

2009

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Paul Boudreaux

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Boudreaux, Paul (2009) "Home, Rights, and Private Communities," *University of Florida Journal of Law & Public Policy*. Vol. 20: Iss. 3, Article 4.

Available at: <https://scholarship.law.ufl.edu/jlpp/vol20/iss3/4>

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HOMES, RIGHTS, AND PRIVATE COMMUNITIES

*Paul Boudreaux**

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I. INTRODUCTION

A sixty-six-year-old Florida man was jailed briefly in 2008 for failing to follow a court order to comply with the rules of his homeowners association, which required him to sod his lawn.¹ Due to a rise in his adjustable rate mortgage payment, he asserted that he could not afford to follow the landscaping requirements of the residential

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1. Erin Sullivan, *Man Jailed for Brown Lawn Gets Help from Neighbors*, ST. PETERSBURG TIMES, Oct. 13, 2008, <http://www.tampabay.com/news/humaninterest/article850257.ece>.

covenant.²

Not far from Prudente's lawn, a 24-year-old woman faced a fine of \$1,000 a month for placing a sign that said "Support Our Troops" on the front yard of her home.³ Although Kelley's husband was serving in Iraq, her residential community enforced a covenant that banned all signs on the residential properties.⁴

The question is whether these property owners have a "right" to contravene certain covenants of their homeowners association (HOA). Over the past few decades, the HOAs and their variants have transformed private home life in America by imposing, in effect, a layer of "private government" on their residents, complete with rules that, in many instances, go far beyond the laws of traditional public government.⁵ While HOA communities once were popular only with

2. *Id.*

3. Stephanie Hayes, 'Support Our Troops' Sign Stolen from Yard, ST. PETERSBURG TIMES, Apr. 28, 2006, <http://www.tampabay.com/SearchForwardServlet.do?articleId=300919>.

4. *Id.* One can find many stories about intrusive HOA covenants and rules. See, e.g., Paul Bannister, *Homeowner Horror Stories: Associations are Heaven or Hell* (a litany of stories, including that of a California man punished by his HOA for planting too many roses, and a Georgia family who was fined for placing a pink flamingo on their lawn), <http://www.bankrate.com/finance/real-estate/homeowner-horror-stories-associations-are-heaven-or-hell.aspx> (last visited July 28, 2009); KDVR News, *Loveland Couple Battling HOA Over Flag Display*, Feb. 4, 2009 (HOA's barring the display of an American flag on a pole, <http://www.kdvr.com/news/kdvr-hoa-flag-020409,0,7067108.story> (last visited Nov. 5, 2009); Alexia Elejade-Ruiz, *What's Next for Smokers?*, CHI. TRIB., Dec. 29, 2008 (discussing application of anti-smoking ordinances to the interiors of condos), available at <http://smokefreeillinois.org/media/Happy%20Banniversary.pdf>.

5. The issue is muddled at the outset by the confusion in terminology. There are many names for private residential communities in which each resident is bound by a series of covenants. Local governments often refer to the communities as "planned unit developments," which implies that the developer holds significant flexibility in land use within the development, regardless of traditional zoning laws. The American Law Institute's Restatement of Law refers to them as "common-interest communities," or CICs. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (1997). Accordingly, many academic commentators use the term CIC or the variant of common-interest development (CID). The chief organization of "residential associations," another frequently used term, is called the Community Associations Institute. See Community Associations Institute Homepage, www.caionline.org (last visited Nov. 5, 2009). Among residents themselves, the most common terms are "homeowners association" (with or without an apostrophe at the end of the first word, and sometimes without the plural) and "condominium association" or "condo association," depending on the type of housing. Of course, apartment resident and cooperative community owners also often have rules and community organizations. In order to follow the theme of this piece—which is practical, not theoretical—I use the term "HOA" throughout, because this is the term that most Americans use in reference to their communities and their rules. Although this term might technically exclude apartment organizations or communities with rules but no association, the term HOA is the most straightforward and distinctive term.

small segments of society—wealthy gated communities and housing for the elderly, for example—HOAs have become the most popular new form of private residential communities. In some regions during the housing boom of the early 2000s, more than half of all new housing construction was in communities in which residents were bound by a panoply of covenants.⁶ These rules, often called CC&Rs (“conditions, covenants, and restrictions”), regulate many aspects of private conduct, from the color of paint, to the size of backyard patios, to the number of permissible guests. HOAs are often governed through a voting system that harkens back to the property qualifications of the eighteenth century.⁷

The academic and legal worlds have debated vigorously whether the triumph of the HOA system is a favorable development for the United States. On one side, many commentators, citing the benefits of a free market, have welcomed the rise of HOA as a system of private ordering.⁸ Under this system, the argument goes, Americans who desire to live by a set of rules more detailed than those of the public government voluntarily choose to bind themselves and—most importantly of course—their neighbors. On the opposing side, other commentators warn that HOAs impose a stifling conformity on society. These critics argue that HOA rules may not be truly voluntary and may not reflect the true desires of their residents.⁹ In any event, their critique continues, many of these rules have the effect of excluding those who do not fit the socially conservative majority of the American populace.

Critics contend that scrutinizing courts should reign in HOA rules. Courts could hold that HOAs are “state actors” that are bound by federal and state constitutions; such a holding would grant residents individual rights, such as the right to place a sign in the front yard. For the most part, however, American courts have refrained from actively imposing substantive limits on HOA covenants. Even the most

6. See Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVT'L. L. 233, 235-40 (2006) (citing data, especially with regard to Sunbelt cities such as Las Vegas).

7. *Id.* at 260-61.

8. See, e.g., Robert Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1520 (1982) (referring to the “perfectly voluntary nature of membership in a homeowners association”); *id.* at 1523 (“[M]embership in a private organization is “wholly voluntary.”). For a fuller discussion of this analysis, see *infra* Part III.

9. See, e.g., Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for the “Nice,”* 37 URB. LAW. 335 (2005) [hereinafter, Franzese, *Nice*] (criticizing HOA suburbs as enforcing a code of “niceness”). For a fuller discussion of this critique, see *infra* Part III.

famously activist court systems have abjured from trying to impose many social justice ideals on HOAs.¹⁰

Interestingly, the most active forums for vindicating individual “rights” against HOA covenants have been state legislatures. Some states have outlawed HOA rules, for example, that prohibit pets or that require a green and lush lawn, thus conferring the right to have a water-conserving yard.¹¹ But these legislative acts have been largely hit-and-miss regulation by subject matter, perhaps in response to individual instances of seemingly unjust application of HOA rules. Legislatures have not adopted statutes that follow a coherent theory of individual rights.

It is also curious that there has been little academic commentary on state statutes concerning HOA covenants. This is explained in part by the natural perspective of academicians to scrutinize court-made law, which logically appears to be pure “law,” as opposed to legislative law, which seems more like mere “policy.” But this focus on court-made law, under which there is in effect no regulation of HOA covenants, creates a gap. Academicians have also commented, as is their wont, on whether HOA covenants fit models of economic efficiency or models of social justice.¹² There has been little commentary, however, on whether law should adopt a specific set of rules to restrain HOA covenants, under a model of individual rights in a realm of private contract.

This Article undertakes that task. As I argue herein, there are coherent arguments that HOA covenants are not fully voluntary; as a result, a law commanding that certain covenants are off limits might be justified. One might use a variety of approaches in crafting a “bill of rights” for HOA residents against certain covenants. This article applies a theory of personal integrity and liberty, using the federal constitutional rights and traditional property law as its guides.

Part II introduces the phenomenon of HOA covenants and their rise in regulating private American communities. Part III examines the academic commentary and explores the criticisms that help guide the creation of a set of rights. Part IV summarizes the current state of the law, in which courts and legislatures largely have refrained from

10. See, e.g., *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947 (N.J. Super. App. Div. 2006) (holding that HOA residents have a right to free expression under the state constitution, regardless of the CC&Rs), *rev'd*, 929 A.2d 1060 (N.J. 2007) (reversing the lower court and concluding that the contractual CC&Rs bound the residents).

11. See, e.g., CAL. CIVIL CODE § 1360.5 (2009) (right to one pet in an HOA); FLA. STAT. ANN. § 720.3075(4) (2009) (right to plant a water-tolerant lawn).

12. For a fuller discussion of these points, see *infra* Part III.

imposing substantive limits on HOA covenants. Part V draws lessons from the earlier parts to craft a model bill of rights for HOA residents.

II. THE RISE OF THE HOA COVENANT

As attested by the old saying “A man’s home is his castle,”¹³ the traditional legal conception of a residence owned in fee simple absolute¹⁴ was that a homeowner had the unfettered right to do with the property whatever the owner desired. A homeowner could freely build, tear down, use, or abuse his or her property. There were limitations, of course. For example, a property owner could not act so as to interfere unreasonably with another’s use or enjoyment of land—a tort concept that came to be known as the law of “nuisance.”¹⁵ Even before the modern regulatory age, governments from time to time imposed restrictions on land use to protect others’ property, such as restrictions against building houses with wood in London after the horrific fire of 1666.¹⁶ But homeowners rarely entered into contractual duties with their neighbors concerning the use of the land. Early real estate developers typically sold the unfettered fee simple absolutes to the homebuyer, at which point the developer left the scene.¹⁷ This notion of a homebuyer as the monarch of his land was especially strong in the Anglo-American tradition, in which the individual resident, even in cities, preferred to own a distinct and independent house,¹⁸ as opposed to an

13. The phrase is a traditional one in Anglo-American culture, extending back to old England. See The Phrase Finder, <http://www.phrases.org.uk/meanings/an-englishmans-home-is-his-castle.html> (last visited Nov. 5, 2009) (giving historical examples of the usage of the phrase).

14. See RESTATEMENT OF PROP.: FUTURE INTERESTS §§ 14-15 (defining the fee simple absolute as an estate of unlimited duration and not subject to a special limitation).

15. See, e.g., *Parks Hiway Enter. LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 666 (2000) (defining a nuisance as the substantial and unreasonable interference with the use or enjoyment of property); *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 133 (D. N.H. 1984) (same).

16. See, e.g., FRED P. BOSSELMAN ET AL., *THE TAKING ISSUE* 99-104 (1973) (discussing the history and limits of governmental regulations of private land).

17. When restrictions were imposed, they were more often in the form of the *defeasibility* of ownership, through which a violation would “defeat” the possessor’s ownership and transfer it to another. Because of the bluntness of this instrument, both sellers and buyers sought out less onerous ways of restricting land use.

18. See Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 595 n.115 (2008) (citing DONALD MACDONALD, *DEMOCRATIC ARCHITECTURE: PRACTICAL SOLUTIONS TO TODAY’S HOUSING CRISIS* 52 (1996)).

apartment¹⁹ or other unit in a multi-family housing complex.²⁰

With the industrial revolution, however, cities became busier and noisier, and homeowners, especially the wealthy, began to look for ways to create peace and sanctuary in their urban homes.²¹ Demand begat supply, and real estate developers realized that if they could offer homes with a guarantee that the neighborhood would remain pleasant and peaceful, then homes there could be sold for a premium. These guarantees came in the form of *covenants*—meaning legal promises—that applied to all homes in a community. One of the earliest developers to make such guarantees was Charles Tulk, who tried in the early nineteenth century to guarantee a pleasant residential neighborhood around London's Leicester Square.²² The English High Court of Chancery held in *Tulk v. Moxhay*²³ that, as a matter of equity, the covenants Tulk included in deeds to homeowners, including a covenant that the square be maintained as a park, both bound all future purchasers and were enforceable by injunctive relief.²⁴ Although Tulk's plan for

("[D]escribing several practical and psychological reasons for the societal preference for detached housing and stating that, 'for better or worse the image of the single-family home on its own land is a deeply rooted American tradition,' and '[i]n many cases [physical separation from other homes] was a decisive selling point'").

19. In contrast to English cities, most European cities in the modern era adopted the apartment building as the primary form of residential living. See MARC GIROUARD, *CITIES & PEOPLE* 151-80 (1980) (discussing the examples of Amsterdam and Paris). Unlike in England or the United States, where social classes were segregated by neighborhood geography, in nineteenth-century Paris they were often segregated vertically within the same building, with poorer classes having to climb the stairs to their more meager apartments. For a wonderful drawing of this phenomenon, see *France in the Age of Les Miserables*, http://www.mtholyoke.edu/courses/rschwartz/hist255-s01/mapping-paris/Paris_econ_space.html (last visited Nov. 5, 2009).

20. See, e.g., Nat'l Park Serv., *Chaco Culture: History and Culture*, <http://www.nps.gov/chcu/historyculture/index.htm> (last visited Nov. 5, 2009) (discussing the large housing blocks in the ancient native American Puebloan site of Chaco, in northeast New Mexico, which reached its peak around 1000 A.D.).

21. See GIROUARD, *supra* note 19, at 271-85 (discussing the rise of the affluent and segregated metropolitan neighborhood).

22. London was, and still is, full of small green squares, which in the nineteenth century were often privately owned. Similar covenant-bound residences around small squares were established at Gramercy Park in New York and in Louisburg Square in Boston. Both are still privately owned parks. See EVAN MCKENZIE, *PRIVATOPIA* 9 (1994).

23. 41 Eng. Rep. 1143 (Chanc. 1848).

24. Tulk sold homes around the square with various restrictions in the deeds, designed to ensure that the property remained residential (even wealthy urban homeowners in the nineteenth century were often shocked to see neighboring properties turned into factories and slaughterhouses) and that the park was maintained. *Id.* at 1148.

Leicester Square later succumbed to market forces for commercial development, this decision showed the potential power of covenants to maintain certain characteristics of the neighborhood and, just as important, to attract potential home purchasers.²⁵

The emergence of governmental “zoning” laws in the early twentieth century²⁶ ensured that factories would not be built next to mansions in many American cities. These land use laws both separated residences from industry and businesses, and the homes of the wealthy from the homes of the poor.²⁷ While governmental regulations offered a *minimum* level of comfort for homeowners, they did not, however, offer a *special* attraction to a particular neighborhood. Only covenants were likely to offer these effectively. Tulk had been able to enforce his covenants because he still owned a home on the square. But modern developers did not want to have to retain ownership of land themselves; rather, they wanted to move on to other locations. Thus arose the HOA, which is created by the developer as an organization authorized to enforce the covenants, and through a form of private republican government, create new rules as the need may arise.²⁸ This technique was given a critical green light by the influential New York Court of Appeals in 1936; in *Neponsit Property Owners’ Association v. Emigrant Industrial Savings Bank*, the court held that even affirmative covenants to pay fees to maintain common areas did indeed “touch or concern” the land, which was a traditional requirement for covenants to bind future owners.²⁹

After a man named Moxhay purchased one of the houses from an original purchaser, with knowledge of the original covenants, he asserted that he was not bound by the covenants because his deed did not contain them. *Id.*

25. In the twentieth century, Leicester Square became a center of London’s theatre and cinema district. For a history of the Leicester Square, see British History Online, *Leicester Square*, <http://www.british-history.ac.uk/report.aspx?compid=45144> (last visited Nov. 11, 2009). A successful and notable American example of a planned affluent urban neighborhood was the small but exclusive Audubon Place, built adjacent to St. Charles Avenue in uptown New Orleans in the 1890s. This was also one of the first “gated” communities; Audubon Place was and still is private street accessible only to the residents or their guests.

26. For a history of the development of zoning laws in the early twentieth century, leading to the famous decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) which upheld zoning as a constitutional exercise of the police power), see generally MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA* (2008).

27. For a wide-ranging discussion of the phenomenon of exclusionary zoning, see CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1998).

28. For a short but informative history of the rise of HOAs, see MCKENZIE, *supra* note 22, at 1-13.

29. *Neponsit Prop. Owners’ Assoc. v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y.

Neponsit and other decisions paved the way for a vigorous use of covenants in the creation of planned residential communities.³⁰ Developers were influenced by the utopian “Garden City” movement and by the invention of the automobile, which enabled citizens (only wealthy ones, at first, of course) to live in green and pleasant surroundings a distance from urban employment.³¹ Kansas City’s Country Club Plaza and Los Angeles’s Beverly Hills were notable examples.³² These new upscale developments offered the promise of social and physical separation from the perceived riff-raff of the urban environment.³³ For the other end of the housing market, the Great Depression encouraged greater respect for the concept of centralized “planning” to help less affluent Americans; the federal government briefly supported the construction of ideal new suburban towns for modest-income residents, such as Greenbelt, Maryland.³⁴ Unlike urban housing projects, Greenbelt was carefully designed to integrate various types of housing with schools, retail stores, lakes, curving streets, and much vegetation, so as to offer the joys of suburbia even for the working class.³⁵ After World War II, a more affluent America embraced the idea of organized bigness in the economy, from large automobiles, to parking-ringed shopping centers, to large new residential developments that fed the car and mall. The most famous of these postwar suburban developers was Abraham Levitt, who constructed mass-produced “Levittowns” of inexpensive suburban homes.³⁶

Although these developments opened the door to suburban homeownership for many families of modest incomes, they did not do so for all: it was common for developers to discourage racial

1938).

