TICKY TACKY LITTLE GOVERNMENTS?

A MORE FAITHFUL APPROACH TO COMMUNITY ASSOCIATIONS UNDER STATE ACTION DOCTRINE

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ABSTRACT

Community associations[1] are an innovative solution to a myriad of challenges that arise in the ownership of residential property. They solve collective action problems and fulfill desires in the common pursuit of neighborhood harmony. But when community associations go too far to conform and perfect the neighborhoods they govern, they often intrude on the fundamental liberties of individual property owners. Without intervention, they stand to threaten the rights of a substantial number of U.S. citizens where it matters most: in the home.[2]

State action doctrine provides an adequate safeguard against this threat. However, courts have struggled to hold community associations to account under the doctrine because they don't fit squarely into the quintessential state action models. The result is seemingly faithful to the black letter of state action precedent, but not its purpose. This Comment analyzes these problems and offers what may be a more faithful approach, in both the letter and spirit of state action doctrine.

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[1] A term referring to the private organizations (usually nonprofit corporations organized under the laws of the state in which they operate) charged with operating various types of common interest communities; it includes, among others, condominium associations, homeowner associations, and cooperative associations. For the purposes of this Comment, the differences between these associations are of little significance except as otherwise noted. The author does not intend to portray all community associations as bad actors and wishes to make clear that common interest communities often do far more good than harm. However, this is not enough to protect those individuals whose rights are infringed upon, whether intentionally or not, by community associations.

[2] *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law . . . .").

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I. INTRODUCTION

The American dream may now come with a hidden cost: individual rights. In the interest of living in a *nice* community,[3] a property owner might be subject to prohibitions on the display of political yard signs and the American flag,[4] or even jailed for failing to water the grass.[5] Community associations restrict the ownership of residential property and "enforce rigid and often repressive codes of conduct governing the most private aspects of peoples' lives"[6] in ways that may implicate the Equal Protection and Due

[3] *See* Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of Government for "the Nice,"* 37 URB. LAW. 335.

[4] *See, e.g.,* Stone Hill Cmty. Ass'n v. Norpel, 492 N.W.2d 409 (Iowa 1992) (upholding flagpole prohibition against World War II combat veteran on grounds that "restrictive covenants . . . are recognized under Iowa law and exist to protect existing and future property owners . . . .").

[5] Erin Sullivan, *Man jailed for brown lawn gets help from neighbors*, ST. PETERSBURG TIMES (Oct. 13, 2008), http://www.tampabay.com/news/humaninterest/article850257.ece.

[6] EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994).

Process Clauses of the Fourteenth Amendment, freedoms of speech, press, and assembly, and even the rights to firearms and privacy, among others.[7]

Those who seek to realize the dream of home ownership unencumbered by community association governance face an increasingly daunting task. As of the last census, nearly 25 million[8] of the 115 million households[9] in the United States were subject to community association governance; a proportion likely to swell as the bulk of U.S. population growth continues to occur in the suburbs. Property accompanied by mandatory membership in a community association accounts for "nearly all new residential development in California, Florida, and Texas, and fifty percent of all housing for sale in the fifty largest metropolitan areas."[10]

Although community associations represent "the most significant privatization of local government responsibilities in recent times,"[11] few courts have yet to constrain their power to the limits of the Constitution under the state action doctrine. As private actors not held subject to the constitutional limitations that constrain municipal, state, and federal

[7] "[N]owhere else are private property rights restricted more than in [community] associations across the nation. 'The entrepreneurship, creativity, sense of individuality that we prize is being ground down relentlessly under the conformity and regimentation that has been foisted on people's homes.' [Consumer organizations] liken the associations to 'giant bulldozers that ravage the rights of homeowners' . . . across the country . . . .'" Sharon L. Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights*, 30 W. ST. U. L. REV. 1, 2 (2003) (citations omitted).

[8] COMMUNITY ASSOCIATIONS INSTITUTE, *Industry Data: National Statistics*, http://www.caionline.org/info/research/pages/default.aspx.

[9] CENSUS BUREAU, CURRENT POPULATION REPORTS, http://www.census.gov/prod/1/pop/p25-1129.pdf.

[10] Steven Siegel, *The Constitution and Private Government: Toward the Recognition of constitutional Rights in Private Residential Communities 50 Years After* Marsh v. Alabama, 6 WM & MARY BILL RTS. J. 461, 469 (1998) [hereinafter Siegel, *The Constitution and Private Government*].

[11] Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 865 (2006) [hereinafter Siegel, *The Public Role*] (quoting U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?, at 18 (1989)).

governments, community associations may intrude upon all facets of their subjects' lives without regard for constitutional guarantees.[12]

However unprecedented in scope, the threat that accompanies community associations is not new:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[13]

In 1946, approximately three percent of Americans lived in company-owned towns.[14] Today, more than one in five U.S. households belong to a common interest community governed by a private association.[15] These communities often share as much in common with traditional municipalities as company-owned towns, and the associations that govern them often enjoy broad power over their respective residents' conduct and property. Despite these similarities, courts have generally rejected the comparison of community associations to company towns, as well as comparisons to the private actors subject to constitutional limitations under other state action theories.[16]

Some courts have fancifully portrayed community associations' powers as necessary to modern suburban living through an innovative application of

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[12] *See* Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 267-68 (1976) ("the residential private government comprises yet another layer of day-to-day regulation that further reduces those personal liberties defined in terms of property rights.").

[13] Marsh v. Alabama, 326 U.S. 501, 508-09 (1946).

[14] Steven Siegel, *The Constitution and Private Government*, *supra* note 10, at n.70; *see also Marsh*, 326 U.S. at n.5.

[15] *See* discussion *infra* Part II.D.

