

## **Covenants, Conditions, and Restrictions ... on Free Speech? First Amendment Rights in Common-Interest Communities**

### I. INTRODUCTION

One out of eight Americans now lives in private common-interest communities (“CICs”).<sup>1</sup> Whether these communities take the form of condominiums, cooperatives, master planned communities, or gated communities, community residents are contractually bound by covenants, conditions, and restrictions (“CC&Rs”) on the use of their property. Some of these CC&Rs even restrict First Amendment activities by prohibiting solicitation, “impos[ing] a ban on posting signs inside or outside a home, . . . restrict[ing] public assembly on their streets, [and] prohibit[ing] the distribution of newspapers on their streets.”<sup>2</sup>

These covenants impact CIC residents and non-residents alike. The First Amendment embraces the right of a speaker to speak and necessarily the right of a listener to be exposed to the speaker’s ideas.<sup>3</sup> This right is undermined when, for example, a CIC denies access to non-resident speakers or allows access to one political candidate or newspaper yet denies access to another.

The loss of speech rights is one of the most severe constitutional deprivations among free people, yet the courts have limited ability to protect private CIC residents and non-residents against it. Because a CIC is a private- not state- actor for federal constitutional purposes, its restrictions on speech are not proscribed by the First Amendment. The two existing tests of state

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<sup>1</sup> See 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, 464 (1998).

<sup>2</sup> Id. at 470.

<sup>3</sup> See Martin v. Struthers, 319 U.S. 141, 143 (1943).

action that would be most applicable to CICs, the “functional equivalent” test and the “judicial enforcement” test, have limited or no applicability to the CIC. In these changing times, where common-interest communities comprise the primary social arrangement for so many Americans, the United States Supreme Court could re-envision its state action jurisprudence so that it is applicable to CICs. This is, however, unlikely. Moreover, while it is true that states may grant their residents greater individual protection under state constitutions than under the federal constitution, formerly expansive court interpretations of state speech rights have been recently curtailed.

The most direct solution lies with CICs themselves. CICs could pass a private Bill of Rights within their CC&Rs. In the likely event that these private actors do not undertake to protect speech rights, state legislatures always have the power to extend these protections by statute. In the absence of legislative will, however, protection of freedom of speech requires resort to the courts. Courts could invalidate covenants restricting speech as unreasonable or as against public policy. Moreover, many courts have already recognized that even if CICs are not state actors, they function as “mini-governments” in the lives of their residents and neighboring communities. The power to govern is not absolute and unilateral; courts could demand that the consent of the privately governed comes only with a CIC’s concomitant commitment to protecting its residents’ basic constitutional rights.

This Comment explores the problem of reviewing CIC restrictions on speech under current First Amendment jurisprudence and the possibility of private, legislative, and judicial solutions. Part II provides background information on the rise of CICs in the United States. Part III explores the various tests of state action created by the United States Supreme Court as well as free speech protections crafted by state courts. Further, it concludes that these tests and

protections have limited or no applicability to CICs. Part IV recommends that CICs import a Bill of Rights into their CC&Rs, that legislatures pass statutory protections of speech within CICs, or that courts refuse to enforce covenants that are unreasonable as against public policy, or that do not respond to the needs of individuals within a quasi-governmental social arrangement. Part V concludes that CICs have gained such a foothold in American life that some protection of First Amendment rights within and around them is imperative.

## II. BACKGROUND

A “common-interest community” is, according to the Restatement (Third) of Property (Servitudes) (“The Restatement”):

a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

- (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
- (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.<sup>4</sup>

The comments accompanying section 6.2 of the Restatement further explain that a CIC is characterized by either commonly held property or a community association, although most CICs have both.<sup>5</sup> CICs are typically created by declaration.<sup>6</sup> The declaration imposes the CC&Rs that bind individual homeowners.

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<sup>4</sup> Rest. (Third) of Prop. (Servitudes) § 6.2 (2000).

<sup>5</sup> See Rest. (Third) of Prop. (Servitudes) § 6.2 cmt. a.

<sup>6</sup> See id.

CICs are a relatively new housing arrangement in the United States. The first gated neighborhoods, New York’s Tuxedo Park and the private streets of St. Louis, were built in the latter half of the nineteenth century.<sup>7</sup> During the twentieth century, wealthy East Coast and Hollywood residents sought prestige and privacy within gated communities.<sup>8</sup> By the 1960s, however, CIC living was within the means of many more Americans.<sup>9</sup> By the 1980s, retirement and golf course communities sprouted up in the Southeast and Southwest parts of the country.<sup>10</sup> Now gated communities and other types of CICs are found throughout the nation, but most commonly in Florida, California, Texas,<sup>11</sup> New Jersey, New York, Virginia, Pennsylvania, Maryland, and Hawaii.<sup>12</sup>

CICs are on the rise, as the following statistics illustrate:

Year	Communities	Housing Units	Residents
1970	10,000	701,000	2.1 million
1980	36,000	3.6 million	9.6 million
1990	130,000	11.6 million	29.6 million
2000	222,500	17.8 million	45.2 million
2002	240,000	19.2 million	48.0 million

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<sup>7</sup> See David L. Callies, Paula A. Franzese, & Heidi Kai Guth, Ramapo Looking Forward: Gated Communities, Covenants, and Concerns, 35 THE URBAN LAWYER 177, 182 (2003).

<sup>8</sup> See id.

<sup>9</sup> See id.

<sup>10</sup> See id.

<sup>11</sup> See id. at 179.

<sup>12</sup> See id. (citing EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994)).

