against a United Nations resolution that condemned Zionism.<sup>168</sup> The California Supreme Court held that the students’ political expression on the privately-owned grounds of PruneYard shopping center was protected, and the United States Supreme Court affirmed.<sup>169</sup> The owner of the shopping center had

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<sup>163</sup> *Id.* Recently this clause, as applied to eminent domain, has generated a great deal of controversy in the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005). The Court deferred to the city in terms of the efficacy of their plan for the private revitalization of the Fort Trumbull area of New London, Connecticut, and found that the plan did not violate the Fifth Amendment because it served the public purpose of economic revitalization. *Id.* at 486–87; see Ryan J. Sevcik, *Trouble in Fort Trumbull: Using Eminent Domain for Economic Development in Kelo v. City of New London*, 85 NEB. L. REV. 547 (2006).

<sup>164</sup> See ELY, *supra* note 15, at 4; see also FRIEDMAN, *supra* note 58, at 26–27, 34; Locke, *supra* note 15, §§ 26–27, 32, 87, at 28–30, 53–54; SANDEFUR, *supra* note 15, at 1–2, 10.

<sup>165</sup> See, e.g., CAL. CONST. art. I.

<sup>166</sup> This also includes Massachusetts, Colorado, and Washington. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 758 (Cal. 2007), *cert. denied*, 129 S. Ct. 94 (2008); see Berger, *supra* note 144, at 634 n.10.

<sup>167</sup> 447 U.S. 74 (1980); see MCKENZIE, *supra* note 8, at 157.

<sup>168</sup> *PruneYard*, 447 U.S. at 77.

<sup>169</sup> *Id.* at 88.

claimed that when the state protected the students' political expression that he wished to prevent on his property, the state was actually taking away his property rights without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and infringing on his free speech rights in violation of the First and Fourteenth Amendments of the United States Constitution.<sup>170</sup>

The Court found more expansive expression rights on private property under the California Constitution, which has more expansive free speech protections than the United States Constitution.<sup>171</sup> The California Supreme Court had held "that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."<sup>172</sup> When the case reached the United States Supreme Court, the Court stated that "neither [the owner's] federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of [the students] to exercise state-protected rights of expression and petition on [the owner's] property."<sup>173</sup> The precedent set in *PruneYard* was that there is no federally-protected First Amendment right to engage in political expression on private property, but there may be such expression rights protected by the state—and property owners cannot rely on a federal Fifth Amendment takings argument to prevent such expression.<sup>174</sup>

The notion of applying state constitutions to political expression on private property has occurred with many types of private property since *PruneYard*, such as office parks, universities, and residential CIDs (of specific interest to this Note).<sup>175</sup> The late Professor Curtis Berger advocated an extension of public political expression on private property through a number of strategies, including state constitutions (as in *PruneYard*), as well as the common law notions of the public forum and marketplace.<sup>176</sup> He claimed there is a necessity for this extension for the proper functioning of "participatory democracy":

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<sup>170</sup> *Id.* at 84–86.

<sup>171</sup> *Id.* at 79–80; see CAL. CONST. art. I, §§ 2, 3; MCKENZIE, *supra* note 8, at 157.

<sup>172</sup> *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

<sup>173</sup> *PruneYard*, 447 U.S. at 88.

<sup>174</sup> See *id.*; MCKENZIE, *supra* note 8, at 157.

<sup>175</sup> Berger, *supra* note 144, at 634.

<sup>176</sup> *Id.* at 659–78.

This [argument] is informed by steadfast faith in political talk. As that talk becomes ever more costly, the need to preserve the domain for cheap talk and grassroots political activity becomes imperative if we wish to enjoy a vital, participatory democracy. If speech—the immediate target of every oppressive regime—is muted, none of our other cherished liberties ultimately can survive.

As the role of the constitutionally protected public forum diminishes . . . other legal approaches to preserve an endangered domain must be sought. The promise of *Pruneyard*, which would have opened shopping malls to political activity, has foundered on the reluctance of most state courts to read their constitutions as providing access to privately owned lands [(recall *PruneYard* is a minority position)]. Speech advocates, therefore, must search elsewhere to fuel their struggle. State common-law limitations on property owners' powers and state regulatory schemes calling for expressive access are two sources for the struggle.<sup>177</sup>

While Berger's ideas are well-argued, his position rather misses the point. Without the most cherished protection of private property and property rights, which occupy a paramount position in our legal, philosophical, and political history, the "participatory democracy" which Berger speaks of would be wholly lost. It can be argued that democracy, without the classically liberal Anglo-American pre-eminence of private property rights, can lead to the totalitarianism and oppression that Berger warns against.<sup>178</sup> Property rights are at the very foundation, literally, of limited government: one of the reasons that the barons of England pressed for Magna Carta—the very basis of limited government—was due to wrongs done to their *property* (such as confiscations and extortions) by King John.<sup>179</sup> Again, *PruneYard* and cases like it are the exception, rather than the rule. Most states have not given as expansive speech rights as California.<sup>180</sup> "Mall owners have prevailed [in protecting their property rights] in Arizona, Connecticut, Georgia, Michigan, New York, North Carolina,

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<sup>177</sup> *Id.* at 690–91.

