NO POLITICAL SPEECH ALLOWED: COMMON INTEREST DEVELOPMENTS, HOMEOWNERS ASSOCIATIONS, AND RESTRICTIONS ON FREE SPEECH

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I. INTRODUCTION

Nearly fifty-five million Americans currently live in homes that are part of some type of common interest development — including condominiums, planned developments, and gated communities.[1] All of these common interest developments (CIDs) have two things in common. First, they are all governed by an overseeing board or association (such as a condominium association or a

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[1] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006). *See also* American Homeowners Resource Center, http://www.ahrc.com/new/index.php/src/home (last visited Mar. 15, 2006).

homeowners association). Second, they all have various forms of restrictive covenants (CC&Rs) to which homeowners must agree before purchasing and occupying the property. One restriction imposed by a "vast number" of CIDs is a prohibition on the display of signs and flags.[2] Frequently, the prohibition is not a restriction that allows for reasonable time, place, and manner of display of signs and flags; rather, the sign and flag covenants entail a complete ban.[3] Such bans can, and often do, include a prohibition on all campaign signs, political banners and fliers, and even on displaying the American flag.[4]

The restrictions imposed by CID governing organizations (hereinafter "HOAs") vary greatly, and are certainly not limited to political speech. That said, the discussion in this paper will address only restrictions on political speech, since political speech is afforded the highest degree of protection in the Supreme Court's First Amendment jurisprudence.

One essential legal aspect of community associations like HOAs is that they operate entirely outside of federal constitutional restrictions, since the law generally views HOAs and other such CID governing boards as private business entities, instead of as governments. This is the case notwithstanding the fact that many commentators and residents of CIDs frequently refer to HOAs as "quasi-governments" or "mini-governments." One article described HOAs and other governing associations as "privately owned and operated 'shadow governments' that 'can rigidly control immense residential areas.'"[5] Even courts have used the "quasi-government" and "mini-government" terminology.[6] These factors raise the

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[2] Wayne S. Hyatt & JoAnne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 686 (1993).

[3] *See id.* at 686-87.

[4] *See id.*

[5] Harvey Rishikov & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call"*, 30 VAL. U. L. REV. 509, 527 (1996) (quoting JOEL GARREAU, EDGE CITY - LIFE ON THE NEW FRONTIER (Doubleday 1991)).

[6] *See, e.g.,* Cohen v. Kite Hill Cmty. Ass'n, 191 Cal. Rptr. 209, 214 (Cal. Ct. App. 1983). This terminology has been used in more recent cases as well. *See, e.g.,* Chesus v. Watts, 967 S.W.2d 97, 108 (Mo. Ct. App. 1998) ("The association 'provides a vehicle for individual owners to work together' to serve their new community or neighborhood, and it also operates as a sort of 'quasi-governmental entity' to provide members utility service, road maintenance, and refuse removal."); Terre Du Lac Ass'n v. Terre Du Lac, Inc., 737 S.W.2d 206, 215 (Mo. Ct. App. 1987) ("There are two distinct roles of the association: managerial or service-oriented functions, and quasi-governmental or regulatory functions . . . . [O]ne clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community with

question of whether the current legal and judicial approach to HOAs — the approach that regards them as private entities whose actions are not subject to constitutional protections — is appropriate, particularly given the rapid growth of, and increasing power of, these associations over millions of homeowners' lives in the United States.

II. COMMON INTEREST DEVELOPMENTS: HISTORY AND CURRENT STATE OF AFFAIRS

Prior to 1960, there were fewer than 500 CIDs in America.[7] Today, there are an estimated 250,000 CIDs, and that number continues to grow at a rapid pace.[8] CIDs are, in fact, the fastest-growing segment of the residential housing industry.[9] Between 6000 and 8000 new CIDs are built each year, including condominiums, cooperatives, and planned communities.[10] The Community Associations Institute estimates that more than four out of five housing starts in the past five to eight years were built in communities governed by an HOA or other similar association.[11] Since 1970, one out of three new residential units has been built in a community governed by an association.[12] In large metropolitan areas, more than 50% of home sales in 2000 involved houses subject to HOA regulations and restrictions.[13]

In 2003, the population of the United States was approximately 293 million, and the 2003 homeownership rate was ap-

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powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.").

[7] Mary Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461 (1998).

[8] Evan McKenzie, Gated Communities and Homeowners Associations, http://tigger.uic.edu/ ~mckenzie/hoa.html (last visited Mar. 15, 2006).

[9] *Id. See also* Barbie L. Anderson, *Common Interest Developments: A Historical Overview of California Case Law* (Public Law Research Institute, U.C. Hastings College of the Law, PLRI Working Paper Series, Fall 1996-03), *available at* http://w3.uchastings.edu/ plri/96-97tex/california.htm (last visited Mar. 15, 2006).

[10] Evan McKenzie, Fannie Mae Foundation, *Common-Interest Housing in the Communities of Tomorrow*, 14 HOUSING POLICY DEBATE 1-2 (2003), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1401_McKenzie.pdf (citing ERIN FULLER & CHRISTOPHER DURSO, A SENSE OF PLACE AND HARMONY: OUTCOMES FROM THE COMMUNITIES OF TOMORROW SUMMIT: A NATIONAL DIALOGUE ON EXCELLENCE IN COMMUNITY DESIGN, GOVERNANCE, AND MANAGEMENT 2 (2000)).

[11] Common Interest Development Statistics, http://davis-stirling.com/ds/pages/stats.html (last visited Apr. 9, 2006) (referencing data from the Community Associations Institute, http://www.caionline.org (last visited Apr. 9, 2006)).

[12] McKenzie, *supra* note 10, at 203.

[13] *Id.*

proximately 68%.[14] Thus, approximately 202 million Americans were homeowners. With fifty-five million people living in associations, that means that nearly one in four Americans who own a home live in a CID of some type. Running a different kind of calculation, these numbers also bear out if we compare the number of owner-occupied housing units in 2003 with the number of housing units that existed in association-governed communities. According to the U.S. Census Bureau, just over seventy-two million housing units were owner-occupied in 2003,[15] and the Community Associations Institute estimates that there were twenty million housing units in associations in 2003.[16] Thus, more than one in four owner-occupied housing units in the United States are located in developments governed by HOAs or similar associations.

The growth of HOAs over the past several decades has been, by any account, rather astounding. In 1970, there were 701,000 housing units in CIDs, comprising less than 1% of American homes.[17] Today, there are twenty million housing units located in CIDs, comprising a full 16.5% of America's housing stock.[18] This fast-growing phenomenon has dramatically affected the nature of residential living in America and is a trend that does not appear likely to slow down. If history is any guide, the percentage of American homes located in developments governed by a private association will continue to rise at a rapid pace for the foreseeable future.

In general, new CIDs tend to sprout up in regions experiencing significant growth and development. Indeed, in some areas of the country, it has already become difficult, if not impossible, for homebuyers to purchase homes in anything *other* than a CID. For example, 80% of all new housing built in Orange County, California between 1980 and 1995 were in CIDs.[19] Most new homes being built in the Orlando, Florida region are in planned communities.[20]

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[14] *See* InfoPlease Population by State, http://www.infoplease.com/ipa/A0004986.html (last visited Apr. 9, 2006); U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 12, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t12.html.

[15] U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 9, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t9.html.

[16] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006).

