This is my Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners’ Associations as State Action

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Deeply rooted in this nation’s foundation is the concept that “a man’s house is his castle,” the use of which he should be free to restrict through freedom of contract. Indeed, the Supreme Court of Florida recognized that “the public policy of this state and this nation favors the fullest liberty of contract and the widest latitude possible in the disposition of one’s property.” The ability to maintain ownership of, and control over, property is consistent with the American dream: “Owning a home of one’s own has always epitomized the American dream. More than simply embodying the notion of having ‘one’s castle,’ it represents the sense of freedom and self-determination emblematic of our national character.” The realization of this dream necessarily comes at the expense of certain freedoms associated with property ownership and the ability to restrict its use.

In modern America, and quite notably in Florida, the exercise of property use restriction is most evident in the common-interest community (CIC). A CIC is often governed by a mandatory association commonly

1. Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 162 (London, Bookfellers in Fleet-Street & Holborn 1669); see Weeks v. United States, 232 U.S. 383, 390 (1914) (“The maxim that ‘every man’s house is his castle,’ is made part of our constitutional law . . . and has always been looked upon as of high value to the citizen.” (quoting Thomas McIntyre Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 299 (Boston, Little, Brown & Co. 1871))).
5. See infra Part IV.A–B.
6. The Restatement refers to residential communities as “common-interest communities”:
A “common-interest community” is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal.
known as the community association. This private entity is charged with enforcing the community’s declaration of covenants, conditions, and restrictions (CC&Rs) while retaining the power to promulgate new rules and regulations. Armed with the power of legal enforcement, community associations can compel compliance with private land use restrictions recorded in the community’s CC&Rs, subject to constitutional, statutory, and public policy limitations.

Issues often arise when homeowners challenge the validity of these covenants. As private entities, community associations are not bound to comport with the protections and limitations of the Constitution—either Federal or State—absent state action. Consequently, restrictive covenants

(1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
(2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (2000).

7. FLA. STAT. § 720.301(9) (2011). These associations are “mandatory” because membership is a condition of purchasing a parcel in a CIC governed by an association. Id.

8. This article refers to the private associations that govern CICs as “community associations,” as this term is recognized by Florida Statutes and Florida courts. See id. § 468.431(1); Woodside Vill. Condo. Ass’n v. Jahren, 806 So. 2d 452, 463 (Fla. 2002).

9. See RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 6.2 (Tentative Draft No. 7, 1998). The Restatement refers to the declaration of CC&Rs as “governing documents,” which it defines as “the declaration and other documents, such as the articles of incorporation or articles of association, bylaws, and rules and regulations, that govern the operation of a common-interest association, or determine the rights and obligations of the members of the common-interest community.” Id.

10. See infra Part II.B.1.


12. Adrienne Iwamoto Suarez, Covenants, Conditions, and Restrictions . . . On Free Speech? First Amendment Rights in Common-Interest Communities, 40 REAL PROP. PROB. & TR. J. 739, 744 (2006). Through the Due Process and Equal Protection Clauses of the Fourteenth Amendment, much of the Bill of Rights has been selectively incorporated to apply to the states. Id. However, the Fourteenth Amendment applies only to state action. Id. Therefore, “in order for [the conduct of] a [community association], a private actor, to be held to constitutional standards, a court would need to determine that [its conduct] was in fact . . . state act[ion].” Id. See infra Part V for a more elaborate discussion of state action and the tests employed.

13. A restrictive covenant is “[a] private agreement, usu[ally] in a deed or lease, that restricts the use or occupancy of real property, esp[ecially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.” BLACK’S LAW DICTIONARY 421 (9th ed. 2009). It is a type of real covenant and is a subset of the larger category of “servitudes,” which is defined as “[a]n encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it.” Id. at 1492. This article refers to land use restrictions primarily as “restrictive covenants” because it
recorded in a community’s CC&Rs may, and often do, abridge certain constitutional guarantees otherwise enjoyed relatively unfettered under the regime of a local or state government. Despite the negative connotation associated with the notion of contracting away one’s constitutional rights, these restrictions are often necessary to support the interests of homeowners who purchase property governed by a community association with the prospect that the development scheme and other aesthetic and practical “vested expectations” will be protected. This article will analyze these issues and conclude that the importance of one’s ability to covenant to mutually restrict the use of property in a CIC is an important freedom and a voluntary choice that should not be abridged by characterizing the conduct of community associations as state action.

In reaching this conclusion, a systematic approach will be presented. Part II of this article will discuss the rapid growth of community associations and their role in the CIC while focusing on the voluntary nature of membership. It will focus primarily on Florida due to the pervasive presence of community associations in its real property landscape and their explosive growth that has outpaced the country’s average over the past few decades. Its scope will be limited to Florida’s relatively young homeowners’ associa-

14. See infra Part V.
15. See 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 (1992). Examples of aesthetic controls are “set-back requirements and architectural standards.” Id.; Lee Anne Fennell, Contracting Communities, 2004 U. ILL. L. REV. 829, 838 (describing aesthetic values “as limits on paint color, yard art, structural changes, fences, building materials, and the like”); see infra Part III.
16. Patrick A. Randolph, Jr., Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners’ Privileges in the Face of Vested Expectations?, 38 SANTA CLARA L. REV. 1081, 1082, 1126 (1998) (discussing the importance of protecting the homeowner’s vested expectations—subject to “the balance of community values and concerns of individual freedom”—of her property governed by a community association, while tolerating reasonable change as a necessary aspect of the complex, evolving nature of community associations).
17. See infra Part VI. While some commentators refer to the state action inquiry as seeking to discern whether the entity itself is a state actor, that characterization is largely misplaced because the inquiry actually seeks to determine whether “the specific conduct of which the plaintiff complains” is “unconstitutional conduct [that] is fairly attributable to the State.” Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50–51 (1999) (internal quotation marks omitted).
18. See infra Part II.A; see also EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994) (most community association governed CICs “are concentrated in the sunbelt states, including Florida”).
Part III of this article will discuss the private land use control mechanisms, the types of restrictive covenants that commonly burden property in CICs, and the desirable nature of many of these restrictions as well as some detrimental consequences. Part IV of this article will discuss the interplay between the freedom to contract and the right to restrict one’s property use rights and rights in other contexts. Part V will analyze Florida’s case law on homeowners’ associations and the state action doctrine. It will attempt to reconcile the holdings and extract from these cases the state action tests employed by the various Florida courts. It will then apply these tests to the characteristics of homeowners’ associations and distinguish them from municipalities. It will illustrate how characterizing homeowners’ associations as “quasi-governmental” entities would jeopardize the ability of homeowners’ and community associations alike to impose and enforce such restrictions on the use of property located within a CIC. Part VI of this article will conclude that the property owner’s freedom to contract outweighs the negligible loss of constitutional rights and that the conduct of private community associations are not, and should not be, considered state action.

II. COMMUNITY ASSOCIATIONS: PROLIFERATION, ROLE, AND VOLUNTARY CHOICE

The importance of this issue is underscored by the dramatic increase in the number of residential communities governed by community associations. The consequence of this trend concerns the prospective homeowner’s autonomy: a transaction involving real property—burdened by use restrictions and subject to others’ property rights—that is the product of “voluntary market transactions.” The role community associations play helps

19. Florida’s condominium law, the analysis of which is beyond the scope of this article, has had more years to develop. DEP’T OF BUS. & PROF’L REGULATION, FINAL REPORT OF THE HOMEOWNERS’ ASSOCIATION TASK FORCE 3 (2004) [hereinafter HOA TASK FORCE], available at http://www.ccfj.net/DBPRTFfinalreport.pdf. For example, condominium associations are subject to regulatory oversight, more in-depth statutory regulation, and more defined unit owner protections. See id. Additionally, statutory recognition and governance of homeowners’ associations in Florida was not codified until 1992. Id. By contrast, Florida’s condominium law was codified in 1963. Russell McCaughan, The Florida Condominium Act Applied, 17 U. FLA. L. REV. 1, 1 (1964).


protect the CIC homeowner’s investment and expectations following these transactions.22

A. Proliferation in the United States & Florida

Included under the community association umbrella are homeowners’ associations, condominium associations, cooperatives, and other associations that govern planned communities.23 Over the past four decades, the number of community associations nationwide has grown exponentially.24 From representing a modest 10,000 communities, which encompassed 701,000 housing units and housed 2.1 million residents in 1970, the number of community associations has skyrocketed to governing 309,600 communities of 24.8 million housing units and 62 million residents.25 Presently, one in five Americans lives in a CIC governed by a community association.26 Just as significantly, close to one in five housing units in the United States is governed by a community association.27 The proportion of community association governed housing units to the total number of housing units in the United States has increased significantly over the past decade.28

While these nationwide statistics are substantial, their magnitude is surpassed by Florida’s real property market and its affinity for community associations.29 However, calculating the number of community associations in

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22. See infra Part II.B.
24. Id.
25. Id.
27. There are 24.8 million housing units represented by community associations. Rathbun, supra note 20. This accounts for almost one-fifth of the 131.7 million housing units in the United States. See 2010 U.S. Profile of General Population and Housing Characteristics, supra note 26.
29. See infra note 42 and accompanying text.
Florida is more difficult than it would appear. Although homeowners' associations are required by Florida law to file articles of incorporation with the Division of Corporations in the Department of State,30 "[t]he number of homeowners' associations . . . in Florida is [largely] unknown."31 This uncertainty is the result of several factors. First, it is difficult to distinguish chapter 720 corporations, which are homeowners' associations, from other not-for-profit entities registered with the Division of Corporation's database.32 Second, homeowners' associations are not required by Florida law to present any significant data to the Division of Corporations that would assist in calculating their numbers.33 Finally, the Department of Business and Professional Regulation (DBPR) does not require homeowners' associations to submit projected development plans that would indicate their homeowners' association status or provide the number of housing units within their developments.34

Notwithstanding this difficulty, estimates place the number of Florida homeowners' associations in the range of 14,30035 to 27,000,36 with private industry research statistics falling within this spectrum.37 Combined with Florida's 20,000 condominium associations,38 a modest estimate of commu-
nity associations in Florida exceeds 40,000. Limiting the scope solely to homeowners’ associations nevertheless produces impressive results: In a state of 18.8 million people, Florida’s estimated 6 million homeowners’ association residents means one in three Floridians lives in a community governed by a homeowners’ association. Outpacing the country’s average number of persons living under a community association, Florida is a prime forum for this analysis.

The dramatic increase in Florida’s population and housing compounds this issue. Florida’s population grew by approximately 15% over the last decade. During the same period, the overall U.S. population growth was 9.7%, outpaced by Florida’s population growth by about 5%. A similar...


40. OPPAGA REP. NO. 10-20, supra note 32, at 3.


housing trend has emerged. In 2010, the total number of housing units in Florida was just shy of 9 million, reflecting an 18.9% increase in total housing units in just ten years, and outpacing the 15% increase in population. Because the average household and family size remained virtually unchanged between 2000 and 2010, the housing boom during the earlier part of the decade is likely the cause of Florida's housing market growing at a greater pace than its growth in population. This is supported by the disparity between Florida's 17.5% vacant housing unit rate and the U.S. average vacant housing unit rate of 11.4%.

Considering most of Florida's new development is governed by community associations, this tremendous growth in housing and the corresponding increase in population signifies that a large portion of prospective homeowners will be faced with the decision of whether to purchase in a community governed by an association. While a housing market recovery in Florida may still be on the distant horizon, the glut in housing inventory, at least some of which is concentrated in community associations, will eventually find its way into the hands of homeowners faced with a familiar choice: Restrict one's use of his or her property and enjoy the benefits of a community association or depend exclusively on a local municipality or city for the provision of such services.


