HOMEOWNERS' ASSOCIATIONS AND THE USE OF PROPERTY PLANNING TOOLS: WHEN DOES THE RIGHT TO EXCLUDE GO TOO FAR?

I. INTRODUCTION

A homeowners' association ("HOA") governs a growing number of suburban American communities.[1] Oftentimes, the presence of an HOA as a mechanism of private government is beneficial to community members and is a main incentive for why homeowners choose what property to purchase.[2] Because of their broad decision-making powers and judicial discretion, however, HOAs sometimes make controversial decisions by overreaching what one would define as the "normal" functions of HOAs.[3] In several recent, controversial decisions in property planning, HOAs may have crossed into illegality by violating constitutional norms.[4]

In Naples, Florida, Tom Monaghan, the founder of Domino's Pizza and a devout Catholic, has attempted to use property planning and HOAs to form the town of Ave Maria, which is considered to be "America's first gated Catholic community."[5] Monaghan, focusing on religious philanthropy, has spent millions of dollars in attempting to advance the moral teachings of the Catholic Church while combating the "morally corroded secularism of modern America."[6] His most recent project, Ave Maria, consists of a 5000-acre plot with plans for 11,000 homes, a commercial district controlled by Monaghan, and a Roman Catholic university.[7] Although the homeowners in Ave Maria will own their property,

1. See *infra* Part II.A for a detailed discussion of the emergence, benefits, and criticisms of common-interest communities ("CICs"). CICs, which include HOAs, are real estate developments or neighborhoods in which the lots are burdened by a servitude imposing certain obligations and are governed by an association. See *infra* Part II.A for a detailed definition of CICs.

2. Margaret Farrand Saxton, Comment, *Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities*, 51 UCLA L. REV. 1437, 1442, 1448 (2004) (noting that proponents of CICs extol associations' ability to offer residents services that municipalities cannot provide).

3. *See, e.g.*, Michael Pollan, *Town-Building Is No Mickey Mouse Operation*, N.Y. TIMES MAG., Dec. 14, 1997, at 56, *available at* http://www.magicalmouse.com/celebration/nytimes971214/article1.html (describing strict HOA rules of Celebration, a private town owned by Disney, in which Disney retains right to approve any change to covenants and to control physical character of town for as long as it wishes). See *infra* notes 5-18 for examples of controversial use of HOAs.

4. *E.g.*, Jeff Huber & Jerry Soucy, *Tom Monaghan's Pizza Pilgrimage*, EPLURIBUS MEDIA, Mar. 11, 2006, http://www.epluribusmedia.org/features/2006/0311tom_monaghan.html (questioning whether Ave Maria, private town to be based on Catholic principles, will violate constitutional rights, including First Amendment free expression of religion).

5. Adam Reilly, *City of God: Tom Monaghan's Coming Catholic Utopia*, BOSTON PHOENIX, June 17, 2005, at 17.

6. *Id.*

7. Susannah Meadows, *Halfway to Heaven: A Catholic Millionaire's Dream Town Draws Fire*,

Monaghan and the town developer, Barron Collier, will retain all control over the commercial property.[8] In 2004, Monaghan announced that

> you won't be able to buy a Playboy or Hustler magazine in Ave Maria Town. We're going to control the cable television that comes in the area. There is not going to be any pornographic television in Ave Maria Town. If you go to the drug store and you want to buy the pill or the condoms or contraception, you won't be able to get that in Ave Maria Town.[9]

Indeed, Monaghan has backed down somewhat from his 2004 claims.[10] Nevertheless, the American Civil Liberties Union has threatened lawsuits[11] and others question whether Ave Maria will violate the constitutional norms guaranteed by the First Amendment, including the right to free speech and exercise of religion.[12]

In the same state, the town of Celebration is facing similar First Amendment concerns. Celebration, built by the Disney Corporation, aims to be a modern day "City on a Hill," based on a foundation of "community" values enforced through the town's HOA.[13] Undeveloped real estate in Orlando, the desire for a safe and welcoming community, property values, and dissatisfaction with the Florida public school system led many homeowners to choose to move to Celebration.[14] These benefits have come at a price for homeowners: they are subject to HOA rules and regulations.[15] These rules call for the surrender of many rights that one would expect from a municipal government, including the HOA's inability to "change any rule or restriction in Celebration 'without prior notice to and the written approval of the Celebration Company.'"[16] The political minority in Celebration oftentimes finds itself to be "'powerless against the association and the association . . . powerless against Disney.'"[17] Many consider

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NEWSWEEK, Feb. 27, 2006, at 39, 39.

8. Brian Skoloff, *He's Bankrolling Florida Town Where Catholicism Would Rule*, SEATTLE TIMES, Mar. 2, 2006, at A1.

9. Naomi Schaefer Riley, *Domino's Illuminatio Mea*, WALL ST. J., Aug. 19, 2006, at A10 (internal quotation marks omitted).

10. *Id.*

11. *Id.*

12. Huber & Soucy, *supra* note 4.

13. Pollan, *supra* note 3.

14. *Id.*

15. *Id.* Such rules include:

> All visible window coverings must be either white or off-white. A resident may hold only one garage sale in any 12-month period. A single political sign (measuring 18 by 24 inches) may be posted for 45 days prior to an election. Any activity that "detracts from the overall appearance of the properties" is prohibited — including the parking of residents' pickup trucks on the street.

Id. at 78.

16. *Id.* (quoting Celebration's covenants). Most of the town is privately owned by Disney, including the town hall. Pollan, *supra* note 3. In addition, all municipal services are privatized. *Id.* The responsibility of managing the privatization lies with Celebration's HOA. *Id.*

17. *Id.* (quoting Evan McKenzie, lawyer and expert on HOAs).

Celebration disconcerting, manufactured, and undemocratic.[18]

This Comment examines the development of common-interest communities ("CICs") and HOAs in American culture, including their prevalence and expansion into American community planning. Part II.B discusses the U.S. Supreme Court decisions that address the state action doctrine as applied to private property owners in the context of how the right to exclude balances with other interests. Additionally, Part II.C addresses the business judgment rule, which is the standard applied by most jurisdictions in analyzing decisions of the HOA directors and officers. Furthermore, Part II.D analyzes federal statutes and their applicability to limiting the intrusion of constitutional norms by HOAs.

Part III of this Comment evaluates the existing law pertaining to HOAs and concludes that such law is inadequate to protect the fundamental rights of property owners from HOAs. More specifically, Part III.A argues that the inapplicability of the state action doctrine to HOAs necessitates a change in what constitutes state action. Next, Part III.B acknowledges that HOAs are not subject to state action analysis and concludes that the right to exclude goes too far in allowing HOAs to enforce discriminatory policies. Part III.C then argues that the business judgment rule is unable to protect homeowners from overreaching associations. Part III.D asserts that states should adopt a fundamental rights inquiry analysis to protect homeowners from overreaching HOAs. Such inquiry would consist of balancing fundamental rights afforded by state constitutions against the reasonableness of the HOA decisions. In conclusion, this Comment determines that the current law on HOAs is not able to protect homeowners' fundamental rights.

II. OVERVIEW OF EXISTING LAW

Over the past thirty years, CICs and HOAs have become staples of American community planning. Many champion a CIC's ability to provide desirable services that local governments are unable to provide adequately.[19] The emergence of the privatization of government services, however, has provided issues that need addressing, including the encroachment on constitutional norms expected by homeowners.[20] The U.S. Supreme Court decisions that are applicable to CICs involve the state action doctrine and the right to exclude balanced against other interests.[21] In addition, the business judgment rule, codified in most states, is the applicable standard to which most decisions of the HOA directors and officers are analyzed.[22] There are a few federal statutes relevant to limiting the intrusion of constitutional norms by

18. *Id.*

19. See *infra* Part II.A for a detailed discussion of CICs and the variety of services they offer.

20. See *infra* Part III for an analysis of the problems presented by CICs.

21. See *infra* Part II.B for a discussion of Supreme Court precedents regarding a private property owner's use of property, the right to exclude, and what constitutes state action.

22. See *infra* Part II.C for a discussion of the business judgment rule and its application to condominium and HOA boards.

CICs.[23]

A. CICs and HOAs—A Background

The law governing CICs is new, rapidly expanding, and "applies to a significant percentage of American homeowners."[24] CICs include condominium complexes, HOAs, cooperatives, planned-unit developments, and master-planned communities.[25] The Third Restatement of Property defines a CIC as "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."[26] Features that distinguish CICs from traditional homeownership are (1) the association governing the community "holds title to the common property . . . and the individual owners share ownership and access to this property" through their membership, (2) "membership in the . . . association is automatic," and (3) members must pay assessments that are "used for maintenance of the common property and other services."[27]

HOAs obtain power through statutes and governing documents and are deemed to have "powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in the declaration."[28] Member-elected boards govern associations in CICs, and these boards are able to exercise all community powers.[29] HOAs owe duties toward their members, in addition to those imposed by the declaration and statute,[30] including using care and prudence, treating members fairly, acting reasonably, and providing members with access to information regarding the CIC.[31]

23. See *infra* Part II.D for a discussion of federal statutory law regarding the regulation of HOAs.

24. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 introductory note (2000); *see also* Laura T. Rahe, Comment, *The Right to Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW. 521, 521 (2002) (noting that as these associations grow increasingly popular they also become increasingly controversial); Saxton, *supra* note 2, at 1437, 1442 (observing that number of Americans living in CICs has reached fifty million, with four million located within restricted-access communities).

25. Saxton, *supra* note 2, at 1440-41. The focus of this Comment is primarily on types of CICs governed by HOAs; therefore, the law that generally applies to HOAs is that which applies to CICs for purposes of this Comment. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2. The distinction between the two for purposes of this Comment is immaterial and thus the terms CICs and HOAs will be used interchangeably.

26. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2.

27. Brian Jason Fleming, Note, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 578 (2006).

28. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.4. CICs have power to raise funds; manage, acquire, and improve property; adopt rules governing property use; enforce rules; amend the original declaration; bring suit, defend, or intervene in litigation; and excuse compliance with CIC rules. *Id.* §§ 6.5-.8, 6.10-.12. CICs do not have power, except to extent granted by declaration or statute, to impose design control, restrictions on structures, or restrictions on landscaping. *Id.* § 6.9.

29. *Id.* § 6.16. Voting rights are based on lots owned, ordinarily with one vote per lot. *Id.* § 6.17.

30. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13.

31. *Id.* § 6.13(1).

Directors and officers of HOAs have similar duties to members.[32]

The developer of the CIC has duties including creating an association, transferring common property to the association, and turning control of the association over to the members.[33] Until the developer turns over property to the community, the developer has duties toward the association and members, consisting of using care and prudence, establishing sound finances for the association, maintaining good financial records, complying with and enforcing governing documents, and disclosing and maintaining all material facts affecting the community.[34] Furthermore, to challenge in court the actions of the HOA, directors, or officers, the community member has the burden of proof of showing misconduct.[35]

People choose to live in a CIC subject to HOA rules for a variety of reasons. Some choose to live in the community because of the legally upheld limited access to the public.[36] In response to criticism of CICs, proponents assert that the right to exclude is one of the basic inherent property rights guaranteed by ownership, personal autonomy, and individual liberty;[37] therefore, a CIC should be free to do what it wishes within the community.[38] Others choose to reside in CICs because of efficient land use, higher property values, services that municipalities do not provide capably or do not provide at all (e.g., lawn mowing, pool maintenance, private shopping areas), and the elimination of crime.[39] In addition, residents tend to favor the community homogeneity created by CICs.[40]

32. *Id.* § 6.14.

