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I. INTRODUCTION

> Special respect for individual liberty in the home has long been part of our culture and our law and that principle has special resonance when government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8 by 11-inch sign expressing their political views.[1]

The concept of the home as a zone of nearly unfettered individual liberty is one of the bedrock principles of American law and culture. Chief among the liberties safeguarded from governmental interference within this zone is freedom of speech, a liberty protected by the First Amendment.[2] While the First Amendment prevents the government from infringing on an individual's speech in many settings, its protection is especially strong in the home. As Justice Stevens wrote in *City of Ladue v. Gilleo*, any attempt by the

1. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

2. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). As originally construed, the First Amendment prohibited only the federal government from interfering with free speech, but the Court's incorporation of the Bill of Rights through the Fourteenth Amendment made the prohibition applicable to the States as well. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

government to prohibit certain forms of speech in the home is so antithetical to our common understanding of individual liberty that it is likely to arouse impassioned opposition.

For millions of Americans,[3] however, certain aspects of the protection that the First Amendment typically provides do not extend to their private residences because they live in a community governed by a homeowner association. In the name of property value and aesthetic coherence, many of these associations impose myriad restrictions on their member-homeowners. One common restriction prohibits the display of political signs on a homeowner's private property.[4] While such a regulation from a local municipality would clearly contravene the First Amendment, homeowner associations have not been held to this standard because of their legal status as private entities.[5] Thus, by virtue of living in an association-governed community, millions of Americans have signed away their ability to display political signs on their property, one of the most significant acts of political speech commonly practiced across the nation.

As communities governed by homeowner associations have proliferated in recent years,[6] limitations on the display of political signs have alarmed scholars and homeowners alike and prompted a variety of responses from both groups.[7] Some scholars argue that the status of homeowner associations as purely private entities is not so clear-cut.[8] Given their expanding role in administering local

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3. As of 2004, it was estimated that approximately 54.6 million Americans live in association-governed communities. Community Association Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 31, 2006).

4. The specifics of the prohibition vary from association to association, but sign bans of some kind are sufficiently common in association-governed communities across the country. Some associations ban all signs other than "For Sale" signs; thus, political signs are included within this general prohibition.

5. The scholarly debate concerning the private v. public character of homeowner associations has been robust, but to date most courts still recognize them as private entities. For further discussion, see *infra* Parts III.B.1, III.C.

6. In 1970, there were approximately 10,000 association-governed communities in the United States. In 2005, there were approximately 274,000. Community Association Institute, Data on U.S. Community Associations, http://www.caionline.org/about/explanation.cfm (last visited Mar. 31, 2006).

7. Litigation between homeowners and associations over covenant enforcement issues has become increasingly common in recent years. *See* EVAN MCKENZIE, PRIVATOPIA 132 (1994) (observing that "covenant enforcement litigation has become a profitable legal specialization for attorneys in states with many [common interest developments]"); Laura Castro Trognitz, *'Yes, It's My Castle': Suits By Unhappy Residents Against Homeowners' Associations Grow*, 86 A.B.A. J. 30, 30–31 (2000) (providing examples of the types of litigation pursued by the "growing number of association residents who are taking their disputes to court").

8. *See* ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 87–103 (1992) (discussing competing views on the benefits and costs of the way in which formation of homeowners associations permit "load

communities[9] and their prevalence in certain regions of the country,[10] homeowner associations undeniably cast a shadow that extends beyond the private realm. Certain commentators characterize homeowner associations as "quasi-governmental organization[s]"[11] and "private governments."[12] Courts, however, have been hesitant to label them as state actors and impose the full breadth of constitutional restrictions that normally attach to such actors.

Given the complexity of the legal issues presented by homeowner associations and their relative novelty in the legal landscape, finding the appropriate legal framework under which to analyze their actions is a difficult task. Additionally, hot-button social and political issues, such as classism and racism, are frequently injected into the debate, complicating matters further.[13] As a result of this confluence of legal, social, and political considerations, homeowner associations are not easily reducible to one particular legal paradigm. The wide variety of approaches found in both the academic literature and the case law reflects this ongoing struggle to successfully characterize the legal dimensions of the homeowner association and the consequent ramifications on both members and non-members.[14] This Note will examine the existing analytical approaches to homeowner associations and suggest that, at least in the context of political sign bans, there is a strong argument for a new approach based on the policies underlying the traditional protection accorded free speech.

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shedding" by local governments and changes "the nature of public service delivery systems in many communities across the United States"); MCKENZIE, *supra* note 7, at 122–49 (discussing the role of homeowner associations as private governments); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976) ("While the 'governmental' features of homeowners' associations cannot be denied, these entities are, nevertheless, of a 'private' nature.").

9. For further discussion, see *infra* Part II.B.4.

10. Homeowner associations govern more than half of all housing for sale in the fifty largest metropolitan areas in the United States. Additionally, approximately 70 percent of existing associations are concentrated in two regions of the country: the east and west coasts. DILGER, *supra* note 8, at 18–19.

11. David J. Kennedy, Note, *Residential Associations As State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L. J. 761, 768 (1995).

12. Reichman, *supra* note 8, at 253; *see* DILGER, *supra* note 8, at 87–103 (discussing the role of homeowner associations in providing services traditionally supplied by local governments); MCKENZIE, *supra* note 7, at 122–49 (discussing the role of homeowner associations as private governments).

13. Kennedy, *supra* note 11, at 761.

14. *See id.* ("Residential associations and gated communities often restrict nonmembers' freedom of speech, limit nonmembers' freedom of movement, and engage in racial discrimination against nonmembers.").

Some critics might dismiss the display of a political sign on one's front lawn as a trivial form of speech. The Supreme Court, however, has characterized political signs as "a venerable means of communication that is both unique and important."[15] With the ideal of traditional "town hall" democracy relegated to the dustbin of myth and history, the political sign is as valid, and accessible, a form of political communication as any other currently available to the vast majority of voters. Beyond accessibility, political signs are important because they directly reflect the way that citizens feel about political candidates. This, in turn, ultimately impacts the outcome of elections and the trajectory of substantive government policy—there is hardly an endeavor more significant in a democratic society.

This Note proceeds in four parts. Following the introduction, Part II examines the growth of homeowner associations across the United States as well as their unique structure, function, and legal characteristics. Part III reviews the analytical frameworks that courts and commentators employ when considering how to regulate homeowner associations and argues that these approaches are flawed, especially in the context of political sign bans. Finally, Part IV proposes a new approach to association bans on political signs based on the public policy exception found in traditional contract law. Specifically, this public policy approach focuses on the substantial societal interests in: (1) preserving the ability of individuals to freely express themselves in their homes; and (2) promoting open and honest discourse relating to electoral politics.

The proposal outlined in Part IV is firmly rooted in the two current approaches to regulating homeowner associations: the contractual approach and the constitutional approach. Both approaches have significant strengths and weaknesses. The proposal offered by this Note attempts to capitalize on the best aspects of each approach while minimizing the negative aspects. The proposal reaffirms the sound policy of generally enforcing homeowner association restrictions but carves out a narrow exception based on the significant negative consequences of over-regulating political signs.

The solution offered by this Note is not as drastic as it might first seem given the long-standing common law tradition of allowing courts to imply public policy exceptions to the general principle of freedom of contract. The constitutional values embodied by political signs are precisely the type that this limited exception was intended to protect. Of course, such an approach poses the risk of judicial arbitrariness and subjectivity. As a normative matter, this Note

15. City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994).

argues that such a risk is worth taking to protect a value as important as political speech. Further, the risk is not so high in this context because the public policy exception is narrowly confined to the realm of political signs. Finally, the exception proposed by this Note is a moderate one built upon the Supreme Court's well-established "time, place, and manner" approach to unintentional infringements of protected First Amendment speech.

II. BACKGROUND

A. The Growth of Homeowner Associations

In twenty-first century America, it is becoming increasingly difficult for individuals and families to realize the dream of home ownership without also becoming a member of a homeowner association.[16] Barely a blip on the housing radar screen a generation ago, association-governed communities, sometimes referred to as common interest communities,[17] have grown rapidly in many parts of the country during the past several decades.[18] As of 2003, an estimated fifty million Americans lived in communities governed by some type of homeowner association,[19] and it is estimated that in the past five to eight years more than 80 percent of new housing starts

16. Nomenclature varies widely throughout the country. WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: HOMEOWNER ASSOCIATION LAW 13 (3d ed. 2000). However, because the focus of this Note is on a certain type of community, *see infra* note 17, I will refer to the associations that govern these developments as "homeowner associations" or simply "associations." Other closely related and commonly used terms include: residential community associations, residential associations, community associations, property owner associations, and condominium associations. HYATT, *supra*, at 20–21.