[16] *See* discussion *infra* Part II. According to one lawyer, twenty five states have "made it clear they would not apply the Constitution to private [community] associations with respect to their internal membership rules . . . ." Barry S. Goodman, *Why the Appellate Division Got it Wrong*, 242 N.J. LAW. 10 (Oct. 2006).

common law servitudes or covenants running with land.[17] Others dismiss state action claims by reasoning that community association powers result from property owners' voluntary contractual agreements to be bound to mutually beneficial restrictions.[18] Still others realize the trouble of comparing the private actors of another era to the community associations of today.

This Comment will explain how state action doctrine has been perceived and applied by courts in cases involving community associations. It will then outline a framework that may be more faithful to the purpose of the doctrine and established U.S. Supreme Court precedent.

II. The Doctrine and Judicial Perceptions of its Application to Community Associations

Since its inception, the Fourteenth Amendment has generally been understood to prohibit only actions by a state and its agents.[19] Were this absolute, a state could deprive individuals of the rights the amendment

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[17] *See* Woodside Village Condo. Ass'n v. Jahren, 806 So. 2d 452, 456 (Fla. 2002) ("A declaration of condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto—it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. . . . From the outset, courts have recognized that condominium living is unique and involves a greater degree of restrictions upon the rights of the individual unit owners when compared to other property owners."); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. 4th DCA 1975) ("[T]o promote the health, happiness, and peace of mind of the majority of unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy . . . ."); *Stone Hill Community Ass'n*, 492 N.W.2d at 410 ("[R]estrictive covenants . . . exist to protect existing and future property owners . . . ."); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 Cornell L. Rev. 1, 11 (1989) ("Recent cases reflect judicial awareness of the group character of residential life in common unit developments. The sense that emerges from these cases is that courts regard these arrangements as new forms of residency, fundamentally different from both traditional fee ownership of the detached house and apartment living.").

[18] *See* Compiano v. Kuntz, 226 N.W.2d 245, 249 (Iowa 1975) (restrictive covenants are agreements or promises and therefore contractual); discussion *infra* Part II.D.

[19] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the amendment."); U.S. Const. amend. XIV.

secures by encouragement, endorsement, mechanism of the law, or by delegating its police power. If states could achieve unconstitutional goals through private agents, the Fourteenth Amendment would be without a remedy.[20] If violations of the rights it secures cannot be remedied, it becomes little more than an empty promise masked in formalism.[21] State action doctrine is the remedy where this occurs.

While courts and scholars have proffered various explanations of state action doctrine, most come in the form of a categorical analysis.[22] Although authorities vary, three categories are most readily apparent: public function theory, in which a private entity exercises power characteristic of the state in a manner that results in a constitutional deprivation; entanglement theory, in which the state and the private party charged with a deprivation enjoy a close relationship such that the state is a joint participant; and enforcement theory, in which the state enforces private agreements or explicitly sanctions private party conduct that results in a deprivation.

However helpful it may be for constitutional law professors to categorize state action cases, the categorical analysis proves unmanageable for the judiciary.[23] Attempts to fit an octangular community association peg into the

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[20] Terry v. Adams, 345 U.S. 461 (1953) (To provide a right without a remedy "is to grant the right but in reality to withhold its privilege and enjoyment.").

[21] *Cf*. Mapp v. Ohio, 367 US. 643, 655 (1961).

[22] *See, e.g.*, Sabghir v. Eagle Trace Community Ass'n, 1997 WL 33635315, No. 96-6964-CIV-HURLEY (S.D. Fla. Apr. 30, 1997) (two tests for state action: public function and significant state involvement); Brock v. Watergate Mobile Home Park Ass'n, 502 So. 2d 1380, 1382 (Fla. 4th DCA 1987) (two tests: public function and sufficient nexus); GEOFFREY R. STONE, ET AL, CONSTITUTIONAL LAW 1543-1608 (6th Ed. 2009) (analysis focused on government neutrality and notable departures therefrom); NOWAK & ROTUNDA, CONSTITUTIONAL LAW 510-27 (7th ed. 2003) (four tests: the *Edmonson* hybrid, public function, state commandment, and mutual contacts).

[23] *See* discussion *supra* Part II.A-C; *See, e.g.,* Lisa J. Chadderdon, Note, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 242 (2006) ("Each of the tests advanced by the above [categories] is different, and none has been consistently or regularly applied . . . . As such, there is no single, clear state action doctrine."); Josiah N. Drew, Comment, *The Sixth Circuit Dropped the Ball: An Analysis of* Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n *in light of the Supreme Court's Recent Trends in State Action Jurisprudence*, 2001

round holes of the categorical analysis has led most courts that have entertained the question to foreclose state action claims.[24] Most rejections of community association state action claims result from a deficient application of precedent—the often stale comparison of associations borne out of our recent housing phenomenon to seemingly ancient actors held to account under three lines of cases decided half a century—or more—ago.

A brief overview of these three strains and examples of how they have been applied in the community association context highlight the problem with approaching state action doctrine in categories.

A. Public function theory

Public function theory rests upon the proposition that a state cannot "free itself from the limitations of the Constitution in the operation of its government functions merely by delegating certain functions to otherwise private individuals."[25] The theory has its roots in a series of cases dealing with the Texas Democratic Party's attempts to exclude blacks from voting in the party primary, first as a state prohibition, then as a party rule, and finally, through a privately held "unofficial" primary in the Jay Bird Democratic Association which determined who would run in the official primary—usually unopposed.[26]

The theory developed from cases where the state quite flagrantly intended to subvert the Fourteenth Amendment by delegating its authority to private entities, but it also reared its head where private entities exercised power in a manner characteristic of the state, such as Chickasaw, the company town at issue in *Marsh v. Alabama*.[27] A non-resident Jehovah's Witness was arrested

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B.Y.U. L. REV. 1313, 1340 ("Essentially, because the courts have these three flexible tests that they shape around the facts on a case-by-case basis, the state action area of the law is quite unpredictable and confusing.").

