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I. INTRODUCTION

Over the last decade, housing providers—including community associations—have seen a significant increase in the number of owners and tenants submitting “prescriptions” for emotional support and comfort animals in pet-restricted or limited communities. This increase—in addition to the lack of...
case law governing how these requests should be evaluated, and the ever increasing number of Housing and Urban Development (HUD) complaints and unfavorable results facing associations—has, in these authors’ opinions, discouraged many associations from challenging these requests even in situations where the association is skeptical of the need for the animal. Until recently, many associations believed that challenging a request for a reasonable accommodation involving an emotional support or companion animal was a losing battle. In 2009, an association in Florida’s panhandle challenged a unit owner’s “prescription” for an emotional support animal, and the outcome significantly changed the landscape for associations evaluating these types of requests.2

The pendulum seems to be swinging in favor of associations challenging facially illegitimate requests for reasonable accommodations, such as emotional support or companion animals, and forcing applicants making a request to substantiate their request with medical records and treatment notes.3 This decision breathes new life into an association’s ability to challenge a facially illegitimate request for an emotional support animal.4 Requests for reasonable accommodations involving emotional support or companion animals have proven to be one of the most litigation-fraught areas of discrimination law—and for good reason.5 While the need for many service animals is readily apparent, such as seeing eye dogs for sight-impaired individuals, that is not the case with most requests for emotional support ani-

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nium Law and Practice, The Florida Bar Continuing Legal Education, 2007, and author of a national treatise, The Law of Condominium Operations, WEST GROUP, 1988. He co-authored, with his son Ryan, “New Neighborhoods: The Consumer’s Guide to Condominium, Co-op and HOA Living,” Emerald Book Group, 2009. He was recognized by the College of Community Association Lawyers with its highest achievement, the Gurdon Buck Award for his contribution to the development, nationally of the field of Community Association Law, and was designated by the Broward County commissioners and the Broward County Historical Commission as a “Pioneer” for his contribution to the field of Community Association Law.


3. See, e.g., id. at *7.

4. See id.

5. SARA PRATT ET AL., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: TESTING GUIDANCE FOR PRACTITIONERS 1 (2005) (“Since 1993, complaints alleging disability discrimination have been the most or second most common type of fair housing complaint received by HUD.”).
The majority of mental and/or psychological conditions are not visible or evident and can be difficult to confirm with a simple "prescription" stating: "It is medically necessary for my patient, who is extremely depressed, to have a dog." While many times HUD and its affiliated investigative agencies find this type of note sufficient to establish a need for an emotional support animal, the federal courts properly recognized that many owners or tenants are abusing the system by submitting "prescriptions" from family or friend physicians, or simply by soliciting a physician to "prescribe" an animal even though the person does not suffer from a true mental or psychological disability. Therein lies the potential for improper requests by those who simply would prefer to have an animal, compared to those who truly require an animal as a medical necessity.

Medical providers should not take these requests lightly; in the event of a legal challenge, their judgment, credibility, and reputation may be questioned. Many disability rights advocates stress that fraudulent or frivolous claims undermine the credibility of the process and ultimately insult those whom the Fair Housing Acts were designed to protect. It is in everyone's interest to maintain the integrity of this legal right.

Requests for service and emotional support animals arise out of the 1988 Amendments to the Federal Fair Housing Act, prohibiting community associations, landlords, and other housing providers from discriminating against residents suffering from a handicap or disability or the handicap or disability of anyone associated with that resident. This means associations are required to "make reasonable accommodations in rules, policies, practices, [and] services when . . . necessary" to provide a disabled person with "equal opportunity to use and enjoy a dwelling." Compliance with the statute appears simple enough. After all, the Fair Housing Amendments Act (FHAA) and the ADA Amendments Act (ADAAA) define the terms handicap and disability respectively and provide guidance on what constitutes a handicap or disability; but is compliance really "simple enough" for most

7. See id. at 13-14.
8. See id., at 6-7.
community associations, landlords, and housing providers faced with the daunting task of determining who is handicapped and what accommodations are reasonable and required? This is an extremely complex and highly fact specific determination that perplexes even the most astute legal and medical minds.

This article will address the legal and medical considerations of requests for service and emotional support animals as reasonable accommodations in pet restricted or limited communities, after providing a historical analysis of the statutes and acts resulting in the evolution of the FHAA and its progeny.

II. HISTORICAL ANALYSIS OF DISABILITY/DISCRIMINATION LAW

The disability and discrimination laws trace their roots back to the Civil Rights Act of 1964. This was a landmark piece of legislation in the United States that outlawed unequal application of voter registration requirements and racial segregation in schools, at the workplace, and by facilities that served the general public—"public accommodations." Once the Civil Rights Act was implemented, its effects were far-reaching and had tremendous long-term impacts on the whole country. It prohibited discrimination in public facilities, in government, and in employment. Thereafter, Title 8 of the Civil Rights Act of 1968, also known as the Fair Housing Act, was enacted by Congress as a means of preventing housing discrimination based upon race, color, religion, and national origin. The Act was amended in 1974 to add "sex" as a protected class. In 1988, Congress enacted the FHAA, which expanded the scope of the Act to include discrimination.

13. See discussion infra Part III.D.
based upon "familial status" and "handicap." 22 The FHAA requires that shared ownership housing communities "make reasonable accommodations in rules, policies, practices, or services," and allow "reasonable modifications of existing premises . . . to afford . . . [handicapped individuals] full [use and] enjoyment of the premises." 23

On the heels of the FHAA, the Americans with Disabilities Act (ADA) was signed into law by President Bush on July 26, 1990. 24 The ADA is a comprehensive formulation of the rights of handicapped individuals in the United States, the purpose of which is:

1) To provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3) to ensure that the federal government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. 25

The ADA is designed to prevent discrimination in public accommodations, commercial facilities, employment, state and local government services, transportation, and telecommunications, 26 while the FHAA is designed to prevent discrimination in housing. 27 Although the two Acts serve different purposes, they both seek to redress discrimination based upon disability or handicap. 28 The FHAA uses the term "handicap" 29 while the ADA uses the

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22. Id. § 5(a)–(b).
23. Id. § 6(a).
26. Id. § 2(a)–(b).
27. Fair Housing Amendments Act of 1988 § 6(a).
28. See Americans with Disabilities Act of 1990 § 2(b)(1); Fair Housing Amendments Act of 1988 § 6(a).
term "disability." Both terms have the same legal meaning and both Acts use the same or similar provisions and definitions, but the ADA has been litigated far more than the FHAA. Accordingly, the body of case law addressing the ADA is more expansive than that addressing the FHAA. Federal courts began addressing FHAA cases and issues by referring to ADA employment discrimination doctrines. "The almost universal application of the two Acts lends itself to similarities in interpretation; the very broadness of their scope virtually necessitates doctrinal equivalence in order to ensure some degree of consistency in the law." The Fourth Circuit Court of Appeals explained that although the Acts "create and protect distinct rights, their similarities have traditionally facilitated the development of common or parallel methods of proof when appropriate." Accordingly, while focusing on the FHAA and requests for emotional support animals, there will be cites to ADA and employment cases within this article.

Having noted the similarities in the Acts, it is important to understand that the Acts are beginning to take separate and divergent paths. On September 25, 2008, the ADAAA was signed into law, effective, January 1, 2009.
The ADA’s definition of “disability” was the same three-pronged definition found in the Rehabilitation Act of 1973 and the definition currently found in the FHAA. The proponents of the ADAAA believed the courts had “narrow[ed] the definition of disability in unexpected ways.” The ADAAA was enacted to “provid[e] ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.” Accordingly, the ADAAA was revised with the intent to lessen the standards for proving disabilities. Since this article focuses on whether an association can or should grant a reasonable accommodation to its pet restrictions and/or limitations with regard to emotional support animals, the differences between the FHAA and ADAAA affecting emotional support—and service—animals will be discussed below.

III. THE LEGAL CONSIDERATIONS IMPLICATED BY THE FHAA

The FHAA is found in section 3601, et seq of Title 42 of the United States Code, and every state has adopted an identical or virtually identical version of the FHAA. In addition to prohibiting discrimination in the sale or rental of a dwelling based upon race, color, religion, sex, familial status, and national origin, it is also unlawful

[to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of [the] buyer or renter, [or the handicap of someone] intending to reside in that dwelling . . . or [the handicap of someone] associated with [the] buyer or renter.

This includes a “refus[al] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to

41. See id. at § 2(a)(4)–(8).
afford [such] person equal opportunity to use and enjoy a dwelling." It is an established principle of law that a reasonable accommodation to an association's pet restriction or limitation must be granted to a disabled individual requiring a service and/or emotional support animal. In other words, granting an accommodation to allow a person who is disabled to have an emotional support animal is considered "reasonable" as a matter of law.

A. Who or What Does the FHAA Govern?

The FHAA applies to condominium and homeowners' associations alike, unless they fall within an express exemption. The Joint Statement of the Department of Housing and Urban Development and the Department of Justice, dated May 17, 2004, explains that the FHAA applies to condominium and homeowners' associations. The exact power is derived from section 3602(d), which defines a "person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under [T]itle 11, receivers, and fiduciaries." The Joint Statement provides:

Any person or entity engaging in prohibited conduct—i.e., refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling—may be held liable unless they fall within an exception to the Act's coverage. Courts have applied the Act to individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services. Courts have also applied the Act to state and local governments, most often in the context of exclusionary zoning or other land-use decisions. Under specific exceptions to the Fair Housing Act, the reasonable accommodation requirements of the Act do not apply to a

44. 24 C.F.R. § 100.204(a) (2011).
46. See id.
49. 42 U.S.C. § 3602(d).
private individual owner who sells his own home so long as he (1) does not own more than three single-family homes; (2) does not use a real estate agent and does not employ any discriminatory advertising or notices; (3) has not engaged in a similar sale of a home within a 24-month period; and (4) is not in the business of selling or renting dwellings. The reasonable accommodation requirements of the Fair Housing Act also do not apply to owner-occupied buildings that have four or fewer dwelling units.50

Accordingly, condominium and homeowners’ associations are governed by the FHAA, and therefore, are subject to discrimination claims based upon an alleged violation of the FHAA arising out of an owner’s, tenant’s, guest’s and/or associated person’s disability.51

B. Who Does the FHAA Protect?

The FHAA is designed to protect owners, applicants or residents from discriminatory practices “because of their disability or the disability of anyone associated with them,” and to prevent housing providers “from treating persons with disabilities less favorably than others because of their disability.” The Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled individual or someone associated with a disabled person an] equal opportunity to use and enjoy a dwelling.”53 “The Act also prohibits housing providers from refusing residency to persons with disabilities, or placing conditions on their residency, because those persons may require reasonable accommodations.”54

C. What Is a Disability or Handicap Under the FHAA?

The term “handicap” is defined in the FHAA as:

1) a physical or mental impairment which substantially limits one or more of such person’s major life activities; 2) a record of having such an impairment; or 3) being regarded as having such an im-

50. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., supra note 6, at 3 (emphasis added) (citations omitted).
pairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).\(^{55}\)

The definition of “handicap” is further clarified in the Code of Federal Regulations, which provides:

Handicap means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. This term does not include current, illegal use of or addiction to a controlled substance. For purposes of this part, an individual shall not be considered to have a handicap solely because that individual is a transvestite. As used in this definition:

(a) Physical or mental impairment [as to prong (1) above] includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

... (c) Has a record of such an impairment [as to prong (2) above] means has a history of, or has been misclassified as having, a men-
tal or physical impairment that substantially limits one or more major life activities.

(d) Is regarded as having an impairment means [as to prong (3) above]:

(1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other toward such impairment; or

(3) Has none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment.56

The following conditions are generally not considered impairments: "environmental, cultural, and economic disadvantages, homosexuality and bisexuality, pregnancy, physical characteristics, common personality traits, [and] normal deviations in height, weight, or strength."57

The ADAAA maintained the same three-prong definition of disability; however, it clarified that the term disability should be construed to provide broad coverage, as follows:

4) Rules of construction regarding the definition of disability.

The definition of ‘disability’ in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.58

56. 24 C.F.R. § 100.201 (2011) (emphasis omitted).
In these authors’ opinions, the courts interpreting the FHAA, HUD and its investigative agencies have been applying this broad definition of disability in the FHAA context.

D. What is Necessary to Establish a Disability?

Many physical impairments are visible and therefore, easily identified without the need for further medical support. For example, someone who is confined to a wheelchair, or who has lost a limb, or who is blind, can be visually identified as having a “physical impairment.” If the impairment is obvious and the nexus between the impairment and the requested service or support animal is also obvious, no additional documentation should be requested. However, someone who claims a physical or mental impairment that is not visually apparent—such as diabetes, high-blood pressure, heart disease, anxiety, depression, panic disorder, obsessive-compulsive disorder, or attention deficit hyperactivity disorder—will most likely be asked to provide medical support and documentation to establish that a disability exists.

The non-visual disabilities pose the greatest challenges for associations and housing providers alike. How is a board of voluntary officers and directors, the majority of which have no legal or medical training, supposed to determine if a person is disabled as a matter of law? Is there a checklist? Are there guidelines?

The short answer is, no. The long answer is the association’s board must attempt to determine if the requesting party’s alleged disability “substantially limits one or more [of the person’s] major life activities.” Major life activities are defined in the Code of Federal Regulations as, “functions such as caring for one’s self, performing manual tasks, walking, seeing, hear-

60. Id. at 13.
61. Id. at 12–13; see also Gary Poliakoff & JoAnn Nesta Burnett, Prescription Pets: Homeowners Are Increasingly Bringing Doctors’ Notes as They Seek Waivers of Their Associations’ No-Pet Rules. When Is a Pet a Medical Necessity Under the Law?, BECKER & POLIAKOFF 2 (2008), http://www.becker-poliakoff.com/pubs/articles/poliakoff_g/poliakoff_prescription_pets.pdf (explaining in detail the type of documentation an association is able to request when an impairment is obvious and the need for a service/support animal is also obvious, differing from when the nexus between the impairment and the requested animal is not obvious, meaning the impairment and nexus cannot be ascertained from a purely visual standpoint).
64. 24 C.F.R. § 100.201 (2011).
ing, speaking, breathing, learning, and working.” Of course, this list is not exhaustive. What qualifies as a major life activity in one situation, may not qualify in another. If determining what constitutes a major life activity was not difficult enough, the association’s board members must then determine if the alleged disability “substantially limits one or more [of a person’s] major life activities.”

The ADAAA revised the definition of major life activities to include:

(2) Major life activities.

(A) In general.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Although this definition provides greater detail about what constitutes a major life activity, the fact of the matter is, these changes appear to codify case law that already existed, and that was previously applied in FHAA cases.

“The term ‘substantially limits’ suggests that the limitation is ‘significant’ or ‘to a large degree.’” The term “substantially limits” is not defined in the FHAA, but is defined and explained in the ADA and case law, to mean:

65. Id. § 100.201(b) (defining “major life activities”).
67. 24 C.F.R. § 100.201.
An impairment is generally considered substantially limiting if it prohibits or significantly restricts an individual’s ability “to perform a major life activity” as compared to the ability of “the average person in the general population [to] perform” the same activity. 72 Determining whether an impairment substantially limits a major life activity is dependent on: “1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent or long-term impact of or resulting from the impairment.” 73 “Although very short-term, temporary restrictions generally are not substantially limiting, an impairment does not have to be permanent to rise to the level of a disability;” but, the expected duration of the impairment is a factor to be considered. 74 “Temporary impairments that take significantly longer than normal to heal”—for example, surgeries resulting in unexpected infections, “long-term impairments, or potentially long-term impairments of indefinite duration may be disabilities if they are severe.” 75 “Chronic or episodic disorders, [such as anxiety and depression] that are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms may be disabilities.” 76 “An individual who has two or more impairments that are not substantially limiting by them-
selves, but [in conjunction] substantially limit one or more [of a person’s] major life activities," is considered disabled.\textsuperscript{77}

The definitions above come from the ADA\textsuperscript{78} and the case law interpreting the term "substantially limits."\textsuperscript{79} However, section 12102 of the ADAAA lessens the standard by stating:

\textbf{(4)(B)} The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

\textbf{(C)} An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

\textbf{(D)} An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

\textbf{(E)(i)} The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

\begin{itemize}
  \item (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
  \item (II) use of assistive technology;
  \item (III) reasonable accommodations or auxiliary aids or services;
  \item or
  \item (IV) learned behavioral or adaptive neurological modifications.\textsuperscript{80}
\end{itemize}


\textsuperscript{80.} ADA Amendments Act of 2008 § 4(a).
It is unknown if the ADAAA definition above will be applied, and if so, to what extent, in FHAA cases. Notwithstanding the fact that this definition is not contained in the FHAA, HUD has been applying these standards in its investigation of discrimination complaints for quite some time.81

Armed with this extensive knowledge and guidance, an association’s board members should be able to apply these definitions and determine whether a person is disabled, right? To some extent that is true, but for the most part each request must be decided on a case-by-case basis.82 As the Seventh Circuit Court of Appeals succinctly explained, not every impairment qualifies as a disability protected by the FHAA because not every impairment is substantially limiting.83 The court described the proper disability determination to be:

A disability determination, however, should not be based on abstract lists or categories of impairments, as there are varying degrees of impairments as well as varied individuals who suffer from the impairments. In fact, the regulations note that a finding of disability: “is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.” This is why a determination of disability must be made on an individualized, case-by-case basis. Whether a substantial limitation upon a major life activity exists depends upon an analysis of 1) the nature and severity of the impairment, 2) the duration of the impairment, and 3) the permanent or long-term impact of the impairment.84

The effect of a particular impairment on several peoples’ lives may vary greatly. Accordingly, a particular impairment might constitute a disability in one case and not in another.85

82. Homeyer v. Stanley Tulchin Assocs., 91 F.3d 959, 962 (7th Cir. 1996).
83. Id.
84. Id. (citations omitted) (quoting 29 C.F.R. app. § 1630.2(j) (2010)).
85. Id.
IV. THE MEDICAL DOCUMENTATION NECESSARY TO SUBSTANTIATE A DISABILITY AND NEED FOR AN EMOTIONAL SUPPORT ANIMAL

As referenced above, there are certain criteria HUD and its investigative agencies apply to discrimination claims concerning the type of documentation an association can or should request to support a person’s claimed disability and need for an emotional support animal. When the disability and nexus are obvious, there is no need for additional information. However, when neither the disability nor the nexus between the requested accommodation are obvious, HUD provides that an association may request the following:

A housing provider may not ordinarily inquire as to the nature and severity of an individual’s disability . . . . However, in response to a request for a reasonable accommodation, a housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act’s definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities), (2) describes the needed accommodation, and (3) shows the relationship between the person’s disability and the need for the requested accommodation. Depending on the individual’s circumstances, information verifying that the person meets the Act’s definition of disability can usually be provided by the individual himself or herself (e.g., proof that an individual under [sixty-five] years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual). A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual’s disability may also provide verification of a disability. In most cases, an individual’s medical records or detailed information about the nature of a person’s disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act’s definition of disability, the provider’s request for documentation should seek only the information that is necessary to evaluate if the reasonable accommodation is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information

86. See supra Part III.D.
to make or assess a decision to grant or deny a reasonable accom-
modation request or unless disclosure is required by law (e.g., a
court-issued subpoena requiring disclosure). 88

How should an association respond to a person who submits a letter
from an out-of-state physician who specializes in treating pediatric patients
and who shares the same name as the requesting party, but whose document-
tation is otherwise facially compliant with the FHAA? Under HUD’s guide-
lines, the association should simply approve the request and ignore any skeptic-
ism the board might have. 89 Meanwhile, the condominium owner making
the request has submitted a note from her son who is a pediatrician and has
written a letter stating that his patient suffers from severe mental impair-
ments that require an emotional support animal. 90 While this may seem to be
an extreme situation, unfortunately it is not; it occurs every day. 91 These
authors have encountered several situations in which a requesting party has a
friend or family member physician write a “prescription” for an emotional
support animal, knowing full well that the requesting party does not suffer
from a disability or handicap. HUD and its investigative agencies frightened
most associations from challenging even the most egregious violations—
until recently, that is. 92

In 2009, the United States District Court for the Northern District of
Florida addressed the issue of whether an association is able to request addi-
tional medical information where the board is skeptical of the request made
and/or the documentation supplied. 93 The Hawn v. Shoreline Towers Phase I
Condominium Ass’n 94 case involved a unit owner in a pet restricted commu-
nity who brought suit against an association (the Association) for alleged
violations of the state and federal Fair Housing Acts and various other re-
lated causes of action arising out of the Association’s denial of Hawn’s re-
quest for an emotional support animal. 95 Hawn purchased a unit in the Asso-
ciation in 2004 with full knowledge that this was a pet restricted communi-

88. Id. at 13–14 (footnote omitted) (citation omitted).
89. See id.
90. See HOA Pet Rules & Required Accommodations: The Facts About Comfort Ani-
91. See id.
92. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HOUS. & URBAN DEV., supra note 6, at
691378, at *7 (N.D. Fla. Mar. 12, 2009).
95. Id. at *1–2.
ty.

In January 2005, about a year after moving in, Hawn wrote to the board and requested that the Association amend the restriction prohibiting pets to allow owners to maintain pets and more specifically, to allow Hawn to keep a pet. The letter did not state that Hawn was disabled, but instead, stated the dog was his close companion. It is unclear what action the board took, but in June 2006, Hawn wrote another letter to the board—for the first time claiming a disability and a need for a “service and support animal” due to his physical and mental disabilities. In support of his request for a reasonable accommodation to maintain a service/emotional support animal, Hawn provided the Shoreline Board of Directors with two letters—one from a psychologist and one from a chiropractor. The psychologist’s letter provided that “the plaintiff suffered from severe panic attacks; was unable to properly cope with anxiety and stress; and was particularly vulnerable ‘while residing at his home/condo due to past occurrences on that property.’” The psychologist stated that he was “prescribing a service animal” to “help plaintiff cope with his ‘emotionally crippling disability.’” Additionally, Hawn’s chiropractor submitted a letter in support of Hawn’s physical disability stating that he was “intimately familiar” with Hawn’s history and the “functional limitations imposed by his disability.” He stated that a “[service] animal would ‘assist Mr. Hawn with his disability.’” The letter did not provide what specific limitations existed.