33. *Id.* § 6.19.

34. *Id.* § 6.20. The developer does not have the power to amend a declaration that would drastically change the character of the community. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.21.

35. *Id.* § 6.13(2). The burden of proof is similar to that borne by individuals challenging actions protected by the business judgment rule. *See* Farrington v. Casa Solana Condo. Ass'n, 517 So. 2d 70, 72 (Fla. Dist. Ct. App. 1987) (concluding business judgment rule protects association's director's business judgment so long as director acted reasonably). See *infra* Part II.C for a discussion of the business judgment rule.

36. *See* Drabinsky v. Sea Gate Ass'n, 146 N.E. 614, 617 (N.Y. 1925) (finding reasonable rules restricting access of uninvited public to community to maintain residential character).

37. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (noting that right to exclude is traditional property right); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (finding that right to exclude is universally held to be fundamental property right).

38. *See* Rahe, *supra* note 24, at 524 (noting that right to exclude can be traced back to Aristotle and John Locke, both of whom emphasized importance of private property).

39. Saxton, *supra* note 2, at 1442, 1448; *see also* Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 620 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001)) (noting that homeowners are predominantly concerned with protecting and enhancing home value); Rahe, *supra* note 24, at 524 (citing benefits of HOAs, including efficient use of resources reducing strain on larger community and assumption of greater responsibility for common property than municipalities); Pollan, *supra* note 3 (noting movement into HOA because of dissatisfaction with public school system).

40. *See* Fennell, *supra* note 39, at 642, 645 (noticing that people have preferences for neighbors with characteristics similar to their own and that general composition of neighborhoods affects property values).

Furthermore, people choose to live in CICs because they often promote social and civic character that many find lacking within a municipality.[41]

The major criticisms of HOAs are the privatization of local government[42] and how HOAs use property rights to infringe on other constitutional rights.[43] The privatization within HOAs arguably redistributes authority from the government to private developers and homeowners' boards, neither of which are subject to constitutional restraints.[44] Moreover, there is a fear that CICs will lead to "insulation from the marketplace of ideas"[45] or an "us versus them mentality"[46] in which the members within the community attempt to keep their distance from the rest of the common population.[47] Additionally, some are concerned that those who live in HOAs have given up their right to free speech simply based on the location of their property,[48] without meaningful consent to the rules of the community or a meaningful choice to abide by those rules.[49] Lastly, some oppose CICs because of how they can seem "a little too perfect, a little too considered."[50]

41. *See* Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 42 (1995) (calling attention to disappearance of community atmosphere within city life); Fleming, *supra* note 27, at 582 ("Because residents look to their homeowner association for many traditional municipal services, they are often more loyal to their particular homeowner association than to their hometown government."); Rahe, *supra* note 24, at 525 (acknowledging friendly environment in CICs because members work together in order to best serve community interests); Pollan, *supra* note 3 (noting that people seek virtue in community involvement).

42. Saxton, *supra* note 2, at 1442. The argument is that HOAs are assuming the responsibilities that are normally entrusted to the government. Some consider the privatization inappropriate because governments are subjected to the Federal Constitution, whereas HOAs are not. *Id.* at 1443.

43. *Id.* at 1443.

44. *Id.* at 1442-43.

45. *Id.* at 1444; *see also* Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of* Pruneyard, 13 CORNELL J.L. & PUB. POL'Y 533, 535-36 (2004) (observing that abandonment of public spaces and public life for CICs and other private institutions takes away important fora for protection within democracy).

46. Rahe, *supra* note 24, at 523 (internal quotation marks omitted) (quoting Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call*," 30 VAL. U. L. REV. 509, 515 (1996)).

47. *See id.* (noting that CICs are conducive to promoting their citizens' removal of themselves from larger general population).

48. *See* Ashley Poyle-Leach, Note, Golden Gateway Center v. Golden Gateway Tenants Ass'n*: Is the California Supreme Court Stripping California's Citizens of Their Constitutional Right to Free Speech?*, 32 SW. U. L. REV. 383, 398-99 (2003) (questioning denial of free speech rights to about twenty percent of California citizens living in private communities simply because their streets are not open to public).

49. *See* Fleming, *supra* note 27, at 586-88 (maintaining that owners do not have actual knowledge of all restrictions within HOAs before purchasing property). A lack of meaningful choice can also be attributed to the housing market's lack of other options besides property subject to HOAs. *Id.* at 588. Concerns as to waivers of fundamental rights of homeowners by signing the HOA before purchasing the home present a separate issue. This issue goes beyond the scope of this Comment.

50. Pollan, *supra* note 3. Pollan noted that it was distressing that the perfection and attention to detail within Celebration made the community seem fake and, likewise, in order for a community to seem real, it had to be run down. *Id.* The emergence of the phenomenon of HOAs and CICs along with passionate criticism of HOA policies and regulations will, undoubtedly, present the next wave of

Today, HOAs are so widespread in America that becoming a homeowner without becoming an HOA member is increasingly less possible.[51] Estimates show that, as of 2008, 59.5 million Americans lived in a community governed by an association, most commonly an HOA.[52] Indeed, HOAs govern as much as eighty percent of new communities recently built.[53] Additionally, in many major urban areas, houses in communities subject to HOAs account for over fifty percent of all home sales.[54] A survey conducted by Zogby International showed that overall, most people residing in a CIC are satisfied.[55] Seventy-two percent of those who participated in the survey classified their community association experience as "positive," with only nine percent expressing a "negative" experience with their community association.[56] Further, eighty-eight percent of those surveyed said that their community association board members "strive to serve the best interests of the community as a whole."[57] In addition, eighty percent responded that they would not like to see any more government regulation of their CIC, whereas only seventeen percent responded they would, and four percent were not sure.[58]

B. The State Action Doctrine and the Right to Exclude

The Supreme Court has addressed the right to exclude and state action regarding property in a few different contexts. The first to be examined in this section is the right to exclude in restrictive covenants. The next series of Supreme Court cases addresses the public-functions test.[59] The last series of cases regards the close-nexus test.[60]

constitutional attacks on property law and planning.

51. *See* Fleming, *supra* note 27, at 577 (calling attention to rapid growth of HOAs in many parts of United States over past few decades).

52. Community Associations Institute, Industry Data, http://www.caionline.org/info/research/Pages/default.aspx (last visited Nov. 28, 2008).

53. Fleming, *supra* note 27, at 576-77.

54. *Id.* at 577.

55. The survey, conducted by phone in November 2007, asked 709 residents of community associations questions about their relationship with the community. Community Associations Institute, 2007 National Survey Data, http://www.caionline.org/info/research/Pages/SurveyData.aspx (last visited Nov. 28, 2008).

56. *Id.*

57. *Id.*

58. *Id.* Although the research currently shows that many people intentionally move into communities subject to HOAs and that, overall, many are satisfied with the structure of their communities as a whole, there should still be concern that HOAs have too much power in limiting constitutional norms because of the right to exclude.

59. See *infra* Parts II.B.2-3 for a detailed discussion of the emergence of the public-functions test and its application to shopping centers.

60. See *infra* Part II.B.4 for a detailed discussion of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the seminal case addressing the close-nexus test.

1. *Shelley v. Kraemer*

The seminal Supreme Court case addressing the right to exclude and personal autonomy in a property context focused on racial discrimination.[61] In the landmark decision, *Shelley v. Kraemer*,[62] the U.S. Supreme Court held that judicial enforcement of discriminatory private agreements constitutes state action for purposes of the Fourteenth Amendment's Equal Protection Clause.[63] *Shelle*y challenged the state judicial enforcement of various restrictive covenants that residential communities used to exclude people from certain property uses.[64] One particular covenant at issue provided in part "'that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended . . . to restrict the use of said property . . . by people of the Negro or Mongolian Race.'"[65] The potential homeowners argued that judicial enforcement of restrictive covenants violated rights guaranteed to all persons by the Fourteenth Amendment.[66] More specifically, the petitioners (who were African American) claimed they were denied property without due process of law, equal protection under the laws, and privileges and immunities as citizens of the United States.[67] The Court reviewed these covenants with elevated scrutiny,[68] noting that the restrictions within the agreements were "directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'"[69] The Court found that the rights to "acquire, enjoy, own and dispose of property" were included in the rights Congress intended to protect from discriminatory state action under the Fourteenth Amendment.[70]

61. *See* 76 AM. JUR. POF 3D § 89 (2004) (noting *Shelley* is leading case addressing "property subject to a racially restrictive covenant").

62. 334 U.S. 1 (1948).

63. *Shelley*, 334 U.S. at 23. The Fourteenth Amendment states, in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

64. *Shelley*, 334 U.S. at 4, 6. Examples of other common restrictive covenants found in HOAs include requiring all visible window coverings to be of a certain designated color; providing that residents may have only one garage sale in a year; providing that a single political sign may be posted before an election; and proscribing activities that detract from the overall appearance of the community, including parking work trucks on the street. Pollan, *supra* note 3.

65. *Shelley*, 334 U.S. at 4-5 (quoting agreement).

66. *Id.* at 7-8.

67. *Id.*

68. *Id.* at 9-10.

69. *Id.* at 10 (quoting Buchanan v. Warley, 245 U.S. 60, 73 (1917)).

70. *Shelley*, 334 U.S. at 10. The Court stated: "Equality in the enjoyment of property rights was

Next, after ruling that even though the restrictive covenants were made by private individuals and did not involve action by "state legislatures or city councils," the Court found there could be state participation through judicial enforcement of the restrictions.[71] The issue presented to the Court was whether enforcement of the restrictive covenant constituted state action in violation of rights guaranteed by the Fourteenth Amendment.[72] The Court relied on voluminous precedent in its analysis[73] and concluded that state action was present through the actions of state courts and state judicial officials.[74] Thus, the Court held there was "no doubt that there has been state action in these cases in the full and complete sense of the phrase," which denied the homeowners equal protection of the laws.[75] Ever since *Shelley*, property owners and community planners have attempted to come up with other methods of exclusion that do not constitute state action.[76]

2. Public-Functions Test—*Marsh v. Alabama*

Another key decision affecting property planning was *Marsh v. Alabama*.[77] In *Marsh*, the U.S. Supreme Court held that actions of a privately owned town are subject to constitutional requirements.[78] A Jehovah's Witness was arrested for trespass in Chickasaw, Alabama, which was a company-owned town, after

regarded by the framers of [the Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Id.* (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70, 81 (1873)).

71. *Id.* at 12-13.

72. *Id.* at 13. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court held that the Fourteenth Amendment only applies to state action and does not apply to conduct of private individuals. *Id.* at 58-59.

73. *Shelley*, 334 U.S. at 14-18 (citing, inter alia, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930); Twining v. New Jersey, 211 U.S. 78, 90-91 (1908); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 233-35 (1897); Hovey v. Elliott, 167 U.S. 409, 417-18 (1897); Scott v. McNeal, 154 U.S. 34, 45 (1894); *The Civil Rights Cases*, 109 U.S. at 11, 17; Neal v. Delaware, 103 U.S. 370, 391 (1881); Commonwealth of Virginia v. Rives, 100 U.S. 313, 318 (1880); Pennoyer v. Neff, 95 U.S. 714 (1878)).