2004                      260,000                      20.8 million                      51.8 million<sup>13</sup>

Every year, nine- to eleven thousand new community associations are formed.<sup>14</sup> The Community Association Institute estimates that “more than four in five housing starts during the past 5-8 years have been built as part of an association-governed community.”<sup>15</sup>

People choose to live in CICs, because “they help protect home values and help meet increased demand for privatization of services as public officials off-load services that were traditionally provided by government, e.g., trash pickup, snow removal, landscaping, street lighting and street and sidewalk maintenance.”<sup>16</sup> Also, planned communities are often more affordable.<sup>17</sup> Some commentators have noted that further reasons people decide to live in CICs include a feeling that “government has failed to do enough to preserve property values . . . and that crime has spun out of control and . . . the state has allowed the social fabric to unravel and is impotent to stop this decay.”<sup>18</sup> As rational as secession from neighboring communities may be for the individual CIC resident, walling oneself off does not come without a cost. In availing themselves of all of the benefits of private membership, residents often unwittingly give up their right to speak within the community and their right to hear and evaluate the speech of others inside and outside of the community. What they may not realize is that the First Amendment

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<sup>13</sup> Community Associations Institute, Gallup Looks at Community Associations, available at <http://www.caionline.org/about/inside.cfm> (last visited Apr. 19, 2005) (summarizing the Gallup Organization’s 1999 National Survey of Community Association Homeowner Satisfaction).

<sup>14</sup> See id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> See Community Associations Institute, Data on U.S. Community Associations, available at <http://www.caionline.org/about/facts.cfm> (last visited Apr. 19, 2005).

<sup>18</sup> See David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 YALE L. J. 761, 766-67 (1995).

rights that they took for granted as residents of municipalities are no longer protected past the CIC gates. The following Part explores this failure of free speech protection in CICs under both federal and state constitutions.

### III. THE FAILURE OF CONSTITUTIONAL PROTECTION OF FREE SPEECH IN COMMON-INTEREST COMMUNITIES

The Fourteenth Amendment incorporates most of the Bill of Rights, including the First Amendment, making them applicable to the states. However, The Civil Rights Cases<sup>19</sup> hold that the Fourteenth Amendment prohibits only state action, not private action, or the “individual invasion of individual rights.”<sup>20</sup> Thus, in order for a CIC, a private actor, to be held to constitutional standards, a court would have to determine that it was in fact a state actor. The United States Supreme Court has created two tests of state action that might apply to the CIC: the “functional equivalent” test and the “judicial enforcement” test. States are also free to interpret their own constitutions to strike a balance between free speech and private property rights. Under either federal or state constitutions, courts have been less willing to hold private communities responsible for protecting the First Amendment rights of CIC residents and non-residents alike.

#### A. The Federal “Functional Equivalent” Test

##### 1. Marsh v. Alabama

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<sup>19</sup> 109 U.S. 3 (1883).

<sup>20</sup> Id. at 11.

In *Marsh v. Alabama*,<sup>21</sup> the United States Supreme Court examined a private residential community, Chickasaw, Alabama—a company town owned by the Gulf Shipbuilding Corporation.<sup>22</sup> The Court noted that Chickasaw had “all the characteristics of any other American town[, including] residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ . . . a deputy . . . [and] a post office . . . .”<sup>23</sup> Grace Marsh, a Jehovah’s witness, distributed religious literature on the sidewalks of Chickasaw, was asked to leave and refused, and was arrested for trespassing.<sup>24</sup> Marsh asserted her rights under the First and Fourteenth Amendment but was nevertheless convicted in state court.<sup>25</sup>

In reviewing the constitutionality of her conviction, the United States Supreme Court held, “Ownership does not 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.”<sup>26</sup> The Court continued, “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.”<sup>27</sup> Thus, Marsh’s First Amendment rights could not be curtailed simply because she chose to exercise them on private property.<sup>28</sup> The Court held that if

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<sup>21</sup> 326 U.S. 501 (1946).

<sup>22</sup> See id. at 502.

<sup>23</sup> Id. at 502-03.

<sup>24</sup> See id. at 504.

<sup>25</sup> See id.

<sup>26</sup> Id. at 505.

<sup>27</sup> Id.

the private community possessed all the attributes of a town and had invited the public in some way, then it was in fact a state actor for First Amendment purposes.

In reaching its holding, the Court did not blind itself to the realities of company-town living at that time. It noted that company-owned towns were common, especially in the South.<sup>29</sup> In protecting the rights of Marsh, an outsider, to speak, the Court strove also to uphold the correlative rights of Chickasaw residents to receive such speech. In order for Chickasaw residents to make informed decisions about their community and nation, the Court said, the information they receive must be uncensored.<sup>30</sup> The First Amendment “lies at the foundation of free government by free men.”<sup>31</sup> Thus, in balancing the rights of private property owners against the people’s First Amendment rights, the Court stated that “the latter occupy a preferred position.”<sup>32</sup> Marsh thus provided strong First Amendment protection for speakers, at least in company towns.

## 2. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza

The Court expanded its Marsh holding in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza.<sup>33</sup> In this case, union members picketed in front of Weis Markets, a tenant of Logan Valley Plaza, because all of Weis’s employees were non-union.<sup>34</sup> Weis Markets

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<sup>28</sup> See id. at 507.

<sup>29</sup> Id. at 508.

<sup>30</sup> See id.

<sup>31</sup> Id. at 509.

<sup>32</sup> Id.

<sup>33</sup> 391 U.S. 308 (1968).

and Logan Valley Plaza successfully petitioned a county court for an injunction against picketing upon their premises.<sup>35</sup> The injunction forced picketers to patrol around the berms and highway surrounding Logan Valley Plaza, where passing drivers probably would not see their signs, and Weis customers already inside the Plaza would definitely not see their signs.<sup>36</sup>

The Court found that the Logan Valley Plaza, private property, was “clearly the functional equivalent of the business district of Chickasaw involved in Marsh.”<sup>37</sup> The Court saw no need to require that Logan Valley Plaza be a business district within a full Marsh-style company town.<sup>38</sup> Thus, the state was prohibited from using its trespass laws from excluding “those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.”<sup>39</sup>

As it did in Marsh, the Court justified its new holding by referring to the realities of the time. It noted that the trend toward suburban living resulted in the abandonment of old business districts, the traditional, literal marketplace of ideas.<sup>40</sup> The suburban shopping centers were the new meeting places for the exchange of information.<sup>41</sup>

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<sup>34</sup> See id. at 311.