30. See, e.g., *Sanborn v. McLean*, 206 N.W. 496, 496-97 (1925) (holding that a property owner must be bound by the zoning in a common scheme); *Wehr v. Roland Park Co.*, 122 A. 363 (Md. 1923) (enforcing deed restrictions and fee assessment, even after purchase).

31. See MCKENZIE, *supra* note 22, at 9-13. For a discussion of the role of the car in the development of planned suburbs, see KENNETH JACKSON, *CRABGRASS FRONTIER* 171-84 (1985).

32. See JACKSON, *supra* note 31, at 177-78; Country Club Plaza, Art & History, <http://www.countryclubplaza.com/About-Us/History> (last visited Nov. 5, 2009).

33. For a discussion of the segregation of the wealthier classes from their poorer fellow citizens, see MCKENZIE, *supra* note 22, at 57, 72.

34. Greenbelt touts itself as the result of the federal government’s first venture into housing. See City of Greenbelt, About Greenbelt, http://www.greenbeltmd.gov/about_greenbelt/history.htm (last visited Nov. 5, 2009).

35. See JACKSON, *supra* note 31, at 195 (discussing the dead end of the 1930s Green Town Program).

36. See *id.* at 234-38 (discussing the rise of the Levittowns).

minorities from entering these all-white communities. One brutally effective method of doing so was through covenants. Although covenants against non-whites had existed in places such as Brookline, Massachusetts, as early as the 1890s,³⁷ early twentieth-century suburbanization encouraged developers to focus more diligently on enforcing segregation. In an oft-told story, the Federal Housing Administration's 1938 manual for underwriting the insurance of mortgage loans asserted that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."³⁸ The private sector needed no encouragement; racially restrictive covenants were common in new housing developments by the 1940s.³⁹

In *Shelley v. Kraemer*, the U.S. Supreme Court in 1949 held for the first time that a neighborhood covenant was unenforceable on public policy grounds.⁴⁰ The Shelleys, a black family, had purchased a house in a St. Louis neighborhood where most of the titles to the homes held covenants against selling to "people of the negro or Mongolian Race."⁴¹ The Court's conclusion that judicial enforcement of racially restrictive covenants would unconstitutionally involve the government in racial discrimination was a striking blow against racial discrimination per se; however, the court's conclusion was not an endorsement of the idea that courts should closely scrutinize residential covenants as a whole.⁴² In any event, most suburban developments in the 1950s and 1960s remained all or nearly all-white, through both subtle forms of discrimination—such as real estate agents' steering black families to certain neighborhoods—and the rise of HOAs, which often quietly worked to ensure that undesired families were kept out of the neighborhoods.⁴³ After the federal Fair Housing Act of 1968

37. MCKENZIE, *supra* note 22, at 35.

38. For a discussion of the infamous 1938 manual, see MCKENZIE, *supra* note 33, at 64-65.

39. An influential book that highlighted the plight of racial segregation after World War II was ROBERT WEAVER, *THE NEGRO GHETTO* (1948). See *id.* at 229 (discussing the promotion and appeal of segregated suburban neighborhoods). Weaver later was appointed by President Johnson in 1966 as the nation's first Secretary of Housing and Urban Development and the first black Cabinet member.

40. *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1949).

41. *Id.* at 4-5.

42. For a discussion of the deferential scrutiny of private residential covenants, see *infra* Part IV.

43. See MCKENZIE, *supra* note 22, at 72-76 (discussing history); see also Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent*

outlawed most forms of overt housing discrimination,⁴⁴ it may be asserted that discrimination in residential communities reflected that in the rest of America: it was unlawful but still covertly prevalent.⁴⁵

Although the 1950s witnessed a great move toward suburbanization, the 1970s experienced an even larger movement from the cities to outlying areas.⁴⁶ Despite predictions of the “revival of the city” in recent years, Americans have steadily moved out of central cities and away from small towns and farms to suburbs in the years since 1970.⁴⁷ While the total U.S. population increased about 50% from 1970 to 2006,⁴⁸ the suburban population rose by nearly 100%.⁴⁹ Much of this boom has been felt in communities with HOAs. It is estimated that, in 1970, about 2.1 million persons, or just about 1% of the population,⁵⁰ lived in one of about 10,000 HOAs.⁵¹ By 1990, the estimates indicated that 29.6 million HOA residents, or 8% of the U.S. population, lived in 130,000 HOAs.⁵² Under the 2008 estimate, the

Domain, 21 YALE L. & POL’Y REV. 1, 32-36 (2003) (giving a history of the government’s using the designation of “blight” to exclude poor persons and African Americans).

44. 42 U.S.C. §§ 3601-3619 (2006) (making housing discrimination unlawful).

45. For a more general assessment of racial segregation in the later twentieth century, and the conclusion that discrimination is still prevalent, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993).

46. The suburban percentage of the U.S. population rose from about 13% in 1940 to 37% in 1970 to 50% in 2000. *See* SUBURB READER 2 (Becky M. Nicolaides & Andrew Wiese eds., 2006) (citing census data). The figures are based on governmental boundaries; thus, a neighborhood of single-family houses in the outer reaches of a central city is considered “urban,” even though it may hold most of the attributes of a suburb. Many older central cities began to decline in population after 1950. *See* WORLD ALMANAC, POPULATION OF THE 100 LARGEST U.S. CITIES, 1850-2006, at 595 (2008) [hereinafter *WORLD ALMANAC, POPULATION OF THE 100 LARGEST U.S. CITIES*].

47. For example, 7 of the 10 largest cities in the United States in 1970 (the exceptions being the Sunbelt cities of Los Angeles, Houston, and Dallas) lost population in the 1970s, and most of these older cities have continued to lose population. *See id.* Some of the most notable examples are St. Louis, whose population fell from 856,796 in 1950 to 348,189 in 2000, and Cleveland, which plummeted from 914,808 to 478,403. *Id.*

48. *See* WORLD ALMANAC, POPULATION BY STATE, 2000-2006, U.S. POPULATION BY OFFICIAL CENSUS, 1790-2000, at 589, 593 (2008) [hereinafter *WORLD ALMANAC, POPULATION BY STATE*] (noting U.S. population increase from about 203 million in 1970 to 300 million in 2006).

49. The suburban population rose from 75 million in 1970 to 140 million in 2000. *See* SUBURB READER, *supra* note 46.

50. Community Associations Institute, Industry Data, www.caionline.org/info/research/Pages/default.aspx (last visited May 13, 2009). These numbers and those that follow in the text include HOAs, condo associations, cooperatives, and other organized residential communities.

51. *Id.*

52. *See* WORLD ALMANAC, POPULATION BY STATE, *supra* note 48, at 593 (noting total American population of 299 million in 2006).

number of HOA residents had reached 59.5 million persons in more than 300,000 HOAs⁵³—or nearly 16% of the total American population.⁵⁴

Why the boom in HOA living? In my view, the movement to HOAs mirrors the market choices of Americans for larger and more complex lifestyles. Just as Americans after 1980 traded in sedans for SUVs, exchanged insured passbook savings accounts for uninsured mutual funds and more exotic investments, gave up shopping at their local Woolworth's and other small stores for a drive to the exurban Wal-Marts and other megastores, many Americans began to demand more than simply a house as their residence.⁵⁵ With easy credit, fostered in part by government programs to boost homeownership rates and by low interest rates set by the Federal Reserve in a time of prosperity, many Americans demanded larger homes with more amenities.⁵⁶ Among these amenities was an HOA community, which often provided common recreation areas, pleasantly landscaped grounds, and a set of covenants that offered the promise of controlling neighbors and ensuring a more predictable and pleasant lifestyle.

The current estimate of one out of every six Americans in an HOA underestimates the significance of the phenomenon. In older metro areas, such as New York, Chicago, or New Orleans, the housing stock tends to be older, often built before 1970. There are, of course, few HOAs in older urban neighborhoods. In the rapidly growing metro areas of the South and West, however, HOAs have often become the norm. No city better exemplifies this phenomenon than Las Vegas, Nevada. With its repackaging from "sin city" to an "all-American" metro area after 1980, Las Vegas and its suburbs grew more quickly than any other large metro area in the nation after 1980.⁵⁷ Unlike cities such as Boston or San Francisco, its growth was not hemmed in by geographic barriers or hamstrung by restrictive zoning laws to hinder sprawl. Its lure of unregulated

53. Community Associations Institute, *supra* note 50.

54. See WORLD ALMANAC, POPULATION BY STATE, *supra* note 48, at 589 (noting total American population of 299 million in 2006).

55. For essays on the rise of suburbs, including many criticisms, see SUBURB READER, *supra* note 46.

56. For an interesting assessment of the modern housing experience, see Lee Ann Fennell, *Homeownership 2.0*, 102 NW. U.L.R. 1047 (2008).

57. Las Vegas's population rose nearly five-fold from 1970 to 2006, from 125,787, to 552,539, while its mega-suburb of Henderson blossomed over the same period from only 16,400 to more than 240,614. WORLD ALMANAC, POPULATION OF THE 100 LARGEST U.S. CITIES, *supra* note 46, at 595.

growth in a sunny climate, exciting atmosphere, and booming economy drew Americans by the SUV load.⁵⁸ Perhaps no other city in the nation better exemplifies the housing boom of the 1990s and early 2000s; Las Vegas became a center for subprime (meaning high interest rate) loans, complicated mortgage terms, and McMansions by the thousands, mostly for moderate income families, spreading across the flat south Nevada desert.⁵⁹ Most new residential construction during the housing boom was in HOA communities.⁶⁰

The market alone did not demand the dominance of the HOA; government also played an essential role. Money is, as with so many things, an explanation. As private developers became willing and able to handle infrastructure that traditionally was provided for by government—laying out streets, burying sewer lines, fixing street lights, and collecting garbage—local governments discovered that it was financially beneficial for them to require, in effect, that these expensive tasks be performed by the developer and the HOA. HOA communities have taken over many of the traditional roles of government—a “privatization” that has been criticized by many academic commentators⁶¹ but that has been welcomed both by developers, who are able to control the creation of infrastructure in their communities without having to wait for government, and by the government, which is freed from these tasks. The Las Vegas zoning code requires, for example, that subdivisions include a landscaping plan and that an HOA maintain this landscaping.⁶²

The dominance of the HOA in modern Las Vegas is mirrored elsewhere, especially in the burgeoning states of the Sunbelt, including Florida, Texas, and California, which are three of the

58. See generally EUGENE P. MOEHRING & MICHAEL S. GREEN, *LAS VEGAS: A CENTENNIAL HISTORY* (2005) (written at the peak of the boom).

59. See, e.g., Alexandra Berzon, *Subprime Clean Up: Sadness Overwhelms*, *LAS VEGAS SUN*, Feb. 20, 2008, available at <http://www.lasvegassun.com/news/2008/jan/30/subprime-clean-sadness-overwhelms/> (discussing the effect of the subprime mortgage boom and bust on Las Vegas).

60. See Chadderdon, *supra* note 6, at 237-38 (quoting Evan McKenzie, one of the nation’s leading scholars of HOAs, and his assessment that “Las Vegas [has] virtually mandate[d] that new development be done with homeowner associations”). Others have noted that the limitations in the housing market may hamper the voluntariness of the choice of an HOA. See, e.g., Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 *CORNELL L. REV.* 883, 900-02 (1988) (asserting the “coercive” nature of HOAs).

61. See, e.g., MCKENZIE, *supra* note 22, at 176-83; see generally Franzese, *Nice*, *supra* note 9 (criticizing HOA suburbs as enforcing a code of “niceness”); JACKSON, *supra* note 31 (a critical history of the suburbs, focusing on the aspects of its conformity).

62. See 18 *LAS VEGAS ZONING CODE* § 18.12.500 (2009).

nation's four most populous states. HOAs are also popular in new exurban developments across the nation, even in the older areas of the Northeast.⁶³ Although precise figures are difficult to ascertain, some have suggested that a majority of new residential construction in many of these regions is in homes bound by HOA covenants.⁶⁴ Accordingly, it appears to be true that in some places, homebuyers who seek—or are compelled, because of work—to live a suburban area find that most of their housing choices are in HOA covenant-bound communities. Interestingly, this empirical observation, which questions the assumption of complete voluntariness in the choice of an HOA, has received little attention in the academic commentary.⁶⁵

HOA covenants address an increasingly wide range of matters. The covenants in the experimental days of *Tulk* and *Neponsit* addressed only fundamental matters, such as assuring that the land remained residential and that payments be made to support the HOA and common areas. Today, however, sets of HOA covenants have grown increasingly complex and have intruded more deeply into the “castle” of the homeowner.⁶⁶ Because they are not, for the most part, limited by the constitutional restraints on the government, HOA covenants may extend far beyond what land use and zoning laws would compel.⁶⁷ It is true that traditional law of covenants requires that they “touch or concern” the land in order to run with the land—that is, to bind future homeowners.⁶⁸ But *Neponsit* and modern cases have interpreted this requirement broadly, and most HOA covenants

63. The most notable recent state court decision concerning the potential rights of HOA residents, for example, arose in *New Jersey Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Assoc.*, 890 A.2d 947 (N.J. Super. App. Div. 2006), *rev'd*, 929 A.2d 1060 (N.J. 2007).

64. See Chadderdon, *supra* note 6, at 237-38 (quoting Evan McKenzie, one of the nation's leading scholars of HOAs, and his assessment that “Las Vegas [has] virtually mandate[d] that new development be done with homeowner associations”).

65. Academic commentary is typically based on a model that assumes that a homebuyer has a wide range of housing choices. See, e.g., Ellickson, *supra* note 8, at 1522 (“[M]embership in a private organization is wholly voluntary”).

66. See examples cited *supra* notes 1-2.

67. For the most part, conduct of an HOA is not “state action” and the limitations on governments do not apply to HOAs, which are for considered privately created contractual communities. See, e.g., *Twin Rivers*, 929 A.2d at 1071-76 (reversing a lower court and concluding that an HOA is not bound in whole by a broad state constitutional right); Chadderdon, *supra* note 6, at 247-61 (discussing potential arguments that an HOA could be bound by rules limiting governments).

68. *Neponsit Prop. Owners' Assoc. v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 794-98 (N.Y. 1938).

today plainly do “touch or concern” the land.⁶⁹ Moreover, as explained herein, the American Law Institute’s Restatement of Property and state law have imposed some limitations.⁷⁰ But “on the ground” across the nation, HOA rules have spread to astonishing lengths.⁷¹

It is common for HOA covenants to restrict many varieties of conduct that might annoy neighbors or potentially decrease the neighbor’s property value. For example, HOA covenants might require that the houses be painted in muted colors, the grass be mowed to a certain height, pets not exceed a weight limit, and cars not be parked on the street as opposed to the driveway.⁷² As HOA governance has expanded, even more detailed intrusive covenants have been imposed. They regulate intricate details of lawn maintenance, such as trimming shrubs and limiting the ratio of tree coverage to grass coverage.⁷³ Beyond requiring that the house walls not be painted pink and purple, HOA covenants may regulate the color of window trim and indoor curtains.⁷⁴ Accessories such as doghouses and movable basketball hoops may be banished to the backyard, if they are permitted at all.⁷⁵

Covenants sometimes intrude even into the personal and expressive lives of the HOA residents themselves. Rules routinely prohibit the placement of signs, even political signs, from front yards.⁷⁶ HOAs have commanded that owners cannot park pickup

69. *Nepositt* held that a requirement to pay a fee to an HOA did indeed “touch or concern” the land because the fee helped maintain the communal areas of the community, increasing the values of all the residential properties. *Id.*

70. See *infra* Part IV for a discussion of state law and the Restatement.

71. The Restatement has proposed abandoning the “touch or concern” requirement. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (2000). In its place, the Restatement suggests a variety of restrictions on the breadth of HOA covenants. *Id.* § 6.7. Most states impose some variant of the requirement that covenants be “reasonable” in order to be enforced. See *infra* Part IV for a fuller discussion of this law.