74. *Id.* at 19.

75. *Id.* The Court then decided it was unnecessary to consider whether there was a denial of due process of law or a denial of the privileges and immunities as citizens against potential homeowners. *Id.* at 23. *Shelley* has been interpreted, however, to be limited to cases of racial discrimination. *See* Rahe, *supra* note 24, at 544 (stating that reading *Shelley* to apply only to cases of racial discrimination is sensible, and noting that "[t]he jury appears to be out as to whether courts will find homeowners' associations to be state actors when they restrict speech on their premises, and in particular, *Shelley*'s reach in these situations").

76. *See, e.g.*, Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001) (holding complex's restriction on distributing pamphlets did not constitute state action); Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948, 951 (Kan. 1992) (upholding community's private agreement restricting signs in residential community, reasoning that agreement was not governed by *Shelley*); Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (upholding restriction on hanging for-sale sign from condominium because court enforcement of condominium regulations did not constitute state action).

77. 326 U.S. 501 (1946).

78. *Marsh*, 326 U.S. at 508-09.

attempting to pass out religious literature against the wishes of town management.[79] Although the town posted that the property was private and prohibited unauthorized solicitation, there was no available means for the Jehovah's Witness to receive authorization to pass out flyers.[80] The U.S. Supreme Court considered the question of whether "those people who live in or come to Chickasaw [could] be denied freedom of press and religion simply because a single company has legal title to all the town?"[81]

The Court emphasized in its analysis of property rights that ownership rights do not "always mean absolute dominion," and the more that property is opened to the general public, the more that property becomes subjected to statutory and constitutional rights of the public.[82] Another consideration that the Court highlighted was that, in order to be first-rate citizens, people must be able to receive uncensored information.[83] The Court concluded that the private town of Chickasaw was no different in function from any other town, because Chickasaw was substituting for and performing the customary functions of government.[84] Specifically, the Court found that the business block where the Jehovah's Witness attempted to distribute information was freely open to the public.[85] Because there was no practical difference between public towns and Chickasaw, the Court was unable to find any reason for depriving persons of First and Fourteenth Amendment liberties.[86] Undertaking a balancing test comparing the constitutional rights of property owners against the right to enjoy First and Fourteenth Amendment liberties, the Court concluded that, in this case, property rights must yield.[87] Thus, the Court held that the actions of Chickasaw, although private in theory, were public in application and violated the constitutional rights of the Jehovah's Witnesses.[88]

79. *Id.* at 503. The Alabama Supreme Court denied certiorari of the Alabama Court of Appeals decision, affirming the trespass conviction. *Id.* at 504. The appellant was convicted of violating the 1940 Alabama Code, which "makes it a crime to enter or remain on the premises of another after having been warned not to do so." *Id.* (citing 14 ALA. CODE § 426 (1940)).

80. *Id.* at 503.

81. *Marsh*, 326 U.S. at 505.

82. *Id.* at 506 (emphasizing that, as property becomes more accessible to community at large, Court will become more concerned with protecting Fourteenth Amendment freedoms).

83. *Id.* at 508.

84. *Id.* at 507-08.

85. *Id.*

86. *Marsh*, 326 U.S. at 508-09.

87. *Id.* at 509.

88. *Id.*

3. The Shopping Center Cases

The U.S. Supreme Court, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[89] expanded the *Marsh* doctrine, holding that the property rights of an owner of a shopping center are subject to First Amendment rights.[90] The Court found that "[t]he shopping center . . . is clearly the functional equivalent of the business district . . . involved in *Marsh*."[91] The issue presented was whether a union's passive picketing of a store within the shopping center could be enjoined because it constituted an invasion of the owner's private property rights.[92] The union contended, and the Supreme Court agreed, that state court decisions enjoining picketing as trespass violated the union's First and Fourteenth Amendment rights.[93] The Supreme Court held that, because the shopping center "'is freely accessible and open to the people in the area and those passing through,' the State may not . . . through the use of its trespass laws . . . exclude those members of the public wishing to exercise their First Amendment rights."[94]

In his dissent, Justice Black argued that the Fifth Amendment supports private property ownership and that, if the Supreme Court were to trump property rights, the owner should be given just compensation for the property taken.[95] Black made clear that he was against applying *Marsh* because of the lack of similarities between a shopping center and a privately owned town and suggested that the majority's reasoning had misconstrued *Marsh*.[96]

Nevertheless, in *Lloyd Corp. v. Tanner*,[97] the Supreme Court limited the holding of *Logan Valley*, asserting that First Amendment free speech rights do not exist in a shopping center context carte blanche.[98] The Court ruled that if the speech was not related to activities within the shopping center, it could be banned.[99] The speech in question was handbills advocating that shoppers protest the draft and the Vietnam War.[100] Focusing its analysis on the ownership rights

89. 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

90. *Logan Valley*, 391 U.S. at 319-20.

91. *Id.* at 318.

92. *Id.* at 309, 315.

93. *Id.* at 309, 320, 323-25.

94. *Id.* at 319-20 (quoting Marsh v. Alabama, 326 U.S. 501, 508 (1946)); s*ee also Marsh*, 326 U.S. at 506 ("Ownership does not always mean absolute dominion. The more an owner . . . opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.").

95. *Logan Valley*, 391 U.S. at 330 (Black, J., dissenting).

96. *Id.* at 332. Justice Black recognized that the picketers had a constitutional First Amendment right to picket; nevertheless, the picketers did not have a constitutional right to compel the private property owner to facilitate the picketers on the private property. *Id.* at 333.

97. 407 U.S. 551 (1972).

98. *Lloyd*, 407 U.S. at 570.

99. *Id.* at 564, 570. The Court made clear that *Logan Valley* was decided on its facts and that the facts differed significantly in this case. *Id.* at 561.

100. *Id.* at 556.

of private property,[101] the Court concluded that it must "respect[] and protect[]" the Fifth and Fourteenth Amendment rights of private property owners.[102] In order to respect such constitutional property rights, the Court held that, although the instant private shopping center was open to public use, the protesters were not entitled to exercise their First Amendment rights within because the speech was not related to the shopping center.[103] Performing a *Marsh* analysis and inquiring whether private parties were "substituting for and performing the customary functions of government," the Court determined that, "First Amendment freedoms could not be denied where exercised in the customary manner on . . . sidewalks and streets."[104] Citing Black's dissent in *Logan Valley*, the Court stressed that *Marsh* was a unique situation in which the private property in contention "had all the attributes of a town and was exactly like any other town."[105] Thus the Court, without overturning *Logan Valley*, distinguished *Lloyd*, although in both cases the property in question was a shopping center.[106]

Finally, in *Hudgens v. NLRB*,[107] the U.S. Supreme Court further expanded property rights and overruled *Logan Valley*, holding that the First Amendment right to free speech applies only to federal and state government actions.[108] As a result, the Court held that First Amendment rights regarding free speech do not restrict privately owned shopping centers.[109] Thus, the Court abandoned applying *Marsh* to privately owned shopping centers.[110] This analysis is contrary to the analysis in *Lloyd*, which focused on whether the speech was related to the shopping center.[111] The speech at issue in *Hudgens* involved picketing by labor

101. *See id.* at 569 (commenting that property does not lose its private character *merely* because public is invited to use it).

102. *Lloyd*, 407 U.S. at 570.

103. *Id.* at 564, 570. *But see* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (noting that, although Federal Constitution did not apply to this shopping center case, states "may adopt reasonable restrictions on private property" and can "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

104. *Lloyd*, 407 U.S. at 562.

105. *Id.* at 563 (citing Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 330-31 (1968) (Black, J., dissenting)).

106. *Id.* at 566.

107. 424 U.S. 507 (1976). The Court expressly overruled *Logan Valley*. *Hudgens*, 424 U.S. at 518.

108. *Id.* at 520-21.

109. *Id.*; *see also* Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 376 F. Supp. 357, 360-61 (D. Del. 1974) (upholding right to exclude based on nature of private property); Fairfield Commons Condo. Ass'n v. Stasa, 506 N.E.2d 237, 247 (Ohio Ct. App. 1985) (determining "where property has fewer attributes of being public in nature . . . the property owners' rights weigh more heavily in the balance than an individual's First Amendment rights"); Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (rejecting attempt to find state action by comparing *Marsh*'s company town to condominium association).

110. *Hudgens*, 424 U.S. at 520-21.

111. *Id.* The government has very limited power to restrict expression based on content. *Id.*; *see also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

unions disgruntled with the owner of a privately owned shopping center.[112] Further, the Court concluded that if the protesters in *Lloyd* did not have a constitutional right to enter the private property, the union members in this case surely did not have a constitutional right to enter.[113]

4. Close-Nexus Test—*Jackson v. Metropolitan Edison Co.*

The United States Supreme Court again faced the issue of state action in *Jackson v. Metropolitan Edison Co*.[114] The respondent, Metropolitan Edison Co., was a privately owned Pennsylvania corporation that delivered electricity to residents of York, Pennsylvania, and was subjected to extensive regulation by the state's Public Utility Commission.[115] The petitioner, Jackson, was a resident of York who had her account terminated without notice or opportunity to be

112. *Hudgens*, 424 U.S. at 508-09.

113. *Id*. at 520-21. Over twenty states have decided shopping mall cases since 1980. Mulligan, *supra* note 45, at 557. Arizona, Connecticut, Georgia, Hawaii, Iowa, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Texas, and Wisconsin have declined to expand their state constitutions to cover the right of free speech in shopping malls and other privately owned establishments. *See* Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 723 (Ariz. Ct. App. 1988) (noting that state constitution does not apply to private conduct); Cologne v. Westfarms Assoc., 469 A.2d 1201, 1202 (Conn. 1984) (holding that state constitution does not apply to large regional shopping centers); Citizens for Ethical Gov't, Inc. v. Gwinnet Place Assoc., 392 S.E.2d 8, 9 (Ga. 1990) (holding that state constitution does not require privately owned shopping malls to allow political speech on premises); Estes v. Kapiolani Women's & Children's Med. Ctr., 787 P.2d 216, 221 (Haw. 1990) (refusing to apply state action doctrine to prevent hospital's no-solicitation policy); State v. Lacey, 465 N.W.2d 537, 539-40 (Iowa 1991) (holding that trespass convictions for passing out handbills in private restaurant did not violate state constitution); Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337, 363-65 (Mich. 1985) (emphasizing importance of private property rights in upholding shopping center's right to exclude); State v. Wicklund, 589 N.W.2d 793, 794-95 (Minn. 1999) (holding that state constitution does not confer rights to citizens against other citizens); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1218 (N.Y. 1985) (holding that there is no right to distribute handbills in privately owned shopping mall); State v. Felment, 273 S.E.2d 708, 711 (N.C. 1981) (upholding no-solicitation policy in privately owned mall parking lot as not violative of federal or state constitution); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 60-62 (Ohio 1994) (upholding privately owned shopping center's policy banning picketing and soliciting); W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1338 (Pa. 1986) (reasoning that privately owned shopping centers are not functional equivalents of municipalities, therefore, state constitution does not apply); Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 92-93 (Tex. 1997) (holding that political party actions do not constitute state action); Jacobs v. Major, 407 N.W.2d 832, 847 (Wis. 1987) (declining to find state action in privately owned shopping mall prohibiting dance troupe from performing or distributing pamphlets). Colorado has found a guaranteed right of access, while Massachusetts has taken a limited approach, similar to *Lloyd*. Mulligan, *supra* note 45, at 558-59. *Compare* Bock v. Westminster Mall Co., 819 P.2d 55, 60-63 (Colo. 1991) (holding that state constitution's free speech clause prevents owner of private mall from prohibiting nonviolent political speech), *with* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 595-96 (Mass. 1983) (holding that Massachusetts's constitution gives right to solicit election petition signatures in privately owned shopping mall). Thus, the result of the shopping center cases, as harmonized by *Hudgens*, is that privately owned shopping centers are not bound by the Constitution.