[24] *See, e.g., Brock*, 502 So. 2d at 1382 (mobile homeowner association not like a company town or sufficiently connected to state).

[25] NOWAK & ROTUNDA, CONSTITUTIONAL LAW, *supra* note 22, at 510.

[26] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[27] 326 U.S. 501 (1946).

and charged with trespassing for distributing religious pamphlets on a sidewalk in the shopping district of a company-owned town.[28] The Court reasoned the town did "not function differently from any other town," and was therefore subject to the limitations of the First and Fourteenth Amendments.[29]

After *Marsh*, the Court expanded the holding to implicate solicitation restrictions in private shopping malls, but quickly reversed course.[30] That private entities could be held to account by the First and Fourteenth Amendments as so-called "public forums" simply by opening their doors for business was an inconsistent extension of the doctrine.[31] Rather than recognize the discredited public forum theory for the outlier it was, courts and commentators have given heavy weight to particularities of the Court's retraction, transforming the way they analyze community associations under the public function theory.[32] Some engage in a disingenuous inquiry into the services an association provides.[33] One court found "the services

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[28] *See id.*

[29] *Id.* at 508.

[30] *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Food Emps v. Logan Plaza 391 U.S. 308 (1968).

[31] *See* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedoms in the States*, 62 ALB. L. REV. 1229, 1262 (1999) ("Societal changes fail to warrant the infusion of such remarkable elements of constitutional relativism. . . . Economic freedom, like expressive liberty, cannot be selectively downgraded toward the achievement of ideological objectives currently in vogue."). *Cf.* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish Comes a Curse*, 45 UCLA L. REV. 1537, 1539 (1998) ("[C]ategorical governmental imposition of First Amendment obligations on private parties presumptively conflicts against government-compelled orthodoxy."); Jonathan D. Varat, *When May Government Prefer One Source of Private Expression Over Another?*, 45 UCLA L. REV. 1645, 1646 (1998) ("[B]lanket transfer of First Amendment obligations will impair severely the expressive rights of private entities" and "necessarily reflects a government decision to prefer one speaker over another . . . .").

[32] *See, e.g.*, Tansey-Warner, Inc. v. East Coast Resorts, Inc., 1978 WL 22460, Civ. A. No. 720 (Del. Ch. July 24, 1978) (must have *all* the attributes of and function sufficiently like a municipality).

[33] Comment, *A Better Twin Rivers: a Revised Approach to State Action by Common-Interest Communities*, 57 Cath. U.L. Rev. 1151, 1176 (2008) ("Some commentators overemphasize the importance of community associations providing municipal services as a basis for equating the associations with state actors."); *see, e.g.*, Midlake on Big Boulder Lake, Condo. Ass'n v.

provided by a homeowners association, unlike those provided in a company town, are merely a supplement to, not a replacement for, those provided by local government."[34] The New Jersey Supreme Court overturned a lower court decision finding state action, but instead of analyzing the issue, purported to apply a "less constrained" state action analysis under the state's analog to the First Amendment, a provision it considers "broader than practically all others in the nation."[35] This less constrained analysis considered the state's version of the defunct "public forum" test without accounting for whether the association performed a traditional government function.[36]

B. Entanglement theory

Just as a private actor who exercises traditional governmental authority is subject to the limitations of the Fourteenth Amendment, a private actor engaged in a mutually beneficial relationship with the state may be subject to constitutional liability. A private actor's conduct can be attributed to that of the state where the state "so far insinuate[s] itself into a position of interdependence with [a private actor] that it must be recognized as a joint participant in the challenged activity . . . ."[37]

In *Burton*, the Court attributed the racially discriminatory conduct of its private lessee, a restaurant located within a public parking garage, to the state. In essence, a close relationship between the state and a private actor can cause the private entity's conduct to be attributable to the state. Even

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Cappuccio, 673 A.2d 340, 342 (Pa. Ct. App. 1996) (community association not like a municipality because it does not run a sewer service, schools, or a library). This approach makes little sense because the municipal services they describe—utilities, trash pickup, etc.—are not "traditionally the exclusive prerogative of the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974). At least some of these decisions never even mention the quintessential governmental function and feature that community associations share with public governments—the regulation of conduct and property within a geographically defined jurisdiction.

[34] Brock v. Watergate Mobile Home Park Ass'n, 502 So. 2d 1380, 1382 (Fla. 4th DCA 1987).

[35] Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1065 (N.J. 2007) (quoting Green Party v. Hartz Mountain Indus., 752 A.2d 315, 364 (N.J. 2000)).

[36] *Id.*

[37] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

"[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" to implicate constitutional limits.[38]

The Court later clarified that while "private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action."[39] It went on to attribute the conduct of a private creditor to the state where it acted in joint participation with a state court to attach a debtor's property in an ex parte proceeding. After *Lugar*, a case brought under an entanglement theory only requires "joint participation" between private individuals and state institutions or officials.[40]

Community associations are not generally held to account under this analysis. Courts most commonly analyze this under *Burton*, but apply language found in *Moose Lodge* or *Metropolitan Edison*: a highly detailed regulatory scheme is not enough.[41] While these courts are correct on this point, they fail to recognize a whole spectrum of ways in which states and their political subdivisions place "power, property and prestige"[42] behind community associations.[43]

C. Enforcement theory

With *Shelley v. Kraemer*[44] came what had the potential to become a sweepingly broad third category under which private actors might be held to account by the Fourteenth Amendment. In *Shelley*, the Court overturned a state court's enforcement of a racially restrictive covenant. The Court was

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[38] Evans v. Newton, 382 U.S. 296, 299 (1966).