17. Although there are several different types of common interest communities, *see* DILGER, *supra* note 8, at 16–17 (explaining the other prominent types of common interest communities), this Note will focus primarily on planned unit developments ("PUDs"). PUDs usually consist of "single-family or multi-family housing, and open space or some other amenity." HYATT, *supra* note 16, at 14. PUDs are typically detached structures, most commonly single-family homes, which occupy their own lots. *Id.* I have chosen to focus on this type of association-governed community because when considered alongside its counterparts, such as condominiums, for example, it is the setting where the discourse concerning political sign bans is most likely to be applicable.

18. *See supra* note 10.

19. The best source for determining the extent of association membership in the United States is the membership list of the Community Association Institute ("CAI"). Despite the best efforts of CAI to determine the total number of association-governed communities in the United States, membership is voluntary and many smaller associations may have decided not to join; thus, these figures may actually underestimate the actual totals. DILGER, *supra* note 8, at 18.

have been part of an association-governed community.[20] In many major metropolitan areas, association homes account for over 50 percent of all new home sales.[21]

Developers rely on homeowner associations as their preferred organizational form because they have proven to be highly profitable.[22] Although it is hard to pinpoint one particular reason for the increase in popularity, homeowner associations are thriving at least in part because "they help protect home values, provide affordable ownership opportunities, help meet the increased privatization of services as local governments cut back, and are efficient land planning, land use and conservation techniques."[23] Association living is also an appealing option for those who wish to become homeowners but are "weary of crime, social ills, and the inability of government to address these pressing concerns."[24]

While the rise of association-governed communities has been largely positive for homeowners, developers, and municipalities, its effect on the broader social and political landscape is more difficult to calculate. One commentator has described the emergence of homeowner associations as a "quiet revolution" with far-reaching effects on political and social arrangements across residential communities throughout the country.[25] Another commentator has argued that associations impose substantial negative externalities on non-members by developing exclusive communities and increasing the fiscal burdens of both local and state governments.[26] Whether viewed as a positive or negative force, the continuing expansion of homeowner associations has had, and will continue to have, a profound impact on a variety of diverse groups and interests in countless communities across the country.

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20. Community Association Institute, Data on U.S. Community Associations, http://www.caionline.org/about/explanation.cfm (last visited Mar. 31, 2006).

21. This includes the majority of new residential development in California, Florida, New York, Texas, and suburban Washington, D.C. DILGER, *supra* note 8, at 18.

22. *See id.* at 5 (discussing the beginning of the "boom" in association housing during the 1980s).

23. Community Association Institute, Data on U.S. Community Associations, http://www.caionline.org/about/facts.cfm (last visited Mar. 31, 2006).

24. Kennedy, *supra* note 11, at 762.

25. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461, 465 (1998).

26. Kennedy, *supra* note 11, at 761–64.

B. Homeowner Associations: Structure and Function

1. Overview

There are three features that distinguish ownership of an association home from traditional homeownership.[27] First, the association holds title to the common property in the development and the individual owners share ownership and access to this property by virtue of their association membership.[28] Second, membership in the homeowner association is automatic when new residents purchase their homes; therefore, homeowners must abide by the usage restrictions that run with the property.[29] Third, association members must pay an "assessment," a fee that is used for maintenance of the common property and other services.[30]

Real estate developers have been the driving force behind the growth of homeowner associations over the course of the last several decades. Typically, a developer will lay the legal foundation for a homeowner association long before any residents purchase their lots or their homes.[31] The developer actually brings the association into existence by recording a set of creating documents that typically includes: a declaration, bylaws, articles of incorporation, plats, and deeds.[32] One scholar has characterized these documents as "akin to a state's constitution"[33] because of their foundational nature and their nearly immutable impact on the character of the community.

2. The Declaration and the Association Board

Most important among an association's founding documents is the declaration.[34] Declarations are typically authored by the developer and are normally only subject to amendment by a supermajority vote of all the members in the homeowner association.[35]

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27. Community Association Institute, A Brief Explanation of Community Associations, http://www.caionline.org/about/explanation.cfm (last visited Mar. 31, 2006).

28. *Id.*

29. *Id.*

30. *Id.*

31. DILGER, *supra* note 8, at 12–13.

32. HYATT, *supra* note 16, at 24–27.

33. MCKENZIE, *supra* note 7, at 127.

34. Declarations are also referred to as Declarations of Covenants, Conditions and Restrictions ("CC&R"). HYATT, *supra* note 16, at 24.

35. *See* MCKENZIE, *supra* note 7, at 21 (explaining that "supermajority vote" typically means three-fourths of all members in the homeowner association; not simply three-fourths of all members who choose to vote).

Because the amendment process usually requires at least two-thirds of all members to approve the change, the existence of absentee owners and renters makes the necessary vote totals very difficult to secure.[36] The difficulties inherent in modifying the declaration mean that "the developer's idea of how people should live is, to a large extent, cast in concrete."[37]

Assuming that the developer includes a ban on political signs in the declaration,[38] a homeowner who wishes to challenge such a ban faces a Sisyphean task. If she cannot command a two-thirds majority vote to amend the declaration, she must challenge the restrictions in court.[39] In most states, however, declaration restrictions are enforceable against association residents absent a showing that they are unreasonable.[40]

Because the amendment process, as administered by the association board, is the first line of recourse for any homeowner who wishes to challenge a restriction, the form of the association board itself is also an important consideration. One commentator has characterized the majority of association boards as "illiberal and undemocratic."[41] Similarly, another commentator has argued that "[r]ather than participatory democracies, residents describe their associations as operating at arm's length from individual residents."[42]

These criticisms emanate from the reality that association boards are often inflexible, self-selecting bodies.[43] Although membership on the board of directors is typically open to all members of the association in good standing,[44] boards do not necessarily reflect a broad cross-section of the popular sentiment within the community.

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36. *Id.* at 127–28; *see also* DILGER, *supra* note 8, at 34 (detailing voting mechanisms permitted for homeowners associations that would violate the constitutional principle of one person, one vote if adopted by local governments, including the denial of voting rights to renters and granting of voting rights to absentee owners).

37. MCKENZIE, *supra* note 7, at 127.

38. The other scenario would involve an association board adopting the sign ban at a later date. This presents a separate issue related to the homeowner's consent to the restriction provided the homeowner was a member of the association at the time the ban was adopted. *See infra* Part III.B.

39. A challenge typically would be brought on traditional property law grounds.

40. Carl B. Kress, Comment, *Beyond* Nahrstedt: *Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 843 (1995).

41. MCKENZIE, *supra* note 7, at 21.

42. James L. Winokur, *The Mixed Blessing of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 62.

43. Association board members are typically counseled by lawyers and developers to maintain "harsh enforcement" of the covenant regime in order to deter non-compliance. MCKENZIE, *supra* note 7, at 21, 131.

44. This means members who are not delinquent in paying the mandatory assessment fees.

Because board members are typically uncompensated, they may be comprised largely of individuals who have the greatest desire to protect their own self-interest rather than those who wish to unselfishly protect the best interests of the community at large.[45] As a result, boards may be composed of residents with "an authoritarian bent" who enjoy exercising power over their neighbors.[46] In recognition of, and in response to this problem, many states have enacted laws requiring boards to act in a more transparent fashion with respect to their meeting schedules and rulemaking processes.[47] Even with added transparency, there is still no guarantee that association boards will alter their behavior or become more receptive to popular sentiment among the rank-and-file members of the association community.

3. Involvement of Local Government

In addition to authoring a declaration that will create a community and attract potential homebuyers, developers must take the necessary steps to secure government approval for their planned communities. They must write articles of incorporation and bylaws that will garner the approval of local planning officials.[48] In many instances, developers must undertake a small-scale lobbying effort to procure the necessary approval from city officials for a new development.

Despite the sometimes onerous approval process, local governments generally encourage the development of association-governed communities.[49] Local governments have tremendous incentive to promote this type of growth because such communities reduce overall expenses while simultaneously increasing the tax-base.[50] Association-governed communities provide this benefit to local governments by simultaneously attracting new residents to the community while privatizing certain services formerly performed at public expense. Thus, there are more taxpayers, but, theoretically, less public expenditures.

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45. There is at least some anecdotal evidence to support this proposition. *See id.* at 131–32.

46. *Id.* at 131.

47. ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS 113–14 (1989).

48. DILGER, *supra* note 8, at 14.

49. Commentators have been eager to scrutinize the connection between homeowner associations and local governments for a variety of reasons. One popular motivation for scrutiny relates to the state action doctrine and the possible imposition of constitutional standards on homeowner associations. For further discussion, see *infra* Part III.C.

50. Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 53 (1995); DILGER, *supra* note 8, at 104–30.