47. 2010 Florida Profile of General Population and Housing Characteristics, supra note 39.


52. 2010 Florida Profile of General Population and Housing Characteristics, supra note 39.


54. See supra note 42 and accompanying text.


56. See infra Parts II.B, III.A.1.a.

57. See infra Parts II.B, III.A.2.
B. The Role of the Community Association

While CICs have become a common fixture in Florida, their legal characteristics are quite unique. These include "common ownership of property, mandatory membership in the [community] association, and the requirement of living under a private regime of restrictive covenants enforced by fellow residents." Aimed at "promot[ing] the community concept and protect[ing] the community’s property values," community associations manage and maintain CIC facilities "rang[ing] from park-like open spaces to streets, lighting, water and sewer facilities and recreational facilities." Enforcement of the community’s CC&Rs is among their primary role, though their overarching purpose serves to protect CIC homeowners’ investments and expectations. While varying in size and complexity, the basic structure of community associations remains relatively similar, and it will be discussed in the context of the Florida homeowners’ association—the focus of this article.

1. An Introduction to the Florida Homeowners’ Association

As a starting point, the basic definition of the homeowners’ association sheds light on its basic structure. Florida defines a “homeowners’ association” as:

a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.

However, this definition is largely inadequate in delineating the purpose and nature of the Florida homeowners’ association and its role in the residen-

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59. Id. at 19.
60. Dunbar & Dudley, supra note 30, at 2.
tial community. Created by the community’s CC&Rs, the Florida homeowners’ association is a corporation, primarily not-for-profit, charged with operating the community. It is statutorily authorized “to enforce the covenants and restrictions contained in the governing documents of the community.” The community includes all property owned by residents individually and “common areas owned or leased by the [homeowners’] association,” and all property within the community is bound by these CC&Rs. Consequently, all current and future owners in the community are bound by them.

The homeowners’ association’s ability to provide beneficial services and to protect homeowners’ investments necessarily entails a cost for homeowners beyond forgoing certain land use rights. Accordingly, homeowners’ associations impose assessments to each parcel owner, pro rata, to share the costs of the provision of services and the maintenance of the common areas. In order to keep up with evolving societal and residential needs, homeowners’ associations often need to implement change. Empowered by its bylaws, it may promulgate new rules and regulations. However, this power is not absolute: While the CIC’s recorded CC&Rs “are clothed with a very strong presumption of validity,” subsequent rules and regulations adopted by the board of directors are subject to the standard of reasonable-

65. DUNBAR & DUDLEY, supra note 30, at 5.
66. Id. at 10.
67. Id. at 5.
68. Id. at 6.
69. Id. at 4.
70. Id. at 10-11.
71. See id. at 2–3.
72. Florida defines “assessment” as a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

FLA. STAT. § 720.301(1).
73. DUNBAR & DUDLEY, supra note 30, at 6.
75. The bylaws of a homeowners’ association, as defined in its articles of incorporation, establish its basic structure, procedures, and rule-making abilities. DUNBAR & DUDLEY, supra note 30, at 10–11.
76. Id. at 11.
ness. Additionally, the business judgment rule applies to the boards of Florida corporations; each director must perform his or her duties in good faith as would a reasonable prudent person given the circumstances, and in a manner reasonably in the best interests of the corporation. Each director also has a fiduciary duty to the residents of the CIC governed by the homeowners’ association.

For all but the smallest CICs, homeowners’ associations are a necessary and desirable means of managing property held in common amongst homeowners. In Florida, homeowners’ associations are charged with the significant responsibility of maintaining facilities and managing the community in a manner residents may not experience in an ungoverned community. Indeed, Florida recognizes the importance of these associations and their potential benefits to homeowners: In enacting chapter 720, Florida Statutes, the legislature indicated the desire “that homeowners associations not be subject[] to extensive state regulation” in order “to protect the rights of property owners and association members without unduly impairing the association’s ability to perform its functions.”

C. The Voluntary Nature of Mandatory Association Membership

Much ink has been spilled debating the consensual nature of mandatory association membership. As a general consensus of these opposing views,

78. Id. at 639–40 (distinguishing CC&Rs which are presumptively valid from board-promulgated regulations which are restrained by the reasonableness standard); DUNBAR & DUDLEY, supra note 30, at 11–12, 88.
81. Id. § 720.303(1); DUNBAR & DUDLEY, supra note 30, at 40–41.
83. See DUNBAR & DUDLEY, supra note 30, at 2.
84. OPPAGA REP. NO. 10-20, supra note 32, at 3 & n.9.
85. DUNBAR & DUDLEY, supra note 30, at 3.
86. See Brower, supra note 15, at 222, 246–47 (discussing the essential premise of community association membership as fully voluntary, subject to arguments of buyer ignorance and the inability to understand covenanting documents); Mark Cantora, Increasing Freedom by Restricting Speech: Why the First Amendment Does Not and Should Not Apply in Common Interest Communities, 39 REAL EST. L.J. 409, 424 (2011) (characterizing the voluntary relinquishment of some constitutional rights in exchange for the expansion of other benefits as “the very essence of democratic freedom.”); Robert C. Ellickson, Cities and Homeowners Associations, 130 U. PA. L. REV. 1519, 1523 (1982) (“[M]embership in a private organization is wholly voluntary.”); Korngold, supra note 21, at 1543–44 (discussing the voluntary nature of “[c]onsensual transfers of partial interests” in land); Randolph, Jr., supra note 16, at 1125.
the dividing line seems to be drawn between accepting the notion that constructive notice\textsuperscript{87} equates to one’s voluntary choice of restricting property use, and the view that consent cannot be voluntary where homeowners lack bargaining power\textsuperscript{88} to negotiate these restrictive covenants or lack the faculties to understand them or even be cognizant of their existence.\textsuperscript{89}

However, the decision to purchase in a CIC governed by a homeowners’ association is not the Hobson’s choice\textsuperscript{90} that some of these commentators have alleged.\textsuperscript{91} Granted, it might often be the case that many homeowners, as laymen, do not appreciate the nature of these restrictions or the extent to which they might limit their constitutional rights.\textsuperscript{92} It might also be the case that the potential homebuyer might not be aware of the restrictions he or she is buying into.\textsuperscript{93} Nevertheless, studies suggest that “87% of residents were told the home they were considering was part of a community association.”\textsuperscript{94} For those who are not, the law in Florida holds that ownership of a

(explaining that the original community association agreement is the product of informed decision making). \textit{But see} Laura Coon, \textit{Sign Restrictions in Residential Communities: Does the First Amendment Stop at the Gate?}, 19 COMM. LAW, 24, 24 (2001) ("Prospective homeowners may agree to such restrictions by choosing to live in such communities, but their choice is often made in the face of limited housing options."); McKenzie, \textit{supra} note 18, at 135 (referring to community associations as "ostensibly voluntarily in membership."); Siegel, \textit{supra} note 42, at 469 (Because of the dominance of community associations and their steady increase in proliferation, "the notion of individual homebuyer autonomy, and especially individual homebuyer consent to the complex and comprehensive [CIC] servitude regime, is illusory.").

\textsuperscript{87} See, e.g., Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 310-12 (Fla. 2d Dist. Ct. App. 1966) (discussing the concept of “constructive notice” and how purchasing property subject to a recorded declaration of CC&Rs constitutes such notice, regardless of whether an immediate deed contains the restrictions contained in the recorded declaration).


\textsuperscript{89} Margaret Farrand Saxton, Comment, \textit{Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities}, 51 UCLA L. REV. 1437, 1437 (2004). Some governing documents are exceedingly complex and often cannot be understood by the average homeowner. \textit{Id.} While it is the responsibility of the seller to disclose the existence of these documents, it is not required that the buyer actually looks at or understands them. \textit{See} Hagan, 186 So. 2d at 310-12; Dunbar & Dudley, \textit{supra} note 30, at 8.

\textsuperscript{90} A “Hobson’s choice” is “[a]n election by compulsion or without freedom of choice; a choice without an alternative.” \textit{Ballein\texttildelow{\textcircled{t}}ne's Law Dictionary} 561 (3d ed. 1969).

\textsuperscript{91} Dunbar & Dudley, \textit{supra} note 30, at 74; Siegel, \textit{supra} note 42 at 469.

\textsuperscript{92} \textit{See} Brower, \textit{supra} note 15, at 246-47. “[E]mpirical evidence [suggests] that most purchasers neither read nor understand [governing] documents.” \textit{Id.}

\textsuperscript{93} \textit{Id.} at 246-48.

parcel burdened by a recorded declaration of restrictive covenants imputes upon the owner knowledge of such restrictions.\textsuperscript{95} Certainly there is a reason the law presumes constructive knowledge of recorded CC&Rs: It is impossible to ascertain whether someone is genuinely unaware of a restrictive covenant.\textsuperscript{96} Unfortunately, candor is not a defining feature of human nature. Therefore, due diligence is rewarded,\textsuperscript{97} whereas the imprudent proceeds at his or her peril. To allow a homeowner to successfully challenge the validity of a restrictive covenant on the basis he or she does not understand the nature or existence of the restriction would be to reward his or her ignorance.

The imputation of knowledge of restrictive covenants supports sound public policy.\textsuperscript{98} By presuming homeowners are aware of their property rights and abridgments thereof, the potential detriment the lack of knowledge of restrictive covenants may have upon their rights and ability to use their property should serve as an incentive for homeowners—and citizens in general—to be more cognizant of their rights.\textsuperscript{99} Although some argue that encouraging residents’ awareness and education of their property rights is insufficient to protect their interests, the mutually beneficial nature of the covenant-restricted CIC compensates for this, as it is designed to promote the overall interests of its residents.\textsuperscript{100}

Subscription to the restrictive covenants burdening a parcel in a CIC is the product of a voluntary market decision, just as the creation of these restrictions is the product of free choice tempered by sophisticated, informed decision-making and market considerations.\textsuperscript{101} As one scholar noted, “the original association agreement was the result of a true market decision by parties with the necessary knowledge and sophistication to make an informed

\textsuperscript{95} Dunbar & Dudley, supra note 30, at 8, 88. Florida’s Marketable Record Title Act protects a homeowners’ association’s declaration of CC&Rs from circumvention by an uninformed homeowner by nevertheless binding his or her property by its restrictive covenants through the doctrine of constructive notice. Fla. Stat. §§ 712.02–.03 (2011).

\textsuperscript{96} Korngold, supra note 21, at 1546. This is because unlike constructive notice, which is imputed, actual notice is “[n]otice given directly to, or received personally by, a party.” Black’s Law Dictionary 1164 (9th ed. 2009).

\textsuperscript{97} The diligent homebuyer, apprised of all restrictions burdening his or her property, is rewarded in the sense that he or she has the ability to make an informed decision in selecting a parcel whose characteristics suit his or her tastes and preferences. Korngold, supra note 21, at 1545.

\textsuperscript{98} Cantora, supra note 86, at 423–24.

\textsuperscript{99} ld.

\textsuperscript{100} ld. at 424.

\textsuperscript{101} See Randolph, Jr., supra note 16, at 1125; see also Fennell, supra note 15, at 832 (“[Community associations] are often viewed as representing a laudable shift in the direction of consumer choice.”).
choice.”