The Association requested additional information “including documentation to support [Hawn’s] alleged disabilities and the qualifications of” the authors of the letters. Hawn did not respond because he felt his letters were sufficient. The board again requested additional information including:

[Expert evidence under oath of the nature of [Hawn’s] impairment, the manner in which it substantially limit[ed] one or more of [Hawn’s] major life functions or activities, how the requested [an-
imal] was necessary to afford [Hawn] an equal opportunity to use and enjoy [his] dwelling and if there [were] other corrective measures which [would] permit such use and enjoyment.\textsuperscript{108}

Again Hawn failed to respond and instead, filed a complaint with the Florida Commission on Human Relations (FCHR).\textsuperscript{109} The FCHR determined that “there was cause to believe that the [Association] discriminated against” Hawn in failing to grant the request for a reasonable accommodation.\textsuperscript{110} Hawn then filed suit.\textsuperscript{111}

In disagreeing with FCHR, and in granting summary judgment for the Association, the United States District Court for the Northern District of Florida explained that “[w]hether a requested accommodation is required by law is highly fact-specific, requiring case-by-case determination.”\textsuperscript{112} The court found that Hawn was unable to establish that he was disabled or that the Association discriminated against him under the Fair Housing Acts because he could not establish that the Association knew or should have known of his alleged disability or that the Association knew an “accommodation was necessary to afford him [an] equal opportunity to use and enjoy [his] dwelling.”\textsuperscript{113}

The court explained that given the fact that Hawn lobbied for a change in the no pet restriction without ever mentioning a disability despite the fact that the alleged disabilities were diagnosed prior to Hawn’s first letter, coupled with the fact that shortly after the failure to amend the restriction occurred, Hawn had his dog trained as a service animal and for the first time claimed a disability, “it [was] understandable that the board was suspicious of his disability claim.”\textsuperscript{114} Further, had Hawn actually provided the additional medical information that was requested, the court believed the Association would have been justified in denying his request because the treatment history revealed that the psychiatrist saw Hawn for only two one-hour sessions and the chiropractor had not seen Hawn in nearly seven years.\textsuperscript{115} Further, Hawn solicited the letters which he essentially drafted for their signature.\textsuperscript{116}

“In order to show that the disabled person needs the assistance of a service

\textsuperscript{108} Id.
\textsuperscript{109} Hawn, 2009 WL 691378, at *2.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at *4 (quoting Loren ex rel. Aguirre v. Sasser, 309 F.3d 1296, 1302 (11th Cir. 2002) (per curiam)) (internal quotation marks omitted).
\textsuperscript{113} Id. at *5-6 (emphasis omitted).
\textsuperscript{114} Hawn, 2009 WL 691378, at *4.
\textsuperscript{115} Id. at *4 n.6.
\textsuperscript{116} See id.
animal... it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service dog can ameliorate the effects of the disability." 117 The letters submitted did not provide that information and the Association was entitled to that additional medical information to make a proper determination.118 The court explained that Hawn’s refusal to provide any additional medical information, in addition to the suspicious grounds surrounding his request, prevented any finding of improper conduct on the part of the Association.119

Hawn then appealed the case to the Eleventh Circuit Court of Appeals which affirmed the trial court’s opinion, stating:

We are similarly unpersuaded by Hawn’s argument that the district court erred by failing to consider the documentation made available to Shoreline during the course of the FCHR investigation. First, the district court did in fact consider such evidence; it noted in its order that Hawn’s doctors completed “Medical Certification Forms,” in which they “opined that plaintiff had a disability and that a service dog was necessary.” Second, a review of the Medical Certification Forms reveals that they lack much of the information requested by Shoreline. The Medical Certification Forms appear to be generic forms obtained from the FCHR that merely required Hawn’s doctors to check “yes” and “no” boxes and, in some spaces, provided blank lines for brief comments. The forms did not ask for—and the doctors did not provide—other information requested by Shoreline, such as Hawn’s doctors’ credentials. Third, aside from the documents addressed by the district court, it is unclear what other evidence was presented to the FCHR and made available to Shoreline. The Medical Certification Forms were the only documents attached to Hawn’s response to Shoreline’s motion for summary judgment that appear to have been created during the pendency of the FCHR investigation. Finally, the FCHR’s opinion, in which it found cause to believe that Shoreline had discriminated against Hawn, relies predominantly, if not exclusively, on evidence predating the filing of the FCHR complaint. It is therefore unclear what additional evidence Hawn believes was presented to Shoreline during the FCHR investigation

117. Id. at *7 (quoting Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1259 (D. Haw. 2003)) (internal quotation marks omitted).
that put Shoreline on notice of Hawn's disability and the necessity of a service animal.\(^{120}\)

To prevail on a discrimination claim,

the plaintiff must establish: 1) that he is disabled or handicapped within the meaning of the FHA, and that the defendants knew or should have known of that fact; 2) that the defendants knew that an accommodation was necessary to afford him equal opportunity to use and enjoy the dwelling; 3) that such an accommodation is reasonable; and 4) that the defendant refused to make the requested accommodation.\(^{121}\)

Hawn was unable to satisfy the first and second prongs stated above, and was therefore, unable to prove a claim of discrimination.\(^{122}\) The court further explained that it was significant that the Association did not outright deny Hawn's request, but instead, it attempted to engage in an interactive process and request additional information.\(^{123}\) The Association attempted to conduct a meaningful investigation of Hawn's claims but his refusal to provide any additional information resulted in the Association's denial of his request.\(^{124}\)

In the case of United States v. Hialeah Housing Authority,\(^{125}\) the Eleventh Circuit Court of Appeals reversed and remanded the southern district's entry of summary judgment in favor of the defendant, Hialeah Housing Authority (HHA), on plaintiff's (on behalf of Miguel Rodriguez) FHA/disability discrimination claims.\(^{126}\) The Rodriguez family was a tenant of HHA—

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122. See Hawn, 347 F. App’x at 468.

123. Hawn, 2009 WL 691378, at *6-7. See Sun Harbor Homeowners’ Assoc., Inc. v. Bonura, No. 4D10-3038, 2012 WL 2120923, *6 (Fla. 4th Dist. Ct. App. June 13, 2012) (explaining that homeowner and his fiancée failed to demonstrate that they requested an accommodation and therefore, discrimination claim failed; Further, association never denied the request); Meadowland Apartments v. Schumacher, 813 N.W.2d 618, 624-26 (S.D. 2012) (finding no discrimination where no action was taken to remove the animal or the tenant pending the outcome of the litigation to determine if tenant was truly disabled).


125. 418 F. App’x 872 (11th Cir. 2011) (per curiam).

126. Id. at 878.
HHA also provided housing to the Amparo and Perez families, who were neighbors of the Rodriguez family. There were several altercations between the families and HHA attempted to terminate the tenancies of all three families because it could not resolve or otherwise prevent the altercations. Mr. Rodriguez was served with a thirty-day notice of termination of tenancy and the family requested an informal hearing to contest the termination. HHA appointed a hearing officer to preside over the proceedings.

At the hearing, Mr. Rodriguez provided the hearing officer with "documents showing that [he] was sick." Mr. Rodriguez and his wife advised the hearing officer that Mr. Rodriguez "had difficulty climbing stairs" and "needed a unit with a bathroom" on the ground floor. HHA offered to transfer the Rodriguez family to a unit in another project that had a bathroom upstairs and downstairs. The Rodriguez family claimed they were not able to inspect the unit prior to accepting the transfer agreement, but based on the representation that there was a downstairs bathroom, Mr. Rodriguez agreed to relocate to the other housing project and executed a transfer agreement accepting the new unit.

Upon inspecting the unit, the Rodriguez family wrote a letter to the hearing officer challenging the transfer because the proposed apartment was dirty, had no air conditioning, and had no bathroom downstairs. The note stated that Mr. Rodriguez and his wife had surgery and they were unable to climb stairs every time they needed to use the bathroom. The hearing officer responded with a letter stating the decision to terminate was upheld. HHA responded by terminating the tenancy and eventually filing an eviction action. In his answer, Mr. Rodriguez asserted that he was "disabled due to hip and back problems and that he could not constantly go up and down.

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128. Id. at *1.
129. Id.
130. Id. at *2.
131. Id. (internal quotation marks omitted).
133. Id.
134. Id.
135. Id.
137. Hialeah Hous. Auth., 418 F. App’x at 874.
138. Id.
139. Id.
stairs to use [the] bathroom."\textsuperscript{140} The parties mediated the eviction claim at which time, counsel for Rodriguez advised HHA "that Mr. Rodriguez had a disability that prevented him from going up and down stairs" and that was the sole reason for rejecting the transfer.\textsuperscript{141} HHA contended it requested documentation substantiating the disability.\textsuperscript{142} It claimed that it had first learned of the alleged disability at mediation; however, HHA would not allow the family to remain in the Project 16 unit and instead, offered the same unit at the other project with the caveat that the family would be placed on a waiting list for a suitable unit.\textsuperscript{143} The Rodriguez family rejected this offer, and instead, the parties entered into an agreement whereby the family would "vacate the Project 16 unit by August 31, 2005."\textsuperscript{144}

Mr. Rodriguez filed a HUD complaint alleging HHA discriminated against him and his family based upon his disability.\textsuperscript{145} HUD found cause to believe discrimination had occurred.\textsuperscript{146} The United States filed suit against HHA on behalf of Mr. Rodriguez in the Southern District of Florida.\textsuperscript{147} The trial court entered summary judgment in favor of HHA finding that "no reasonable jury could conclude that [HHA] knew or should have known Mr. Rodriguez was disabled and . . . the requested accommodation was necessary."\textsuperscript{148}

On appeal, the Eleventh Circuit reversed and remanded because there were genuine issues of material fact concerning whether HHA had notice of the disability and the requested accommodation.\textsuperscript{149} The Eleventh Circuit explained that the disability defense raised in the eviction claim, coupled with counsel's explanation at mediation that Mr. Rodriguez was disabled and required an accommodation so he did not have to go up and down the stairs, were "sufficient to allow a reasonab[le] jury to find that Mr. Rodriguez [was claiming a disability and that he] made a specific demand for an accommodation."\textsuperscript{150} Although Mr. Rodriguez did not use the term "reasonable accommodation," HHA had sufficient information to know of Mr. Rodriguez's

\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Hialeah Hous. Auth., 418 F. App'x at 877.
\textsuperscript{143} Id. at 875.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Hialeah Hous. Auth., 418 F. App'x at 875.
\textsuperscript{148} Id. (alteration in original) (quoting United States v. Hialeah Hous. Auth., No. 08-22679-CIV, 2010 WL 1540046, at *6 (S.D. Fla. Apr. 19, 2010) (internal quotation marks omitted), rev'd per curiam, 418 F. App'x 872 (11th Cir. 2011)).
\textsuperscript{149} Id. at 876, 878.
\textsuperscript{150} Id. at 877.
disability and his desire for an accommodation. That "trigger[ed] HHA's duty to provide a reasonable accommodation." The court further stated there were material issues of fact concerning whether HHA refused to grant an accommodation either by an outright denial or a constructive denial.

The court acknowledged that as in Hawn, if the Association is skeptical of Mr. Rodriguez's disability they could, and should, request additional information. The appellate court noted that there were additional issues raised and required to be addressed on remand. Notwithstanding the reversal of summary judgment, the appellate court recognized that the single most critical issue had not been addressed, which could produce an identical outcome. The trial court assumed Mr. Rodriguez was disabled, but never made a finding that he satisfied the Fair Housing Act's definition of a person with a disability. Similarly, the appellate court agreed that HHA's assertion that it had no duty to grant the requested accommodation "because the Rodriguez family was a direct threat" to others pursuant to section 3604(f)(9) of Title 42 of the United States Code, must also be addressed.

These cases demonstrate that an association has the right to request additional medical support from a requesting party if the association is skeptical of the alleged disability and/or need for an animal.

V. DO EMOTIONAL SUPPORT ANIMALS STILL EXIST AFTER THE REVISIONS TO THE ADAAA?

One of the most significant changes to the ADAAA is the definition of a "service animal." This definition became effective March 11, 2011, and has already created quite a controversy. The revised definition of service animal is:

[A]ny dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a phys-

cal, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.\textsuperscript{162}

This definition officially eviscerates emotional support animals, at least in public.\textsuperscript{163} It also limits service animals to dogs,\textsuperscript{164} and in certain circumstances, miniature horses,\textsuperscript{165} and requires that the animal be trained to work or perform a task for the disabled individual.\textsuperscript{166} Some legal commentators have argued that this revision to the ADAAA also applies to the FHAA, and therefore, associations will no longer have to make accommodations to allow emotional support animals.\textsuperscript{167} To eliminate any confusion, HUD issued a memorandum dated February 17, 2011,\textsuperscript{168} explaining:

This memo explains that the Department of Justice’s (DOJ) recent amendments to its Americans with Disabilities Act (ADA) regulations do not affect reasonable accommodation requests under the Fair Housing Act (FHA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). The DOJ’s new rules limit the definition of “service animal” in the ADA to include only dogs. The

\begin{itemize}
  \item 162. \textit{Id.} (emphasis added).
  \item 163. \textit{See id.}
  \item 164. \textit{Id.}
  \item 165. \textit{Id.} § 36.302(c)(9); Memorandum from Sara K. Pratt, Deputy Assistant Sec’y for Enforcement & Programs, to FHEO Region Dirs. 1 (Feb. 17, 2011), http://www.nwfairhouse.org/images/1300304582.pdf.
  \item 166. 28 C.F.R. § 36.104.
  \item 167. \textit{See Memorandum from Sara K. Pratt, supra note 165, at 1.}
  \item 168. \textit{Id.}
\end{itemize}
new rules also define "service animal" to exclude emotional support animals. This definition, however, does not apply to the FHAct or Section 504. Disabled individuals may request a reasonable accommodation for assistance animals in addition to dogs, including emotional support animals, under the FHAct or Section 504. In situations where both laws apply, housing providers must meet the broader FHAct/Section 504 standard in deciding whether to grant reasonable accommodation requests.\textsuperscript{169}

The purpose behind the ADAAA revisions was to prevent people from having to dine with an emotional support potbellied pig or watch a movie with a comfort goat. Dogs are considered to be one of the most acceptable animals and they are easily trained.\textsuperscript{170} However, many other types of animals provide these same functions.\textsuperscript{171} For example, many people use monkeys to alert oncoming seizures, to help feed quadriplegics, and for various other tasks that require fine motor skills.\textsuperscript{172} Herein lies the quandary: What will happen when a disabled individual has a trained monkey in his or her home to perform specific required motor skills, such as turning on a light switch, opening a bottle or turning a door knob—things the disabled individual can no longer do? Since the ADA prevents the disabled person from bringing his or her service monkey to a restaurant or shopping mall, the monkey is banned, right?\textsuperscript{173} A city in California addressed this issue and chose to pass an ordinance to continue to use the original definition of a service animal.\textsuperscript{174}

\textsuperscript{169} Id. (emphasis omitted) (footnote omitted).


\textsuperscript{172} See Helping Hands Monkey Helpers for Quadriplegics, DISABLED WORLD (Jan. 8, 2009), http://www.disabled-world.com/disability/serviceanimals/monkey-helpers.php (discussing how a national organization provides and trains monkeys to assist people with spinal injuries and other mobility impairments); Information on Disability Service Animals for Blind and Persons with Disabilities, supra note 170 ("Capuchin monkeys have been trained to perform manual tasks such as grasping items, operating knobs and switches, and turning the pages of a book.").

\textsuperscript{173} See 28 C.F.R. § 36.104 (2011) (indirectly limiting the definition of a "service animal" under the ADA to a dog); Rose v. Springfield-Greene Cnty. Health Dep’t, 668 F. Supp. 2d 1206, 1214 (W.D. Mo. 2009) (finding that the plaintiff’s service monkey did not fall within the definition of "a service animal under the ADA"), aff’d, 377 F. App’x 573 (8th Cir. 2010), cert denied, 131 S. Ct. 929 (2011).

This ordinance allowed a woman to continue to use her trained service rats that detect, and alert her to, severe muscle spasms. Local government has the ability to expand the rights provided under the FHAA, but not to restrict those rights. While it is unlikely she will receive the same treatment outside the city of Hesperia, at least for now, this woman can dine and shop in peace with her rats.

This is one of the most significant examples of how the ADAAA and FHAA appear to be deviating. Where the two Acts were once almost completely uniform in language and application, they are now beginning to deviate, at least in terms of the definitions of disabilities and service and emotional support animals. These differences will most certainly produce substantial litigation. If a monkey is permitted in a condominium as an epileptic seizure alert service animal, how will the courts reconcile the fact that the monkey is not able to accompany its owner in public? It will be interesting to see how the courts deal with these types of issues.

A. Training

While the ADAAA makes clear that training of a service animal is required, the case law interpreting the FHAA is unsettled. There are cases suggesting that some form of training is required even for an emotional support animal, and other cases, along with HUD decisions, that suggest otherwise. Some courts insist that there must be some evidence of training of the emotional support animal, either by a professional or other person, to set the service animal apart from an ordinary pet and to establish that allowing an animal on the premises is a necessary and reasonable accommodation.

175. Manning, supra note 174.
177. See Manning, supra note 174.
180. Memorandum from Sara K. Pratt, supra note 165, at 1.
Other courts take the position that the plaintiff need not establish that the animal has any type of training if it can be shown the animal's presence ameliorates the effects of the disability. \(^\text{184}\) In the case of *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Commission*, \(^\text{185}\) the California court stated that it is "the innate qualities of a dog, in particular a dog’s friendliness and ability to interact with humans, that ma[k]e it therapeutic" without the need for special training. \(^\text{186}\) Whether the animal is trained, courts agree there must be a showing of how the animal "will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." \(^\text{187}\)

### B. Animal Certifications and Records

An association is able to request documentation concerning the proposed animal to ensure that the animal does not pose a threat to other residents. \(^\text{188}\) An association can request the vaccination and inoculation records

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\(^\text{185}\) Id. at 682. In a recent case in the Southern District of Florida, the Court entered an Order Denying Defendant’s Motion for Summary Judgment, stating that although there is conflicting case law addressing whether an emotional support animal requires any training, this Court would follow the line of cases that provide that emotional support animals do not require any training. Falin v. Condo. Ass'n of La Mer Estates, Inc., No. 11-61903-CIV, 2012 WL 1910021, *3 (S.D. Fla. May 28, 2012).


for the animal at the time of the initial request for accommodation and then annually thereafter.\textsuperscript{189}

HUD states that an animal's certifications should not be requested.\textsuperscript{190} However, it is these authors' opinions that in many cases, a determination of whether the animal ameliorates the effects of a disability is dependent upon what the animal is trained to do. Several courts have agreed with this proposition also.\textsuperscript{191}

\section*{VI. Conclusion}

For virtually every association, claims for reasonable accommodations to a pet restriction or limitation can be landmines. The manner in which they are investigated, the information requested, and the decision process are fraught with pitfalls. Where associations once shied away from challenging a request for an emotional support animal claimed under suspicious circumstances, the case law now gives the association some teeth in requesting additional medical information.\textsuperscript{192} Although HUD may disagree, at least the courts have begun to acknowledge and prevent the abuses of the system that currently plague virtually every association.\textsuperscript{193}

\textsuperscript{189} See id. Notwithstanding a disabled individual's legitimate request for an accommodation to maintain an emotional support animal, the animal may not cause a nuisance. See generally Meadowland Apartments v. Schumacher, 813 N.W.2d 618, 624–26 (S.D. 2012).

\textsuperscript{190} Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. at 63835.

\textsuperscript{191} See, e.g., Bronk, 54 F.3d at 429; Prindable, 304 F. Supp. 2d at 1256–57.

\textsuperscript{192} Hawn v. Shoreline Towers Phase I Condo. Ass’n, 347 F. App’x 464, 468 (11th Cir. 2009) (per curiam).

\textsuperscript{193} See Roustan, supra note 9.
CAN THE CITY COUNCIL PRAISE THE LORD? SOME RUMINATIONS ABOUT PRAYERS AT LOCAL GOVERNMENT MEETINGS

MARC ROHR*

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I. INTRODUCTION

The short answer is: Yes, a city council can give praise to a deity—at least through the medium of prayer offered at a council meeting to a generic "God." But can such a prayer be addressed to, say, "our Lord, Jesus Christ"? The answer to that question is far from clear, as the disparate decisions rendered by federal appellate courts in two recent cases demonstrate.1

II. A TALE OF TWO COUNTY COMMISSIONS

In a decision rendered in 2008, the United States Court of Appeals for the Eleventh Circuit held that even sectarian prayers are constitutionally permissible at governmental meetings, as long as the governmental entity has not acted with the impermissible motive of advancing a particular religious belief or affiliating the government with a specific faith.2 The result of that decision was the rejection of an Establishment Clause challenge, brought by

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2. Pelphrey III, 547 F.3d at 1271–74, 1278.
citizens and taxpayers of Cobb County, Georgia, in the following circumstances:

Both the Cobb County Commission and the Cobb County Planning Commission have a long tradition of opening their meetings with a prayer offered by volunteer clergy or other members of the community. The clergy have represented a variety of faiths, including Christianity, Islam, Unitarian Universalism, and Judaism, and their diverse prayers have, at times, included expressions of their religious faiths.

... The majority of the speakers are Christian. The taxpayers contend that, between 1998 and 2005, 96.6[%] of the clergy were Christian. During the same period, adherents to the Jewish, Unitarian Universalist, Muslim, and Baha’i faiths also provided invocations.

Over the past decade, 70[%] of prayers before the County Commission and 68[%] of prayers before the Planning Commission contained Christian references. Often the prayers ended with references to “our Heavenly Father” or “in Jesus’ name we pray.” Prayers also contained occasional references to the Jewish and Muslim faiths, such as references to Passover, Hebrew prayers, Allah, and Mohammed.3

More recently, the United States Court of Appeals for the Fourth Circuit held that the Forsyth County—North Carolina—Board of Commissioners was acting in violation of the Establishment Clause in the following circumstances:

On December 17, 2007, [plaintiffs] decided to attend a meeting of the Forsyth County Board of [County] Commissioners. Like all public Board meetings, the gathering began with an invocation delivered by a local religious leader. And like almost every previous invocation, that prayer closed with the phrase, “For we do make this prayer in Your Son Jesus’ name, Amen.”

3. Id. at 1266–67.
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. . . [T]he prayers frequently contained references to Jesus Christ; indeed, at least half of the prayers offered between January 2006 and February 2007 contained concluding phrases such as “We pray this all in the name under whom is all authority, the Lord Jesus Christ,” “[I]t’s in Jesus’ name that we pray[,] Amen,” and “We thank You, we praise You, and we give Your name glory, and we ask it all in Your Son Jesus’ name.”

. . . [T]he prayers repeatedly continued to reference specific tenets of Christianity. These were not isolated occurrences: between May 29, 2007 and December 15, 2008, almost four-fifths of the prayers referred to “Jesus,” “Jesus Christ,” “Christ,” or “Savior.” In particular, most of the prayers closed by mentioning Jesus . . . [n]one of the prayers mentioned non-Christian deities.

The purpose of this essay is to briefly explain and evaluate these decisions.

III. THE DOCTRINAL BACKGROUND

A. Lemon

Beginning in 1971, in a case known as Lemon v. Kurtzman, the Supreme Court of the United States has, most often, in cases involving Establishment Clause challenges to government actions, required the government to establish that it acted with a secular purpose, that the primary effect of the challenged action is not the advancement of religion, and that the challenged action has not resulted in “excessive entanglement” between government and religion. If the government does not prevail with respect to each prong of this test—known forever after as the Lemon test—it loses. Note, too, that it is not a required element of an Establishment Clause violation that a governmental actor be found to have promoted, or advanced, a particular religion—although such a finding would almost surely lead to a finding of un-

4. Joyner, 653 F.3d at 342–44.
5. 403 U.S. 602 (1971).
6. Id. at 612–13. The test has been modified in recent years, but remains essentially the same. See McCrery Cnty. v. ACLU of Ky., 545 U.S. 844, 864–65 (2005), cert denied, 131 S. Ct. 1474 (2011); Agostini v. Felton, 521 U.S. 203, 233 (1997).
constitutionality; the promotion or advancement of religion in general will suffice.  