<sup>178</sup> See FRIEDMAN, *supra* note 58, at 22–27; Locke, *supra* note 15, at 53–54; SANDEFUR, *supra* note 15, at 22 (citing JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27, at 329 (Peter Laslett ed., rev. ed., Oxford Univ. Press 1963)); see also HAYEK, *supra* note 73.

<sup>179</sup> Hinkle, *supra* note 46, at 267–68.

<sup>180</sup> Berger, *supra* note 144, at 634.



Pennsylvania, and Wisconsin but have lost in California, Massachusetts, Washington, and Oregon.”<sup>181</sup>

Despite being in the minority camp concerning state constitutional protection of political speech on private property, California, where *PruneYard* originated, is a particularly important example for the tension between expression rights and property rights for this Note because of the state’s economic significance in both the country and the world.<sup>182</sup> Large dominant states like California often blaze the trail for the nation in general—if not always with legal theory, certainly in terms of economic models and, to some extent, social trends. Thus, states like California, New York, Florida, or Texas may predict the direction the country, in general, is heading. In the real estate industry, planning concepts such as CIDs, and lifestyle centers may often arrive first in the highly populated, economically vibrant, and fast growing parts of the country. For example, California has approximately 25,000 CIDs, the second most of any state (second to Florida where there are approximately 40,000 CIDs).<sup>183</sup> Also, both California and Florida are the only states where the Community Associations Institute has established permanent legislative action committees.<sup>184</sup>

The California Court of Appeal used the same state constitutional framework as *PruneYard* in *Laguna Publishing Co. v. Golden Rain Foundation*,<sup>185</sup> but also discussed and employed the state action doctrine. In *Laguna Publishing* the HOA of the CID Leisure World imposed a blanket ban on the distribution of one free newspaper, while allowing the distribution of another.<sup>186</sup> Leisure World is a gated community where there is no general public invitation.<sup>187</sup> The Court of Appeal of California held that the banned newspaper was

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<sup>181</sup> *Id.* at 634 n.10. However, Washington narrowed its state constitutional stance to only requiring that owners allow solicitation of signatures for an initiative in *Southcenter Joint Venture v. National Democratic Policy Committee*, 780 P.2d 1282 (Wash. 1989). *Id.*

<sup>182</sup> See Legislative Analyst’s Office, Cal Facts 2004 State Economy, [http://www.lao.ca.gov/2004/cal\\_facts/2004\\_calfacts\\_econ.htm](http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_econ.htm) (last visited Jan. 18, 2008). An illustrative example is that in 2003 the economy of California was slightly larger than that of Italy and slightly smaller than that of France. *Id.* In 2004, our nation’s second largest economy, that of New York, was only 60 percent as large as California’s economy. *Id.*; see MCKENZIE, *supra* note 8, at 153–54.

<sup>183</sup> MCKENZIE, *supra* note 8, at 153–54.

<sup>184</sup> *Id.* at 154. See generally Community Associations Institute, <http://www.caionline.org/> (last visited Mar. 18, 2008).

<sup>185</sup> 182 Cal. Rptr. 813 (Cal. Ct. App. 1982); see MCKENZIE, *supra* note 8, at 158–60.

<sup>186</sup> *Laguna Publishing*, 182 Cal. Rptr. at 815.

<sup>187</sup> *Id.* See generally BARNETT, PRESUMPTION OF LIBERTY, *supra* note 127, at 40–42 (using Leisure World as an example of consent).

discriminated against and was entitled to damages under Article I, section 2 of the California Constitution.<sup>188</sup>

Though the court ultimately decided the case based on a discrimination doctrine, it also discussed the *Marsh* type of state action.<sup>189</sup> In its discussion of *Marsh*, the court cited *Van Nuys Publishing Co. v. City of Thousand Oaks*<sup>190</sup> to illustrate that an ordinance restricting the unsolicited newspaper distribution to residences of a municipality (the city of Thousand Oaks) was unconstitutional.<sup>191</sup> This is analogous to the situation within Leisure World to the extent that when a municipality restricted the same type of activity that a HOA restricted in a CID, the municipal ordinance was found to be unconstitutional. Thus, if the state action doctrine was used to put the HOA in the shoes of the state, the CC&R restricting newspaper distribution would be similarly circumspect.

The discussion in *Laguna Publishing* also implicated a type of state action that is associated with *Shelley v. Kraemer*,<sup>192</sup> which is typically referred to as the “judicial enforcement” theory of state action.<sup>193</sup> Although this theory is not as generally relevant to this Note,<sup>194</sup> it deserves some comment. In *Shelley v. Kraemer*, the Court held that when courts uphold racially restrictive covenants in deeds, this public enforcement of a private agreement constitutes state action.<sup>195</sup> The decision in *Laguna Publishing* actually hinted at a broader reading of *Shelley v. Kraemer* than that which is typical. The *Laguna Publishing* court cites to the California Supreme Court case *Mulkey v. Reitman*<sup>196</sup> to suggest that not only does judicial enforcement of any discriminatory actions constitute state action, but in fact *aid* by any state agency, department, or branch would constitute state action.<sup>197</sup>

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<sup>188</sup> *Laguna Publishing*, 182 Cal. Rptr. at 835–36. The pertinent part of the section reads: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” CAL. CONST. Art. 1, § 2.