It was the intention of the original drafters of these restrictive covenants to maintain the image and community they desired to build, crafted to embrace societal factors and market considerations as a reflection of the desired development scheme. Just as those before them desired to achieve, new purchasers, while perhaps unaware of particular restrictions, choose to be a part of this community and reap the benefits these restrictions affect through compliance. This voluntary choice of communal belonging is accompanied by the use restrictions necessary to achieve and perpetuate the desired development scheme.

While free, unrestricted use of property is generally favored, effect is given to the original intent of the developer or homeowners who desire to mutually restrict the use of property in order to achieve a development scheme that will continue for years to come. For those potential homeowners seeking to purchase, whether they wish to buy into this development scheme or seek housing unburdened by restrictive covenants, they nevertheless retain their freedom of choice. Some might argue, and with merit, that the proliferation of homeowners’ associations and community associations in general leaves prospective homeowners with fewer options. Compounded by the fact that one in five Americans, and more significantly, one in three Floridians, lives in a community association, it would seem that the decision has already been made for many of these consumers. Despite the assertion that the lack of available housing unburdened by restrictive covenants may result in involuntary acquiescence to those covenants, these prospective buyers are not bereft of their freedom to choose their homesteads. It is just as possible that the lack of available housing unburdened by restrictive

104. Id. at 224 (“Accordingly, common interest developments cannot protect residents’ investments and socially based preferences unless members are assured that their choices and agreements will confine themselves and others, both now and in the future.”).
105. Id. at 223–25.
106. Sinclair Ref. Co. v. Watson, 65 So. 2d 732, 733 (Fla. 1953) (en banc).
107. Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 307 (Fla. 2d Dist. Ct. App. 1966) (“Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee . . . .”).
108. See Fennell, supra note 15, at 832; see also Ellickson, supra note 86, at 1520.
109. Brower, supra note 15, at 248 (discussing the scarcity of unrestricted housing as a result of the great increase in number of CICs); Fennell, supra note 15, at 829 (“In many parts of the country today, a homebuyer who wishes to purchase a new home is likely to find that home in a private development governed by a homeowners association.”).
110. See discussion supra Part II.A.
111. See Brower, supra note 15, at 248.
covenants is the product of a housing market modeled after consumer demand and social preference, leaving immaterial their non-acquiescence to those specific restrictions of whose effect they desire to be a part anyway.112

The voluntary nature of mandatory homeowners’ association membership is more apparent when distinguished from the contrary, involuntary nature of city or municipality membership.113 A homeowner acquires membership in a homeowners’ association by purchasing a parcel of land in a CIC governed by one.114 By contrast, “statutory procedures for incorporating a new city invariably authorize a majority (perhaps only concurrent or extraordinary majorities) to coerce involuntary minorities to join their organization.”115 While the decision of which city or municipality will become their domicile may be a voluntary choice, residents do not have the same freedom of choice they have regarding homeowners’ association membership.116 Residents can choose to forego association membership by moving into a community not governed by one, but they cannot avoid membership in a city or municipality, no matter where they live.117 This comparison leads into the premise, discussed later, that homeowners’ associations should not be likened to municipalities.118

III. RESTRICTIVE COVENANTS AND FLORIDA’S HOMEOWNERS’ ASSOCIATION

A short drive through the traditional CIC should make apparent the need for, and impact of, restrictive covenants. From the uniformity in structural aesthetics119 to the well-manicured common areas, the system of restrictive covenants is evident.120 Beginning in the early twentieth century, restrictive covenants emerged as developers’ primary means of implementing their subdivision plans.121 By recording a master declaration of CC&Rs, the de-

112. See id. at 239 (Under a “market theory of consent,” which refers to the collective choice of societal values, “people acknowledge and appreciate the risks and advantages of [community] association[s] . . . when they shop for family residences. Thus, by definition, their decision to purchase in a [CIC] means that they have determined they are better off, or at least no worse off, in a community with those restrictions than in one without them.”).
113. See Ellickson, supra note 86, at 1520.
114. See supra text accompanying note 64.
115. Ellickson, supra note 86, at 1523.
116. Id. at 1520.
117. See id.
118. See infra Part V.B.
119. See Fennell, supra note 15, at 838.
120. See id. at 830.
121. MCKENZIE, supra note 18, at 36.
velopper restricts the use each future parcel owner can make of his or her property in order to preserve the community concept. At first glance, the most noticeable objects for preservation are aesthetic values, where restrictive covenants impose "limits on paint color, yard art, structural changes, fences, building materials, and the like." More covert are those covenants obligating homeowners to pay assessments and those "providing for the operation, maintenance or management of the association or the property." Through these various private land use controls, property owners can mutually restrict the use of property that will bind present and future owners alike. These restrictions, while limiting the use one can make of his or her property, are often desirable. They can, however, have detrimental consequences for those who fail to educate themselves on the substance of the restrictive covenants to which they subscribed when they purchased their property. Overall, the entity responsible for enforcing these restrictive covenants is a necessary device.

A. CC&Rs, Rules and Regulations, and the Florida Homeowners' Association

In recognizing the importance of voluntary consumer autonomy, the Fourth District Court of Appeal held in Hidden Harbour Estates, Inc. v. Basso, that restrictions recorded in a declaration of CC&Rs "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." This holding supports the policy underlying the voluntary nature of restrictive covenants. It further held that these restrictions "will not be invalidated absent a showing that they are wholly arbitrary in

122. See id.; Fennell, supra note 15, at 838.
123. Fennell, supra note 15, at 838.
124. DUNBAR & DUDLEY, supra note 30, at 88–89.
125. Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 307 (Fla. 2d Dist. Ct. App. 1966). Each homeowner has the right to enforce these restrictions against one another. Id. A "restriction," in the real property context, is a "limitation . . . placed on the use or enjoyment of property." BLACK'S LAW DICTIONARY 1429 (9th ed. 2009).
126. See DUNBAR & DUDLEY, supra note 30, at 8 ("When covenants run with the land, a person who assumes ownership of a parcel of the land also assumes ownership with the presumed knowledge of the covenants.").
127. See infra Part III.A.1.a.
128. See infra Part III.A.1.a.
130. Id. at 639.
131. See supra Part II.C.
their application, in violation of public policy, or that they abrogate some fundamental constitutional right.” 132 While some commentators have vividly epitomized homeowners’ associations as supreme arbiters having limitless power and absolute authority to capriciously enact rules at a whim, 133 these characterizations are misplaced and largely embellished.

The limitations on an association’s board of directors is apparent in the Basso decision: It distinguished a CIC’s CC&Rs from those rules and regulations “promulgated by the association’s board of directors,” 134 qualifying the latter with the standard of “reasonableness,” which confines the board’s rule-making discretion to those “reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.” 135

Further protection from arbitrary or exceedingly unreasonable restrictions can be found in federal and state statutes. 136 For example, the Federal Fair Housing Act (FHA), which applies to both state and private actors—such as homeowners’ associations—provides that “it shall be unlawful . . . to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” 138 Additionally, Florida prohibits certain covenants that give unilateral association decision making power to emancipated developers 139 and preempts covenants that infringe upon a homeowner’s right to fly an American flag. 140

132. Basso, 393 So. 2d at 640.
134. Basso, 393 So. 2d at 639.
135. Id. at 640; see also Fla. Stat. § 720.304(1) (2011) (“The entity or entities responsible for the operation of the common areas and recreational facilities may adopt reasonable rules and regulations pertaining to the use of such common areas and recreational facilities.”).
136. This qualifier is necessary, considering “a use restriction in a declaration . . . may have a certain degree of unreasonableness to it, and yet withstand attack in the courts.” Basso, 393 So. 2d at 640 (emphasis omitted).
137. See e.g., 42 U.S.C. § 3604(b) (2006); Fla. Stat. § 720.3075(1)(a).
140. Id. §§ 720.304(2)(a), 3075(3).
At the end of the day, the restrictions embodied in a community’s CC&Rs and the later promulgated rules and regulations serve the homeowners. Whether that service is to their benefit or detriment depends on many factors, such as the complexity and nature of their community and its operations, the level of awareness and understanding homeowners have of the restrictive covenants that burden their properties, and the zeal of the association’s board of directors. But ultimately, the homeowners’ association charged with enforcing these CC&Rs, rules, and regulations is a necessary vehicle.

1. Private Land Use Controls and the Enforcing Entity

a. Desirable for Many, Detrimental for Some: Perception is Through the Lens of the Media

The ability to control the manner in which one’s community functions and appears is a useful device, not only in theory. As discussed, the desire for uniformity and consistency is satisfied through imposition of private land use controls and the subsequent enforcement thereof. The corollary benefits of these private land use controls, steadfastly enforced by a governing entity, are numerous. In some communities, residents enjoy certain amenities and facilities, such as “a golf course, a swimming pool, tennis courts, [and] a clubhouse.” Through economies of scale, residents may enjoy

141. For example, the residents of an exclusive golf and country club community, which would likely require a complex regime of restrictions and regulations in order to function, may support the passing of more stringent rules, whereas the residents of a modest suburban community comprised of homes and insignificant common areas may support more relaxed measures. See Fennell, supra note 15, at 841–42. One commentator colorfully described a declaration of CC&Rs as “a fat package many pages long and full of elaborate restrictions that, taken as a whole, dictate to a large extent the lifestyle of everybody in the project.” McKenzie, supra note 18, at 21.

142. Restrictive covenants, rules, and regulations are worth no more than their ability to be enforced. See Franzese & Siegel, supra note 133, at 1135 (“Under the standard CIC originating documents, a key mandate of [the] board[] [of directors] is to enforce the developer-imposed servitudes scheme and to mete out penalties against homeowners who fail to comply.”).

143. See infra Part III.A.2.

144. This article discusses private land use controls, such as restrictive covenants, as opposed to public controls, such as zoning ordinances, which are beyond the scope of this article.

145. Fennell, supra note 15, at 838.

146. See id. at 841–42.

147. Id.
these amenities and facilities they would otherwise be unable to afford or maintain. In addition to benefitting from a harmonized aesthetic and development scheme, homeowners in a CIC governed by a community association benefit from increased property values. In fact, 70% of homeowners living in association-governed CICs believe their communities' rules enhance their property values. Similarly, 71% of these residents rate their experience living under the governance of these community associations as positive. Overall, this survey confirmed the following findings:

- Residents are satisfied with their community associations.
- Association board members strive to serve the best interests of the community.
- Community managers provide value and support to associations.
- Association rules protect and enhance property values.
- Homeowners value the return they get for their association assessments.

148. A production analogy is helpful here: “Economies of scale” is referred to as “[s]avings achieved in the cost of production by larger enterprises because the cost of initial investment can be defrayed across a greater number.” Definition of: Economies of Scale, GEOGRAPHY-DICTIONARY.ORG (2008), http://geography.geography-dictionary.org/Geography-Dictionary/Economies_of_Scale. Similarly, in the community association, such costs may be defrayed amongst numerous homeowners, thereby achieving an efficient provision of services otherwise out of the financial reach of the average homeowner.

149. Fennell, supra note 15, at 842; see also Korngold, supra note 21, at 1543–44 (discussing the market efficiency of pooled resources to provide amenities for CIC residents).


151. Id.; Suarez, supra note 12, at 743; Lara Womack & Douglas Timmons, Homeowner Associations: Are They Private Governments?, 29 REAL EST. L.J. 322, 323 (2001). But see Korngold, supra note 21, at 1544 (contending that use restrictions burdening a parcel might decrease its value but that such loss is offset by the mutual nature of such restrictions binding other lots in the community).