72. See, e.g., Franzese, *Nice*, *supra* note 9, at 339-40 (discussing a variety of examples of intrusive HOA covenants and rules).

73. See Duane D. Stanford, *Covenants a Basis for Turf Battles*, ATLANTA J.-CONST., May 8, 2000, at 1A (discussing restrictions on landscaping).

74. See David L. Kirp, *Pleasantville*, N.Y. TIMES, Sept. 19, 1999, at 22, available at <http://www.nytimes.com/1999/09/19/books/pleasantville.html?pagewanted=1> (rules on interior design).

75. See Cara DeGette, *Playing Hardball*, COL. SPRINGS INDEP., Aug. 10, 2000, available at <http://www.csindy.com/gyrobase/Content?oid=oid%3A2035> (enforcement of rule against basketball hoop).

76. See Stephanie Hayes, *Under Public Eye, Sign Disappears*, ST. PETERSBURG TIMES, Apr. 29, 2006, at B3.

trucks overnight in private driveways.⁷⁷ In some places, magazines may not be piled up in the living room.⁷⁸ In condominiums and co-ops, some organizations have gone so far as to prohibit the wearing of flip-flops or kissing in the condominium elevator.⁷⁹

While HOA constitutions or declarations typically impose the majority of these regulations, they frequently also authorize the HOA board to adopt new rules as it sees fit—the parallel being to statutes adopted from time to time by a government legislature. These boards are composed of HOA residents, elected by the membership.⁸⁰ Unlike public government, however, votes on HOA regulations are sometimes not counted on the principle of one-person, one-vote, but according to the value of the resident's investment—a practice that harkens back to the eighteenth century practice of property qualifications for the voting franchise.⁸¹ Because they are not governments, HOAs are not bound by constitutional requirements of republican democracy.⁸²

Mechanisms for enforcement ensure that these covenants do not remain merely paper commands. HOA constitutions typically authorize the board to impose fines on violators, as well as to take self-help measures against offending practices. For residents who refuse to pay their fines, rules often allow the HOA to foreclose and seize the residence of the offender without having to seek judicial approval—thus giving HOAs greater powers than those that held by mortgage lenders.⁸³ While the character of HOA boards no doubt varies tremendously, some commentators have noted that boards

77. See *Pickup Trucks banned from parking in Driveway by Homeowners Association*, AUTOMOBILE MAG. (Aug. 19, 2008), <http://blogs.automobilemag.com/6287190/car-news/pickup-trucks-banned-from-parking-in-driveway-by-homeowners-association/index.html>.

78. See Kirp, *supra* note 74, at 22.

79. See N.R. Kleinfeld & Tracie Rozhon, *In Flat Market, Co-op Life Has Steep Ups and Downs*, N.Y. TIMES, Oct. 30, 1995, at A1, available at <http://www.nytimes.com/1995/10/30/nyregion/in-flat-market-co-op-life-has-steep-ups-and-downs.html> (no flip-flops).

80. See MCKENZIE, *supra* note 22, at 122-47 (discussing the typical governmental structures of HOAs); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 (2000) (setting standards for election of board as a representative government to make and enforce rules).

81. See MCKENZIE, *supra* note 22, at 128; Comm. For a Better Twin Rivers v. Twin Rivers, 890 A.2d 947, 949 (N.J. Super. App. Div. 2006) (upholding a rule that gave more voting rights to residents with a higher valued property).

82. See *Baker v. Carr*, 369 U.S. 186 (1962) (establishing the principle of one person, one vote); *Karcher v. Daggett*, 462 U.S. 725, 747 (1983) (imposing the one person, one vote principle on state government).

83. See Don Taylor, *Condo Dues Lapse May Prompt Foreclosure* (July 16, 2009), <http://www.bankrate.com/finance/mortgages/condo-dues-lapse-may-prompt-foreclosure.aspx> (noting that HOAs typically hold the right to foreclose for non-payment of fees and dues).

hold an unfortunate incentive to enforce rules without exception and without sensible discretion in order to avoid being sued for favoritism.⁸⁴ Thus HOA enforcement often differs from that of governmental laws, under which police and prosecutors realize that laws are often written broadly to cover conduct that, in particular instances and under particular circumstances, should not be penalized.⁸⁵ Other commentators have concluded that HOA boards, which are comprised of typical citizens, usually with little or no training in governance, often include a disproportionate number of “busybodies” who find no value in discretion and who may merely enjoy wielding power against others.⁸⁶

With these observations in mind, should law restrict HOA covenants or their application, and if so, under what circumstances? Should courts hold the powers to scrutinize the substance of rules or applications on a case-by-case basis? Would such judicial intervention interfere unproductively with the benefits of the private governance offered by HOAs? Part III examines how other academic commentators have approached these questions.

III. HOA COVENANTS: MARKET OR EXCLUSION OR BOTH?

The HOA covenant as a controlling feature in the lives of millions of Americans has drawn considerable attention from academic commentators. This is appropriate, because HOA rules form, after traffic ordinances, the most common day-to-day form of legal restriction on personal behavior in modern America. For the most part, however, the commentary has focused on competing theories of HOA rules, with little focus on the substantive details of covenants of what sorts of “rights,” if any, should be retained by HOA residents.

84. See Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362-69 (2005) (discussing the incentive to avoid discretion).

85. For example, it is unlikely a driver will be cited for traveling two miles an hour over the maximum speed limit on a freeway because police officers typically look for more serious offenses. A bedrock principle of federal administrative law is that government holds the power to decline to enforce a law in certain circumstances. The key case is *Heckler v. Chaney*, 470 U.S. 821 (1985) (Food and Drug Administration held the power to decline to investigate alleged abuses of drug usage in death penalty applications).

86. See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1429 (1994) (identifying the “busybody” phenomenon); see also WINSTON S. CHURCHILL, *THEIR FINEST HOUR* 15 (1949) (“Power, for the sake of lording it over fellow-creatures or adding to personal pomp, is rightly judged base.”).

The theory that HOA covenants are the product of a free market for contracts has, unsurprisingly, influenced a number of commentators. Under this line of thinking, people choose HOA communities because they prefer a residential environment in which their neighbors, and themselves, are constrained by rules, which on the whole makes everyone happier and more secure. Citizens choose an HOA if they want to ensure, for example, that their neighbors will not let the paint on their house peel or clutter their yards with political signs. For those who prefer not to be bound by such rules, the theory goes, they may avoid HOAs and may choose a more traditional neighborhood, in which they and their neighbors are free to act in any way that is permissible under governmental laws. This line of theory postulates that the option to choose an HOA maximizes the human happiness.⁸⁷

Many of these commentators are influenced by the ideas of Charles Tiebout, who in the 1950s asserted that people may “shop” for a system of laws just as they might shop for goods and services.⁸⁸ People who desire expansive local government—for example, schools with well-paid teachers, a good library, and a well-maintained park—can choose a town with these services, and probably high taxes as well. Others who do not use or care about these services can “vote with their feet” and chose another town, with a low level of services, but also lower taxes. One citizen may want to possess a handgun for home security; another may want to live in a community in which handguns are outlawed.⁸⁹ The market for laws is facilitated by the American system of federalism and devolution of authority to local governments, under which a citizen has a choice of localities and a variety of legal options.⁹⁰

In an early and influential piece, Professor Robert Ellickson considered HOAs “perfectly voluntary,” in a work that compared

87. This syllogism follows nineteenth century libertarianism, which held that freedom of choice maximized human happiness. See, e.g., John Stuart Mill, *On Liberty*, in *ON LIBERTY AND REPRESENTATIVE GOVERNMENT* (R. McCallum ed., 1946) (1859).

88. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956).

89. See *id.*; WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 39-71 (Harv. Univ. Press 2001).

90. This discussion does not mean that all writers who employ economic analysis conclude that HOA covenants are the happy result of voluntary contractual behavior. Lee Ann Fennell has suggested ways that HOA rules often do not mirror the desires of its members. See Lee Ann Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 848-84. Fennell's work is discussed in more detail *infra* Part III.

government land use laws with those addressing HOAs.⁹¹ Because the decision to be bound by HOAs covenants is voluntary, whereas being bound by governmental laws is not, Ellickson reasoned that courts should scrutinize HOA rules under a more exacting standard than that which applies to land use ordinances.⁹² He cited examples of a Jewish-orthodox-oriented community that wished to impose a requirement that men wear yarmulkes in common areas on holidays, and a community's banning of alcohol in the swimming area, as the sort of voluntary contractual obligations that should not be subject to tough judicial scrutiny.⁹³ Ellickson concluded that market forces will keep prospective residents away from HOAs with rules that they do not like, and that market forces will work to ameliorate potentially onerous rules of all types.⁹⁴

Ellickson asserted that the courts' use of the prevailing standard of "reasonableness" when reviewing HOA covenants is an "apparent invitation to Lochnerian activism."⁹⁵ Reasoning that HOA rules are closer to routine private contracts than they are to governmental laws, he concluded that courts should impose a special standard of "reasonableness": "So long as the rule at issue does not violate fundamental external norms that constrain the contracting process, the rule's validity should not be tested according to external values, for example, the precise package of values that would constrain a comparable action by a public organization."⁹⁶

91. Ellickson, *supra* note 8, at 1520 (referring to the "perfectly voluntary nature of membership in a homeowners association"); *id.* at 1523 ("membership in a private organization is wholly voluntary").

92. *Id.* at 1526-28 (discussing examples illustrating why courts should not scrutinize private contracts as thoroughly as governmental laws).

93. *Id.* at 1528-30 (discussing the examples of why courts should scrutinize private contracts more thoroughly than government laws).

94. *See id.* at 1524-25 (discussing the effect of discouraging unfair "redistributionist" rules, at least for ex ante rules in the master declaration).

95. The "reasonableness" standard is discussed *infra* Part IV. Ellickson referred to *Lochner v. New York*, 198 U.S. 45 (1909), which was the most famous—or infamous—example of judicial activism of the U.S. Supreme Court in the early twentieth century, at which time the court imposed a free-market philosophy to strike down a number of laws to regulate business—popular in the "progressive" era—with little basis in the text of the Constitution. Advocates of judicial restraint cite *Lochner* as a prime historical example of how courts interfere without authority on the workings of a republican form of government. *See, e.g.*, BERNARD H. SIEGEN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980).

96. Ellickson, *supra* note 8, at 1530. His most notable suggestion for legal reform was an idea to allow residents who object to a change in HOA rules to sue for a "taking" of property, correlating to the right to sue the governments under the Fifth Amendment of the U.S. Constitution. *Id.* at 1535-39. Gerald Frug called this idea "truly astonishing." Gerald E. Frug,

More recently, Professor Michael Heller characterized the boom in HOAs as an example of the benefits of what he called a “liberal commons”—a term used to refer to forms of property ownership in which private rights and public control are blended.⁹⁷ While public control of property can lead to an overuse of property—the famous “tragedy of the commons”—a world of completely private realms can lead to an underutilization of resources, which he called “the tragedy of the anticommons.”⁹⁸ A liberal commons allows for freedom of individual choice to an extent, but also creates some collective ownership in a way that is beneficial to the members of the limited commons. Thus, we have the phenomena of HOAs offering swimming pools and other amenities that are a mixture of both public property (they are not owned by any single individual and are shared by member persons) and private property (they may be used only by members of the community and are subject to community rules).⁹⁹ The explosion in the popularity of HOAs over the past few decades, Heller concluded, has been “a stunning example of the power of law in action—of getting a liberal commons form right.”¹⁰⁰

Not all economically oriented commentary, however, has led to the conclusion that HOA covenants are the happy result of consumer choice.¹⁰¹ For example, Professor Lee Ann Fennell has explained a number of reasons why HOA rules might not reflect personal

Cities and Homeowners Associations: A Reply, 130 U. PA. L. REV. 1589, 1592 (1982). See *infra* Part V for a discussion of how the constitutional taking right could be applied to HOA covenants.

97. Michael Heller, *Common Interest Developments at the Crossroads of Legal Theory*, 37 URB. LAW. 329, 332-34 (2005). Heller cites other examples as “corporations, partnerships, family property, trusts, and co-ownership.” *Id.* at 333.

98. *Id.* at 330.

99. See *id.* at 331-32 (discussing the swimming pool and other examples).

100. *Id.* at 333.

101. For another thoughtful assessment from an economically oriented perspective, see Gillette, *supra* note 86, at 1388-91. He gave credence to the Tieboutian argument that private HOAs allow for choice, thus permitting “birds of a feather to flock together.” See *id.* at 1388-89 (citing Tiebout); see also *id.* at 1380-81 (choosing the striking example of Amish or Orthodox Jews who wish to impose their unusual and restrictive lifestyles on their community with little harm to the outside world). But Gillette also recognized some of the problems in assuming that HOAs are wholly voluntary, including the problems of ignorance of rules by new residents, *id.* at 1406-07, and the spillover effects to other communities by one HOA’s exclusionary rules. *Id.* at 1432. Interestingly, another problem is that HOA boards tend to be populated by “busybodies” who enjoy making and enforcing rules against their neighbors for the enjoyment of it. *Id.* at 1429.

preference.¹⁰² As with many complicated contracts, the “bundling” of terms discourages non-repeat parties from paying much attention to less significant provisions.¹⁰³ Because HOAs are discouraged from breaking the mold and allowing conduct that typically is barred in other HOA communities—to do so would attract quirky personalities to the sole “maverick” HOA—even fairly widespread consumer aversion to restrictive rules may not be reflected in the “path dependent” market.¹⁰⁴

Perhaps most significantly, Fennell pointed out that, unlike public governments, HOA boards typically do not selectively enforce their rules.¹⁰⁵ Governments, however, have wide discretion in enforcing laws. As those who drive just a few miles per hour over the speed limit know, they are unlikely to be ticketed because traffic police have more serious matters to deal with. This selective enforcement makes sense in part because written rules are unlikely to capture all of the important factual nuances of a situation. Courts have consistently upheld the governmental discretion in enforcement and its non-reviewability before the courts.¹⁰⁶ HOA boards, however, do not hold this near-immunity from suit. Accordingly, HOA boards may enforce rules even in circumstances that might seem unfair to most observers—such as enforcing a lawn-watering requirement in an extreme drought, or enforcing a no “overnight-guests-for-longer-than-30-days” rule against a family who shelters a relative made homeless by a hurricane. Despite the telling holes that

102. See Fennell, *supra* note 90, at 848-82. An earlier and more traditional critique of voluntariness in HOA covenants was made by Alexander. Alexander, *supra* note 60, at 887. Covenants are the most common type of servitude—so called because one property owner is restricted, in order to “serve” the property or interests of another person. See *id.* at 883, 889. Alexander focused his attack on the law that permits covenants to burden the land in perpetuity as long as they are recorded, thus perpetuating a “dead hand” control of the land. *Id.* at 890-91, 899.

103. Fennell, *supra* note 90, at 873-81.

104. *Id.* at 864-70; see also Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 905-06 (1999) (discussing the issues of consent and dissent inherent in plans for private “urban neighborhood associations,” as proposed by Robert Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999)). As a skeptic of solutions that depend on greater citizen participation in democratic governmental affairs, I am skeptical of most “private government” solutions.

105. See Fennell, *supra* note 90, at 840-41 (discussing selective enforcement).

106. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (Food and Drug Administration held the power to decline to investigate alleged abuses of drug usage in death penalty applications).

Fennell poked in the free-contract model, however, she offered few concrete suggestions for changing the law.¹⁰⁷

On the other side of the theoretical fence are the critics of HOAs and their covenants. These critics tend to eschew the economic efficiency argument in favor of a communitarian perspective. They typically assert that HOAs and their covenants harm both the social fabric and their individual members. Professor Gerald Frug has rejected Ellickson's characterization of HOAs as "voluntary," albeit with little substantive rebuttal.¹⁰⁸ Frug disparaged Ellickson's suggestion that people are empowered to "shop for homeowners associations" and instead argued that courts should give HOA covenants the same scrutiny that they apply to governmental laws.¹⁰⁹ His policy recommendation urged an unspecified "enrichment" of the democratic process through decentralizing power between both HOAs and cities and their residents.¹¹⁰

Perhaps the most vigorous legal critic of HOA covenants in recent years has been Professor Paula Franzese.¹¹¹ She reasons that although HOAs may manifest a desire of modern Americans for the small-town community,¹¹² today's HOAs fail at this task. Criticizing the "privatization" of functions, such as regulation of land use, that used to be purely public, she asserts that HOA rules promote a "regimentation" of behavior that "do[es] more to destroy community than to build it."¹¹³ HOA covenants demand a "community of the nice"—with nice meaning a personality that "does not tend to inspire great originality, depth or tolerance. Nor does it allow much room for heterogeneity of a sort that might rock the nice boat."¹¹⁴

107. See Fennell, *supra* note 90, at 890 ("I have focused on pointing out problems, while saying very little about possible solutions.").