Local governments play an essential, yet underestimated, role in the expansion of association-governed communities throughout the country.[51] Indeed, some commentators contend that the growth of association-governed communities would not have been possible if not for the "plenary authority exercised by municipalities over the use and development of land within their jurisdictions."[52]

4. The Association as Service Provider and Private Government

Planned community living is the area in which the association serves its two primary, ongoing purposes: protecting property values and life-style preferences.[53] To achieve these goals, the homeowner association performs four basic operational functions: (1) it maintains common areas; (2) it arranges for delivery of services; (3) it taxes members through regular and special assessments to pay for amenities and services; and (4) it protects neighborhood aesthetics and real estate values by enforcing the declaration.[54] In addition to these core functions, homeowner associations may also provide other services such as: day care; traffic regulation; street maintenance; park and recreational facility maintenance; elementary schools; and law enforcement and security.[55]

What is striking about these functions is that they replicate and supplement the functions that the local government performs. They are viable—meaning residents are willing to pay for them—because many believe that homeowner associations can deliver certain services more efficiently and effectively than the local government.[56] The prevailing wisdom is that, by administering the community, homeowner associations not only deliver what residents need, but also allow "people of similar backgrounds and values . . . to join together to create a strong sense of community at the local level."[57] Both features

51. DILGER, *supra* note 8, at 104–30.

52. Siegel, *supra* note 25, at 520.

53. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 205–06 (1992); *see also* MCKENZIE, *supra* note 7, at 122 (stating that the homeowner association's primary purpose is to protect property values).

54. DILGER, *supra* note 8, at 20–24.

55. George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 351–62 (1993).

56. *See* DILGER, *supra* note 8, at 87 (noting that public dissatisfaction with the public sector's performance as a service provider resulted in a political atmosphere which is conducive to private institutions such as RCAs); *see also infra* text accompanying note 61 (describing the resistance to local taxes which can arise when municipal services are privatized and observing tbat homeowners pay a special fee to their RCAs in addition to property taxes).

57. DILGER, *supra* note 8, at 131–44.

have the added benefit of increasing property values. For this reason, the Advisory Commission on Intergovernmental Relations ("ACIR") Report on Residential Community Associations ("RCA") called the trend in homeowner association growth "the most significant privatization of public services in recent times."[58] This same trend has also led several commentators to characterize homeowner associations as "private governments."[59]

Unquestionably, homeowner associations play a formative role in shaping the social and civic character of their members' lives. Because residents look to their homeowner association for many traditional municipal services, they are often more loyal to their particular homeowner association than to their hometown government. This loyalty arises, at least in part, because residents feel that their homeowner association does a superior job of delivering most, if not all, desired public goods and services formerly provided by the local government.[60] Indeed, in many association-governed communities, residents have protested against paying local taxes, which they view as being duplicative of the assessments that they already pay to their homeowner associations.[61]

III. ANALYSIS: HOW SHOULD THE LAW TREAT HOMEOWNER ASSOCIATIONS AND POLITICAL SIGN BANS?

A. Overview

For many of the reasons detailed above,[62] the search for an appropriate legal framework for the bomeowner association has frustrated legal scholars and courts.[63] Clean, categorical distinctions are nearly impossible to come by when it comes to homeowner associations.[64] Finding a framework for the homeowner association is problematic because there is not one that can be "transferred

58. *See id.* at 9 (citing the ACIR Report).

59. *See supra* note 8. The term "private government" was first used to describe corporations. Reichman, *supra* note 8, at 253.

60. *See* DILGER, *supra* note 8, at 61–86 (recognizing the growing trend toward privatization in the United States and laying out the arguments in favor of and against privatization).

61. *Id.* at 102–03.

62. *See supra* Part II.B–C.

63. Brower, *supra* note 53, at 237–38.

64. Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call,"* 30 VAL. U. L. REV. 509, 526 (1996).

wholesale" to this context.[65] Part III will analyze two competing approaches in an attempt to develop a coherent approach to this challenging problem.

When characterizing the legal dimensions of homeowner associations and how best to regulate them in light of their complex structure, there are two predominant approaches:[66] (1) the contractual/consent approach, which focuses on the belief that associations are based on the consent of private parties; and (2) the constitutional approach, which conceives of associations as mini-governments that should be accorded state actor status.[67]

From the standpoint of a homeowner who wishes to litigate the issue of political sign bans, neither of these approaches, in their purest forms, offers much promise. Under a strict application of the contractual/consent approach, assuming no fraud or duress in the formation of the contract, the homeowner has no remedy because she consented to the ban when she voluntarily purchased her home and became a member of the association. Likewise, under a strict application of the constitutional approach, the homeowner has no redress. Although a ban on political signs from the local city council would be an impermissible abridgement of free speech under the First Amendment, courts do not typically find that homeowner associations are state actors. Therefore, no First Amendment protection is afforded to homeowners who live in privately operated homeowner associations. Thus, a homeowner who wishes to display a political sign on her front lawn has no remedy short of selling her house and moving to a neighborhood that is not governed by an association.

The remainder of this Part will detail the basic elements of these two analytical approaches, offer criticism of both approaches, and identify elements from each that may be helpful in order to develop a novel approach to the regulation of political signs in private homeowner associations.

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65. Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 53 (1990).

66. While there are several other frameworks that are also helpful here, such as trusts and corporations, for the purposes of this Note, I have chosen to focus on what are clearly the two most important approaches in current application.

67. Brower, *supra* note 53, at 238.

B. Contractual/Consent Approach

1. Overview

The contractual/consent approach[68] to homeowner associations is, for the most part, exactly what it suggests: a framework that views associations as private organizations that should be governed exclusively by contract law and property law, and that are not subject to the constitutional rules that apply to state actors.[69] The basis for this straightforward approach is the notion "that because all residents agreed to the terms and conditions of the [association] rules, the [association] regulations should be given great deference."[70] Thus, the theory postulates that when a homeowner signs the contract to purchase her home, she does so with actual or constructive knowledge of the accompanying covenants that burden the real estate and she thereby consents to these restrictions. As a result, the homeowner is left with few, if any, contract or property law mechanisms at her disposal if she wishes to challenge the restrictions to which she previously "consented."[71]

The key element of the contractual approach is the idea that the homeowner gives actual consent to be bound by the particular covenants and restrictions that affect her land and her usage of that land. As Professor Epstein asserted quite succinctly, "[t]he logic of contracting is the logic of unanimous consent."[72] One major problem with this idea of unanimous consent arises, however, if the consent is not expressly given, but is assumed based on constructive notice of the covenants or, worse yet, is completely fictionalized.

Professor Alexander further explained the theory behind the contractual model with respect to covenants running with the land, such as those that govern homeowner associations, and subsequent purchasers:

> The standard explanation used to reconcile running covenants with individual freedom is that a legal system that holds a subsequent owner to a promise made by a predecessor

68. Hereafter, the contractual/consent approach will be referred to primarily as the "contractual approach."

69. Rishikof & Wohl, *supra* note 64, at 528.

70. Brower, *supra* note 53, at 238.

71. When considering the merits of a homeowner's challenge to a particular regulation, there is often a distinction drawn between restrictions that were part of the original declaration and those subsequently added through the amendment process. This distinction has to do with the unanimous vs. non-unanimous consent to be bound by certain restrictions. Brower, *supra* note 53, at 239–42.

72. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 906 (1988).

> is in fact enforcing private intentions. This intentionalist model necessitates assuming that the person who succeeded to the promisor's estate has assented to the obligation even though he may never have expressed his consent. The purchaser manifested her assent simply by purchasing land subject to a discoverable obligation. The obligation is not law-imposed but privately created, and the whole regime of land-use obligations running with the land is thereby erected on the foundation of free choice.[73]

The idea of homeowner assent to covenants running with the land by virtue of the act of purchase is one of the central tenets of the contractual theory. By employing this mechanism to signify consent by the homeowner, however, the contractual approach necessarily rests upon the assumption "that consumers make rational, economically efficient choices in housing purchase decisions."[74]

Perhaps the biggest strength of the contractual model is its almost clinical simplicity. By relying on a heavily market-driven view of consent, the contractual approach posits a straightforward black-letter rule with no gray area. For this reason, courts[75] and commentators that value stability and predictability generally favor the contractual approach.[76]

Due to the small amount of flexibility permitted by the contractual approach, courts engage in limited review of the substantive restrictions imposed by associations on their members. For the most part, courts will look only to the process through which the restriction was adopted in determining whether to uphold a restriction.[77] Occasionally, however, courts will also engage in a perfunctory analysis of whether or not a substantive association regulation is "reasonable."[78]

Arguably, "reasonableness" is not a true standard of review. Rather, it is a way for a court to substitute its own substantive value judgments in rare instances when it finds an association regulation to be repugnant to its own subjective definition of "reasonableness."[79] Along these same lines, commentators have criticized

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73. Gregory S. Alexander, *Freedom, Coercion and the Law of Servitudes*, 73 CORNELL L. REV. 883, 889 (1988).