152. CMTY. ASS'NS INST., supra note 94, at 5. By comparison, only 2% of homeowners thought the rules harmed their property values, 2% were not sure, and 27% perceived no difference. Id.

153. Id. at 2. By contrast, only 12% of residents had a negative experience, and 17% were neutral. Id.
Residents do not want . . . government intervention in their communities.\textsuperscript{154}

This research suggests that homeowners are satisfied with the restrictive covenants binding the use of their property and the association responsible for enforcing them.\textsuperscript{155}

Beyond those values ascertainable by survey, the historical development of CICs promoted certain ideals, still important today.\textsuperscript{156} They "were seen as serving important, then emerging and still valued social policies—protection of the family home, fostering a positive communal setting for families and children, efficiently offering recreation facilities at a shared cost, and use of democratic principles of self-governance."\textsuperscript{157} Some of the restrictions used to craft these CICs, and their place in Florida communities, will now be discussed.

Some restrictive covenants concern the makeup of the community.\textsuperscript{158} Aesthetic policies such as building restrictions serve to protect the integrity of the community’s appearance and development scheme.\textsuperscript{159} Examples of structures and improvements that have been ordered removed by Florida courts as not conforming to a community’s CC&Rs include: ‘‘unauthorized carports,’\textsuperscript{160} porches,’\textsuperscript{161} decks,’\textsuperscript{162} satellite dishes,’\textsuperscript{163} ham radio antennas,’\textsuperscript{164} radio tower/antennas,’\textsuperscript{165} docks,’\textsuperscript{166} exterior awnings,’\textsuperscript{167} sheds and similar struc-

\begin{thebibliography}{99}
\bibitem{154} Id.
\bibitem{155} CMTY. ASS'NS INST., supra note 94, at 3.
\bibitem{156} Korngold, supra note 21, at 1571–72.
\bibitem{157} Id. at 1572.
\bibitem{158} See Brower, supra note 15, at 205.
\bibitem{159} See id.
\bibitem{160} Pelican Island Prop. Owners Ass'n v. Murphy, 554 So. 2d 1179, 1180, 1182 (Fla. 2d Dist. Ct. App. 1989).
\bibitem{161} Europeco Mgmt. Co. of Am. v. Smith, 572 So. 2d 963, 965, 968 (Fla. 1st Dist. Ct. App. 1990).
\bibitem{162} Miami Lakes Civic Ass'n v. Encinosa, 699 So. 2d 271, 271, 273 (Fla. 3d Dist. Ct. App. 1997).
\bibitem{163} Killlearn Acres Homeowners Ass'n v. Keever, 595 So. 2d 1019, 1020, 1022 (Fla. 1st Dist. Ct. App. 1992); see also Latera v. Isle at Mission Bay Homeowners Ass'n, 655 So. 2d 144, 144–45 (Fla. 4th Dist. Ct. App. 1995); Esplanade Patio Homes Homeowners’ Ass’n v. Rolle, 613 So. 2d 531, 532 (Fla. 3d Dist. Ct. App. 1993).
\bibitem{164} Emerald Estates Cmty. Ass’n v. Gorodetzker, 819 So. 2d 190, 191, 195 (Fla. 4th Dist. Ct. App. 2002).
\bibitem{165} Brower v. Hubbard, 643 So. 2d 28, 29 (Fla. 4th Dist. Ct. App. 1994).
\bibitem{167} Eastpointe Prop. Owners’ Ass’n v. Cohen, 505 So. 2d 518, 518, 521 (Fla. 4th Dist. Ct. App. 1987).
\end{thebibliography}
tures, improper fencing, concrete walls, an exterior wall plaque, and a portion of a dwelling encroaching on a setback line between parcels. However, their enforcement depends on the existence of a recorded CC&R regulating an aesthetic scheme. Indeed, one Florida court held that:

In the absence of an existing pattern or scheme of type of architecture which puts a prospective purchaser on notice that only one kind of style will be allowed, either in the recorded restrictions or de facto from the unified building scheme built on the subdivision, [a homeowners' association] board does not have the power or discretion to impose only one style over another, based purely on “aesthetic concepts.”

This limitation preserves homeowners’ autonomy in deciding which architectural scheme they desire to buy into and ensures that an imprudent board of directors will not be successful in enforcing arbitrarily-adopted building or aesthetic restrictions not contemplated by the community’s CC&Rs—the restrictions to which homeowners voluntarily acquiesced by purchasing in the community. Restricting aesthetic values, such as the color residents can paint their houses and the materials used in additions or repairs serves an important purpose: to avoid unsightly and devaluing consequences.

The effect these aesthetic and architectural controls have on homeowners is not always favorable, and the association often gets a bad rap for enforcing them. Unfortunately, the media exposure given to homeowners’
associations is not normally cast in favorable light. The result is often an over-dramatization of otherwise reasonable restrictions in homeowners’ associations across the state, focusing on the specific peculiarities of the violating homeowner. For example, a homeowner in an upscale subdivision in Tampa, Florida neglected to consult his copy of his community’s CC&Rs before building a backyard tree house for his son. Because the tree house was six feet taller than the restrictive covenants permitted, the homeowners’ association warned of its intentions to pursue legal action against the offending homeowner. This story would likely not have made it in a newspaper save for one fact: The son for whom the tree house was built had leukemia. The restriction undoubtedly served an aesthetic purpose to which this homeowner subscribed, and the board cannot make an exception merely out of compassion for the homeowner’s unfortunate circumstances because such an act could compromise its ability to enforce the restriction in the future.

Similarly, in Sanford, Florida, a homeowner tragically lost his wife, child, and home when a plane crashed into his house. The homeowner rebuilt his house without architectural approval from his homeowners’ association, and it turns out the location of the new house and materials used in

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180. See, e.g., CMTY. ASS’NS INST., supra note 94, at 3. Research suggests that anecdotal reports provided by the media feed the negative connotation associated with homeowners’ associations:

Conflict makes headlines, and that’s what most Americans read in newspapers and see on television about community associations. Unfortunately, there is little news in harmony. We don’t see stories about the tens of millions of homeowners who are satisfied and content in their communities. We don’t read many media profiles about association board members who lead their associations quietly and effectively. We don’t see stories about managers and other professionals who provide invaluable guidance and support to their community association clients.

Id.


182. Herdy, supra note 181.

183. Id.

184. Id.

185. See id. If a pattern of selective enforceability is demonstrated, the association may not be able to enforce that regulation. Chattel Shipping & Inv., Inc. v. Brickell Place Condo. Ass’n, 481 So. 2d 29, 30 (Fla. 3d Dist. Ct. App. 1985) (“[W]hen selective enforcement has in fact been demonstrated, the association is said to be ‘estopped’ from applying a given regulation.” (citing White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 352 (Fla. 1979))).

186. McDaniel, supra note 181.
its construction were inconsistent with other houses in the neighborhood.\textsuperscript{187} Although the homeowners' association threatened litigation should the homeowner fail to rectify the inconsistencies, it is not clear whether the community's recorded CC&Rs addressed the architectural or aesthetic scheme allegedly violated.\textsuperscript{188} The compassion any reasonable person would have for the homeowner in the face of such a tragic accident seems to shroud the fact that he violated the architectural covenant—presuming the CC&Rs addressed the issue—while simultaneously depicting the homeowners' association, whose job it is to enforce these covenants, as callous and cold-hearted.\textsuperscript{189}

Just down the Atlantic coast in Jupiter, Florida, a condominium association\textsuperscript{190} recently passed a rule requiring residents who own dogs to pay a $200 fee.\textsuperscript{191} The purpose of this fee seems quite bizarre: It will pay for dog DNA sampling, testing, and registration of each owner's dog's DNA profile, and help defray the cost of pet waste cleanup.\textsuperscript{192} Faced with the recurring issue of feces and urine “in elevators, in stairwells, on carpets and in the lobby, as well as [the] common areas outside” resulting in a $10,000 to $12,000 annual cleaning and repair expense, the association considered this approach its best option.\textsuperscript{193} Carrying with it the threat of a $1000 fine—and a property lien in the event of nonpayment—for those owners whose dog’s DNA matches samples of feces collected in these areas, the regulation has been criticized by many owners.\textsuperscript{194} Legitimate or not, the press-induced awareness of these types of regulations feeds the stereotype that associations and their boards are too cavalier with their rule-making power.\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{187} Id.
\item \textsuperscript{188} See id. This is important because it concerns the enforceability of the restriction. See supra text accompanying notes 174–75.
\item \textsuperscript{189} See Franzese \& Siegel, supra note 133, at 1136 (“[Homeowners’ association] boards have the capacity to proceed vigorously and even arbitrarily against dissenters, rule-benders and rule-breakers of both good and bad faith.”).
\item \textsuperscript{190} While an in-depth analysis of condominium associations is beyond the scope of this article, it suffices to say they function very similarly to homeowners’ associations. See HOA TASK FORCE, supra note 19, at 3.
\item \textsuperscript{192} Id.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} See Franzese \& Siegel, supra note 133, at 1136 (“[C]oupled with too many rules and too few checks on the rulers,” homeowners’ associations boards superfluously “use missiles to kill mice.”).
\end{itemize}
Concerning another aspect of the community makeup, many Florida communities cater to senior adult living, restricting ownership and occupancy to adults fifty-five years of age or older. This type of community is desirable for retirees, though “[p]reserving the common scheme and continuity for a senior adult community necessitates the enforcement of age restrictions that prohibit children from becoming permanent residents in the community.” While a restriction barring children from residing in the community would be unconstitutional if arbitrarily enforced, the FHA provides that a community may do so subject to certain limitations. As with any restriction, there are always those few who end up between a rock and a hard place. In a Clearwater, Florida age-restricted retirement community, a young girl was living with her grandparents because her mother was unfit to care for her. However, the community’s CC&Rs dictated that no person younger than fifty-five may live in the community. Accordingly, the association brought an action to evict the young girl as a measure of enforcing the restrictive covenant. While it appears a deal between the grandparents and the association to allow the girl to remain in the household under some obscure temporary zoning exemption may be imminent, it is nevertheless a painful reminder of the difficult decisions homeowners’ association boards must make and the unfortunate circumstances that can result from enforcing

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197. DUNBAR & DUDLEY, supra note 30, at 97.

198. Id.

199. White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 348 (Fla. 1979) (“[A] restriction against residency by children under the age of twelve . . . is not constitutionally prohibited unless unreasonably or arbitrarily applied.”).

200. DUNBAR & DUDLEY, supra note 30, at 97. For example, a community may restrict its residents to persons sixty-two years of age and older if that is its intent, or it may restrict residents to fifty-five years of age and older so long as “at least 80% of the parcels are occupied by at least one person [fifty-five] years of age or over.” Id.; see 42 U.S.C. § 3607(b)(2) (2006) (a provision of the FHA); FLA. STAT. § 760.29(4)(b) (2011) (employing language virtually identical to the FHA).


203. See id.

204. Chen, supra note 201.
restrictive covenants in emotional situations. What must necessarily be factored into this equation are the rights of the other residents in the community to enforce the restriction by which they freely contracted to abide, and those rights are considerably important.