[17] McKenzie, *supra* note 10, at 206.

[18] *See* Community Associations Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 15, 2006). According to the U.S. Census Bureau, in 2003 there were 120,834 total housing units in the United States. U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics 2003, Table 9, *available at* http://www.census.gov/hhes/www/housing/hvs/annual03/ann03t9.html.

[19] Karen E. Klein, *Owners Complain of Double Tax*, L.A. TIMES, Mar. 5, 1995, at Part K.

[20] Matthew Benjamin, *Hi, Neighbor, Want to Get Together? Let's Meet in Court!*, U.S. NEWS & WORLD REP., Aug. 21, 2000, at 56.

In early 2001, 5,400 new homes were being built in San Clemente, California, all of which were in CIDs.[21] In addition to Florida and California, other fertile areas of growth for CIDs include the Sunbelt, northern Virginia, southern Maryland, Las Vegas, and the outer suburban ring of most large metropolitan areas.[22] The result is that homebuyers in many areas of the country often have little choice but to accept the often rigid restrictions placed on them by CID covenants into which they must buy.

In addition to the sheer preponderance of this type of housing in many areas of the country, and arguably more important to this analysis, are local zoning regulations related to the development of CIDs. Gilbert, Arizona, for example, is a fast-growing town of 107,000 that has zoning laws that "all but require new homes to be built in associations."[23] The result has been that 90% of homes in Gilbert are in HOAs.[24] According to another report, Glendale, Arizona has zoning regulations that effectively restrict new development to houses built in a community governed by an association:

> '[T]he mandate is for HOAs in all new subdivisions WITH common areas. The catch is that ALL new subdivisions have common areas. All new subdivisions have at least [one] water-retention area to collect rainwater run-off' . . . . 'This may be the only common area for the community. (For this, an HOA is mandated.)'[25]

Las Vegas is another example of a region that has implemented zoning regulations that effectively require that all new housing developments be governed by private associations. Evan McKenzie, who has studied the HOA phenomenon for many years, explains that "[t]he City of Las Vegas [has] virtually mandate[d] that new development be done with homeowner associations" by

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[21] The American Homeowners Resource Center, The American Home — A Thing of the Past, Feb.18, 2001, http://ahrc.com/old/HOAorg/Media/ma_180201_AHRC_AHome.html.

[22] *Id.*

[23] Benjamin, *supra* note 20. *See also* The American Homeowners Resource Center, *supra* note 21.

[24] *Nasty Neighbors: Are HOA Boards Abusing Power?*, THE SCOTTSDALE TIMES, July 7, 2004, *available at* http://www.ccfj.net/HOAAZnastyneighbors.html.

[25] Bob Lewin, *Issues Homeowners Have with Common Interest Developments*, The American Homeowners Resource Center (1998), http://ahrc.com/old/HOAorg/News/keyreports/ kr_lewinCIDs.html.

implementing a two-step process.[26] First, the city's zoning and development codes require that all new developments contain specific features, such as open spaces, landscaping plans, and even security walls.[27] Second, other parts of the zoning and development codes require that 'if" these features are included in a new development (the codes, in fact, *require* that those features be included), then there must be a homeowners' association to maintain them.[28] Nearby suburbs have similar requirements.[29] In response to complaints from Las Vegas builders and homeowners that these kinds of zoning and development ordinances, which have been on the books since 1997, mandated that all new subdivisions be built as part of homeowner associations, Las Vegas Mayor Oscar Goodman responded that "[w]e can see if we can make some adjustments."[30] But, as McKenzie suggests, any such adjustments are not likely to be made anytime soon, if at all.[31]

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[26] 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/cnr papersword/gated/mckenzie.pdf.

[27] *Id.*

[28] *Id.* For example, in the following excerpt from Title 18 of the Las Vegas Zoning Code Section 18.12.5600, the word "shall" was recently substituted for the word "may" to provide as follows:

> 18.12.5600 Landscaping Plan: *A landscaping plan shall be provided by the subdivider as an integral part of subdivision design.* Such a plan shall be prepared and submitted with each final map application addressing the landscape design of the subdivision with respect to such features as wall or fence design; land forms or berms; rocks and boulders; trees and plant materials; sculpture, art, paving materials, street furniture; and subdivision entrance statement; common area landscaping and other open space areas . . . . *Where common lots are shown for landscaping, the applicant shall cause the creation of a homeowners association for purposes of owning the common lot and maintaining the landscaping.*

The code further provides that:

> All walls, setback areas and landscaping created to accommodate these regulations shall be located on private property. *If in common ownership, the property shall be owned and maintained by a Homeowner's Association.*' (Las Vegas Zoning Code, Section 18.12.570, subsection C. And Chapter 19 of the Zoning Code requiers [sic] that in Residential Planned Development Districts, 'All development with 12 or more dwelling units shall provide 15 percent useable open space for passive and active recreational uses.'

Id. at 5-6 (emphasis added).

[29] *Id.* at 7.

[30] *Id.*

[31] *Id.*

In addition to effectively mandating that HOAs govern all new housing units built in the area, the City of Las Vegas "also encourages existing neighborhoods that [are] not [governed by] homeowner associations to *form* them."[32] Through its "Neighborhood Services Department," Las Vegas has successfully urged more than 150 new neighborhood homeowners' associations to form.[33]

Thus, through the use of a variety of land use and zoning laws, local governments (like Las Vegas) can effectively force all new developments in a given region to be built within CIDs, subject to the governing structure of HOAs and other associations. This is no accident: local governments can derive significant benefits from encouraging this kind of development in the form of an increased tax base and lower expenses. This is because in many CIDs, services typically provided by the city (using taxpayer revenue) are instead performed by HOAs (using the fees paid by homeowners living in each CID). These services can range from plowing snow, to replacing light bulbs in street lights, to landscaping, to removing leaves in autumn, to maintaining parks and other community common areas, to collecting garbage. At the same time, building new communities within carefully planned and zoned CIDs allows for more people to live in a smaller area. The land use control process is thus turned into "a fiscal instrument, enabling cities to acquire new property tax payers without having to extend the city's governmentally funded infrastructure to them."[34] McKenzie has called this broad-ranging privatization of municipal services "'the most significant privatization of local government responsibilities in recent times.'"[35]

Assuming that the trend seen over the past few decades continues, more CIDs are likely to be built in more areas across the country. Additionally, more local governments are likely to jump on the HOA zoning bandwagon, passing regulations that encourage — and even force — new developments to be built under HOA governing structures. If this is the case, then a series of related circumstances may put pressure on the traditional view of HOAs as purely private groups. First, homebuyers in many areas

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[32] *Id.*

[33] *Id.* (citing MARK GOTTDIENER, ET AL., LAS VEGAS: THE SOCIAL PRODUCTION OF AN ALL-AMERICAN CITY 182 (1999)).

[34] McKenzie, *supra* note 10, at 221.

[35] EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 178 (Yale University Press 1994) (quoting Advisory Comm'n on Intergovernmental Relations, Residential Community Associations 18).

will have no choice but to buy a home in a community other than one in an HOA. Second, many local governments will have implemented zoning regulations that effectively mandate new homes be built in CIDs. And third, many, if not most, of those HOAs will have covenants that restrict political speech in the form of signage and/or flags. The question posed by this paper is this: assuming that these three factors are present, would adequate "state action" then exist such that restrictions on political speech in HOAs constitute an infringement of First Amendment free speech rights?