74. Brower, *supra* note 53, at 239.

75. In this Part, the term "courts" generally refers to all courts (local, state, or federal) that have occasion to consider the legality of homeowner association regulations.

76. *See generally* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982) (arguing that a private approach to property law with little public regulation is the best approach).

77. The prevailing judicial practice also reflects the fact that the majority of legislative enactments dealing with homeowner association regulations "focus on process-based controls." Brower, *supra* note 53, at 228.

78. *See* Kress, *supra* note 40, at 843–44 (discussing reasonableness review in California courts).

79. Brower, *supra* note 53, at 236.

"reasonableness" review by comparing it to traditional substantive due process analysis and arguing that this practice "permit[s] reviewing judges to substitute their standards of wisdom and fairness"[80] in the face of clearly written regulations.[81] Despite concerns over the use of the "reasonableness" standard, courts rarely strike down association regulations on the grounds that they are unreasonable.[82]

2. Limitations of the Contractual/Consent Approach as Applied to Political Sign Bans

Despite the appeal of its ordered simplicity, the contractual model is flawed. As applied to the issue of political sign bans, the contractual model is problematic for two very important reasons. First, there is a lack of meaningful consent to the restriction. Second, homeowners have a lack of meaningful choice due to the homogeneity of most housing markets.[83]

a. Lack of Meaningful Consent

The notion of consent relied upon by the contractual model is inapposite in the homeowner association context due to the nature of the transaction and the way in which covenants are bundled by the associations. In the contractual model, homeowner consent is premised on the idea that purchasing with notice of restrictions, either actual or constructive, equals consent. One scholar has observed, "With consent to servitudes constructively inferred, their acceptance by homebuyers reflects little autonomous will."[84] The problem of inferred consent is compounded in the homeowner association context by the almost non-existent bargaining power possessed by the homeowner in this transaction. In most homeowner associations,

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80. NATELSON, *supra* note 47, at 133–34.

81. In the administrative law realm, "reasonableness" is a principle of restraint used as a tool to prevent rather than enable judicial overreaching. In *United States v. Mead Corp.*, the Supreme Court stated:

> [A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise . . . but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is *reasonable* . . . .

533 U.S. 218, 229 (2001) (empbasis added) (internal citations omitted).

82. NATELSON, *supra* note 47, at 133–34.

83. *See supra* notes 71–72 (pointing out that dissenters to a restriction enacted through a non-unanimous vote should not be seen as having given meaningful consent to the restriction).

84. Winokur, *supra* note 42, at 62.

numerous servitudes are commonly "bundled" together with the real estate.[85] Consequently, a purchaser's ability to select or decline the terms and restrictions governing her purchase is severely limited.

Since prospective homebuyers are not able to dicker over individual terms and restrictions imposed upon them by homeowner associations, it is almost impossible for a homeowner to manifest explicit consent to individual terms. When it comes to the restrictions imposed on a development by the declaration, it is an all-or-nothing proposition for the homeowner, who must either take or leave the entire package. Arguably, a prospective buyer's ability to walk away from a transaction and purchase a home in a "competing" association will lead to an efficient marketplace in which homeowner preferences are optimized. In many housing markets, however, lack of differentiation between competing developments counteracts this notion.[86]

This lack of differentiation is compounded by the fact that all homeowners automatically become members of their respective associations once they purchase their homes.[87] One scholar has focused on the compulsory nature of membership as a cause for concern when analyzing whether residents give meaningful consent to be bound by association rules and regulations.[88] If it were common practice to separate the act of purchasing from the act of consenting to the restrictions enforced by the homeowner association, then the contractual model's theory of consent may not be so problematic.

In the context of political sign bans the consent problem becomes even murkier because this particular type of restriction is not typically something that a new homebuyer is likely to be cognizant of when purchasing an association home. Since the culture of free speech is so central to our democratic society,[89] it is quite likely that many homebuyers have no inkling that they could be subjected to such a restriction in their own homes. As a result, actual knowledge of the restriction may only be gained when the homeowner desires to engage in the prohibited conduct and is denied permission to do so. Situations such as these are the kind that can cause great tension due to the dissonance between buyer expectations and reality. What the

85. Alexander, *supra* note 73, at 894 (discussing the "bundling" problem).

86. For further discussion, see *infra* Part III.B.2.b (discussing the lack of meaningful choice for homebuyers because of the homogeneity of housing markets).

87. *See supra* Part II.B.1 (overview of homeowner associations).

88. MCKENZIE, *supra* note 7, at 146–47.

89. *See infra* Part IV.B.1–2 (discussing the importance of free speech as a constitutional value and an indispensable aspect of a democracy).

homeowner believes she is consenting to when she purchases her home and what she is actually consenting to are often incongruous.

b. Lack of Meaningful Choice

In many housing markets, the lack of meaningful consumer choice also creates serious problems for the contractual model. Proponents of association living argue that residents accept certain burdens when they choose to live in an association-governed neighborhood. Others have questioned whether residents really have a meaningful choice in accepting the burdens along with the benefits. In many housing markets,[90] consumer choice is relatively limited because most available housing is organized under the homeowner association model, and most homeowner associations provide similar services, fees, and restrictions.[91]

As association-governed communities become simultaneously more common and more similar to one another,[92] consumer choice is increasingly limited.[93] Thus, the claim that buyers have a substantial amount of choice in the marketplace is somewhat dubious. The uniformity of the bundled restrictions offered by competing developments becomes a larger problem as markets grow more homogeneous.[94]

Even those who refuse to accept the argument that market homogeneity is a meaningful limitation on overall consumer choice, must acknowledge that sign bans, political or otherwise, are apt to be included as "standard" aesthetic regulations in almost all homeowner association declarations.[95] This creates a vicious cycle because if one association includes such a ban, there is the tendency for all similarly situated associations in the same geographic region to include that very same ban.[96] Rather than giving consumers increased choice in

90. This is especially true in two of the country's most populous states: California and Florida. MCKENZIE, *supra* note 7, at 11.

91. DILGER, *supra* note 8, at 95–96; *see also* Winokur, *supra* note 42, at 58–59 (discussing the recent growth of homeowner associations and the standardization of restrictions).

92. *See supra* Part II.A (detailing the rapid expansion of homeowner associations in the last several decades).

93. MCKENZIE, *supra* note 7, at 12.

94. *See* Winokur, *supra* note 42, at 58–62 (discussing characteristics of real estate transactions that are factors in the standardization of servitude regimes).

95. *See id.* at 58–59 (discussing the standardization of servitude regimes).

96. Because developers tend to be repeat players in certain areas of the country, association regulations are often templates that are simply cut and pasted from one development to another. Thus, once a restriction gets included in one declaration it is almost always going to he included in the declarations of subsequent developments. *See id.* (discussing the standardization of real estate documents and the widespread use of hoilerplate language in servitudes).

order to differentiate themselves, homeowner associations are actually inclined to preserve their underlying similarities and maintain the status quo.

Furthermore, just as membership in a homeowner association is automatic, membership cannot be resigned unless a homeowner sells her house and moves out. Thus, there are very high exit costs for a homeowner who wishes to extricate herself from a particular association.[97] From a practical perspective, when the only alternative is selling one's house and moving, many homeowners will simply bear the negative consequences of undesirable regulations.

C. Constitutional Approach

1. Overview

In contrast to the contractual approach, the constitutional approach is a less traditional way to characterize homeowner associations and their attendant legal responsibilities. It seems only natural that those opposed to the regulation of free speech, and political speech in particular, would invoke the First Amendment to supply a remedy. However, it is well established that the Constitution only prohibits actions by private actors when they are fairly attributable to the State; the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful."[98]

For this reason, scholars and litigants have been eager to make the case that the actions of homeowner associations are fairly attributable to the State and deserve to be restricted according to the dictates of the Constitution. This assertion is not unfounded given the large number of analogies that can be drawn between homeowner associations and local governments.[99] While the Court has developed a handful of state action theories over the past several decades, two seem particularly applicable to the homeowner association context:[100]

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97. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1415 (1994).

98. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

99. *See supra* Part II.B.3–4 (noting the vital role of local governments in the estahlishment and growth of homeowner associations, and the similar characteristics that such associations share with local governments).

100. The decision to focus on these two theories of state action is based upon my conclusion that these theories have the most applicability to the association context. As to the public function theory, this conclusion is driven by the fact that the prohlem of political sign bans involves a conflict between property rights and free speech; the precise problem dealt with by *Marsh* and its progeny. *See infra* text accompanying notes 101–114 (discussing the public function theory and relevant case law). As to the symbiotic relationship theory, the role that local

(1) the public function theory; and (2) the symbiotic relationship theory.