B. Marsh

In a 1983 decision, Marsh v. Chambers, however, the Supreme Court of the United States—without applying the Lemon test—rejected an Establishment Clause challenge to the offering of prayers, by a paid chaplain, at the start of each day of a state legislative session. If the Supreme Court had applied the Lemon test in Marsh, answers to one or more of the following questions would have been dispositive: Is the offering of a prayer motivated by a religious purpose? Is its primary effect the advancement of religion? Does the practice of bringing members of the clergy to government meetings, for the purpose of offering religious invocations, result in excessive “entanglement” of church and state? The Eighth Circuit Court of Appeals believed that the answer to each of these questions was clearly “yes”—as did the Supreme Court Justices who dissented in Marsh—but the majority felt no need to even address those questions. Instead, Chief Justice Burger, writing for the majority, relied on historical practice, particularly the fact that the very first Congress in 1789 adopted the policy of selecting a chaplain to open each legislative session with a prayer. “Clearly,” he concluded, “the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amend-

8. See, e.g., Larson v. Valente, 456 U.S. 228, 244 (1982). “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Id.


11. Id. at 784–85, 792–95.


15. See id. at 784–86, 792–94 (majority opinion).

16. Id. at 786–88.
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17. Id. at 788.
21. Id. at 795.
22. See, e.g., Christopher C. Lund, Legislative Prayer and the Secret Costs of Religious Endorsements, 94 Minn. L. Rev. 972, 976–77 (2010) ("Religious liberty, within the sphere of legislative prayer, thus becomes a perverse sort of zero-sum game—no matter how it is done, someone's religious liberty will inevitably be lost as a consequence. The only way to really protect religious liberty, it seems, is by not having legislative prayer at all."); Eric J. Segall, Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause, 63 U. Miami L. Rev. 713, 725 (2009).
24. Id.
25. See id.
If this test were to be applied, might not the offering of a prayer at a city council meeting be perceived, by an objective observer, as an endorsement of religion, particularly if the prayer makes reference to the beliefs of a particular religion?

IV. DOES MARSH GOVERN?

Because of the Marsh decision, lower courts have agreed that prayers, benedictions, and invocations can be offered at the start of meetings of the governing bodies of cities and counties, as well as at state legislative sessions.28 This is a key threshold determination, because the generally applicable Lemon and endorsement tests would presumably govern the question at hand if the reasoning of the decision in Marsh—a case involving the utterance of prayers at sessions of a state legislature, resolved on the basis of the age-old practice of our national legislature—were found to be inapplicable at the local legislative level.29

Should Marsh apply at the local level, or not? Again, the general assumption by lower courts is that it does.30 But Judge Middlebrooks, dissenting in the Cobb County case, took the position that Marsh—"an outlier in Establishment Clause jurisprudence"—should not govern prayers at government meetings at the local level.31 Prayers at meetings of the county commissions involved in this case, he argued, "hardly can be considered part of the fabric of this nation's history."32 He pointed out, in addition, that the county commission—in contrast to a state legislature—performed executive and adjudicative, as well as legislative, functions,33 contrasting a state legislative session "with a county commission acting in a quasi-adjudicative role, deciding whether to terminate an employee, suspend a liquor license, or grant a zoning variance. A citizen seeking relief has little choice but to attend."34

28. See the summary of the relevant case law in Pelphrey III, 547 F.3d 1263, 1272–74 (11th Cir. 2008). But a federal appellate court recently held that the Marsh legislative prayer exception did not apply to meetings of a school board which students routinely attended. Doe v. Indian River Sch. Dist., 653 F.3d 256, 275 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012).


31. Pelphrey III, 547 F.3d at 1286 (Middlebrooks, J., dissenting).

32. Id.

33. Id. at 1287.

34. Id. at 1288.
I would expand upon Judge Middlebrooks’ arguments by adding the following two pertinent contentions. The first is that the core reasoning of Marsh—i.e., that the practice of the first Congress provides strong evidence that the generation that drafted and ratified the Establishment Clause did not believe that the utterance of prayers at legislative sessions violated the Clause—does not apply at the local level because the framers had no reason to consider the applicability of the Clause at the local level. The second—concededly offered without the benefit of empirical research—is that a meeting of a local “legislature” is qualitatively different from a meeting of a state or national legislative body. There may be some citizens “in the gallery” at a state or national legislative session, but ordinary citizens are far more likely to be in attendance—perhaps regularly, perhaps only occasionally—at monthly meetings of city or county commissions, not only because they may have business before the commission, as Judge Middlebrooks noted, but also because it is common for such a local legislative body to provide the opportunity for attending citizens to address the commission. Arguably, these experiential differences—between local legislative entities, on the one hand, and state and national legislatures, on the other—ought to make a difference with respect to the applicability of Marsh, an aberrational legal principle based solely on a historical practice should not be lightly extended to apply to situations not wholly analogous to that historical antecedent.

The majority in the Cobb County case, however, was not persuaded that state and local governments should ever be treated differently, for Establishment Clause purposes.

V. THE LIMITS OF MARSH

Assuming, as the court in Pelphrey v. Cobb County (Pelphrey III) held, that Marsh does control the issue of prayer at local government meetings, what limitations apply, with respect to the content of such prayers?

36. Indeed, it is clear that the first ten amendments to the Constitution initially had no application to state and local governments. Not until 1940 did the Supreme Court declare that the Establishment Clause was “incorporated” into the Due Process Clause of the Fourteenth Amendment, and thereby applicable to state and local governments. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
37. See Pelphrey III, 547 F.3d at 1287–88 (Middlebrooks, J., dissenting).
39. See id. at 786–89.
40. Pelphrey III, 547 F.3d at 1275–76.
41. 547 F.3d 1263 (11th Cir. 2008).
42. Id. at 1271.
Again, *Marsh* provides an answer. The majority in *Marsh* was untroubled by the fact that the Nebraska legislature had, for sixteen years, paid a clergyman of one denomination (Presbyterian) to offer prayers which, according to the chaplain, were “nonsectarian” and “Judeo Christian”—whatever that might mean—in nature. The court indicated, as well, that the chaplain “removed all references to Christ after a 1980 complaint from a Jewish legislator.” These facts led Chief Justice Burger to utter the following, fateful sentence: “The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” That sentence embodies the key consideration in lower court cases involving prayers at local government meetings. But what does it mean?

It might be understood to mean that “nonsectarian” prayers are permissible at such meetings, but that sectarian prayers are not. But Judge Pryor, writing for the majority in the *Pelphrey III* case, rejected that interpretation as “contrary to the command of *Marsh* that courts are not to evaluate the content of the prayers absent evidence of exploitation.” The Supreme Court, he added, “never held that the prayers in *Marsh* were constitutional because they were ‘nonsectarian.’” “The ‘nonsectarian’ nature of the ... prayers [in *Marsh*, he maintained,] was one factor in [a] fact-intensive analysis.” In rejecting this suggested dividing line, Judge Pryor went so far as to say that “[w]e would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions,” observing that even plaintiffs’ counsel had difficulty, during oral argument, in deciding whether “king of kings” was a sectarian reference.
In the *Joyner* ruling, however, the majority of the three-judge appellate panel appears to have interpreted *Marsh* quite differently. Judge Wilkinson, virtually at the outset of his opinion, stated that "both Supreme Court precedent and our own . . . establish that in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide."

Later in the opinion, he asserted that "[t]he cases . . . seek to minimize these risks"—the appearance of religious preference and sectarian strife—"by requiring legislative prayers to embrace a nonsectarian ideal." Still later, he quoted with approval a statement in an amicus brief that "the exception created by *Marsh* is limited to the sort of nonsectarian legislative prayer that solemnizes the proceedings of legislative bodies without advancing or disparaging a particular faith." Admittedly, Judge Wilkinson distinguished, rather than disapproved of, the Eleventh Circuit’s decision in *Pelphrey III*, pointing to the fact that invocations in Cobb County occasionally featured non-Christian references, whereas no such non-Christian references had found their way into Forsyth County Commission meetings during the time period in question. It must also be acknowledged that Judge Wilkinson’s opinion leaves the reader with some uncertainty as to exactly what is, and is not, forbidden in terms of the content of future Forsyth County prayers. Still, the Fourth Circuit appears to have embraced the "sectarian/nonsectarian" distinction that the Eleventh Circuit unequivocally rejected.

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54. *Id.* at 342.
55. *Id.* at 347.
56. *Id.* at 349 (quoting Brief of Amicus Curiae Baptist Joint Committee for Religious Liberty at 13, *Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011) (No. 10-1232)).
57. *See id.* at 352–53.
58. The appellate court affirmed the district court’s issuance of "a declaratory judgment that the ‘invocation policy, as implemented, violates the Establishment Clause of the Constitution’ and an injunction against the Board ‘continuing the Policy as it is now implemented.’" *Joyner*, 653 F.3d at 345, 355. Moreover, Judge Wilkinson, immediately after stating that "legislative prayer[s] must strive to be nondenominational so long as that is reasonably possible," said this: "Infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. But legislative prayers that go further—prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith—transgress the boundaries of the Establishment Clause." *Id.* at 349. That statement arguably implies that Judge Wilkinson was not in fact insisting upon a strict avoidance of all sectarian prayers. *See id.*
59. *Id.* at 348, 354–55. Judge Wilkinson said nothing regarding the feasibility of such a demarcation, despite the fact that Judge Niemeyer, dissenting, complained that "there is no clear definition of what constitutes a ‘sectarian’ prayer." *Id.* at 364 (Niemeyer, J., dissenting).
So, is the distinction between “sectarian” and “nonsectarian” prayers in fact an unworkable one, as the Eleventh Circuit panel concluded?60 “Sectarian” is a word with clear meaning.61 Would it perhaps be appropriate to treat, as “nonsectarian”—and thus permissible—any word or combination of words like, “king of kings”—which is 1) a common noun—like “lord”—or adjective—like “heavenly,” 2) not generally capitalized, and 3) capable of usage outside of a religious or historical context? The word “god,” even when capitalized, could be viewed as nonsectarian as well.62 A sectarian reference, in contrast, typically takes the form of a proper noun—or possibly an adjective—that is always capitalized—such as “Jesus,” “Jehovah,” “Allah,” or “Buddha.”63 On the other hand, a combination of nonsectarian words, like “the father, the son, and the holy ghost,” may have attained sectarian meaning. The matter is thus not entirely subject to bright-line rules, but does that fact render the distinction unworkable?64

Furthermore, if the distinction between sectarian and nonsectarian references does not provide the limiting principle in this context, what does? The majority in Pelphrey III latched onto the precise language of Marsh, which again, indicated that legislative prayers would violate the Establishment Clause only if the offering of such prayers “has been exploited to proselytize or advance” a single religion,65 and concluded:

The district court did not clearly err when it found that the County did not exploit the prayers to advance one faith by using predominantly Christian speakers. Although the majority of speakers were Christian, the parties agree that prayers were also

60. A powerful argument that the distinction is “illusory” is found in Robert J. Delahunty, “Varied Carols”: Legislative Prayer in a Pluralist Polity, 40 CREIGHTON L. REV. 517, 522–26 (2007) (“However inclusionary or ecumenical a prayer is intended to be, it necessarily incorporates a particular theological viewpoint or belief . . .”). But see Lund, supra note 22, at 1001 (“It is true that there is no clear boundary between sectarian and nonsectarian prayers. But that does not make the nonsectarian standard incoherent or meaningless.”).

61. It is defined, most pertinently, as “confined to the limits of one religious group, one school, or one party.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2052 (3d ed. 2002).

62. See id. at 973, 2052. Note that the word “god” is defined in Webster’s Dictionary—without capitalization—as, inter alia, “one who wields great or despotic power.” Id. at 973.

63. See Lund, supra note 22, at 1005 (quoting Pelphrey III, 547 F.3d 1263, 1272 (11th Cir. 2008)).

64. Professor Lund suggests “a possible response to Judge Pryor” as follows: “Religious language objectionable to any of the three major monotheistic religions (Christians, Jews, and Muslims) is overly sectarian and unconstitutional; language acceptable to all three religions is nonsectarian and constitutional.” Id. at 1006.

offered by members of the Jewish, Unitarian, and Muslim faiths. This diversity of speakers ... supports the finding that the County did not exploit the prayers to advance any one religion. The speakers ... represented "a wide cross-section of the County's religious leaders."

The finding that the diverse references in the prayers, viewed cumulatively, did not advance a single faith also was not clearly erroneous. The prayers included references from Christianity and other faiths ... 66

More guidance, as to the meaning of this "exploitation" concept, may possibly be derived from the thoughtful opinion of Judge Story, whose ruling in Pelphrey v. Cobb County (Pelphrey I)67 at the district court level was affirmed by the Eleventh Circuit.68 Judge Story made clear—as Judge Pryor did not—that "exploitation" was all about legislative motive:

Marsh identifies as the focus of the Establishment Clause analysis the purpose or intent of the legislature, rather than the effects of its practices. ... In this way, ... Marsh deems the purposeful preference of one religious view to the exclusion of others as the primary evil to be avoided in the arena of legislative prayer.69

Judge Story was open, it seemed, to finding such an impermissible purpose on the basis of circumstantial evidence, as he explained, "[w]here the invocation of sectarian concepts or beliefs, viewed from a cumulative perspective, reaches a certain level of ubiquity and exclusivity, the appearance of a legislative preference for one particular faith may well become constitutionally intolerable."70 But he was not led to that conclusion in this case, and the Eleventh Circuit panel found no clear error in that regard.71

Fairly obviously, that approach raises difficult questions as to how many religions must be represented at such meetings, and how frequently, in order to dispel the suggestion of impermissible preference.72 Is a municipali—

66. Pelphrey III, 547 F.3d at 1277 (citation omitted).
68. Pelphrey III, 547 F.3d at 1266–67.
70. Id. at 1339.
72. Professor Lund, critiquing Pelphrey III, said this:
   It ends up suggesting that the presence of a few non-Christian references or speakers saves a legislative prayer program, regardless of how frequent the Christian references are. ... If such
ty on safe ground if only Christian and Jewish clergy are invited to deliver prayers, if other religions have a presence in the city? If not, must every such religion be given its opportunity to offer such prayers, or only those with a sufficient number of adherents in the local population—and, if so, what number might that be? Moreover, if the city’s practice is evaluated on a calendar-year basis, does the selection of a non-Christian prayer leader once during that year supply enough diversity to defeat an inference of purposeful preference for Christianity? Would the answer depend on the demographics of the municipality? If not, how many such opportunities would suffice?^73

The matter of how visiting clergy are selected has also arisen, in cases addressing these issues.^74 Indeed, in Pelphrey v. Cobb County (Pelphrey II)^75 itself, at the district court level, it was found that the County Planning Commission had, at one point in time, engaged in a constitutionally unacceptable method of selecting clergy, because representatives of “certain faiths were categorically excluded . . . based on the content of their faith.”^76 The Eleventh Circuit upheld that finding, but emphasized that “[t]he ‘impermissible motive’ standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.”^77

In an earlier Fourth Circuit case from Virginia involving this issue, a county resident who identified herself as a “witch” (or wiccan) asked to be added to the list of religious leaders available to deliver invocations at meetings of the county board of supervisors.^78 When her request was denied, she brought suit.^79 The district court held that “the [c]ounty had engaged in [an] impermissible denominational preference,” but the court of appeals reversed.^80 Given the fact that the Nebraska Legislature’s employment of a single Presbyterian minister was deemed constitutional in Marsh,^81 along with the fact that Chesterfield County had invited a diverse group of clergy

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Lund, supra note 22, at 1013.

73. Professor Segall has raised similar questions. Segall, supra note 22, at 734.

74. See, e.g., Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 276, 284, 287 (4th Cir. 2005); Pelphrey II, 448 F. Supp. 2d at 1361.


76. Id. at 1373–74.

77. Pelphrey III, 547 F.3d 1263, 1281 (11th Cir. 2008).

78. Simpson, 404 F.3d at 279.

79. Id. at 280.

80. Id. at 280, 288.

to its meetings, the court's rejection of a requirement of all-inclusiveness is not surprising.82

Indeed, there appears to be no established requirement of all-inclusiveness with regard to represented religions, in this context. In the Eleventh Circuit, under Pelphrey III, there is only a ban on purposeful exclusivity.83 But, in determining whether a municipality has crossed the line and entered the realm of impermissible preference, it seems likely that courts will have to address the kinds of "diversity" questions that I have raised herein. Might it not be more challenging for a municipality to try to achieve a satisfactory balance, in terms of religions represented and frequency of inclusion, than it would be to simply insist on the delivery of only nonsectarian prayers—a policy that would reduce the significance of who utters the prayer?84

VI. EMPHASIZING THE "ENDORSEMENT" PRINCIPLE

The Supreme Court is quite unlikely to overrule Marsh, but even a Supreme Court generally regarded as primarily "conservative"85 could conceivably revisit its holding in Marsh and refine it in light of its later-developed "endorsement" concept; a refinement that would clarify Marsh as permitting only nonsectarian prayers at legislative sessions and meetings.86 This would be consistent with Marsh, because the chaplain in Marsh, as noted above, described his prayers as "nonsectarian" and had abandoned explicitly Christian references in his prayers.87

The endorsement concept is arguably relevant here, even though it is not presently applied—given the court's exclusive reliance on Marsh—in the

82. See Simpson, 404 F.3d at 279.
83. Pelphrey III, 547 F.3d 1263, 1281 (11th Cir. 2008).
84. Again quoting Professor Lund: "The nonsectarian standard has virtues and vices . . . . Its chief virtue is that it seems the only workable solution to the problem of denominational exclusivity." Lund, supra note 22, at 1023. But here, Professor Delahunty is the optimist, contending that a sufficiently pluralistic approach to diversity of religious speakers can ensure that legislative prayer does not result in religious preference. Delahunty, supra note 60, at 561–68.
85. As of this writing, four members of the Court have yet to directly address (as Supreme Court Justices) any substantive Establishment Clause issue. Justice Kennedy, moreover, while usually allied with two Justices who have rarely—if ever—found violations of the Establishment Clause, has parted company with them in school prayer cases. See e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). Justice Kennedy has, however, argued against the use of the "endorsement" test. Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).
86. See id. at 595 (majority opinion).
legislative-prayer context. 88 Recall Justice O’Connor’s explanation that governmental endorsement of religion is constitutionally impermissible because it “sends a message to nonadherents that they are outsiders, not full members of the political community.” I think it very likely that a Jewish resident of a city, attending even a single meeting of the city commission—much less repeated instances of the same experience—at which a Christian minister voices his thanks to “Jesus Christ,” would feel like an “outsider.” I think it quite possible, too, that a Muslim resident of the city, attending a rare city council meeting at which a Jewish rabbi delivered the invocation, would experience a reinforcement of his belief that only Christians and Jews really matter in America. Admittedly, in each of these instances, these feelings of alienation might be alleviated if the Jew or the Muslim knew that his or her religion would be represented at a future meeting of the city council; but it might not be represented, or he or she might not know that it would, or it might not make him or her feel any better about the situation.

In his majority opinion in the Joyner case, Judge Wilkinson displayed welcome sensitivity to such concerns, saying this:

Take-all-comers policies that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein. This effect creates real burdens on citizens—particularly those who attend meetings only sporadically—for they will have to listen to someone professing religious beliefs that they do not themselves hold as a condition of attendance and participation. 90

A reinterpretation of Marsh, to allow only nonsectarian prayers, would eliminate such unnecessary feelings of alienation. 91 Unless Marsh is overturned, of course, there will be no judicial relief forthcoming for sensitive atheists.

VII. CONCLUSION

For now, however, in the Eleventh Circuit, the looser standard of the Pelphrey III decision governs. But, of course, to say that a municipality is

88. See Pelphrey III, 547 F.3d at 1275, 1277.
91. See Marsh, 463 U.S. at 793–95.
free, under our Constitution, to engage in a certain practice is not to say that it must do so. Every city or county commission in the Eleventh Circuit—which includes Florida—can weigh the perceived benefits of sectarian expression against the costs thereof. It may then choose, on its own and free of judicial compulsion, to decline to allow the utterance of sectarian prayers at its meetings. Or, per Pelphrey III, it may choose to allow sectarian prayers, taking care to avoid appearing to prefer one religion over others.92

HISTORICAL AND LEGAL IMPLICATIONS OF SUBLIMINAL MESSAGING IN THE MULTIMEDIA: UNCONSCIOUS SUBJECTS

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I. INTRODUCTION

"Teenagers, take off your clothes" is what people all over the world began to hear as word spread that Disney incorporated a hidden message in its acclaimed movie "Aladdin." The message, unavoidable, yet undetectable

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unless paid close attention to, has been linked to “the power of suggestion” because once people were informed of the rumored dialogue, they too began to hear it.²

Visual hidden messages have also surfaced in Disney movies.³ For example, in “The Lion King,” Disney artists manipulated their drawings to briefly flash the word “SEX” on the screen, scrawled out in a cloud of dust.⁴ This “message[] can be identified as [an] indirect hidden message[], which mean[s] the viewer was not directly intended to see the message, unless possibly looking for such material.”⁵ However, a Disney representative argued that this scene was in a wholesome family film, and anything that might be viewed as inappropriate for such a film is perceptional.⁶

Subliminal messaging is not specific to Disney, nor is it solely sexual in nature.⁷ In several situations, musicians have included messages in their songs that have not only led to atypical acts by listeners, but have also allegedly led to their self-inflicted deaths.⁸ In response to reactions, such as these suicides, courts have explored the issue of whether subliminal messages are considered speech and covered by the same First Amendment protections as actual lyrics—which are classified as speech.⁹

Similarly, this article will explore the conflicting First Amendment rights of both the entertainment industry and the fans of the particular pieces of work. Sections II and III will discuss the history of attempts at unconscious persuasion and current regulations regarding subliminal messaging. This article will further explain how subliminal messages work and the sickness these messages have been reported to cause. This article will also dis-

². Id.
⁴. Id.; see LION KING (Walt Disney Pictures 1994).
⁵. Pilkington & Raszka, supra note 3, at 4.
⁶. Id.
⁷. See, e.g., Larry Rohter, 2 Families Sue Heavy-Metal Band as Having Driven Sons to Suicide, N.Y. TIMES, July 17, 1990, at C13.
⁸. E.g., id. The album that was said to influence the suicides of teenage boys was Stained Class by Judas Priest, and the lyrics at issue included “Let’s be dead” and “Do it.” Id. “Both the group and its record label [were] charged in a civil suit with the liability arising from the manufacture and marketing of a faulty product, as well as negligence and intentional and reckless misconduct.” Id.
cuss the unconscious processing and impact on behavior, as well as the public's reactions to these messages and the consequences these messages have. The final sections will analyze the First Amendment implications, as previously mentioned, that may exist for both parties to the message—the creator and the viewer or listener. This article will conclude with recommendations by the authors and a brief summary of the issue.

II. THE HISTORY OF ATTEMPTS AT UNCONSCIOUS PERSUASION

The word “subliminal” is a Latin word derived from the words “sub,” meaning below, and “limen,” meaning threshold. The Oxford English Dictionary defines subliminal as that existing or functioning “under the threshold of consciousness.” Subliminal messages are generally defined as “the projection of messages by light or sound so quickly and faintly that they are received below the level of consciousness.” There are various ways to achieve a subliminal message including: A picture or written command flashing briefly on the screen, audio messages “prerecorded and later multi-tracked over regular [music or] promotional” messages, or even inserting messages into “empty” programming pauses. Many studies have shown the effectiveness of these subliminal techniques and how they play into the psychodynamic activity of our unconscious mind.