108. Frug asserted that Ellickson had made failed to make a "convincing distinction" between governmental laws and HOA rules. Frug, *supra* note 96, at 1589. It is unclear why he chose to place a burden of persuasion on Ellickson's side. Frug's chief empirical point is that the original covenants in an HOA are often created without direct input from any of the future residents. *Id.* at 1590.

109. See *id.* at 1591 ("I can see no difference at all—no legitimate public/private distinction at all—between cities and homeowners associations."); *id.* at 1601 (distinctions "do[] not much matter to me").

110. *Id.*

111. See generally Franzese, *Nice*, *supra* note 9; Paula A. Franzese, *Does it Take a Village?: Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002) [hereinafter Franzese, *Village*].

112. Franzese, *Village*, *supra* note 111, at 557-58, 571-72 (discussing the appeal of HOAs to those who long for old-fashioned community values).

113. *Id.* at 560.

114. Franzese, *Nice*, *supra* note 9, at 338. It is interesting to note that the Community

Rather, the mushrooming of HOA rules leads, in her view, to an “inherent distrust” of neighbor and neighbor, each of whom is constantly on the lookout for even a minor violation of some restrictive covenant.¹¹⁵ Such an outcome may not be surprising in a nation in which personal self-interest, not public spiritedness, seems to be a long-standing part of the national psyche, as first recognized by Alexis de Tocqueville in the early nineteenth century.¹¹⁶

Franzese does not trust that the housing market will act as a brake on abuse or an incentive to the liberal commons expostulated by Heller.¹¹⁷ She cites a widespread ignorance of rules by new residents and scoffs at the notion that the agreement to follow HOA rules is wholly voluntary.¹¹⁸ Rather, she concludes that the coercive pursuit of a community for the nice is inherently “exclusionary” against those who are less affluent and against those who live differently or who would “rock the boat.”¹¹⁹

The criticism of “privatization” has been echoed by Professor Sheryll Cashin, who asserts that the HOA phenomenon creates a “potential schism” between those inside and outside the community.¹²⁰ Using the gated HOA community as an example, Cashin criticizes a “fear of ‘other’” as the reason for those who live inside locked gates to try to engage in what she calls the “civic secession” of affluent HOA suburban residents from less affluent America, especially poorer, urban America.¹²¹ This secession results in HOA’s being “highly homogeneous by income and race,”¹²² although she does not cite statistics that HOA communities are more segregated than are more traditional affluent suburban communities.¹²³

Associations Institute, the organization that represents HOAs, places a photomontage on its web home page that prominently shows two non-white families. See Community Associations Institute Homepage, *supra* note 5.

115. Franzese, *Nice*, *supra* note 9, at 346; see also Franzese, *Village*, *supra* note 111, at 559.

116. Franzese, *Village*, *supra* note 111, at 570 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 525 (1839)).

117. See *id.* at 562-64.

118. See *id.* at 562-64, 582 (referring to the ignorance of HOA rules by new residents).

119. *Id.* at 560.

120. Sheryll D. Cashin, *Privatized Communities and the “Secession of the Successful”*: *Democracy and Fairness Beyond the Gate*, 28 *FORDHAM URB. L.J.* 1675, 1676-79 (2001).

121. *Id.* at 1681-82.

122. *Id.* at 1679, 1681.

123. See Gillette, *supra* note 86, at 1397-98 (“Established neighborhoods and even complete towns or cities (certainly suburbs) tend to sort by income or socioeconomic status, even without covenants.”). For an influential assessment of racial segregation in the United

Franzese asserts rather boldly—and opaquely—that the goal of a community should be the development of “trusting communit[y]” with “social capital” and “shared emotional connection.”¹²⁴ Here, her critique becomes as theoretical as the applause of the free market advocates. Despite the breadth of her criticism, Franzese’s policy recommendations for restrictions on HOA rules are rather mild. She recommends a patchwork of corrective measures, mandatory mediation for disputes, better disclosure forms, ethics training for HOA board members, and a sunset provision for covenants so that the rules favored by one generation must be reconsidered by the next.¹²⁵ While these process-oriented recommendations are each worthwhile on their own, they are unlikely to amount to a wholesale revolution in close-knit communities that she appears to espouse. Although she mentions a potential “bill of rights” for HOA residents, she was referring to a set of procedural rights, not a list of substantive rights that covenants cannot infringe.¹²⁶

IV. THE DEFERENTIAL LAW OF HOA COVENANTS

This part examines how American law has scrutinized the substance of HOA covenants. Most state courts have employed a “reasonableness” test. Despite the apparent appropriateness of such a standard, this test has failed in either of two possible goals. First, the availability of judicial review undermines the libertarian position that covenants should be treated just as any other private contract. Second, the deference that almost all courts have given to HOA covenants under the reasonableness test ignores the position that courts should block HOA rules that intrude on personal liberty. The result is a doctrine of judicial review that serves little purpose.

A. State Law Standards of Review of HOA Rules

The history of the jurisprudence concerning “real” covenants—that is, concerning land—is one of the most confusing and unsatisfying in all

States, with little attribution to HOA covenants, see generally MASSEY & DENTON, *supra* note 45.

124. See Franzese, *Village*, *supra* note 111, at 567-71, 585 (discussing these ideals).

125. See *id.* at 591-92; Franzese, *Nice*, *supra* note 9, at 347-52 (discussing recommendations for reform).

126. See Franzese, *Village*, *supra* note 111, at 582-83 n.206 (citing Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 346 (1992) (proposing a set of procedurally oriented rights)).

of Anglo-American law. A historical reason for the development of this cockeyed doctrine is the misfit between land and contract. Under traditional English law, with its emphasis on the stability of land ownership (which, before the modern age, was in effect equivalent to wealth), land passed from father to eldest son and so on, through the law of primogeniture.¹²⁷ If a landowner wished to restrict the use of land, he did so through forfeiture language in the deed—the “defeasibility,” “conditions subsequent,” and “determinability” that often restricted the property in perpetuity,¹²⁸ and that today linger largely to torment first-year law students.¹²⁹ These tools were unique to deeds of real property. In contrast to the long-term vision of land ownership were mere “contracts,” concerning goods and services, which typically were short-term transactions. Traditional English law, therefore, with its sharp divisions between “contract,” “tort,” and “property” law, contemplated a minor role for concepts of short-term contract law in the law of real property.

When modern developers sought to impose nontraditional, urban-oriented restrictions in deeds—such as covenants restricting the use of the land to residential purposes, without forfeiture as a penalty—English courts were hesitant to merge fully the doctrine of contract law into the ownership of land. Accordingly, these courts justified the new forms of deed restrictions by inventing a new term—the “equitable servitude,”¹³⁰ which for the most part was simply a covenant by another name—and by imposing limitations on the reach of these land-based covenants. Most significantly, the courts imposed the requirement that these covenants “touch or concern the land” before they could bind future landowners, even if these landowners were fully aware of the restrictions when purchasing the land.¹³¹ Next, courts held that they

127. See *Succession of Luaga*, 624 So. 2d 1156, 1181 (La. 1993) (discussing the traditional English rule).

128. These provisions, which created “determinability”—meaning termination—of land ownership, were not limited by the English Rule Against Perpetuities, which restricted only potential future terminations of ownership that sent the land to a third party, through an executory interest or conditional remainder. See, e.g., *Wash. State Grange v. Brandt*, 148 P.3d 1069, 1073-75 (2006) (discussing traditional principles of the Rule Against Perpetuities).

129. See *RESTATEMENT OF PROP.* §§ 44-48 (modern summaries of these restrictions).

130. See *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Chanc. 1848) (establishing that courts of equity will enforce real covenants by injunctive relief, even if such relief were not available in a traditional court of law).

131. The most notable modern case on the “touch or concern” requirement was *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*, which interpreted the requirement broadly, thus facilitating the modern housing development. *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 794-98 (N.Y. 1938) (holding that association fee

would not enforce real covenants that “violated public policy” or were “arbitrary.”¹³² The “public policy” limitation is familiar from contract law,¹³³ but the “arbitrary” limitation is not. Today, this word is most commonly employed by American courts in administrative law, under which governmental actions may be struck down if they are “arbitrary” or “capricious” under the federal Administrative Procedure Act.¹³⁴ Because few actions meet the dictionary meanings of these terms, courts have in effect reinterpreted them for the purpose of judicial review to mean “unreasonable,” in the sense of having no rational justification.¹³⁵

From this principle, courts and state legislatures have chosen to reinterpret the “arbitrary” standard as a “reasonableness” standard for reviewing HOA covenants, as explained herein. This is not necessarily a welcome development. First, the judicial review of governmental administrative actions under the reasonableness standard typically asks whether the government has articulated a cogent rationale for its policy choice in its administrative proceedings.¹³⁶ Such a requirement would not make sense for HOA covenants, which are created by developers and HOA boards, not governmental agencies; courts have not required such formal justifications from HOAs.¹³⁷ Rather, courts have in effect imposed a test of “reasonableness” that seems similar to the “rational basis” test for statutes under the U.S. Constitution’s “equal protection” requirement of the Fourteenth Amendment—that is, the rule survives scrutiny unless there is no conceivable rational justification, even if this conceivable justification was never articulated by the enacting body.¹³⁸

For a closer examination of how courts have applied the “reasonableness” standard to HOA covenants, let us examine the law of two large states, Florida and California. These two states, one on the

met the requirement).

132. For example, the Restatement says that a covenant may be set aside if it is “illegal or unconstitutional, or violates public policy.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000). Among other specific grounds for holding a servitude invalid are that it imposes an unreasonable restraint on alienation, an unreasonable restraint on competition, or is unconscionable. *Id.*

133. *See, e.g.,* Lucier v. Williams, 841 A.2d 907 (N.J. Super. App. Div. 2004) (contracts invalid when they violate public policy).

134. 5 U.S.C. § 706(2)(a) (2006).

135. *See, e.g.,* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) (under the APA’s arbitrary and capricious standard, 5 U.S.C. § 706(2)(a) (2006), a court must uphold any reasonable agency decision and cannot merely substitute its judgment for that of the agency).

136. *See id.*

137. *See* Heller v. Doe, 509 U.S. 312, 320 (1993).

138. *Id.* at 319-20 (conduct survives rational basis review if it is rational under any “reasonably conceivable state of facts”).

east coast and one on the west, have been key players in the development of HOA law, in large part because they have been the two most prominent focuses of the movement to the Sunbelt over the past half-century, which has dovetailed with the explosion of HOA communities. Both states have experienced a great demand for new construction of housing developments, mostly far from the old central cities, and both have experienced growing efforts to preserve unique environmental landscapes and wildlife habitat—most notably wetlands in Florida and deserts and dry hills in California.

Florida's two landmark pronouncements on the standard for reviewing HOA covenants both came in connection with the same development: Hidden Harbour Estates in Martin County. In a 1975 case, a homeowner challenged the condominium association rule against the "use of" or "consumption of" alcohol beverages in common areas.¹³⁹ The trial court imposed a burden on the association to justify its rules, holding that a rule "must have some reasonable relationship to the protection of life, property or the general welfare of the residents of the condominium in order for it to be valid and enforceable."¹⁴⁰ The Florida appellate court reversed, reasoning that

inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society [sic] of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.¹⁴¹

Because the rule was reasonable, the court upheld its application.¹⁴²

Six years later, the appellate court clarified the standard of review in another case involving Hidden Harbour Estates.¹⁴³ In this case, a homeowner had dug a well to access freshwater, in response to a

139. *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181 (Fla. Dist. Ct. App. 1975).

140. *Id.* (quoting the unpublished trial court opinion).

141. *Id.* at 181-82.

142. *Id.* at 182.

143. *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. Dist. Ct. App. 1981). The standards set forth in the 1981 Hidden Harbour Estates decision have been reiterated by many courts. *See, e.g.*, *Yankovski v. Keller*, No. 04-1813C, 2004 WL 2451293, at *2 (Mass. Super. Oct. 25, 2004).

community limitation on using communal water for lawn-watering.¹⁴⁴ The HOA had a rule that prohibited “temporary or permanent improvements or alterations” without board approval.¹⁴⁵ The board sued to enjoin the homeowner’s use of the well, arguing that individual wells might pull saltwater into the community’s freshwater supply, among other potential harms.¹⁴⁶ The court clarified that the standard of review was whether the rule was “reasonable,” noting the policy set forth in the previous *Hidden Harbour Estates* opinion about HOA residents’ voluntary choice to give up some freedom.¹⁴⁷

The court further distinguished between rules that are imposed in the HOA’s master declaration (and thus are available for all to see before buying a home) and those adopted by the HOA board later on, perhaps over the objections of some or many homeowners.¹⁴⁸ If the word “reasonable” were not already vague enough, the court split the term into two different applications (with an amusing attempt at precision, in my view).¹⁴⁹ For master declaration covenants, “the restrictions are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.”¹⁵⁰ In fact, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux.”¹⁵¹ The court did clarify when a rule might display “a certain level of unreasonableness,” and how a court is supposed to distinguish among a fully reasonable rule, one that is slightly unreasonable, and one that is entirely unreasonable.¹⁵²

For board-adopted rules, by contrast, reviewing judges should apply a true “reasonableness” test, in order to “somewhat fetter the discretion of the board of directors.”¹⁵³ Such a standard, the court explained, best assures that governing boards will “enact rules and make decisions that are reasonably related to the promotion of the health, happiness and

144. *Basso*, 393 So. 2d at 638.

145. *Id.*

146. *Id.*

147. *Id.* at 638-40.

148. *Id.* at 639-40.

149. *Id.*

150. *Id.* at 639.

151. *Id.* at 640.

152. *Id.* at 639-40.

153. *Id.* at 640.

peace of mind” of the project owners, considered collectively.¹⁵⁴ In fact, the appellate court concluded in this case that the board had not shown that its concerns—increased salinity, and so on—were borne out by the homeowner’s particular freshwater well.¹⁵⁵ Under such a standard of individualized determination, therefore, the association presumably would have to allow each homeowner to dig wells, until the point that the communal wells were spoiled by salt water.¹⁵⁶

California law did not clarify its standard of care until 1994, in the much-publicized case of *Nahrstedt v. Lakeside Village Condominium Association*.¹⁵⁷ There, the California Supreme Court applied a California statute (still extant) which states that HOA covenants in the master declaration are enforceable “unless unreasonable.”¹⁵⁸ The plaintiff, who had three cats—Boo Boo, Dockers, and Tulip—challenged her HOA covenant that barred pets, arguing that the cats stayed indoors, were well-behaved, and did not bother anyone; thus, she reasoned, it was unreasonable to apply the no-pet rule to her.¹⁵⁹ The California court cited approvingly Florida’s 1981 *Hidden Harbour Estates* decision, but then questioned the rationale, expressed by the Florida court, that each challenge should be judged by its own merits:

Refusing to enforce the CC&R’s contained in a recorded declaration, or enforcing them only after protracted litigation that would require justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development. It would frustrate owners who had purchased their units in reliance on the CC&R’s. It would put the owners and the homeowners association in the difficult and divisive position of deciding whether particular CC&R’s should be applied to a particular owner. Here, for example, deciding whether a particular animal is “confined to an owner’s unit and create[s] no noise, odor, or nuisance” is a fact-intensive determination that can only be made by examining in detail the behavior of the particular animal and the behavior of the particular owner. Homeowners associations are ill-equipped to make such investigations, and any decision they might make in a

154. *Id.*

155. *See id.*

156. *Id.* at 638-41.

157. 878 P.2d 1275 (1994).

158. *Id.* at 1278-1292; CAL. CIV. CODE § 1354 (1994).