[39] Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

[40] *Id.*

[41] *See, e.g.,* Anelli v. Arrowhead Lakes Cmty. Ass'n, 689 A.2d 357 (Pa. Commw. Ct. 1997) (detailed regulatory scheme not state action) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

[42] *Burton*, 365 U.S. 715, 725.

[43] *See* discussion *infra* Part III.A.

[44] 334 U.S. 1 (1948).

unconvinced that the private character of the agreements were controlling in the analysis:

> The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce constitutional commands.[45]

In one way, community associations uniquely implicate this category of state action: they derive nearly all their enforcement authority from the use of restrictive covenants.[46] The formal power they hold over constituents usually rests on their ability to place liens and ultimately foreclose on the homes of those who fail to pay assessments and fines. As one Florida court put it, when a community association invokes the powers of a court to enforce its rules, "it invoke[s] the sovereign powers of the state to legitimize the restrictive covenant at issue."[47]

A little history might also be telling. Racial segregation was a marketing tool for early common interest community developers, and racial restrictive

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[45] *Id*. at 20.

[46] This authority is often supplemented by state statute. Daniel Goldmintz, *Lien Priorities: The Defects of Limiting the "Super Priority" for Common Interest Communities*, 33 CARDOZO L. REV. 267, 274-75 (2011) (stating 30 states and DC codify enforcement authority). States have recognized association authority in three ways: statutory law, common law covenants running with the land or equitable servitudes, and as contractual obligations undertaken at purchase. *See Id*.

[47] Franklin v. White Egret Condo., Inc., 358 So. 2d 1084, 1089 (Fla. 4th DCA 1977), *aff'd on other grounds*, 379 So. 2d 346 (Fla. 1979).

covenants were an intentional result of the planned community movement to which all community associations owe their existence.[48]

Despite these similarities, *Shelley* has been dismissed by many as a "race case" limited to its facts.[49] Court enforcement isn't good enough, they say, because private litigation, such as actions available to creditors under state enactments of the Uniform Commercial Code, cannot be said to implicate state action. Many rely on subsequent Supreme Court decisions, especially *Flagg Brothers, Inc. v. Brooks*: "[t]he settlement of disputes between [private parties] is not traditionally an exclusive public function" and "the field of private commercial transactions would be a particularly inappropriate area" to apply it.[50]

Some courts have found *Shelley* persuasive in state action claims against community associations. In one case, a federal district court judge cited *Shelley* and found disingenuous an argument that it was distinguishable as a race case.[51] Another federal district court criticized its sister court for relying on "old-fashioned patriotism, rather than old-fashioned legal reasoning," and because where the association "has not secured a state judgment against

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[48] MCKENZIE, *supra* note 6, at 36 ("As the twentieth century began, [developers] began heavy promotion of restrictive covenants through their professional associations. . . . Deed restrictions were the legal means by which developers were able to conduct privatized land planning and, in effect, lay out the suburbs of most major American cities. They intentionally created patterns of housing segregation by race and class that persist to the present."

[49] *See, e.g.,* Loren v. Sasser, 309 F.3d 1296 (11th Cir. 2002) ("*Shelley* has not been extended beyond race discrimination."); Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (same); (Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Ct. App. 1996) (*Shelley* not applicable to enforcement of restrictive covenants absent racial discrimination); Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948 (Kan. 1992) (same).

[50] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 161-63 (1978).

[51] Gerber v. Longboat Harbour North Condo., Inc., 757 F. Supp. 884, 887 (M.D. Fla. 1989) ("It is an exercise in sophistry to posit that courts act as the state when enforcing racially restrictive covenants but not when giving effect to other provisions of the same covenant."). On rehearing, 757 F. Supp 1339, the court stated it "found and continues to find that judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment . . . ," although vacating in part its decision on other grounds.

[a constituent property owner] . . . , [a plaintiff] cannot establish state action under *Shelley*."[52] The Kansas Supreme Court distinguished *Shelley* as not just a race case depriving the Shelleys of the right to own property, but also because they "had no prior actual knowledge of the restrictive covenant."[53] One interesting case in Florida applied *Moore v. City of East Cleveland*[54] to strike down condominium restrictions that forbade children and any living arrangement other than single-family residency.[55] The district court of appeal cited to *Shelley*,[56] but the Florida Supreme Court affirmed in result only.[57] It instead established a public policy restriction against the arbitrary or capricious enforcement of age and residency restrictions on the basis that it could implicate constitutional values.[58]

Courts may be apprehensive about upsetting the longstanding common law institution of covenants and servitudes. But the deed restrictions of today share little with their historical predecessors. "Early uses of covenants had to do with promises between individuals concerning use of their own land and

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[52] Goldberg v. 400 East Ohio Condo. Ass'n, 12 F. Supp 2d 820, 823 (N.D. Ill. 1998) ("It is difficult to understand, then how the court in *Gerber* found state *action* before the state *acted*."); *see also* Quail Creek Prop. Owners Ass'n v. Hunter, 538 So. 2d 1288 (Fla. 2d DCA 1989) (possible enforcement of restrictive covenants not sufficient for state action). *Goldberg*, like *Gerber*, was a pre-enforcement challenge to an association rule, and the court did not "express [an] opinion on whether it would be proper to extend *Shelley* to [community association] rules actually enforced by state courts." *Goldberg*, 12 F. Supp 2d at 823. This reasoning holds true for civil rights actions under 42 U.S.C. § 1983, which includes an "under color of state law" requirement. Although the state action requirement of § 1983 is essentially synonymous with the state action requirement of the Fourteenth Amendment, § 1983 is a remedy for rights violations that have already occurred. A person does not have to expose herself to enforcement to challenge the constitutionality of a law if she can demonstrate an intention "to engage in a specific course of conduct 'arguably affected with a constitutional interest.'" American Civil Liberties Union v. Fla. Bar, 999 F.2d 1486, 1491 (11th Cir. 1993) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

[53] *Brockway*, 824 P.2d at 951.