Homeowners acquiesce to many of these aesthetic and community-makeup restrictions at the expense of certain liberties otherwise protected by the First Amendment. These are significant because they may apply both to owners’ parcels and common areas, though Florida offers certain protections to use of common areas involving freedom of assembly and expression: “The right of a parcel owner to use the common areas includes the right to peaceably assemble in the common facilities and the right to invite public officers or candidates for public office to appear and speak on the common facilities.” While the Supreme Court of the United States has addressed the issue of political speech in the form of political signs on a homeowner’s property in violation of a municipal ordinance—which the Court found to be unconstitutional—its holding does not apply to homeowners’ associations because their conduct does not amount to state action. An illustration of free speech restriction in action comes from the City of Coral Springs in south Florida, where a homeowner whose community was governed by a homeowners’ association displayed a magnetic American flag and the words “God Bless America” on his garage door. Because his community’s CC&Rs prohibited the display of signs of any type without prior approval,

205. See Retirement Community Fights to Evict 6-Year-Old Girl, supra note 202 (“[T]he president of the homeowners’ association looks positively gleeful as he discusses the prospect of getting sheriffs to forcibly remove the small girl.”). While the board president may have been less than compassionate, he has a duty to the other residents to enforce the rules and regulations that attracted them to the retirement community. See id. Recognition of this duty often gets lost in the emotionally-charged media rendition of the story. See id.

206. See infra Part IV.A.

207. Coon, supra note 86, at 24; Fleming, supra note 88, at 583. Absent state action, private individuals may covenant to mutually restrict First Amendment rights such as freedom of speech and other political expression. Coon, supra note 86, at 24; Fleming, supra note 88, at 583.

208. DUNBAR & DUDLEY, supra note 30, at 75.

209. 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, 240–42 (2006) (“Purely private conduct, absent state action, is not subject to the First Amendment’s protections.”); see, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994); Coon, supra note 86, at 24 (“The most significant hurdle in establishing and vindicating free speech rights for private community residents who want to post political signs on their property is the state action requirement for all constitutional claims.”).

the association demanded that the homeowner remove it. While such a patriotic sign may emblemize the essence of America, the rules to which the homeowner covenanted prohibiting any type of signs cannot be undermined by the content of that sign, and selective enforcement will always be the danger of acceding to one type of sign over another.

Another area of controversy may come as a surprise after reading the FHA protections, which apply to both public and private actors. Among other things, the FHA prohibits discrimination on the basis of religion “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.” However, issues may arise with religion-neutral restrictions, which do not favor one religion over another, but rather espouse a religion-free environment. Because this has not been found to come within existing statutory protections, and judicial interpretation of the state action doctrine does not, and should not, permit characterization of the conduct of homeowners’ associations as state action, the legislature seems to be the only means of change. For example, in a recent Florida case, condominium unit owners brought an action for declaratory relief and to enjoin a condominium association-imposed ban on the use of common areas, which included an auditorium being used to hold religious services. The court held that the owners’ right to assemble is not absolute, and that “the statute itself permits the reasonable regulation of that right.” It found that the association’s ban on religious practice in common areas was a reasonable regulation of that statutory right.

211. Id.
212. Id.; DUNBAR & DUDLEY, supra note 30, at 96 (discussing the importance of uniform enforcement and the consequences of selective enforcement).
214. Id. § 3604(b).
215. Angela C. Carmella, Religion-Free Environments in Common Interest Communities, 38 PEPP. L. REV. 57, 58 & n.9 (2010); Brower, supra note 15, at 219 (“[R]estrictions on the transfer of units have limited some prospective purchasers to persons compatible with the current social, racial, religious, moral, or philosophical composition of the community.”).
216. See infra Part V.
217. Carmella, supra note 215, at 58.
219. See id. at 498. “No entity or entities shall unreasonably restrict any unit owner’s right to peaceably assemble or right to invite public officers or candidates for public office to appear and speak in common elements, common areas, and recreational facilities.” FLA. STAT. § 718.123(1) (2011).
220. Neuman, 861 So. 2d at 498.
221. Id.; see also Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners’ Ass’n, 456 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005) (finding prohibition of religious services in common areas did not violate the FHA because access to common areas was not denied for
highlights the ability of a homeowners’ association to promote the best interests of the community as a whole, and that regulation of religious practice in common areas may serve that collective interest.\textsuperscript{222}

As a result of their decision to voluntarily covenant to abide by a community’s CC&Rs, homeowners have a vested expectation\textsuperscript{223} that such restrictions will be followed and enforced.\textsuperscript{224} They moved into a CIC with the desire to restrict many aspects of the community in order to maintain its attractive aesthetic appearance,\textsuperscript{225} and to protect, further, and support their “investment-backed expectations.”\textsuperscript{226} After all, such rules and regulations “create and maintain the atmosphere and lifestyle that attracted the[se] residents in the first place.”\textsuperscript{227} In fact, 82\% of homeowners believe they receive a favorable return on their investment.\textsuperscript{228} If these residents desire to enjoy their neighborhood unblemished by signs dotting every lawn expressing various political or religious views, or to be free from being subjected to religious practice in common areas, why jeopardize their ability to contract away those rights in the name of state action at the expense of their freedom of contract?\textsuperscript{229} While there will always be situations where restrictions end up harming a handful of residents, for the countless others eager to enforce them, it is not fair or equitable to waive them for one person. Such selective enforcement could lead to a court declaring the covenant unenforceable, thereby destroying the vested expectations and investments of all the other homeowners in the community.\textsuperscript{230}

\begin{itemize}
\item \textsuperscript{222} See Carmella, \textit{supra} note 215, at 64 (“CIC residents who want to live in a religion-free environment . . . may have the general right to expect the absence of . . . visible religious symbols and religious uses. They might consider the public manifestation of religion to be ugly, messy, offensive, divisive, discomforting, or even threatening.”).
\item \textsuperscript{223} See \textit{infra} Part IV.
\item \textsuperscript{224} See \textit{supra} Part II.B.
\item \textsuperscript{225} See \textit{supra} text accompanying notes 119–23.
\item \textsuperscript{226} Brower, \textit{supra} note 15, at 205; see also Paula A. Franzese, \textit{Privatization and Its Discontents: Common Interest Communities and the Rise of Government for “the Nice”}, 37 URB. LAW. 335, 342 (2005) (considering “at least [sixty-four] percent of Americans invest all that they have into the purchase of a home, the stakes are high indeed.”).
\item \textsuperscript{228} \textit{CMTY. ASS’NS INST., supra} note 94, at 6.
\item \textsuperscript{229} Characterizing the conduct of homeowners’ associations as state action would jeopardize their ability to enforce covenants restricting free speech or religious practice because they would then be subject to the Constitution. \textit{See supra} note 12 and accompanying text; \textit{see also infra} Parts IV–V.
\item \textsuperscript{230} See DUNBAR & DUDLEY, \textit{supra} note 30, at 96.
\end{itemize}
2. The Homeowners' Association: A Necessary Mechanism

With budget shortfalls, the decline in provision of municipal services gives rise to an increase in popularity of homeowners' associations.231 Where municipalities are unwilling or unable to provide services desired by homeowners, a private entity steps in to do just that.232 Where public police presence can fall short of homeowner expectations, homeowners' associations can provide an increased sense of security that gates out crime and employs private security officers to offer a safer community.233

As a remedial measure, CIC homeowners “employ [homeowners’] associations to correct the deficiencies and abuses, as they perceive them, of public governments,” thereby compensating for the inadequate provision of services by cities and municipalities.234 The desire for supplanting governmental control in their communities is evident: 87% of homeowners in governed communities do not want more governmental control over their association.235 Overall, residents are satisfied with the services homeowners’
associations provide. While some criticize the privatization of CICs as resulting in "the possibility that those affluent enough to live in [CICs] will become increasingly segregated from the rest of society," those residents' tax dollars are not beyond the reach of the local government serving the same society. Therefore, if anything, CIC residents may be contributing to society at a rate greater than their non-CIC neighbors, because they "still must pay local property taxes for local government services, whether or not they avail themselves of such services, and even though they already pay extra for their private community's services."

Finally, the homeowners' association, as an enforcing entity, provides homeowners with economical representation when it comes to enforcing restrictive covenants. Even before litigation is contemplated, Florida homeowners' associations are statutorily authorized to impose fees for noncompliance and suspend the offender's rights to use common areas and facilities "for a reasonable period of time." These benefits would not be realized by a CIC resident not governed by a homeowners' association because his or her only recourse would be to sue the offender to enjoin the violation.

236. See id. at 2.
237. MCKENZIE, supra note 18, at 22.
238. Callies & Suarez, supra note 231, at 493.
239. Id.
240. In the sense that in the absence of a governing association, a homeowner in a CIC with the power to enforce a mutually-restrictive covenant is left with no other remedy for the breach thereof but a lawsuit against the offending homeowner, the ability of a homeowners' association to spread the cost of litigation through assessments to all homeowners is an economical way of representing each individual homeowner's interest without the individual burden of litigation costs. See generally Howard M. Erichson, Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation, 24 Miss. C. L. Rev. 285, 287–88 (2005) (discussing the economic benefits that mass collective litigation provides to groups such as homeowners' associations).
241. So long as the governing documents permit, the association may levy fees of up to $100 per violation. DUNBAR & DUDLEY, supra note 30, at 94.
242. Id.
243. In the absence of an association acting as an agent of the homeowners for enforcement purposes, a homeowner with the right to enforce a mutually-restrictive covenant is free to enforce that covenant on a theory of breach of covenant, but must proceed without the benefits of spreading the cost amongst other homeowners. See Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 307 (Fla. 2d Dist. Ct. App. 1966) ("Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee . . . .").
IV. THE FREEDOM OF CONTRACT AND THE RIGHT TO RESTRICT THE USE OF ONE'S PROPERTY

A. The Freedom of Contract

As a basic premise, freedom of contract\(^{244}\) in the real property context involves the liberal ability of a grantor to deliver to a grantee a bundle of possessory rights while simultaneously retaining certain lesser, non-possessory rights.\(^{245}\) Put more simply, it involves the ability of a property owner to sell some of his or her property subject to use restrictions such as "single-family residence only" or "no commercial development" while retaining the power to enforce such restrictions.\(^{246}\) The importance of this liberty is embodied in an opinion by the Supreme Court of Florida which recognized, as public policy of the state and nation, the liberal freedom and autonomy one has in the disposition of his or her property.\(^{247}\) To this end, a property owner should be free to tailor her property rights and use restrictions as she sees fit, subject of course, to statutory, constitutional, and public policy limitations.\(^{248}\)

Concerns about the extent to which this freedom may affect the rights of residents are evident when considering the consequence restrictive covenants may have on future owners.\(^{249}\) Because the exercise of "personal autonomy of some . . . entails joining other like-minded persons in homogenous communities," the result may end up "suppress[ing] the individualism of its members to preserve the counter-societal nature of the association."\(^{250}\)

\(^{244}\) This is also termed "liberty of contract." See Sinclair Ref. Co. v. Watson, 65 So. 2d 732, 733 (Fla. 1953) (en banc). An in-depth discussion of the freedom of contract and its historical underpinnings is beyond the scope of this article.

\(^{245}\) See Korngold, supra note 21, at 1543.

\(^{246}\) See 21 C.J.S. Covenants as to Use of Real Property § 24 (2006) ("A restrictive covenant is a negative covenant that limits permissible uses of land. The purpose of restrictive covenants is to allow for uniformity in a given, planned development and to maintain or enhance the value of adjacent property by controlling the nature and use of surrounding properties.").

\(^{247}\) Sinclair Ref. Co., 65 So. 2d at 733; see also supra text accompanying note 3.

\(^{248}\) Sinclair Ref. Co., 65 So. 2d at 733; see also Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 640 (Fla. 4th Dist. Ct. App. 1981) (Restrictive covenants "will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.").