159. *Nahrstedt*, 878 P.2d at 1277-78.

particular case could be divisive or subject to claims of partiality.¹⁶⁰

Rather, the California court reasoned, imposing a high burden on a homeowner under a “reasonableness” standard is better for the community as a whole:

When courts accord a presumption of validity to all such recorded use restrictions and measure them against deferential standards of equitable servitude law, it discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project’s recorded CC&R’s. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions.¹⁶¹

More recent California cases have reaffirmed *Nahrstedt*’s great deference to HOA covenants; in a recent case, the court upheld a no-pet rule even though it was adopted by the board after the master declaration.¹⁶² Such covenants should be approved unless they are “arbitrary” or “violate public policy,” the California court held.¹⁶³ Other courts have interpreted “reasonableness” with the language of deferential rational basis test.¹⁶⁴ In one case, rejecting a challenge to an HOA rule that required an “art jury” to pass on the plaintiff’s proposal to add a turret and other features to his house, the California court concluded that, to be “arbitrary,” a rule must “bear . . . no rational relationship to the protection, preservation, operation or purpose of the affected land.”¹⁶⁵

In sum, therefore, the state law of judicial review of HOA rules is one of great deference. This standard emphasizes the putative value of enforcing rules of private governments, entered into voluntarily by those who choose to join an HOA community. At the same time, the

160. *Id.* at 1288-89.

161. *Id.* at 1287-88.

162. *Villa DeLas Palmas Homeowners Ass’n v. Terifaj*, 90 P.3d 1223, 1224-25 (Cal. 2004).

163. *Id.* at 1224.

164. *Dolan-King v. Rancho Santa Fe Ass’n*, 97 Cal. Rptr. 2d 280 (App. 4th Dist. 2000).

165. *Id.* at 288 (citing *Nahrstedt*, 878 P.2d 1275 (1994)).

“reasonableness” standard does allow a homeowner to argue in court that a rule is “arbitrary,” “violates public policy,” or otherwise is “unreasonable,” perhaps on a case-by-case basis. These are all very amorphous exceptions—rarely wielded with much effect by homeowners—to the general rule that presumes validity.

As a result, we are left with an unsteady standard for review of HOA covenants. Free-market critics, such as Professor Richard Epstein, have criticized both the easy availability of judicial review and the traditional “touch and concern” requirement.¹⁶⁶ He saw HOA rules as simply a modern form of private contract, and argued forcefully that human affairs will run more smoothly and more efficiently if everyone knows and expects that private contracts will be enforced.¹⁶⁷ Even the opportunity for a resident to challenge a covenant in court will cost money and disrupt the expectations of other residents. Accordingly, he argued that covenants should be viewed as fully enforceable private contracts—in other words, with a powerful presumption of legality, and only a rare chance of being overturned.¹⁶⁸

Another criticism of the current common law is that none of the leading state court cases has suggested that homeowners do or should possess some fundamental rights of liberty that may override HOA rules. Nor have the cases relied on any of the economic or sociological arguments for suspecting that HOA rules might not accurately reflect the desires of a majority of the residents. For an expression of these concerns, we must look elsewhere.

B. Asserting Individual Rights: The Restatement and Other Critics

First, state legislatures have responded in piecemeal fashion to claims of unfairness or invasion of personal freedom asserted by aggrieved residents. For example, largely in response to the publicity surrounding *Nahrstedt*, the California legislature made it unlawful for HOA rules adopted after 2001 (too late to help *Nahrstedt*, Boo-Boo, Dockers, and Tulip!) to forbid a resident from keeping one pet.¹⁶⁹ California also enacted a provision that gives a homeowner a “right,” regardless of HOA rules, to display one small American flag outside the

166. See, e.g., Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 909-13 (1988) (criticizing arguments for not enforcing certain covenants against successors of original promisors and calling such as an “unmitigated disaster”).

167. *Id.* at 911-14.

168. *Id.* at 915-25.

169. CAL. CIV. CODE § 1360.5 (2002) (right to one pet, for HOAs adopted after 2001).

home.¹⁷⁰ In Florida, the state code has been amended to give a homeowner the right to have a “Florida-friendly” lawn of water-tolerant plants, instead of the green-grass-lawn requirements that are common in Florida but difficult to attain in the sandy, sun-baked soils that exist throughout much of the state.¹⁷¹ Other states have enacted statutory provisions that override HOA rules and give a grab bag of “rights” to residents.¹⁷² There is little consistency, rhyme, or reason to these statutory enactments, other than, perhaps, a response to applications that have captured the fancy of state legislators from time to time.

Next, the American Law Institute’s Restatement of Property has taken a somewhat tougher line on HOA covenants than have most state courts. The Restatement’s reporter for the division on Servitudes, Professor Susan French, has been critical of HOA rules, has asserted that HOA boards are often poorly educated as to their tasks, and often suffer from a desire to enforce every infraction, no matter how minor, which stands in contrast to the discretion employed by government.¹⁷³ A typical HOA “lacks the checks and balances that typically constrain cities from abusing their residents,” she has argued.¹⁷⁴

The current Restatement reflects French’s skepticism of the idea that the free market will result in a sensible set of rules that reflect the preferences of community residents.¹⁷⁵ The Restatement would require common-interest communities to “treat members fairly” and “act reasonably in the exercising of its discretionary powers of rulemaking,

170. *Id.* § 1353.5 (right to display a flag, but specifying the permissible materials for the flag). Many states have enacted rights to display a flag at HOAs. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1808 (2008) (right to display a U.S., state, POW/MIA, or American Indian nations flag); 805 ILL. COMP. STAT. 105/103.30 (2009) (American or military flag); 44 PA. CONS. STAT. § 48.1 (2009) (general right to display a flag at one’s residence, unless in violation of land use laws).

171. FLA. STAT. ANN. § 720.3075(4)(a) (2009).

172. *See, e.g.*, MD. CODE ANN., REAL PROP. § 2-119 (2009) (right to place solar panel on the roof, regardless of HOA rules); N.C. GEN. STAT. § 47C-3-121(2) (2009) (right to a “political sign”); WASH. REV. CODE ANN. § 64.38.034 (2009) (right to place political signs in an HOA yard before an election).

173. *See* Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362-69 (2005). Among other recommendations is that states should give greater administrative support to HOA board to make better decisions. *Id.* at 362, 368.

174. *Id.* at 365. Other commentators have suggested the process-oriented solution of requiring major disputes between HOAs and residents to be decided by an ombudsman. *See, e.g.*, Edward D. Hannaman, *Homeowner Association Problems and Solutions*, 5 RUTGERS J.L. & PUB. POL’Y 699 (2008). This solution would help factual disputes, of course, but would not directly affect the legal validity of intrusive covenants.

175. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000) (common-interest communities).

enforcement, and design-control powers,” although the burden would remain on challengers to the rules to prove that the association acted unlawfully.¹⁷⁶

The Restatement would constrain HOA covenants to those types of harms that resemble nuisances. Under the traditional common law doctrine of the tort of nuisance, a landowner can be restrained from engaging in conduct that “unreasonabl[y] interfere[s] with the use or enjoyment” of another person’s property.¹⁷⁷ Thus, a court can find a nuisance when a suburbanite plays music in the backyard all night long,¹⁷⁸ or an apartment building runs a very noisy industrial air conditioner close to a single-family house,¹⁷⁹ or a factory emits unusually smelly air pollution near a residential community.¹⁸⁰ In each case, a property owner whose enjoyment of property is significantly impaired may assert an actionable claim. Whether the annoying conduct rises to the level of a nuisance and whether relief is granted (injunctive relief is the traditional remedy, although money damages are an alternative¹⁸¹) is left to the discretion of the court. Nuisance is an extraordinarily “elastic” tort; courts often consider a wide range of circumstances in deciding whether the defendant’s conduct is “unreasonable” (annoying conduct is typically more excusable in rural areas, for example) and often balance the presumed benefit of the defendant’s conduct against the harm to the plaintiff in determining whether a remedy is warranted.¹⁸² A unifying principle, however, is that the defendant must show a “significant” injury; conduct that is merely mildly annoying does not constitute an actionable nuisance.¹⁸³ Significantly, the nuisance doctrine does not allow recovery simply

176. *Id.* § 6.13(1).

177. *See, e.g., Parks Hiway Enter. LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 666 (Ala. 2000) (defining a nuisance as the substantial and unreasonable interference with the use or enjoyment of property).

178. 66 C.J.S. *Nuisances* § 53 (2009) (“Noise may be a nuisance where it is of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibilities.”).

179. *See, e.g., Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217 (Tex. Civ. App. 1973) (loud apartment building air conditioner constituted an actionable nuisance).

180. *See, e.g., Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682 (1953) (pollution from oil refinery was an actionable nuisance).

181. *See, e.g., Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705-06 (Ariz. 1972) (en banc) (damages are a potential remedy when the injury is slight).

182. *See Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (discussing the balancing of equities between the desires of the plaintiff and defendant).

183. *E.g., Mable Cleary Trust v. Edward-Marlah Muzyl Trust*, 686 N.W.2d 770, 787 (Mich. App. 2004).

because a neighbor does not like or does not approve of what another resident is doing.¹⁸⁴

In line with this traditional law of nuisance, the Restatement would authorize a “common-interest community”¹⁸⁵ to “govern the use of individually-owned property to protect the common property.”¹⁸⁶ Moreover, a community would be authorized to “adopt reasonable rules designed to . . . protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property by use of other individually owned lots or units”¹⁸⁷ The power to restrict “the use or occupancy of, or behavior within” homes would be permitted only if the master declaration specially authorized such rules.¹⁸⁸

The effort to limit HOA rules to those that resemble the abatement of nuisances is apparent by the revealing examples provided by the ALI. The Restatement would authorize HOA rules that restricted noise from a communal pool after 10 p.m.,¹⁸⁹ required dogs to be kept on a leash in the community,¹⁹⁰ and prohibited garbage disposals that posed a threat to an antiquated communal plumbing system.¹⁹¹ Rules against more minor annoyances, however, would not be authorized. For example, an illustration states that a rule against parking in driveways overnight would not be permissible because “it is not reasonably necessary to protect the common property or to protect the other owners’ interests in reasonable use and enjoyment of their property or the common property.”¹⁹² A covenant that barred use of the pool to those over the age of 30 would not be allowed, even in a community where nearly all members are over 30, because it “discriminates against a minority” and “is not the only means to provide safety . . . and minimize spill-over effects of pool usage.”¹⁹³ Similarly, a rule against cohabitation by

184. See, e.g., *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006) (nuisance claims must be judged by a “normal-person,” or objective, standard).

185. The term “common-interest community” is defined as “a real-estate development or neighborhood in which individually owned lots or units are burdened by” restrictive covenants. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2(1). For purpose of this Article’s discussion, I use the narrower but more familiar term homeowners association (HOA) to be equivalent to the term “common-interest community” as used in the Restatement.

186. *Id.* § 6.7(1)(b).

187. *Id.* § 6.7(2)(a).

188. *Id.* § 6.7(3).

189. *Id.* § 6.7 cmt. c. illus. 1.

190. *Id.* § 6.7 cmt. c., illus. 4.

191. *Id.* § 6.7 cmt. d, illus. 7.

192. *Id.* § 6.7 cmt. e, illus. 11.

193. *Id.* § 6.7 cmt. c, illus. 2.

unmarried couples would not be permitted because such a rule does not affect other's "use and enjoyment of their property."¹⁹⁴

Most strikingly, the Restatement would frown upon rules governing aesthetics. Unless the power was specifically authorized by the master declaration, HOAs could not restrict "structures or landscaping" on lots, nor the "design, materials, colors, or plants" at each home.¹⁹⁵ An illustration suggests that an HOA could not adopt, without authorization in the declaration, a rule that required the exterior of houses to painted one of five specified colors.¹⁹⁶ Such a rule would be invalid, the Restatement opines, because it is "not reasonably necessary to prevent damage to the common property."¹⁹⁷

As may readily be seen, the Restatement would impose far tighter restrictions on HOA covenants than state courts typically have.¹⁹⁸ The Restatement plainly has been influenced by the law of nuisance, which mobilizes the machinery of tort relief only for significant and unreasonable interferences with property enjoyment. But this does not mean the Restatement approach makes sense as a matter of policy. First, the Restatement fails to address the argument that HOA rules may be more restrictive because they are the voluntary products of free contract and private democratic government; residents may choose an HOA precisely because they desire to limit their neighbors' conduct in a more intrusive manner than they could obtain through tort law. Moreover, the Restatement's illustrations appear to require an HOA to use the least-invasive means of achieving a goal.¹⁹⁹ While such a duty is imposed by constitutional law governing free speech,²⁰⁰ this duty is not clarified by the Restatement itself. Nonetheless, if the Restatement is not necessarily a model for reform of HOA law, it signals a path for further inquiry. This path is the idea that certain HOA covenants should be off limits when they interfere with fundamental *liberty rights* of residents, regardless of whether a majority of the HOA residents would like to restrict these rights.

194. *Id.* § 6.7 cmt. e, illus. 14.

195. *Id.* § 6.9.

196. *Id.* § 6.7 cmt. d, illus. 9.

197. *Id.*

198. *But see supra* text accompanying notes 214-19.

199. *See, e.g., supra* text accompanying notes 218-19 (appearing to impose a duty to choose a less intrusive means of achieving a goal).

200. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 798-99 (1989). Government may regulate the "time, place, or manner" of speech, but it must narrowly tailor the regulation to meet the government's interest. *Id.*

For a final word in this part on this advocacy of liberty rights, consider a case that in 2006²⁰¹ generated much commentary and briefly threatened to shake up the law of the HOA covenants.²⁰² In *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, a New Jersey appellate court employed the state constitution to stake out new ground for asserting a resident's "expressive rights" to trump HOA rules.²⁰³ The New Jersey constitution sets forth rights to "speak, write and publish," without necessarily limiting this right to governmental constraints.²⁰⁴ Dissident residents at the Twin Rivers community argued, among a host of claims, that the state constitution gave them the right to override their HOA rules concerning signs on lawns, restricting the use of public spaces in the community, giving the HOA board control over the local newsletter, and weighting voting rights based on the value of property.²⁰⁵

Setting aside the argument that joining the HOA was voluntary, the appellate court held that "any regulation of a fundamental right engages the public interest by definition, especially where the regulator is functionally equivalent to a governmental body in its impact upon the affected public."²⁰⁶ The HOA community resembled a town and was functionally equivalent to a government in many respects, the court concluded.²⁰⁷ Salient among the fundamental rights, it noted, is the right of free expression:

201. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowner's Ass'n*, 890 A. 2d 947 (N.J. Super. Ct. App. Div. 2006), *rev'd*, 929 A. 2d 1060 (N.J. 2007).

202. See, e.g., Mark Perkiss, *Dissident Homeowners Get a Voice*, NJ.COM, Feb. 8, 2006, http://swagman.typepad.com/poa_governance/files/nj_trentontimes60208_twinrivers.html; Paula Franzese & Margaret Bar-Akiva, *Homeowners Association Can't Bar Democracy*, STAR-LEDGER, Feb. 20, 2006, <http://hoanewsnetwork.com/articles/Homeowner%20boards%20can't%20exclude%20democracy.pdf> (commentary by critics of HOA rules).

203. *Twin Rivers*, 890 A.2d at 951.

204. N.J. CONST. art. 1, ¶ 6 (1947). More specifically, the New Jersey Constitution states that: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." *Id.* Although this provision echoes the U.S. Constitution's First Amendment's protection that "no law shall be passed to restrain or abridge the liberty of speech or the press," absence of a reference to the "government" in New Jersey's provision has led New Jersey courts to conclude that the provision is not limited to governmental restraints. *State v. Schmid*, 423 A.2d 615, 632-33 (N.J. 1980). The state language is "more sweeping in scope than the language of the First Amendment [of the U.S. Constitution]," and had been imposed to restrict even certain private property owners that open their land to the public. *Id.* at 626, 628-30 (reversing a conviction of trespassing against a man who had distributed political literature on the campus of Princeton University).

205. *Twin Rivers*, 890 A.2d at 951-52.

206. *Id.* at 963.