[54] 431 U.S. 494 (1977).

[55] Franklin v. White Egret Condo., Inc., 358 So. 2d 1084 (Fla. 4th DCA 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979).

[56] 358 So. 2d at 1089.

[57] 379 So. 2d at 352.

[58] *Id.*

had nothing to do with large-scale planning by real estate developers," while their current use only came about with the suburbanization of the twentieth century.[59] These new deed restrictions do not memorialize a particular burden or benefit that runs with the land, but rather impose an everlasting commitment to live by whatever rules the board of directors sees fit.

The express purpose of this innovative new scheme was the formation of private governments to supplement those of municipalities.[60]

D. Consent and the common law distortion

The most popular criticism of attributing state action to the conduct of community associations is what can be seen as the consensual decision to buy property subject to conditions, covenants, and restrictions.[61] This reliance on the voluntary nature of common law servitudes is both doctrinally and empirically misplaced. Doctrinally, consent has never been an element of any state action analysis. Empirically, residential property not subject to community association governance is increasingly scarce, raising a question of whether its purchase is a truly voluntary acquiescence to community association governance.

Those who seek to purchase a home not encumbered by covenants requiring membership in a community association find it an increasingly difficult task, such that one might question exactly how voluntary such

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[59] MCKENZIE, *supra* note 6, at 33.

[60] *Id.* at 29-30; *see* discussion *infra* Part III.A.

[61] *See, e.g.*, Old Colony Village Condo. v. Preu, 956 N.E.2d 258 (Mass. App. Ct. 2011) (finding state action but noting importance that association did not claim unit owner voluntarily and knowingly waived rights in buying condo unit) (citing Perricone v. Perricone, 972 A.2d 666 (2009) and Cohen v. Cowles Media Co., 501 U.S. 663 (1991)); Bryan v. MBC Partners, L.P., S.E.2d 124 (Ga. Ct. App. 2000) (freedom of contract allows individuals to waive constitutional and legal rights); Reichman, *supra* note 12, at 276 ("Neither *Shelley* nor *Marsh* dealt with a situation, like the present one, in which a person was attempting to avoid his voluntarily assumed obligations because they violated his constitutionally protected rights."); Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 657 (1981) ("consent arguably vitiates the basis for constitutional review.").

agreements really are.[62] Indeed, "the notion of consent to the [community association] legal regime at the time of purchase . . . is simply incompatible with the exigencies of the housing market."[63]

Regardless how pervasive community associations are today, the voluntary nature of subjecting oneself to constitutional violations is not a subject of inquiry in constitutional analysis; if it were, one might reason the decision to locate in a given city should be considered a voluntary acquiescence to its municipal government's unconstitutional action—a meritless proposition. Yet voluntariness is the chief reason given by courts and commentators against charging association conduct to the state.[64]

The decision to purchase property in a particular community association is no more or less voluntary than the decision to purchase property in a particular municipality, or even in a particular state.[65] A state action analysis foreclosed by voluntariness is inconsistent with the doctrine of unconstitutional conditions, under which a state actor cannot require an individual to choose between some benefit and a constitutional right, "even if he has no entitlement to that benefit."[66]

The voluntariness excuse also offends the longstanding principle that government derives its power "from the consent of the governed."[67] This proposition represents not just a general consent through republican notions of representation, petition, and redress, but that a citizen has the

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[62] Case Comment, *State Constitutional Law—Freedom of Speech—New Jersey Supreme Court Holds that Restrictions in Common Interest Community do not Violate the State's Constitution*, 121 HARV. L. REV. 644, 650 (2007) [hereinafter Comment, *Twin Rivers*] ("The prospect of living in a community that is not governed by a homeowners' association is hence becoming more elusive for many Americans."); *see also* notes 8-11, *supra* and accompanying text.

[63] Siegel, *The Constitution and Private Government*, *supra* note 10, at 469.

[64] *See* cases cited *supra* note 61.

[65] Edward R. Hannaman, *Homeowner Association Problems and Solutions*, 5 RUTGERS J. L. & PUB. POL'Y 699, n.4 (2008) ("The only way to avoid the board's jurisdiction is to sell one's home and move—exactly as if one desires to avoid State or local government jurisdiction.").

[66] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59 (2006) (quoting Grove City College v. Bell, 465 U.S. 555, 575-76 (1984)).

[67] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

prerogative to choose her place of residence without concern for how that locality recognizes her rights.[68] While she is entitled to take such considerations into account and vote with her feet, her decision does not give her state and local governments license to ignore constitutional constraints. Citizens often take personal and economic freedom into account when considering whether to move to another state,[69] but the Court did not inquire as to why Dick Heller would remain in the District of Columbia with full knowledge of its uniquely prohibitive firearms laws.[70] It did not question whether John Lawrence moved to Texas on his own initiative, or even whether he considered moving in light of its laws against homosexual sex.[71] Nor did it ask the parents of John and Mary Beth Tinker whether they had considered home schooling their children.[72] The Court didn't ask these questions because they do not matter.

Marsh could have evangelized somewhere other than Chickasaw, Burton could have dined down the street, and the Shelleys could have purchased a home in a more welcome neighborhood. To ask whether one's decision to purchase a residence burdened by conditions, covenants, and restrictions is voluntary would not only be inconsistent with constitutional principles, but the history of state action doctrine itself.

III. A More Faithful Approach to the Doctrine

Courts have continued to apply a splintered, categorical analysis in state action cases against community associations despite the Court's consistent warnings that "to fashion and apply a precise formula . . . is an 'impossible

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[68] This freedom is recognized in the Privileges and Immunities Clause and in the Fourteenth Amendment. *See* Saenz v. Roe, 526 U.S. 489 (1999); Art. IV, U.S. Const.; U.S. Const. Amend. XIV.