2. Public Function Theory

The public function theory is rooted in the seminal state action case, *Marsh v. Alabama*.[101] *Marsh* considered the case of Grace Marsh, a Jehovah's Witness, who was convicted of criminal trespassing for distributing religious literature on the streets of a privately owned "company town."[102] The key issue before the Court was whether a private company, the Gulf Shipbuilding Corporation, that owned and operated the "company town" of Chickasaw, Alabama, should be recognized as the equivalent of the State for the purposes of the First Amendment.[103] The Court held that, as applied to Ms. Marsh, the Alabama criminal trespass statute was an unconstitutional abridgement of the First and Fourteenth Amendments.[104]

Central to the Court's holding in *Marsh* was the striking similarity between Chickasaw and other typical American towns of its era. In an oft-cited passage, Justice Black wrote:

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. *Except for that it has all the characteristics of any other American town.* The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.[105]

One lasting legacy of this passage has been the scholarly and judicial focus on Justice Black's assertion that Chickasaw possessed *all*, rather than merely some or most, of the characteristics of a typical American town. As subsequently interpreted, this language set the bar very high for courts to find that a private entity assumed all, or at least a sufficiently large number, of the traditional public functions in a given locality to merit a finding of state action.[106]

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governments play in the planning and functioning of most common-interest communities seems to resemble, at least arguably, the level of state involvement required by the Court in this line of cases. *See supra* Part II.B.3–4 (analyzing the involvement of local governments in homeowner associations and the benefits that the government derives from the existence of these communities); *see also infra* text accompanying notes 115–120 (discussing the symbiotic relationship theory and relevant case law).

101. 326 U.S. 501 (1946).

102. *Id.* at 503–04.

103. *Id.* at 502.

104. *Id.* at 509–10.

105. *Id.* at 502 (emphasis added).

106. During its initial attempt to clarify *Marsh*, the Court temporarily expanded its reading of the public function doctrine in the so-called "shopping center cases." In *Amalgamated Food*

At first blush, the homeowner association seems to be the modern analogue to the company town found in *Marsh*. As one scholar argues, the primary holding of *Marsh* can be viewed as a "narrow expansion of constitutional protection applicable only to company towns and other privately owned communities that are the 'functional equivalent of . . . municipali[ties]' . . . ."[107]

If homeowner associations are viewed in the eyes of the law as the functional equivalents of municipalities, just as company towns were in the 1940s, then this "functional equivalent" argument has substantial merit. From a functional standpoint, there are similarities between homeowner associations and municipalities because most associations provide services such as street cleaning, trash collection, snow removal, and maintenance of common areas.[108] In addition, associations also impose zoning-type regulations like those usually imposed by local governments, such as building and occupancy restrictions.[109] Because of these similarities, one scholar argues that the Court's public function paradigm, as first articulated in *Marsh* and later clarified in the shopping center cases,[110] should be updated to encompass certain types of association-governed communities.[111]

The public function theory of state action is further complicated by its ill-defined parameters. The cleanest articulation of the public function theory can be found in *Rendell-Baker v. Kohn*.[112] In *Rendell-Baker*, the Court asserted that a private entity might fall under the umbrella of the public function theory of state action if the function performed was one that was "traditionally the exclusive prerogative of

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Employees Union v. Logan Valley Plaza, Inc., the Court held that a shopping center was "the functional equivalent of [the] 'business block' [in Chickasaw] and for First Amendment purposes must be treated in substantially the same manner." 391 U.S. 308, 325 (1968). However, the Court quickly halted this expansion, first in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) and finally in *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976). In *Hudgens*, the Court announced that *Logan Valley* had been formally overruled and essentially adopted the position of Justice Black's dissent in *Logan Valley*. 424 U.S. at 518–21. Justice Black wrote:

> The question is, [u]nder what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all the attributes of a town*, i.e., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."

Logan Valley, 391 U.S. at 332 (Black, J. dissenting) (emphasis added).

107. Siegel, *supra* note 25, at 473.

108. *Id.* at 476–77; *see also supra* Part II.B.4 (detailing ways in which homeowner associations are similar to municipalities in the services they provide).

109. Siegel, *supra* note 25, at 476–77.

110. *See supra* note 106 for a discussion of the shopping center cases.

111. Siegel, *supra* note 25, at 482–89.

112. 457 U.S. 830 (1982).

the State."[113] While this seems to lend clarity to the analysis, it may actually raise more questions than it answers because the inquiry is necessarily an incredibly fact-intensive exercise,[114] which can yield vastly different results from case to case.

3. Symbiotic Relationship Theory

At its core, the symbiotic relationship theory of state action relies upon the premise that if the government is so intimately involved in certain private activity, it defies logic and common sense to characterize this activity as anything other than the work of the State. The first case that sketched out the parameters of what would become the symbiotic relationship theory was *Burton v. Wilmington Parking Authority*. In *Burton*, the Court held that the exclusion of an African-American patron from a restaurant solely on the basis of race was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.[115] The Court's decision turned on the fact that the restaurant was operated by a private owner who leased the premises from the Wilmington Parking Authority, an agency of the State. Significantly, the Court stated that "the State has so far insinuated itself into a position of interdependence with Eagle [restaurant] that it must be recognized as a *joint participant* in the challenged activity."[116]

In subsequent cases, the joint participation element came to be the key component of the Court's analysis under the symbiotic relationship theory. In *Jackson v. Metropolitan Edison Co.*,[117] the Court articulated the test somewhat differently when it wrote, "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[118] At present, the concept of "a sufficiently close nexus" between the State and a private actor remains the central focus of the Court's inquiry when applying the symbiotic relationship theory.

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113. *Id.* at 842.

114. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (discussing the state action doctrine generally and concluding that when courts determine whether the Fourteenth Amendment applies to nominally private conduct this "can be determined only in the framework of the peculiar facts or circumstances present").

115. *Id.* at 716–17.

116. *Id.* at 725 (emphasis added).

117. 419 U.S. 345 (1974).

118. *Id.* at 351.

As previously discussed,[119] the symbiotic relationship theory of state action may be applicable to homeowner associations for several reasons. First, associations are the result of conscious policy choices by local municipalities. Second, associations and local government act as partners in revenue collection and/or service delivery.[120]

4. Limitations of the Constitutional Approach as Applied to Political Sign Bans

a. Public Function Theory

Despite the functional similarities between associations and local governments, several major problems arise when applying the public function theory to homeowner associations.[121] With few exceptions,[122] homeowner associations fall short of *Marsh*'s mandate that a private entity must take over all public functions traditionally performed by the State in order to be considered a state actor. The absence of a business district from most homeowner associations is one of the main factors that prevents a complete *Marsh* analogy. Because homeowner associations are, by their very nature, almost uniformly one-dimensional in their residential character, this is a problem that is not easily overcome. While one commentator has argued that the Chickasaw/company town paradigm needs to be refreshed for the modern era,[123] there is little evidence in the years since the shopping center cases were decided that the Court is willing to engage in such a revision to the doctrine.[124]

Those eager to apply the public function theory to homeowner associations may point to the laundry list of similarities between associations and local governments.[125] In response to this argument, one commentator wrote, "Those advocating the application of the Constitution to private associations offer nothing more than a thinly veiled substantive choice among competing normative values."[126] In

119. *See supra* Part II.B.3–4.

120. Siegel, *supra* note 25, at 520–24.

121. Reichman, *supra* note 8, at 253.

122. One exception could arise in the case of mixed-use developments governed by associations. A mixed-use development "includes residential and commercial elements, and may also include recreational and other components." HYATT, *supra* note 16, at 18.

123. Siegel, *supra* note 25, at 489–90.

124. *See infra* text accompanying notes 130–141 (discussing the symbiotic relationship theory).

125. *See supra* Part II.B.4.

126. Brower, *supra* note 53, at 254.

other words, associations only appear to resemble state actors, as traditionally defined by the Court, because certain parties have a social or political agenda that requires them to be viewed as such.

Perhaps the best hope for a successful application of the public function theory to association bans on political signs is a reconsideration of the shopping center cases along the lines suggested by Justice Marshall in his *Hudgens v. National Labor Relations Board* dissent. Justice Marshall wrote:

> The underlying concern in *Marsh* was that *traditional public channels of communication remain free, regardless of the incidence of ownership.* Given that concern, the crucial fact in *Marsh* was that the company owned the traditional forums essential for effective communication; it was immaterial that the company also owned a sewer system and tbat its property in other respects resembled a town.[127]

By dispensing with the requirement that a private entity possess all of the incidents of a normal town to qualify as a state actor, and instead focusing on the question of private control over "traditional public channels of communication," Justice Marshall offered an approach that is applicable to the association context. Since homeowner associations exercise control over the display of political signs on land incident to privately owned homes (a traditional public channel of communication), this may be sufficient to satisfy the state action requirement.[128] In other words, if a court were to accept Marshall's argument that *Marsh*'s holding was driven by Gulf's control over the traditional public forums and means of communication in Chickasaw, then it may be immaterial that most association-governed communities do not have "*all* the characteristics of any other American town."[129]

b. Symbiotic Relationship Theory

Under the symbiotic relationship theory, it would also be difficult to support the claim that the State is a joint actor with a homeowner association. While local governments are typically

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127. Hudgens v. Nat'l. Labor Rel. Bd., 424 U.S. 507, 539 (Marshall, J. dissenting) (emphasis added).