114. 419 U.S. 345 (1974).

115. *Jackson*, 419 U.S. at 347.

heard based on delinquency of payments.[116] Jackson sought damages and an injunction requiring Metropolitan to provide power.[117] Further, Jackson's claim asserted that, because the state commissioned the respondent, the termination of service for nonpayment constituted state action and a deprivation of due process under the Fourteenth Amendment.[118]

The Middle District of Pennsylvania granted Metropolitan Edison's motion to dismiss and the Third Circuit affirmed, both finding a lack of state action.[119] The United States Supreme Court affirmed the decisions of the lower courts,[120] stating that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."[121] The Court focused the inquiry of state action on "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[122] After a detailed inquiry, the Court determined there was an absence of a close nexus—Pennsylvania was not sufficiently linked with Metropolitan's conduct—and, as a private entity, it was not subject to Fourteenth Amendment requirements of due process.[123] As a result, the Court

116. *Id.*

117. *Id.*

118. *Id.* at 347-48. Jackson based her claim on 42 U.S.C. § 1983 (2006), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. § 1983. Section 1983, authorizing civil actions for the deprivation of rights, is the basis for many cases dealing with the state action of private entities, which may have an expansive effect on HOA actions and policies. *See* Rahe, supra note 24, at 529 (noting that § 1983 is genesis of many causes of actions regarding state action and private entities).

119. *Jackson*, 419 U.S. at 349.

120. *Id.* at 359.

121. *Id.* at 350.

122. *Id.* at 351.

123. *Id.* at 358. In the inquiry, the Supreme Court rejected various state action arguments of Jackson, including that the monopoly status conferred by Pennsylvania to Metropolitan Edison constituted state action, that Metropolitan Edison provided an essential public service on a continuous basis as required by Pennsylvania statute, and that the state had approved Metropolitan Edison's termination process. *Jackson*, 419 U.S. at 351-54; *see also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978) (holding that private actor's proposed sale of goods, entrusted to him as permitted by New York Uniform Commercial Code, does not constitute state action nor require due process). *But see* Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230, 231 (1957) (finding board, a state agency, committed unconstitutional state action discrimination by denying applications for admission to school based on race alone); Nixon v. Condon, 286 U.S. 73, 88-89 (1932) (finding state action present in election and asserting that, where private actor is to be classified as representative of state, "the great

found no state action and, therefore, refused to apply the Due Process Clause to the actions of Metropolitan.[124]

C. *Reasonableness Standard—The Business Judgment Rule*

A key safeguard for HOAs in defending their policies and decisions is the business judgment rule, which protects business decisions of HOAs, as long as the association's directors and officers act reasonably.[125] Florida's business judgment rule, now codified, originated in the common law.[126] The rule establishes the general standards required of directors and officers[127] and

restraints of the Constitution set limits to their action").

124. *Jackson*, 419 U.S. at 358-59.

125. *See* Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060, 1074 (N.J. 2007) ("[T]he business judgment rule protects common interest community residents from arbitrary decision-making. That is, a homeowners' association's governing body has 'a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owe to its stockholders.'" (quoting Siller v. Hartz Mountain Assocs., 461 A.2d 568, 574 (N.J. 1983)) (citation omitted)); *see also* Steven B. Lesser, *Guarding Yourself from Liability Using the Business Judgment Rule*, http://www.becker-poliakoff.com/pubs/articles/lesser_s/lesser_guarding_yourself.html (last visited Nov. 28, 2008) ("The Florida Business Judgment Rule protects the business decisions of a Condominium Association's Board of Directors as long as the Board acts in a reasonable manner."). Limitations on business judgment rule are requirements of good faith, fair dealing, fiduciary duty, and reasonableness. *Twin Rivers II*, 929 A.2d at 1074-75.

126. FLA. STAT. ANN. §§ 607.0830-.0831 (West 2007); James F. Carroll, *The Business Judgment Rule in Florida – on Paper and in the Trenches*, FLA. B.J., July 2006, at 55, 55. This Comment examines in particular Florida's business judgment rule because of Ave Maria's and Celebration's locations in the state of Florida. All jurisdictions have similar statutes. *See* Miller v. Am. Tel. & Tel. Co., 507 F.2d 759, 762 (3d Cir. 1974) (expressing unanimity in jurisdictions' adoption of business judgment rule); Richard C. Brown, *The Role of the Courts in Hostile Takeovers*, 93 DICK. L. REV. 195, 217 (1989) (noting that all jurisdiction have embraced business judgment rule).

127. FLA. STAT. ANN. § 607.0830. The statute states, in pertinent part:

> (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> (2) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or
>
> (c) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.
>
> (3) In discharging his or her duties, a director may consider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation or its subsidiaries, the communities and

provides for liability of directors and officers of HOAs.[128] Section 607.0830 of the Florida Code requires that a director must act in good faith, with care, and in the best interests of the corporation.[129] Generally, under the business judgment rule, courts automatically presume that corporate directors act in good faith, "'in the absence of a showing of abuse of discretion, fraud, bad faith, or illegality.'"[130] Thus, a director will not be liable for damages under the business judgment rule unless one can show the breach of duty is reckless, constituted a criminal

society in which the corporation or its subsidiaries operate, and the economy of the state and the nation.

. . . .

(5) A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

Id.

128. *Id.* § 607.0831. The statute states, in pertinent part:

(1) A director is not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, by a director, unless:

(a) The director breached or failed to perform his or her duties as a director; and

(b) The director's breach of, or failure to perform, those duties constitutes:

1. A violation of the criminal law, unless the director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against a director in any criminal proceeding for a violation of the criminal law estops that director from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law; but does not estop the director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;

2. A transaction from which the director derived an improper personal benefit, either directly or indirectly;

3. A circumstance under which the liability provisions of [§] 607.0834 are applicable;

4. In a proceeding by or in the right of the corporation to procure a judgment in its favor or by or in the right of a shareholder, conscious disregard for the best interest of the corporation, or willful misconduct; or

5. In a proceeding by or in the right of someone other than the corporation or a shareholder, recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(2) For the purposes of this section, the term "recklessness" means the action, or omission to act, in conscious disregard of a risk:

(a) Known, or so obvious that it should have been known, to the director; and
(b) Known to the director, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or omission.

(3) A director is deemed not to have derived an improper personal benefit from any transaction if the transaction and the nature of any personal benefit derived by the director are not prohibited by state or federal law or regulation . . . .

Id.

129. *Id.* § 607.0830(1)(a)-(c); *see also* FDIC v. Stahl, 89 F.3d 1510, 1517 (11th Cir. 1996) (emphasizing directors must act with due care for business judgment rule to apply).

130. Bal Harbour Club, Inc. v. AVA Dev., Inc., 316 F.3d 1192, 1195 (11th Cir. 2003) (quoting Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1461 (11th Cir. 1989)).

violation, or involved "improper personal benefit," willful misconduct, bad faith, or malicious actions.[131] The primary purpose of the business judgment rule is to protect the board of directors from liability, not to state a cause of action against it.[132]

The Florida District Court of Appeals applied Florida's business judgment rule in the framework of condominium associations in *Farrington v. Casa Solana Condominium Ass'n*.[133] Condominium owners brought their claim in an attempt to estop their condominium association from assessing bills for special repairs and lawyers' fees.[134] The association argued that the condominium's declaration and bylaws permitted the assessment.[135] The court asserted that it would uphold board decisions as long as the board followed the rules within the condominium declaration and Florida statutes and used reasonable business judgment.[136] After analyzing the business judgment rule and its application to condominium associations, the court held that the association's decisions were reasonable and upheld the assessment.[137] The court also noted that Florida's business judgment rule "will protect a corporation's board of directors' business judgment as long as the board acted in a 'reasonable' manner."[138] Generally, an HOA can ensure that a court will deem business decisions reasonable by seeking professional opinions in order to gain an adequate background to make a reasonable decision.[139]

Although most jurisdictions apply some form of the business judgment rule, a trend toward rejecting a liberal application of the business judgment rule to HOAs was espoused by the Superior Court of New Jersey in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n* (*Twin Rivers I*).[140] In *Twin Rivers I*, the court addressed the issue of if and when the New Jersey

131. FLA. STAT. ANN. § 607.0831(1); s*ee also* Kloha v. Duda, 246 F. Supp. 2d 1237, 1244 (M.D. Fla. 2003) (preventing courts from asking directors to account for actions unless plaintiff shows "abuse of discretion, fraud, bad faith, or illegality"); Carroll, *supra* note 126, at 55 (stating that "[p]roving gross negligence is not enough" to be held liable under business judgment rule).

132. Carroll, *supra* note 126, at 55; *see also* Schein v. Caesar's World, Inc., 491 F.2d 17, 18 (5th Cir. 1974) (noting that, while directors are required to act with care, they will not be liable for decisions based on business judgment); Skinner v. Hulsey, 138 So. 769, 773 (Fla. 1931) (stating that directors are not personally liable except in cases of actual fraud); Braun v. Buyers Choice Mortgage Corp., 851 So. 2d 199, 202 (Fla. Dist. Ct. App. 2003) (asserting that directors generally are not personally liable for breach of fiduciary duties or mismanagement).

133. 517 So. 2d 70 (Fla. Dist. Ct. App. 1987).

134. *Farrington*, 517 So. 2d at 71.

135. *Id.*

136. *Id.* at 71-72.

137. *Id.*

138. *Id.* at 72.

139. *See* Lesser, *supra* note 125 (observing that, as long as professionals are consulted when HOAs make their decisions, they will most likely be deemed reasonable).

140. 890 A.2d 947, 963 (N.J. Super. Ct. App. Div. 2006), *rev'd*, Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060 (N.J. 2007); *see also* Poyle-Leach, *supra* note 48, at 400 (challenging forthright long-established state action model and application of business judgment rule to HOAs).

Constitution limits the authority of HOAs regarding the restrictions enforced within the community.[141] The plaintiffs, disgruntled association members, sued for declaratory and injunctive relief against their HOA for various limitations regarding use of their property,[142] claiming that the association's procedures constituted governmental actions subject to constitutional protection.[143] The superior court took into consideration the expansive nature of HOAs,[144] along with prior state case law, which supported a balancing test of reasonableness for resolving "the conflict between the protections to be accorded private property and those to be given to expressive exercises upon such property."[145] The association argued that subjecting these associations to constitutional principles would have numerous negative consequences, including altering the nature of property planning, eroding basic private property rights, and infringing on the will of the majority.[146] The superior court rejected the argument that all HOA regulations should be regarded as matters of contract law or the business judgment rule because of the nature of the fundamental rights at issue[147] and held that the trial court erred by applying the improper standard of contract law and the business judgment rule to resolve HOA issues.[148] In its judgment, the court did not strike down any of the regulations but remanded and instructed the

141. *Twin Rivers II*, 929 A.2d at 1063.