<sup>189</sup> *Laguna Publishing*, 182 Cal. Rptr. at 824–25.

<sup>190</sup> 489 P.2d 809 (Cal. 1971).

<sup>191</sup> *Laguna Publishing*, 182 Cal. Rptr. at 825. Compare 182 Cal. Rptr. 813 (discriminatory restriction on newspaper distribution), with *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (ordinance restricting signs found to be unconstitutional).

<sup>192</sup> 334 U.S. 1 (1948).

<sup>193</sup> Chadderdon, *supra* note 11, at 243.

<sup>194</sup> See *Laguna Publishing*, 182 Cal. Rptr. at 828 (stating that the application of the “judicial enforcement” theory is not limited to state action).

<sup>195</sup> *Id.*

<sup>196</sup> 413 P.2d 825 (Cal. 1966) (describing how a defendant refused to rent an apartment on the grounds of race and a state constitutional amendment prohibited laws against racial discrimination in housing), *aff’d*, 387 U.S. 369 (1967).

<sup>197</sup> *Laguna Publishing*, 182 Cal. Rptr. at 819–20.

Because even the basic rationale, although not the result, in *Shelley v. Kraemer* was, and continues to be, very controversial,<sup>198</sup> *Laguna Publishing's* extension of *Shelley's* reasoning is quite a stretch. Most shocking is that *any attempt to enforce a private agreement*—one of the very roots of the common law<sup>199</sup>—would be viewed as state action. This makes it quite impossible to distinguish between private and public for the purposes of constitutional analysis.<sup>200</sup> Nonetheless, the *Laguna Publishing* court used both *Marsh* and *Shelley v. Kraemer* to approach the situation as a hybrid case: a CID with municipality-like characteristics, which employs a discriminatory practice.<sup>201</sup> The court ultimately found that discrimination tipped the scale, declaring the practice unconstitutional.<sup>202</sup> However, by using this rationale, the court both maintained the existing private property regime and was inconclusive as to the issue of whether HOAs are private governments, due to the use of both the *Marsh* and *Shelley v. Kraemer* doctrines of state action.<sup>203</sup>

New Jersey courts, like those in California, have also used the state constitution to recognize a more expansive protection of expressive rights on private property<sup>204</sup> and have followed the model California set in *PruneYard* for shopping centers.<sup>205</sup> The leading shopping center case relating to protected expression on privately owned property in New Jersey is *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*<sup>206</sup>

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<sup>198</sup> See Chadderdon, *supra* note 11, at 243; see also Shelly Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61 (1998).

<sup>199</sup> The right to contract is at the very heart of common law and the Anglo-American legal tradition. See, e.g., R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 151 (1985); see also *Lochner v. New York*, 198 U.S. 45 (1905). The Magna Carta itself was an *agreement* between King John and the lords and barons of England. See Hinkle, *supra* note 46, at 262. Thus, private agreement is at the very heart of limited constitutional government and the common law—*our law*. In light of our proud and privileged legal history, the extreme confusion of private and public that the *Shelley v. Kraemer* "judicial enforcement" state action doctrine espouses is all the more circumspect.

<sup>200</sup> Chadderdon, *supra* note 11, at 244. There are compelling arguments that there are much better ways to go about dealing with the situation than invoking state action, such as rights balancing and legislative action. Saxer, *supra* note 198, at 62–63.

<sup>201</sup> *Laguna Publishing*, 182 Cal. Rptr. at 828–29.

<sup>202</sup> *Id.*

<sup>203</sup> See MCKENZIE, *supra* note 8, at 158–60.

<sup>204</sup> See, e.g., *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994).

<sup>205</sup> *Id.* at 769. However, in a recently decided opinion, the Supreme Court of New Jersey found that the community of Twin Rivers' CC&Rs restricting political expression did not violate the state constitution. *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060 (N.J. 2007).

<sup>206</sup> *N.J. Coal*, 650 A.2d 757 (N.J. 1994).