III. THE FIRST AMENDMENT, FREE SPEECH, AND THE REQUIREMENT OF STATE ACTION

The threshold question in the analysis of whether or not prohibitions on political signs and other speech in CIDs are constitutional is whether any state action is involved. If the associations that govern CIDs are considered state actors, then restrictions or bans on political signs would be subject to First Amendment scrutiny and protection. Purely private conduct, absent state action, is not subject to the First Amendment's protections. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[36]

There are no Supreme Court cases directly on point regarding HOAs as state actors and HOA restrictions on political signs. But one recent Supreme Court case did deal with the issue of city ordinances against the posting of political signs on residential property. In *City of Ladue v. Gilleo*,[37] a homeowner (who did not live in a CID) filed suit against the city of Ladue, Missouri, challenging a local ordinance that banned the display of most signs on residential property.[38] After noting that prior decisions had voiced special concern for regulations that banned an entire medium of expression,[39] the Court found that, in this case, it was "not persuaded that adequate substitutes exist for the important medium

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[36] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[37] 512 U.S. 43 (1994).

[38] *Id.* at 45 (1994). The restriction at issue prohibited all homeowners from displaying signs on their property, except for "'residence identification' signs, 'for sale' signs, and signs warning of safety hazards." *Id.* Gilleo had placed a sign protesting the Gulf War in her front yard, and later, after being told such a sign was illegal, put an 8.5" x 11" sign in a second story window. *Id.* at 45-46.

[39] *Id.* at 48-51.

of speech that Ladue has closed off."[40] The Court further noted that:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[41]

The Court ultimately held that the Ladue ordinance was an unconstitutional restriction on freedom of speech as guaranteed by the First Amendment.[42] In so holding, it stated that, although reasonable time, place, and manner restrictions on signs might pass muster, "[a] special respect for individual liberty in the home has long been part of our culture and our law . . . . Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 by 11-inch sign expressing their political views."[43]

Despite the fairly strong language used by the Court in striking down the Ladue city ordinance restricting homeowners' ability to display political signs, a similar restriction on political speech would not be struck down in CIDs, unless the CID's governing association was considered a state actor. Although state action was unquestionably involved in *Ladue*, since Ladue was a municipality, the Court's analysis nonetheless helps shed light on its view of free speech — and especially of political speech — when it comes to the display of political signs in homeowners' front yards or windows. Given the language used in *Ladue*, and in other cases that have struck down restrictions on political expression, it is quite

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[40] *Id.* at 56.
[41] *Id.* at 57.
[42] *Id.* at 58.
[43] City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (citations omitted).

likely that the Court would find similar restrictions on expression in CIDs unconstitutional, *provided that* it could reasonably find state action. It has even been suggested that a trend in this direction could occur in the absence of a clear finding of state action: "*Ladue* does not, in its own right, affect the legality or enforceability of community association covenants; [but] it could . . . be the beginning of a line of cases leading to such a result."[44] While there seems to be no evidence of such a trend on the federal level, there has been some movement in this direction on the state level, as will be discussed below. For the time being, though, it seems safe to say that, according to Supreme Court jurisprudence, a finding of state action would be a necessary condition to striking down restrictions on political speech in HOAs.

There are four primary ways in which state action has historically been analyzed by the Supreme Court: (1) *Shelley v. Kraemer*[45] and the "judicial enforcement" theory of state action; (2) *Marsh v. Alabama*[46] and the "company town" approach to state action; (3) *Jackson v. Metropolitan Edison*[47] and the "sufficiently close nexus" test for state action; and (4) *Brentwood Academy v. Tennessee Secondary School Athletic Association*[48] and the "entwinement" theory of state action. Each of the tests advanced by the above four cases is different, and none has been consistently or regularly applied so as to have become the defining test for state action. As such, there is no single, clear state action doctrine. As one commentator noted, "[l]ack of predictability is [a] troubling hallmark in state action law. Essentially, because the courts have . . . flexible tests that they shape around the facts on a case-by-case basis, the state action area of the law is quite unpredictable and confusing."[49]

In addition to the four approaches used by the Supreme Court in analyzing state action for the purposes of First Amendment law, a number of states have also used state constitutions to find violations of the right to free expression even where state action for federal First Amendment purposes might not have been found.

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[44] Monique C. M. Leahy, *Homeowners' Association Defense: Free Speech*, 93 AM. JURIS. TRIALS 293, § 8 (updated 2006) (alteration in original) (citing *Common Ground*, Cmty. Ass'ns Inst., Sept./Oct. 1994).

[45] 334 U.S. 1 (1948).

[46] 326 U.S. 501 (1946).

[47] 419 U.S. 345 (1974).

[48] 531 U.S. 288 (2001).

[49] Josiah N. Drew, *The Sixth Circuit Dropped the Ball: An Analysis of* Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n *in Light of the Supreme Court's Recent Trends in State Action Jurisprudence*, B.Y.U. L. REV. 1313, 1340 (2001).

Below, each of the four state action approaches is broken down and analyzed in terms of how each might apply, or not apply, to HOAs. The analysis will proceed based on a hypothetical situation which includes the three assumptions described above: first, that CIDs have become so widespread that homebuyers wishing to live in many locations have no choice but to accept the restrictive covenants of such CIDs; second, that in many of these locations, local zoning regulations have been enacted so as to mandate the development of all homes under the umbrella of a homeowners' association, since such developments both reduce costs for the municipality and increase the tax base; and third, that the vast majority of these CIDs enforce covenants that restrict or prohibit political speech by homeowners. Although these three assumptions do present a hypothetical scenario, the scenario is, in fact, not far afield from the situation which exists today in a number of regions, and which is likely to exist in more and more communities over time.

A. Shelley v. Kraemer: Racially Discriminatory Covenants and the Judicial-Enforcement Theory of State Action

One way that state action can be found is through the "judicial enforcement" theory of state action. This theory was first proffered by the Supreme Court in *Shelley v. Kraemer*, a case in which the Court held that judicial enforcement of a racially discriminatory covenant constituted "state action."[50] In that case, an African-American bought property subject to a racially restrictive covenant stating that ownership of the property in question was limited to Caucasians.[51] The same restrictive covenant bound the owners of nearly fifty neighboring properties.[52] One of the other owners subject to the same covenant brought suit, seeking to enforce the covenant.[53] The Supreme Court of Missouri held that the covenant could be enforced,[54] but the U.S. Supreme Court reversed, holding that the covenant was not enforceable because enforcement of the covenant violated the Equal Protection Clause.[55] The Court reasoned that judicial enforcement of the covenant by Missouri courts

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[51] Shelley v. Kraemer, 334 U.S. 1, 21 (1948).
[52] *Id.* at 4.
[53] *Id.* at 5.
[54] *Id.* at 6.
[55] Kraemer v. Shelley, 198 S.W.2d 679, 683 (Mo. 1947).
[56] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

amounted to state action, since the courts were an instrument of the state.[56] Therefore, the covenant was subject to constitutional review.[57]