128. Although Justice Marshall does not explicitly discuss this in his *Hudgens* dissent, I would argue that such a finding of state action should be confined solely to the issue of political sign bans or any other related First Amendment claims. Thus, the scope of a state action holding based on the fact that a homeowner association controlled a "traditional public channel of communication" would activate the First Amendment to protect the impermissibly regulated speech; it would not necessarily attach the full breadth of constitutional restrictions normally placed on the government. In essence, this would be an issue-specific application of the state action doctrine.

129. Marsh v. Alabama, 326 U.S. 501, 502 (1946) (emphasis added).

involved in the preliminary stages of association development,[130] it is difficult to argue that they have much lasting involvement with the administration of homeowner associations.

Some have argued that homeowner associations are the result of conscious policy choices by local municipalities, which, in turn, create virtual partnerships between associations and local governments,[131] but this argument is problematic because the Court has set the bar very high for finding state action under the symbiotic relationship theory. In finding, or refusing to find, the symbiotic relationship test satisfied, the Court has stressed that the private entity must "insinuate itself into a position of interdependence"[132] with the State or have a "sufficiently close nexus"[133] with the State. In light of precedent, and the narrowing scope of its application, most homeowner associations are not likely to be classified as state actors under the symbiotic relationship theory. As a practical matter, the list of private entities that have *not* met the Court's stringent test include: a private club licensed by the State,[134] a privately owned electric utility heavily regulated by the State as a government-approved monopoly,[135] and a private school[136] and private nursing home[137] that were both funded, licensed, and regulated by the State.

Other difficulties with the symbiotic relationship theory as applied to homeowner associations are the lack of a principled test to guide its application and the heavy dependence upon case-by-case factual analysis.[138] As the Court stated in *Burton*, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[139] Likewise, one scholar commented, "In virtually every case, however, the ultimate question seems to be factually based, with state action being applied when 'the facts warrant such a finding.'"[140] By engaging in a fact-based totality-of-the-circumstances test, findings of state action become very subjective determinations, which have the

130. *See supra* Part II.B.3 (discussing the relationship between associations and local governments).

131. *See* Siegel, *supra* note 25, at 520–24 (connecting the recent growth of homeowner associations with local governmental interests).

132. Burton v. Wilmington Parking Auth., 365 U.S. 715, 715 (1961).

133. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 345 (1974).

134. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

135. *Jackson*, 419 U.S. at 351.

136. Rendell-Baker v. Kohn, 457 U.S. 830, 830 (1982).

137. Blum v. Yaretsky, 457 U.S. 991 (1982).

138. The public function theory suffers from this same shortcoming.

139. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

140. Wohl & Rishikoff, *supra* note 64, at 530.

potential to be influenced by the court's sympathies toward the underlying claim presented by the litigant.[141] As a practical matter, this uncertainty may deter homeowners who wish to challenge these bans in court under the symbiotic relationship theory.

c. The State Action Doctrine Generally

The Court's growing hostility to the state action doctrine itself over the last several decades is another relevant consideration that limits the utility of the constitutional approach in challenging homeowner associations' political sign bans. After a period of expansion that lasted until the 1970s,[142] the Court has limited the scope of the doctrine in recent years.[143] In most recent cases, the Court has declined to find state action unless the factual circumstances closely mirror past precedent.[144]

One plausible explanation for this trend is that the Court created the state action doctrine in order to remedy social wrongs that Congress had failed to address.[145] For example, the Court was apt to find state action in the post-war era, but curtailed such findings after the enactment of much of the federal civil rights legislation in the 1960s and 1970s.[146] Essentially, the Court used state action as a tool of judicial activism at a time when the legislature remained silent on pressing issues such as racial discrimination and segregation. Once Congress stepped in to prohibit discrimination in numerous private

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141. In fairness to judges, the extreme subjectivity of the state action analysis can cut the other way as well by encouraging judicial restraint.

142. *See generally* Marsh v. Alabama, 326 U.S. 501 (1946); Shelley v. Kramer, 334 U.S. 1 (1948); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Adickes v. H.S. Kress & Co., 398 U.S. 144 (1970). The expansion of the state action doctrine effectively came to a halt with a series of key cases in the 1970s. *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Jackson v. Metropolitan Edison Co, 419 U.S. 345 (1974); Hudgens v. Nat'l. Labor Rel. Bd., 424 U.S. 507 (1976); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

143. One possible exception is *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). In *Brentwood Academy*, the Court held that there was state action due to the "pervasive entwinement" between a nominally private organization, the Athletic Association, and the State. While some have characterized this as a new test for state action, others have argued that it is merely a recasting of the symbiotic relationship test. *See supra* Parts III.C.3, III.C.4.b.

144. Six such cases fit this mold. *See generally Moose Lodge*, 407 U.S. at 163; *Metropolitan Edison*, 419 U.S. at 345; *Flagg Bros.*, 436 U.S. at 149; Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); NCAA v. Tarkanian, 488 U.S. 179 (1988).

145. In the mid-twentieth century, problems of racial discrimination by private parties were sometimes addressed vis-à-vis the state action doctrine. *See, e.g., Shelley*, 334 U.S. at 1; *Burton*, 365 U.S. at 715. This insight is derived directly from Professor Thomas McCoy's in-class lectures concerning the state action doctrine at Vanderbilt Law School in fall of 2004.

146. The 1964 Civil Rights Act is the cornerstone of this trend.

contexts, judicial intervention on this front became less critical. Furthermore, the Rehnquist Court made a concerted effort to refrain from engaging in this type of judicial activism. Assuming that the Roberts Court will carry on this ethos of judicial restraint, it will be very difficult to break new ground in the realm of state action.

IV. PROPOSAL: LIMITATION ON ASSOCIATION REGULATION OF POLITICAL SIGNS BASED ON PUBLIC POLICY

A. The Remedy: Traditional Contract Law Public Policy Justification for Holding Political Sign Bans Unenforceable

Given the problems presented by homeowner associations and the limitations of the existing analytical frameworks when applied to the issue of political sign bans, a new approach is necessary to address these concerns. A sensible place to start is by combining the core insights of the two existing frameworks while minimizing their problematic aspects. The core insight of the contractual approach is that, at a minimum, parties come to the community with constructive knowledge of homeowner association restrictions. If this assumption is correct, then courts generally should uphold such restrictions. Courts should make an exception, however, with respect to restrictions that (1) impair the ability of individuals to freely express themselves in their homes; and (2) impede open and honest discourse relating to electoral politics.[147] Protecting these values is the core insight of the constitutional approach. This insight requires courts to invalidate political sign bans on public policy grounds.

A limited exception to the contractual approach for political sign bans does not require judicial adoption of a public policy exception to freedom of contract when reviewing association regulations generally.[148] Rather, it requires a more modest change. Invalidation of contracts, or specific contract terms, based on the concept that they are contrary to public policy is a well-established

147. The public policy concern outlined in this Section, which focuses primarily on the detrimental effects that political sign bans may have on individual rights and the proper functioning of our democratic system of government, is compounded by the concerns discussed earlier in Part III.B; namely, lack of meaningful consent by homeowners to the restrictions imposed upon them by associations and lack of meaningful choice for homeowners between competing associations within a particular geographic region.

148. One commentator has advocated judicial adoption of a public policy exception to freedom of contract when reviewing association regulations generally. *See* Brower, *supra* note 53, at 266–72.

practice in our common law tradition.[149] When interpreting a contract, courts seek to give effect to the intent of the parties. As an initial matter, courts attempt to gauge the intent of the parties by focusing on the specific language contained within the written document that memorializes the parties' agreement. Courts parse the language of the contract by construing the specific terms in accordance with their plain meaning and other generally accepted canons of construction. However, there are certain special instances when a court recognizes that an external control "imposed by the world around the bargain"[150] trumps the plain meaning of the contract language. In these cases, courts may choose not to enforce a contract, or a specific contract term, on the grounds that it is against public policy.[151]

According to the Restatement (Second) of Contracts, a contract term may be unenforceable if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[152] Furthermore, a court may elect to strike down certain problematic terms as against public policy based on "its own perception of the need to protect some aspect of the public welfare."[153] In many instances, the "against public policy" rationale for unenforceability is synonymous with illegality. For example, "A contract may be contrary to public policy because the performance that is bargained for is against public policy. [Thus], a contract to set up a gaming business may be contrary to public policy because the creation of a gaming enterprise and gaming are illegal."[154] However, illegality is not a necessary condition for unenforceability of a contract term on public policy grounds. The need to protect some critical aspect of the public welfare underpins the public policy exception to freedom of contract. Thus, "a court may determine a public policy and may determine that a particular contract contradicts that policy by simply evaluating the prevailing practices and notions of the

149. "The law has a long history of recognizing the general rule that certain contracts, though properly entered into in all other respects, will not be enforced, or at least will not be enforced fully, if found to be contrary to public policy." CORBIN ON CONTRACTS § 79.1 (2004).