In *New Jersey Coalition* a group wanted to leaflet privately-owned, (large) regional shopping centers.<sup>207</sup> The New Jersey lower courts upheld the property rights of the shopping centers' owners.<sup>208</sup> However, the New Jersey Supreme Court held that parties must have a right to petition societal issues at *all* regional shopping centers, subject to reasonable time, place, and manner restrictions.<sup>209</sup> The court, *inter alia*, looked to the fact that large regional shopping centers were the new functional equivalent of "downtown business districts."<sup>210</sup> The court's holding relied in part on its decision in *State v. Schmid*,<sup>211</sup> where a member of the U.S. Labor Party<sup>212</sup> was arrested for criminal trespass at Princeton University for distributing political material without a permit.<sup>213</sup> The *Schmid* court held that because the *private* university did not have appropriate time, place, and manner regulations regarding such speech, it could not bar such speech.<sup>214</sup> The court presumed that to accomplish the purpose of the private institution (presumably 'academic inquiry,' or 'the expansion of knowledge'), the university *must* allow uninvited political speech subject only to reasonable time, place, and manner restrictions.<sup>215</sup>

If one values the importance (both structurally and normatively) of *private* land ownership and the property rights that flow from it in the Anglo-American legal tradition, as well as the tradition of limited constitutional government, then *New Jersey Coalition* and *Schmid* seem all too troubling. An analogous situation would be if an individual operated a private research foundation (partially funded through public grants, which were not its primary source of financing), the individual would have to allow uninvited political solicitation on the property owned by the foundation—*private* property. In essence, the court used a doctrine classically developed to allow the government to put some restriction on expression in

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<sup>207</sup> *Id.* at 760.

<sup>208</sup> *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 628 A.2d 1075, 1076 (N.J. Super. Ct. App. Div. 1993), *rev'd*, 650 A.2d 757 (N.J. 1994); *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 628 A.2d 1094, 1099 (N.J. Super. Ct. Ch. Div. 1991), *aff'd*, 628 A.2d 1075 (N.J. Super. Ct. App. Div. 1993), *rev'd*, 650 A.2d 757 (N.J. 1994).

<sup>209</sup> *N.J. Coal.*, 650 A.2d at 780–82.

<sup>210</sup> *Id.* at 768.

<sup>211</sup> 423 A.2d 615 (N.J. 1980).

<sup>212</sup> The U.S. Labor Party was the vehicle used by Lyndon LaRouche when he ran for president in 1976. Paul L. Montgomery, *One Man Leads U.S. Labor Party on Its Erratic Path*, N.Y. TIMES, Oct. 8, 1979, at B1. This party is to be distinguished from, and is unrelated to, the current Labor Party that operates in the United States, which was founded in Cleveland, Ohio by a number of labor unions in 1996. See Labor Party, Labor Party: About, [http://www.thelaborparty.org/a\\_index.html](http://www.thelaborparty.org/a_index.html) (last visited Mar. 8, 2009).

<sup>213</sup> *Schmid*, 423 A.2d at 618.

<sup>214</sup> *Id.* at 632–33.

<sup>215</sup> *Id.* at 630–31.

actual public forums (time, place, and manner restrictions),<sup>216</sup> to force private institutions to allow expression on their private property.

*C. Private Property Rights Paramount, and Not Inconsistent with Expression in the Public Sphere: The Road to Overruling PruneYard*

Most recently, the California Supreme Court has upheld broad expression rights on private property in *Fashion Valley Mall, LLC v. NLRB*,<sup>217</sup> re-affirming *PruneYard*. In *Fashion Valley* the issue was whether a mall restriction that prevented individuals from encouraging customers to boycott certain stores in the mall (in other words, strikers picketing) was constitutional under the California Constitution.<sup>218</sup> Specifically, members of a local graphic communications union were distributing leaflets to customers in front of a Robinsons-May department store at the Fashion Valley mall in San Diego.<sup>219</sup> The fact pattern of *Fashion Valley* is remarkably similar to both *Logan Valley* and *Hudgens*; however, in *Fashion Valley* those facts are applied to the more expansive protections under California state law.<sup>220</sup> In *Fashion Valley* the Supreme Court of California held that a blanket rule that prohibits individuals from encouraging customers to boycott stores (specifically leafleting) violates reasonable time, place, and manner restrictions for limiting speech under the California Constitution.<sup>221</sup> The decision affirms *PruneYard*<sup>222</sup> and confirms the notion that the California Constitution has more expansive protections for speech than the United States Constitution.<sup>223</sup>

However, the dissent makes an argument for overruling *PruneYard*.<sup>224</sup> The dissent notes the overwhelming rejection of *PruneYard* in other states.<sup>225</sup> In fact, as mentioned above, only four

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<sup>216</sup> See, e.g., *United States v. Grace*, 461 U.S. 171, 180–81 (1983).

<sup>217</sup> *Fashion Valley*, 172 P.3d 742 (Cal. 2007), cert. denied, 129 S. Ct. 94 (2008).

<sup>218</sup> *Id.* at 743–44.

<sup>219</sup> *Id.*

<sup>220</sup> See *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), overruled by *Hudgens*, 424 U.S. 507.

<sup>221</sup> 172 P.3d at 751. The mall's rule ran afoul of Article I, section 2, of the California Constitution. *Id.* at 743. See generally CAL. CONST. art. I, § 2. For reference purposes a boycott is regarded as a type of expression that is typically protected under the First and Fourteenth Amendments. *Fashion Valley*, 172 P.3d at 753. See generally U.S. CONST. amends. I, XIV.

<sup>222</sup> 172 P.3d at 749–50.