The holding of *Shelley* was, and continues to be, fairly controversial. The idea that judicial enforcement of the provisions of a private agreement or covenant can, in and of itself, amount to state action and thus subject a private agreement to federal constitutional restraints is a sweeping notion. It certainly raises the problematic issue of distinguishing what is private from what is public for constitutional purposes. Read broadly, if any judicial enforcement can constitute state action, then *nothing* is truly private — every private action or agreement becomes potentially subject to a claim of state action and thus to a claim of federal constitutional protection. This problem was aggravated by the Court's failure to state a clear set of rules for lower courts to apply the *Shelley* state action theory. As one commentator summarized:

> In the absence of [such] guidance, the *Shelley* decision, taken literally, can be understood as subjecting to constitutional constraints the entire sphere of private agreements whenever these agreements are subject to judicial enforcement. It is doubtful that the Court ever intended this result in *Shelley*, because such a result effectively would reduce the Fourteenth Amendment state-action requirements to a 'meaningless formality.'[58]

To prevent a reduction of state action requirements to a "meaningless formality," the holding of *Shelley* has frequently been read and applied quite narrowly by courts. But the ultimate scope of *Shelley*'s judicial enforcement theory of state action, even today, remains uncertain. During the past several decades, for example, many lower courts have limited the application of *Shelley* exclusively to racially discriminatory covenants.[59] But others have read

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[57] *Id.*

[58] *Id.*

[59] Siegel, *supra* note 7, at 492-93.

[60] *See, e.g.,* Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that *Shelley* "has not been extended beyond the context of race discrimination"); Parks v. "Mr. Ford," 556 F.2d 132, 136 n.6a (3d. Cir. 1977) (noting that the doctrine propounded in *Shelley* "has been limited to cases involving racial discrimination"); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340,342 (Pa. Super. Ct. 1996) (quoting Wilco Elec. Sys., Inc. v. Davis, 543 A.2d 1202, 1205 (Pa. Super. Ct. 1988)) (stating that "there is no state action for constitutional purposes absent a finding that racial discrimination is involved as existed in the *Shelley* case").

it considerably more broadly. Take, for example, *Gerber v. Longboat Harbour North Condominium, Inc.*[60] In that 1991 case, a Florida district court suggested that *Shelley* might apply to HOAs in the context of regulations on speech and expression:

> [B]y applying the principles enumerated in *Shelley v. Kraemer* [citation omitted], this Court found and continues to find that judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states. [61]

Two years earlier, a Florida district court of appeal held precisely the opposite, finding a lack of "state action" that would warrant a finding that an HOA's restrictive covenants regarding signs on homeowners' property were unconstitutional.[62] The court held that, "neither the recording of the protective covenant in the public records, *nor the possible enforcement of the covenant in the courts of the state,* constitutes sufficient 'state action' to render the parties' purely private contracts relating to the ownership of real property unconstitutional."[63] Thus, although *Shelley* as a whole appears to have been interpreted and applied quite narrowly by many subsequent court decisions, its continuing influence is apparent.

In one interesting 1969 case, *West Hill Baptist Church v. Abbate*[64], the Ohio Court of Common Pleas held that a covenant that restricted privately owned land to residential and agricultural uses was unconstitutional.[65] The case was brought after two religious organizations were denied permission to build churches and a synagogue on the property in question.[66] Applying *Shelley*, the

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[61] 757 F. Supp. 1339 (M.D. Fla. 1991).

[62] *Id.* at 1341 (M.D. Fla. 1991). In Gerber, the owner of a condominium unit challenged a regulation of the condominium association that banned the flying of flags (including the American flag) except on specified holidays. The court held that judicial enforcement of covenants restricting homeowner's ability to fly the flag would constitute state action. *Id.*

[63] Quail Creek Property Owners Ass'n, Inc. v. Hunter, 538 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 1989).

[64] *Id.* (emphasis added).

[65] 261 N.E.2d 196 (Ohio Com. Pl. 1969).

[66] *Id.* at 202.

court stated that, "if this Court were to enforce (by declaratory judgment) the restrictive covenants here we would be engaging in state action."[67] In finding the covenant unconstitutional, the court's stated rationale was that, "covenants such as these here in issue, which seek to limit an area to residential use only, thereby barring churches, would be unconstitutional as to houses of worship if they were in the form of zoning ordinances or resolutions rather than covenants."[68] Given that this is a state case from the 1960s, its precedential value is clearly limited. However, it does provide another example of how *Shelley* can be, and has been, extended, in a limited way, to cover land-use restrictions created and applied by private owners.

One possible solution has been proposed by Mary Steven Siegel, who suggests that courts apply a "land-use reading" of *Shelley*.[69] Such a reading would limit *Shelley* to the enforcement of covenants that restrict the use or occupation of land in ways that would be deemed unconstitutional had the restriction been the product of a state instrumentality.[70] This may be a workable, and perhaps desirable, solution, particularly as applied to CIDs, since CIDs effectively privatize land-use decisions and functions that would otherwise be the domain of the state or local municipality. Such a solution would certainly reduce the risk of completely blurring the distinction between public and private, since it would be limited to the enforcement of land-use covenants that restrict the use or occupation of land. This solution also seems to remain true to the original intent of *Shelley*, which was aimed specifically at a covenant restricting ownership of private land.

But Siegel's solution is not without problems. If such a solution were implemented, individuals would no longer be able to *choose* to develop or live in any communities that restricted political speech or other kinds of activities and speech — even if they so desired. This raises an important question: do we want to tell all people, in every state, that they simply cannot choose to live in a place that restricts political speech? Perhaps not; but Steven Siegel's approach would do exactly that. This does seem potentially problematic and may pose too significant an encroachment on individuals' rights to choose how they want to live. Nonetheless, the Supreme Court did decide in *Shelley* that racially restrictive covenants were something that, as a society, we should not allow people to opt into, since racial discrimination is such an in-

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[67] *Id.* at 196-98.
[68] *Id.* at 200.
[69] *Id.* at 200-01.
[70] Siegel, *supra* note 7, at 502-508.

sidious harm. There is certainly an argument to be made that since political speech is so essential to our society — precisely because it is so highly-valued and protected — covenants restricting political speech should similarly not be something that people are allowed to opt into.

Alternately, there appears to be a middle ground. If we do not think that individuals' choices should be limited, and if we fear judicial encroachment on private decisions and agreements, then we should limit *Shelley* to racially discriminatory covenants, but create a second, very narrow judicial enforcement exception. This new exception would be for political speech in HOAs that exist in areas where consumer choice in non-CID housing is extremely limited. This compromise solution would give individuals the continued ability to choose to build or live in communities that restrict political speech and would also leave room in the doctrine for other, future narrow exceptions for important rights and values, as facts and society require.

As *Shelley* stands today, though, the extent to which the judicial enforcement theory of state action may apply to HOAs is still an undecided and live issue. As the two Florida federal court cases mentioned above demonstrate, it is certainly not outside the realm of possibility that the ghost of *Shelley* may be resurrected in the future, perhaps successfully, by homeowners in the context of state action and HOAs.

B. Marsh v. Alabama: Company-Owned Towns and State Action

In *Marsh v. Alabama*, the Supreme Court held that privately-owned streets in a "company town" were subject to the protections of the First Amendment.[71] In that case, a Jehovah's Witness was arrested and convicted of handing out religious literature on a street in Chickasaw, a town owned by the Gulf Shipbuilding Company, after being warned not to do so.[72] The Supreme Court overturned her conviction, finding that her rights under the First and Fourteenth Amendments had been violated.[73]

Chickasaw was, for all intents and purposes, identical to any other town, save for the fact that it was owned by a company. As the Court described:

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[71] Marsh v. Alabama, 326 U.S. 501, 509-10 (1946).
[72] *Id.* at 501.
[73] *Id.* at 509-10.