142. *Id.* at 1064-65; *see also* Laura Mansnerus, *Chalk One Up for Homeowners*, N.Y. TIMES, Mar. 12, 2006, § 14, at 1 (outlining various reasons for filing suit, including fine assessment for color of front door, display of political signs on front lawn, and refusal to publish editorial in HOA's local paper).

143. *Twin Rivers II*, 929 A.2d at 1066. For details about the Twin Rivers community, including size, population, composition, amenities, and annual budget, see *id.* at 953-54.

144. *Twin Rivers I*, 890 A.2d at 954-55. Over 1,000,000 New Jersey citizens were governed by HOAs in 1992. *Id.* at 955.

145. *Id.* at 957. The standard takes into account:

> "(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."

Id. (quoting State v. Schmid, 423 A.2d 615, 630 (N.J. 1980)); s*ee also* N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 771-75 (N.J. 1994) (emphasizing that "[s]tate right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities," and ultimately holding in favor of free speech); State v. Shack, 277 A.2d 369, 371-72, 375 (N.J. 1971) (reversing trespass convictions because "ownership of real property does not include the right [to] bar access to governmental services"); Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 158-59 (N.J. Super. Ct. Ch. Div. 1996) (requiring condominium association to allow distribution of political pamphlets because free speech in this situation outweighed property rights); State v. Brown, 513 A.2d 974, 976 (N.J. Super. Ct. App. Div. 1986) (affirming trespass convictions for demonstrators because property was not sufficiently devoted to public use). *But cf.* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001) (maintaining that "actions of a private property owner constitute state action for purposes of California's free speech clause *only* if the property is freely and openly accessible to the public" and that there is no state action without invitation to general public (emphasis added)).

146. *Twin Rivers I*, 890 A.2d at 965.

147. *Id.* at 963.

148. *Id.* at 969, 978.

lower court to reconsider policies of the association in light of the New Jersey Constitution.[149] The court's holding emphasized that, when fundamental rights are implicated, regardless of if the limitation of such rights resulted in light of business decisions, a constitutional inquiry is necessary.[150] Conversely, the court noted that when disputes do not involve fundamental rights, the application of the business judgment rule is appropriate.[151] *Twin Rivers I* has been overruled by the Supreme Court of New Jersey, but that court still appears to endorse a balancing test for infringements of fundamental rights, signifying a willingness to depart from a strict business judgment rule application.[152] In particular, the court noted, "[w]e conclude that the three-pronged test in *Schmid* and the general balancing of expressional rights and private property interests in *Coalition* are the appropriate standards to decide this case."[153]

D. Federal Statutes

There are a few federal laws that arguably may limit the ability of HOAs to exclude at the expense of constitutional rights.[154] Most recently, Congress passed the Freedom to Display the American Flag Act of 2005 (the "Act").[155] The Act prohibits condominium associations, cooperatives, and residential real estate associations[156] from adopting or enforcing policies restricting the display of the American flag.[157] Republican Roscoe Bartlett of Maryland sponsored the bill, which passed by voice vote in the House of Representatives and by unanimous consent in the Senate.[158] During the debates regarding this Act, Representative Bartlett addressed House members with real instances in which HOA members were being "admonished" for displaying the American flag.[159] Although the Act

149. *Id.* The court disagreed with the trial court's finding that the Twin Rivers HOA was not subject to constitutional limitations. *Id.* at 954.

150. *Twin Rivers I*, 890 A.2d at 965.

151. *Id.*

152. Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060, 1072 (N.J. 2007). The Court ultimately concluded that the HOA did not unreasonably restrict plantiffs' expressional activities. *Id.* at 1073.

153. *Id.*

154. The federal government has not completely ignored the issue of HOAs. The Supreme Court has recognized that states may impose greater restrictions than the federal government. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 78, 88 (1980) (noting that Supreme Court decisions do not limit states from adopting liberties more expansive than those granted by Constitution).

155. Pub. L. No. 109-243, § 1, 120 Stat. 572 (2006).

156. This includes HOAs. Freedom to Display the American Flag Act of 2005 § 3.

157. *Id.*

158. The bill was introduced on January 4, 2005, passed in the House on June 27, 2006, passed in the Senate on July 17, 2006, and was signed by President George W. Bush on July 24, 2006. GovTrack.us, H.R. 42 [109th]: Freedom to Display the American Flag Act of 2005, http://www.govtrack.us/congress/bill.xpd?bill=h109-42 (last visited Nov. 28, 2008).

159. 152 CONG. REC. 85, 4575 (2006). Representative Bartlett discussed how flag purchasers "who were members of a homeowner's association or a condominium association . . . when they flew their flag, were admonished by the association that they could not fly a flag on their condo or on their townhouse or home. So, as a result of those problems . . . we filed [this bill]." *Id.* at 4575 (statement of

is a mechanism that limits HOAs and their ability to restrict property, Congress passed the Act for patriotic purposes and to honor the sacrifices made for the flag—not primarily to combat and limit the general overreaching of HOAs.[160] Congress has shown little concern, outside of displaying the American flag, for limiting the power of HOAs to regulate property.

Another piece of legislation that possibly limits the ability of HOAs to exclude at the expense of constitutional rights is Title VIII of the Civil Rights Act of 1968, entitled the Fair Housing Act.[161] Congress passed this legislation to prohibit discrimination as well as the intention to discriminate regarding housing based on "race, color, *religion*, sex, handicap, familial status, or national origin."[162] Several prohibitions within the Fair Housing Act are relevant to implications on property planning and HOAs. Discrimination based on race, color, religion, sex, handicap, familial status, or national origin in the housing context includes: refusing to sell or rent,[163] discriminating in the terms of sale or rental,[164] advertising preference,[165] denying inspection,[166] or inducing persons to sell or rent for profit.[167] Thus, Congress made clear in the Fair Housing Act that it is United States policy to provide fair housing within constitutional limitations.[168] Although the Office of Fair Housing and Equal Opportunity diligently attempts to enforce this legislation and other housing statutes[169] to ensure that "all Americans have equal access to the housing of their choice,"[170] it is neither difficult nor complicated for HOAs to disguise discrimination through the execution of sophisticated property planning.[171]

Rep. Bartlett). Representative Bartlett also read letters from Veterans of Foreign Wars of the United States, Jewish War Veterans of the United States of America, Military Officers Association of America, Gold Star Wives of America, and AMVETS in support of the Act. *Id.* at 4575-76 (statement of Rep. Bartlett).

160. *See id.* at 4576 (focusing on symbolic importance of flag, not danger of overreaching HOAs).

161. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (2006).

162. *Id.* § 3604(c) (emphasis added); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (ensuring equal access to "goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, *religion*, or national origin" (emphasis added)). The statute does not apply to private establishments. 42 U.S.C. § 3604.

163. 42 U.S.C. § 3604(a).

164. *Id.* § 3604(b).

165. *Id.* § 3604(c).

166. *Id.* § 3604(d).

167. *Id.* § 3604(e).

168. 42 U.S.C. § 3601. The statute states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.*

169. Other statutes concerned with fair housing include: Education Amendments of 1972, 20 U.S.C. § 1681 (2006); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2006); Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4156 (2006); Housing and Community Development Act of 1974, § 109, 42 U.S.C. § 5309 (2006); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

170. Hud.gov, Fair Housing and Equal Opportunity: About FHEO, http://www.hud.gov/offices/fheo/aboutfheo/aboutfheo.cfm (last visited Nov. 28, 2008).

171. See *infra* notes 208-12 and accompanying text for a discussion of disguised religious

III. DISCUSSION

The popularity of HOAs, the expansive powers granted to HOAs, and the lack of federal protection against HOAs require states to step in to protect property owners from overreaching associations.[172] Because of the state action doctrine's inapplicability to HOAs, current federal law is inadequate to protect the fundamental rights of property owners from HOAs.[173] Thus, the right to exclude goes too far in allowing HOAs to enforce discriminatory policies.[174] Additionally, the business judgment rule is unable to protect homeowners from overreaching associations.[175] Because the current laws at the federal and state levels governing HOAs are insufficient to protect homeowners' fundamental rights, states should adopt a fundamental rights inquiry analysis.[176] Such an inquiry would consist of balancing fundamental rights afforded by state constitutions against the reasonableness of the HOA's decisions.[177] In conclusion, states must take action in order to preserve the notion of democracy and individual rights in the face of overreaching property planning by HOAs.

A. The Application of the State Action Doctrine to HOAs

1. *Shelley v. Kraemer*'s Applicability to HOAs

The result of defining an HOA as a state actor would force an HOA to yield to the same restrictions as municipalities do, including the First and Fourteenth Amendments.[178] In *Shelley v. Kraemer*,[179] the United States Supreme Court adopted the stance that state action principles may apply to private actors,[180] emphasizing that among the rights protected from state action are property rights.[181] Although many interpretations of *Shelley*'s holding are offered,[182] there are only a few plausible explanations of *Shelley*'s effect on private property owners and HOAs.[183] An expansive interpretation limits the holding "'to the

discrimination in Ave Maria, Florida.

172. See *infra* Part III.D for a discussion on the necessity of action at the state level to afford protection to rights that the Federal Constitution is unable to protect.

173. See *infra* Part III.A for a discussion of how Supreme Court precedent regarding state action is not broad enough to encompass actions of HOAs.

174. See *infra* Part III.B for a discussion of how prevalent HOAs are in communities and the implications of their prevalence, including the ability to use property tools to violate constitutional norms guaranteed by the Federal Constitution.

175. See *infra* Part III.C for a discussion of the business judgment rule's general inability to overturn decisions made by HOA board members.

176. See *infra* Part III.D for a discussion of the fundamental rights inquiry analysis.

177. See *infra* notes 270-74 and accompanying text for a discussion of the balancing approach.

178. *See* Rahe, supra note 24, at 526-27 (noting that defining HOAs as state actors would allow extensive regulations of HOA action).

179. 334 U.S. 1 (1948).

180. *Shelley*, 334 U.S. at 19.

181. *Id.* at 10.

182. *See* Rahe, *supra* note 24, at 528 (examining various interpretations).

183. *Id.*

enforcement of covenants that restrict the use and occupation of land in ways that would be unconstitutional if such restrictions were the product of a state instrumentality.'"[184] If such an interpretation were imposed, some advocate that the realistic result would be the demise of property and privacy rights because most private property decisions of HOAs could be subjected to the Constitution.[185] This interpretation is therefore questionable because property and privacy rights are regarded as having equal constitutional protection as the rights intended to be protected by *Shelley*.[186] Case law reflects a more plausible and acceptable application of *Shelley* to property law, which limits the holding to racial discrimination.[187]

In actuality, *Shelley* is no longer critical in its application to HOAs because today it is unlikely to find overt racial discrimination, or any overt discrimination for that matter, within the context of an HOA's property planning and regulations.[188] For example, while one can argue that the town of Ave Maria discriminates against non-Catholics,[189] it is difficult to find concrete evidence that rises to the level of the discrimination found in *Shelley*.[190] Father Joseph Fessio, the Provost of Ave Maria University, has stated on the record that Ave Maria "is going to be open to everybody."[191] In addition, the Ave Maria Web

184. *Id.* (internal quotation marks omitted) (quoting Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461, 542 (1998)).

185. *Id.* at 541-42.