<sup>223</sup> *Id.* at 748–49. "Our decision that the California Constitution protects the right to free speech in a shopping mall, even though the federal Constitution does not, stems from the differences between the First Amendment to the federal Constitution and article 1, section 2 of the California Constitution." *Id.* at 749.

<sup>224</sup> *Id.* 754–55 (Chin, J., dissenting).

<sup>225</sup> *Id.* at 757–59.

states other than California accept the reasoning of *PruneYard*: New Jersey, Massachusetts, Colorado, and Washington.<sup>226</sup> As a counterexample, the Connecticut Supreme Court expressly rejected *PruneYard* in *United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associates, L.P.*<sup>227</sup> and upheld a restriction on speech in a shopping center—despite the fact that the California and Connecticut Constitutions have nearly identical provisions regarding speech.<sup>228</sup> Justice Chin, the dissenter in *Fashion Valley*, cites the *Crystal Mall* court’s explanation:

“[s]ince the decision in *Cologne*, courts in other jurisdictions that have considered this issue overwhelmingly have chosen *not* to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises.” . . . “Under *Cologne*, as in the overwhelming majority of our sister jurisdictions, the size of the mall, the number of patrons it serves, and the fact that the general public is invited to enter the mall free of charge *do not, even when considered together*, advance the plaintiff’s cause in *converting private action into government action*.”<sup>229</sup>

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<sup>226</sup> *Id.* at 758. Also, Colorado has actually recently weakened its stance. *Id.* at 759; see *Robertson v. Westminster Mall Co.*, 43 P.3d 622 (Colo. Ct. App. 2001). It should be noted that the four other outliers, while certainly not being economically insignificant, do not include states that are more influential in the national economy, such as Texas, Florida, Illinois, and especially New York, the state with the next largest economy after California (60 percent that of California). Legislative Analyst’s Office, Cal Facts 2004 State Economy, [http://www.lao.ca.gov/2004/cal\\_facts/2004\\_calfacts\\_econ.htm](http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_econ.htm) (last visited Jan. 18, 2008).

<sup>227</sup> 852 A.2d 659 (Conn. 2004) (finding that evidence did not lead to conclusion of state action for disallowing union access to mall common areas to distribute literature to patrons regarding legal rights of union employees).

<sup>228</sup> *Fashion Valley*, 172 P.3d at 758 (Chin, J., dissenting).

<sup>229</sup> *Id.* (quoting *Crystal Mall*, 852 A.2d at 667, 673) (citations omitted) (first alteration in original) (emphasis added). *Cologne v. Westfarms Associates* is an earlier Connecticut Supreme Court case with facts analogous to *PruneYard*. *Cologne v. Westfarms Associates*, 469 A.2d 1201 (Conn. 1984). *Cologne* was decided contrarily to *PruneYard*, although both were decided in a post-*Lloyd Corp. v. Tanner* environment:

Although we are under no legal constraint to follow *Lloyd Corporation v. Tanner*, we approve the rejection in that decision of such a claim as applied to a shopping center: “Nor does property lose its private character merely because the public is generally invited to use it for designated purposes . . . . The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.”

*Id.* at 1210 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)) (citation omitted) (omission in original). It should be noted that the language of the court in *Crystal Mall* actually also applies to the facts and reasoning of *New Jersey Coalition*.

Justice Chin's *Fashion Valley* dissent agrees with the reasoning of *Lloyd Corp.*, stating that a shopping mall is hardly a company town that performs nearly all the functions of the state.<sup>230</sup> As an important philosophical and doctrinal point, the dissent points out that allowing restrictions of speech on *private* property does not have to be conceptually inconsistent with promoting the freedom of speech:

*I do not denigrate free speech rights.* As the New York Court of Appeal stated in its opinion rejecting *Pruneyard* [sic], "the right to free expression is one of this Nation's most cherished civil liberties." But free speech rights and private property rights can and should coexist. The last 30 years have not seen a significant diminution of free speech opportunities in the many jurisdictions that have followed the high court's lead regarding private property. The Union *here is not without recourse* if it wants to urge a lawful boycott of any business or engage in any other protected freedom of expression. *It has plenty of outlets to exercise its free speech rights. If it wants to picket, it simply has to do so on public property or seek permission from private property owners.* The Union can exercise its free speech rights, for example, just outside the shopping center, including near the entrances . . . especially today with the advent of the Internet and other forms of mass communication . . . . *But I would find no right to engage in speech activity on private property over the owner's objection.*<sup>231</sup>

Justice Chin goes on to point out that, even if expression and speech rights do exist in shopping centers, shopping centers are still *not* quintessential public forums, like "Hyde Park in London . . . or the National Mall in Washington, D.C."<sup>232</sup>

Consequently, in this recent case, cracks may be forming in the case law of California, the stalwart of state constitutional expression rights on private property. The dissent in *Fashion Valley* gives compelling justification for overruling *PruneYard*. Protecting the property rights of owners of private property does not need to be fundamentally inconsistent with a culture of allowing expression on public property, in legitimate public forums. I would add that the

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<sup>230</sup> *Fashion Valley*, 172 P.3d at 758–60 (Chin, J., dissenting).