[69] William P. Ruger & Jason Sorens, George Mason University Mercatus Center, FREEDOM IN THE 50 STATES: AN INDEX OF PERSONAL AND ECONOMIC FREEDOM 1 (June 2011), available at http://www.mercatus.org/freedom-50-states-2011.

[70] *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (city ordinance banning handgun possession in the home violated Second Amendment).

[71] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[72] *See* Tinker v. Des Moines Ind. Comm. School Dist., 393 U.S. 503 (1969).

task.'"[73] A categorical analysis doesn't lend itself well to "sifting facts and weighing circumstances" to determine the "true significance" of "the nonobvious involvement of the State in private conduct."[74] In applying state action doctrine below, courts have routinely compared and contrasted the actors of historic cases in an attempt to fit community associations into the neat categories of decades' old situations lacking contemporary analogs.

Perhaps recognizing the inconsistencies generated by lower courts' applications of the doctrine, the Court explained exactly how to determine whether or not a private actor's conduct can be held to account by the Constitution despite not fitting neatly into a particular category.[75] The analysis is a two-part inquiry: "first, wether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."[76] The first question simply asks whether the action at issue was taken in conformity with state law. The second question is answered by a fact-based inquiry into the extent to which an actor relies on the government, performs public functions, or should otherwise be held to account as a state actor.[77]

Edmonson recognized that some cases don't necessarily strongly implicate just one theory of state action, but sufficiently qualify as state actors because

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[73] *Burton*, 365 U.S. at 722 (quoting Kotch v. Bd. of River Port Pilot Com'rs, 330 U.S. 552, 556 (1947). See also discussion *infra* Part II.B. for courts' attempts to confine their analysis to these three "boxes."

[74] *Id.*

[75] The Court recognized that "generalizations do not solve concrete cases" in finding that an entanglement analysis was "buttressed" by the additional consideration of the public function the private actor served in *Evans v. Newton*. 382 U.S. 296, 301 (1966). *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 847-52 (1982) (Marshall, J., dissenting) ("Performance of a public function is by itself sufficient to justify treating a private entity as a state actor only where the function has been traditionally the exclusive prerogative of the State. But the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action." (internal citations and quotations omitted)).

[76] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

[77] *Id.*

they touch on all three. Although the decision dealt with a jury selection system not new or novel, it recognizes the private institutions of generations past were. The world has changed much since the decisions of *Marsh*, *Shelley*, and *Burton*, which aren't entirely comparable with their contemporary analogs.[78] Certainly they shouldn't form the bases for three distinct tests. Put another way, company towns, segregated restaurants leasing public property, and racially restrictive covenants have little practical significance today, and the contemporary replacements for these actors are not replicas; they represent innovations in law and society that implicate state action in a way that cannot be ascertained through side-by-side comparisons to institutions abandoned long before these new threats came.

Edmonson first asks whether the conduct at issue was taken in conformity with state law. If an association has otherwise violated state law in taking the challenged action, the analysis ends here. For example, where state law requires approval by a majority of all unit owner voting interests to enact any rule or regulation, an association that attempts to enact a rule prohibiting political yard signs merely by a vote of the board of directors fails the first part of the *Edmonson* test. Likewise, where a state prohibits an association from abridging the right of owners to peaceably assemble[79] or display political signs,[80] an association that enacts a blanket ban on the use of common areas for political purposes could not do so in conformity with state law.

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[78] To a degree, this depends on the level of generality applied. For example, the *Marsh* Court made much of the contemporary significance of the company town: "Many people in the United States live in company-owned towns. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." Marsh v. Alabama, 326 U.S. 501, 508-09 (1946). Since *Marsh*, "company towns virtually have disappeared and [community associations] have grown to . . . occupy a similar, if not more dominant, position than that occupied by company towns some fifty years ago." Siegal, *The Constitution and Private Government*, *supra* note 14, at 469. Courts, even the Supreme Court, have limited the doctrine's reach by comparing cases to a high degree of specificity. *See supra* note 50 and accompanying text.

[79] *See, e.g.*, FLA. STAT. § 718.123 (2011).

[80] *See, e.g.*, CAL. CIV. CODE § 1353 (West 2004).

Next, "a court should consider '[1] the extent to which the actor relies on governmental assistance or benefits, . . . [2] whether the actor is performing a traditional government function . . . and [3] whether the injury caused is aggravated in a unique way by the incidence of governmental authority."[81] These factors are a rough recasting of the questions found in each of the three categories often relied upon by courts. Instead of attempting to fit community associations into the neat confines of a single category, however, courts should consider how and the extent to which community associations implicate all three.[82]

A. Community associations enjoy unique governmental benefits and assistance

An actor's reliance on governmental assistance or benefits to execute the challenged action is a question of whether the state has "created a legal framework governing the [challenged] conduct."[83] Nearly all states have enacted legislation to provide for homeowners' associations, and all states have enacted legislation to provide for the creation and governance of condominiums.[84] Although legislative schemes vary from state to state, statutes usually provide associations express powers and duties, including the authority to enact rules and regulations governing many aspects of residential life.[85]

Local governments often work with developers or even zone new residential developments to require community association governance.[86] A local government often "gets benefits as a result of increased population and increased tax base and yet does not have to assume all the responsibility and costs for providing public services to the new residents . . . ."[87] As planned

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[81] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991).

[82] In *Edmonson*, the Court explains exactly what considerations under each factor are significant to the analysis by exporting the general principles of its past cases.

[83] *Edmonson*, 500 U.S. at 624.

[84] Gary A. Poliakoff, *The Phantom of the Condominium*, 72 FLA. B.J. 44 (Feb. 1998) (condominiums statutorily regulated in all 50 states).

[85] *See, e.g.*, CAL. CIV. CODE § 1363 (West 2012); FLA. STAT. § 718.111 (2011).