\(^{249}\) Because restrictive covenants run with the land—provided they satisfy parties' intent, privity, touch and concern, and other jurisdiction-specific requirements—they are enforceable against successors in interest; or more simply, subsequent grantees. 20 AM. JUR. 2D Real Covenants § 20 (2005).

\(^{250}\) Brower, supra note 15, at 219.
ever, notwithstanding these concerns, the law should respect the voluntary choice a subsequent purchaser makes in purchasing a parcel of land subject to a use restriction. 251 Although the initial decision invokes the landowner’s exercise of free choice and control over the property to his or her personal satisfaction in a manner that may not comport with efficiency or societal ideals, “[t]he [future] purchasers with notice [of such restrictions] ‘buy into’ those expressions of liberty, and these choices are deemed to be theirs as well.”252

Other concerns express discomfort with the notion of burdening a parcel of property with abridgements of certain constitutional rights of residents and non-residents alike.253 These abridgements may include restrictions on public assembly,254 the right to free speech and political expression,255 and the right to travel.256 While these restrictive covenants could last perpetually, they are the product of free autonomous decision making that addresses the needs and desires of the property owner in an efficient manner, employing servitudes as that vehicle.257 As one scholar eloquently stated:

> [O]ne of the most powerful traditional justifications for freedom of contract is that we should give people the freedom to make arrangements that suit their individual interests; social welfare improves when we enforce mutually advantageous agreements, and it suffers if we prevent people from tailoring property rights in ways that serve their mutual interests.258

Who are we to interfere with these private agreements tailoring the rights affecting the use of private property? Recognizing this important freedom is not only “sanctioned by society . . . to promote efficiency . . . [and] to safeguard individual freedom.”259 it also serves to protect against a modern-

251. Korngold, supra note 21, at 1548. This respect for individual choice is subject to “overriding public policy consideration[s].” Id.
252. Id. at 1547–48.
253. See David J. Kennedy, Note, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 YALE L.J. 761, 767 (1995) (arguing that because of community associations, “nonmembers must forfeit their right to live in certain areas, their right to move about freely, their constitutional guarantees of equal protection and due process, and their right to a fair share of the public fisc.”).
254. See supra note 219 and accompanying text; see also Siegel, supra note 42, at 469–70 (“restrict[ing] public assembly on [CIC] streets”).
255. See supra text accompanying notes 207–12.
256. Kennedy, supra note 253, at 770 & n.49.
257. See Korngold, supra note 21, at 1543–44.
258. Singer, supra note 2, at 1028.
ized feudal system of oppressive "serfdom." In recognizing this autonomy, "[c]ourts now consistently view servitudes as vehicles capable of facilitating the autonomous choices of individuals and enhancing the value of land." The freedom to restrict the use of property is already tempered by the FHA and other statutory protections, and constitutional and public policy limitations. Legitimate criticisms of the consequences produced by unchecked restrictive covenants having a discriminatory impact on residents and nonresidents alike were answered by Congress in enacting the FHA to protect access to housing for racial minorities who were historically discriminated against. The FHA provides "a means to redress private acts of discrimination" in housing matters, and prior versions were modified "by including more protected characteristics, providing a more expansive and detailed list of prohibited conduct, and creating an administrative and judicial enforcement mechanism." FHA moderation lessens the likelihood of discriminatory impact in housing transactions, and the courts will not enforce a restrictive covenant in discord with its protections, provided the challenger satisfies the statutory prerequisites.

Limiting a property owner's freedom to restrict the use of her property threatens market efficiency and endangers his or her vested expectations. This is because property owners whose CIC properties are burdened by use restrictions purchased them subject to these restrictions with the expectation that they will enjoy the corollary benefits. Therefore, judicial enforcement

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260. Id. A serf is "[a] person in a condition of feudal servitude, bound to labor at the will of a lord." BLACK'S LAW DICTIONARY 1489 (9th ed. 2009); see also Laura T. Rahe, The Right to Exclude: Preserving the Autonomy of the Homeowners' Association, 34 URB. L. 521, 527 (2002) (Americans have revered property rights because, "as the horrors of communist regimes past and present demonstrate, the elimination of private property means the destruction of other liberties.").

261. Fennell, supra note 15, at 837.

262. See supra text accompanying note 138.

263. See supra note 248 and accompanying text.


265. Id. at 29.


267. See Korngold, supra note 21, at 1543-45.

268. See Randolph, Jr., supra note 16, at 1085 ("[T]here are clearly expectations that [property] owners have when they invest.").

269. See id. at 1105.
of these restrictive covenants should continue unhindered, save for those falling within statutory and public policy considerations, because "[p]eople will not likely enter such efficiency maximizing transactions unless they are confident that the legal system will enforce them."270 Further advancing this view, one scholar warns of the dangers of restricting the freedom of contract:

From both the libertarian and efficiency point of view, there seems to be nothing to gain (and a lot to lose) by limiting freedom of contract or freedom of disposition. Restrictions on disaggregation of property rights can only decrease freedom and well-being by preventing individuals from entering mutually beneficial arrangements. And anyone who wants to reassemble a fee simple (full ownership rights) can simply bargain with the owners of each of the sticks, just as one could try to buy four contiguous parcels of land to develop a large project.271

In undertaking the purchase of real property, the individual homebuyer is in the best position to determine which rights he or she wishes to acquire and forego, and in the absence of extreme overriding considerations, the law should refrain from interfering with one’s freedom of choice.272

B. The Right to Restrict the Use of One’s Property and the First Amendment: Hypocrisy by Analogy

The Supreme Court of Florida observed “that the right to own, use, occupy, and dispose of property is a privilege guaranteed to a citizen."273 As discussed, property owners in a CIC may, and often do, restrict their free speech as a tradeoff for creating and maintaining the community image they so desire.274 As controversial as that may seem, there are many other acceptable means of contracting away one’s right to free speech.275 In everyday transactions, people enter into “contracts of silence"276 such as confidentiality

270. See Korngold, supra note 21, at 1545.
271. Singer, supra note 2, at 1024.
272. Korngold, supra note 21, at 1548.
274. See supra text accompanying notes 207–12.
275. See Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 268 (1998) (“In a legal regime that provides for freedom of contract, parties are generally free, absent public policy or First Amendment restraints, to commit to being silent about almost anything.”).
276. A “contract of silence” is a “contract in which a party has made an enforceable promise to keep quiet about something.” Id. (footnote omitted).
agreements, non-compete agreements, agreements containing employee “gag” provisions, agreements “protect[ing] privacy and reputational interests,” and government confidentiality agreements “in exchange for some valuable benefit.” As a seeming contradiction, some commentators condemn the ability of a CIC to mutually restrict property owners’ First Amendment rights while paying no attention to those agreements in other contexts. So why, then, can individuals restrict their First Amendment rights in some, but not all, areas of free contract? In either context, the exchange is freedom for benefit, and it is difficult to discern much of a difference. Homeowners restrict their rights to certain First Amendment freedom of speech protections in exchange for the collective benefit that their communities will be more aesthetically pleasing, more desirable to suit their tastes and preferences, and that their property values will increase as a result. With contracts of silence, individuals restrict their First Amendment right to free speech in order to protect some pecuniary or confidential interest in exchange for some economic benefit. While it could be argued that the

277. A confidentiality agreement is “[a] promise not to disclose trade secrets or other proprietary information learned in the course of the parties’ relationship . . . [and is] often required as a condition of employment.” BLACK’S LAW DICTIONARY 339–40 (9th ed. 2009).

278. A non-compete agreement involves “[a] promise, usu[ally] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer.” Id. at 420.

279. Garfield, supra note 275, at 265.

280. Id. at 272.

281. Id. at 274.


283. See Frank Askin, Free Speech, Private Space, and the Constitution, 29 RUTGERS L.J. 947, 960–61 (1998) (arguing that the lack of access to private CICs for non-resident citizens is greatly reduced by the Supreme Court of the United States’ refusal to extend the state action doctrine to these communities in the face of “more and more of the nation’s residential streets [that] are now off-limits in private gated communities.”); Coon, supra note 86, at 24 (“[F]ew community associations will satisfy the state action requirement, thereby silencing an opportunity for political speech by a growing number of Americans.”)); Suarez, supra note 12, at 741 (“The loss of speech rights is one of the most severe constitutional deprivations among free people, yet the courts have limited ability to protect private CIC residents and non-residents against it.”); Chadderdon, supra note 209, at 264 (positing that in the context of First Amendment rights, “the restrictions imposed by quasi-governmental bodies like [homeowners’ associations] do, indeed, today make it harder for millions of citizens to communicate and express themselves to their neighbors.”); Zelica Marie Grieve, Note, Latera v. Isle at Mission Bay Homeowners Ass’n: The Homeowner’s First Amendment Right to Receive Information, 20 NOVA L. REV. 531, 556 (1995) (criticizing a homeowners’ association’s aesthetics-conscious decision to ban satellite dishes as an infringement on homeowners’ First Amendment right to receive information).

284. See supra text accompanying notes 223–30.

285. Cantora, supra note 86, at 424; Garfield, supra note 275, at 269.
potential impact on third parties that arises out of restricting free speech is greater in the property context than in contracts of silence, the loss of third-party access to information as a result of the latter suppresses speech no less than the former. Property as an institution should be afforded the same independence in contracting as with any other private contract. The same critics who condemn the ability of property owners in a CIC to restrict free speech rights would undoubtedly covet their right to privately contract away their free speech rights in a similar contract of silence unrelated to real property.

V. STATE ACTION AND THE COMMUNITY ASSOCIATION: FLORIDA’S JURISPRUDENCE

The Constitution’s explicit distinction between the public sphere and private property is a testament to the notion that it did not contemplate private conduct as falling within its purview. Therefore, as a threshold issue, state action is required before the strictures of the Constitution—specifically the First and Fourteenth Amendments—will apply to private entities. This doctrine stands for “the principle that only government actors are subject to constitutional rules.” This is because “[o]ne great object

286. See Cantora, supra note 86, at 425; Garfield, supra note 275, at 270, 363.
287. See Cantora, supra note 86, at 425.
289. The Constitution protects private property rights. U.S. CONST. amend. III (no quartering of soldiers in a private home without the owner’s consent); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”); U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).
290. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (“Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptional) that is not.” (citations omitted)); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (“[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (“[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”).
291. See Shelley, 334 U.S. at 13; Coon, supra note 86, at 24.
of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.\textsuperscript{293}

We subject states and local governments, such as cities and municipalities, to the constitutional protections and limitations because of the power they lawfully possess to coerce and control the rights of their citizens.\textsuperscript{294} They have broad regulatory authority that has the propensity to infringe upon the constitutional rights of these residents whose acquiescence to those abridgements and choice of residency does not resemble the voluntary nature of private community association membership.\textsuperscript{295} The acts of homeowners’ associations should not be held to the same scrutiny. This is because the abridgement of rights in a community association is the product of the voluntary exercise of freedom of contract\textsuperscript{296} and its conduct cannot fairly be deemed that of the states’.\textsuperscript{297} Indeed, “private autonomy is a fundamental notion implicit in American law: maintaining a separation of private and public spheres of activity.”\textsuperscript{298}

With important rights and freedoms at stake on both sides of the scale, it is imperative that fair and careful analysis be given to balancing the rights of individuals to freely contract away their own rights—and the ability of the governing homeowners’ association to further promulgate rules and regulations consistent with this intent—with the corollary abridgment of constitutional rights that may not be “primarily the product of consumer choice”\textsuperscript{299} or those that affect nonresidents.\textsuperscript{300} Whatever balance is struck between these competing values, one thing remains constant: Absent “an overriding public policy consideration,”\textsuperscript{301} constitutional scrutiny will not interfere with private conduct without state action.\textsuperscript{302} In maintaining a focus on Florida jurisprudence and homeowners’ associations, this analysis will focus on Florida cases and the state action tests recognized by them. It will then apply them to

\begin{itemize}
  \item See id.
  \item See supra Parts II.C, IV.A.
  \item Shelley v. Kraemer, 334 U.S. 1, 13 (1948); see infra Part V.B–C.
  \item Brower, supra note 15, at 217.
  \item See Siegel, supra note 42, at 468.
  \item See Kennedy, supra note 253, at 761.
  \item Korngold, supra note 21, at 1548.
  \item See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (stating that to determine whether conduct constitutes state action and is therefore subject to constitutional scrutiny, courts “ask[] first whether 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.” (citations omitted)).
\end{itemize}
the typical homeowners' association and explain why they do not, and should not, apply.