The concept of subliminal messages can be dated back as early as 400 B.C.; however, the study of their use and the effect they have on the unconscious mind “did not become prevalent until the mid-to-late 1800s.” “The concern[s] about . . . subliminal messages came to the forefront in the mid-1950s [when] James Vicary [stated at] a press conference . . . that his company, Subliminal Projection Inc., was ready to offer the use of subliminals to customers.” Based upon the increase of Coca-Cola and popcorn sales after flashing the messages, “Drink Coca-Cola” and “Hungry? Eat Popcorn” “every five seconds for one three-thousandth of a second” over Kim Novak’s face in the movie “Picnic,” Vicary was ready to offer his proclaimed success

11. Id.
14. Id. at 332–35.
15. Pearson, supra note 12, at 776.
16. Id. at 777.
to the world. According to Vicary, the influence was not conscious; however, if the viewer's predispositions were consistent with the subliminal message, the audience would be influenced by it. The public, however, opposed these techniques, voicing concerns such as: general uneasiness of the unknown, the belief that the world was being brainwashed, and an attempt at mind manipulation. The public grew so concerned that they soon believed that "the Soviets would use subliminals to turn neutral nations against the United States, thereby increasing their power throughout the world." Shortly after these concerns grew, all major television networks announced that they "would not accept subliminal advertising or use the technique in their productions." However, this was not the end to experiments in subliminal messages and the effects they have on the unconscious mind.

The next year, "in 1957, a television station in Maine conducted . . . [a subliminal message] experiment" of its own. The station stated "every eleven seconds at one eightieth of a second," every other day for two weeks: "IF YOU HAVE SEEN THIS MESSAGE, WRITE WTwo." Further, in 1958, CBS-TV in Canada broadcasted subliminals "between one-fifth and one-half second 352 times in one half hour" the words "Telephone Now." Unfortunately, both of these experiments "did not increase mail or calls from viewers" and were ultimately deemed a failure. This upset, however, did not slow down others from experimenting on their own.

The same year, in 1958, on WTTV in Bloomington, Indiana, two university faculty members "superimposed a low-contrast beam, which conveyed a subliminal message [over a nightly television movie] at a dimmer light level than the [original]." This message notified viewers to "Watch

17. Id.
20. Id.
21. Daus, supra note 9, at 243. CBS, NBC, and ABC, along with national and state civic organizations, and the National Association of Radio Television Broadcasters condemned subliminal messages. Id.
22. Capps, supra note 9, at 30.
24. Schiller, supra note 13, at 332.
25. Pearson, supra note 12, at 777; Schiller, supra note 13, at 332.
27. Id.; Schiller, supra note 13, at 332.
Frank Edwards," and was intended to make the viewers watch the television show without changing the channel.28 Following the rage of visual subliminals, audio subliminals soon became popular with radio stations.29 In 1962, the popular network station CBS announced that "subliminals were used in [its] regular program credits."30 The Federal Communications Commission (FCC) received an abundant amount of complaints from their viewers, to which CBS declared the whole "announcement was a hoax."31

In 1973, both television and radio were issued a warning against any further subliminals due to a public outcry when the Premium Corporation of America superimposed the message “Get It” on a toy called “Husker-Du” during Christmas.32 “The Premium Corporation of America ‘claimed that it was inserted by an exuberant but misguided young man from the production house in Minneapolis’.”33 Politics has also been an area that subliminals have boomed in.34 According to Dr. Key, the use of SEX “embeds” “have been used in every political campaign of any magnitude in the United States and Canada for at least twenty-five years—if not much, much longer.”35 Dr. Key reports:

In a recent U.S. congressional election campaign in Virginia’s 10th District, SEX “embeds” were discovered in the campaign literature of all candidates except one who could not afford to hire an advertising agency. . . . A formal complaint was initiated by one candidate with the Virginia Election Commission, charging the use of subliminal techniques in the candidate’s literature. The commission refused to accept the complaint.36

Subliminals had yet to find their place in the world of advertisements; however, they had evolved into both encouraging and artistic devices.37 For example, subliminals had been used in movies such as “The Exorcist” and “My World Dies Screaming” to enhance the tension level by projecting the

29. Id. at 778.
30. Id.
31. Id.; Schiller, supra note 13, at 332–33.
32. Pearson, supra note 12, at 778; Schiller, supra note 13, at 333.
33. Schiller, supra note 13, at 333.
34. See id. at 335.
35. Id. (quoting WILSON BRYAN KEY, MEDIA SEXPLOITATION 8 (1976)) (internal quotation marks omitted). SEX embeds is the technique of engraving the letters S-E-X or S-X into the natural lines of faces or hands of candidates in promotional ads. Id.
36. Id. (omission in original) (quoting KEY, supra note 35, at 8).
37. See Schiller, supra note 13, at 333–34.
word “BLOOD” \(^{38}\) or placing a serpent across a villain’s chest subliminally. Furthermore, subliminals had been shown “to induce weight control, promote safe driving, [and] prevent shoplifters.”\(^{39}\) For instance, a television station in Los Angeles “flashed ‘DRIVE SAFELY’ during [a] news [programming] in an . . . attempt to lower the accident rate.”\(^{40}\) Additionally, an audio “Black Box” was used by Dr. Hal Becker playing messages such as, “do not steal” and “I am honest” over music in department and grocery stores in order to deter shoplifting.\(^{41}\) Research in this area illustrates how subliminal messages affect “the moral and ethical implications” of the unconscious mind.\(^{42}\)

III. CURRENT REGULATION

Since its beginnings in the public eye, subliminals have drawn the attention of governmental restraints on its use.\(^{43}\) “[O]n February 8, 1958, and March 12, 1958, [r]epresentatives . . . introduced bills H.R. 10802 and 11363 [in order] ‘to make unlawful the use of subliminal advertising on television and [to prescribe] penalties.’”\(^{44}\) There were never hearings held on either bill and, to date, there is no law dealing with the issue of subliminal messages.\(^{45}\)

Despite having power, although limited, the FCC and the Federal Trade Commission (FTC) have made minimal regulations in the area of subliminals.\(^{46}\) Acting as a quasi-judicial body, the FCC and the FTC have “wide discretion to determine whether any practice is unfair.”\(^{47}\)

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38. Id. at 333. “The Exorcist” involved a “subliminal deathmask[,] in the old priest’s dream sequence.” Id. Purportedly, “after seeing the subliminal deathmask . . . a young Indianapolis man fainted and broke his jaw [and was] suing Warner Brothers for $350,000 because ‘the subliminal image constitutes an intentional defect in the movie . . . that . . . can harm the viewer.’” Id.


40. Schiller, supra note 13, at 334.

41. Pearson, supra note 12, at 779; Schiller, supra note 13, at 334. “The ‘Black Box’ is a soundmixer—like those used by deejays—that mingles bland music with the desired subliminal message.” Pearson, supra note 12, at 779. According to Dr. Becker, the “use of subliminals would increase in the future: ‘[S]omeday there will be audio conditioning in the same way we now have air conditioning.’” Id. at 779–80 (quoting Schiller, supra note 13, at 335).

42. Id.

43. Id. at 781.


45. Pearson, supra note 12, at 782.

46. Id.

47. See Daus, supra note 9, at 253. However, “the FTC has no specific regulations or policy concerning subliminals.” Schiller, supra note 13, at 359.
in *Functional Music, Inc. v. FCC*, the FCC attempted to ban "the broadcast of functional music to the general public, but allowed private subscribers to receive it." The court reasoned that the listening audience had "consented to listen to the music" being broadcasted and did not consider the issue of the unconscious listeners' invasion to privacy. The regulation was overturned when the court held that "functional [music] can be, and is, of interest to the general radio audience." Further action was taken in 1958 by the National Association of Radio and Television Broadcasters (NARTB) by stating it banned subliminals, however, this ban did not supply any enforcement mechanisms, and the NARTB has never actively searched for subliminals.

"Courts have [also] dealt with [the issue of] subliminals both directly and indirectly." An indirect analysis can come from the court discussing a captive audience, the right to privacy, or even deceptive advertising. For instance, the court in *Banzhaf v. FCC* analogized the potential grave consequences cigarettes might have on a person's health with those impacts of subliminals and the grave consequences the unknown might have. Specifically, the court stated "[i]t is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." Furthermore, in *Stevens v. Parke, Davis & Co.*, the court, in finding that a physician could be influenced subliminally to administer the wrong drug, stated:

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49. Pearson, supra note 12, at 782 (footnote omitted).
50. Functional Music is best known by the trademark of its largest producer, Muzak. It is designed by psychologists to achieve specific psychological and physiological changes in listeners. Depending on the intentions of the designers of a particular program, the music may increase sales in supermarkets, increase the vigilance of military personnel, or reduce the error rate in a factory.
51. *Banzhaf v. FCC*, 274 F.2d at 548-49 (emphasis in original).
52. Pearson, supra note 12, at 783.
54. *Id.* at 784.
55. *Id.* at 784-85.
56. 405 F.2d 1082 (D.C. Cir. 1968).
57. *Id.* at 1099-1101.
The record reveals in abundant detail that Parke, Davis made every effort, employing both direct and subliminal advertising, to allay the fears of the medical profession which were raised by knowledge of the drug's dangers. It cannot be said, therefore, that Dr. Beland's prescription of the drug despite his awareness of its dangers was anything other than the foreseeable consequence—indeed, the desired result—of Parke, Davis' overpromotion.

More recently, there have been cases involving people who commit suicide, or attempt to, because of subliminal messages affecting those who already have a predisposition for depression or suicidal thoughts. This "suicide zone" creates a compulsion to attempt suicide and illustrates the effect subliminals have on human behavior.

IV. How Subliminal Messages Work

The receipt of subliminal messages is undetectable and unnoticeable, however, the effects such messages have on the brain are quite the opposite. Subliminal messages may be sent through text, images, or sound. Each form of media affects the brain by submitting a signal to the brain, which, over time, trains it to perform in a particular way. Generally, subliminal messages work by flashing the message quickly enough so "that the conscious mind [will not] pick up on it, but the rest of [the] brain has time to decipher.

While subliminal messages may be used positively—by teaching one's brain to refrain from bad habits, change old habits, and create new, positive habits—these messages may result in negative effects on the person who is receiving the message. For example, the power of these messages may

59. Id. at 664.
61. Id. A "suicide zone" "occurs when a person has both a personality predisposition and a situational predisposition to commit suicide." Id. at 788 (quoting Vance v. Judas Priest, No. 86-5844, 1990 WL 130920, at *12 (Nev. Dist. Ct. Aug. 24, 1990)).
63. Id.
64. Id. The example given on SubliminalAnalysis.com involves the "psychological dependence on [nicotine and] the act of smoking and the craving for tobacco." Id. Sending subliminal messages to the nicotine-dependent brain will eventually result in elimination of the craving and the need to smoke. Id.
66. Id.
affect one’s mood rather dramatically, resulting in extreme happiness or extreme depression, depending upon the context of the message.\textsuperscript{67} Studies have shown that the negative message with emotional meaning is more likely to be recalled.\textsuperscript{68}

Specifically, a United Kingdom study at the University College London asked participants “to recall and identify words with an emotional value” after they were visually displayed “for as little as [seventeen] milliseconds.”\textsuperscript{69} The results of the study showed that humans are programmed to respond subconsciously to potential threats.\textsuperscript{70} While advertisers may use this information to their advantage and phrase their advertisements using words that are more likely to be recalled by consumers—and while there are clear “evolutionary advantages” to a quick response to a threatening message—the conclusive demonstration “that people are much more attuned to negative words,” may also serve as a severe disadvantage.\textsuperscript{71}

V. VIOLENCE AND SICKNESS

Studies show that only 3% of the public is affected by subliminal messages when considering whether the messaging may result in violence.\textsuperscript{72} The question proposed by doctors has been whether that 3% of the population suffers from some form of brain damage and if so, whether the lesions on their brain causing the specific damage lend a hand in the eventual violent acts that may occur.\textsuperscript{73} Those who have frontal lobe lesions, specifically, are more apt to respond violently to messages suggesting as such, and within that portion of the population, the percentage of those who respond violently to messages increases to 13%.\textsuperscript{74}

Typically, people respond to messages regarding how they should act, “what groups they belong to, or what type of person they are,” without the

\begin{itemize}
  \item \textsuperscript{67} Id.
  \item \textsuperscript{69} Id. The words in the study included positive words—“flower,” “peace,” “cheerful”—and negative words—“agony,” “despair,” “murder.” \textit{Id}. The positive words were recalled 59% of the time, while the negative words were correctly recalled 77% of the time. \textit{Id}.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} UCL Study: \textit{Subliminal Messaging ‘More Effective When Negative’}, UCL NEWS (Sept. 28, 2009), http://www.ucl.ac.uk/news/news-articles/0909/09092801.
  \item \textsuperscript{73} Id. at 00:21:00--35:00.
  \item \textsuperscript{74} Id. at 00:47:00--1:04:00.
\end{itemize}
realization they are responding to a message at all. "There are groups of people in society who are being given the message 'we expect you to be violent,' and [there are] groups of people who are being given the message 'we don't expect you to be violent.' These people may be given messages both explicitly and with unawareness.

A major concern of these messages rests on the impact they will have on children. It is suggested that children are most susceptible to media influences of violent behavior during “the prime of a child’s emotional developmental life.” “[I]n American society today, where image management has become a lucrative business and a matter-of-fact necessity in commerce, industry, politics, and personal relationships, style has ripened into an intrinsic form of information.” The mass media has begun to tell people who they are and what they should do, eliminating the need for people to think for themselves and instead, replacing their thoughts with images that may be violent in nature.

Competing views exist relating to whether media messages influence people and create violence in society. One view is that the media does not create violent people and instead, simply offers an aggression outlet for those who may need one. These same media supporters blame people’s overindulgence in media, victimizing those who go out and act subsequent to viewing violent messages. Contrarily, “many political scientists, educators, and criminologists and much of the general public” believe that media influences its audience, providing somewhat of a “cultural training ground” for those who are receiving messages through television, movies, music, and the like. Those who take this contrary opinion state that media teaches those in society what their roles are and what is expected of them, often communicating messages that “are confusing, inaccurate, and distorted.”

75. Id. at 1:55:00−:58:00 (quoting Dr. Rebecca Saxe).
76. Id. at 3:00:00−:09:00 (quoting Dr. Rebecca Saxe).
77. Subliminal Messages and Violence, supra note 72, at 3:08−:15.
79. Id.
80. Id. (quoting Pat O’Malley & Stephen Mugford, Crime, Excitement, and Modernity, in Varieties of Criminology: Readings from a Dynamic Discipline 205 (Gregg Barak ed. 1994)) (internal quotation marks omitted).
81. Id.
82. Id. at 70−71.
83. Sgarzi & McDevitt, supra note 78, at 71.
84. Id.
85. Id.
86. Id.
VI. UNCONSCIOUS PROCESSING AND THE IMPACT ON BEHAVIOR

What impact, if any, do subliminals actually have on our behavior? This is a question that is still ripe for controversy. Researchers and scientists agree that subliminal messages do exist and the brain can receive messages without being consciously aware of it.87 However, the controversy is surrounded around whether the received messages impact human behavior.88 Particularly, researchers want to know “whether subliminal communication actually has the ability to induce new behavior or whether it can only strengthen behavior to which an individual is already predisposed.”89 Theories of the impact subliminals have on human behavior have been presented by various researchers who have come to diverse conclusions, such as:

1) Individuals are capable of unconsciously receiving information, and yet can discriminate, recognize and react to the content of such information, resisting negative content and more readily accepting positive content.

2) A predisposing behavior or response is not always necessary for effective subliminal suggestion, and certain new responses may be induced.

3) Individuals do not react uniformly to subliminal messages presented at the same level of intensity and duration.

4) Certain personality characteristics may predispose some individuals to be more easily influenced by subliminal suggestion.

5) Related to the concept of predisposition, the effectiveness of subliminal communication may be somewhat dependent upon the motivational and emotional states of the receiver.

87. See Pearson, supra note 12, at 788.
88. Id. at 788–89. Specifically, researchers want to know whether “subliminal persuasion” exists. Id. at 788 (emphasis omitted).
89. Id. at 789.
6) Subliminal persuasion is possible yet inefficient.

7) The messages do register in some deep recess of the brain and apparently influence behavior.\(^{90}\)

These theories of impact all illustrate how subliminals can affect the viewers’ or listeners’ thoughts; however, what impact does it play on others? Have subliminals been an auxiliary to discrimination, stereotyping, characterizing, and favoritism? Has television and radio shaped the images, messages, thoughts, and values of our society? We are incapable and defenseless against these messages absorbing into our minds because of our inability to even know we are receiving information.\(^{91}\)

A. Discrimination, Stereotyping, Categorizing, and Favoritism

Subliminal messages that are positive and convey a message that promote new beginnings and healthy lifestyles have more or less been tolerated in our society. However, it is just as easy for a subliminal message to convey a derogatory or prejudicial statement that manipulates the behavior of the listener towards certain people because of their class, race, or gender. The court in *Vance v. Judas Priest*\(^{92}\) argued:

> [Subliminals] do not convey ideas or information to be processed by the listener so that he or she can make an individual determination about its value. They do not enable an individual to further his personal autonomy. Instead, they are intended to influence and manipulate the behavior of the listener without his [or her] knowledge.\(^{93}\)

Invisible influence—the power of persuasion—in the wrong hands, could lead to the malicious, unethical, and the immoral molding of one’s mind. Our behavior, one could argue, is part of our conscious mind; however, our

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93. *Id.* at *25.
attitude and the ways it affects our behavior are subconscious. 94 Few people want the way they act—whether accommodating or aggressive towards a person—to be prejudiced by mental bias because of news broadcasts, advertisements, and movies. 95 However, this type of situation happens daily, and it is what psychologists Timothy Wilson and Nancy Brekke describe as "mental contamination." 96 According to researchers, stereotyping, categorizing, and prejudice are all things that are learned at a young age and are uncontrollable when such an encounter takes place. 97 For example, studies have shown countless times that when an individual is physically attractive, people—subconsciously—tend to treat them in a more accommodating way. 98 Or, on the contrary, an employer might give an employee a less than favorable evaluation because of the employee’s skin color or gender—even if the employer did not intend to be persuaded by such stereotypical social judgments. 99 In both instances, the assessor is influenced by an observed attribute and is unaware of such influence. 100

Furthermore, researchers have speculated that stereotyping is a process of the subconscious. 101 A stereotype is an "abstract structure[] of knowledge or [an] understanding[] that link[s] group membership to a set of traits or behavioral characteristics." 102 Indeed, one of the most influential cases of subconscious stereotyping is Price Waterhouse v. Hopkins. 103 Here, Ann Hopkins was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 104 At trial, a social psychologist, Dr. Susan Fiske, testified as an expert witness that "Price Waterhouse was likely influenced by sex stereotyping." 105 Dr. Fiske based her conclusions not only on the sexual comments made by the

96. Id. More specifically, “mental contamination” is defined as “the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable.” Id.
97. Id. at 127.
98. See, e.g., Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129, 1135 (1999); see also Wilson & Brekke, supra note 95, at 117.
99. Wax, supra note 98, at 1135.
100. Id.
101. Id. at 1136–37.
102. Id. at 1136.
103. 490 U.S. 228 (1989).
104. Id. at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)) (internal quotation marks omitted).
105. Id.
partners, but also comments made by those who hardly knew her or had contact with her. The Court, in more or less words, only affirmed the pervasiveness of unconscious stereotyping by stating, “some of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women.”

Nonetheless, how can we control something that is invisible? Studies have shown that an individual’s attempt to control or suppress one’s own discriminatory or stereotypical responses commonly leads to an increase in frequency of the same. Therefore, the issue of unconscious discrimination becomes a double-edged sword. On the one hand, we are defenseless against messages when we do not have the awareness we are receiving them, and on the other hand, if we are aware of them and attempt to control them, they only amplify.

B. Activists

Over time, our society has come to accept different walks of life. More than one would presume that prime time television has been one of the most skillfully capitalized resources for gaining acceptance in the wider society. Activist groups, since as early as the 1950s, have been involved in the struggle to control network television. The theory motivating this struggle is that people depend on television for most of their information about the world. Television is the most commanding, comprehensive, and controlling mass medium in our society. It has such considerable power to shape and reinforce the values in American society by just telling a fictional story. For instance, television bears the ability to transform the “contours of the real world” and allows our subconscious to confuse such images with reality. One advocacy group leader proclaims that television “is an electronic vending machine, offering sweet-smelling bodies, stuffed, satisfied

106. Id. Gender-neutral remarks were made, describing Hopkins as “universally disliked” and “consistently annoying and irritating.” Id.
108. Wilson & Brekke, supra note 95, at 127.
109. Id. at 6.
111. Id. at 6.
112. Id.
113. See id. at 6–7.
114. Id. at 6.
bellies, and great vacant gaps in our cerebral cortex.” By the early 1980s, industry leaders finally accepted the fact that advocacy groups were going to be a permanent part of influencing television programming.

The portrayals of stereotypical characters in television—such as businessmen, women lawyers, elderly individuals, homosexuals, union workers, and minorities—have influenced how we view these characters in the day-to-day world.' Activists, having knowledge of this influence, have used television to their advantage. For instance, pro-abortion activists in 1971 used a popular television show entitled Maude to educate and influence society about the dangers of an unconstrained population growth. This led to a number of other activist groups pressuring networks to televise shows concerning their controversial issues in a favorable light. By the 1972–1973 television season, networks were broadcasting lesbian seduction, wife-swapping, homosexuality, and intermarriage—both race and religion—segments. The success of these shows and the slowly progressing acceptance of different groups have demonstrated the ability to influence and change the views of our nation based on the subconscious ability to confuse the images of television with reality.

VII. THE PUBLIC REACTION

The term “subliminal advertising” is widely known throughout the public, and a vast majority understands the basic concept of the use of subliminal messaging and views it as a successful means of influence by advertisers of brands. When subliminal messaging first surfaced, the FCC received numerous inquiries and complaints about the technique. The majority opinion was that use of such messaging was “sneaky” and worrisome because it left the public unsure what the government would do with this technique in its hands.