<sup>35</sup> See id. at 312.

<sup>36</sup> See id. at 320-21.

<sup>37</sup> Id. at 318.

<sup>38</sup> See id. at 319.

<sup>39</sup> Id. at 319-20.

<sup>40</sup> See id. at 324 (“The largescale movement of this country’s population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.” (citation omitted)).

<sup>41</sup> See id.

The Court stated that the public should have as great a right in a private suburban shopping center as it would have on a municipal business block to protest substandard working conditions, shoddy merchandise, or discriminatory hiring practices.<sup>42</sup> The Court left for another day the issue of whether speech unrelated to the business of a mall was protected on private mall property. The decision was controversial. Justice Black, who had authored the Marsh opinion, dissented, stating that he would limit the Marsh holding to “the very special situation of a company-owned town.”<sup>43</sup> In any event, Logan Valley provided the most far-reaching protection of First Amendment rights on private property.

### 3. Lloyd Corp. v. Tanner

In Lloyd Corp. v. Tanner,<sup>44</sup> the Court began its retreat from Logan Valley's broad holding. In this case, a group of Viet Nam War protestors distributed handbills within the Lloyd Center Mall.<sup>45</sup> Mall security guards asked the group to leave the mall to distribute their handbills outside on the public streets and sidewalks adjacent to the mall.<sup>46</sup> The group complied, to avoid arrest, then sued for and was granted declaratory and injunctive relief.<sup>47</sup>

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<sup>42</sup> See id. at 324-25.

<sup>43</sup> Id. at 331 (Black, J., dissenting).

<sup>44</sup> 407 U.S. 551 (1972).

<sup>45</sup> See id. at 556.

<sup>46</sup> See id.

<sup>47</sup> See id.

The United States Supreme Court reversed. In scaling back First Amendment rights on private property, the Court found factual distinctions between Lloyd Corp. and Logan Valley.<sup>48</sup> First, addressing the unanswered question of Logan Valley, the Court held that malls are open to the public so that the public may transact business with mall tenants, not so that the public may use the property as a forum for all manner of speech.<sup>49</sup> Second, unlike the highway surrounding Logan Valley Plaza, the sidewalks and streets surrounding Lloyd Center provided safe and effective alternative avenues of expression.<sup>50</sup> Thus, limiting the handbilling to those public places was a reasonable time, place, and manner restriction. In short, the Court held that a “privately owned and operated shopping center [is not dedicated] to public use as to entitle [the] exercise therein [of] asserted First Amendment rights.”<sup>51</sup>

As with Marsh and Logan Valley, the Court in Lloyd Corp. took into account the practical realities of the day. It noted that the company-owned town, once prevalent when Marsh was decided, had become an anachronism.<sup>52</sup> The company towns were a product of their times: “They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States, and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government.” Thus, because the factual basis for the Court’s precedents ceased to exist, so too did the need to extend

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<sup>48</sup> See id. at 561.

<sup>49</sup> See id. at 565.

<sup>50</sup> See id. at 567.

<sup>51</sup> Id. at 570.

<sup>52</sup> See id. at 558.

speech rights along precedential lines. With changing times came the changing scope of First Amendment rights on private property.

#### 4. *Hudgens v. Nat'l Labor Relations Bd.*

The Court pounded the last nail in the free speech coffin in *Hudgens v. Nat'l Labor Relations Bd.*<sup>53</sup> In this case, Butler Shoe Co. warehouse employees went on strike and decided to picket Butler's retail stores, including one located within the North DeKalb Shopping Center, owned by Hudgens.<sup>54</sup> The Court in *Hudgens* expressly overruled *Logan Valley*.<sup>55</sup> Moreover, the Court held that under *Lloyd Corp.*, the picketers had no First Amendment right to enter the private property of the mall to advertise their strike against Butler Shoe Co.<sup>56</sup> Thus, *Hudgens* rolled back First Amendment protection on private property to *Marsh*'s express holding: when a company-owned town that possesses all the attributes of a town, including a business district, invites the public in, it is the functional equivalent of a state actor, and it must extend First Amendment protections to speakers on its premises. As the Court's jurisprudence now stands, free speech rights on private property, such as in a CIC, are extremely limited.

#### 5. The limitations of the federal "functional equivalent" test

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<sup>53</sup> 424 U.S. 507 (1976).

<sup>54</sup> *See id.* at 509.

<sup>55</sup> *See id.* at 518.

<sup>56</sup> *See id.* at 520-21.

Under the Court’s current Marsh/Hudgens test, only a few CICs would qualify as state actors. Privately owned “new towns” such as Reston, Virginia;<sup>57</sup> Sun City, Arizona;<sup>58</sup> Columbia, Maryland;<sup>59</sup> Kentlands, Maryland; Celebration, Florida; Seaside, Florida; and Columbia, Missouri are all state actors. They possess all the attributes of a town, including business districts, and have invited the public to their property.<sup>60</sup> By contrast, the vast majority of CICs consist primarily of residential and recreational areas; that is, they do not possess all the attributes of a town, including a business district. Moreover, they are purely private property, in no way inviting the public upon their premises. As such, they are not state actors under Marsh/Hudgens.