[86] Siegel, *The Public Role*, *supra* note 11, at 859-62.

[87] C. JAMES DOWDEN, COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS 41 (1980).

development communities began to sprout, private residential developers organized into a powerful political influence that directly transformed the emerging system of public land planning and land-use regulation.[88] The developers recognized "the importance of developing a symbiotic relationship with government . . ." in their efforts to expand the highly profitable market for planned development communities.[89]

This symbiotic relationship provides an "increase in the local tax base which occurs without a proportionate increase in costs to local government," returning "to the local government many more tax dollars per acre than would be possible through any other form of residential development."[90] With benefits like these, it comes as no surprise that many local governments enact zoning regulations that require land be developed according to the planned development model, complete with community association governance.[91]

State legislatures also paved the way for community association governance with statutes recognizing and enabling various types of cooperative living.[92] In addition to burdening the land, some statutes bind the members of the association.[93] Courts have elevated community associations to governmental status, giving broad deference to associations in their efforts to restrict property owners' freedom.[94] In some states, associations enjoy

[88] MCKENZIE, *supra* note 6, at 38. Deed restrictions and other features devised by community developers were later adopted by public planners and "became part of typical zoning laws."

[89] *Id.*

[90] DOWDEN, *supra* note 90, at 51-52.

[91] *See* Comment, *Twin Rivers*, *supra* note 62, at 650 ("For local governments, [common interest communities] are similarly appealing, so cities have encouraged the development of such communities through land use and zoning restrictions.").

[92] *See, e.g.*, FLA. STAT. §§ 718.111, 720.303 (2011); 765 ILL. COMP. STAT. 605/18.4 (2010).

[93] *See, e.g.*, FLA. STAT. § 720.305 (2011) ("Each member and the member's tenants, guests, and invitees . . . are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply . . . may be brought by the association . . . .").

[94] *See, e.g.*, Woodside Village Condo. Ass'n v. Jahren, 806 So. 2d 452, 456 (Fla. 2002) ("Courts have also consistently recognized that restrictions contained within a declaration of condominium should be clothed with a very strong presumption of validity when challenged."); Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. 4th DCA 1975) (stating "on

special statutory privileges to place liens on individuals' property for failure to pay assessments or fines resulting from violations of rules. Even where an association lacks lien authority, it may exercise common law or statutory rights to sue for violations of the covenants, conditions, and restrictions.[95]

The federal government has directly or indirectly encouraged planned development communities since the New Deal.[96] Early on, Federal Housing Authority underwriting policies "indirectly set a national zoning policy" that favored community developers, and its land planning efforts advised them how to plan neighborhoods.[97] The FHA also suggested and sometimes required the use of racially restrictive covenants.[98] As an unabashed advocate for the proliferation of planned development communities, the FHA began insuring community associations and even wrote a 422-page handbook to promote the benefits of community association living and guide "land developers, planners, homebuilders, appraisers, mortgage

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the contrary, we believe the test is reasonableness," in response to the trial judge's holding that community association rules must be related to the protection of life, property, or the general welfare of residents); 175 East Delaware Place Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. Ct. App. 1997) (an association "generally has broad powers and its rules govern the requirements of day-to-day living."). California codified the reasonableness standard and places the burden on the individual property owner to prove a restriction is unreasonable. *See* CAL. CIV. CODE § 1354 (West 2005). The reasonableness test resembles the highly deferential business judgment rule often applied in challenges to the decisions of the board of directors of for-profit corporations. *See* Hollywood Towers Condo. Ass'n v. Hampton, 40 So. 3d 784 (Fla. 4th DCA 2010) (A number of "courts have applied an adaptation of the business judgement rule to decisions made by condominium associations.") (citing Kaung v. Bd. Of Managers of Biltmore Towers Condo. Ass'n, 70 A.D. 3d. 1004 (N.Y. App. Div. 2010)). Interestingly, few of the justifications for the business judgment rule apply to community associations: the courts' inability to evaluate business decisions (such as "what business a corporation should pursue, what risks are acceptable, what returns are desired"), the market sufficiently polices bad management decisions, portfolio diversification, and liquidity—the ease with which a shareholder may vote with her feet. Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)*, 40 Vill. L. Rev. 1297, 1301, n.13 (1995).

[95] *See, e.g.*, FLA. STAT. § 720.305 (2011).

[96] *See* DONALD R. STABILE, COMMUNITY ASSOCIATIONS: THE EMERGENCE AND ACCEPTANCE OF A QUIET INNOVATION IN HOUSING 78-84 (2000).

[97] *Id.* at 78.

[98] *Id.* at 80.

lenders, realtors, attorneys, association officers, and public officials" in the development of community association-governed neighborhoods.[99]

The benefits community associations derive from government are widespread. Community associations are largely the result of government efforts to create more low cost housing, increase economic development, and enlarge tax bases without a proportional increase in the cost of government. For each action a community association takes, it does so with the authority of the state, usually through an enabling statute. Courts should weigh this factor heavily in applying *Edmonson* to community associations.

B. Community associations exercise traditional governmental functions

The second factor asks "where the action in question involves the performance of a traditional function of the government." Unlike public function theory under the categorical analysis, which was limited to the functional equivalent of a municipality,[100] the *Edmonson* analysis also considers the source of the power exercised: "that the government delegates some portion of this power to private [parties] does not change the governmental character of the power exercised."[101]

A community association "has powers and responsibilities that are similar to those of local governments,"[102] whose members "comprise a little democratic sub society."[103] The model of governance is the same council-manager form of governance used by nearly half of all U.S. municipalities

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[99] *Id*. at 92; FED. HOUSING ADMIN. LAND PLANNING BULL. NO. 6 (1963, 1964, 1967, 1970, 1973).

[100] *See* Hudgens v. NLRB, 424 U.S. 507 (1976); *see also* discussion *supra* Part II.A.