> [I]t has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center.[74]

Except for private ownership, the town of Chickasaw does not function differently from any other town.[75] As a consequence, citizens' rights under the federal Constitution were protected as if the town were, in fact, any other municipally-owned and operated town; the Court found no more reason to curtail the liberties and freedoms of citizens in Chickasaw any more than citizens in other towns:[76]

> Whether a corporation or a municipality owns or possesses the town the public in either case has *an identical interest in the functioning of the community in such manner that the channels of communication remain free* . . . . 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.* Many people in the United States live in company-owned towns . . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Four-

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[74] *Id.* at 502-03.
[75] *Id.* at 502-03, 508.
[76] Marsh v. Alabama, 326 U.S. 501, 508-09 (1946).

> teenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[77]

In short, the Court held that, because Chickasaw looked and acted just like a traditional municipality, it was a state actor and was therefore subject to federal constitutional restrictions on government action, including the First Amendment. Therefore, despite the fact that the streets were privately-owned, people like the Jehovah's Witness in *Marsh* had a First Amendment right of access in order to speak to or communicate with the citizens of the company-owned town.

More than thirty years later, at a time when many fewer company towns existed, the Court in *Amalgamated Food v. Logan Valley Plaza*[78] extended the logic of *Marsh* to privately-owned shopping centers that served a community's business block and that were freely accessible and open to the public.[79] *Logan Valley*, in fact, expanded the reasoning of *Marsh* quite extensively, since a private shopping center performs few of the functions of a traditional municipality and cannot generally be considered to look, and act, like a traditional town. Nonetheless, the Court found that, "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw . . . ."[80] As a result, the owners of the shopping center could not prohibit citizens from exercising their First Amendment rights under the Constitution; private ownership of the property did not bar the application of First Amendment protections. As the Court explained, "[o]wnership 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."[81]

This significant extension of the company-town analysis promulgated in *Marsh* did not last long. Only eight years later, in *Hudgens v. NLRB*,[82] the Supreme Court overturned *Logan Valley* and instead adopted a much narrower reading of *Marsh*.[83] In overturning *Logan Valley*, the *Hudgens* majority relied heavily on, and quoted extensively from, Justice Black's *Logan Valley* dissent:

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[77] *Id.* at 507-509 (emphasis added).
[78] 391 U.S. 308 (1968), *vacated by* 424 U.S. 507 (1976).
[79] *Id.* at 325.
[80] *Id.* at 318.
[81] *Id.* at 325 (quoting *Marsh*, 326 U.S. at 506).
[82] 424 U.S. 507 (1976).
[83] *See id.* at 516-20.

> 'Marsh dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town . . . . 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.' . . . The question is, *Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on All the attributes of a town*, I. e., 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U.S., at 502. . . . *I can find nothing in Marsh which indicates that if one of these features is present, e. g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property* and give its use to people who want to picket on it.'[84]

Under *Hudgens*, the mere fact that privately-owned property has one, or even some, of the characteristics of a traditional municipally does *not* mean that the full protections of the Constitution apply. Simply having a "business district," for example, would no longer be sufficient to find state action adequate to trigger the protections of the First Amendment. Instead, in order to be the functional equivalent of a traditional town, the private property in question would have to take on most, or even all, of the attributes of a typical municipality. This concept echoed the language of a case that preceded *Hudgens* by four years. In *Lloyd Corp. v. Tanner*,[85] the Court held that protesters did not have a right to exercise their free speech rights on the grounds of a privately-owned shopping mall.[86] In its opinion, the majority noted that in *Marsh*, "the owner of the company town was performing the *full spectrum of municipal powers* and *stood in the shoes of the State*."[87]

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[84] *Id.* at 516-17 (quoting *Logan Valley Plaza*, 391 U.S. at 330-32) (emphasis added).
[85] 407 U.S. 551 (1972).
[86] *Id.* at 570.
[87] *Id.* at 569 (emphasis added).

One commentator noted that *Hudgens* was more than just a mere narrowing of the interpretation of *Marsh*. "[T]he Court in *Hudgens* not only replaced the broad reading of *Marsh* with the narrow reading; in a sense, the Court memorialized *Marsh's* Chickasaw as the paradigmatic town for constitutional purposes."[88] This rather stringent test, based on the framework established by *Marsh*, is the test that still technically applies today.

Since *Hudgens* was decided, many claims of state action based on *Marsh* have been rejected.[89] Given this history, and the strictness of the *Hudgens* test, it is likely that most courts would find that CIDs are not state actors. This is because most CIDs do not have business districts, nor post offices, sewage disposal plants, police departments, or many of the other services and functions commonly associated with government municipalities.[90] To the contrary, many, if not most, CIDs explicitly prohibit commercial activity and business districts from forming within their boundaries.

That said, it may nonetheless be time for courts to reconsider how they view CIDs and their governing associations with regard to the *Hudgens* and *Marsh* precedents. It is no accident that many commentators have referred to HOAs as "private governments," "mini-governments," or "quasi-governments."[91] Some of those commentators have suggested that HOAs be recognized as a new form of local government based on their special characteristics, power, and similarity to local municipalities.[92] The result of this approach would be that HOAs would then ostensibly be subject to the restrictions of the federal Constitution.

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[88] Siegel, *supra* note 7, at 474.

[89] For a partial listing of these cases, see LAURA COON, SIGN RESTRICTIONS IN RESIDENTIAL COMMUNITIES: DOES THE FIRST AMENDMENT STOP AT THE GATE? 19 A.B.A. F. COMM. L. 24, 27 n.21 (2001), http://www.abanet.org/forums/communication/comlawyer/summer01/coon.pdf.

[90] There are a few very large CIDs, sometimes called "mixed-use developments," that would probably qualify under the *Hudgens* test for state action. In these large, mixed-use developments, there exists a combination of residences and businesses. Reston, Virginia is one such example; Sun City, Arizona is another. Reston has a population of 35,000 and contains 12,500 residential units, 500 businesses, 21 churches, 8 public schools, 1 sewage treatment plant, 4 shopping centers, and its streets and businesses are open to the public at large. Siegel, *supra* note 7, at 479. I would argue that this kind of large, mixed-use development looks, acts, and feels like a regular municipality so as to qualify under the *Hudgens* test.

[91] *See supra* notes 5-6.

[92] *See, e.g.,* Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322 (Spring 2001).