116. Id.
117. Id. at 6.
118. See id. at 7–8.
119. Id. at 29–31.
120. MONTGOMERY, supra note 110, at 31.
121. See id. at 38–40.
122. Id. at 39–40.
125. Id. Specifically, the public expressed concerns that subliminal messages “could be used to brainwash Americans with foreign ideologies.” Id.
Shortly after the Vicary study was conducted, a study in San Francisco determined that 41% of the 324 participants involved were familiar with the term "subliminal advertising," were of the impression that use of such was unethical, but 67% of those with awareness stated they would not be deterred from watching a television program, despite having a belief that such messages were included in the commercials.\textsuperscript{126} A later study conducted showed an increasing public awareness of the term "subliminal advertising" and that the method of advertising was successful in product sales.\textsuperscript{127}

In response to the public's concerns about the use of subliminal messaging and advertising, the FCC provided that the Communications Act was generally applicable to use of these messages.\textsuperscript{128} Under Section 303 of the Act, the FCC explained that all communications were controlled and regulated by the Commission, which was "guided by public interest, convenience, or necessity."\textsuperscript{129} "Section 326 [of the Act] prohibits the FCC from censoring broadcast material, including advertising."\textsuperscript{130} However, the government has stated that those on the receiving end of messages are entitled to the knowledge of who is attempting to persuade them.\textsuperscript{131} The requirement that all broadcast material "is to be announced as paid for or furnished, and by whom" is a longstanding requirement, dating back to the Radio Act of 1927.\textsuperscript{132}

In response to the public's concern of unbridled access to its subconscious, the FCC contended that Section 317's applicability would extend to the prohibition of "subjecting audiences to messages received from undisclosed sources."\textsuperscript{133}

Application of Section 317 to sponsored subliminal program material presented, for example, at five-second intervals, would, in practical effect, ban unrestricted use of the technique. In addition, Sections 73.1212 and 76.221 (applicable to broadcasting and cable television, respectively) of the Commission's Rules require that sponsored program matter be announced as such. Therefore, it ap-

\begin{enumerate}
\item[126.] Rogers & Smith, supra note 123, at 11.
\item[127.] Id. This later study, and a study which followed, also revealed that those who were familiar with subliminal messaging were more educated than those who were not. Id. The researchers recognized a correlation between education and awareness—as the educational level of the participants rose, awareness did as well. Id.
\item[128.] FCC Information Bulletin on Subliminals, supra note 124.
\item[129.] Id.
\item[130.] Id.
\item[131.] Id.
\item[132.] Id.
\item[133.] FCC Information Bulletin on Subliminals, supra note 124.
\end{enumerate}
pears that sponsored telecast or cable-originated material that is
subliminally projected falls within these rules.134

Despite the rules that existed, broadcast companies continued to air sub-
liminal messages and claimed they never received information from the FCC
regarding the ban of such advertisements.135 As such, the FCC issued a Pub-
lic Notice explaining that “[w]e believe that use of subliminal perception is
inconsistent with the obligations of a licensee, and therefore we take this
occasion to make clear that broadcasts employing such techniques are con-
trary to the public interest. Whether effective or not, such broadcasts clearly
are intended to be deceptive.”136

VIII. LEARNING TO SEE THE INVISIBLE

Subliminal messages are all around, though most are covert.137 However,
one can train his or her self to recognize these messages and decipher the
intention of the message, so long as certain steps are followed.138
First and foremost, it is imperative that the recipient of the message is
able to identify what the nature of the message is, for example, what particu-
lar item a subliminal advertisement is enticing one to purchase.139 Next, the
audience member should read, view, or listen to the message carefully, start-
ing at the top or beginning of the message and paying close attention to it all
the way through the bottom or the end.140 This will allow the audience mem-
ber to determine whether “the message [is] suggestive, embedded, or
overt.”141 Messages that are embedded in images are typically more difficult
to decipher, while the rare, overt messages are more visible.142
Important while examining a message for subliminals, is the ability to
recognize if anything seems unusual or misplaced.143 In order to best utilize
one’s ability to recognize these items, it is critical to be relaxed; otherwise, a
subliminal message is easy to overlook.144 This is because subliminal mes-

134. Id.
135. Id.
136. Id.
137. How to Spot Subliminal Ads: Steps on How to Spot Subliminal Ads, STARTUPBIZHUB,
138. Id.
139. Id.
140. Id.
141. Id.
142. How to Spot Subliminal Ads: Steps on How to Spot Subliminal Ads, supra note 137.
143. Id.
144. Id.
sages are meant to trigger the subconscious of those who are simply glancing at or thoughtlessly listening to a form of media. Specifically, when looking at advertisements, reading the advertisement in reverse may reveal a message that was undetectable in the original reading. Failure to pay careful attention to the details of the message may result in behaviors in which a person would not have normally engaged. In other words, the messages may remove from a person his or her ability to make a decision about a particular product or may result in atypical behavior due to his or her failure to decipher a message.

Accordingly, the question becomes: Is it constitutional, or even ethical, for companies and organizations to include these messages into their media in order to influence people's performances?

IX. THE FIRST AMENDMENT

In 1791, freedom of speech was guaranteed by the First Amendment with the adoption of the Bill of Rights. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech;" however, this right is not absolute. Speech may be regulated because of certain ideas it conveys or by limiting certain types of activities. It has been argued that subliminal messages are not speech because they "are not consciously perceived and are not meant to be heard and discussed, [and] they do not advance the ideals of the Free Speech Clause." In contrast, subliminal messages, like speech, are intended to convey a message and have been proven to be effective in such conveyance. "[T]he central concern of the First Amendment . . . is that there be a free flow from creator to audience . . ." "Freedom of speech is not limited to political expression or comment on public affairs."

145. Id.
146. Id.
147. See How to Spot Subliminal Ads: Steps on How to Spot Subliminal Ads, supra note 137.
148. See id.
150. U.S. CONST. amend. I; Silverglate, supra note 149, at 1246.
151. Silverglate, supra note 149, at 1260.
152. Capps, supra note 9, at 32.
153. Id. at 33.
A. Commercial Speech

Although commercial speech is protected by the First Amendment, it has a somewhat lesser protection for which there are numerous rules and regulations with which advertisers must comply in order to be afforded the protection. The Supreme Court has defined purely commercial speech as speech that “does no more than propose a commercial transaction” and is so removed from any exposition of ideas. If commercial speech “is neither misleading nor related to unlawful activity,” then it is protected. Does the very nature of the word subliminals place them into the category of misleading? The incorporation of subliminals in advertising and still affording them First Amendment protection under commercial speech has long been a controversial issue.

Advertisements, as early as the seventeenth century, have used people’s emotions and nonverbal conditioning techniques in order to sell their products. Intelligent advertisers appeal to a customer’s “emotional or psychological needs” and portray a product that effectively conditions a consumer to believe that this product will fulfill his or her needs. So, how is basic advertising different from advertising with subliminals? Both intend to condition a positive response to a product in order to more effectively sell the product, and both change the way people think to motivate sales or ratings. One argument is that where basic advertisements are just intended to trigger feelings and emotions and portray an artistic expression, subliminals in advertisements are only intended to trigger a response in favor of such advertisements. However, supporters of this view also state, “[a] primary purpose of music is to trigger emotion. Listeners often ‘consume’ musical emotion purely for private enjoyment, but music can be used manipulatively as well to enhance work production or to catalyze in store shopping behavior.”

158. Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
160. Silverglate, supra note 149, at 1261.
161. Id. at 1262.
163. Id. at 276 (footnotes omitted).
Although our verbal communications are an important factor in human information, they are not the only form through which we receive information.\textsuperscript{164} Nonverbal communication, regardless of its categorization as subliminal or not subliminal, plays an important role as well.\textsuperscript{165} For instance, when you have a conversation with someone, you perceive him or her not only by what is being said with words, but also by his or her body gesture, posture, tone of voice, eye contact, and tonal inflections.\textsuperscript{166} Advertisements use this same technique.\textsuperscript{167} One study on television advertisements indicated that:

\begin{quote}
Fewer than half of the commercials examined contained even one of some thirteen possible categories of product-intrinsic information. \ldots  However, information theory holds that “information is a name for the content of what is exchanged with the outer world as we adjust to it, and make our adjustments felt upon it.”\textsuperscript{168}
\end{quote}

The question remains unanswered: Are subliminal messages a part of commercial speech? Advertisers, whether subliminals are used or not, must still comply with the restrictions and regulations that our government has in place. Psychological methods of persuasion are used in our everyday life; the very purpose of an advertisement is to promote sales by altering your view of a product. Does adding a subliminal message to an advertisement change this purpose? Does adding an extra invisible influence, among the many that naturally occur, violate our right to privacy?

B. Right to Be Free from Unwanted Speech

A chain of Supreme Court of the United States cases beginning in the 1940s balanced the right of an individual’s privacy with another individual’s right to free speech.\textsuperscript{169} These cases held that people should be free from unwanted speech, thereby restricting the First Amendment freedom of speech

\begin{thebibliography}{99}
\item 164. \textit{Id.} at 268.
\item 165. \textit{See id.}
\item 166. \textit{Id.} at 268–69.
\item 167. Reed & Whitman, \textit{supra} note 162, at 274.
\item 168. \textit{Id.} at 273–74.
\end{thebibliography}
so as to only reach a captive audience. However, the Supreme Court has also held that if the unwanted audience is able to avoid the speech after hearing it, the individual’s freedom of speech will prevail. Moreover, unless one can illustrate that “the speech is offensive or objectionable, and the unwilling listener or viewer is unable to avoid continued exposure to the message or is captive in his or her home,” then the individual’s freedom of speech will triumph.

Are all subliminals offensive? Is unaware speech the same thing as unwilling speech? After reviewing the history of attempts at subliminal speech, one can answer both of these questions in the negative. Furthermore, the court has held in many instances that it is “better to err on the side of free speech” in competing interests. For instance, the Supreme Court stated in Martin v. City of Struthers that “[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society, that putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”

On the other hand, one of the main purposes of free speech is personal autonomy. Personal autonomy “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” By allowing the use of subliminals in an attempt to honor the right of free speech, are we ultimately defeating one of its main purposes? Although the speaker is entitled in a subliminal message to communicate his or her free expression, the listener is denied his or her personal autonomy by not being able to make his or her own decisions.

To label subliminal messages, as a whole, protected or unprotected speech would be improper. The more competent approach is to evaluate each subliminal on a case-by-case basis and discuss each element necessary

170. See Frisby, 487 U.S. at 488; Pacifica Found., 438 U.S. at 748–49; Lehman, 418 U.S. at 303–04; Rowan, 397 U.S. at 738; Kovacs, 336 U.S. at 88–89.
172. Capps, supra note 9, at 37.
173. See discussion supra Part II.
175. 319 U.S. 141 (1943).
177. Pearson, supra note 12, at 794.
to determine whether the speech is protected or unprotected, using a reasonable person standard.

X. RECOMMENDATIONS

Although the concern over subliminals came to the forefront in the mid-1950s, the issues surrounding the proper way to regulate them still have a long way to go. Both federal and state legislation continue in the attempt to protect the balancing interests of freedom of speech and freedom of privacy, however, they have yet to settle this war. Subliminals have become a global issue, encompassing the media, the news, our entertainment, and influencing our everyday decisions and actions.

One of the easiest and probably most effective ways to resolve the issues subliminal messaging may cause is to place warning labels on those messages that contain them. This would allow an individual the ability to refrain from hearing the subliminals if they do not wish to, and still allow an individual to maintain his or her freedom of speech. For example, a simple statement at the beginning of a CD stating, “this CD contains subliminal messages,” or a brief statement at the start of a television or media broadcast to the same extent, could be the beginning of the end of this ongoing battle. Although seemingly one of the simplest solutions, it still poses some problems. Is there really a way to know if a person fully consents to a message when they do not know what it involves? Further, although an individual may consent to hearing the message, he or she has not consented to the effect the subliminal will have on his or her behavior in the future, or throughout his or her entire life. Moreover, what if a person begins watching or listening to a show or the radio in the middle of the program? The warning stating that this message contains subliminals would be missed and, therefore, the individual would never consent.

Another simple, yet problematic, approach is to partially regulate subliminals. A committee could be set up to regulate which subliminals are allowed to be used and which are not. However, how will the government decide who that committee consists of or which subliminals the committee should prohibit? Our society can hardly come up with an exact definition of what a subliminal is, so is there any way to partially regulate something we cannot yet define?

The government could also try to ban subliminals altogether. However, this is an unlikely solution as subliminals currently are afforded First

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180. See id. at 1266–69.
181. See id. at 1266–67; see also Pearson, supra note 12, at 781–82.
Amendment protection and a blanket ban would chill the speech of those attempting to deliver the subliminal message. Additionally, there are various naturally occurring subliminal messages that happen daily and it would be impossible to prosecute and deter the use of such subliminals. Moreover, this would lead to a flooding of our courts if we allowed every painter, musician, broadcaster, or company to be sued for the invasion of privacy of an individual whose behavior was affected in some way by a subliminal.

XI. CONCLUSION

Subliminal message use, research, and regulation have come a long way since the 1950s. With the greater use of technology and the means to produce subliminal messages, the use of them is only going to grow with time. How this invisible influence has shaped the images, messages, thoughts, and values of our society is a topic at the forefront of our concerns about subliminals. Are we incapable and defenseless against these messages absorbing into our minds because of the lack of awareness that we are even receiving information? This disputed question lies beyond the concept of communication and goes into the psychological theories of speech. Our experiences throughout life shape our existence—should other people be allowed to shape our experiences through subliminals? This is a question that can only be answered with time.

Until that time comes, we, as viewing audiences, remain at the disposal of filmmakers, musicians, advertisers, and other individuals involved in the creation of media to receive their messages, whether voluntarily or not. While we choose which movies we sit down to watch, which songs we listen to, and which channels we change while watching television, the visual and audio bits that lie beneath the surface of the messages are unavoidable. Until this dispute is laid to rest, children today remain susceptible to hearing their favorite cartoon characters urge them to undress in a public theater or seeing
the word “SEX” flash across the screen as they watch a classic animated film. But those signals could not possibly be intentional—or could they be?

As long as those in the legal field are unable to answer this question, movies, television shows, music, and commercials will continue to be produced, and those responsible for their creation cannot be asked to halt production due to a mere possibility that our lives are being affected by some undetectable and uninvited influence. So, in the meantime, it is lights, camera, action, because as they say, the show must go on!
A LOOK AT THE PROPOSED ELECTRONIC COMMUNICATIONS PRIVACY ACT AMENDMENTS ACT OF 2011: WHERE IS SMART GRID TECHNOLOGY, AND HOW DOES INEVITABLE DISCOVERY APPLY?

DARLENE BEDLEY*

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C. Applying the Exceptions to the Proposed Legislation

1. Application of the Independent Source Doctrine to the Proposed Warrant Requirement
2. Application of the Inevitable Discovery Rule to the Proposed Warrant Requirement

V. CONCLUSION

I. INTRODUCTION

Cloud computing and smart grid technologies increase efficiency and lower costs to telecommunication and energy consumers. In addition, smart grid technology results in lower fossil fuel consumption, and is therefore considered a green technology. U.S. privacy law has not kept up with the pace of these technologies, especially in the area of Fourth Amendment protection. Specifically, search warrants are not required for government access of information remotely stored by third party providers in some cases. This area, known in the industry as digital due process, requires reformation to the existing Electronic Communications Privacy Act of 1986 (ECPA).

Currently, there is proposed legislation on this topic, which was introduced to the Senate on May 17, 2011 as the Electronic Communications Privacy Act Amendments Act of 2011. The proposed legislation includes an updated requirement for a search warrant for government access of information remotely stored by third party providers and addresses some of the Fourth Amendment protection issues.

This paper will suggest that the proposed legislation should include smart grid technology. In addition, this paper will suggest that the independent source doctrine and the inevitable discovery rule should be considered because they may undermine the proposed legislation’s goals. The next sec-

2. Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 89.
5. Anderson, supra note 3; see Electronic Communications Privacy Act § 2703(a)–(b)(1).
7. Id. § 3.
tion of this paper includes a brief and simplified overview of cloud computing and smart grid technologies. Economic and environmental benefits of both technologies are introduced in this section. Projections and statistics are included to provide a perspective of the potential reach of the proposed legislation.

The third section of this paper focuses on the current legal standards regarding privacy issues of cloud computing and smart grid technologies. Constitutional requirements under the Fourth Amendment are discussed. The outdated provisions of the ECPA are also outlined. This section contains an overview of *Katz v. United States*\(^8\) and the current reasonable expectation of privacy standard. Further, the evasion of the electronic communications privacy issue by the Supreme Court of the United States in *City of Ontario v. Quon*\(^9\) is presented. Following the *Quon* overview, this section addresses the third party exception doctrine. Finally, this section ends with a discussion of what would be a reasonable expectation of privacy in the cloud.

The fourth section will provide information on the proposed legislation that was presented to the Senate on May 17, 2011, which focuses on updating the ECPA and requiring the government to obtain a search warrant for access to information stored by third parties beyond the existing 180-day window.\(^10\) This section recommends that because the energy companies will face similar issues as smart grid technology becomes universally available, smart grid technology should be included in the proposed legislation. Additionally, some exceptions that may challenge the goals of this bill are addressed in this section. Specifically, the independent source doctrine and the inevitable discovery rule may provide a circular way around the legislation. This section will explain both doctrines, and will suggest how these exceptions may provide loopholes that undermine the current proposed legislation's purpose.

The paper concludes with the Obama administration’s position on the changes in the proposed legislation and recaps the economic benefits of the technologies. The conclusion summarizes the views presented in the third section.

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II. OVERVIEW OF CLOUD COMPUTING AND SMART GRID TECHNOLOGIES

A. Cloud Computing

Cloud computing is a technology that allows for an economically more efficient use of Information Technology (IT) resources. The "cloud" is a data hosting method and consists of networks, remote data storage, and remote web-based applications. Businesses and consumers use "webmail services, store data online, or . . . use software" applications having functionality in the cloud. The cloud is where the remote IT applications, infrastructure, and platforms reside, rather than at an in-house data center. The cloud could be a private network within an organization, a public network provided by a third party vendor, or a hybrid of both. In a public network, the applications are hosted by a third party provider and are delivered to the end user via the Internet. End users may view their files, pictures, movies, and emails at their visual display unit, which has access to the cloud. This, in effect, gives users anywhere access to their applications and files stored by the third party provider. Once information is stored in a third party cloud, it may be retrievable years later, even if the end user deletes the information. A few of the major third party cloud-computing providers include Google, Amazon, Microsoft, and AT&T.

It is estimated that over sixty-nine percent of people in our country use cloud computing for a variety of services. Although there is a growing trend utilizing cloud computing, the technology behind cloud computing is

11. See Thethi, supra note 1, at 2.
13. Id.
15. Thethi, supra note 1, at 2.
17. Blitz, supra note 14, at 367.
20. Soghoian, supra note 12, at 361; Anderson, supra note 3.
not new. Increases in processor and network speeds, coupled with the ability to store data inexpensively, provided the technology for cloud computing by the late 1990s. Following this, virtualization enabled businesses to separate their software and hardware and run their applications remotely. Virtualization was the impetus required to make cloud computing economically attractive and advantageous.

Traditionally, many businesses have used an in-house data center IT model. This required businesses to have enough capacity to handle peak requirements and pay the associated fixed costs of peak capacity. Other fixed costs included the "cost of servers and storage, [in addition to] employee salaries and overhead." Cloud computing offers flexibility and scalability, which enables businesses to only pay for what they actually use, or their variable costs. The result is significant savings to businesses with respect to the fixed costs associated with hardware, software, facilities, and staff required for an in-house data center.

It is projected that cloud computing will grow to account for a total public and private network spend of $33.1 billion by 2013. There are some revenue projections as high as "$160 billion over the next few years." It is also estimated that cloud computing technology will be deployed for the majority of IT services by 2020.

B. Smart Grid Technology

Another technological area that is beginning to experience significant growth is smart grid technology. With smart grid technology, utility companies are able to read meters remotely, reducing the costs of the staff and

23. Id. at 1–2.
24. Id. at 2.
25. See id.
26. Id. at 1.
27. See Cooke, supra note 22, at 2.
28. Id.
29. Id.; Thethi, supra note 1, at 2.
31. Id. at 5.
32. Soghoian, supra note 12, at 361.
33. Cooke, supra note 22, at 7.
Transportation required to read a meter on site. Energy usage may be tracked and managed not only by the utilities, but also by consumers. The technology involves a decentralized system, two-way information flow, and two-way energy flow. Smart grid technology requires a collaborative effort between "the IT industry, the telecom industry, the [I]nternet industry, the cyber-security industry, the appliance manufacturing industry, the meter manufacturing industry, and many more industries." President Obama announced $3.4 billion in smart grid investment grants in 2009. The United States Department of Energy predicts that over fifty-two million more meters will be installed by 2012.

Experts in this area claim that the technology will result in a more efficient, secure, and reliable system. It is predicted that with smart grid technology, electrical vehicles will "reduce our [country's] dependence on foreign oil by fifty-two percent." Additionally, with smart grid, it is estimated that overall consumption will be reduced by up to four percent. A few million metric tons of carbon dioxide is projected to be saved by 2030 with the use of smart grid, making it a green technology. Furthermore, smart grid technology decreases the possibility of outages with its self healing characteristic, which would contribute to a significant cost savings because it is estimated that blackouts can account for $135 billion to commercial customers. Finally, it is estimated that 280,000 jobs would be created with the implementation of smart grid technology.