<sup>231</sup> *Id.* at 760 (quoting *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1212 (N.Y. 1985)) (citation omitted) (emphasis added); see also *Kasky v. Nike, Inc.*, 45 P.3d 243, 263–68 (Cal. 2002) (Chin, J., dissenting).

<sup>232</sup> *Fashion Valley*, 172 P.3d at 760 (Chin, J., dissenting).

reasoning of Justice Chin's dissent (and the authority he cites) becomes all the more compelling given the historic, jurisprudential, and philosophical importance of the protection of private property rights.

*D. State Corporation Laws: An Alternative to State Action?*

Courts have also used state corporation law and doctrines relating to businesses as a vehicle by which to hold HOAs to the standard of public governments. In *Cohen v. Kite Hill Community Association*,<sup>233</sup> the California Court of Appeal applied corporate fiduciary duty doctrine—a private right—to hold the HOA to the same standard as a municipality using an analogy to public governments and the rights and expectations inherent therein.<sup>234</sup> The court stated that “‘like any government, the Association must balance individual interests against the general welfare.’”<sup>235</sup>

Also, in *O'Connor v. Village Green Owners Association*,<sup>236</sup> a couple had a baby boy, violating a CC&R restricting persons under the age of eighteen from living in the CID.<sup>237</sup> In its holding, the Supreme Court of California found the HOA to be operating a “business establishment” as applied in the Unruh Civil Rights Act of California.<sup>238</sup> The pertinent part of the Unruh Civil Rights Act (Section 51 of the California Civil Code), entitling all people in the jurisdiction to full and equal use of accommodations, reads that people shall be free “from arbitrary discrimination in ‘accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever.’”<sup>239</sup> The *O'Connor* holding meant that the HOA would have to allow children to live in the CID, discarding the benefit that added to their personal utility maximization, which they had bargained for.<sup>240</sup> However, in response to *O'Connor*, the California legislature exempted age restrictions in CIDs from similar regulation one year later in 1984.<sup>241</sup>

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<sup>233</sup> 191 Cal. Rptr. 209 (Ct. App. 1983) (regarding a dispute over CC&Rs relating to a fence that blocked the plaintiff's view).

<sup>234</sup> *Id.* at 214 (citing Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915 (1976)); see MCKENZIE, *supra* note 8, at 160.

<sup>235</sup> MCKENZIE, *supra* note 8, at 160 (quoting *Cohen*, 191 Cal. Rptr. at 215).

<sup>236</sup> 662 P.2d 427 (Cal. 1983).

<sup>237</sup> *Id.* at 428.

<sup>238</sup> *Id.* at 429.; see CAL. CIV. CODE ANN. § 51 (West 2007).

<sup>239</sup> *O'Connor*, 662 P.2d at 430 (quoting CAL. CIV. CODE ANN. § 51); see CAL. CIV. CODE ANN. § 51.

<sup>240</sup> See COOTER & ULEN, *supra* note 16, at 23–26.

<sup>241</sup> MCKENZIE, *supra* note 8, at 161.



Another interesting decision relating to the entity status of HOAs is *Frances T. v. Village Green Owners Association*,<sup>242</sup> where a resident of a condominium sued the HOA after being attacked in her condominium unit.<sup>243</sup> The court viewed the situation like a landlord-tenant *as well as* a corporate fiduciary relationship for the purposes of the duty of care, thereby allowing suits to be filed against HOA directors for breach of fiduciary duty.<sup>244</sup>

Opening up this type of potential tort liability to HOA directors (some of whom are management executives, but some of whom are simply residents) was viewed as particularly unwelcome by HOAs.<sup>245</sup> Notwithstanding the issue of possible inexperience of resident-directors, the budgets of many HOAs may not allow room for director and officer (“D&O”) insurance; in addition, if the HOAs were forced to buy D&O insurance, this would necessitate an increase in HOA fees required to cover the newly increased costs to the HOAs.<sup>246</sup> Partly in response to these concerns, the California state legislature passed legislation limiting the tort liability of HOA directors.<sup>247</sup>

This is particularly interesting because this type of statutorily-limited liability, or “sovereign immunity,” resembles the limits imposed on the liability of municipal officials.<sup>248</sup> In an attempt to preserve the freedom of action of HOA directors and protect them from broad tort liability, the California legislature actually may have provided further evidence that CIDs are the functional equivalents to municipalities in that their officials are treated similarly regarding tort liability. Along similar lines is the private association theory of Richard Eells and Clarence Walton, which claims that large corporations act like governments toward their employees and have ties to public governments to the extent of being agents of the government.<sup>249</sup> This is certainly an outlier opinion, especially in

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<sup>242</sup> 723 P.2d 573 (Cal. 1986); *see* MCKENZIE, *supra* note 8, at 162.

<sup>243</sup> *Frances T.*, 723 P.2d at 574.

<sup>244</sup> *Id.* at 576–77, 587; *see* MCKENZIE, *supra* note 8, at 162.