But, as Marsh, Logan Valley, and even Lloyd Corp. recognized, the scope of First Amendment protections on private property expands and contracts in response to practical realities.<sup>61</sup> The CIC is a ubiquitous form of community life in modern times. Perhaps the Court, as it did in Marsh, would recognize the special threats to free speech imposed by this new social arrangement. Justice Marshall prophesied as much in his dissenting opinion in Lloyd Corp.:

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<sup>57</sup> See Siegel, supra note 1, at 479 (“Reston, an RCA in northern Virginia, is spread over 74,000 acres and has a population of over 35,000. It contains 12,500 residential units and over 500 businesses. It also has twenty-one churches, four shopping centers, eight public schools, and a sewage treatment plant. The streets and businesses are open to the general public.” (citations omitted)).

<sup>58</sup> Id. (“Sun City, an RCA in Arizona, has 46,000 residents and ten shopping centers, which are open to residents and nonresidents alike. The Sun City community association operates parks, libraries, and a fire department.” (citations omitted)).

<sup>59</sup> See Margaret Farrand Saxton, Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities, 51 U.C.L.A. L. REV. 1437, 1448 (2004) (“The affluent, 96,000-person MPC of Columbia, Maryland, built in the 1960s with private financing by the Rouse company, boasts shopping malls, restaurants, retail stores, industrial firms, an “Interfaith Center,” healthcare facilities, and schools.” (citations omitted)).

<sup>60</sup> Josh Mulligan, Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of PruneYard, 13 CORNELL J. L. & PUB. POL’Y, 533, 547, n.99 (2004).

<sup>61</sup> See supra notes 29, 40, 41, 52 and accompanying text.

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 . . . . When there are no effective means of communication, free speech is a mere shibboleth.<sup>62</sup>

What Justice Marshall predicted has come to pass. Moreover, as one commentator noted, the “Marsh ‘town’ paradigm no longer is consistent with prevailing patterns of community development [because of] zoning ordinances that separate commercial uses from residential uses.”<sup>63</sup> Thus, Marsh, as a precedent for free speech protection, has limited application to current communities. Retaining the Marsh/Hudgens precedent because of stare decisis is justified only if it fairly encompasses changed circumstances. Because it does not, Marsh/Hudgens “simply persists from blind imitation of the past,”<sup>64</sup> and it is time for the Court to re-envision its state action jurisprudence to take into account how CICs are changing the First Amendment landscape. As another Justice Marshall would remind us, “[W]e must never forget that it is a constitution we are expounding.”<sup>65</sup>

Lofty constitutional ideals aside, however, it is very unlikely that the High Court will begin the pendulum swing back towards recognizing CICs as state actors. After Hudgens, the United States Supreme Court retired from balancing freedom of speech and private property interests. Its last major decision on the issue, PruneYard Shopping Center v. Robins,<sup>66</sup> extended an invitation to state courts to interpret state constitutions in the negotiation between private

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<sup>62</sup> Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (Marshall, J., dissenting).

<sup>63</sup> See Siegal, supra note 1, at 480-81.

<sup>64</sup> Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).

<sup>65</sup> McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

<sup>66</sup> 447 U.S. 74 (1980).

property and free speech rights. The next Part of this paper explores PruneYard and subsequent state experimentation the protection of free speech on private property.

## B. State Protection of Free Speech in Common-Interest Communities

### 1. PruneYard Shopping Center v. Robins

In PruneYard, several high school students set up a table in the PruneYard Shopping Center's central courtyard, distributed pamphlets, and asked passersby to sign a petition opposing a United Nations resolution against Zionism.<sup>67</sup> Upon the request of a security guard, the high school students left PruneYard's premises.<sup>68</sup> The group then filed suit in state court to gain access to PruneYard.<sup>69</sup> The California Supreme Court eventually ruled in favor of the high school students, stating that they enjoyed greater protection of their right to speech under the California Constitution than under the Federal Constitution.<sup>70</sup>

The United States Supreme Court affirmed, holding that California may indeed grant greater speech protections under its constitution.<sup>71</sup> Further, the Court held that PruneYard suffered no taking of private property by virtue of the state's constitutional protection of the high school speakers' right to physically occupy the premises.<sup>72</sup> Lastly, the Court held that the state's

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<sup>67</sup> See id. at 77.

<sup>68</sup> See id.

<sup>69</sup> See id.

<sup>70</sup> See id. at 78.

<sup>71</sup> See id. at 82.

<sup>72</sup> See id. at 85.

protection of the high school speakers was not tantamount to forcing PruneYard to adopt such speech as its own, violating PruneYard's own First Amendment rights.<sup>73</sup> The Court left for the states the task of balancing free expression with private property rights after PruneYard.

California and New Jersey accepted PruneYard's invitation to formulate their own private property/free speech balance. As the next Part explains, these state experiments were initially successful in providing broad protection to speakers on private property. This protection, however, has recently been curtailed in both California and New Jersey. Thus, CICs are unlikely under either the federal or state constitutions to have their speech restrictions scrutinized by the courts.

## 2. The California experience

In Laguna Publishing Co. v. Golden Rain Foundation of Laguna,<sup>74</sup> California continued its state constitutional protection of speech on private property, extending PruneYard to gated communities. Article I, section 2 of the California Constitution states: "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."<sup>75</sup> In Laguna Publishing, the gated community of Rossmoor Leisure World<sup>76</sup> excluded an unsolicited give-away

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<sup>73</sup> See id. at 87.

<sup>74</sup> 131 Cal.App.3d 816 (1982).

<sup>75</sup> CAL. CONST. art I, § 2 (granting to individuals an affirmative right to free speech, rather than a limitation on government's power to abridge free speech as in the federal Constitution).