[101] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991).

[102] DIV. FLA. CONDOS., TIMESHARES, AND MOBILE HOMES, DEP'T BUS. PROF'L REG., CONDOMINIUM LIVING IN FLORIDA ((2010); *see also* Reichman, *supra* note 12, at 274 ("The promotion of health, safety, the common good and social welfare is almost always declared as the primary objective, suggesting that the homeowners' organization claims to possess at least the same powers that municipalities have-without the concomitant
limitations of public law."); *see also* GARY A. POLIAKOFF, THE ROLE OF THE ASSOCIATION IN CONDOMINIUM OPERATIONS (2d ed. 2011) (Associations "analogous to that of a municipal government.").

[103] Woodside Village Condo. Ass'n v. Jahren, 806 So. 2d 452, 456 (Fla. 2002) (quoting Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. 4th DCA 1975).

today. Like city government, community associations hold elections for a small group of representatives who oversee the budget, make policy decisions, and pass regulations. Many require regulations be enacted by referendum, requiring approval by a majority of voting interests.

The boards of directors are responsible for hiring administrators to conduct day-to-day business of the association, and many employ security guards to keep the peace and enforce regulations. Community associations collect assessments functionally equivalent to real estate taxes, and many also control infrastructure, such as roads, sewers, and bulk telecommunications delivery.[104]

The modern planned development community was conceived as a "privatized version of council-manager municipal government."[105] Community associations, although sometimes ostensibly characterized as voluntary in membership, "exist 'alongside and subordinate to' public governments [and] exhibit 'fundamental political characteristics.'"[106] Until recently, proponents of common interest communities "clearly and explicitly understood they were creating residential private governments."[107] Now, special interests and courts resist labeling community associations as private governments, reflecting "a concern that constitutional limitations on municipal government might become applicable to [community] associations."[108]

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[104] *See* Steven Siegel, *A New Paradigm for Common Interest Communities: Reforming Community Associations Through the Adoption of Model Governing Documents that Reject Intricate Rule-Bound Legal Boilerplate in Favor of Clarity, Transparency, and Accountability*, 40 REAL EST. L.J. 27, 30-31 (2011).

[105] MCKENZIE, *supra* note 6, at 29-30.

[106] *Id*. at 135.

[107] *Id*. at 136; *see also* Uriel Reichman, *supra* note 12, at n.3.

[108] *Id*. McKenzie explains this change in position occurred in the Community Association Institute (CAI) under the watch of Katharine Rosenberry, who was also responsible for a "sweeping reorganization . . . that reduced homeowner influence" in the organization, shifting control to developers and industry beneficiaries, such as lawyers and community association managers. *See also* Siegel, *The Public Role*, *supra* note 11, at n. 31 (CAI protects interests of industry).

The concern is warranted, but avoiding a label does not change the character of authority entrusted to community associations. These powers are the result of direct and indirect delegations of authority from local governments, many of which have crafted policies favoring the development of and delegated authority to association-governed common interest communities through zoning policies or exceptions for developers.[109]

C. Government authority uniquely aggravates the injury

The final factor asks "whether the injury caused is aggravated in a unique way by the incidence of governmental authority."[110] In *Edmonson*, the Court simply considered this factor satisfied by noting "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself," citing to *Shelley*.[111]

The answer to this question is more apparent where the action of a community association is challenged after the association attempts to enforce it through the judiciary. *Edmonson* could stand for the proposition that the discrimination was particularly egregious because the discriminatory act occurred in the courtroom during the process of litigation. But because the Court cites to *Shelley* for this proposition, it seems more likely the Court intended for a broader interpretation: courts, as the final arbiters of constitutional questions, should not be an instrumentality used to abridge constitutional rights because "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds."[112] This should be considered even where a given case is initiated by the individual homeowner against the association because the mere threat of a lien can be coercion enough.

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[109] For an elaborate discussion on the history of planned unit development policies in local government, see Siegel, *The Constitution and Private Government*, *supra* note 14, at 521-22.

[110] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

[111] *Id.* at 628.

[112] *Id.*

Government has at times encouraged, incentivized, and even required community association governance in a manner that could satisfy this inquiry. The FHA's advocacy for the inclusion of racially restrictive covenants seems to aggravate the type discrimination that occurred in *Shelley*.[113] A local government recognizing the limits of state police power may find through policies that encourage or require the development of association-governed common interest communities they can achieve results ascertainable only by unconstrained power.

Whatever the motive, the rich history of federal, state, and local government involvement in the creation of conditions through which a fifth of all U.S. citizens are subjected to extraconstitutional power should be a persuasive factor in the analysis.

IV. Conclusion

Under the Supreme Court's most recent formulation of state action doctrine, the case for finding state action in the conduct of community associations is persuasive. Such conduct may be fairly attributed to the state when considering the extent to which community associations exercise power in a manner that implicates the three factors of the *Edmonson* test.

However, courts have not relied on this test in cases involving community associations. Some courts have found that community associations simply don't fit into a given category, while others theorize that the purchase of land encumbered with covenants and governed by an association is willing and voluntary. But voluntary acquiescence does not factor into the doctrinal equation, and the growing proportion of properties encumbered with covenants that provide for community association governance has made it increasingly difficult for a prospective home buyer to avoid, especially in the suburbs of metropolitan areas.

Given the extent to which community associations limit the exercise of individual rights and the manner in which they supplant traditional government, courts should take more seriously these claims of state action

[113] *See supra* note 96 and accompanying text.

by analyzing community associations under the *Edmonson* test. Rather than try to compare community associations to company towns, restaurants in public parking garages, or an explicit racially restrictive covenant, the *Edmonson* formulation may better allow courts to recognize community associations for what they are: pervasive private governments that will seriously undermine fundamental liberties if not properly held to account.