<sup>245</sup> *See* MCKENZIE, *supra* note 8, at 162.

<sup>246</sup> *See* LOW, *supra* note 2, at 177–78 (HOA operating budgets).

<sup>247</sup> MCKENZIE, *supra* note 8, at 162.

<sup>248</sup> *Id.*

<sup>249</sup> RICHARD EELLS & CLARENCE WALTON, *CONCEPTUAL FOUNDATIONS OF BUSINESS* 134–35, 142 (1961); MCKENZIE, *supra* note 8, at 124–25. The theory goes on to state that corporations act in a much more undemocratic fashion than public governments—consequently the theory argues that corporations should be more “socially responsible.” EELLS & WALTON, *supra*, at 134–35; MCKENZIE, *supra* note 8, at 125. *Compare* EELLS & WALTON, *supra*, at 134–35, 142 (regarding corporations in general), *with* *Cohen v. Kite Hill Cmty. Ass’n*, 191 Cal. Rptr. 209, 214–15 (Ct. App. 1983) (suggesting that HOAs are like governments and should act more socially responsible, in the way governments do). *Contra* FRIEDMAN, *supra* note 58, at 135–36.

regard to agency, but an interesting extension of the comparison between public and private “governments.”

Our modern theory of the corporation began with the corporation as a concession of the state—to do business *for* the state—during the age of mercantilism.<sup>250</sup> The earliest examples were Crown-chartered joint-stock companies, such as the British East India Company that was chartered in 1600.<sup>251</sup> This concession theory was embodied in Chief Justice Marshall’s words from *Trustees of Dartmouth College v. Woodward*<sup>252</sup>: “[a corporation is] an artificial being, invisible, intangible and existing only in contemplation of law.”<sup>253</sup> However, this is far from the prevailing theory of the corporation today. The corporation, as a private contractual organization, has its roots in the freedom of association, the specifics of which can often be altered from the default rules in state corporation statutes.<sup>254</sup> As Eells and Walton themselves have said: “‘men [have] formed such bodies without the sanction of a sovereign as far back as we can trace business activity under modern conditions.’ . . . [There is the] ‘historic practice of men in a free society to organize voluntarily for the pursuit of common purposes—quite independent of state action.’”<sup>255</sup> Despite the private association theory that suggests large corporations are agents of the sovereign, the above quote drives to the heart of classical liberal notions. Consequently, I believe it to be fundamentally inappropriate to use the corporation, one of the primary vehicles of private wealth creation and economic efficiency not to mention an integral part of our free-market system, to effectuate the public ordering of HOAs.<sup>256</sup>

*E. Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association: Consent, Waiver, and the Protection of Private Property Rights, the Right to Contract, and Personal Choice*

The recently decided New Jersey case *Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association*<sup>257</sup> provides a promising glimpse of the possibility that the efforts to treat HOAs as

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<sup>250</sup> MCKENZIE, *supra* note 8, at 124.

<sup>251</sup> *Id.*

<sup>252</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>253</sup> MCKENZIE, *supra* note 8, at 124 (quoting *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 636).

<sup>254</sup> MCKENZIE, *supra* note 8, at 124.

<sup>255</sup> *Id.* (quoting EELLS & WALTON, *supra* note 249, at 134–35, 142).

<sup>256</sup> See generally FRIEDMAN, *supra* note 58.

<sup>257</sup> 929 A.2d 1060 (N.J. 2007).

state actors (effectuating the public ordering of HOAs) may be losing ground. *Twin Rivers* dealt with CC&Rs restricting signposting, common room use, and community newspaper access in a contest for control of the HOA that managed Twin Rivers.<sup>258</sup> Twin Rivers, which is located in East Windsor, New Jersey, is a mixed-use CID consisting of condominiums (duplexes, townhouses, and single-family homes), apartments, and commercial buildings.<sup>259</sup>

A lower court, the Appellate Division of the New Jersey Superior Court held in part that the dissidents' "right[] to engage in expressive exercises[,] including those relating to public issues in their own community, such as with regard to the election of candidates to the [HOA b]oard, or broader issues of governmental and public policy consequence, . . . must take precedence over the [HOA's] private property interests."<sup>260</sup>

However, the New Jersey Supreme Court rejected this holding and began its opinion with the proposition that despite the fact that the citizens of New Jersey possess speech and assembly rights under the state constitution, these rights are *not absolute and can be waived* or otherwise curtailed through private arrangement.<sup>261</sup> The court viewed this case as a hybrid of both *New Jersey Coalition* and *Schmid*.<sup>262</sup> However, despite the fact that the court used its precedent from *New Jersey Coalition* and *Schmid*, it held in *Twin Rivers* that the HOA restrictions do not violate the state constitution due to the fact that through private arrangements citizens can change what their rights would have been in the public sphere.<sup>263</sup> Using a three-factor test from *Schmid*, the court ascertained that the primary purpose of the CID was for private residential use, that there was no general public invitation onto the CID, and that the group seeking political expression (through political signs, etc.) was not unduly restricted.<sup>264</sup> The last factor in the *Schmid* test is essentially a "fairness" standard, which looks at the restriction in relation to the type of expression sought.<sup>265</sup>

The most important aspect of *Twin Rivers* is that the court accepts the notion that through private ordering—namely consent and waiver

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<sup>258</sup> *Id.* at 1064–65.