There is something to be said for this argument. First, the reality is that many CIDs do, indeed, perform many of the services and functions typically provided by municipal governments. Siegel, for example, notes the striking functional similarity of CIDs to municipalities:

> Territorial [CIDs] exercise authority over a network of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial [CIDs] typically provide services such as street cleaning, trash collection, snow removal, and maintenance of open space. Territorial [CIDs] also exercise powers traditionally associated with the municipal zoning authority, such as review of proposed home alterations and enforcement of rules governing home occupancy. All purchasers of property within [a CID] community automatically become members of the [CID], and are required to obey its rules and pay its fees and special assessments. A failure to pay [a CID] fee, like the failure to pay a municipal real estate tax, can result in a lien on a homeowner's residence, and, ultimately, in the forced sale of the property through the enforcement of the lien. Finally, [a CID] community, like a municipality, is governed by officers who are elected by community residents.[93]

Second, these kinds of services and activities "are financed through assessments" that resemble taxes.[94] Homeowners in CIDs are effectively double-taxed: they pay property taxes to the local municipal government and also pay an HOA fee to help pay for many of the same services that the municipal government would normally supply. Third, some states (including Maryland, Virginia, California, and Arizona) have passed statutes that suggest that even some legislatures regard HOAs as quasi-governmental organizations, as opposed to private corporations.[95]

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[93] Siegel, *supra* note 7, at 476-77. *See also* Womack & Timmons, *supra* note 92 at 322 ("Homeowner associations have taken on many of the characteristics of governmental entities. They regulate the use of privately owned property, own common property, and provide services such as utilities, roads, lighting, refuse removal, and security.").

[94] Siegel, *supra* note 7, at 535 (quoting Wayne S. Hyatt & James B. Rhoads, *Concepts of Liberty in the Development and Administration of Condominium and Home Owner Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976)).

[95] Siegel, *supra* note 7, at 535.

Thus, many modern CIDs appear to be quite similar to the company town that the Supreme Court reviewed in *Marsh*. Undoubtedly, CIDs are much more akin to company towns than they are to shopping malls. But, as Siegel persuasively argues, modern CIDs may, in fact, have *more* in common with municipalities than did company towns, specifically because a CID is a "comprehensive system of service delivery, quasi-taxation, and community governance." [96] In *Marsh*, the company town was considered to have "all the characteristics of any other American town" — an analysis which led to the "functional equivalent of a municipality standard."[97] But precisely because this standard was based on a company town, it does not consider other municipal characteristics found in some private communities, but not found in company towns, and thus is not entirely consistent with modern-day patterns of residential and community development.[98] Siegel concludes that if the *Marsh* "town" paradigm were to be "updated and made consistent with contemporary forms of community development, which typically exclude commercial uses from residential areas," then many modern CIDs would, in fact, be considered the functional equivalent of municipalities.[99]

As persuasive as that argument may be, it seems to take the analogy a little too far. It is hard to disagree with the assertion that the nature of a "typical" municipality has changed significantly since the *Marsh* era of company towns. Zoning and development ordinances today are such that, in many municipalities, commercial districts are carefully regulated or even practically prohibited. But one key problem remains: in addition to the fact that most CIDs do not contain a business district, few contain their own post office, sewage treatment plant, or police departments. As much as typical municipalities and development patterns have changed since the 1940s, these factors are still a standard in most municipalities. Thus, absent a perhaps-desirable shift in its understanding of the *Hudgens* "functional equivalent of a municipality" standard, the current Supreme Court would still probably find that most CIDs do not meet the *Hudgens* test. Alternately, if we assume the existence of the three hypothetical factors detailed in

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[96] *Id.* at 478.

[97] *Id.* at 477-78.

[98] *Id.* at 477, 480. "The Thornton Wilder version of a small town exemplified in *Marsh* has been replaced by suburban sprawl, regional shopping centers far removed from residential areas, and zoning ordinances that separate commercial uses from residential uses — or even entirely prohibit commercial uses within a municipality." *Id.* at 480-81.

[99] *Id.* at 481.

Section II (above), it is fathomable that the Supreme Court might find some large HOAs to be the "functional equivalent of a municipality" under the *Hudgens* and *Marsh* doctrines, and thus subject to the same constitutional restraints as any other state actor.

C. Jackson v. Metropolitan Edison and the "Sufficiently Close Nexus" Test

Another test that has been used to determine whether or not a private organization is engaged in state action is the "sufficiently close nexus" test. The defining case for this test is *Jackson v. Metropolitan Edison Company*.[100] In *Jackson*, a woman brought suit against a privately-owned utility company after the utility terminated her electric service.[101] She claimed that, since the utility company had failed to provide adequate notice or any hearing with regard to the termination of her electricity, her due process rights had been violated.[102] She based the suit on a state action theory, since the state licensed the private utility as, effectively, a statewide monopoly.[103] The Supreme Court rejected the extension of state action to licensed monopolies, holding that even though the utility was heavily regulated by the state, there was no sufficient connection between the utility and the state as to establish that state action existed.[104]

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. *But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the lat-*

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[100] 419 U.S. 345 (1974).

[101] *Id.*

[102] *Id.* at 347-48.

[103] *Id.* at 351. There was a state statute that required utilities to provide and maintain service to customers in a way that was "reasonably continuous and without unreasonable interruptions or delay." *Id.* at 348.

[104] *Id.* at 345, 350-52.

> *ter may be fairly treated as that of the State itself.*[105]

Thus, the essential line of inquiry required by *Jackson* is whether there is a "sufficiently close nexus" between the challenged conduct of the private company (e.g., the HOA), and the involvement of the state to find that state action is present in the actions of the private company.

Unquestionably, there is state involvement in the creation of CIDs. For example, the development of CIDs is commonly controlled by state statutes; local zoning laws almost always impact the creation of CIDs; sometimes there are state regulations related to how and when HOA Covenants, Conditions, and Restrictions documents are provided to potential and current homeowners; and state agencies often must get involved when common property within CIDs is developed (e.g., if a swimming pool is put into a common area, the local water board and health and safety agencies may need to be involved). But, under *Jackson*, this kind of involvement is clearly not enough to amount to state action. This is likely the case, even though HOAs are "often forced upon reluctant private developers by local governments exercising regulatory powers,"[106] because under *Jackson's* sufficient connection test, the simple pervasiveness of state or local regulation is not enough to create state action. The utility in *Jackson* was more involved with the state than most HOAs (arguably including even those whose existence is mandated by local zoning laws), and yet the Supreme Court found no state action.[107]

Thus, as a whole, it seems quite unlikely that the Supreme Court would find that an HOA was a state actor based on the sufficiently close nexus test promulgated by *Jackson*. CIDs and HOAs are certainly "regulated," in the sense that there are zoning ordinances that the HOAs must adhere to, and other development ordinances with which they must comply; but *Jackson* ultimately seems to require much more. If *Jackson*'s sufficiently close nexus test was the sole test used in determining the existence of state action, or lack thereof, CIDs would be able to continue enforcing

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[105] Jackson v. Metro. Edison Co., 419 U.S. 345, 350-51 (1974) (citations omitted) (emphasis added).

[106] Siegel, *supra* note 7, at 550 (quoting STEPHEN E. BARTON & CAROL J. SILVERMAN eds., COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST xi (1994)).

[107] *Jackson*, 419 U.S. at 350-52.

substantial limitations on freedom of expression and speech without fear of any claim of state action or violation of homeowners' First Amendment rights.