<sup>76</sup> See id. at 843, n. 10 ("Leisure World at the time material to this litigation had about 20,000 residents, its own system of roads and streets, its own security force, its own parks, its own recreation facilities, and a hybrid form of self-government which dealt with matters of internal maintenance, security, and operation of the eight square miles of the project.").

newspaper entitled Leisure World News-Post yet permitted another unsolicited give-away newspaper to be delivered to its residents.<sup>77</sup> The News-Post sued for money damages and an injunction against its exclusion from Leisure World.<sup>78</sup> The trial court denied the request for an injunction.<sup>79</sup> In reversing, the California appellate court held that, although Leisure World was not a company town for Marsh purposes,<sup>80</sup> if it chose to admit one speaker, it could not discriminatorily exclude another similar speaker.<sup>81</sup>

This conflict, though cloaked in the rhetoric of free speech and free press versus private property and privacy rights, was over access to Leisure World's residents for the purposes of generating advertising revenues for the competing papers.<sup>82</sup> Nevertheless, the court then handed down the following strongly worded pronouncement: "[T]he gated and walled community is a new phenomenon on the social scene, and . . . the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities. . . ."<sup>83</sup> Thus, speech rights in CICs received ironclad protection from California courts. Curiously absent in both Pruneyard and Laguna Publishing, however, was any discussion of whether private property owners constituted state actors for free speech purposes.

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<sup>77</sup> See id. at 820.

<sup>78</sup> See id. at 821.

<sup>79</sup> See id. at 825.

<sup>80</sup> See id. at 836 ("There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred.")

<sup>81</sup> See id. at 843.

<sup>82</sup> See id. at 847, n.14.

<sup>83</sup> Id. at 839.

Twenty years after PruneYard and Laguna Publishing, the California Supreme court clarified the scope of California state constitutional protection of speech in Golden Gateway Center v. Golden Gateway Tenants Ass’n.<sup>84</sup> In this case, the new manager of the Golden Gateway residential apartment complex revised a building rule to prohibit leafleting within the complex.<sup>85</sup> The Golden Gateway Center sued to enjoin the Golden Gateway Tenants Association from slipping its newsletter under residents’ doors.<sup>86</sup> The Tenants Association counterclaimed, asserting its free speech rights under the California Constitution.<sup>87</sup> Ultimately the California Supreme Court held that the Tenants Association had no constitutional right to distribute its newsletters to residents in the private complex.<sup>88</sup> Addressing the apparent absence of state action discussion in PruneYard and Laguna Publishing, the court expressly held that the California Constitution did in fact contain a state action requirement,<sup>89</sup> and that Golden Gateway was not a state actor.

The court noted that most states with comparable constitutional provisions require state action.<sup>90</sup> The rationale for requiring a state action limitation is twofold: first, the state action

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<sup>84</sup> 29 P.3d 797 (Cal. 2001).

<sup>85</sup> See id. at 800.

<sup>86</sup> See id.

<sup>87</sup> See id.

<sup>88</sup> See id. at 803.

<sup>89</sup> See id. The court found that the first clause of the constitutional provision makes no reference to state action, but that the second clause did. See id. In order to resolve this ambiguity, the court then turned to the history behind the amendment but found that it was passed without debate. See id. at 804. Because the amendment was drawn from the New York State Constitution, the court then looked to the history behind that amendment’s enactment and discovered that the New York framers intended the amendment to limit governmental, not private, action. See id. at 805.

<sup>90</sup> See id. at 808, n.9 (citing Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz.App. 1988); Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984); Cahill v. Cobb Place Assocs., 519 S.E.2d 449 (Ga. 1999); State v. Lacey, 465 N.W.2d 537 (Iowa 1991); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59 (Iowa 1994); People v. DeGuida, 604 N.E.2d 336 (Ill. 1992); Woodland. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 185); Minnesota v. Wicklund, 589 N.W.2d 793 (Minn. 1999); S.O.C., Inc. v. Mirage Casino-Hotel, 23 .3d

limitation preserves individual autonomy; and, second, it preserves separation of powers by preventing courts from imposing limits on private conduct more appropriately set by the legislature.<sup>91</sup> With Golden Gateway, California retreated from its liberal protection of speech rights in common-interest communities.

### 3. The New Jersey experience

New Jersey has also experimented with granting greater speech rights under its state constitution. Like the California Constitution, New Jersey's Constitution guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. . . ."<sup>92</sup> In an early case negotiating free speech and private property interests, *State v. Schmid*,<sup>93</sup> the New Jersey Supreme Court held that Princeton University had to accommodate the speech of a non-student member of the United States Labor Party.<sup>94</sup> In balancing private property and free speech rights, the court held that state action was not required under its constitution.<sup>95</sup> Rather, New Jersey has formulated the following test:

[T]he test to be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property

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243 (Nev. 2001); *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211 (N.Y. 1985); *Western Penna. Socialist Workers v. Conn. General Life Ins. Co.*, 515 A.2d 1331 (Penn. 1986); *Southcenter Joint Venture v. Nat'l Democratic Policy Com.*, 780 P.2d 1282 (Wash. 1989); *Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987).

<sup>91</sup> See id. at 808.

<sup>92</sup> N.J. CONST. art. 1, par. 6.

<sup>93</sup> 423 A.2d 615 (N.J. 1980).

<sup>94</sup> See id. at 633.

<sup>95</sup> See id. at 629.

reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally it's "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.<sup>96</sup>

The court held that Princeton's and Schmid's activities were not incompatible with Princeton's overall educational mission of fostering the free exchange of ideas.<sup>97</sup> Thus, Princeton's private property interests yielded to Schmid's right to free expression upon its premises.<sup>98</sup>

Schmid became applicable to CICs in *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*.<sup>99</sup> In this case, a private condominium association distributed the flyers of political candidates that it endorsed, provided absentee ballot applications, held registration drives, and telephoned condominium residents to encourage them to vote.<sup>100</sup> As a result of the condominium's political activity, candidates endorsed by the condominium association were disproportionately successful within the district in which the condominium was located.<sup>101</sup>

The condominium denied permission to an outside political group to enter the condominium to distribute flyers for its candidates.<sup>102</sup> Finding this to be a violation of the outside group's state constitutional rights, the court held that the condominium had dedicated its

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<sup>96</sup> Id. at 630.