186. *Id.*

187. Rahe, *supra* note 24, at 528 (arguing that this version of *Shelley*'s holding is sensible); *see also* Jojola v. Wells Fargo Bank, No. C71-900SAW, 1973 WL 158166, at *4 (N.D. Cal. May 2, 1973) (emphasizing that "the absence of subsequent development of the doctrine indicates that the precedential value of *Shelley* is narrowly limited to its facts"); Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948, 951 (Kan. 1992) (rejecting contention that *Shelley*'s holding should be read to espouse test questioning "whether a valid ordinance could be passed prohibiting the conduct proscribed in the restrictive covenant"); Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (noting that *Shelley* does not apply to covenant enforcement between private parties where no racial discrimination exists); Craig Bradley, *Untying the State Action Knot*, 7 J. CONTEMP. LEGAL ISSUES 223, 243 (1996) (reasoning that Supreme Court is less likely to find state action when constitutional violations have been alleged that do not involve race); Fleming, *supra* note 27, at 596 (asserting that Court employed judicial activism in applying state action because Congress remained silent on racial discrimination).

188. This author was unable to find one modern case in which an HOA was found to discriminate based on race. This author believes believe that it is implausible that overt racial discrimination would be found in HOA policies because of *Shelley*'s holding and fear of being politically incorrect.

189. *See* Huber & Soucy, *supra* note 4 (mentioning Monaghan's Catholic visions for city); Reilly, *supra* note 5, at 17 (claiming Ave Maria will be Catholic community); Skoloff, *supra* note 8 (asserting Ave Maria "will be governed according to strict Roman Catholic principles").

190. The particular covenant at issue in *Shelley* provided in part "that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended . . . to restrict the use of said property . . . by people of the Negro or Mongolian Race." Shelley v. Kraemer, 334 U.S. 1, 4-5 (1948) (internal quotation marks omitted).

191. Bill Berkowitz, *Pizza Magnate Flees the Pagan Hordes*, INTER PRESS SERVICE NEWS AGENCY, Aug. 12, 2005, http://www.ipsnews.net/print.asp?idnews=29885.

site does not refer to the town's Catholic mission but instead describes the future town as "a true community . . . where neighbors care about neighbors, friendships span generations, and a sense of pride is felt by every resident, student, business owner, and employee."[192] Without evidence of explicit discrimination by Tom Monaghan and Ave Maria's HOA, an argument advocating that Ave Maria should be bound by the Constitution as a state actor cannot be based on *Shelly*, considering *Shelley*'s applicability is limited to instances of overt discrimination.

2. Private Property Assuming Municipal Characteristics: A Public-Functions Analysis

Marsh v. Alabama[193] is the seminal U.S. Supreme Court case addressing state action through the public-functions doctrine, and it held that the policies of Chickasaw, a corporate-owned town, must yield to the Constitution.[194] The public-functions doctrine operates when private services are unmistakably indistinguishable from municipal services as to warrant the application of the U.S. Constitution.[195] After analyzing and expanding the *Marsh* doctrine and public-functions analysis through a series of cases questioning whether shopping centers were the equivalent of municipalities,[196] the Supreme Court eventually concluded that privately owned shopping centers are not subject to constitutional restriction.[197] What ultimately prevails from the original public-functions analysis in *Marsh* is Justice Black's assertion that Chickasaw, the privately owned town, possessed all of the characteristics one would expect to find in any other American town, and therefore its residents were entitled to constitutional protections.[198] Thus, the current application of *Marsh* underscores this comparison and, as a result, sets a very high benchmark for courts to find state action based on the public-functions doctrine.[199]

192. Ave Maria, Discover Ave Maria, http://www.avemaria.com/Default.aspx?ID=5 (last visited Nov. 28, 2008); *see also* Bill Berkowitz, *Mr. Monaghan Builds His Dream Town*, WORKING FOR CHANGE, Aug. 25, 2005 (noting absence of overt discrimination on Ave Maria's Web site).

193. 326 U.S. 501 (1946).

194. *Marsh*, 326 U.S. at 507-10.

195. *Id.*

196. *See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (abandoning *Marsh*'s application to privately owned shopping centers); Lloyd Corp. v. Tanner, 407 U.S. 551, 563, 570 (1972) (holding that shopping center could not deny customary First and Fourteenth Amendment freedoms that are normally exercised on sidewalks and streets after applying *Marsh*); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc, 391 U.S. 308, 318 (1968) (holding that shopping center is functional equivalent of business district after applying *Marsh*), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

197. *Hudgens*, 424 U.S. at 520-21.

198. *Marsh*, 326 U.S. at 507-09. These "characteristics" include residential buildings, streets, sewage systems, a business block, a police force, and a post office. *Id.* at 502-03.

199. *See Hudgens*, 424 U.S. at 517-22 (asserting that nothing about privately owned shopping center remotely represents the "business block" necessary under *Marsh* analysis to find state action); *see also* Fleming, *supra* note 27, at 590 (noting that *Marsh*'s language establishes "the bar very high for courts to find that a private entity assumed all, or at least a sufficiently large number, of the traditional

Attempts to subject HOAs to the U.S. Constitution through a *Marsh* public-functions analysis would presumably fail because HOAs likely fall outside the scope of *Marsh* as interpreted[200] by *Hudgens v. National Labor Relations Board*.[201] Nevertheless, some commentators believe that *Marsh*'s holding would apply to HOAs, arguing that the "'company town' lives on in the form of the modern master-planned community."[202] This position is mistaken because there are fundamental differences between CICs subject to HOAs and the "company town" of *Marsh*.[203] While CICs exist for a variety of reasons, including improving property values,[204] a CIC does not aim to create profit for the HOA in the way that the company in Chickasaw wanted to generate profit for the owner-corporation.[205] In addition, courts have been hesitant in applying *Marsh* to a community that does not enjoy every distinct attribute of a municipal town.[206] Furthermore, there does not seem to be any HOAs that include "full business districts" as required under a state action *Marsh* analysis.[207]

The similarities in characteristics between HOAs and municipalities, however, necessitate an extension of the *Marsh* doctrine to encompass communities that HOAs govern. Ave Maria is a perfect example of how the public-functions doctrine is ineffectual to prevent the intrusion of constitutional norms such as free speech and religion.[208] Many argue that Tom Monaghan is using property tools, including an HOA, to organize Ave Maria based on

public functions in a given locality to merit a finding of state action").

200. *See* Mulligan, *supra* note 45, at 545, 548 (observing that *Hudgens* "essentially narrowed the *Marsh* holding to situations in which the entity in question undertakes all of the responsibilities of a municipality" such that gated communities are not subject to *Marsh*'s scope).

201. 424 U.S. 507 (1976).

202. Saxton, *supra* note 2, at 1454; *see also* Fleming, *supra* note 27, at 591 (noting that HOAs provide zoning regulations, along with the following services, which could be construed as functional equivalent of municipalities: street cleaning, snow removal, trash collection, and common area maintenance); Saxton, *supra* note 2, at 1454 (explaining that many CICs governed by HOAs resemble entire towns by providing schools, streets, sewage and water services, along with allowing public access to property).

203. Saxton, *supra* note 2, at 1454.

204. See *supra* Part II.A for background on CICs.

205. Marsh v. Alabama, 326 U.S. 501, 502 (1946) (noting Chickasaw is owned by Gulf Shipbuilding Corporation); *see also* Saxton, *supra* note 2, at 1454 (arguing that residents of CICs are not invited to live there based on governing body's interest in generating profits).

206. *See* Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding HOA, which provided maintenance, street repair, and sewer service, was not subject to *Marsh* because there was not library, school, or "other public functions" subject to HOA's governance); *see also* Rahe, *supra* note 24, at 545 (asserting that courts do not like to subject HOAs to state action doctrine based on similarities to *Marsh*'s company town); Saxton, *supra* note 2, at 1455 ("[C]ourts have shown reluctance to apply *Marsh* if a residential community or other entity contains anything less than all the attributes of a municipal town.").

207. *See* Mulligan, *supra* note 45, at 548 (noting differences between Celebration, Florida, and Chickasaw that make Celebration not subject to *Marsh*: (1) HOA owns common areas of Celebration, and residents own the HOA, thereby making town owned by residents, whereas common areas of Chickasaw were owned by corporation; and (2) residents of Celebration own their homes, whereas company owned homes in Chickasaw).

208. See *supra* notes 7-12 and accompanying text for an overview of Ave Maria.

religious tenets, resulting in a town in which all citizens conform to Catholic principles and traditions.[209] Ave Maria is different from the town of Chickasaw,[210] however, because the residents in Ave Maria will own their property and therefore retain ownership in the common areas.[211] Because Ave Maria will not be under complete control of Monaghan and an HOA,[212] the application of *Marsh* is seemingly inappropriate. The inapplicability of state action through a *Marsh* analysis to Ave Maria demands an evolution of the state action doctrine. In order to prevent encroachment on constitutional norms, the doctrine would have to address circumstances similar to those of Ave Maria.

3. Close-Nexus Inquiry

The last prominent federal state action theory to apply in order to determine whether HOAs can be subject to constitutional norms is espoused in *Jackson v. Metropolitan Edison Co*.[213] The U.S. Supreme Court established in *Jackson* that state action can be found if "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[214] One commentator noted that, in a close-nexus query, "[t]he dichotomy between passive state action and active state involvement has become the deciding factor in determining whether states participate sufficiently to modify the common law that may violate the Fourteenth Amendment."[215]

Applying a "sufficiently close nexus" analysis to HOAs, it is clear that under *Jackson*, an HOA is not subject to the state action doctrine. Critics will often acknowledge that developers of CICs need approval of the community plan from government officials, which may require undertaking lobbying efforts to obtain the necessary consent from the municipality to build a new development.[216] In addition, local governments frequently will promote growth of CICs, because these communities increase the taxpayer base while reducing public expenditures necessary to maintain the municipality.[217] Nevertheless, as stated in *Jackson*, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the

209. *See The Situation: ACLU Opposes Creation of 'Catholic Town'* (MSNBC television broadcast Feb. 22, 2006), *available at* http://www.msnbc.msn.com/id/11499702 (arguing that Monaghan is utilizing property principles to violate constitutional rights).

210. *See Marsh*, 326 U.S. at 502-03 (discussing Chickasaw's structure and characteristics). The common areas, along with the residential property in Chickasaw, were owned by a corporation, not the residents. *Id.*

211. Skoloff, *supra* note 8.

212. *See id.* (explaining that residents will own their houses, not rent from Monaghan).

213. 419 U.S. 345 (1974).

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

215. Kathryn F. Voyer, Note, *Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts*, 7 WM. & MARY BILL RTS. J. 943, 964 (1999).

216. *See* Fleming, *supra* note 27, at 580 (observing that developers must "write articles of incorporation and bylaws that will garner the approval of local planning officials").

217. *See id.* (noting local governments facilitate CIC expansion).