D. Brentwood Academy v. Tennessee Secondary School Athletic Association: The "Entwinement" Theory of State Action

A relatively new test for state action, the "entwinement" test, was used in *Brentwood Academy v. Tennessee Secondary School Athletic Association* ("TSSAA").[108] In that case, Brentwood Academy was a member of the non-profit corporation, TSSAA.[109] TSSAA was created to regulate interscholastic athletics in Tennessee high schools.[110] Although high schools were not forced to join the Association, member schools (84% of which were public) were not allowed to play against non-member schools unless they had special permission.[111] After the TSSAA claimed Brentwood had violated the Association's football recruiting policies, Brentwood sued the TSSAA, claiming that it was a state actor and had violated the First and Fourteenth Amendments.[112]

The Supreme Court held that TSSAA was a state actor.[113] It based this holding on a finding of excessive "entwinement" between state school officials and the actions and structure of the ostensibly private non-profit organization.[114] The decision was based on the fact that a large majority of TSSAA members were public school officials, that employees of TSSAA were treated like state employees in terms of their eligibility for the state's retirement program, and that public school officials "overwhelmingly perform[ed] all but the purely ministerial acts by which the Association exists and functions."[115] In short, the non-profit athletic association was held to have to comply with federal constitutional standards based on its excessive entwinement with state employees and programs.

In some ways, the *Brentwood Academy* state action test seems similar to the *Jackson* state action test. *Jackson* required a "sufficiently close nexus" between the actions of the private company and the state. By definition, this seems very similar to the

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[108] 531 U.S. 288 (2001).
[109] *Id.* at 291.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 293.
[113] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 291 (2001).
[114] *Id.*
[115] *Id.* at 298-302.

question of whether a private entity and the state are so closely "entwined" with each other as to find state action. Both tests require a case-by-case inquiry into the extent to which the actions of the state are connected to or involved in the actions of a private entity. There are subtle differences between the two tests, of course, but to some degree, *Brentwood Academy* may be considered an updated version of the *Jackson* sufficient connection test. *Brentwood Academy* also seems more on-point to the inquiry at hand, since it dealt specifically with a First Amendment violation.

Applying the entwinement test to HOAs, it seems unlikely that most HOAs would be considered state actors based on excessive entwinement with local government officials. In most HOAs, there simply is not the kind of connection or entanglement with the state that existed in *Brentwood Academy*. For example, most of the people sitting on HOA boards are not state officials, unlike in *Brentwood Academy*. But if we consider the actual *development* of HOAs, and apply our three hypothetical factors, the answer is not as clear. Might the entwinement test be met, for example, by a community like Las Vegas? There, excessive entwinement arguably could be found between state programs and private entities based on zoning ordinances that effectively mandate the creation of CIDs. The strong incentives that municipalities have to create such laws, the enactment of such ordinances, and the fact that developers and builders are forced to build CIDs rather than any other type of building or development might together add up to "entwinement" that constitutes state action under *Brentwood Academy*.

IV. STATE RESPONSES TO THE PROBLEM OF RESTRICTIONS ON POLITICAL SPEECH IN HOAS

Courts in several states have addressed the problems posed by covenants imposed by HOAs. Many courts have used a "reasonableness test" in determining whether a particular restriction or covenant can stand.[116] Others have relied on state constitutions

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[116] *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Assn., 878 P.2d 1275 (Cal. 1994) (applying a reasonableness standard to condominium covenants, and holding that when a condominium use restriction is contained in declaration of a common interest development, there is a rebuttable presumption that the restriction is reasonable); Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637, 639 (Fl. Dist. Ct. App. 1981) ("[T]he 'rule of reasonableness' [is] the touchstone by which the validity of a condominium association's actions should be measured."); Riley v. Stoves, 526 P.2d 747, 752 (Ariz. Ct. App. 1973) ("[W]e should ascertain

to find greater protection of free speech rights than the federal Constitution provides. This is not surprising given that the constitutions of thirty-five states have free speech clauses that are framed in the affirmative.[117] In those states, freedom of expression is affirmatively granted to citizens, as opposed to the First Amendment, which prohibits restrictions on free speech. This distinction may prove important, as the granting of such affirmative rights may be a valid way for courts to invalidate HOA restrictions on speech.

Among those states that provide more protection than the U.S. Constitution with regard to freedom of expression is California. In one of the seminal cases in this area, *Pruneyard Shopping Center v. Robins*,[118] the U.S. Supreme Court upheld a California Supreme Court decision determining that the California Constitution protects free speech in privately-owned shopping centers.[119] (In effect, it upheld freedom of expression in shopping centers, similar to the Supreme Court's holding in *Logan Valley*.) The Supreme Court majority held that states can, through state constitutional provisions, provide broader protections of individual liberties than the federal Constitution would provide under the same facts or circumstances. This was precisely the case in *Pruneyard*. There, although the speech at issue would not have been protected under the First Amendment (as per *Hudgens*), California's constitution did protect free speech in the shopping mall context.[120] Thus, one way that states may be able to reach into CIDs to protect political speech (or other types of speech) is by applying their own state constitutional provisions.

In *Pruneyard*, the California Supreme Court implicitly applied a balancing test of sorts to weigh the rights of private property owners against the free speech rights of protesters.[121] Other states have also solved the problem posed by overly-restrictive CID covenants by applying similar combinations of state statutes, state constitutions, and balancing tests. For example, in *Gutenberg Taxpayers v. Galaxy Towers Condominium Association*[122], a New Jersey case, the court applied a three-part test (derived from the earlier New Jersey case of *State v. Schmid*[123]) in order to "deter-

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the extent to which the restriction is a reasonable means to accomplish the private objective when considered in light of its effect upon defendants.").

[117] James C. Harrington, *Homeowners Associations: Creating Deconstitutionalized Zones*, TEX. LAW., Oct. 18, 2004, at 34.

[118] 447 U.S. 74 (1980).

[119] *Id.* at 88.

[120] *Id.* at 78.

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

[122] 688 A.2d 156 (N.J. 1996).

[123] 423 A.2d 615 (N.J. 1980).

mine the parameters of the right to free speech upon privately-owned property and the extent to which access to private property can be restricted and still accommodate this right."[124] In *Galaxy,* the court held that determining whether a "constitutional obligation to permit public access on the part of the private property owner exists" depends on the three *Schmid* factors as well as on "a balancing of the right to free expression and the right to private property."[125]

The current legal situation on the federal level with regard to state action involves multiple possible tests for determining the presence or absence of state action, and has been highly criticized in legal scholarship. A number of commentators have encouraged the use of a balancing test for all state action cases.[126] With the exception of a few state courts, though, the balancing test approach has generally not been implemented with regard to HOAs and land-use covenants that restrict freedom of expression. Nonetheless, such a balancing test may prove to be a positive and practical solution to the problem. This is because the careful application of a balancing test on a case by case basis would take into consideration the continuing conflict between private property rights and constitutional liberties and would allow courts to make fact-based determinations as to which of the two tipped the scale in any given case. Josiah Drew explains the balancing test this way:

> If judges were to implement a balancing test, they would weigh two items — rights against practices. If the value of a legitimate right (e.g., First Amendment, Due Process, etc.) outweighs the value of the private entity's challenged practice (e.g., athletic rule making, Medicaid implementing, etc.) then the practice violates the constitutional amendment at issue, and the state

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[124] *Galaxy*, 688 A.2d at 158. This three-part test was established in an earlier decision by the New Jersey Supreme Court. State v. Schmid, 423 A.2d 615 (N.J. 1980). First, the court considered the "nature, purposes, and primary use of such private property: generally, its 'normal' use;" second, the "extent and nature of the public's invitation to use that property;" and third, the "purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." *Gutenberg*, 688 A.2d at 158. In Galaxy, the court found that a condominium group's regulation prohibiting the distribution of political campaign literature by non-members of the condominium violated free speech rights under New Jersey's state constitution. *Id*. at 159.