207. See also *id.* at 954 (referring to the testimony of HOA critic Evan McKenzie).

The supremacy of free speech is a significant element of the required balance [between private government and individual rights]. Freedom of speech ‘occupies a preferred position in our system of constitutionally-protected interests’ It follows that fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationships or have changed old ones. Expressive exercises, especially those bearing upon real and legitimate community issues, should not be silenced or subject to undue limitation because of change in residential [living] arrangements, such as where lifestyle issues are governed or administered by community associations in addition to being regulated by governmental entities.²⁰⁸

The appellate court remanded to the lower court, directing the lower court to apply state constitutional freedoms of expression to HOA residents against their covenants.²⁰⁹

Had the much-discussed appellate ruling in *Twin Rivers* stood, it might have signaled a turning point in judicial review of HOA rules, away from great deference and toward a more jaundiced and scrutinizing eye, at least in terms of free expression or other putatively fundamental rights.²¹⁰ In this sense, it might have been an echo of the famous rulings in the epic *Mt. Laurel* litigation of the 1970s and 1980s. In *Mt. Laurel*, the New Jersey courts used the state constitution to bring to the nation’s attention the problem of exclusionary zoning laws that mandated single-family housing and its harmful effects on the availability of low-cost housing, especially in the suburbs.²¹¹ These New Jersey holdings spurred many states and localities to scrutinize more closely their zoning laws and to address the problem of “affordable” and “workforce” housing.²¹² However, *Twin Rivers* did not

208. *Id.* at 959-60 (quoting *Schmid*, 423 A.2d at 615) (internal citation omitted).

209. *Id.* at 971.

210. *Id.*

211. See *S. Burlington County NAACP v. Mount Laurel Township*, 336 A.2d 713, 734 (N.J. 1975) (concluding that growing localities must change land use laws to allow for a “fair share” of low-cost housing), *later proceedings*, 456 A.2d 390, 441-42 (N.J. 1983) (imposing the additional step of requiring localities to take affirmative measures to ensure the construction of low-cost housing); see generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1998) (discussing the *Mt. Laurel* epic and its politics).

212. The New Jersey legislature responded to the *Mt. Laurel* requirement by enacting a Fair Housing Act to impose a “fair share” requirement, N.J. STAT. ANN. § 52:27D-302 (2006), through the state Council on Affordable Housing, *id.* § 52:27D-305 (2006). Other states followed with similar requirements, of varying strengths, to require localities to assess, and

repeat this incentive. A year after the appellate holding in *Twin Rivers*, the New Jersey Supreme Court reversed, focusing not on the importance of free expression, but on the fact that “the relationship between the [HOA] and the homeowners is a contractual one, formalized in reasonable covenants that appear in all the deeds.”²¹³ Although the state constitution imposes some restraint on actors beyond the government, the high court also noted that “[w]e do not interfere lightly with private property rights;” in this case, “in balancing plaintiffs’ expressional rights against the [HOA]’s private property interest, the Associations’ polices do not violate the free” expression rights.²¹⁴ Accordingly, *Twin Rivers* is not precedent for a bill of rights for HOA residents. But it serves as an inspiration into further inquiry as to whether homeowners should hold certain rights on which HOA covenants may not tread.

V. CREATING A BILL OF RIGHTS FOR HOA RESIDENTS

In this part, I endeavor to create a “bill of rights” for HOA residents that HOAs cannot infringe. Although others have attempted to delineate such a list of rights, for the most part these previous efforts have promoted procedural rights for residents—the right to receive notice of HOA board meetings, the right to speak at such meetings, and procedures for the elections of HOA boards.²¹⁵ While useful, these rights serve a radically different purpose than that served by many of the federal constitutional bill of rights. Procedural rights for HOA residents appear to be predicated on the assumption that the rules of an HOA are the worthy result of voluntary contract and private government, and that procedures alone may ensure that these rules are the reflection of HOA majoritarian democracy. By contrast, the substantive constitutional rights are counter-majoritarian. Many of the federal constitutional rights, particularly the first ten amendments, are substantive rights. They impose a set of subject-matter restrictions on governmental action—no infringement of free speech, freedom of religion, no search or seizure without probable cause, a qualified right to

provide for, low-cost housing needs. *See, e.g.*, 310 ILL. COMP. STAT. § 67/5 (2004); FLA. STAT. ANN. § 163.3177 (2009); MINN. STAT. § 473.859 (2009).

213. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1073 (N.J. 2007).

214. *Id.* at 1074.

215. *See, e.g.*, David A. Kahne, *A Bill of Rights for Homeowners in Associations* (sponsored by the American Association of Retired Persons), <http://www.ccfj.net/HOAbillintro.htm>. This “bill of rights” would grant rights that are largely procedural in nature. *Id.*

bear arms—regardless of the majoritarian desires of a republican government or of the people at any point in time.

It is beyond the scope of this work to justify a set of counter-majoritarian rights; however, among the reasons for such rights are the avoidance of laws enacted by temporary majorities, the protection against emotionally driven majority rules, and, perhaps most significantly, a recognition of fundamental human liberties that government may not violate.²¹⁶ If one accepts any or all of these reasons for a set of rights against the rules of public government, one might well accept that some, if not all, of these rationales apply to HOA covenants created by private governments. One crucial difference is that the decision to be bound by HOA rules is somewhat voluntary. Even if one accepts the criticism that limited geography and imperfect information make the choice of an HOA community not wholly voluntary, however, the choice is undoubtedly more voluntary than, say, the choice of living under the laws of the United States of America.²¹⁷ On the other side are the economic and behavioral arguments, raised by Fennell, Franzese, French, and others, that cast doubt on the efficiency of HOA covenants to reflect accurately and fairly the full range of desires of their residents.²¹⁸ Such potential inefficiencies may serve as a further justification for the assertion of individual rights.

In any event, the HOA bill of rights created here is shaped by a number of principles that this Article has already identified. First is the traditional tort law of nuisance. For centuries, nuisance law has distinguished between, on the one hand, conduct that significantly harms others across property boundaries and is unreasonable under the circumstances—an actionable nuisance—and, on the other hand, those

216. The literature on the philosophy of rights is extensive. Perhaps one of the most notable works is RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), in which Dworkin contends that rights do and should exist superior to the desires of the majority.

217. Persons born in the United States are automatically bound by its laws with no “choice” involved. It is a great stretch to say that a citizen who refrains from immigrating to another country as an adult has voluntarily “chosen” to be bound by American law, as opposed to German law or Thai law (or, perhaps, in the twenty-second century, Martian law?). The Tieboutian model of the ability to “shop for government” far stretches beyond the breaking point. There traditionally has been a freer choice in residences, in that even young adults who have been reared in an HOA community have had the choice, when they are emancipated, to live elsewhere. In a region where HOAs are the dominant form of residence, however, the notion that a person has “chosen” an HOA may make as little sense as saying a young native-born American has “chosen” to be bound by American federal law.

218. For a discussion of the academic criticism of HOA covenants and the debate over whether they are indeed wholly voluntary contracts that reflect the desires of the majority, see *supra* Part III.

more minor cross-boundary annoyances that either are too small to justify legal relief or are justified by the benefit created by the offending conduct. To the extent that a category of conduct resembles a nuisance, the greater the justification for approving HOA rules that target such conduct; to the extent that the conduct resembles minor annoyances for which the common law would offer no relief, the relatively stronger the argument for protecting such conduct under a system of rights.

Second, the HOA bill of rights is informed by the critique of scholars such as Fennell, Franzese, and French, who have suggested structural, economic, and social reasons why HOA rules sometimes do not reflect either the true desires of the residents or may impose unwise policy.²¹⁹ To the extent that a category of HOA covenants implicates these critiques, the stronger the argument for allowing contravention by an HOA bill of rights.

Finally, the bill of rights is shaped by the recognition, as stated in the ill-starred *Twin Rivers* decision and elsewhere, that privileges of free expression hold a special and prominent place among the panoply of rights. The U.S. Supreme Court has often asserted that free speech and related rights are the “most important” of the constitutional rights.²²⁰ There may be many reasons for this conclusion. Speech, assembly, and religion are protected by the First Amendment, which gives them prominence.²²¹ Moreover, these expressions of human feelings appear to be personal, and inherent in the concept of rights is a tolerance of other’s opinions; as a category, these rights are perhaps less likely to interfere with another’s rights.²²² Finally, issues of speech, expression,

219. See *supra* Part III.

220. See, e.g., *Federal Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 503 (2007) (Alito, J., concurring) (“It is perhaps our most important constitutional task to assure freedom of political speech.”); *Brown v. Glines*, 444 U.S. 348, 368 (1980) (Brennan, J., dissenting) (“Even the most important governmental purpose cannot justify a regulation that unduly burdens First Amendment liberties”).

221. The founders did not intend, however, for this to be the “first” amendment in the sequence. As originally drafted, the first two amendments addressed the apportionment of representatives in Congress and limitations on Congress’s raising its own pay (eventually ratified in 1992 as the 27th amendment). These two amendments were not ratified by the states in the 1790s, leaving the amendment concerning free speech and other freedoms in the “first” position. See Library of Congress, *Bill of Rights*, <http://www.loc.gov/rr/program/bib/ourdocs/billofrights.html>. It is interesting to speculate whether the American law of individual rights might have been shaped differently had these rights been “third amendment” rights.

222. Dean Harry Wellington wrote: “Intuition at first may suggest that an individual ought to have more freedom to speak than he has liberty in other areas. There would seem to be some truth in the adage, ‘sticks and stones can break my bones, but words will never hurt me.’” Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106-07 (1979). But he added: “Yet

and religion seem close to the core of the human psyche, which gives them special resonance in the realm of human dignity.

A bill of rights for HOA residents is created here by examining, *seriatim*, each of the relevant amendments in the U.S. Constitution's Bill of Rights. It is conceded that my suggestions as to a set of rights are informed by personal opinion, as well as precedent and logic. The point of this discussion is not to create an immutable and non-amendable tablet of rights, but perhaps to spark a discussion of what rights should, or should not, trump HOA covenants, through an enactment of state legislatures.

A. *Freedom of Speech and Expression*

Federal courts have made clear that the First Amendment's right of free speech is zealously guarded, even to include conduct that criticizes judges and other governmental officials,²²³ advocates general lawlessness,²²⁴ offers false information,²²⁵ and constitutes speech that would offend an average person.²²⁶ Even non-verbal conduct that expresses political views, such as burning an American flag, is protected.²²⁷

Less protected is commercial speech²²⁸ or speech that is sexually obscene.²²⁹ Moreover, government may regulate in a manner that is

speech often hurts. It can offend, injure reputation, fan prejudice or passion, and ignite the world." *Id.* John Stuart Mill espoused the classic libertarian argument that government should intervene only when conduct hurts another. John Stuart Mill, *On Liberty*, in *ON LIBERTY AND REPRESENTATIVE GOVERNMENT* 145-401 (R. McCallum ed. 1946) (1859).

223. See, e.g., *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt conviction of newspaper writers for criticizing judge's opinion).

224. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing convictions of Ku Klux Klan members who vaguely advocated unlawful activity, and holding that penalties on speech are allowed only when "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

225. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (a claim for libel brought by a public official cannot succeed unless the public figure shows "actual malice" in the speech, in order not to avoid "chilling" of speech).

226. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of antiwar activist who wore in a courthouse a jacket bearing the words "Fuck the Draft"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing conviction of speaker who played a phonograph record in public that attacked Roman Catholics); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (holding unconstitutional a city ordinance designed to prevent American Nazis from holding a march in the heavily Jewish city of Skokie, Ill.), *request for stay denied*, 436 U.S. 953 (1978).

227. *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

228. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (granting commercial speech to some but not full first amendment protection); Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114-51

“content-neutral,” that is, the regulation does not target the content of the speech but instead regulates the time, place, and manner of the speech. If the regulation is content-neutral, it must be supported by a legitimate government interest.²³⁰ Thus, a law may prevent a sound truck from broadcasting loud noises, even about political matters, in the middle of the night,²³¹ but may not prohibit people from ringing doorbells during the day to distribute political literature.²³² Although the government may exclude free speech conduct on public land in certain circumstances,²³³ it must be very tolerant of free speech and expression in places generally open to the public, such as sidewalks, streets, and public parks.²³⁴

Less common are lawsuits asserting free speech claims against private property owners because the First Amendment generally bars only government, not private conduct.²³⁵ In an unusual but much-discussed opinion, the U.S. Supreme Court held in *Marsh v. Alabama* in 1946 that constitutional protections such as free speech applied in a “company town.”²³⁶ The rationale was, in effect, that if a private company acts like a town, then persons within the town must hold rights against the company just as if it were a town government. If this simplistic rationale were applied to HOAs, it would end our analysis.

(1981) (discussing and scrutinizing the distinction).

229. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (“[O]bscene material is unprotected by the First Amendment.”).

230. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (emphasizing the practical reasons for regulating speech in a content-neutral manner).

231. *Kovacs v. Cooper*, 336 U.S. 77, 82-83 (1949).

232. *Martin v. City of Struthers*, Ohio 319 U.S. 141, 143 (1943).

233. See, e.g., *Adderly v. Florida*, 385 U.S. 39 (1966) (government can criminalize marching when it blocks access to a government building); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1983) (upholding law against sleeping on the National Mall in Washington, even by a protesting group).

234. *United States v. Grace*, 461 U.S. 171, 177 (1983) (invalidating a federal law that limited displays on the sidewalks in front of the U.S. Supreme Court building because it was not “narrowly tailored” to allow as much speech as practicable); *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (holding invalid a city law that prohibited distribution of leaflets on the public streets).

235. The First Amendment refers only to a “law” by “Congress.” U.S. CONST. amend. I. But the rights have imposed on state governments through the incorporation doctrine, via the Fourteenth Amendment’s Due Process clause. See *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (concluding that some of the bill of rights applies to the states because to deny them would violate “due process”); see generally Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

236. *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946). The town, Chickasaw, AL (outside Mobile) was owned and run by the Gulf Shipbuilding Co. *Id.* at 502-04. The plaintiff distributed Jehovah’s Witness materials on sidewalks of the town until her arrest. *Id.* at 503-04.

Indeed, some discussions of HOA rules begin with the hope of *Marsh*, as a straightforward way of “incorporating” constitutional rights against HOAs.²³⁷ But *Marsh* is far too blunt a tool. It was a unique holding explained in part by the times (immediately after World War II), by the undercurrent of the exploitative nature of company towns, the fact that the town was freely open to the public, and the disturbing fact that the plaintiff, who did not work for the company, was peacefully distributing religious literature until she was arrested and prosecuted for trespassing.²³⁸

In fact, the U.S. Supreme Court has refused to extend *Marsh* to the modern-day equivalent of the company town—the shopping center. In *Lloyd Corporation v. Tanner*²³⁹ and *Hudgens v. National Labor Relations Board*,²⁴⁰ the Court concluded that there is no individual federal right to disseminate political leaflets or picket for labor unions in shopping malls. Indeed, HOAs may be distinguished from the company town in *Marsh* by the fact that HOAs are usually well-marked as being a “private community” and do not hold all the attributes of a town government. Perhaps the most significant distinction between the speaker in *Marsh* and the HOA resident is the latter has voluntarily joined the private association through a contract that limits the homeowner’s freedom. In the New Jersey Supreme Court’s opinion in *Twin Rivers*, the Court implicitly rejected application of *Marsh* to the HOA.²⁴¹ Accordingly, I conclude that *Marsh* is a dead end as a matter of direct constitutional precedent, although not as a guide to potential state legislation.

Perhaps more on point are the limited number of cases in which governments have sought to regulate speech at private residences. Such

237. See, e.g., Chadderdon, *supra* note 6, at 247-50 (discussing the potential application of *Marsh* to HOAs covenants).

238. *Marsh*, 326 U.S. at 503-04.

239. 407 U.S. 551, 565 (1972) (distinguishing *Marsh* on the basis that a shopping center does not hold all the attributes of a city government).

240. 424 U.S. 507, 519-20 (1976). The absence of a federal right does not mean that state constitutions may not impose free speech rights on private property. As discussed in the *Twins Rivers* case *infra*, the New Jersey Constitution grants some rights to speech on quasi-public property; in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980), the U.S. Supreme Court did not interfere with a California court’s constitutional holding that granted the right to speech and petition at shopping centers.