III. CURRENT LEGAL AND STATUTORY STANDARDS REGARDING PRIVACY

Privacy concerns affect both the cloud computing and smart grid technology industries. Consumers and businesses may hesitate to subscribe to

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35. Id.
36. Id.
37. Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 84.
38. Id. at 93.
40. Balough, supra note 39, at 162.
41. Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 85.
42. Id. at 88.
43. Id.
44. Id. at 88, 89.
45. Id. at 89.
46. Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 89.
47. Balough, supra note 39, at 162–63; Cooke, supra note 22, at 4.
services which expose them to the risk of unauthorized access to their private
information. 48 Given the tremendous impact that the telecommunications
and energy industries have on the economy, it would be ideal to address the
privacy issues now, rather than later. 49

A. Privacy Issues and the Fourth Amendment

End users of both cloud based and smart grid technologies are suscepti-
ble to privacy invasion. 50 The nature of cloud computing lends itself to the
risk of insecure transmission of data. 51 Even with some forms of encryption,
hackers are still able to access private information. 52 Risks to the end users
are especially significant "when they [are] connect[ed] to . . . public wireless
networks." 53

Cloud computing services are not only exposed to cyber security issues
involving potential hackers, but also are exposed to government access to
private files and documents without a warrant in certain circumstances. 54
The Fourth Amendment states that:

The right of the people to be secure in their persons, houses,
papers, and effects, against unreasonable searches and seizures,
shall not be violated, and no Warrants shall issue, but upon prob-
able cause, supported by Oath or affirmation, and particularly de-
scribing the place to be searched, and the persons or things to be
seized. 55

Digital search and seizure using third party providers is much easier
than retrieving documents from a personal computer. 56 In a digital environ-
ment, "law enforcement agents can obtain wiretaps, emails, text messages or
real time phone location information." 57 It has previously been alleged that
information from a third party cloud computing provider has been directly
transmitted to government servers without a warrant. 58 In some cases, the
government has been accused of having access to the entire network of a

48. See Balough, supra note 39, at 162–63; Cooke, supra note 22, at 4.
49. See Balough, supra note 39, at 161–65.
50. Id. at 165; Soghoian, supra note 12, at 361.
51. See Soghoian, supra note 12, at 361.
52. See id.
53. Id. at 372.
54. Id. at 361–62.
55. U.S. CONST. amend. IV.
57. Id. at 385.
58. Id. at 385–86.
provider, which would enable the government to monitor an individual without involving the provider at all.\textsuperscript{59}

Similarly, there are also privacy concerns with smart grid technology.\textsuperscript{60} It is not absolutely clear just how much information the new and future smart meters will be able to accumulate.\textsuperscript{61} The information obtained by the utility would include all of the energy consumed within a home and might also include additional information, such as the energy charged to an electric vehicle.\textsuperscript{62} The electric vehicle would likely be registered to a user, or a unique identifier, so the data would follow the vehicle, even if it were charged somewhere else.\textsuperscript{63} The information is gathered real-time for smart devices.\textsuperscript{64} There are privacy implications when personal information—such as energy consumption within the home, and travel habits outside of the home—may potentially be tracked real-time.\textsuperscript{65}

With smart grid technology, utilities currently use the Internet or other public networks to transfer the data.\textsuperscript{66} The experts in the industry recognize that the smart grid system will be vulnerable to cyber attacks, and to authorized access to private information.\textsuperscript{67} Additionally, “[u]nutilities themselves [may also] pose a threat to . . . data” security through their internal monitoring and maintenance of the smart grid.\textsuperscript{68} Other concerns with smart meters include the possibility of information remaining from previous homeowners, if not erased from the smart meter, and unauthorized landlord access in a rental situation.\textsuperscript{69}

In the smart grid environment, law enforcement officials have previously used energy consumption data as an information tool.\textsuperscript{70} The officials were able to use excessive energy consumption data to obtain warrants to access homes where they suspected marijuana might be grown because of the high energy usage.\textsuperscript{71} Currently, it is not clear who owns the smart grid data—the end user or the utility.\textsuperscript{72} Third party cloud computing providers and

\textsuperscript{59.} Id. at 386.
\textsuperscript{60.} Balough, supra note 39, at 162–63.
\textsuperscript{61.} Id. at 165.
\textsuperscript{62.} Id. at 166–67.
\textsuperscript{63.} Id. at 167.
\textsuperscript{64.} Id. at 166.
\textsuperscript{65.} See Balough, supra note 39, at 165–67.
\textsuperscript{66.} Id. at 168.
\textsuperscript{67.} See id. at 169; Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 87.
\textsuperscript{68.} Balough, supra note 39, at 169.
\textsuperscript{69.} Id. at 171.
\textsuperscript{70.} Id.
\textsuperscript{71.} Id.
\textsuperscript{72.} Id. at 173.
utilities similarly face the challenge of unauthorized access of private information and Fourth Amendment privacy issues.\(^\text{73}\)

**B. ECPA Statutory Requirement**

Digital Due Process is a coalition of major carriers including: AT&T, AOL, Amazon, Microsoft, and others calling for a reform of the ECPA.\(^\text{74}\)

The ECPA is made up of “the Wiretap Act, the Stored Communications Act (SCA), and the use of pen register information.”\(^\text{75}\) Whether the government is required to obtain a search warrant, or only a court order, is determined by how the communication is interpreted.\(^\text{76}\) If the communication is interpreted to fall under the Wiretap Act, then a search warrant is required.\(^\text{77}\) On the other hand, if a communication falls within the SCA, only a court order may be required for government access.\(^\text{78}\)

The main issue that the Digital Due Process coalition aims to address is the lack of a warrant requirement for a third party provider to disclose private communications and information to the government.\(^\text{79}\) The coalition bases its argument on the need for Fourth Amendment protection in the cloud computing environment.\(^\text{80}\) Quoting Justice Brandeis, the coalition emphasizes that privacy is “the most comprehensive of rights, and the right most valued by a free people.”\(^\text{81}\)

The ECPA does not clearly and effectively define how interception of modern day communications, such as email, should be treated.\(^\text{82}\) By definition, a cloud computing provider is both an electronic communications service and a remote computing service.\(^\text{83}\) An electronic communication service

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76. *See id.*
77. *Id.*
78. *Id.*
80. *About the Issue, supra* note 74.
81. *Id.*
83. *See id.* at 169.
provides users with the ability to send and receive electronic information.84
A remote computing service, on the other hand, includes third party remote
storage and applications.85 Under the United States Code sections 2703(a)
and 2703(b)(1)(B), after 180 days of an electronic communication, the gov-
ernment can compel a third party provider to release content information of
that communication without a warrant and without the higher burden of
probable cause.86

[Section] 2703. Required disclosure of customer communications
or records

(a) Contents of Wire or Electronic Communications in Electronic
Storage.—A governmental entity may require the disclosure by a
provider of electronic communication service of the contents of a
wire or electronic communication, that is in electronic storage in
an electronic communications system for one hundred and eighty
days or less, only pursuant to a warrant issued using the proce-
dures described in the Federal Rules of Criminal Procedure (or, in
the case of a State court, issued using State warrant procedures) by
a court of competent jurisdiction. A governmental entity may re-
quire the disclosure by a provider of electronic communications
services of the contents of a wire or electronic communication that
has been in electronic storage in an electronic communications
system for more than one hundred and eighty days by the means
available under subsection (b) of this section.

(b) Contents of Wire or Electronic Communications in a Remote
Computing Service.—(1) A governmental entity may require a
provider of remote computing service to disclose the contents
of any wire or electronic communication to which this paragraph is
made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if
the governmental entity obtains a warrant issued using the proce-
dures described in the Federal Rules of Criminal Procedure (or, in
the case of a State court, issued using State warrant procedures) by
a court of competent jurisdiction; or

84. See id. at 167–68.
85. See id. at 168–69.
III 2009); see Bagley, supra note 75, at 168.
(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.87

The advances in technology have made the ECPA outdated and insufficient in addressing privacy concerns.88 The standards have not been consistently applied by courts and there is no adequate protection of personal information.89 The main changes in technology that are not adequately addressed by the ECPA are email, cell phone location data, cloud computing and social networking, and smart grid data.90

The ability of the government to obtain electronic communications from a service provider without a warrant requirement91 demonstrates the problem that the coalition of Digital Due Process aims to correct.92 There were seventeen class action cases in 200693 where the major telecommunications companies had allegedly partnered with the National Security Agency (NSA) to monitor phone calls and voluntarily provide information to the government.94 The government had access to the information without obtaining a warrant.95 The telecommunications companies were given legal protection when President Bush signed legislation granting immunity to the telecommunications

88. About the Issue, supra note 74.
89. Id.
90. Id.
91. See Bagley, supra note 75, at 174.
providers when assisting government in the fight on terrorism. 96 The NSA may have continued to intercept email and phone communications into 2009. 97

Turning to the energy industry, the ECPA may provide some protections if a smart meter is considered to fall within the definitions under the Wiretap Act, where law officials would have to obtain a warrant for access to the information. 98 Under the Stored Communications Act, however, the level of privacy protection will depend on how the smart grid is defined. 99 If the smart grid is categorized as a remote computing service, then after 180 days of the data storage, the government could compel the utility to release the content of the information without a warrant. 100

Given the technology movement toward remote storage of data, it is predictable that smart grid technology will ultimately be treated similar to cloud computing, i.e., as an electronic communication service and a remote computing service. 101 The technologies in the industries are converging in that there is an integration of IT and Operational Technology (OT). 102 "There is a strong push to . . . use . . . broadband, instead of utility-owned wires, for the transfer of smart meter data back to the utilities." 103 However, the technology currently available allows for the direct communication of the smart meter to the utility. 104 One supplier of smart meters explains:

Gathering real-time data from intelligent endpoints provides the brainpower that drives the smart grid. [This supplier] outfits a variety of intelligent endpoints with its Communications Module to gather and relay this information. The . . . Communications

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97. Bagley, supra note 75, at 159.
98. See Balough, supra note 39, at 177.
99. Id. at 179.
102. Id.
103. Balough, supra note 39, at 168.
Modules support two connections—one into the utility’s smart grid network and one into the consumer’s home area network.\(^{105}\)

In other words, the utility is able to gather the real-time data because the communicating devices, or intelligent endpoints, reside at the end user’s home and at the utility.\(^{106}\) This is analogous to a cloud computing provider gathering data communicated between a computer residing at a residence and the cloud. Therefore, it is predictable that the same privacy issues that are currently faced by the cloud computing providers will be faced by the utilities in the near future with the universal implementation of the smart grid.\(^{107}\)

C. Katz v. United States and the Reasonable Expectation of Privacy Test

The modern standard for privacy with regard to electronic surveillance is based on *Katz*.\(^{108}\) In *Katz*, the FBI attached an electronic listening and recording device to the outside of a phone booth and monitored the petitioner’s conversations during phone calls he made while in the phone booth.\(^{109}\) The Supreme Court of the United States was asked to address whether a public telephone booth is a protected area of an individual’s right to privacy.\(^{110}\) The Court reasoned that “the Fourth Amendment protects people, not places.”\(^{111}\) The Court stated:

One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.\(^{112}\)

\(^{105}\) Id.
\(^{110}\) Id. at 349.
\(^{111}\) Id. at 351.
\(^{112}\) Id. at 352.
The standard explained in Justice Harlan’s concurring opinion in *Katz* is followed today and is the reasonable expectation of privacy test. The reasonable expectation of privacy standard has two prongs. Under the first prong, an individual must subjectively have an expectation of privacy. Under the second objective prong, society would have to recognize it as a reasonable expectation of privacy.

There has been criticism of the subjective nature of the *Katz* test and some inconsistent results in applying the reasonable expectation of privacy standard. For example, in *Oliver v. United States*, the Supreme Court of the United States held that a person does not have a reasonable expectation of privacy for activities conducted in fields that could have been seen by lawful aerial surveillance. In *Oliver*, two agents approached a farmhouse, followed a footpath around a locked gate, and entered into a field where marijuana was grown. The Court explained that an expectation of privacy in open fields is not one that society would recognize as reasonable. The Court held that no expectation of privacy attaches to open fields.

However, in *Bond v. United States*, the Court distinguished between visual and tactile observation of property. In *Bond*, a bus passenger’s luggage was placed in the overhead storage area. A border patrol agent squeezed the luggage as he walked through the bus. The Court applied the two pronged reasonable expectation of privacy test. Under the first prong, the passenger was found to expect privacy because he placed his belongings in an opaque bag and positioned the bag directly above him. Under the second prong, the Court explained that a bus passenger may expect some handling of the bag, but not handling in an exploratory manner.

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113. Solove, supra note 108, at 1511 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).
115. *id.*
116. *id.*
119. *id.* at 178–79.
120. *id.* at 173.
121. *id.* at 179.
122. *id.* at 180.
124. *id.* at 337.
125. *id.* at 335.
126. *id.*
127. *id.* at 338.
128. *Bond*, 529 U.S. at 338.
held that the physical manipulation of the bus passenger's luggage violated the Fourth Amendment, even though the bag was exposed to public handling in an overhead compartment.  

Additionally, in *Kyllo v. United States*, law enforcement used a thermal imaging device to detect the heat generated from lamps used for indoor marijuana growth. The Court held that this was an intrusion into the protected area and would constitute a search. The Court also emphasized that this type of technology is not in general public use. The Court stated that the "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." Justice Stevens, dissenting, argued that heat waves that are generated "enter the public . . . if and when they leave a building." According to the dissent, "[a] subjective expectation that [heat waves] would remain private is not only implausible, but also surely not 'one that society is prepared to recognize as reasonable.'"

Most recently, in *United States v. Jones*, the Supreme Court of the United States reverted to trespass analysis in deciding that the physical attachment of a GPS tracking device on the defendant's vehicle constituted a trespass of a constitutionally protected "effect." The Supreme Court of the United States did not apply the *Katz* test, but explained that "unlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test." Therefore, the *Katz* reasonable expectation of privacy test continues to apply.

130. *Id.*
131. *Id.* at 29.
132. *Id.* at 34.
133. *Id.* at 35 n.2.
135. *Id.* at 44 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
137. *Id.* at 4, 10 & n.8.
138. *Id.* at 11 (emphasis in original).
139. *Id.*
D.  *Supreme Court of the United States Evades Fourth Amendment Issue in City of Ontario v. Quon*

There is not a significant amount of case law applying Fourth Amendment protection in electronic communications. Some believe that the current case law "leaves more questions than answers" regarding whether the Fourth Amendment applies in government access to electronic communications. The Supreme Court of the United States had an opportunity in *Quon* to address issue of Fourth Amendment protection with respect to text messaging.

In *Quon*, a city employee claimed that his Fourth Amendment privacy rights were violated when the city "read text messages sent and received on [his] pager." The Supreme Court of the United States avoided taking a stand on the Fourth Amendment issues. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Because the pager was owned and issued to the employee from the employer, the Court explained that "prudence counsels caution" in defining privacy expectations of employees using employer provided communication devices. Although the Court acknowledged that cell phone and text message communications are highly personal, the Court also explained that these devices could be purchased by individuals themselves.

The Court reasoned that there are exceptions to the general rule of warrantless searches, and that "'special needs' of the workplace justify one such exception." The issue of whether there was a reasonable expectation of privacy was not necessary to resolve because the Court held that the city's review of its employee's text messages was reasonable under the exception regarding "'special needs' of the workplace." Therefore, the reasonable expectation of privacy regarding electronic communications has not been clearly addressed by the Supreme Court of the United States.

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142. See Blitz, *supra* note 14, at 372.
145. *Id.* at 2624.
147. *Quon*, 130 S. Ct. at 2629.
148. *Id.*
149. *Id.* at 2630.
150. *Id.* (quoting O'Connor v. Ortega, 480 U.S. 709, 725 (1987)).
151. See *id.*
152. *Quon*, 130 S. Ct. at 2630.
153. See *id.*
E. The Third Party Doctrine

The third party doctrine is thought by some to be "disguised as an application of Katz’s 'reasonable expectation of privacy'" standard.\(^{154}\) The logic in support of the third party doctrine is that if an individual discloses information to a third party, then it is not reasonable for the individual to have an expectation of privacy.\(^{155}\) The third party doctrine is pertinent to third party cloud computing providers, and will be pertinent to smart grid utilities, because data is turned over to and stored remotely by the third party providers.\(^{156}\)

In *Smith v. Maryland*,\(^{157}\) telephone numbers dialed from the petitioner's home were recorded using a pen register installed by the telephone company at the request of the police.\(^{158}\) The police did not obtain a warrant or court order for access to the information.\(^{159}\) The Supreme Court of the United States distinguished a pen register from the listening device in *Katz*, because the register only disclosed the telephone numbers that the petitioner dialed not the conversations.\(^{160}\) The Court reasoned that by disclosing the telephone numbers to the phone company, the petitioner could not have a reasonable expectation of privacy because the phone company uses the information to complete the calls and bill the end user.\(^{161}\)

Likewise, in *United States v. Miller*,\(^{162}\) a bank provided the petitioner's checks, deposit slips, financial statements and monthly statements to agents.\(^{163}\) The Supreme Court of the United States differentiated between an individual's private papers and the bank's business records.\(^{164}\) The Court further explained that the documents contained only information willingly communicated to the bank.\(^{165}\) Justice Powell stated that "[t]he depositor..."
takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to [another].”

Critics of the third party doctrine claim that it is incorrectly applied to the Katz test. It has been argued that it is reasonable to “expect privacy [of] bank records, phone records, and other third-party records.” Another view is that the third party doctrine gives the government too much power. With the advances in technology and public access to the Internet, the third party doctrine is thought to be insufficient in addressing the modern information era. An additional criticism is that the doctrine was articulated prior to data storage in the cloud and should not apply to a third party provider and its end users.

On the other hand, benefits of the third party doctrine may often be overlooked. Some contend that the rule ensures “technological neutrality in Fourth Amendment rules.” For example, the third party doctrine prevents criminals from conducting their crimes privately and hiding the public aspects of those crimes. Without the third party doctrine, criminals would be enabled to conceal their crimes. Another argument in defense of the third party doctrine is that when users divulge information to a third party, they are impliedly consenting under the Fourth Amendment.

F. Reasonable Expectation of Privacy in the Cloud

The question is, “when do people have a reasonable expectation of privacy in data stored in the cloud?” Likewise, when will people have a reasonable expectation of data generated from a smart meter? Some view the Internet as a public space where there can be no reasonable privacy expectation. However, several factors support an individual having a reasonable expectation of privacy in using third party providers. First, a user account

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166. Id. at 443 (citing United States v. White, 401 U.S. 745, 751–52 (1971)).
167. Kerr, supra note 154, at 570.
168. Id. at 571.
169. Id. at 572.
170. See id. at 573.
172. Kerr, supra note 154, at 573.
173. Id.
174. Id.
175. Id.
176. Bagley, supra note 75, at 175.
177. Barnhill, supra note 19, at 621.
178. Couillard, supra note 18, at 2221.
179. See Bagley, supra note 75, at 176–77.
is typically protected by a password and personal login.\textsuperscript{180} Password protection, in itself, would lead one to have an expectation of privacy.\textsuperscript{181} In addition, an individual’s private account is not accessible to public view.\textsuperscript{182} Furthermore, the nature of photographs, calendars, and other private files is highly personal.\textsuperscript{183} Moreover, it is reasonable to have an expectation of privacy when conducting a search for information on the Internet in the privacy of one’s home, or in the privacy of using one’s personal devices.\textsuperscript{184}

Individuals’ privacy expectations are no longer confined to the protected area of the home, but also include their password-protected activities and accounts.\textsuperscript{185} However, “web searches, emails, documents, photos, location data, and even evidence of acquaintanceship can be extracted from a user account.”\textsuperscript{186} Data from calendars, voicemails and instant message logs are also retrievable.\textsuperscript{187} It has been suggested that this type of information could even possibly be used for criminal profiling.\textsuperscript{188}

The third party doctrine has not been adapted for the post-\textit{Katz} cloud computing environment, nor has it been adapted for the smart grid era.\textsuperscript{189} The third party doctrine must take into account modern society’s expectations that private password protected information, whether stored remotely or on a desktop, or generated from a smart meter is not accessible to the general public.\textsuperscript{190} Some contend that “[I]looking at expectations is the wrong inquiry” all together.\textsuperscript{191}

\begin{footnotes}
\footnote{180. \textit{Id.} at 176.}
\footnote{181. \textit{Id.}}
\footnote{182. \textit{Id.}}
\footnote{183. Couillard, \textit{supra} note 18, at 2219–20.}
\footnote{184. Bagley, \textit{supra} note 75, at 170–71.}
\footnote{185. \textit{Id.} at 170.}
\footnote{186. \textit{Id.} at 161.}
\footnote{187. \textit{Id.} at 162.}
\footnote{188. \textit{Id.} at 164.}
\footnote{189. Couillard, \textit{supra} note 18, at 2219.}
\footnote{190. \textit{Id.} at 2231–32.}
\footnote{191. Solove, \textit{supra} note 108, at 1524.}
\end{footnotes}
IV. PROPOSED STATUTORY REQUIREMENTS REGARDING PRIVACY AND POTENTIAL EXCEPTIONS

A. The Proposed Electronic Communications Privacy Act Amendments Act of 2011

Proposed legislation, introduced in May 2011, attempts to address some of the privacy concerns with respect to electronic communications.\(^{192}\) The Electronic Communications Privacy Act Amendments Act of 2011 aims to “improve the provisions relating to the privacy of electronic communications.”\(^{193}\) This paper focuses on sections two and three of the bill:

Sec. 2. Prohibition on Disclosure of Content.

Section 2702(a)(3) of title 18, United States Code, is amended to read as follows:

(3) A provider of electronic communication service, remote computing service, or geolocation information service to the public shall not knowingly divulge to any governmental entity the contents of any communication described in section 2703(a), or any record or other information pertaining to a subscriber or customer of such provider or service.

Sec. 3. Elimination of 180-Day Rule and Search Warrant Requirement; Required Disclosure of Customer Records.

(a) In General.—Section 2703 of title 18, United States Code, is amended—

(1) by striking subsections (a), (b), and (c) and inserting the following:

(a) Contents of Wire or Electronic Communications in Electronic Storage.—

(1) In general.—A governmental entity may require the disclosure by a provider of electronic communication service, remote computing service, or geolocation information service of the contents of a wire or electronic communication that is in electronic

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193. Id.
storage with or otherwise held or maintained by the provider if the governmental entity obtains a warrant issued and executed in accordance with the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) that is issued by a court of competent jurisdiction directing the disclosure.

(2) Notice.—Except as provided in section 2705, not later than [three] days after a governmental entity receives the contents of a wire or electronic communication of a subscriber or customer from a provider of electronic communication service, remote computing service, or geolocation information service under paragraph (1), the governmental entity shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, as specified by the court issuing the warrant, the subscriber or customer—

(A) a copy of the warrant; and

(B) a notice that includes the information referred to in section 2705(a)(5)(B)(i).

(b) Records Concerning Electronic Communication Service, Remote Computing Service, or Geolocation Information Service.—

(1) In general.—Subject to paragraph (2) and subsection (g), a governmental entity may require a provider of electronic communication service, remote computing service, or geolocation information service to disclose a record or other information pertaining to a subscriber or customer of the provider or service (not including the contents of communications), only if the governmental entity—

(A) obtains a warrant issued and executed in accordance with the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) that is issued by a court of competent jurisdiction directing the disclosure;

(B) obtains a court order directing the disclosure under subsection (c);

(C) has the consent of the subscriber or customer to the disclosure; or

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the...
The proposed legislation addresses the search warrant requirement for contents of electronic communications stored by cloud computing providers.\textsuperscript{195} However, it does not attempt to include smart grid technology.\textsuperscript{196} It is not clear how the smart meter would be defined.\textsuperscript{197} The proposed legislation should include consideration for smart meter technology because it seems that the energy industry will be faced with the same Fourth Amendment privacy issues as the telecommunications providers.\textsuperscript{198} Otherwise, the courts will be left struggling with whether a smart meter may be categorized as an electronic communication service, remote computing service, or geolocation information service.\textsuperscript{199} It would be a better use of resources to address these industries and technologies together, based on the synergies of the industries and the interests of the taxpayers for efficient use of government and judicial resources.\textsuperscript{200}

B. Exceptions for the Proposed Legislation to Consider

As mentioned previously, the third party doctrine is thought to be insufficient in addressing the modern information era.\textsuperscript{201} If the proposed legislation passes, it will clearly establish a warrant requirement for government access to the content of stored third party cloud information.\textsuperscript{202} However, in addition to the third party doctrine, there are two other exceptions that should be considered in addressing the modern information era—the independent source doctrine and the inevitable discovery rule.\textsuperscript{203} If the above proposed legislation is adopted, and a warrant is required for access to the information stored in the cloud or with a third party, then the independent source doctrine and the inevitable discovery rule may undermine its purpose.