150. RICHARD E. SPEIDEL ET AL., CONTRACT LAW 572 (6th ed. 2003).

151. Although this Note advocates a public policy approach based primarily upon contract law principles, an almost identical public policy exception is also well-established in the law of servitudes. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmts. e-f (2000) (discussing judicial authority to hold certain privately created servitudes invalid as a matter of public policy).

152. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1978).

153. *Id.* § 178 cmt. b.

154. CORBIN ON CONTRACTS § 79.1 (2004).

community as to what is in the interest of the general welfare of the society."[155]

There are understandable objections to the public policy approach. Courts ordinarily review the process, not the terms or substance, of association rules and rulemaking.[156] This limited review reduces the risk of judicial arbitrariness and subjectivity. However, in the case of political sign bans, this level of review under-protects the important value of free speech. The new approach proposed by this Note attempts to strike a sensible balance between these competing concerns. As the following Section shows, the balance must tip in favor of free speech over association bans on political signs.

B. The Reasoning: Analogous to the Reasons that Core Political Speech Is Protected from Governmental Interference by the First Amendment

Although political signs often are small in size, their significance is enormous. Indeed, political signs vindicate the values at the heart of the First Amendment's protection of free speech. Furthermore, the importance of such speech, i.e. core political speech that directly contributes to the "marketplace of ideas,"[157] is not diminished in a neighborhood operated by a private homeowner association. It is axiomatic that the principal aims served by free speech in the United States are (1) promoting individual autonomy, self-expression, and self-fulfillment; and (2) facilitating representative democracy and self-government.[158] The remainder of this Part demonstrates that a public policy approach to association regulation of political signs is justified because political signs are a vital mechanism by which to advance these core principles.

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155. *Id.* § 79.2.

156. Brower, *supra* note 53, at 228–31.

157. The phrase "marketplace of ideas" is derived primarily from a notable passage in Justice Holmes's dissenting opinion in *Abrams v. United States*:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the *competition of the market* . . . .

250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (emphasis added).

158. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 959 (14th ed. 2001).

1. Individual Rights Concern: Tradition of Special Respect for Individual Liberty in the Home

Dating back to colonial times, the "freedom of one's house" has been at the core of the American conception of individual liberty.[159] The Third and Fourth Amendments integrated this freedom into our constitutional scheme to prevent unwanted and unjustified intrusion into the home by the government.[160] In modern times, this freedom has also been recognized by implication, most notably in the series of Supreme Court cases developing the "right to privacy."[161]

The centrality of the home to the American conception of individual liberty embodies the fundamental belief that property is the guardian of personal liberty.[162] The essence of personal liberty, in turn, is the ability to express one's self and one's viewpoints freely and without interference. Thus, as a practical matter, one's home allows an individual to have an unregulated forum for free expression and self-realization. So long as the law prevents the government from intruding into the home, individual liberty and self-expression will thrive.

In *Stanley v. Georgia*, a First Amendment obscenity case, Justice Marshall wrote,

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[163]

Although *Stanley* by no means provides a perfect analogy to political sign bans,[164] Justice Marshall's words reverberate in this context by emphasizing that the cultivation of one's own intellectual, moral, political, and sexual self within one's home is an undertaking that is zealously protected by the traditions of our culture and our legal system. Accordingly, any intrusion into this protected realm

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159. Payton v. New York, 445 U.S. 573, 597 n.45 (1980) (quoting John Adams, 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

160. U.S. CONST. amends. III & IV.

161. The "right to privacy" was first articulated in the Court's landmark decision *Griswold v. Connecticut*. 381 U.S. 479, 484 (1965). Later cases applied the right to privacy in other contexts, namely abortion. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Moore v. East Cleveland, 431 U.S. 494 (1977); Planned Parenthood of Southeastern Pa v. Casey, 505 U.S. 833 (1992).

162. Winokur, *supra* note 42, at 43.

163. 394 U.S. 557, 565 (1969).

164. Again, I emphasize this point because I am not advocating the finding of state action or the application of the First Amendment to homeowner associations. I am merely using the rationale that underpins the First Amendment's free speech protection as the theoretical foundation for making a public policy argument.

necessarily requires the strongest justification and the utmost restraint.

Political sign bans do substantial damage to this ideal. In a very meaningful way, association bans on political signs wreak the same havoc on "men's minds" as the obscenity laws at issue in *Stanley*. As one commentator observed, "In a society which increasingly abstracts and renders fungible so much in our lives, we should protect opportunities to be peculiarly one's self, even at the expense of the neighbors' heightened aesthetic sensibilities . . . ."[165] By restricting one of the most powerful forms of free speech that can be undertaken on one's own property, often in the name of "aesthetic sensibilities," political sign bans erode the traditional respect that our society places on individual liberty and self-expression in the home.

Furthermore, assuming that the exercise of free speech promotes individual autonomy, self-expression, and self-fulfillment,[166] there is substantial societal value in protecting that very exercise in the home because it is the forum where most individuals feel most secure engaging in it. This assertion carries special significance in relation to political signs because the location where this particular type of speech occurs adds invaluable credibility to the content of the message. Since the display of a political sign "signal[s] the resident's support for particular candidates, parties, or causes,"[167] it is a form of political speech, which is inextricably linked to the identity and community reputation of the speaker. Although their size and mobility allow for the display of political signs in many locations, there is no more profound statement of one's beliefs than to sing them from the rooftop, quite literally, of one's own home. By invoking public policy to invalidate association bans on political signs, courts can preserve our cultural and legal tradition of guarding the home as a precious sanctuary of individual liberty and self-expression.

2. Systemic Rights Concern: Protecting the Marketplace of Ideas and the Proper Functioning of Our Democratic System

> When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.[168]

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165. Winokur, *supra* note 42, at 74–75.

166. SULLIVAN & GUNTHER, *supra* note 158, at 959.

167. City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

168. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1965).

Beyond the individual rights rationale, a second justification for the public policy approach emanates from the concept that free expression is a right derived implicitly from the role that public debate and elections play in our democratic system of government. In *Masses Publishing Co. v. Patten*,[169] Judge Learned Hand began the movement away from the notion that free speech is solely an individual right by characterizing the right of free speech in the collective, as *the* source of governmental authority in a democratic society.[170]

Over the years, many scholars, most notably Dr. Alexander Meiklejohn, expanded on Judge Hand's conception of free speech as a systemic right[171] that is clearly inferable from our constitutional structure of government. In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court cited Meiklejohn, and others, when it wrote, "The First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government."[172] Similarly, Professor Emerson also articulated the fundamental role that free speech plays in our democratic system when he wrote:

> The crucial point, however, is not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government. Once one accepts the premise of the Declaration of Independence—that governments derive "their just powers from the consent of the governed"—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.[173]

The role that free expression plays in fostering our democratic system of self-government is most clearly exemplified by one particularly vital act: voting. Thus, the need to zealously guard free speech in our society "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[174] Without the protections afforded by the principles of free speech, the electoral process that is at the core of the American democratic system of government becomes de-legitimized.

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169. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

170. Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 12 (1990) (emphasis added).

171. Some analogous terms include: "structural right," "collective right," or "societal right." My use of the term "systemic right" encompasses these and other similar terms.

172. 448 U.S. 555, 587 (1980) (citing A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

173. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883 (1963).