<sup>97</sup> See id. at 631.

<sup>98</sup> See id.

<sup>99</sup> 688 A.2d 156 (N.J. Super. 1996).

<sup>100</sup> See id. at 157.

<sup>101</sup> See id. at 158.

<sup>102</sup> See id. at 157.

property to political campaigning during election times, a public use.<sup>103</sup> Further, it had become, “in essence a political ‘company town.’”<sup>104</sup> The court mandated that the condominium allow outside speakers equal access to its resident registered voters.<sup>105</sup>

Following Guttenberg, the New Jersey court scaled back state constitutional protection for outside speakers. In William G. Mulligan Foundation for the Control of First Aid Squadders & Roving Paramedics,<sup>106</sup> a community association refused to publish in its newsletter an outside group’s advertisement criticizing local paramedics.<sup>107</sup> Finding for the community association, the court stated that the newsletter “accepts advertising from local businesses, that invitation to the community does not constitute public use of the premises similar to that in which [its] courts have upheld the right of free speech on private property [and] the public is not permitted on any part of the defendants’ property.”<sup>108</sup>

After Mulligan, New Jersey’s protections of free speech on private property are unclear, as the scope of “public invitation” has been contradictorily defined. On one hand, if public invitation means physical invitation upon CIC premises, as Mulligan held, then most CICs, as purely private property, would be off-limits to outside speakers. If, on the other hand, public invitation is broader, encompassing the right of the public to speak to CIC residents under certain circumstances, such as during election time at Galaxy Towers, as Guttenberg held, then outside

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<sup>103</sup> See id. at 158.

<sup>104</sup> Id. at 159.

<sup>105</sup> See id.

<sup>106</sup> 711 A.2d 961 (N.J. 1998).

<sup>107</sup> See id. at 963.

<sup>108</sup> Id. at 966.

speakers still retain a vestige of free speech rights in CICs. In any event, New Jersey's once unequivocal, broad state protection of free speech on private property has been chipped away.

#### 4. Limitations of state constitutional protection of free speech in common-interest communities

States generally have not taken up the United States Supreme Court's invitation to grant greater protection of speech rights on private property. Those states that have, California and New Jersey, have recently cabined these protections. It is unlikely that state courts will interpret their constitutions to hold that CICs are state actors or that they must yield their private property rights in favor of free speech on their premises. Thus, for now, covenants restricting free speech are beyond the reach of the courts. Speakers will likely fair as poorly under another test of state action, the "judicial enforcement" test, explained in the next section.

#### C. The "Judicial Enforcement" Test: *Shelley v. Kraemer* and its Failure to Protect First Amendment Rights in Common-Interest Communities

In *Shelley v. Kraemer*,<sup>109</sup> the Court iterated another test of state action, the "judicial enforcement" test. In this case, the Shelley family, an African American family, bought a house with a deed containing a racially restrictive covenant.<sup>110</sup> Neighboring property owners who were parties to the racially restrictive covenant sued in state court to enjoin the Shelleys from taking possession of the property.<sup>111</sup> The issue the Court faced was whether a state court's enforcement

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<sup>109</sup> 334 U.S. 1 (1948).

<sup>110</sup> See id. at 4-5.

of private covenants amounted to state action under the Fourteenth Amendment.<sup>112</sup> The Court noted that “the restrictive covenants standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”<sup>113</sup> However, the purposes of the covenants could be secured only through judicial enforcement.<sup>114</sup> Hence, the Court held the following:

[T]hese are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the ground of race or color, the enjoyment of property rights on premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. . . . The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the law to other individuals.<sup>115</sup>

Thus, the Court invalidated the judgments of the state courts below.<sup>116</sup>

It would seem that Shelley's holding would extend to invalidate a covenant restricting free speech, a fundamental right equal in value to racial equality under the law. Indeed, one court has so held.<sup>117</sup> Most courts, however, limit Shelley's reach to racially restrictive covenants.<sup>118</sup> Thus, it is unlikely that judicial enforcement of covenants restricting speech

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<sup>111</sup> See id. at 6. This case also involved a similar racially restrictive covenant sought to be enforced against another African American couple, the Fergusons. See id. at 6-7.

<sup>112</sup> See id. at 13.

<sup>113</sup> Id.

<sup>114</sup> See id.

<sup>115</sup> Id. at 19-22.

<sup>116</sup> See id. at 23.

<sup>117</sup> See Gerber v. Longboat Harbour North Condominium, Inc., 757 F.Supp 1339 (M.D. Fla. 1991).

<sup>118</sup> See, e.g., Goldberg v. 400 East Ohio Condominium Ass'n, 12 F.Supp.2d 820 (N.D. Ill. 1998); Quail Creek Prop. Owners v. Hunter, 538 So.2d 1288 (Fla. 1989); Linn Valley Lakes Prop. Owners Ass'n v. Brockway,

constitutes state action in violation of the First Amendment, even though conditioning CIC life upon relinquishing the fundamental right to speak is clearly offensive to constitutional ideals.

#### IV. EMERGING POSSIBILITIES FOR PROTECTING SPEECH IN COMMON-INTEREST COMMUNITIES

Despite the aforementioned precedential obstacles, commentators, legislators, and courts have suggested and even enacted limitations on the power of CICs to restrict speech. These limitations include a CIC resident Bill of Rights, statutory protections of speech in CICs, and judicial invalidation of covenants that are unreasonable or against public policy. Courts could also reason within their existing analogy of CICs as “mini-governments” to demand that, in exchange for mandatory assessments from residents, CICs must refrain from abridging residents’ First Amendment rights. Each of these solutions is discussed in turn below.