\textsuperscript{194} Id. §§ 2–3.  
\textsuperscript{195} See id.  
\textsuperscript{196} See id.  
\textsuperscript{197} Balough, supra note 39, at 172.  
\textsuperscript{198} Id.  
\textsuperscript{199} See id.  
\textsuperscript{200} See Berst, supra note 101.  
\textsuperscript{201} Kerr, supra note 154, at 573.  
1. The Independent Source Doctrine

Under the independent source doctrine, evidence that is first discovered unlawfully, but later is obtained in a lawful manner that is independent of the first discovery, is admissible.\textsuperscript{204} In \textit{Segura v. United States},\textsuperscript{205} the Supreme Court of the United States addressed the issue of whether items discovered by agents under a valid search warrant, following an unlawful entry, should be suppressed from evidence.\textsuperscript{206} In \textit{Segura}, agents entered into and remained in an apartment for nineteen hours awaiting a search warrant while the lawful occupants were taken into police custody.\textsuperscript{207} After the warrant issued, the agents discovered drugs, ammunition, cash, and records.\textsuperscript{208} The Court held that the evidence discovered pursuant to the warrant was admissible, and only the evidence that was discovered prior to the warrant was suppressed.\textsuperscript{209} The Court reasoned that none of the information on which the warrant was secured was derived from the initial entry, and the information was known to the agents prior to the entry.\textsuperscript{210} The Court stated that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'"\textsuperscript{211}

In \textit{Murray v. United States},\textsuperscript{212} federal agents entered a warehouse, without a warrant, to apprehend those who were seen from surveillance within the warehouse.\textsuperscript{213} The agents forced entry and did not find the individuals, but they did view burlap-wrapped bales of marijuana in plain sight.\textsuperscript{214} The agents left the warehouse under surveillance and then obtained a search warrant.\textsuperscript{215} The search warrant did not rely on the observations made in the first unlawful entry of the warehouse and was considered to be untainted.\textsuperscript{216} The Court explained that the independent source doctrine may apply to evidence acquired through Fourth, Fifth, and Sixth Amendment violations.\textsuperscript{217} The doctrine's aim is to protect society's interest of allowing juries to receive

\begin{quote}
\textsuperscript{204} \textit{Segura}, 468 U.S. at 805.
\textsuperscript{205} 468 U.S. 796 (1984).
\textsuperscript{206} \textit{Id.} at 804.
\textsuperscript{207} \textit{Id.} at 800–01.
\textsuperscript{208} \textit{Id.} at 801.
\textsuperscript{209} \textit{Id.} at 813–14, 816.
\textsuperscript{210} \textit{Segura}, 468 U.S. at 814.
\textsuperscript{211} \textit{Id.} at 805 (quoting Wong Sun v. United States, 371 U.S. 471, 487 (1963)) (internal quotation marks omitted).
\textsuperscript{212} 487 U.S. 533 (1988).
\textsuperscript{213} \textit{Id.} at 535.
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 535–36.
\textsuperscript{216} See \textit{id.} at 535–37.
\textsuperscript{217} \textit{Murray}, 487 U.S. at 537.
\end{quote}
evidence of a crime by putting police in the same position they would have been in if no violation occurred. 218

"[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." 219

In Murray, Justice Scalia explained that "[t]o determine whether [a] warrant was independent of the illegal entry, [the question is] whether it would have been sought even if what actually happened had not occurred." 220

In Hudson v. Michigan, 221 the Supreme Court of the United States also applied the independent source doctrine. 222 In Hudson, there was a valid warrant, but it was executed in violation of the knock and announce rule. 223 Justice Scalia compared the search to the warrantless search in Segura. 224 He stated that "[i]f the probable cause backing a warrant that was issued later in time [in Segura] could be an ‘independent source’ for a search that proceeded after the officers illegally entered and waited, a search warrant obtained before going in must have at least this much effect." 225

2. The Inevitable Discovery Rule

The inevitable discovery rule is inferred from the independent source doctrine. 226 The main difference is that with the inevitable discovery doctrine, derivative evidence is permissible if the police would have hypothetically discovered the evidence lawfully. 227 The prosecutor must show that by a preponderance of the evidence, the challenged evidence would inevitably

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218. Id. (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).
219. Id. (alteration in original) (emphasis omitted) (quoting Nix, 467 U.S. at 443).
220. Id. at 542 n.3.
222. See id. at 600–01.
223. Id. at 588, 590.
224. Id. at 600–01.
225. Id. (emphasis omitted).
“have been discovered by lawful means.”

Probable cause must have been established for the application of inevitable discovery.

In Nix v. Williams, the location of a body was disclosed to law enforcement in violation of the defendant’s right to counsel. Although Nix is a Sixth Amendment case, the reasoning may logically apply to Fourth Amendment cases as well. In the inevitable discovery situation, there is a causal connection between the illegality and the acquisition of the evidence.

In Nix, a nearby search team was within a few miles of discovering the body, but was called off after the defendant brought the police to where the body was buried. The Supreme Court of the United States reasoned that it was inevitable that the body would have been found by the search team. The Court justified adopting the inevitable discovery rule based on the rationale of the independent source exception. The underlying reasoning of both doctrines is to allow evidence that would have been available absent any unlawful police activity. Nix was decided in 1984, at a time the Court believed that “[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”

In one lower court decision, United States v. Rodriguez, one of the defendants, King, made a statement under duress, which led to derivative evidence. The court relied on the inevitable discovery exception, and reasoned that “[u]pon consideration of all the circumstances surrounding this search, I conclude that a team of well trained and experienced law enforce-

228. Id. at 444.
229. See id. at 443–44.
231. Id. at 435–37.
232. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 388 (5th ed. 2010) (“Although the violation in Nix involved the Sixth Amendment right to counsel, the . . . analysis applies in the same manner in Fourth Amendment cases.”). Additionally, the inevitable discovery doctrine is inferred from the independent source doctrine, which does apply to Fourth, Fifth, and Sixth Amendment cases. Murray v. United States, 487 U.S. 533, 537 (1988).
233. Nix, 467 U.S. at 444.
234. Id. at 436.
235. Id. at 449–50.
236. Id. at 444.
237. Id. at 443–45.
238. Nix, 467 U.S. at 431, 445.
240. Id. at 1374.
ment officers would have discovered the . . . evidence without King’s assistance.”

C. Applying the Exceptions to the Proposed Legislation

In effect, the independent source and inevitable discovery rules are exceptions that may potentially undermine the proposed search warrant requirement for electronic communications in certain instances. There are main features of electronic communications that differentiate electronic communications from traditional paper sources and other types of evidence: Processability, recoverability, and remote storage. “Electronic [e]vidence [i]s [a]lways [p]rocessable.” Traditional paper documents must be manually searched through, whereas electronic communications may be electronically searched for within seconds. In addition to traditional searching, modern technology also allows for data mining, where patterns within data are identified. Furthermore, it is possible to recover, preserve, and reproduce deleted files in electronic communications. These features coupled with cloud computing technology, where files are remotely stored, are characteristics unique to electronic communications. The outdated inquiries and standards for the independent source doctrine and the inevitable discovery rule are less burdensome in electronic evidence because of the characteristics of electronic communications.

1. Application of the Independent Source Doctrine to the Proposed Warrant Requirement

The question in Murray of whether a warrant “would have been sought even if what actually happened had not occurred,” opens the door in the electronic world to hack now, get a warrant later. The Court in Murray

241. Id. at 1375.
244. Id. at 364.
245. Id.
248. See Scheindlin & Rabkin, supra note 243, at 364.
250. See id. at 540 n.2.
explained that the lawfully obtained search warrant did not rely on the observations made in the first unlawful entry of the warehouse. In an electronic communications environment, if there is an unlawful access to electronic information stored by a third party, followed by a lawfully obtained warrant, there is a potential argument that the lawfully obtained warrant "would have been sought even if what actually happened had not occurred." The characteristics of electronic communications support the idea that the lawfully obtained warrant would not have relied on the observations made by the first unlawful access to the information. The reasoning in support of this hypothetical argument is that the second lawfully obtained warrant would have been obtained based on the search criteria—which for this analysis assumes was sufficient to give rise to probable cause—used to access the electronic communication in the first unlawful access.

There are unique processes in place for investigators to conduct a search through Internet service providers. For example, when dealing with Internet service providers, the agent determines what material the provider is to retrieve, but the agent usually does not conduct the search of the provider's computers. The agent "serve[s] the warrant on the provider,... and the provider produces the material specified in the warrant." In order to navigate through massive volumes of electronic documents, the provider would use the information provided by the agent to conduct the search. Next, the agent reviews the information retrieved, and makes copies of what the agent believes falls within the scope of the warrant. It follows that if an agent started with sufficient information to give rise to probable cause, and that information led to search criteria to be used by a provider in order to retrieve the electronic communications, then the search criteria would always be an independent source of what is actually retrieved.

For example, in the personal computer environment, if an agent obtains an IP address from a victim's computer, after a cyber crime has been com-

251. Id. at 541-43.
252. See id. at 542-43 & 542 n.3.
253. Id. at 542-43.
255. Id. at 134.
256. Id. (citing Electronic Communications Privacy Act, 18 U.S.C. § 2703(g) (2006 & Supp. III 2009)).
257. See Scheindlin & Rabkin, supra note 243, at 364.
258. U.S. DEP'T OF JUST., supra note 254, at 134.
259. Id.
mitted, and the agent, pursuant to a subpoena, compels the Internet service provider to provide the name and address associated with the IP address, and verifies the address, then with that information the agent typically has probable cause to search the suspect’s home computer.260 Electronic communications associated with the suspect would also likely be stored in the cloud.261 By analogy, the agent in this example would have the same probable cause to search the cloud for the electronic communications. In other words, if the information gives rise to probable cause to search the suspect’s home computer, it will also give rise to probable cause to search the suspect’s material stored in the cloud. The sufficient information used to search and acquire the electronic communication in the cloud would be known to the agent prior to the search in the cloud.

The independent nature of an electronic communication search is consistent with the reasoning in Segura, where the Court stated that the information was known to the agents prior to the entry, and was, therefore, an independent source.262 The characteristic of electronic communications being processable, based on entered search terms, supports the notion that the electronic communications “would have been sought even if what actually happened had not occurred.”263 Without a focused search at the outset containing specific information, there would be potentially millions of pages of retrievable text stored as electronic documents.264 Assuming the agent has sufficient information to give rise to probable cause in formulating the search criteria, the search would not be based on information found in the material generated by the search.265

In defending against the criticism that the independent source doctrine fosters a “search first, warrant later mentality,” Justice Scalia notes that:

260. Id. at 65.

In a common computer search scenario, investigators learn of online criminal conduct. Using records obtained from a victim or from a service provider, investigators determine the Internet Protocol (“IP”) address used to commit the crime. Using a subpoena . . . investigators then compel the Internet Service Provider (“ISP”) that has control over that IP address to identify which of its customers was assigned that IP address at the relevant time, and to provide (if known) the user’s name, street address, and other identifying information. In some cases, investigators confirm that the person named by the ISP actually resides at that street address by, for example, conducting a mail cover or checking utility bills. Affidavits that describe such an investigation are typically sufficient to establish probable cause . . . .

261. See Couillard, supra note 18, at 2215.


265. See U.S. DEP’T OF JUST., supra note 254, at 134.
An officer with probable cause . . . would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence . . . [and would have] the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected . . . the law enforcement officers' decision to seek a warrant . . . .266

Based on the processable nature of electronic communications, the burden of convincing a trial court that there was no information gained from the illegal access to electronic communications may be lessened, because in order to have retrieved the documents there must have been information obtained prior to and independent of the search to conduct the search.267 If the information used to conduct the search was sufficient to give rise to probable cause, and the information was used to identify search criteria, then the information was known prior to and independent of the search. Therefore, the risk for the officer that Justice Scalia refers to, in effect, may not be as great as it would be in dealing with others forms of evidence.268

2. Application of the Inevitable Discovery Rule to the Proposed Warrant Requirement

At the time Nix was decided, electronic communication as we know it today did not exist. The reasoning in Nix that “[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered”269 does not apply in an electronic communication world where evidence can be backed up, restored, “mined” for patterns and irregularities, and remotely stored.270 Stored data, on a third party computer, may be backed up by the third party for disaster recovery purposes, which allows for restoration of data to a previous date.271 Additionally, even if an end user deletes an electronic file, it can still technically be recovered with computer forensic services.272 Furthermore, with data mining technology available, patterns in data will reveal information that otherwise would not be obvious.273

266. Murray, 487 U.S. at 540 n.2, 540.
267. Cf. id. at 540, 542 n.3.
268. See id. at 539, 540.
270. See, e.g., Barnhill, supra note 19, at 644; see Data Mining, supra note 246.
271. See Barnhill, supra note 19, at 644.
272. Specialized Hard Drive Data Recovery Services, supra note 247.
273. Data Mining, supra note 246.
Data mining is a special process used to search electronic stored information (ESI). The results of the data mining process will help direct future actions in the discovery process prior to litigation. Generally data mining refers to searching large volumes of data for patterns and irregularities in the data. The patterns and irregularities found, in turn, trigger yet more detailed searches within the data.  

In order to satisfy the inevitable discovery doctrine, the prosecutor only has the burden of a preponderance of the evidence showing that the electronic communication and its contents “would have been [found] by lawful means.” Again, assuming there is sufficient information to obtain a warrant, an agent has the technical ability to process, recover, or access a remote copy in the cloud. In electronic communications, these characteristics increase the likelihood that the electronic communication and its contents would have been found with a lawfully obtained warrant. This may suggest that an officer would be placed in a position to accurately calculate whether the evidence sought would inevitably be discovered, which undermines the court’s reasoning in Nix.

In applying Rodriguez, where the judge believed that a well trained team would have discovered the evidence regardless of King’s statements, there is a circular reasoning in electronic communications because of the processable, restorable, and remotely stored cloud characteristics. In the case where there is sufficient probable cause for a search, a well trained team would almost always have been able to discover documents that are stored in the cloud. The reasoning that applies in the inevitable discovery doctrine becomes circular when applied to electronic communications.

For example, an inevitable discovery argument may arise when a lawfully seized device contains information that may also be stored in the cloud, such as email account information. A potential argument is that the material relating to that account information is stored in the cloud and would be

274. Id.
276. See Barnhill, supra note 19, at 644.
277. See id.
278. Compare Nix, 467 U.S. at 445, with Barnhill, supra note 19, at 644.
280. Compare Nix, 467 U.S. at 445, with Barnhill, supra note 19, at 644.
282. Compare Nix, 467 U.S. at 445, with Barnhill, supra note 19, at 644.
inevitably discovered.284 In one such case, emails were obtained from Microsoft by the government with a warrant.285 The defendant claimed that the warrant lacked probable cause to believe that the email account would contain relevant evidence.286 The government responded that even if the warrant lacked probable cause, the court should deny the motion to suppress based on inevitable discovery.287 The government had lawfully seized the defendant’s cellular telephone which had email information stored on it.288 The government argued that “[t]o the extent that [the] email account information stored on the defendant’s seized telephone overlaps with [the] email account information obtained through the search [through Microsoft] at issue here, the [c]ourt should not suppress that information.”289 The court did not need to address the inevitable discovery issue.290 Nevertheless, the government’s argument was that inevitable discovery should apply where the email account information was unlawfully obtained from the cloud provider, because the email account information was lawfully obtained through another device, and would have inevitably lead to the information in the cloud.291

The aforementioned processable, recoverable, and remotely stored characteristics support the idea that where probable cause exists, the electronic communication and its contents would have been inevitably found with a lawfully obtained warrant, regardless of a prior unlawful access.292 The underlying aim of both the independent source doctrine and the inevitable discovery rule is to protect society by putting police in the same position they would have been in if no violation occurred.293 The nature of electronic communications and applications in the cloud may put police in the same position as they would have been in if no search warrant violation had occurred because of the unique characteristics of electronic communications.294

284. See id.
286. Id. at *1–2.
288. Id.
289. Id. at 16.
292. See id. at 15–16 (citing Nix v. Williams, 467 U.S. 431, 444 (1984)).
294. See Barnhill, supra note 19, at 644–45.
V. CONCLUSION

The Obama administration opposes changes to the existing ECPA, which would make it more difficult for the government to obtain access to the content of electronic communications.295 “[T]he Obama administration testified that imposing constitutional safeguards on email stored in the cloud would be an unnecessary burden on the government. Probable-cause warrants would only get in the government’s way.”296 Nevertheless, the economy would benefit if more users felt secure about cloud computing, and storing their information with third party providers.297

Cloud computing decreases IT costs and increases overall efficiencies, which has a positive impact on the financial health of corporations.298 Financially healthy corporations can hire more people, who in turn will have more disposable income to spend, which will benefit the economy. The size of the cloud computing industry, especially if looked at in combination with the energy industry, is significant enough to have an impact on the economy.299 However, consumers do not want compromised Fourth Amendment rights and will hesitate to convert to a technology where the government has access to the content of their stored electronic communications.300

The counter argument to the current administration's position is presented by the Digital Due Process coalition, arguing that Fourth Amendment privacy issues are not sufficiently protected under the ECPA and calling for reform.301 In particular, the lack of a search warrant requirement, for access to the content of communications stored for more than 180 days, leaves consumer data susceptible to government access.302 The legal protections have not kept up with technology, and the proposed legislation is a step toward providing Fourth Amendment protection to consumers.303 As more consum-

296. Kravets, supra note 295.
297. See Cooke, supra note 22, at 3.
298. See id.
299. Soghoian, supra note 12, at 361.
300. See Balough, supra note 39, at 103; Cooke, supra note 22, at 4; see also About the Issue, supra note 74.
301. See Our Principles, supra note 79.
303. See id. §§ 2-3.
ers are comfortable with storing their private information with third party carriers, the projected growth may be realized.

Unfortunately, the proposed legislation leaves behind smart grid technology.304 Because of the synergies in telecommunications and energy industries, it is predictable that the same Fourth Amendment issues will arise when smart grid technology is universally deployed.305 The economy would benefit from the deployment of smart grid—it is estimated that 280,000 jobs will be created.306 In order for this to occur, consumers will need to feel comfortable with privacy protections.307 Additionally, the use of smart grid technology would improve the environment.308 Judicial, government and technical resources would be more efficiently used if both industries were addressed together, and the proposed legislation included a warrant requirement for government access to the content of smart grid information.

Further, in order to address all the Fourth Amendment privacy issues, the current bill should consider how the independent source doctrine and inevitable discovery doctrine might apply to electronic communications. Maybe safeguards aimed at avoiding these exceptions could be incorporated into the proposed legislation. The processable and recoverable characteristics of electronic communications, coupled with remote storage in the cloud, support the circular reasoning of these doctrines. There will be minimal risks to the “search now, warrant later” mentality. Law enforcement agents may be able to get around the search warrant requirement because they will be able to easily meet the threshold inquiries of these doctrines. Consequently, the proposed warrant requirement may be just a futile effort and may be meaningless in certain instances. The proposed legislation might better address Fourth Amendment privacy concerns if it considered the exceptions of the independent source and inevitable discovery doctrines.

305. Balough, supra note 39, at 172.
306. Energy Bar Association Panel Discussing the Smart Grid, supra note 1, at 89.
307. Id.
308. Id.
THIS IS MY CASTLE: ON BALANCE, THE FREEDOM OF CONTRACT OUTWEIGHS CLASSIFYING THE ACTS OF HOMEOWNERS' ASSOCIATIONS AS STATE ACTION

GRANT J. LEVINE

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I. INTRODUCTION

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 a 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

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(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.*
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.\footnote{See infra Part V.} 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\footnote{See Todd Brower, Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations, 7 J. LAND USE & ENVT'L. 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.} and practical “vested expectations”\footnote{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).} will be protected.\footnote{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).} 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.\footnote{See infra Part VI.} 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.\footnote{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”).} Its scope will be limited to Florida’s relatively young homeowners’ associ-
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

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.
28. Rathbun, supra note 20; 2010 U.S. Profile of General Population and Housing Characteristics, supra note 26; UNITED STATES PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, US CENSUS BUREAU 1 (2000), http://censtats.census.gov/data/US/01000.pdf. In 2000, there were 115.9 million housing units in the United States, and only 17.8 million of them were represented by community associations. Rathbun, supra note 20; UNITED STATES PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, supra.
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-

33. OPPAGA REP. NO. 10-20, supra note 32, at 3.
34. Id.
35. Id.
36. Id.; COMM. ON REGULATED INDUS., supra note 31, at 6.
38. COMM. ON REGULATED INDUS., supra note 31, at 6. Other sources estimate a higher figure. For example, private industry research estimates that there are 22,320 condominium associations in Florida. See 2011 2nd Qtr Florida Community Association Reference Directories, supra note 37. An analysis of Florida’s DBPR yields a total of 26,773 condominium associations licensed with the DBPR. See Florida Condominiums, Timeshares, and Mobile Homes, FLA. DEP’T OF BUS. & PROF’L REG., http://www.myfloridalicense.com/dbpr/sto/file_download/lsc_download.shtml (follow “North Florida Counties” hyperlink, “Central Florida East Counties” hyperlink, “Central Florida West Counties” hyperlink, “Dade and Monroe Counties” hyperlink, and “Broward and Palm Beach Counties” hyperlink and add
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


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


42. Compare Florida Census 2000 Profile, supra note 39, at 1


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-
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. DUNBAR & DUDLEY, supra note 30, at 7–8, 90. These restrictive covenants are said to “‘run[] with the land’ as a set of permanent restrictions governing [the community’s] use.” Id. at 7.
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.
73. FLA. STAT. § 720.301(1).
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 covenanitng 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 equates to one’s voluntary choice of restricting property use, and the view that consent cannot be voluntary where homeowners lack bargaining power to negotiate these restrictive covenants or lack the faculties to understand them or even be cognizant of their existence.

However, the decision to purchase in a CIC governed by a homeowners’ association is not the Hobson’s choice that some of these commentators have alleged. 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. It might also be the case that the potential homebuyer might not be aware of the restrictions he or she is buying into. Nevertheless, studies suggest that “87% of residents were told the home they were considering was part of a community association.” 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). But see Laura Coon, 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, supra note 18, at 135 (referring to community associations as “ostensibly voluntary in membership.”); Siegel, 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.”).

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).


89. Margaret Farrand Saxton, Comment, 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. 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. See Hagan, 186 So. 2d at 310–12; DUNBAR & DUDLEY, supra note 30, at 8.

90. A “Hobson’s choice” is “[a]n election by compulsion or without freedom of choice; a choice without an alternative.” BALLENTINE’S LAW DICTIONARY 561 (3d ed. 1969).

91. DUNBAR & DUDLEY, supra note 30, at 74; Siegel, supra note 42 at 469.


93. 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} Id.

\textsuperscript{100} Id. at 424.

\textsuperscript{101} See Randolph, Jr., supra note 16, at 1125; see also Fennell, supra note 15, at 832 (“[C]ommunity associations are often viewed as representing a laudable shift in the direction of consumer choice.”).
choice."\textsuperscript{102} 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.\textsuperscript{103} 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.\textsuperscript{104} This voluntary choice of communal belonging is accompanied by the use restrictions necessary to achieve and perpetuate the desired development scheme.\textsuperscript{105}

While free, unrestricted use of property is generally favored,\textsuperscript{106} 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.\textsuperscript{107} 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.\textsuperscript{108} Some might argue, and with merit, that the proliferation of homeowners' associations and community associations in general leaves prospective homeowners with fewer options.\textsuperscript{109} Compounded by the fact that one in five Americans, and more significantly, one in three Floridians, lives in a community association,\textsuperscript{110} 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,\textsuperscript{111} 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

\begin{itemize}
\item \textsuperscript{102} Randolph, Jr., supra note 16, at 1125.
\item \textsuperscript{103} Brower, supra note 15, at 205–06.
\item \textsuperscript{104} \textit{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.").
\item \textsuperscript{105} \textit{Id.} at 223–25.
\item \textsuperscript{106} Sinclair Ref. Co. v. Watson, 65 So. 2d 732, 733 (Fla. 1953) (en banc).
\item \textsuperscript{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 . . .").
\item \textsuperscript{108} \textit{See} Fennell, supra note 15, at 832; \textit{see also} Ellickson, supra note 86, at 1520.
\item \textsuperscript{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 homeowner who wishes to purchase a new home is likely to find that home in a private development governed by a homeowners association.").
\item \textsuperscript{110} \textit{See} discussion supra Part II.A.
\item \textsuperscript{111} \textit{See} Brower, supra note 15, at 248.
\end{itemize}
The voluntary nature of mandatory homeowners' association membership is more apparent when distinguished from the contrary, involuntary nature of city or municipality membership. A homeowner acquires membership in a homeowners' association by purchasing a parcel of land in a CIC governed by one. 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." 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. 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. This comparison leads into the premise, discussed later, that homeowners' associations should not be likened to municipalities.