Fourteenth Amendment."[218] The "mere fact" that CICs are subjected to government approval before they are built is not an adequate foundation to form a "sufficiently close nexus" between CICs and the state to qualify as state action.[219] It is clear under *Jackson* that state approval of the practices of a private entity is not enough to qualify the practices as state action, and, therefore, approval of a CIC would not be enough to constitute the "sufficiently close nexus."[220]

In regard to Ave Maria, Tom Monaghan understands the importance of money in politics.[221] Monaghan founded the Ave Maria List Organization with an associated political-action committee ("PAC") and 527 soft-money advocacy group[222] to contribute to candidates who advocate traditional Catholic positions on prominent issues, including abortion, school prayer, and gay marriage.[223] Additionally, Jeb Bush, former governor of Florida and practicing Catholic, attended Ave Maria's groundbreaking, "praising the project as a new kind of town where like-minded people could live in a harmony between faith and freedom."[224] His spokesman made clear, however, that "[w]hile the governor does not personally believe in abortion or pornography, the town, and any restrictions they may place on businesses choosing to locate there, must comply with the laws and constitution of the state and federal governments."[225]

Even though Monaghan clearly has some connections in Florida politics and politicians support the town of Ave Maria, he did not receive state funding for his town, he did not purchase the land from the state, and there is no close relation between the state and the town.[226] Thus, there is not a remotely close nexus to attribute the actions of Ave Maria to the actions of the state, and, therefore, constitutional norms do not apply to Tom Monaghan or Ave Maria's actions under a *Jackson* analysis.

218. 419 U.S. at 350.

219. *Id.* at 350-51. Subjecting a CIC to regulation does not equate to state action. *Id.*

220. *See id.* at 354 (rejecting notion that state action is present when state authorizes and approves practice of private entity).

221. *See* Huber & Soucy, *supra* note 4 (remarking that, in 2004 alone, Monaghan and his wife "contributed more than $290,000 to right-wing political causes and candidates").

222. Section 527 of the Internal Revenue Code covers political organizations. I.R.C. § 527 (2006). For a discussion of 527 organizations and their efforts to affect political campaigns, see generally Joseph Argentina, Comment, *We Do Not Approve This Message: Using Campaign Advertising to Expose Stealth Political Committees*, 81 TEMP. L. REV. 239 (2008).

223. Huber & Soucy, *supra* note 4. In 2004, the Ave Maria PAC contributed money to the campaign of Senator Mel Martinez, who is a United States senator from Florida and George W. Bush's former Secretary of Housing and Urban Development. *Id.* Ave Maria PAC gave approximately $70,000 to Senator John Thune's 2004 election campaign, resulting in Thune unseating then-Democratic Senate Minority Leader, Tom Daschle. *Id.* Thune criticized Daschle, a Roman Catholic, for being "ambiguous on the abortion issue." *Id.* Monaghan and his wife personally contributed close to $300,000 in 2004 to right-wing politicians and causes. *Id.*

224. Huber & Soucy, *supra* note 4.

225. *Id.*

226. Ave Maria, *supra* note 192.

B. The Current Trend in Property Planning—When Do the Ramifications of the Right to Exclude Go Too Far?

The right to exclude is one of the traditional property rights that an owner possesses in regard to his property.[227] The U.S. Constitution emphasizes the importance of private property ownership by plainly limiting the government's ability to limit the rights of private property owners by blurring the public-private property distinction.[228] Generally, the right to exclude is considered a fundamental property right, because society recognizes the desire of an owner to protect his property.[229] Although the right to exclude in connection with HOAs has yet to be confronted squarely, there is favorable case law indicating that most courts will uphold the HOA's right to exclude.[230] Nevertheless, as seen in *Marsh*, the right to exclude is not absolute—ownership does not automatically equate to absolute control and dominion over private property.[231]

HOAs function like little democracies in which the community privatizes governmental services.[232] Some commentators have even referred to HOAs as "residential private government[s]"[233] because of the similarities between living in a municipality and living in a community with an HOA.[234] A danger of HOAs

227. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968) (asserting that right to exclude is "part and parcel" of ownership rights associated with private property), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976).

228. *See* U.S. CONST. amend. III (restricting government's capacity to force citizens to quarter soldiers); *id.* amend. IV (guaranteeing people right to security of property); *id.* amend. V (forbidding any deprivation of any person of "life, liberty, or property, without due process of law" as well as taking of privately owned property for public use without "just compensation").

229. *See* Rahe, *supra* note 24, at 525 (noting John Locke's emphasis on private property importance). Locke is quoted as stating, "whenever the Legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a State of War with the People." *Id.* at 525 (emphasis omitted) (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 412 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689)).

230. *See id.* at 541-42 (noting cases involving entities similar to HOA in which state courts have upheld property owners' right to exclude (citing Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co, 376 F. Supp. 357, 360-61 (D. Del. 1974); Fairfield Commons Condo. Ass'n v. Stasa, 506 N.E.2d 237, 247 (Ohio Ct. App. 1985))). In both of these cases, the court upheld a right to exclude and the property in question was much more open to the public than in a traditional HOA. *Id.* at 542.

231. *See* Marsh v. Alabama, 326 U.S. 501, 505-06 (opining that the more property owner opens his property to public use, the more his rights give way to constitutional rights of others); *see also* Mays, *supra* note 41, at 48 (stating that opening up property for public use obligates owner to be constrained by constitutional rights of those using property).

232. See *supra* Part II.A for an in-depth discussion of HOAs and their functions. *See also* Mays, *supra* note 41, at 57 (comparing HOAs to municipalities).

233. Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 254 (1976).

234. *Id.* at 254-55. When a person moves into a city, that person establishes legal relations and ties to the local government along with receiving benefits of municipal services. *Id.* This is analogous to a homeowner in a CIC owing legal obligations to the community and, because of ownership, being entitled to certain benefits. *Id.* There are also similarities in the structure of a municipal government and an HOA, both being organized based on a democratic system. *Id.* Both municipal governments and private communities offer services such as street maintenance, garbage collection, park facilities, and snow removal. Reichman, *supra* note 233, at 255. Municipalities tax their residents, which is

becoming a substitute for government is that the same types of protections required from municipalities under the U.S. Constitution are not required from a private community.[235] Thus, when facing the tyranny of the majority, dissenting homeowners subjected to an HOA are not afforded the same type of protection that dissenting minorities have in the public forum.[236]

An example of dissenting homeowners who live under HOA rules and who are not being afforded the same rights of those who live in a public community can be found in Celebration, Florida.[237] Disgruntled homeowners who wanted to sell their houses were subject to a restriction within the contract they signed to buy their property, stating that a homeowner may not profit from the sale of his house if held for less than a year, unless the homeowner can show economic hardship.[238] The town offered to discharge this requirement, so long as the disgruntled homeowners signed a confidentiality agreement promising not to reveal why they left the community.[239] Although the composition of Celebration's HOA seems to accommodate the minority, as a municipal government does, the ownership contract that all homeowners in Celebration are required to sign unexpectedly endorses a community that is unlike the public forum (oftentimes this fact is unknown to property purchasers).[240]

As of right now, homeowners in Celebration have no control as to who is on the board of directors.[241] While Celebration residents will eventually be able to elect the directors of their HOA, Disney, as the corporate owner of the town, has the ability, granted to it in the housing contracts and incorporation documents, to retain control of the HOA for as long as it wishes without letting residents determine the composition of the board.[242] Moreover, the HOA is unable to change any rule or restriction in the town without approval of Disney.[243] Disney also retains control over every aspect of the physical character of Celebration.[244]

comparable to HOAs raising revenue through assessments and dues. Mays, *supra* note 41, at 57.

235. *See* Mays, *supra* note 41, at 58 (stressing that public governments are restrained in actions by constitutional norms regarding individual rights and freedoms, whereas HOAs are not subjected to Constitution because they are not state actors). For an in-depth analysis of HOAs failing to qualify as state actors, see *supra* Part III.A.

236. See J. Joseph Miller, *Of Factions and Proportional Voting: Madison and Mill on 'Tyranny of the Majority'* (2006), http://www.politicalthought.org.uk/conference/pdfs/10.pdf (expressing fear of majority tyranny over minorities).

237. Pollan, *supra* note 3.

238. *Id.*

239. *Id.*

240. *Id.* at 80-81. Property owners do not know the terms of the contract because of the legalese used and the voluminous nature of contract. *Id.* In addition, prospective homeowners do not have bargaining power to decline terms of ownership contracts. *See* Fleming, *supra* note 27, at 587 ("Since prospective homebuyers are not able to dicker over individual terms and restrictions imposed upon them by homeowner associations, it is almost impossible for a homeowner to manifest explicit consent to individual terms.").

241. Pollan, *supra* note 3.

242. *Id.*

243. *Id.*

244. *Id.*

Thus, the framework of Celebration absolutely and indefinitely allows Disney to retain power over the homeowners, resulting in the homeowners being powerless for all practical purposes.[245] Disney's ability to retain control over all aspects of the town is *anything but* a model of democracy that citizens would demand from their local government and is a clear-cut example of when the right to exclude goes too far.

C. The Business Judgment Rule's Inability to Protect HOA Members

Currently, the only protection afforded to HOA members is the business judgment rule, which protects the business decisions of HOAs as long as the association's directors and officers act in a reasonable manner.[246] HOA boards often will be able to defend their actions when challenged by citizens by relying on the business judgment rule.[247] As previously stated, an HOA can usually ensure that state courts will deem its business decisions reasonable if the HOA seeks professional opinions when making a decision. Such an action therefore lays the appropriate foundation to meet the requirements under the business judgment rule.[248]

Florida, the state where Tom Monaghan plans to build Ave Maria, has codified the business judgment rule.[249] Taking into account that Florida courts have generally upheld the actions of board members under the business judgment rule,[250] Monaghan and his developers will not have a hard time

245. *Id.*

246. *See* Lesser, *supra* note 125 (explaining that business judgment rule only protects HOA members if decisions made by officers are unreasonable). For an in-depth discussion of the business judgment rule, see *supra* Part II.C. *See also* Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060, 1074 (N.J. 2007) ("[T]he business judgment rule protects common interest community residents from arbitrary decision-making. That is, a homeowners' association's governing body has 'a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owe to its stockholders.'" (citation omitted) (quoting Siller v. Hartz Mountain Assocs., 461 A.2d 568, 574 (N.J. 1983))).

247. *See, e.g.*, Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n., 980 P.2d 940, 944, 953-54 (Cal. 1999) (determining that deference to board decisions, in this particular case dealing with condominium repairs, is appropriate under business judgment rule so long as decisions are made in good faith); Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1321 (N.Y. 1990) (accepting cooperative board's decisions so long as they are in accordance with business judgment rule); *see also Homeowner Association Boards and the Business Judgment Rule*, COMMUNITY E-SSENTIALS, (HindmanSanchez P.C., Colo.), Dec. 5, 2005, http://www.imakenews.com/eletra/mod_print_view.cfm?this_id=497059&u=ortenhindman&issue (noting that, when HOA is presented with lawsuits, it can rely on business judgment rule to defend action).

248. *See* Lesser, *supra* note 125 (observing that, as long as HOAs consult professionals when making decisions, all decisions will most likely be deemed reasonable). For a full discussion of the business judgment rule, see *supra* Part II.C.

249. FLA. STAT. ANN. §§ 607.0830-.0831 (West 2007). For pertinent parts of these statutes, see *supra* notes 127-29.

250. *See, e.g.*, Farrington v. Casa Solana Condo. Ass'n, 517 So. 2d 70, 71-72 (Fla. Dist. Ct. App. 1987) (providing example of court applying business judgment rule, and asserting that, as long as condominium board followed rules within condominium declaration, Florida statutes, and used business judgment, decisions made by board would be upheld).

satisfying the requirements to uphold decisions that infringe on constitutional rights.[251] Under current Florida law, the decisions that Monaghan is likely to have to make at some point to sustain the traditional Orthodox Catholic principles of Ave Maria's HOA[252] can be assumed to be valid, presuming any breach of fiduciary duty will not do any of the following: constitute recklessness; constitute a criminal violation; or involve "improper personal benefit," willful misconduct, bad faith, or malicious actions.[253] Monaghan and the developers are consulting Florida law in the planning of Ave Maria,[254] and therefore one can presume that they will make sure that their conduct falls inside the "reasonable" realm, so as not to violate Florida's business judgment rule.[255] Thus, the future town of Ave Maria is a perfect example of how the business judgment rule is an inadequate protection for dissenting homeowners, because it generally offers no recourse for homeowners who are unhappy with HOA decisions.