##### A. The Common-Interest Community Bill of Rights

The most direct way for CICs to protect First Amendment rights is for them to undertake the commitment themselves. Susan French has proposed a Common-Interest Community Homeowner’s Bill of Rights, listing, among other rights, the following: “Speech: The rights of residents to display political signs and symbols of the kinds normally displayed in or outside residences located in single-family residential neighborhoods in their individually owned property shall not be abridged, except that the association may adopt reasonable time, place, and manner restrictions for the purpose of minimizing damage and disturbance to other owners and

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824 P.2d 948 (Kan. 1992); *Midlake on Big Boulder Lake Condominium Ass’n v. Cappuccio*, 673 A.2d 340 (Pa.Super. 1996); *Golden Gateway Center v. Golden Gateway Tenants Ass’n*, 29 P.3d 797 (Cal. 2001).

residents.”<sup>119</sup> Voluntary private agreements limiting the power of the CIC and affirming the rights of its members would go far in securing true consent of the privately governed.

## B. Legislative Protection

In the likely event that CICs choose not to undertake speech protection themselves, state legislatures can always pass statutes mandating such protection. For example, Arkansas law protects CIC residents’ right to display the American flag:

[N]o person, homeowners association, property owner’s association, or other private entity shall adopt any rule, regulation, or policy or shall enter into any agreement or protective covenant that prevents any person or private entity that would otherwise have the legal right to properly display a flag of the United States on private property from exercising that right.<sup>120</sup>

Perhaps states like Arkansas will expand statutory protection of speech rights within private communities to embrace other activities such as leafleting, petitioning, and posting political signs. States could, for example, follow Illinois’s lead in prohibiting condominium boards of managers from passing “any rule or regulation [that] may impair any rights guaranteed by the First Amendment to the Constitution of the United States or

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<sup>119</sup> Susan F. French, The Constitution of a Private Residential Government Should Include a Bill of Rights, 27 WAKE FOREST L. REV. 345, 351 (1992).

<sup>120</sup> ARK. CODE ANN. § 14-1-203 (Michie 2005); see also ARIZ. REV. STAT. § 33-1261 (2005); CAL. GOV’T CODE § 434.5(b)(1) (West 2005); COLO. REV. STAT. § 27-2-108.5 (2005); DEL. CODE ANN. tit. 25, § 2242 (2005); FLA. STAT. ANN. § 718.113 (West 2005); 765 ILL. COMP. STAT. ANN. 605/18.6(a) (West 2005); 805 ILL. COMP. STAT. ANN. 105/103.30 (West 2005); KY. REV. STAT. ANN. § 2.042 (Michie 2005); MD. CODE ANN. REAL PROP. § 14-128 (2005); MICH. COMP. LAWS ANN. § 559.156a (West 2005); NEV. REV. STAT. ANN. 116.31067 (Michie 2005); N.J. STAT. ANN. § 45:22A-48.1 (West 2005); OHIO REV. CODE ANN. § 5301.072 (West 2005); OHIO REV. CODE ANN. § 5311.191 (West 2005); S.C. CODE ANN. § 27-1-60 (Law. Co-op. 2005); WIS. STAT. ANN. § 703.105 (West 2005).

Section 4 of Article I of the Illinois Constitution. . . .”<sup>121</sup> Protection of free speech in CICs is an issue effectively addressed through the political process.

C. Judicial Non-Enforcement of Covenants That are Unreasonable as against Public Policy or that are Unresponsive to Community Needs

If the political process fails to yield up satisfactory protections for those impacted by CIC speech restrictions, courts should have a free hand in reshaping community life along constitutional lines. Courts are frequently called upon to interpret private covenants. Traditionally, courts have upheld covenants that are reasonable.<sup>122</sup> The Restatement would allow courts to probe beyond this deferential reasonableness review to invalidate a covenant that “unreasonably burdens a fundamental constitutional right,”<sup>123</sup> such as speech.<sup>124</sup>

The drafters of the Restatement recognized that constitutional claims will not lie against private actors, as most CICs are, but that the violation of constitutional rights contravenes public policy, thus justifying judicial invalidation of covenants abridging free speech.<sup>125</sup> The Restatement asserts that “[t]he question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, not of constitutional law.”<sup>126</sup> The court must weigh the competing interests of “freedom of contract, freedom to dispose of one’s

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<sup>121</sup> 765 ILL. COMP. STAT. ANN. 605/18.4(h) (West 2005).

<sup>122</sup> See, e.g., Riley v. Stoves, 526 P.2d 747 (Ariz.App. 1994).

<sup>123</sup> Restatement (Third) of Prop. (Servitudes) § 3.1.

<sup>124</sup> Id., cmt. h.

<sup>125</sup> Id.

<sup>126</sup> Id.

property, and protection of legitimate-expectation interests”<sup>127</sup> against freedom of speech. In so doing, the court may determine that a covenant proscribing speech “inhibits the exercise of rights that are important to the public good, like participation in political debate [and] public harm results that may justify the invalidation of the servitude.”<sup>128</sup> Thus, the following covenants would not withstand judicial review: covenants that restrict when residents may criticize their community association,<sup>129</sup> that prohibit political signs,<sup>130</sup> that prohibit displaying the American flag,<sup>131</sup> and that prohibit door-to-door solicitation by an outside citizens group.<sup>132</sup>

Some state courts, such as Florida’s, have already begun invalidating covenants as unreasonable if “they are . . . in violation of public policy, or . . . abrogate some fundamental constitutional rights.”<sup>133</sup> A New Jersey court has also found that a CIC may not prohibit door-to-door petitioning by outsiders, if the result is that the CIC renders itself “in effect . . . a political ‘isolation booth.’”<sup>134</sup> The Restatement properly recognizes that common-interest community life, notwithstanding its private character, is still subject to the give-and-take of the social contract.