241. See Comm. For a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1066-67 (2007) (noting implicitly that *Marsh* appears to be limited to its specific facts, citing the shopping mall cases). For a survey of arguments advocating that an HOA should be treated as if it were a government, see Lara Womack & Douglas Timmons, *Homeowner Associations: Are They Private Governments?*, 29 REAL EST. L.J. 322 (2001).

cases are rare because of the obvious constitutional perils of such regulation. In *City of Ladue v. Gilleo*,²⁴² an affluent suburb of St. Louis passed an ordinance that banned signs on residential property, including those merely placed in the window of a home.²⁴³ The city justified the restriction in a manner that would be familiar to many HOA residents—that signs would “create ugliness,” cause “visual blight and clutter,” “tarnish the natural beauty of the landscape as well as the residential and commercial architecture,” pose “safety and traffic hazards to motorists, pedestrians, and children,” and, of course, “impair property values.”²⁴⁴ A resident who sought to display a sign opposing the 1991 war against Iraq challenged the ordinance, arguing that it violated her right to free speech. The Supreme Court unanimously agreed with the homeowner, stating that:

A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person’s ability to *speak* there Whereas the government’s need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable, its need to regulate temperate speech from the home is surely much less pressing.²⁴⁵

Indeed, “[d]isplaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the ‘speaker.’”²⁴⁶

Accordingly, a state legislature that sought to create a bill of rights for HOA residents would do well to employ both the precedent and policies behind the existing law of free speech. First, such a statutory right would recognize that the expression of personal ideas is especially significant at and inside one’s home. Second, the right would recognize that this free expression may be bounded by the law of nuisance, which

242. 512 U.S. 43 (1994).

243. *Id.* at 46–47.

244. *Id.* at 47 (quoting the city ordinance).

245. *Id.* at 58 (internal citations omitted).

246. *Id.* at 56. Although the city had striven to be content-neutral, its ordinance was far too broad to address traffic or safety concerns; such problems could be addressed by much narrower rules such as limiting signs that were immediately adjacent to the street or that blocked views of intersections. *See id.* at 58–59.

protects neighbors from impairment of their property enjoyment, especially for environmental intrusions such as noises, smells, and vibrations. Third, the right would acknowledge that membership in an HOA community is somewhat voluntary and that the existence of mutually binding covenants involves some release of the right to free conduct.

Consider the application of such a potential right in three frequent areas of disagreement at HOAs: signs, aesthetics, and accessories. Each of these forms of conduct implicates interesting questions of rights and responsibilities at an HOA community.

Signs can express the purest form of political speech, as in *Gilleo*; they can also constitute an annoyance, as in a hypothetical case of a resident who places a large abusive sign directed at a neighbor near their joint property boundary. Because of the potential for abuse, or at least annoyance, it is common for HOAs to ban all or nearly all signs from residences, as in the case of the Florida woman who was barred from displaying a sign that cheered the troops in Iraq, which included her husband.²⁴⁷ If a legislature were to assign some rights to an HOA resident, however, the expression of political views at the home would seem to be the most sensible and fundamental place to start. At the same time, such a recognition of a right to expression could be crafted so as to minimize the adverse aesthetic and annoyance effects on neighbors, whose property values may be diminished by a “cluttered” yard next door; indeed, these neighbors may have chosen an HOA community in part because of a desire to live in a community in which all residents are bound by such mutual restraints.

In contrast to signs, the aesthetics of a home, such as landscaping or paint color, rarely reflect the expression of core, political, First Amendment values.²⁴⁸ Nonetheless, they do reflect the expression of personality. Moreover, the requirement of traditional aesthetics might be seen as a prime example of the overly regulatory “busybody” attribute of HOA rules, which do not necessarily reflect deeply held desires of a majority of the voluntary community.²⁴⁹

247. See Hayes, *supra* note 3.

248. It might be rare, for example, for a Republican to plant a garden of blue irises or penstemons to broadcast his or her political values! However, in *Shaw v. County of Santa Cruz*, the plaintiffs argued that their creation of a “liberty garden” (the property) was “an expression of their belief that individual liberty and ecological health are inseparable.” *Shaw v. County of Santa Cruz*, 88 Cal. Rptr. 186, 193 (2008). The California appellate court held, however, that the local government’s dumping of sweet sweepings adjacent to their property was neither a compensable taking nor a nuisance. *Id.* at 234.

249. See Gillette, *supra* note 86, at 1429 (identifying the “busybody” phenomenon).

The decision to plant a flower garden or a water-stingy landscape of cactus, instead of the plain grass lawn mandated by so many HOAs²⁵⁰ even in dry regions of the nation, is nonetheless an expression of individual personality and dignity. A nontraditional lawn is often an important step in water and environmental conservation, as the Florida and other state legislatures have recognized.²⁵¹ At the same time, such nontraditional landscaping would be unlikely to rise to the level of a nuisance, even if the nontraditional yard decreased property values of neighbors a smidgen. Accordingly, the ability of homeowners to adopt nontraditional but neat landscaping might be a good candidate for inclusion in a bill of rights.

Similarly, aesthetics of a home's exterior, such as paint color, are a frequent target of HOA covenants, which often require uniform or muted colors. Once again, the concern appears to be that a garish or otherwise unusual paint job will annoy a neighbor or decrease property values. Unlike water-tolerant landscaping, a disfavored paint job—such as a house painted a garish bright pink—is unlikely to reflect any socially responsible policy.²⁵² Moreover, to the extent that rules about appearance of the home target neatness, as opposed to taste, they infringe little on personal liberty. Accordingly, rules on exterior paint colors would appear to form a relatively weaker case for a claim of personal liberty.

Similarly, advocates of allowing clotheslines in backyards—something that was common before the rise of the mechanical dryer but that often is banned by HOAs—have begun a movement that they amusingly call the “right to dry.”²⁵³ Advocates of a “right to dry” point out that they use less energy and generate less pollution than using a machine.²⁵⁴ Like requirements for a traditionally well-kept lawn, rules against clotheslines appear to arise from a desire to create a well-heeled and uncluttered appearance in an HOA community. Clotheslines are associated with poorer communities that cannot afford mechanical

250. See discussion of the Association of Artificial & Synthetic Grass Installers, *Bill Would Let Agencies Trump Homeowners Association Rules* (2009), <http://www.asgi.us/2009/03/hoa-mwd-ab1061>.

251. See, e.g., FLA. STAT. ANN. § 720.3075(4) (2008) (HOA residents have the rights to “Florida-friendly” landscaping, regardless of HOA covenants); Connie Lewis, *Drought Prompts Rising Tide of Interest in Water Savings*, 30 SAN DIEGO BUS. J. 23, June 8, 2009, at 1 (discussing efforts in California to override HOA covenants).

252. This is not to say that there is always a bright line distinguishing the categories. An unusual homeowner might, for example, desire to paint a political message on the exterior wall of his or her house.

253. See Right to Dry, <http://right2dry.org> (last visited July 22, 2009).

254. See *id.*

dryers and that are not bothered by allowing others to see their laundry. But a typical clothesline would never be considered so bothersome as to be a nuisance. Accordingly, like landscaping, clotheslines do not rise to the same depth or importance of expression as do signs or other political communications.

Finally, many HOAs bar or tightly regulate accessory structures, such as sheds, gazebos, grills, and basketball nets. While these accessories undoubtedly reflect the individual desires of the resident, rules against them appear to be closely aligned with cross-boundary harms that have been traditionally regulated as nuisances, such as noises, odors, and views.²⁵⁵ Moreover, rules prohibiting the expansions of a residence, such as by building a wing or adding a floor, are often covered by strict governmental zoning and land use laws.²⁵⁶ Accordingly, HOA rules regulating accessories or the bulk of the residence are, as a category, a weak candidate for inclusion within a set of rights.

In accordance with these relative judgments, we may draft a statutory right to free expression for HOA residents. One cannot “prove” that this draft is the only appropriate mirror of the right of personal expression in the context of an HOA; there may be valid arguments for either narrowing or expanding this draft. Nonetheless, erring on the side of inclusiveness, here is a model for a state statutory right to free expression for HOA residents:

Right to Free Speech and Expression in HOA Communities:

A resident in an HOA community holds the following rights to free speech and free expression; no HOA covenant, conditions, or rules may interfere with these rights:

- (1) Each resident holds the right to display three non-illuminated signs, not larger than three feet by three feet in size,

255. Traditional nuisance law allows a claim for excessive noise. C.J.S. Nuisances § 29 (2009), and sometimes for blocking visions; *Engle v. Ogburn*, 1999 WL 1231806, at 6 (Ohio Ct. App. 1999) (noting that foliage and vegetation that blocks the view of automobile drivers may constitute a nuisance). Zoning laws typically include height and bulk restrictions on buildings. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 395-96 (1926) (landmark decision upholding the constitutionality of an early zoning ordinance that imposed limitations on building’s use and heights and the ratio of building size to lot size).

256. Similarly, there is little ground for a right to park one’s vehicle on the common street—conduct that often is prohibited by HOA rule. See, e.g., Understanding Homeowners Associations, *What to do About Parking*, <http://hoacommunitysolutions.wordpress.com/2009/04/03/what-to-do-about-parking/> (last visited Sept. 24, 2009).

in the front of a resident's property, as long as the signs are placed either on the house or apartment structure, or, if on a yard, placed within the central third of the resident's property, as measured from any other residential property on either side, and within the two-thirds of the yard closest to the house, as measured from a street or public way.

(2) In the two months preceding a primary or general governmental election in the locality, the resident holds the right to place an unlimited number of signs of the size and location specified in paragraph (a).

(3) A resident holds the right to express political views or any other free speech idea through oral communication on the resident's property and to distribute information and literature on the resident's property, unless the time, place, or manner of conduct constitutes a nuisance under applicable state law (such as through amplified communication during the sleeping hours).

(4) A resident holds the right to develop a landscaped property in any way that is recognized by landscape design professionals, such as a water-tolerant landscape, a bird-friendly landscape, or a suburban wildlife-friendly landscape, as long as the conduct does not constitute a nuisance under applicable state law. This right does not extend to an HOA covenant that regulates foliage in order to protect a specific view or views from another residence or common area.

(5) A resident holds the rights to choose the paint color or color combination of the exterior. This right does not prevent an HOA from creating and enforcing rules that concern the neatness of the exterior painting, the frequency of painting, or fixtures on the exterior of the residence.

(6) There is no right of a resident to use the rights enumerated in this section to create excessive noises or smells, or engage in other conduct that may be regulated as a nuisance under applicable state law.

B. Right to Bear Arms

Depending on one's view of public policy, the U.S. Constitution's Second Amendment "right to bear arms"²⁵⁷ might or might not seem an appropriate fit within an HOA resident's bill of rights. Interestingly,

257. U.S. CONST. amend. II. In full, the Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

most HOAs reportedly hold restrictions against firearms in homes—a point which, if we follow the voluntary contract model of HOA rules—reflects a widespread desire of HOA residents to live in a community without guns.²⁵⁸

There is no doubt, however, that the U.S. Supreme Court has given an individual's right to firearms a status similar to the rights in the First Amendment. In the 2008 decision in *District of Columbia v. Heller*,²⁵⁹ the Court rejected arguments that the “right to bear arms” refers to things other than a citizen's right to possess weapons, and rejected arguments that the amendment's prefatory phrase concerning a “well regulated Militia” and “security of free state” limits this right to the collective right of state militias.²⁶⁰ Although governments may regulate firearm possession, they cannot simply ban it.²⁶¹ The Court's opinion, written by Justice Scalia, relied in large part on the traditional right of Englishmen to possess guns in their homes—the traditional right that formed the background for passage of the Second Amendment.²⁶² The local law at issue was unconstitutional, the Court held, because it banned handgun possession in the home, “where the need for defense of self, family, and property is most acute.”²⁶³

Accordingly, if we follow federal constitutional law, the right to possess a firearm in one's home dovetails with the other rights of human integrity in the home, regardless of whether this conclusion might annoy advocates of non-gun-related personal liberties.²⁶⁴ If stored and handled properly, firearms such as rifles and handguns within a home pose little threat to neighbors; moreover, mere possession is unlikely to be actionable as a nuisance. Accordingly, the right to firearms in the home is another relatively strong candidate for inclusion in an HOA resident bill of rights, perhaps along these lines:

Right to Firearms in the Home.

A resident in an HOA community holds the right to possess

258. See, e.g., SETHA LOW, BEHIND THE GATES 162 (discussing the common covenants against handguns in HOA communities).

259. 128 S. Ct. 2783 (2008).

260. *Id.* at 2797-803.

261. *Id.* at 2818-19.

262. *Id.* at 2815-16.

263. *Id.* at 2817.

264. The American Civil Liberties Union, for example, takes the position that *Heller* was unwise and that the regulation of guns does not “raise[] a civil liberties issue.” ACLU, *Second Amendment*, <http://www.aclu.org/crimjustice/gen/35904res20020304.html> (last visited Sept. 24, 2009).

firearms in the home; no HOA covenant, condition, or rule may interfere with this right. An HOA may, however, regulate the terms of possession of such firearms by rules involving storage, locks, and security. The HOA may regulate or ban certain firearms, such as assault rifles or automatic weapons, that are not typically used for home security, and the HOA may regulate or ban the possession of such firearms in common areas of the community.

C. Rights Specific to Government

The Third Amendment of the U.S. Constitution creates a right against the quartering of troops—something that even the toughest HOA presumably has not done (yet!).²⁶⁵ This highlights the fact that, of the twenty-seven amendments of the U.S. Constitution, many are not directly relevant to our crafting of an HOA resident bill of rights. First, a number of provisions relate specifically to the rights of the criminally accused, including Amendments Five (concerning the rights to a grand jury, against double jeopardy, and against self-incrimination), Six (rights in a criminal trial, including the right to confront witnesses), Seven (right to a jury trial), and Eight (right against excessive bail).²⁶⁶ Although some of these rights may bear faint echoes of HOA enforcement proceedings, there is, needless to say, an imperfect match with the criminal justice system. Moreover, most states have statutes that grant procedural rights to an HOA resident in cases of adjudication and punishment by an HOA board, which are separate from the substantive rights that are the subject of this current inquiry.²⁶⁷ Accordingly, these procedural strictures, as well as the amorphous procedural “due process” right in the Fifth and Fourteenth Amendment, are ill-suited to an HOA bill of rights.²⁶⁸ Other amendments relate to the workings of the federal government, including the military, or federal-state relations (Amendments Three, Ten, Eleven, Twelve, Seventeen, Twenty, Twenty-Two, Twenty-Three, Twenty-Five, and Twenty-Seven). These are not directly relevant to substantive rights of HOA residents. The Thirteenth Amendment’s ban on slavery applies in all situations, not just governmental conduct.²⁶⁹

265. U.S. CONST. amend. III.

266. U.S. CONST. amends. V, VI, VII, & VIII.

267. *See, e.g.*, FLA. STAT. ANN. § 720; CAL. CIV. CODE §§ 1350-1359 (codifying the Davis-Stirling Common Interest Development Act); COLO. REV. STAT. ANN. § 38-33.3-101.

268. U.S. CONST. amend. V, XIV.

269. The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except

A number of amendments relate to the right to vote (Fifteen, Nineteen, Twenty-Four, and Twenty-Six) or to tax (Amendment Sixteen)—topics that typically are already covered by state HOA procedural laws.²⁷⁰ This is not to say that voting rights at an HOA have not been the subject of great controversy. As shown in *Twin Rivers*, for example, it is common for HOAs to grant greater voting power to residents with a larger property or greater assessed value.²⁷¹ Such a weighted voting system would violate the constitutional one-person, one-vote principle that applies to governmental elections²⁷² and echoes the now-discredited property qualifications for voting that used to be common in eighteenth and early nineteenth century American state politics.²⁷³ The rationale for weighted voting is that homeowners with larger houses have a greater financial stake in the success of the community, of which the maintenance of property values usually is the primary long-term concern of HOA governance.²⁷⁴ In *Twin Rivers*, however, even the activist appellate court found that weighted voting did not violate state constitutional principles of personal integrity. Similarly, here, because voting rights often are regulated to some extent by state procedural law, and because the weight of voting is not a substantive right *per se*, it is excluded from the current shaping of an HOA resident bill of rights.²⁷⁵

as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII.

270. See, e.g., CAL. CIV. CODE § 1356; FLA. STAT. ANN. § 720.3075; COLO. REV. STAT. ANN. § 38-33.3-217.

271. See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 890 A.2d 947, 975 (N.J. Super. App. Div. 2006) (upholding against a challenge of the HOA’s weighted voting system).

272. See *Baker v Carr*, 369 U.S. 186, 344 (1962) (establishing the principle of one person, one vote); *Karcher v. Daggett*, 462 U.S. 725, 739 (1983) (imposing the one person, one vote principle on state governments).

273. See CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 73-74 (1944) (discussing 18th century property qualifications to vote).

274. See MCKENZIE, *supra* note 22, at 122 (noting that maintenance of property values is the fundamental purpose of the HOA).