A. Florida Cases and State Action Tests

Over the years, the Supreme Court of the United States has recognized several tests or theories under which private conduct may constitute state action and thereby be subjected to the Constitution. Although these tests are known by various names using less than consistent language, one commentator gleaned seven distinct tests from the Court's state action jurisprudence: the "public function" test, the "state compulsion" test, the "nexus" test, the "state agency" test, the "entwinement" test, the "symbiotic relationship" test, and the "joint participation" test. Aside from the conceptual mess that the seven potential tests leave for the lower courts, the problem is further complicated with the inconsistent application of this doctrine: While some cases expressly address the issue of state action, other courts fail to address the issue or assume state action is present. A few of the tests that are recognized by Florida courts—and worded as their case law dictates—will now be presented and analyzed.

1. Judicial Enforcement

The state action doctrine has been held to apply to all branches of government. In the landmark case Shelley v. Kraemer, the Supreme Court of the United States held that state court enforcement of a racially restrictive covenant prohibiting the sale of a burdened parcel to a person not of the "Caucasian race" constituted state action, which thereby violated the Equal
Protection Clause of the Fourteenth Amendment. While this case serves as the foundation for the judicial enforcement test, it has been the subject of differing interpretations. While some courts have interpreted the holding narrowly as applying only to judicial enforcement of racially restricted covenants, others have read it more broadly to include judicial enforcement of restrictive covenants involving other constitutional matters. Notwithstanding this split in interpretation, the dangers of the latter interpretation are apparent: Extending Shelley beyond racially restrictive covenants "would effectively eviscerate the state action requirement because private property owners, for the most part, enforce their property rights through court actions." Because these conflicts have made their way into Florida case law, they will be discussed in turn.

In Harris v. Sunset Islands Property Owners, Inc., decided eleven years after Shelley, the Supreme Court of Florida was faced with a similar task. On review of whether to enforce a restrictive covenant prohibiting the sale of property in a subdivision to any non-Caucasian or Jewish person, the court followed the reasoning of Shelley, and recognized that:

When . . . a state court on the petition on [sic] one who seeks to enforce such covenants undertakes to inject judicial validity into the restriction and thereby through the medium of a judicial decree en-

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309. Id. at 4–5, 19–21.
311. See Loren ex rel. Aguirre, 309 F.3d at 1303 ("Shelley has not been extended beyond race discrimination." (alteration in original)); Davis, 59 F.3d at 1191 ("Shelley . . . has not been extended beyond the context of race discrimination," and "the concept of state action has since been narrowed by the Supreme Court [of the United States]."); Golden Gateway Ctr., 29 P.3d at 810 ("Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases.") (citations omitted)).
312. See Gerber, 757 F. Supp. at 1341 (reading Shelley to include judicial enforcement of restrictive covenants involving First Amendment free speech issues); Franklin, 358 So. 2d at 1088–89 (Mager and Cross, J.J., concurring) ("State action is . . . a broad concept and the actions of state courts and of judicial officers performing in their official capacities have long been regarded as state action.").
313. Golden Gateway Ctr., 29 P.3d at 811.
314. 116 So. 2d 622 (Fla. 1959).
315. See id. at 623–24.
316. Id. at 623.
forces the restriction in violation of the rights of the property owners, such action by the state court constitutes state action violative of the equal protection provisions of the Fourteenth Amendment.\textsuperscript{317}

The court was careful to narrow its holding to the specific facts of the case,\textsuperscript{318} which is consistent with the prevailing view of Shelley.\textsuperscript{319}

In Quail Creek Property Owners Ass’n v. Hunter,\textsuperscript{320} a homeowner challenged the constitutionality of a restrictive covenant prohibiting the display of signs of any kind on any property in his subdivision.\textsuperscript{321} Relying on a first district case, the second district followed the lead of Shelley—extended by Harris—and held that “neither the recording of the protective covenant in the public records, nor the possible enforcement of the covenant in the courts of the state, constitutes sufficient ‘state action’ to render the parties’ purely private contracts relating to the ownership of real property unconstitutional.”\textsuperscript{322}

Despite this clear, logical extension of Shelley, a later case muddied the water. In Gerber v. Longboat Harbour North Condominium, Inc.,\textsuperscript{323} a condominium unit owner challenged a restrictive covenant that barred the display of an American flag except on certain holidays as violative of the First Amendment right to free speech.\textsuperscript{324} Although during the pendency of this case the Florida Legislature amended a statute to permit the display of a flag and expressly preempt any conflicting restrictions,\textsuperscript{325} its applicability was prospective, leaving the court to consider the constitutional issues.\textsuperscript{326} The court expressly relied on Shelley while disagreeing with Quail Creek,\textsuperscript{327} hold-
ing that judicial enforcement of restrictive covenants contained in a declaration of condominium that prohibited the display of an American flag except on designated holidays constituted state action, thereby bringing it within the ambit of the Fourteenth Amendment through which the First Amendment guarantee of free speech was selectively incorporated to apply to the states. On reconsideration, the same court vacated in part on other grounds, and reaffirmed partial summary judgment as to the issue of state action. The court reiterated its reliance on Shelley, and opined that 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, through which the First Amendment guarantee of free speech is made applicable to the states." This extension of Shelley did not enjoy any camaraderie in later cases or even in other jurisdictions. Perhaps the most perplexing inconsistency with Gerber's reasoning is its misplaced reliance on Shelley: While Gerber posits to rely on Shelley's principle that judicial enforcement of a racially restrictive covenant constitutes state action, Gerber found state action before the state, through its judiciary branch, even acted; whereas Shelley overturned an actual judicial decree that enforced the restrictive covenant at issue.

Recognizing that the issue of whether judicial enforcement of a restrictive covenant curtailing First Amendment rights constitutes state action "is not well settled," the court in Sabghir v. Eagle Trace Community Ass'n was faced with a homeowner seeking to enjoin his homeowners' association from enforcing a restrictive covenant prohibiting the display of his political...
While the facts in this case resembled Quail Creek and Gerber, it is distinguishable to the extent that the homeowners' association in Sabghir purportedly relied upon a municipal ordinance barring the display of political signs in enforcing its restrictive covenant. Relying on this additional variable, the court denied the homeowners' association's motion to dismiss, finding it unwarranted “based upon the mere allegation of no state action.”

Whether or not the fact that the homeowner seeking relief was a candidate for a judicial office played any role in the court's decision to deny the motion to dismiss on grounds of no state action, the court held that, “[a]t a minimum, the [homeowner] is entitled to offer proof on the matter.”

In Loren ex rel. Aguirre v. Sasser, a homeowner brought a suit against her homeowners' association seeking to enjoin the enforcement of a restrictive covenant prohibiting the display of signs on her property. Apart from other FHA claims, the focus of the state action issue involved the homeowners' association's refusal to waive the restriction to allow the homeowner to place a “For Sale” sign on her property in what she claimed was a violation of her First Amendment guarantee of free speech. The Second Circuit implicitly refused to follow Gerber's purported extension of the judicial enforcement doctrine, holding that the homeowners' association was not acting under the color of state law despite the threat of judicial enforcement of a restrictive covenant restricting the ability of a homeowner to place a sign on her property. In further recognizing that “Shelley has not been extended beyond race discrimination,” Loren's holding would appear to abrogate the earlier, divergent Gerber decision, though it did not expressly do so.

2. Public Function

While much of the state action doctrine in Florida's case law focuses on Shelley and its progeny, the public function test has been expressly recognized by Florida courts as one avenue to finding state action in the conduct

336. Id. at *1.
337. Id. at *2.
338. Id.
339. Id.
340. 309 F.3d 1296 (11th Cir. 2002) (per curiam).
341. Id. at 1300.
342. Id. at 1298.
343. See id. at 1303.
344. See id.
of private individuals. The public function doctrine was originally espoused in *Marsh v. Alabama*, where the Supreme Court of the United States overturned the trespass conviction of a Jehovah’s Witness who was distributing religious literature on the private streets of a company-owned town. The Court found that the town, while owned by a private corporation, functioned no differently than a public municipality, as it consisted of “residential buildings, streets [and sidewalks], a system of sewers, [and] a sewage disposal plant,” employed the services of a county sheriff to “serve[] as the town’s policeman,” and operated a “business block,” which included a “community shopping center . . . freely accessible and open to the people in the area and those passing through.” In *Hudgens v. National Labor Relations Board*, the Court read *Marsh* narrowly, holding that a private entity is the “functional equivalent of a municipality,” for the purpose of finding state action under the public function doctrine, where it has taken “all the attributes of a town [including] residential buildings, streets, a system of sewers, a sewage disposal plant, and a ‘business block’ on which business places are situated.” This “remains the prevailing federal constitutional standard for determining whether a private community is the functional equivalent of a municipality.”

In *Brock v. Watergate Mobile Home Park Ass’n*, residents of a mobile home park brought an action against their homeowners’ association and its directors for various alleged violations of their civil rights. They proceeded under two different theories of state action: public function and state involvement. The court explained that “[u]nder the public function test, state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in

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345. See, e.g., Sabghir v. Eagle Trace Cmty. Ass’n, No. 96-6964-CIV-HURLEY, 1997 WL 33635315, at *2 (S.D. Fla. Apr. 30, 1997) (“In view of the state action requirement set out by the Supreme Court, constitutional challenges may only be brought against private organizations where such organizations are performing public functions . . . .” (citation omitted)).
346. This doctrine is known by various names, including the “functional equivalent of a municipality theory.” Siegel, *supra* note 42, at 471.
348. *Id.* at 503, 509–10.
349. *Id.* at 502–03, 507–08.
351. *Id.* at 516, 520 (quoting Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 332 (1968) (Black, J., dissenting) (emphasis omitted)).
353. 502 So. 2d 1380 (Fla. 4th Dist. Ct. App. 1987).
354. *Id.* at 1381.
355. *Id.; see infra* Part V.A.3 (discussion of state involvement theory).
nature.” In a concise opinion, the court concluded that “[a] homeowner’s association lacks the municipal character of a company town.” Because homeowners governed by a homeowners’ associations “own their property and hold title to the common areas pro rata,” and homeowners’ associations provide services not as a replacement of, but rather supplemental to, those provided by cities and municipalities, homeowners’ associations do not “act[] in a sufficiently public manner so as to subject its activities to a state action analysis.” This case conforms to the prevailing view of the public function doctrine that a homeowners’ association would have to operate all of the Marsh/Hudgens municipal characteristics in order to consider its conduct state action.