In fact, some commentators and courts have analogized the community association to miniature governments. The community association, like a government, requires the ability to

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<sup>127</sup> Id., cmt. i.

<sup>128</sup> Id., cmt. h.

<sup>129</sup> Id., illus. 5.

<sup>130</sup> Id., illus. 7.

<sup>131</sup> Id., illus. 8.

<sup>132</sup> Id., illus. 18.

<sup>133</sup> *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 639-40 (Fla.App. 1981).

<sup>134</sup> *See State v. Kolcz*, 276 A.2d 595 (N.J. Super. 1971).

tax its residents in the form of assessments in order to provide for and maintain common infrastructure:

[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 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.<sup>135</sup>

Pennsylvania courts in particular have relied upon this analogy to further justify the community association's implied right to levy assessments from its residents.<sup>136</sup>

California courts have latched onto the analogy of the community association as mini-government in contexts other than implying the power to assess. As mini-governments, community associations are charged with balancing the needs of their members in cases involving design approval conflicts between neighbors,<sup>137</sup> openness of corporate practices versus

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<sup>135</sup> 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, 918 (1976).

<sup>136</sup> See, e.g., *Holiday Pocono Civic Ass'n., Inc. v. Benick*, 7 Pa. D & C 3d 378, 385 (Pa.Com.Pl. 1978). The court stated:

Privately developed residential communities such as Holiday Poconos are in many respects analogous to mini-governments and are totally dependent upon collection of such assessments in order to maintain and clear roads and provide other essential facilities and services, as well as recreational amenities which benefit all property owners in the development.

Id.

See also *Meadow Run and Mountain Lake Park Ass'n v. Berkel*, 598 A.2d 1024 (Pa. Super. 1991); *Spinnler Point Colony Ass'n., Inc. v. Nash*, 689 A.2d 1026 (Pa. Cmwlt. 1997); *Hess v. Barton Glen Club, Inc.*, 718 A.2d 908 (Pa. Cmwlt. 1998).

<sup>137</sup> See *Cohen v. Kite Hill Community Ass'n*, 142 Cal.Ap.3d 642 (Cal.App.3d.Dist. 1983) (holding that, in granting design approvals, the community association as a mini-government owes fiduciary duties to homeowners to balance the interests neighbors reasonably).

individual privacy,<sup>138</sup> as well as free speech. On the issue of free speech, in *Damon v. Ocean Hills Journalism Club*,<sup>139</sup> a former community association manager sued his community association newspaper, alleging defamation.<sup>140</sup> His suit was dismissed under the California anti-SLAPP (strategic lawsuit against public participation) statute, because the lower court found that Damon had brought the suit in order to chill the newspaper's First Amendment right to freedom of speech on a vital public issue: to wit, Damon's leadership.<sup>141</sup> The newspaper had published articles critical of Damon's management style and called for professional management of the community association.<sup>142</sup> The appellate court stated that debate about the Damon's abilities in the association newspaper constituted political speech about a public issue in a public forum.<sup>143</sup> The management of the community association, as a quasi-governmental entity,<sup>144</sup> was a question of vital public interest to its members.<sup>145</sup> Therefore, living in a CIC is akin to living in any municipality. Free speech is crucial to the CIC's ability to govern itself.

In short, a CIC may be treated as a mini-government for purposes of raising revenues from residents. Courts have also held that, as mini-governments, CICs have the power to negotiate among the competing interests of their residents, just as any true governmental body

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<sup>138</sup> *See* *Chantiles v. Lake Forest II Master Homeowner's Ass'n*, 37 Cal.App.4th 914 (Cal.App.4th Dist. 1995) (holding that the right of a past director of a community association to inspect the association's ballots electing him to his position had to be balanced against the other homeowners' privacy interests).

<sup>139</sup> 85 Cal.App.4th 468 (Cal.App.4th Dist. 2000).

<sup>140</sup> *See id.* at 473.

<sup>141</sup> *See id.* at 480.

<sup>142</sup> *See id.* at 472.

<sup>143</sup> *See id.* at 476.

<sup>144</sup> *See id.* at 475 (citing *Nahrstedt v. Lakeside Village Condominium Ass'n*, 8 Cal.4th 361, 374 (1994) ("As our Supreme Court has recognized, owners of planned development units 'comprise a little democratic subsociety . . . .").

<sup>145</sup> *See id.* at 480.

does. Perhaps it is time for courts to recognize a reciprocal right of residents to have their fundamental speech rights protected from “government” intrusion.

## V. CONCLUSION

As important as the right to free speech is in any community, public or private, there currently exists no sure way for speakers in and around CICs to have their First Amendment rights secured. It is unlikely that any court would hold that a CIC is the functional equivalent of a state actor for First Amendment purposes under either federal or state constitutions. It is also unlikely that state courts would tip the balance in favor of free speech rights over private property rights. Also unavailing to speakers in and around CICs is the judicial enforcement test. Judicial enforcement of covenants restricting the fundamental right of free speech would not be construed as state action on par with the judicial enforcement of racially restrictive covenants in Shelley.

Moreover, solutions to these problems are in their nascent stages. A CIC Bill of Rights would be the most effective private check on a CIC’s potential abuse of power, but whether CICs will choose to adopt it is unknown. State legislation protecting First Amendment rights in CICs would also be effective, assuming the political will exists. It may be that the courts are the most important defenders of First Amendment rights on private property. They have the power to invalidate covenants that are unreasonable as against public policy, or that are unresponsive to the practical realities of new community living under the rule of CICs. Regardless of the form that speech protection takes, the ubiquity of CICs, their impact on the social and political lives of

their residents, and the values of democracy and a free society dictate that First Amendment protections be preserved in the face of new challenges.

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