275. This Article does not discuss the potential implications of the Ninth Amendment, which somewhat obscurely “retained” certain rights “by the people” that were not specifically enumerated. U.S. CONST. amend. IX. Because of the open-ended nature of this language, it has played little role in the development of the law of constitutional rights. See generally Thomas McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment’s Spreading Confusion*, 1996 B.Y.U. L. REV. 351 (1996) (arguing for a broad interpretation of the right). This Article does not suggest a similar right in an HOA resident bill of rights.

D. *The Right Against Uncompensated "Taking"*

The only substantive right in the U.S. Constitution that specifically refers to property is the Fifth Amendment's command that government may not "take" private property "without just compensation."²⁷⁶ Indeed, this right has generated a complex legal doctrine of the relationship between a property owner and government regulators; as such, it might at first appear to be a good centerpiece for an HOA resident bill of rights. Ellickson has suggested that residents might be given this "taking" right against HOA board regulations.²⁷⁷

But there are many complications in transferring this provision of the Fifth Amendment to HOAs. First, unlike other constitutional rights, the prohibition against unjust taking is not truly a substantive right of a citizen against government interference; rather, the right merely establishes that if government "takes" property, it must compensate the property owner with money.²⁷⁸ Most historians agree that the framers intended to require only that government compensate property owners when it exercises the power of *eminent domain* to seize private property.²⁷⁹ In the past century, the right has been construed to compel compensation, in some circumstances, for a mere regulation of land

276. U.S. CONST. amend. V. Property is also mentioned in the due process clauses of the Fifth and Fourteenth Amendments, which command that government may not "deprive" a person of "property" without "due process of law." By the term "process," these clauses would seem to refer to procedure, not substance. Nonetheless, this did not stop the Supreme Court from creating in effect a doctrine of "substantive due process." In the now-infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857), the Supreme Court held that a federal statute seeking to deprive a citizen of his "property" "could hardly be dignified with the name of due process of law." *Id.* Because the notion of "substantive due process" provides a hook to create whatever enumerated right the judge desires to create, the principle has been applied inconsistently, first to justify a right to economic freedom, most notably in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (holding that a state law regulating working hours for bakers was unconstitutional), and more recently in the creation of a right to privacy, in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (right to privacy created through a "penumbra" of other rights) and *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to privacy includes a limited right to abortion). Because of the amorphousness of the "substantive due process" doctrine and its potential for abuse, I do not suggest that such a principle be codified in an HOA resident bill of rights.

277. See Ellickson, *supra* note 8, at 1530.

278. U.S. CONST. amend. V (government may not "take" property for public use "without just compensation").

279. See generally William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (concluding that the drafters of the Fifth Amendment intended the takings clause to apply only to governmental seizures of property); Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 HARV. L. REV. 1030 (1996) (outlining the expansion of takings jurisprudence).

without seizure of title.²⁸⁰ The doctrine that has developed is extraordinarily amorphous. Suffice to say, however, that minor regulations of property use do not rise to the level of a compensable taking.²⁸¹

Indeed, in nearly all cases in which a property owner has developed a strong case for a compensable regulatory taking, the government has severely restricted a pre-existing right to build on the land, thus significantly upsetting an “investment-backed expectation.”²⁸² In the landmark *Penn Central Transportation Co. v. City of New York*, the U.S. Supreme Court rejected an argument that regulations that hindered construction of a large office building on top of a governmentally designated historic landmark constituted a regulatory taking; the law does not conceptually “sever” portions of a property in deciding whether a taking has occurred.²⁸³ The most notable victory for a property owner was *Lucas v. South Carolina Coastal Council*, in which a governmental body in effect barred a landowner from building anything on his coastal land, causing him to lose all of his million-dollar investment.²⁸⁴ Such a “total taking” is the most common way in which a regulatory taking claim is successfully asserted.

In contrast to the successful federal takings cases, HOAs do not typically bar residents from engaging in major construction projects in which they have already invested money. There are unlikely to be many, if any, “total taking” cases involving HOAs, and only rare cases in which an HOA covenant is as dramatically restrictive as the *Penn Central* or *Lucas* cases. Most HOA rules of construction—for example, a rule that prohibits work sheds over six feet wide in the backyard—are minor regulations for which no compensation is required under federal law.²⁸⁵ In fact, many zoning and land use laws have small adverse

280. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding for the first time that government regulation may trigger compensation if it “goes too far”). Holmes’s vague standard has bedeviled the law ever since.

281. *Id.* at 413 (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

282. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (referring to a property owner’s claim of “investment-backed expectations” as a relevant consideration in the decision whether to consider a regulation a compensable taking).

283. *Id.* at 130 (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. Rather, it looks at the effects on the property as a whole.”).

284. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (compensation required for a regulation that created a “total taking”).

285. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (regulation is not a compensable taking if it regulates only a small portion of the property and allows for

effects on property values for which no compensation is required under federal law.²⁸⁶ Rather, we might look to state law to develop a conceivably workable “takings” right for HOAs. Over the past twenty years, a handful of states have gone beyond federal constitutional law and have required government to compensate landowners when government regulates the land so that the value of the land has been diminished by a certain percentage or amount.²⁸⁷ Although it would be a rare case in which an HOA rule causes a major diminution in property value—an example might be a rule that prohibited for the first time the construction of a second story on a house, just as new property owner signed a contract with a builder, in reliance on a pre-existing right—we can craft a potential takings right for HOA residents as follows:

Right against an Uncompensated Taking.

An HOA may not upset the reasonable investment-backed expectations of a resident by a covenant, condition, or rule that diminishes the value of the resident’s property by more than 50 percent, unless the HOA compensates the resident for the value of the diminution. This right applies only to diminutions caused exclusively by HOA rules, and not by the changes in housing values not within the sole control of the HOA. The right does not apply to diminutions that regulate conduct that is considered a nuisance under applicable state law. A resident may establish a right to compensation only by presenting evidence of the diminished property value through a report of a state-licensed property appraiser; if the HOA denies compensation by virtue of reliance on another assessment by another state-licensed property appraiser, the resident holds the right to resolve the dispute by appeal to state court.

economically beneficial use of the remainder).

286. The Court in *Lucas* stated that it was “unclear” whether a regulatory taking that is less than total would require compensation. 505 U.S. at 1016 n.7. But there is ample precedent for cases in which even a large diminution in property value did not trigger compensation. *See, e.g.,* *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages, thus decreasing the value of a brewery property); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick kiln in residential area, thus decreasing the value of the kiln property).

287. *See* STATE ENVTL. RES. CTR., *Takings Legislation*, <http://www.serconline.org/Takings/stateactivity.html> (summarizing some significant state laws). Many states trigger compensation when a regulation or law diminishes property value by a certain percentage.

E. The Right Against Housing Discrimination

The anti-discrimination principle set forth by the Equal Protection clause of the Fourteenth Amendment has been imposed on private housing relations by various statutes at both the national and state level. Most notably is the federal Fair Housing Act,²⁸⁸ which makes it unlawful to discriminate because of race, national origin, religion, and other grounds in the advertisement, sale, or rental of housing.²⁸⁹ All of these proscriptions apply with full force to HOAs. Many states go further and include sexual orientation and other factors as unlawful grounds for discrimination.²⁹⁰ Even before the Fair Housing Act, the U.S. Supreme Court held as early as 1949 that federal courts could not enforce racially discriminatory covenants.²⁹¹ Because of the governmental occupancy of this field, it might seem unnecessary to include similar rights in an HOA resident bill of rights.²⁹² Nonetheless, such an HOA right could be written as follows:

Right Against Discrimination.

An HOA may not, in its covenants, conditions, and rules, or in the application thereof, discriminate on the basis of race, sex, national origin, religion, or sexual orientation, if such discrimination is a significant factor in the HOA's conduct. This prohibition includes, but is not limited to, advertisement, marketing, sale, rental, participation in HOA affairs, governance, and enforcement of rules.

288. 42 U.S.C. §§ 3601-3619 (2006).

289. *Id.* § 3604 (making it unlawful to discriminate in various aspects of the housing relationship).

290. Liberal-oriented localities across the nation have enacted ordinances outlawing housing discrimination based on sexual orientation. *See, e.g.*, City of Gainesville, Fla. Ord. § 8.86, available at <http://municode.com/resources/gateway.asp?pid=,10819&sid=9>; City of South Portland, Me. Ord. § 10-1101, available at <http://www.memun.org/SchoolsProject/Resources/Ordinance/SexOrientationSP.htm>; City of Austin, Tex., *Fair Housing Ordinance*, <http://www.ci.austin.tx.us/hrights/housing.htm>.

291. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (holding that judicial enforcement of a racially restrictive covenant would violate the Fourteenth Amendment).

292. After all, in a state that declined to protect against sexual orientation discrimination in housing in general, it seems unlikely that this state would entertain a statutory right against such discrimination in the somewhat voluntary world of HOA communities.

F. Rights Inside the Home

The remaining amendments in the U.S. Constitution that might relate to HOAs²⁹³ are the Fourth Amendment's right against "unreasonable" searches and seizures²⁹⁴ and the Twenty-First Amendment's repeal of alcohol prohibition.²⁹⁵ While these two provisions might seem unrelated, they both point to a final category in the shaping of an HOA resident bill of rights: the rights of liberty *inside* the residence.

The regulation of conduct behind closed doors is an area in which HOAs have often extended their covenants and rules beyond the regulations of government. Federal, state, and local laws typically do not regulate conduct wholly inside homes, with the exceptions of laws to protect other persons—such as laws against violent crime or against usage of mood-altering narcotics. Beyond this, citizens are largely free to do what they desire inside their homes. By contrast, some HOAs, in pursuit of what Franzese calls a community of the "nice," regulate things such as interior paint and furniture design,²⁹⁶ smoking and drinking,²⁹⁷ and the possession of pets.²⁹⁸

Many of these interior activities may not seem as important to personal integrity as political expression. However, most of these interior activities also have little or nothing to do with the neighbors' enjoyment or use of their own property, or with significantly affecting

293. This Article also does not discuss potential implications of the Ninth Amendment. See *supra* note 275.

294. U.S. CONST. amend. IV. The Fourth Amendment states that warrants to search or seize may be granted only upon a showing of "probable cause, supported by oath or affirmation, and particularly describing the place to be searched . . . or things to be seized." *Id.*

295. U.S. CONST. amend. XXI. The Twenty-First Amendment repealed the Eighteenth Amendment, which imposed restrictions on obtaining liquor. The Twenty-First Amendment does not grant a right; it merely permits states to enact their own regulations concerning the manufacture, possession, and consumption of alcohol. Many states and localities do regulate or even ban the sale of alcohol. See David J. Hanson, *Dry Counties*, <http://www2.potsdam.edu/hansondj/controversies/1140551076.html> (discussing alcohol prohibition across the United States). Accordingly, the amendment does not grant an individual right.

296. See, e.g., Cypress Creek Homeowners Association Architectural Control Committee Rules, <http://www.cypresscreekhoa.org/documents/ACC%20Rules.pdf> (requests for interior painting done on a case-by-case basis).

297. For examples of covenants banning smoking in townhouses, see *HOA Rule Forbids Couple to Smoke in Their Own Home*, Denver 7 News (Nov. 18, 2006), <http://www.thedenverchannel.com/news/10336501/detail.html>; Julian Emerson, *Housing Complex Owners Vote to Ban Smoking*, LEADER-TELEGRAM (Eau Claire, Wis.), July 19, 2009, <http://www.tobaccofacts.net/2009/07/housing-complex-owners-vote-to-ban-smoking>.

298. See, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275 (1994) (upholding no-pet covenant).

the neighbors' property values. Rules against interior conduct might be considered a prime example of "busybody" regulation—that is, regulation for its own sake. The chief exception would be regulation of nuisance-like activities—odors, noises, and smoke—that extend from the interior onto others' property.

Similarly, there appears to be little justification for an HOA rule that authorizes the search or seizure of the interior of a residence, except in connection with issues of community integrity, such as emergency repairs in a condominium building or to enter an HOA house on fire when the owner is not home. These exceptions would not authorize covenants that allowed HOA board members, for example, to enter homes simply to gather evidence to support a suspicion of a violation of other rules. Accordingly, our final provision in the draft HOA resident bill of rights could read as follows:

Right to Conduct and Privacy Inside the Home

(1) An HOA resident holds the right to unregulated conduct inside the home, including the right to choose interior paint, place furniture, decorate, smoke, drink alcohol, engage in sexual activity, entertain others, or own pets that are confined to the interior of the home. This right does not extend to conduct that causes significant odors, smoke, or sounds that might significantly interfere with other residents' use or enjoyment of property. Specifically, an HOA may regulate or ban a resident's allowing a dog to occupy the exterior yard. This right also does not extend to conduct that is unlawful or a nuisance under federal, state, or local law.

(2) An HOA resident holds the right to refuse entry by others, including other residents and HOA board members, without the resident's permission. This right does not extend to entries deemed necessary, consistent with HOA rules, for the physical or structural protection of common areas or buildings, or the physical safety of residents, after discussion with the resident when feasible. If an HOA rule purports to grant the authority to enter a residence for other purposes, this authority may be exercised only by application to an appropriate state court.

VI. CONCLUDING COMMENTS

With the burst of the most recent housing "bubble" and its resultant economic recession, many commentators predicted "the death of the

suburbs” and planned communities.²⁹⁹ I believe that such assertions are exaggerated. The desire for a home and yard has always been deeply embedded in the American psyche; neither the tightening of mortgage credit nor high gasoline prices will likely alter this predisposition.³⁰⁰ The extraordinary rise of the common-interest residential community, which I have abbreviated as HOA in this Article, is due in part to government encouragement, but in larger part due to the aspirations of American families for communities in which the peace and happiness of their surroundings is close to guaranteed, even if this requires constraining one’s neighbors.³⁰¹ The lull in new HOA construction may prove to be ephemeral. If American families did decide to move *en masse* back into the central cities, this would generate a boom in condominium associations, the city’s variant of HOAs.

This desire for a regulated community does not mean, however, that any and all HOA covenants are the welcome reflection of market demand. Economic and psychological phenomena, such as the problems of “bundling,” geographic restraints, skewed HOA board incentives, and the lack of discretionary enforcement, each point to a conclusion that law should scrutinize more closely the breadth of substantive HOA rules. The challenge for the legal reformer is separating unjustified covenants from those that law should respect as voluntary choice. Considering the range of criticisms of HOA covenants, it is not surprising that there is no single or noncontroversial analytical tool for scrutinizing such rules. Accordingly, the bill of rights proposed in this Article is not set in stone, but rather suggests a starting point for discussion.

299. See, e.g., Richard Florida, *How the Crash Will Reshape America*, ATLANTIC (Mar. 2009), available at <http://www.theatlantic.com/doc/200903/meltdown-geography> (predicting that many Americans will return to the city and eschew the suburbs); Christopher B. Leinberger, *The Next Slum?*, ATLANTIC (Mar. 2008) <http://www.theatlantic.com/doc/200803/subprime> (predicting the demise of suburban subdivisions). For an interesting study of the possible future of homeownership, see Fennell, *supra* note 56.

300. See, e.g., Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 186 (1998) (“Suburbanization and sprawl are as ingrained in our national myth as baseball and apple pie once were.”).

301. See Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 149 (1997) (citing surveys of preferences for suburban living); Paul Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 184 (2000) (discussing reasons for suburbanization); BROOKINGS INSTITUTION, *Job Sprawl Revisited: The Changing Geography of Metropolitan Employment* (2009), http://www.brookings.edu/reports/2009/0406_job_sprawl.kneebone.aspx (noting that employment has continued to move to suburbs in recent years).

I have proposed focusing on the principle of personal liberty and integrity at the home, curbed by the traditional tort law of nuisance, in shaping a bill of rights for HOA residents. By their nature, rights are counter-majoritarian—they allow people to do what the majority of peers prefer that they not do. While such a notion may be novel in the world of HOA covenants, it is a mainstay in the law of scrutinizing governmental laws, through which American citizens hold cherished rights to a range of freedoms, especially concerning expression, especially at their homes. To be sure, the “private governments” of HOAs are not identical to public governments, and law should not impose all of the rules governing relations between citizens and their public governments on private covenant-bound communities. But to the extent that HOAs have become a standard form of residential life in the United States—and throughout much of the Sunbelt this may already be the case—the residents of these communities, who often have no other real choice, deserve their own set of rights to engage in free expression and other manifestations of personal liberty at their homes.