[125] *Gutenberg*, 688 A.2d at 158 (citing New Jersey Coal Against War v. J.M.B. Realty Corp., 138 N.J. 326, 356 (N.J. 1994)).

[126] *See, e.g.*, Rishkof & Wohl, *supra* note 5; Drew, *supra* note 49, at 1342.

> (either covertly or overtly) is allowing the practice to limit this right when it should not. Conversely, if the value of a right is not clearly greater that the challenged practice's value, then the practice does not violate the amendment at issue, and the state is not allowing a practice to continue that it should not.[127]

Although the implementation of such a test would, undoubtedly, increase the risk of blurring the lines between public and private, the simple fact of the matter is that courts already do this to a significant extent. *Shelley* is a perfect example of how the Supreme Court is willing to stretch existing doctrine quite thin in order to achieve what it considers a "right" or "just" result in a particular case. In *Shelley* and similar cases where the Court feels that a fundamental liberty has been violated, it has been known to go out of its way to achieve the right result, even if it means developing an entirely new doctrine of "state action." Although the balancing test does run the risk of blurring the public-private line too much, it may, in fact, not do so any more than current state action doctrines already allow. The balancing test would simply allow courts to come to the right decision in a particular case without having to resort to tortured contortions of existing state action tests or trying to create entirely new state action doctrines.

V. HOMEOWNERS' VOTING RIGHTS IN HOAS — AN ADEQUATE POLITICAL REMEDY?

One argument that can be made against applying state action doctrine to HOAs is that HOA members do have the ability to change the covenants of the HOA through a vote of the members. Thus, there appears to be a political remedy built into the HOA structure: if enough homeowners want to make a change, they can vote to make that change.

The problem with this voting-remedy argument is that it is an extremely limited remedy. This is primarily because the notion that homeowners can makes changes to CC&Rs once becoming home-owning members of HOAs is largely illusory. In most HOAs, there is a process by which, through a vote of homeowners (but not renters), the covenants and restrictions can be changed or amended. But in order to change the CC&Rs in most HOAs, a vote

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[127] Drew, *supra* note 49, at 1342.

of a *supermajority* of *all* HOA members is required.[128] McKenzie puts it this way:

> Amendments are . . . difficult to enact, especially because most CIDs have a number of absentee owners who rent their units and are not present to vote, even if they are interested in the issue. So *the developer's idea of how people should live is, to a large extent, cast in concrete*.[129]

Thus, except in highly unusual cases, it is effectively impossible to enact such change as a "voting" member of an HOA.

Another interesting freedom of expression argument is one that circumscribes the issue of consent entirely: the impact of HOAs on non-members. Although not specifically tied to the issue of signs on lawns or in windows, the free speech rights of non-members of HOAs can nonetheless be significantly affected by HOA regulations. HOAs commonly prohibit all solicitation, including door-to-door political campaigning, and gated communities are able to effectuate this goal even more easily. Unquestionably, non-members of these communities do not consent to the HOA restrictions as homeowners do. Yet they are restricted nonetheless — and these restrictions may be significant, especially in communities where the majority of residences, and even some businesses, are located within HOAs and gated communities. Although there appears to be no persuasive authority on the issue as of yet, it is an issue which will probably continue to create litigation as CIDs continue to spread in size and influence.

VI. CONCLUSION

Given the current, confusing state of state action doctrine, if the Supreme Court were to hear a case regarding HOAs and restrictions on political speech, it would not be likely to find state action unless a specific series of facts were in evidence. First, there would need to be zoning laws in place that explicitly or effectively mandated all new development be built within CIDs. Second, CIDs in the area in question would have to be so pervasive that homebuyers effectively had no choice but to submit to the re-

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[128] MCKENZIE, *supra* note 35, at 127.
[129] *Id.* (emphasis added).

strictive covenants connected to those developments. And third, the majority of HOAs within such an area would have to have covenants restricting speech. It is not unlikely that, in the future, we may see such a confluence of facts in CIDs across the country. Taken individually, none of these factors alone seems to rise to the level of "state action" under any of the tests formally accepted to date by the Supreme Court; but the combination of factors, when taken together, does seem to strongly smack of state action, and may be considered as such by the Court.

Courts understandably are protective of private property rights and will be hesitant to make a major change unless circumstances truly merit it. But as one commentator noted, "[b]y any standard, these associations clearly strain the distinction between public and private."[130] It is also important to note that "much about [CIDs] is decidedly not private, including the policy choices made by municipal officials that induced, even compelled, real estate developers in many areas of the country to establish [CIDs] as a means of securing building permits."[131] If enough CIDs develop, limiting homeowner choice significantly and also significantly decreasing the ability of those homeowners to exercise fundamental rights, the Court may find that a line has been impermissibly crossed.

Going forward, it may make sense for courts to take a second look at the extent to which HOAs really do perform the same functions as municipalities, and the extent to which these associations act as mini-governments. Although the Supreme Court in particular has seemed reluctant to expand government control over privately-owned property, as demonstrated by the strict test promulgated in *Hudgens*, the growth of CIDs, and the increasing lack of choice that homebuyers have in terms of whether or not to buy into a CID, may eventually demand a change of course.

If a solution is not found through litigation, an alternative solution may present itself in the form of state legislation. Already, Arizona and Maryland have passed laws that prevent HOAs from banning homeowners from posting political signs.[132] California and Texas are considering a similar law.[133] Florida, California, and Arizona legislatures have passed laws forbidding HOAs from enforcing covenants against flying the American flag.[134] While

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[130] Rishkof & Wohl, *supra* note 5, at 525.

[131] Siegel, *supra* note 7, at 548.

[132] *See* MD. CODE ANN., REAL PROP. § 11B-111.2 (West 1999); H.R. 2478, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

[133] Harrington, *supra* note 117, at 34.

[134] *Id. See also* Jeff Kunerth, *The Political Divide Among Neighbors*, ORLANDO SENTINEL, Aug. 28, 2004, at B1.

these laws may not reach all homeowners, they suggest a trend toward legislative recognition of the problematic nature of many such restrictions and recognition of the violation that such covenants do to private property owners' fundamental rights and liberties.

One thing is clear: the jury is still out on the extent to which any of the four primary state action doctrines might apply to HOAs. Any finding of state action on the part of an HOA is likely to be narrowly applied to the facts of the specific case and to the specific situation of the HOA and the region in question.

Justice Marshall was uncannily prescient in his dissent in *Lloyd Corp. v. Tanner* — a dissent written more than thirty years ago.

> It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh* v. *Alabama* and continue to hold that '(t)he 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.' When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.[135]

What Justice Marshall discussed in hypothetical terms in 1972 has today become a reality. CIDs in many communities are undeniably taking over many of the functions that used to be served by the government. Zoning laws create incentives — or even de facto mandates — to build new developments under the auspices of an

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[135] Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (citations omitted).

HOA or other association. This is no accident — cities are well aware of the advantages that such associations can create in terms of reducing expenses and increasing the tax base, as Marshall foresaw. And, as Marshall also suggested, the restrictions imposed by quasi-governmental bodies like HOAs do, indeed, today make it harder for millions of citizens to communicate and express themselves to their neighbors. Unless the courts or state legislatures step in to prevent further erosion of these rights by powerful and purportedly private HOAs, the First Amendment will, indeed, become but a "mere shibboleth" for millions of Americans.