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 aesthetics to the well-manicured common areas, the system of restrictive covenants is evident. Beginning in the early twentieth century, restrictive covenants emerged as developers' primary means of implementing their subdivision plans. By recording a master declaration of CC&Rs, the de-
veloper 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.\textsuperscript{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,\textsuperscript{133} these characterizations are misplaced and largely embellished.

The limitations on an association's board of directors is apparent in the \textit{Basso} decision: It distinguished a CIC's CC&Rs from those rules and regulations "promulgated by the association's board of directors,"\textsuperscript{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."\textsuperscript{135}

Further protection from arbitrary or exceedingly\textsuperscript{136} unreasonable restrictions can be found in federal and state statutes.\textsuperscript{137} 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."\textsuperscript{138} Additionally, Florida prohibits certain covenants that give unilateral association decision making power to emancipated developers\textsuperscript{139} and preempts covenants that infringe upon a homeowner's right to fly an American flag.\textsuperscript{140}

\begin{thebibliography}{9}
\bibitem{132} \textit{Basso}, 393 So. 2d at 640.
\bibitem{133} See Sharon L. Bush, \textit{Beware the Associations: How Homeowners' Associations Control You and Infringe upon Your Inalienable Rights!}, 30 W. St. U. L. Rev. 1, 4–5 (2003) (contending that homeowners' associations, whose "[e]motionally entrenched board members . . . make up their own rules" while "wielding a big stick," control every aspect of homeowners' lives, likening them to "giant bulldozers that ravage the rights of homeowners"); Paula A. Franzese & Steven Siegel, \textit{Trust and Community: The Common Interest Community as Metaphor and Paradox}, 72 Mo. L. Rev. 1111, 1130 (2007) (asserting that "homeowners association boards can devolve into mini-autocracies").
\bibitem{134} \textit{Basso}, 393 So. 2d at 639.
\bibitem{135} \textit{Id.} at 640; see also \textls[75]{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.").
\bibitem{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." \textit{Basso}, 393 So. 2d at 640 (emphasis omitted).
\bibitem{137} See e.g., 42 U.S.C. § 3604(b) (2006); \textls[75]{FLA. STAT. § 720.3075(1)(a).
\bibitem{138} 42 U.S.C. § 3604(b).
\bibitem{139} \textls[75]{FLA. STAT. § 720.3075(1)(a).
\bibitem{140} \textls[75]{Id. §§ 720.304(2)(a), 720.3075(3).
\end{thebibliography}
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

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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.149 In addition to benefitting from a harmonized aesthetic and development scheme,150 homeowners in a CIC governed by a community association benefit from increased property values.151 In fact, 70% of homeowners living in association-governed CICs believe their communities' rules enhance their property values.152 Similarly, 71% of these residents rate their experience living under the governance of these community associations as positive.153 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.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.155

Beyond those values ascertainable by survey, the historical development of CICs promoted certain ideals, still important today.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."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.158 Aesthetic policies such as building restrictions serve to protect the integrity of the community's appearance and development scheme.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,160 porches,161 decks,162 satellite dishes,163 ham radio antennas,164 radio tower/antennas,165 docks,166 exterior awnings,167 sheds and similar struc-
ures,\textsuperscript{168} improper fencing,\textsuperscript{169} concrete walls,\textsuperscript{170} an exterior wall plaque,\textsuperscript{171} and a portion of a dwelling encroaching on a setback line\textsuperscript{172} between parcels.\textsuperscript{173} However, their enforcement depends on the existence of a recorded CC&R regulating an aesthetic scheme.\textsuperscript{174} 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 \textit{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.”\textsuperscript{175}

This limitation preserves homeowners’ autonomy in deciding which architectural scheme they desire to buy into and ensures that an imputant board of directors will not be successful in enforcing arbitrarily-adopted building or aesthetic restrictions\textsuperscript{176} not contemplated by the community’s CC&Rs—the restrictions to which homeowners voluntarily acquiesced by purchasing in the community.\textsuperscript{177} 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.\textsuperscript{178}

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.\textsuperscript{179} Unfortunately, the media exposure given to homeowners’

\textsuperscript{169} James v. Smith, 537 So. 2d 1074, 1075, 1078 (Fla. 5th Dist. Ct. App. 1989).
\textsuperscript{170} Velickovich v. Ricci, 391 So. 2d 258, 259 (Fla. 4th Dist. Ct. App. 1980).
\textsuperscript{171} Lakeridge Greens Homeowners Ass’n v. Silberman, 765 So. 2d 95, 96 (Fla. 4th Dist. Ct. App. 2000).
\textsuperscript{172} Daniel v. May, 143 So. 2d 536, 537–38 (Fla. 2d Dist. Ct. App. 1962).
\textsuperscript{173} DUNBAR & DUDLEY, supra note 30, at 107.
\textsuperscript{174} Young v. Tortoise Island Homeowner’s Ass’n, 511 So. 2d 381, 384 (Fla. 5th Dist. Ct. App. 1987).
\textsuperscript{175} Id. (footnotes omitted).
\textsuperscript{176} See, e.g., Voight v. Harbour Heights Improvement Ass’n, 218 So. 2d 803, 806 (Fla. 4th Dist. Ct. App. 1969) (per curiam).
\textsuperscript{177} Ellickson, supra note 86, at 1523; see discussion supra Part II.C.
\textsuperscript{178} See Fennell, supra note 15, at 843–44, 872 (discussing aesthetic values by analogy of ugly yard art and the resulting aesthetic dismay and diminution of property value due to loss of the community ambiance).
\textsuperscript{179} See, e.g., Callies et al., supra note 42, at 185 (“Increasingly, [homeowners’] associations are described as rigid, uninspired, and excessively concerned with compliance and con-
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

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.


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}

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{See id.} This is important because it concerns the enforceability of the restriction. \textit{See supra} text accompanying notes 174–75.
\textsuperscript{189} \textit{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.”).
\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. \textit{See HOA TASK FORCE, supra} note 19, at 3.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{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.”).
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

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.\textsuperscript{205} 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.\textsuperscript{206}

Homeowners acquiesce to many of these aesthetic and community-makeup restrictions at the expense of certain liberties otherwise protected by the First Amendment.\textsuperscript{207} 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."\textsuperscript{208} 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.\textsuperscript{209} 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.\textsuperscript{210} Because his community's CC&Rs prohibited the display of signs of any type without prior approval,

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\item \textsuperscript{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.
\item \textsuperscript{206} See infra Part IV.A.
\item \textsuperscript{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.
\item \textsuperscript{208} DUNBAR & DUDLEY, supra note 30, at 75.
\item \textsuperscript{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.").
\item \textsuperscript{210} Lisa J. Hurish, Coral Springs Homeowners Association Orders Cop to Remove His 'God Bless America' Sign, TRIB. BUS. NEWS, Aug. 28, 2010.
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the association demanded that the homeowner remove it.\footnote{Id.} 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.\footnote{Id.; Dunbar & Dudley, supra note 30, at 96 (discussing the importance of uniform enforcement and the consequences of selective enforcement).}

Another area of controversy may come as a surprise after reading the FHA protections, which apply to both public and private actors.\footnote{See generally 42 U.S.C. §§ 3601-3619 (2006).} 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."\footnote{Id. § 3604(b).} However, issues may arise with religion-neutral restrictions, which do not favor one religion over another, but rather espouse a religion-free environment.\footnote{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.").} 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,\footnote{See infra Part V.} the legislature seems to be the only means of change.\footnote{Carmella, supra note 215, at 58.} 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.\footnote{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).} The court held that the owners' right to assemble\footnote{Neuman, 861 So. 2d at 498.} is not absolute, and that "the statute itself permits the reasonable regulation of that right."\footnote{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.\(^{222}\)

As a result of their decision to voluntarily covenant to abide by a community's CC&Rs, homeowners have a vested expectation\(^{223}\) that such restrictions will be followed and enforced.\(^{224}\) They moved into a CIC with the desire to restrict many aspects of the community in order to maintain its attractive aesthetic appearance,\(^{225}\) and to protect, further, and support their "investment-backed expectations."\(^{226}\) After all, such rules and regulations "create and maintain the atmosphere and lifestyle that attracted the[se] residents in the first place."\(^{227}\) In fact, 82% of homeowners believe they receive a favorable return on their investment.\(^{228}\) 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?\(^{229}\) 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.\(^{230}\)

other purposes and the prohibition applied evenly to all residents of all religions as a total exclusion).

\(^{222}\) See Carmella, 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.").

\(^{223}\) See infra Part IV.

\(^{224}\) See supra Part II.B.

\(^{225}\) See supra text accompanying notes 119–23.

\(^{226}\) Brower, supra note 15, at 205; see also Paula A. Franzese, 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.”).


\(^{228}\) CMTY. ASS’NS INST., supra note 94, at 6.

\(^{229}\) 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. See supra note 12 and accompanying text; see also infra Parts IV–V.

\(^{230}\) See DUNBAR & DUDLEY, supra note 30, at 96.
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.\(^\text{231}\) Where municipalities are unwilling or unable to provide services desired by homeowners, a private entity steps in to do just that.\(^\text{232}\) 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.\(^\text{233}\)

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.\(^\text{234}\) 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.\(^\text{235}\) Overall, residents are satisfied with the services homeowners'

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\(^{231}\) See David L. Callies & Adrienne I. Suarez, Privatization and the Providing of Public Facilities Through Private Means, 21 J.L. & Pol. 477, 477 (2005) (describing the privatization of services formerly provided by local governments as the result of budget shortfalls); McKenzie, supra note 18, at 11 (“[F]inancially strapped local governments . . . found [community association governed] housing appealing because it had features of private infrastructure, allowing communities to grow and add property-tax payers at reduced public cost.”); Uriel Reichman, Toward a Unified Concept of Servitudes, 55 S. Cal. L. Rev. 1177, 1238 (1982).

\(^{232}\) That private entity, the homeowners' association, can provide these services through collection of assessments that are in addition to property taxes homeowners would normally pay to a city or municipality. See, e.g., Paul Boudreaux, Homes, Rights, and Private Communities, 20 U. Fla. J.L. & Pub. Pol'y 479, 490 (2009) (“As private developers became willing and able to handle infrastructure that traditionally was provided for by government—laying out streets, burying sewer lines, fixing street lights, and collecting garbage—local governments discovered that it was financially beneficial for them . . . that these expensive tasks be performed by the . . . [homeowners’ association].”).

\(^{233}\) See Callies et al., supra note 42, at 181–82 (noting that gating out nonresidents can provide a sense of security and safety, and that "private [security] officers outnumber public police officers three to one." (quoting John B. Owens, Westec Story: Gated Communities and the Fourth Amendment, 34 Am. Crim. L. Rev. 1127, 1129 (1997) (internal quotations marks omitted))); Callies & Suarez, supra note 231, at 492 (“CICs promise privacy, exclusivity, and the perception of safety.”); Peña, supra note 42, at 327 (observing that homeowners' associations “fill[] [the] perceived gap in [municipal provision of safety and security] service[s] by employing security guards and constructing entrance gates”).

\(^{234}\) Brower, supra note 15, at 205; see also Peña, supra note 42, at 327 (“[A]s cities skirted maintenance duties associated with community developments by refusing to accept the responsibility of the communities' road systems, [homeowners' associations] stepped in as a necessary private vehicle for providing . . . road and esplanade maintenance.”).

\(^{235}\) CMTY. ASS'NS INST., supra note 94, at 5.
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 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. 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. 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. 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.

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. 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." How-

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).
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.\textsuperscript{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, “[f]uture purchasers with notice [of such restrictions] ‘buy into’ those expressions of liberty, and these choices are deemed to be theirs as well.”\textsuperscript{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.\textsuperscript{253} These abridgements may include restrictions on public assembly,\textsuperscript{254} the right to free speech and political expression,\textsuperscript{255} and the right to travel.\textsuperscript{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.\textsuperscript{257} As one scholar eloquently stated:

\begin{quote}
[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.\textsuperscript{258}
\end{quote}

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,”\textsuperscript{259} it also serves to protect against a modern-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{251} Korngold, \textit{supra} note 21, at 1548. This respect for individual choice is subject to “overriding public policy consideration[s].” \textit{Id.}
\item\textsuperscript{252} \textit{Id.} at 1547–48.
\item\textsuperscript{253} See David J. Kennedy, Note, \textit{Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers}, 105 \textit{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.”).
\item\textsuperscript{254} \textit{See supra} note 219 and accompanying text; \textit{see also} Siegel, \textit{supra} note 42, at 469–70 (“restrict[ing] public assembly on [CIC] streets”).
\item\textsuperscript{255} \textit{See supra} text accompanying notes 207–12.
\item\textsuperscript{256} Kennedy, \textit{supra} note 253, at 770 & n.49.
\item\textsuperscript{257} \textit{See Korngold, supra} note 21, at 1543–44.
\item\textsuperscript{258} Singer, \textit{supra} note 2, at 1028.
\end{enumerate}
\end{footnotesize}
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.”

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.

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.

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.” 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. As controversial as that may seem, there are many other acceptable means of contracting away one’s right to free speech. In everyday transactions, people enter into “contracts of silence” 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.286 Property as an institution should be afforded the same
independence in contracting as with any other private contract.287 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 prop-
erty.

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

The Constitution’s explicit distinction between the public sphere288 and
private property289 is a testament to the notion that it did not contemplate
private conduct as falling within its purview.290 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.291 This doctrine stands for “the principle that only government ac-
tors are subject to constitutional rules.”292 This is because “[o]ne great object
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.”

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. 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. 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 and its conduct cannot fairly be deemed that of the states’. Indeed, “private autonomy is a fundamental notion implicit in American law: maintaining a separation of private and public spheres of activity.”

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” or those that affect nonresidents. Whatever balance is struck between these competing values, one thing remains constant: Absent “an overriding public policy consideration,” constitutional scrutiny will not interfere with private conduct without state action. 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

295. See supra Part II.C, IV.A.
296. Shelley v. Kraemer, 334 U.S. 1, 13 (1948); see infra Part V.B–C.
298. See Siegel, supra note 42, at 468.
299. See Kennedy, supra note 253, at 761.
300. See Korngold, supra note 21, at 1548.
301. 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)).
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, JJ., 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).
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.317

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

In Quail Creek Property Owners Ass’n v. Hunter,320 a homeowner challenged the constitutionality of a restrictive covenant prohibiting the display of signs of any kind on any property in his subdivision.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.”322

Despite this clear, logical extension of Shelley, a later case muddied the water. In Gerber v. Longboat Harbour North Condominium, Inc.,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.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,325 its applicability was prospective, leaving the court to consider the constitutional issues.326 The court expressly relied on Shelley while disagreeing with Quail Creek,327 hold-

317. Id. at 624.
318. “All that we here determine is that the original requirement of membership in the specific exclusion of Jews constituted an illegal and unenforceable restraint on these appellants... As to them the requirement could not be enforced. This opinion is not to be given any broader interpretation.” Id. at 625.
319. See Cantora, supra note 86, at 426 (“[A]lmost all courts and commentators today agree that the Shelley decision should be interpreted very narrowly.”); Siegel, supra note 42, at 493 (“Virtually all courts and commentators agree that the reach of the Shelley doctrine should be restricted.”).
320. 538 So. 2d 1288 (Fla. 2d Dist. Ct. App. 1989) (per curiam).
321. Id. at 1289.
322. Id.
324. Id. at 885–86.
327. Id. “This Court cannot agree with [Quail Creek’s] conclusion that judicial enforcement of racially restrictive covenants is state action and judicial enforcement of covenants which restrict one’s right to patriotic speech is not state action.” Id. at 886–87.
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.\textsuperscript{328} On reconsideration, the same court vacated in part on other grounds, and reaffirmed partial summary judgment as to the issue of state action.\textsuperscript{329} The court reiterated its reliance on \textit{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."\textsuperscript{330} This extension of \textit{Shelley} did not enjoy any camaraderie in later cases or even in other jurisdictions.\textsuperscript{331} Perhaps the most perplexing inconsistency with \textit{Gerber}'s reasoning is its misplaced reliance on \textit{Shelley}: While \textit{Gerber} posits to rely on \textit{Shelley}'s principle that judicial enforcement of a racially restrictive covenant constitutes state action, \textit{Gerber} found state action before the state, through its judiciary branch, even acted;\textsuperscript{332} whereas \textit{Shelley} overturned an actual judicial decree that enforced the restrictive covenant at issue.\textsuperscript{333}

Recognizing that the issue of whether judicial enforcement of a restrictive covenant curtailing First Amendment rights constitutes state action "is not well settled,"\textsuperscript{334} the court in \textit{Sabghir v. Eagle Trace Community Ass'n}\textsuperscript{335} was faced with a homeowner seeking to enjoin his homeowners' association from enforcing a restrictive covenant prohibiting the display of his political

\textsuperscript{328}. \textit{Id.} at 886.
\textsuperscript{330}. \textit{Id.} at 1341.
\textsuperscript{331}. \textit{See supra} note 311 and accompanying text; \textit{Loren ex rel. Aguirre v. Sasser}, 309 F.3d 1296, 1303 (11th Cir. 2002) (per curiam); \textit{Davis v. Prudential Sec., Inc.}, 59 F.3d 1186, 1191 (11th Cir. 1995); \textit{Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n}, 29 P.3d 797, 810 (Cal. 2001); \textit{Goldberg v. 400 E. Ohio Condo. Ass'n}, 12 F. Supp. 2d 820, 821–23 (N.D. Ill. 1998) (criticizing \textit{Gerber} on several grounds: Its reliance on \textit{Shelley} is unfounded, because "\textit{Gerber} found state action before the state acted"; "old-fashioned patriotism, rather than old-fashioned legal reasoning, is the source of the \textit{Gerber} opinion's persuasive force"; and the court agreed with \textit{Quail Creek}, declaring that "\textit{Gerber} is not good law").
\textsuperscript{332}. \textit{See Goldberg}, 12 F. Supp. 2d at 822.
\textsuperscript{333}. \textit{Shelley v. Kraemer}, 334 U.S. 1, 20, 23 (1948).
\textsuperscript{335}. No. 96-6964-CIV-HURLEY, 1997 WL 33635315 (S.D. Fla. Apr. 30, 1997).
signs. 336 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. 337 Relying on this additional vari-
able, the court denied the homeowners’ association’s motion to dismiss, find-
ing it unwarranted “based upon the mere allegation of no state action.” 338
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.” 339

In Loren ex rel. Aguirre v. Sasser, 340 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. 341 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. 342 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 en-
forcement of a restrictive covenant restricting the ability of a homeowner
to place a sign on her property. 343 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. 344

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 recog-
nized 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.\textsuperscript{345} The public function doctrine\textsuperscript{346} was originally espoused in \textit{Marsh v. Alabama},\textsuperscript{347} 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.\textsuperscript{348} 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.”\textsuperscript{349} In \textit{Hudgens v. National Labor Relations Board},\textsuperscript{350} the Court read \textit{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.”\textsuperscript{351} This “remains the prevailing federal constitutional standard for determining whether a private community is the functional equivalent of a municipality.”\textsuperscript{352}

In \textit{Brock v. Watergate Mobile Home Park Ass’n},\textsuperscript{353} residents of a mobile home park brought an action against their homeowners’ association and its directors for various alleged violations of their civil rights.\textsuperscript{354} They proceeded under two different theories of state action: public function and state involvement.\textsuperscript{355} 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

\textsuperscript{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)).

\textsuperscript{346} This doctrine is known by various names, including the “functional equivalent of a municipality theory.” Siegel, \textit{supra} note 42, at 471.

\textsuperscript{347} 326 U.S. 501 (1946).

\textsuperscript{348} \textit{id.} at 503, 509–10.

\textsuperscript{349} \textit{id.} at 502–03, 507–08.

\textsuperscript{350} 424 U.S. 507 (1976).

\textsuperscript{351} \textit{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)).

\textsuperscript{352} Siegel, \textit{supra} note 42, at 474–75.

\textsuperscript{353} 502 So. 2d 1380 (Fla. 4th Dist. Ct. App. 1987).

\textsuperscript{354} \textit{id.} at 1381.

\textsuperscript{355} \textit{id.}; \textit{see infra} Part V.A.3 (discussion of state involvement theory).
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.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.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.367 A broader reading proffering a contrary view would threaten the ability of private individuals to contract to restrict the use of property.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.”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.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.”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.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,373 it

365. Brock, 502 So. 2d at 1382.
366. See supra Part V.A.1.
367. See id.
368. Cantora, supra note 86, at 426.
369. Id.
371. Id.
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, 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

374. See, e.g., Brock, 502 So. 2d at 1381–82.
375. Id.
376. Cantora, supra note 86, at 425.
377. Ellickson, supra note 86, at 1523.
378. Michelman, supra note 294, at 1167.
379. See Brock, 502 So. 2d at 1382; Cantora, supra note 86, at 425; Ellickson, supra note 86, at 1523; Michelman, supra note 294, at 1167.
380. Brock, 502 So. 2d at 1382.
381. Cantora, supra note 86, at 426.
382. Id. at 425.
383. Telephone Interview with Jay Steven Levine, Founding Att'y, Jay Steven Levine Law Grp. (July 19, 2011). Mr. Levine has been practicing community association law for over thirty years and runs his practice out of multiple offices, the main of which is located in Boca Raton, Florida. Id.
used. This is also the prevailing view of most attorneys in this area of prac-
tice." 384

C. Why Quasi-Governmental Status for Homeowners’ Associations is
Dangerous

As it stands, under the current state action tests, the acts of homeown-
ers’ associations remain without state action designation. 385 In response,
some commentators propose a per se rule that would characterize homeown-
ers’ associations as a new form of government, classifying them as “quasi-
governmental” entities, 386 and thereby subjecting their conduct to the Consti-
tution and its protections and limitations. 387

However, such an extension of the state action doctrine would be dan-
gerous. 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 en-
force them. 388 It would strip any meaning from restrictive covenants, and
essentially, the freedom of contract. 389 This strongly militates against such a
per se rule. 390 As an alternative, one commentator proposed a multi-part state
action balancing test, which necessarily takes into consideration many perti-
nent factors relevant to the nature and operation of CICs and homeowners’
associations. 391 Concededly complex, 392 this unwieldy test, if adopted by

384. Id.
385. See Cantora, supra note 86, at 425; Rahe, supra note 260, at 546 (“[F]uture litigation
will determine when, and if, a homeowners’ association becomes a state actor.”).
386. See, e.g., Kennedy, supra note 253, at 763 (suggesting community associations are
quasi-governmental in nature).
387. See MCKENZIE, supra note 18, at 135–36 (advocating that homeowners’ associations
function as private governments); see also Kennedy, supra note 253, at 764 (advocating a per
se classification treating homeowners’ associations as state actors); Siegel, supra note 42, at
561–63 (arguing for recognition, under a complex multi-factor test, of homeowners’ associa-
tions as state actors in order protect the constitutional rights of their residents).
388. See e.g., Siegel, 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.” 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.
See id. at 469–71.
389. See id.
390. See id. at 469–70.
391. See Siegel, supra note 42, at 555–57. These factors include:
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.\footnote{Chadderdon, supra note 209, at 264; Kennedy, supra note 253, at 763–64, 789–91.} Indeed, such a proposition would entail “transferring property from the private sphere to the public . . . result[ing] in the . . . deprivation of Americans’ property rights.”\footnote{Rahe, supra note 260, at 527.} 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.\footnote{See supra text accompanying notes 368–71.} 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.\footnote{Cantora, supra note 86, at 426.} 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.