174. MEIKLEJOHN, *supra* note 168, at 27.

Political sign bans imposed by homeowner associations are a dangerous rebuke to the argument that free speech serves an exalted purpose in our system of government. While Hand and Meiklejohn were primarily concerned about *governmental* interference with speech, the reasoning behind their concerns is no less applicable when private homeowner associations interfere with the free speech of their members in their homes. An individual voter's ability to contribute to the marketplace of ideas, or her opportunity to be influenced by that very same marketplace, should not be stifled simply because she chooses to live in a community governed by a homeowner association. A voter's role in the proper functioning of our democratic system of government is equally important regardless of her home address. As the Supreme Court has asserted, political "[s]igns that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community."[175]

Without the ability to display political signs on private property, communities, and more specifically elections, may evolve into empty voids within the democratic landscape where only a few select voices will be heard concerning the candidates or the issues. As Professor Emerson wrote, "It is through the [electoral] process that most of the immediate decisions on the survival, welfare and progress of a society are made. . . . Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere."[176] If this "necessary condition" is missing or significantly diminished in its scope by bans on political signs, then the maintenance of a fully optimized electoral process, fueled by lively and robust public debate, becomes increasingly difficult.[177] Accordingly, the electoral process is at risk of being gutted of its intended constitutional purpose as the mechanism to secure "the consent of the governed."[178]

Avoiding over-generalization, it is not far-fetched to presume that many Americans gain awareness, especially during the early stages of election season, about political candidates and issues while driving through the streets of their local community and viewing the political signs displayed on their neighbors' lawns.[179] The home is an

175. City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994).

176. Emerson, *supra* note 173, at 883.

177. Meiklejohn argues that fostering "robust public debate" is the central function of the First Amendment. *See* MEIKLEJOHN, *supra* note 168, at 75 ("The primary purpose of the First Amendment is, then, that all citizens shall, so far as possible, understand the issues which bear upon our common life.").

178. Emerson, *supra* note 173, at 883.

179. This premise is even stronger when considering local elections where in-depth media coverage and television advertising are going to be at a minimum.

especially powerful forum from which to voice one's political viewpoints. The placement of a political sign on one's property is an unequivocal declaration of one's political beliefs for all to see and, more importantly, consider for themselves. As one commentator noted, "[Political campaign signs] have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate—an impact that money can't buy."[180] Moreover, when taken in the aggregate, the sheer number of signs for a particular political candidate throughout a given community can signal the relative strength or weakness of a particular political viewpoint; information that could bear on a voter's ultimate Election Day decision.

The Framers recognized "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be the fundamental principle of the American government."[181] Political signs are simple, yet powerful, communicative tools for modern voters to express their political beliefs and stave off the inertia that threatens our democratic system.

C. The Application: Fashioning an Approach Based on the Supreme Court's "Time, Place, and Manner" Cases

Courts should recognize a public policy exception to the general freedom of contract because political signs are core political speech and implicate the most fundamental values of the First Amendment. However, courts need not be insensitive to the motivation behind most association sign regulations: a desire to keep the community "attractive and livable"[182] by controlling the creation of too much litter and visual clutter. This raises an important question: when applying the public policy exception, how should courts evaluate association regulations of political signs given that such regulations are generally motivated by legitimate interests? To answer this question, courts should fashion an approach based on the Supreme Court's well-established "time, place, and manner" approach to unintentional infringements of protected First Amendment speech.[183]

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180. *Gilleo*, 512 U.S. at 55 n.12 (quoting DICK SIMPSON, WINNING ELECTIONS: A HANDBOOK IN PARTICIPATORY POLITICS 87 (rev. ed. 1981)).

181. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

182. Community Association Institute, Frequently Asked Questions (FAQ), http://www.caionline.org/faq.cfm#4 (last visited Mar. 31, 2006).

183. *See generally* Schneider v. State, 308 U.S. 147 (1939) (distribution of handbills); Martin v. Struthers, 319 U.S. 141 (1943) (door-to-door canvassing); Kovacs v. Cooper, 336 U.S. 77 (1949) (raucous noises); Cox v. Louisiana, 379 U.S. 536 (1965) (student anti-segregation protest at courthouse); Heffron v. Int'l. Society for Krishna Consciousness (ISKON), 452 U.S. 640 (1981)

The "time, place, and manner" cases establish that courts should tolerate regulations that accidentally interfere with the exercise of free speech as long as the interference is merely incidental to some other significant state interest.[184] In *Clark v. Community for Creative Non-Violence*, the Court articulated its standard for analyzing regulatory interferences with free speech under the "time, place, and manner" paradigm as follows:[185]

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[186]

The Court's "time, place, and manner" balancing test weighs the interests inherent in a particular type of speech against the government's interest in regulating that speech indirectly in the name of public order, safety, aesthetics, or tranquility, privacy, and repose.[187]

Integrating the "time, place, and manner" methodology into the public policy exception for political sign regulations is eminently sensible. In this context, the aesthetic concern is likely to be a primary motivation behind the regulation.[188] Despite the strong justifications for a public policy exception,[189] it would seem imprudent to assert that such weighty concerns should remove all regulatory power from homeowner associations to curb the potential aesthetic drawbacks of political signs. For instance, a homeowner should not be able to argue for a public policy exception in order to enable her to

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(distribution of religious literature on state fair grounds); Metromedia v. San Diego, 453 U.S. 490 (1981) (billboards); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (posting signs on public property); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping in park during demonstration); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (noise restrictions on use of band shell); *Gilleo*, 512 U.S. at 43 (residential signs); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) (anti-abortion protestors); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997) (same); Hill v. Colorado, 530 U.S. 703 (2000) (approaching a person near a healthcare facility).

184. By "incidental," I mean that the regulation is not directly intended to suppress a particular substantive political viewpoint.

185. The modern formulation of the "time, place, and manner" balancing test comes from *United States v. O'Brien*, 391 U.S. 367 (1968). However, the Court later refined the "time, place, and manner" standard in *Clark*, 468 U.S. at 293.

186. *Clark*, 468 U.S. at 293.

187. SULLIVAN & GUNTHER, *supra* note 158, at 1197–1220.

188. *See supra* Part II.B.1–4 (arguing that one of the four main functions of a homeowner association is to protect neighborhood aesthetics and real estate values).

189. *See supra* Part IV.B.1–2 (outlining botb individual and systemic rights concerns).

erect a twenty-foot tall political billboard on her front lawn. Such a result would clearly be absurd.

To prevent such a scenario, courts should fashion an approach similar to the balancing test articulated in *Clark*.[190] When analyzing a "time, place, and manner" regulation, courts will normally: (1) assess the significance of the asserted governmental interests; and (2) determine whether the State has employed the least restrictive means available to achieve its asserted interests and minimize the interference with the activity protected by the First Amendment.[191] Courts should undertake a similar analysis in determining whether to invalidate an association regulation of political signs. Courts should: (1) assess the significance of the association's asserted interests in regulating political signs, or external signs generally;[192] and (2) determine whether there are less restrictive means to achieve the association's interests while minimizing the interference with political speech.

Indisputably, there are alternative ways for individuals to advocate their political views outside of the home, but the reasoning detailed above[193] will ensure that an *outright* ban on all political signs will fail the balancing test because there is clearly a less restrictive means to achieve the association's interest. By contrast, it will be considerably more challenging to apply the balancing test to an association regulation that limits the size of political signs or the time period during which political signs may be displayed.[194] Although speculating about the myriad different factual scenarios is not very fruitful, courts will have to give careful consideration on a case-by-case basis to the interests set forth by associations in light of the extent of the interference with homeowners' free speech interests.

V. CONCLUSION

The influence that homeowner associations have over an ever-increasing percentage of the population demands a more exacting degree of scrutiny from the legal and academic community. Political sign bans may only be the tip of the iceberg when it comes to the

190. *See supra* text accompanying note 186.

191. Schad v. Mt. Ephraim, 452 U.S. 61, 68–69 (1981).

192. Again, in most instances this will be the desire to minimize litter and/or visual clutter.

193. *See supra* Part IV.B.1–2 (discussing individual and systemic rights arguments).

194. These are simply two ohvious examples of less restrictive regulations that *could* pass muster under the proposed balancing analysis. In these two hypothetical cases, the outcome of the balancing analysis is likely to be very fact-intensive.

substantial effect that associations can have on individual liberty and the proper functioning of our democratic system of government.

In arguing for a public policy approach to guide the legal treatment and regulation of political signs in homeowner associations, this Note advocates a proactive approach to this problem. By expanding common law protections,[195] both associations and homeowners can come out ahead in the final analysis. Under this approach, homeowner associations can continue to operate and thrive without the burden of being tagged as full-fledged state actors while ceding only a small swath of their contractual and rulemaking autonomy in the name of a broader societal good. Likewise, homeowners can enjoy the essential free speech protections normally guaranteed by the First Amendment and still gain all of the benefits of association living.

Brian Jason Fleming[*]

195. Although this Note has argued for a common law remedy, the eventual adoption of state statutory solutions to the political sign han issue would be ideal because it would clarify the rights of associations to regulate and homeowners to engage in this particular form of speech. Florida is one example of a state that has enacted a statutory free speech right for association residents. Brower, *supra* note 53, at 231. Additionally, state constitutional law may provide another means to secure greater free speech protections for residents of private homeowner associations. A recent New Jersey state appellate court decision held that, as a matter of state constitutional law, homeowner associations may not abridge the rights of their members to display political signs on their lawns. *See* Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006).

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