3. State Involvement

The third main state action theory recognized by Florida courts is the state involvement test, which draws its roots from a line of Supreme Court of the United States cases. As Brock recognized, “[u]nder the state involvement test, there must be a sufficiently close nexus between the State and the challenged activity such that the activity may be fairly treated as that of the State itself.” In considering the residents’ second state action theory, the Brock court found that “the association’s maintenance, assessment, and collection activities are not sufficiently connected to the State to warrant a finding of state action.” Despite extensive state law regulating the activities of homeowners’ associations, the court found insufficient state in-

356. Brock, 502 So. 2d at 1381.
357. Id. at 1382.
358. Id.
359. See supra text accompanying notes 345–52.
360. Brock, 502 So. 2d at 1381.
361. See Jackson v. Metro. Edison Co., 419 U.S. 345, 357 (1974) (holding that state regulation of private utility companies was not sufficient state involvement as to constitute state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–73 (1972) (holding that the granting of liquor license does not translate private group’s discrimination into state action because, “where the impetus for the discrimination is private, the State must have ‘significantly involved itself with invidious discriminations.’” (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967))); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–25 (1961) (holding that the state was sufficiently and significantly involved in discrimination by its restaurant lessee, which refused to serve a black patron).
362. Brock, 502 So. 2d at 1381 (citing Jackson, 419 U.S. at 357).
363. Id. at 1382.
volvement, "either directly or indirectly," to fairly attribute the acts of the homeowners’ association to those of the state.\textsuperscript{365}

B. Application

In applying these three tests to the traditional homeowners’ association, it becomes apparent that its conduct cannot fairly be said to qualify as state action. First, under the judicial enforcement test, Shelley’s impact on Florida’s jurisprudence and its evolution thereof suggests that Florida courts view the enforcement of restrictive covenants as not constituting state action.\textsuperscript{366} This reading of Shelley does not commit the enforcement by homeowners’ associations of restrictive covenants to state action designation absent the threat of enforcement of racially restrictive covenants.\textsuperscript{367} A broader reading proffering a contrary view would threaten the ability of private individuals to contract to restrict the use of property.\textsuperscript{368} Even more alarming, such a reading “would obliterate any public-private distinction and open up nearly every private action to constitutional restrictions as state action merely because private actions can and will be enforced by state judiciaries.”\textsuperscript{369} Therefore, because courts will inevitably be called upon by homeowners’ associations to enforce restrictive covenants, “Shelley is of limited use for a precedent-based, stare decisis application” to cases involving homeowners’ associations.\textsuperscript{370} Because Shelley never contemplated judicial enforcement to extend beyond the context of racially restrictive covenants, to find otherwise would result in “other constitutional values involving private contracts [to] be forsaken.”\textsuperscript{371} After all, what significance remains in a private covenant restricting the use of land absent the power of judicial enforcement?

Second, under the public function test, Florida courts have provided a clear and simple answer: Homeowners’ associations simply lack the traditional characteristics one would attribute to a city or municipality.\textsuperscript{372} While some argue that the increased privatization of municipal services by CICs is within the concerns Marsh had in finding a company-town a state actor,\textsuperscript{373} it

\textsuperscript{365} Brock, 502 So. 2d at 1382.
\textsuperscript{366} See supra Part V.A.1.
\textsuperscript{367} See id.
\textsuperscript{368} Cantora, supra note 86, at 426.
\textsuperscript{369} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Brock v. Watergate Mobile Home Park Ass’n, 502 So. 2d 1380, 1381–82 (Fla. 4th Dist. Ct. App. 1987).
\textsuperscript{373} See Siegel, supra note 42, at 541.
is difficult to fit CICs and those associations governing them within this analogy. Brock explains that the provision of these services does not replace those provided by municipalities, but rather supplements them. Indeed, that homeowners’ associations may and often do provide and control utilities also supplied by local government, does not propose to translate that activity into a public function. In addition, homeowners’ associations possess powers that are less intrusive and less extensive than those possessed by state and local governments. Furthermore, “governments are distinguished by their acknowledged, lawful authority—not dependent on property ownership—to coerce a territorially defined and imperfectly voluntary membership by acts of regulation, taxation, and condemnation, the exercise of which authority is determined by majoritarian and representative procedures.” These factors demonstrate the difficulty in analogizing homeowners’ associations to local government.

Finally, under the state involvement test, Brock tells us that statutory regulation of homeowners’ associations is not state involvement significant enough to signal the state action doctrine. Aside from statutory regulation, “there is no other significant connection between states and [homeowners’ associations].” Certainly, statutory regulation that provides homeowners’ associations with certain authority cannot be viewed as a state delegation of powers “that have traditionally been associated exclusively with sovereignty.”

This deficient analogy that fails to liken the acts of homeowners’ associations to those of the state is consistent with the current state of the law in Florida. According to an expert with over thirty years of experience practicing community association law in Florida, “[t]he law does not consider there being state action in association affairs, no matter what test is being
used. This is also the prevailing view of most attorneys in this area of practice.\textsuperscript{384}

\section*{C. Why Quasi-Governmental Status for Homeowners' Associations is Dangerous}

As it stands, under the current state action tests, the acts of homeowners' associations remain without state action designation.\textsuperscript{385} In response, some commentators propose a per se rule that would characterize homeowners' associations as a new form of government, classifying them as "quasi-governmental" entities,\textsuperscript{386} and thereby subjecting their conduct to the Constitution and its protections and limitations.\textsuperscript{387}

However, such an extension of the state action doctrine would be dangerous. Because such a proposition would submit the acts of homeowners' associations to the state action doctrine, the result would intrude upon the rights of homeowners to covenant for the restriction of property rights in a CIC and frustrate the homeowners' association's ability to regulate and enforce them.\textsuperscript{388} It would strip any meaning from restrictive covenants, and essentially, the freedom of contract.\textsuperscript{389} This strongly militates against such a per se rule.\textsuperscript{390} As an alternative, one commentator proposed a multi-part state action balancing test, which necessarily takes into consideration many pertinent factors relevant to the nature and operation of CICs and homeowners' associations.\textsuperscript{391} Concededly complex,\textsuperscript{392} this unwieldy test, if adopted by

\begin{footnotesize}
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\item \textsuperscript{384} \textit{Id.}
\item \textsuperscript{385} \textit{See} Cantora, \textit{supra} note 86, at 425; Rahe, \textit{supra} note 260, at 546 ("[F]uture litigation will determine when, and if, a homeowners’ association becomes a state actor.").
\item \textsuperscript{386} \textit{See, e.g.}, Kennedy, \textit{supra} note 253, at 763 (suggesting community associations are quasi-governmental in nature).
\item \textsuperscript{387} \textit{See} MCKENZIE, \textit{supra} note 18, at 135–36 (advocating that homeowners’ associations function as private governments); \textit{see also} Kennedy, \textit{supra} note 253, at 764 (advocating a per se classification treating homeowners’ associations as state actors); Siegel, \textit{supra} note 42, at 561–63 (arguing for recognition, under a complex multi-factor test, of homeowners’ associations as state actors in order protect the constitutional rights of their residents).
\item \textsuperscript{388} \textit{See e.g.}, Siegel, \textit{supra} note 42, at 469–71. For example, as private actors, community associations may restrict First Amendment rights, including the ability “to impose a ban on posting signs inside or outside a home, to restrict public assembly on their streets, [and] to prohibit the distribution of newspapers on their streets.” \textit{Id.} at 469–70 (footnote omitted). By classifying homeowners’ associations as a new form of government, these restrictions would likely violate First Amendment rights protected by the Constitution and therefore be invalid. \textit{See id.} at 469–71.
\item \textsuperscript{389} \textit{See id.}
\item \textsuperscript{390} \textit{See id.} at 469–70.
\item \textsuperscript{391} \textit{See} Siegel, \textit{supra} note 42, at 555–57. These factors include:
\end{enumerate}
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courts, would likely “breed uncertainty and inconsistent rulings across the state” as well as “substantially increase the cost of litigation.” Additionally, “[p]ractitioners won’t be able to advise their clients with any confidence as to whether they are outside or inside the parameters of this test.”

VI. CONCLUSION

Private contracting autonomy involving the creation of, and subsequent voluntary acquiescence to, restrictive covenants should not yield to the strictures of the Constitution. Neither should the homeowners’ association’s ability to enforce these covenants be impaired by characterizing such conduct as state action merely because the same would be an unconstitutional abridgment of rights if performed by state or local government. These private contracts are the product of voluntary market transactions whose regulation is sufficient under current statutory and public policy considerations. Aside from well-established restrictions on the freedom of contract such as FHA protections and the unwillingness of courts to enforce racially restrictive covenants, if courts were to impose limitations in other circumstances, how would such a restriction be administered? To what extent would we erode

1. The nature and extent of RCA property, including the number of housing units; housing tenure; and the ownership of streets, facilities, and real estate: Does the RCA encompass a substantial tract of land that incorporates streets and other infrastructure?
2. The nature and extent of RCA services to RCA residents, including street cleaning, trash collection, snow removal, street repair, sewage treatment, park administration, and security: Are these services a supplement to municipal services or a substitution for such services?
3. The nature and extent of RCA authority over RCA residents: Does the RCA exercise comprehensive land-use powers over a substantial number of landowners such that the land-use scheme is the functional equivalent of municipal zoning? Does the RCA levy and collect mandatory assessments on real property that amount to the functional equivalent of municipal real estate taxes?
4. The availability of comparable non-RCA housing in the local housing market: Is the choice to live in an RCA truly voluntary?
5. The local government in-kind contributions of services to RCAs or local government contributions of taxpayer funds in connection with RCA services: Are the contacts between government and an RCA so pervasive as to warrant a finding of state action even if the RCA otherwise were deemed not to be the functional equivalent of a municipality?
6. Nonresident access to RCA property: Does the RCA hold open portions of its property [sic], such as streets, retail establishments, or common areas, to members of the public?

Id. (footnotes omitted).

392. Id. at 558. However, the author hedged this concession by referencing several other valid tests relating to constitutional doctrine which are similarly complicated but are nevertheless applied by the courts. Id. at 558–60.

393. Telephone Interview with Jay Steven Levine, supra note 383.

394. Id.

395. Korngold, supra note 21, at 1543.
such an important liberty in the name of protecting rights voluntarily abridged in exchange for other benefits?

Classification of homeowners’ associations as per se quasi-governmental entities whose conduct is subject to the state action doctrine—and accordingly the Constitution—would threaten the enforceability of restrictive covenants, rendering meaningless even those most desirable. Indeed, such a proposition would entail “transferring property from the private sphere to the public . . . result[ing] in the . . . deprivation of Americans’ property rights.” It would also result in an exponential increase in litigation; countless suits for declaratory judgment and injunctive relief would result because those covenants restricting free speech would then become unconstitutional as enforced by the homeowners’ association. The homeowners’ association would lose its efficacy in enforcing covenants, supporting homeowners’ expectations, and protecting their investments should its conduct be characterized as state action.

As to private restrictive covenants burdening parcels in the numerous CICs across the country, the state action doctrine largely has no applicability. Therefore, as to the homeowners’ association—the entity responsible for enforcing these covenants—the state action doctrine similarly has little thrust in curtailing those responsibilities. Consequently, the state action doctrine does not, and should not, apply to homeowners’ associations. The freedom of contract and the free use of property outweigh a contrary proposition.

397. Rehe, supra note 260, at 527.
398. See supra text accompanying notes 368–71.
399. Cantora, supra note 86, at 426.