D. Adoption of a New Standard—The Fundamental Rights Inquiry Analysis

It is necessary to take action to protect homeowners because the state action doctrine and the business judgment rule are inadequate to protect dissenting homeowners from abuse of their constitutional rights.[256] Actual protection of constitutional norms from the overreaching of HOAs remains in the hands of individual states.[257] Under our country's concept of dual federalism, states may impose greater constitutional restrictions than the federal government.[258] Thus, states are not barred "from extending . . . rights beyond those afforded by the First Amendment within their own state constitutions."[259]

251. *See* Lesser, *supra* note 125 (mentioning all that is required to fulfill business judgment rule is professional consultation).

252. *See* Huber & Soucy, *supra* note 4 (mentioning Monaghan's plans to control Ave Maria's "moral atmosphere and behavior").

253. FLA. STAT. ANN. § 607.0831(1); *see also* Kloha v. Duda, 246 F. Supp. 2d 1237, 1244 (M.D. Fla. 2003) (preventing courts from asking directors to account for actions unless plaintiff shows "abuse of discretion, fraud, bad faith, or illegality"); Carroll, *supra* note 126, at 55 (stating that "[p]roving gross negligence is not enough" to be held liable under business judgment rule).

254. *See* Skoloff, *supra* note 8 (noting that attorneys for project "are reviewing the legal issues").

255. FLA. STAT. ANN. §§ 607.0830-.0831.

256. *See* Poyle-Leach, *supra* note 48, at 400 (emphasizing that limitations of state action doctrine with respect to residential community associations necessitate finding alternative).

257. *See id.* at 405 (noting that states, not federal government, are responsible for vigilantly monitoring HOA policies).

258. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

259. Poyle-Leach, *supra* note 48, at 384 (discussing PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 80-81 (1980)); *see also* Cologne v. Westfarms Assocs., 469 A.2d 1201, 1206 (Conn. 1984) (noting that federal law establishes minimum standard for exercise of individual rights, but does not inhibit states from affording higher protection for those rights); Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (stressing that federal standards regarding individual rights and civil liberties are floor beneath which restrictions cannot fall—states are free to afford greater civil protection); Commonwealth v. Sell, 470 A.2d 457, 466-67 (Pa. 1983) (emphasizing state has power to provide broader protections than those required by Federal Constitution).

Accordingly, in *PruneYard Shopping Center v. Robbins*,[260] the U.S. Supreme Court acknowledged that the decisions made regarding state action do not preclude states from exercising authority through the "police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[261] In order to ensure that decisions made by HOAs are subject to a state's constitution, it may be necessary that those constitutions be interpreted to include a state action limitation that would be applicable to HOAs.[262]

In *Committee for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n* (*Twin Rivers I*),[263] the New Jersey Superior Court, being on the forefront of the movement rejecting the business judgment rule, recognized the shortcomings of the safeguards established to protect homeowners.[264] Although this ruling was overturned by the state supreme court, many commentators argue that the superior court ruling "'recognize[s] the governmental nature of all these associations and expose[s] associations to the same safeguards expected to be provided by any other form of government.'"[265] In addition, the superior court's rejection of the application of the business judgment rule to HOAs raises the issue of whether due process and equal protection under the laws will be required from HOAs at some point in the future.[266] Therefore, the superior court's stance in *Twin Rivers I* regarding the regulation of HOAs provides some assurance to homeowners. In the future, it may be that homeowners can rely on the fact that the purchase of their property sanctions complete dominion and control over that property.[267]

Nonetheless, the appropriate inquiry into decisions made by HOAs (as applied by the superior court in *Twin Rivers I*) should take into account whether there is an implication of fundamental rights concerns along with the reasonableness of the rules and policies imposed.[268] Courts should analyze

260. 447 U.S. 74 (1980).

261. *PruneYard Shopping Ctr.*, 447 U.S. at 81.

262. *See, e.g.*, Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001) (finding California's free speech clause to be ambiguous in its application to state action, yet declining to characterize apartment owner's limitation on tenant speech as state action).

263. 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), *rev'd*, Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060 (N.J. 2007).

264. *See Twin Rivers I*, 890 A.2d at 965 (rejecting argument that HOA regulations should be regarded as matters of business judgment because of nature of fundamental rights at issue, and instead focusing inquiry on constitutional principles, not on reasonableness); *see also* Poyle-Leach, *supra* note 48, at 400 (noting New Jersey "boldly challenged" traditional model of application of business judgment rule to HOAs).

265. Mansnerus, *supra* note 142, at 8 (quoting Professor Paula Franzese).

266. *See id.* (explaining repercussions of *Twin Rivers I* decision and potential extension of due process requirements to HOAs, including questioning of voting and public hearing procedures within HOAs).

267. *Id.*

268. *See, e.g.*, *Twin Rivers I*, 890 A.2d at 963 (rejecting argument that community's obstruction of members' fundamental rights is matter of contract or business judgment, and concluding that obstruction requires constitutional evaluation).

decisions made by HOAs under a fundamental rights approach because of the importance of constitutional rights and the growth of HOAs.[269]

Such an inquiry would consist of a balancing approach of the fundamental rights afforded by state constitutions against the reasonableness of the limitations imposed by the HOA.[270] In employing the balancing approach, courts would be able to recognize rights that have been determined to be fundamental enough to include in the state constitution, while acknowledging the importance of property ownership and the right to exclude.[271] In applying the balancing approach, courts should analyze the reasonableness of the limitations by inquiring into such factors as the time, place, and manner of those limitations.[272] Similar to the *Twin Rivers I* appellate decision, if HOA decisions implicate fundamental rights, a constitutional inquiry is necessary, and the balancing approach should be applied.[273] Conversely, if HOA decisions do not involve fundamental rights, the application of the existing business judgment rule is appropriate.[274]

If Florida were to adopt a fundamental rights inquiry analysis[275] of HOA decisions, Ave Maria's plan could be in jeopardy. Considering that Monaghan's enemy "is the morally corroded secularism of modern America"[276] and that through the town of Ave Maria "he seeks . . . freedom to fully obey the moral teachings of the Catholic Church,"[277] there are fundamental rights concerns. Ave Maria's planning, which envisions a town regulated to conform to traditional Catholic principles while excluding those not in conformity,[278] demands a fundamental rights inquiry. Ave Maria's proposed structure of accordance with Catholic tenets implicates infringements on the fundamental rights of free speech by limiting the content of information received by homeowners and consumers to only information that is in accordance with Catholic teachings.[279]

269. See *supra* notes 51-54 and accompanying text for examination of the rapid growth of American communities subjected to HOAs.

270. *See Twin Rivers I*, 890 A.2d at 971 (recognizing that standard of fundamental rights inquiry should be rights guaranteed by New Jersey Constitution balanced against reasonableness of limitations).

271. *See id.* (noting that rights are fundamental but not absolute).

272. *Id.*

273. *See id.* at 963 (emphasizing necessity of constitutional inquiry if HOA decisions affect fundamental rights).

274. *See, e.g.*, Comm. for Better Twin Rivers v. Twin Rivers Homeowners' Ass'n (*Twin Rivers II*), 929 A.2d 1060, 1074 (N.J. 2007) (observing that "common interest residents have other protections" in addition to constitutional protections, and noting that business judgment rule offers residents in HOAs protection from arbitrary decision making by HOA). The business judgment rule should not be entirely displaced from HOA decisions and would still be applicable regarding decisions that do not rise to constitutional concern.

275. See *supra* Part II.C for an in-depth treatment of *Twin Rivers*, including what comprises a fundamental rights inquiry analysis.

276. Reilly, *supra* note 5, at 17.

277. *Id.*

278. *Id.*

279. *See id.* (arguing that Monaghan's plan to limit what television channels are available to

Ave Maria's policies would also violate the constitutional norm of free exercise of religion[280] and possibly the Establishment Clause.[281] The town of Celebration, as well, raises fundamental rights issues when taking into account Celebration's HOA policies and composition,[282] including those of free speech,[283] equal protection, and due process concerns.[284] Most likely, if Ave Maria or Celebration were subjected to a fundamental rights analysis, many of the restrictions would not pass judicial scrutiny.

Disney's Celebration community and Tom Monaghan's plans for Ave Maria reflect just two of many instances in which federal law, the state action doctrine, and the business judgment rule are inadequate safeguards of constitutional norms. In our system of government, it is the responsibility of the states to ensure that these fundamental rights are protected from overreaching HOAs.[285] Thus, states should reject the old approach of applying the business judgment rule[286] and adopt a fundamental rights inquiry analysis in order to regulate the expansive scope of HOAs, subjecting them to state constitutions and treating them as if they were municipalities.

IV. CONCLUSION

The modern development of HOAs within the American community along with the privatization of communities has changed the conception of local government.[287] HOAs provide to their constituents services that were formerly expected from a municipal government. Nonetheless, in providing governmental services, the Federal Constitution does not restrict associations from encroaching on individual liberties and rights.[288]

The expansive power of HOAs coupled with the lack of federal protection for residents of such associations suggests that states must intervene to protect their citizens. This need is particularly acute given the popularity of HOAs.[289] If

homeowners is unconstitutional).

280. *See* Skoloff, *supra* note 8 (noting Monaghan's insistence on Ave Maria's promotion of Catholic tenets, which could arguably infringe on homeowners' rights of free exercise of religion).

281. *See id.* (noting Monaghan's assertion that Ave Maria "will be governed according to strict Roman Catholic principles," which could constitute municipality establishing religion in contravention of First Amendment).

282. See *supra* Part III.B for a discussion of the structure of Celebration's HOA composition and how it differs from people's expectations of municipal governments.

283. An example of such a free speech restriction is Celebration's offering to discharge an HOA restriction on the sale of property, so long as disgruntled homeowners signed confidentiality agreements promising not to reveal why they left the community. Pollan, *supra* note 3, at 76.

284. See *supra* notes 240-45 and accompanying text for a discussion of policies of Celebration's HOA that could potentially violate equal protection and due process.

285. See *supra* notes 257-61 and accompanying text for a discussion on the relationship between the Federal Constitution and state power.

286. See *supra* Part II.C for a discussion of the business judgment rule.

287. See *supra* Part II.A for a discussion of the expansive nature of HOAs.

288. See *supra* Part III.A-C for an explanation of how HOAs are, for the most part, not subject to federal regulation, and, as a result, there is little to check the encroachment of individual rights.

289. See *supra* Part III.C for a discussion of the necessity of action at the state level to afford

the states refuse to take action, the notion of democracy and individual rights may yield in the context of property ownership to the power of privatization and the right to exclude. Such restrictions on our fundamental rights do not encompass the America our forefathers envisioned, nor the country we as citizens know and love today.

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protection to rights that the Federal Constitution is unable to protect.

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