<sup>259</sup> *Id.* at 1063.

<sup>260</sup> Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947, 959 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007).

<sup>261</sup> 929 A.2d at 1063.

<sup>262</sup> *Id.*; see N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994); State v. Schmid, 423 A.2d 615 (N.J. 1980).

<sup>263</sup> *Twin Rivers*, 929 A.2d at 1063.

<sup>264</sup> *Id.* at 1072–73.

<sup>265</sup> *Id.*

through the CC&Rs—the CID residents cannot expect to have the same rights they would be guaranteed under the state constitution if they were living in a municipality.<sup>266</sup> From this one could even interpret that if a CID were to have a blanket restriction on traditional forms of expression, the CC&Rs would not be “unconstitutional.”<sup>267</sup> The court stated “that plaintiffs’ expressional [sic] activities are not unreasonably restricted. As the [HOA] points out, the relationship between it and the homeowners is a contractual one, formalized in reasonable covenants that appear in all deeds.”<sup>268</sup> In doing this, the court distinguishes *Schmid*, where academic discourse and the search for knowledge needed to be facilitated, and *New Jersey Coalition*, where the protection of the “new town square” needed to be maintained (even if the town square was now privately owned and took on all the characteristics of private property while allowing public invitees).<sup>269</sup>

Notwithstanding the fact that a private university, shopping center, and residential CID are all different types of private property, this seems to be a distinction without a difference. The fact remains that each is *private property* where there is some degree of public invitation (Twin Rivers was not gated<sup>270</sup>). To borrow the metaphor of Justice Chin, Princeton University and a privately-owned large shopping center are hardly Hyde Park, with its multitude of soap boxes and impassioned orators.<sup>271</sup> It is difficult to see the distinction between privately-owned shopping centers on the one hand, and un-gated CIDs with businesses inside on the other.

The court in *Twin Rivers* did emphasize the necessity of reasonable time, place, and manner restrictions for the political expression in Twin Rivers.<sup>272</sup> For example, the CC&Rs in Twin Rivers did allow for political signs to be placed one per window and in flower beds adjacent to units (presumably not to interfere with lawn mowing). Also, political gatherings were permitted in residents’ private units.<sup>273</sup> These are certainly reasonable restrictions. However, the court goes on to make a statement that would even

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<sup>266</sup> *Id.* at 1074.

<sup>267</sup> *See id.*

<sup>268</sup> *Id.* at 1073.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 1073.

<sup>271</sup> *See Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 760 (Cal. 2007) (Chin, J., dissenting), *cert. denied*, 129 S. Ct. 94 (2008).

<sup>272</sup> *Twin Rivers*, 929 A.2d at 1074. *See generally* *United States v. Grace*, 461 U.S. 171, 180–81 (1983) (regarding time, place, and manner).

<sup>273</sup> *Twin Rivers*, 929 A.2d at 1073–74.

apply to CIDs that have blanket restrictions on signage or other types of political expression<sup>274</sup>:

Plaintiffs can walk through the neighborhood, ring the doorbells of their neighbors, and advance their views. . . . [Also, a]s members of the [HOA], plaintiffs can vote, run for office, and participate through the elective process in the decision-making of the [HOA]. Thus, plaintiffs may seek to garner a majority to change the rules and regulations to reduce or eliminate the restrictions they now challenge.<sup>275</sup>

Thus, even in the most restrictive CIDs, the residents are not forced to be mute, nor are they immobile subjects of a totalitarian regime trapped behind the Iron Curtain, despite the resemblance of some CID gatehouses to Checkpoint Charlie.

#### CONCLUSION

Therefore, in light of classically liberal notions of property rights, and the economic efficiency and market advantages of the private ordering of CIDs, both to individuals and to society at large, I advocate for the continued private ordering of HOAs through CC&Rs. HOAs have come under attack for their restriction of political expression, and some have called for HOAs to be treated as state actors or regulated through public law by various means, most notably the state action doctrine. However, despite these assertions, I maintain that the most efficient and just strategy for the regulation of HOAs is to continue to use a system of private ordering by way of CC&Rs—schemes of contracts, HOA regulations, equitable servitudes, and real covenants—as opposed to a public or constitutional framework.

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<sup>274</sup> Even if a CID banned all political gathering in common areas, presumably one could always have a gathering in his unit. However, one may not be able to advertise through leafletting.

<sup>275</sup> *Twin Rivers*, 929 A.2d at 1074. Further, “every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, *at least in degree*, where ownership is *in common* or cooperation with others.” *Sterling Vill. Condo., Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. Dist. Ct. App. 1971), cited in Cara L. Thomas, *Butt Out! Controlling Environmental Tobacco Smoke in Condominiums*, PROB. & PROP. MAG., May/June 2008, at 11, 17.

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