

March 1998

The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama

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**THE CONSTITUTION AND PRIVATE GOVERNMENT:
TOWARD THE RECOGNITION OF CONSTITUTIONAL
RIGHTS IN PRIVATE RESIDENTIAL COMMUNITIES FIFTY
YEARS AFTER *MARSH V. ALABAMA***

Steven Siegel*

This Article considers the application of the Supreme Court's state-action theory to residential community associations (RCAs), a form of housing and community governance that has experienced extraordinary growth in recent years. Fewer than 500 RCAs were in existence in the United States before 1960. In the early 1990s, it was estimated that 32 million Americans lived in 150,000 RCAs. A continuing boom in RCA construction has led to predictions that twenty-five to thirty percent of Americans will be living in RCAs by early in the next century. Steven Siegel argues that this trend, although largely unnoticed, carries significant implications for the structure of our government, the delivery of traditional public services, and the availability of constitutional protections.

Many RCAs exercise powers traditionally associated with local government. Such powers may be extensive, including the ownership of streets and parks; the regulation of land use and home occupancy; the delivery of services such as refuse collection, street maintenance, and security; and the assessment and collection of mandatory fees that may be considered the functional equivalent of real estate taxes. Although the traditional view of RCAs is that each homeowner consents to the regime or chooses to reside elsewhere, Siegel rejects this view and suggests instead that RCAs are the product of forces other than consumer choice, including local government land-use policies and fiscal pressure on local governments leading to the privatization of local government services. Because of the traditional view, RCAs rarely have been deemed state actors subject to the requirements of the Constitution. As private entities, RCAs regulate behavior in a way that is anathema to traditional constitutional strictures.

As with company towns earlier this century, RCAs pose a threat to the constitutional rights of millions of Americans. This threat warrants a principled judicial response. Siegel assesses four established theories of state ac-

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tion and argues that although many RCAs could be considered state actors by operation of one or more of these theories, a more comprehensive and systematic approach to state action should be developed to evaluate RCAs. Siegel provides an approach that accounts for the special characteristics of the RCA form and the legal and political environment in which the RCA operates.

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Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.¹

In all probability, residential community associations account for the most significant privatization of local government responsibilities in recent times²

The privatization of [local] government in America is the most important thing that's happening, but we're not focused on it. We haven't thought of it as government yet.³

I. BACKGROUND: THE EMERGENCE OF THE RESIDENTIAL COMMUNITY ASSOCIATION AS THE DOMINANT FORM OF NEW HOUSING IN THE UNITED STATES

One in eight Americans lives in a residential community association (RCA),⁴ a form of housing and private-community governance that encompasses condominiums,⁵ housing cooperatives,⁶ and planned single-family

¹ *Marsh v. Alabama*, 326 U.S. 501, 508 (1946).

² U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 18 (1989).

³ JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 185 (1991) (quoting Gerald Frug, professor of local government law at Harvard University).

⁴ The term "residential community association" is used by some authorities to refer to condominiums, housing cooperatives, and planned single-family home developments. See U.S. ADVISORY COMM'N, *supra* note 2, at 3, 9-10. Other terminology employed by various authorities includes: "common interest development," see, e.g., CAL. CIV. CODE § 1351(a) (West Supp. 1997); "community association," see, e.g., FLA. STAT. ANN. § 468.431 (West 1991); "common interest community," see, e.g., UNIF. COMMON INTEREST OWNERSHIP ACT (1986); "common interest realty association," see, e.g., AMERICAN INST. OF CERTIFIED PUB. ACCOUNTANTS, *COMMON INTEREST REALTY ASSOCIATIONS* 1 (1992).

⁵ In a condominium, a homeowner holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. A condominium association manages the common spaces but does not hold title to any real property. A condominium property may consist of a single high-rise apartment building or may encompass attached or detached housing units on a substantial tract of land.

⁶ In a housing cooperative, the entire property is owned by a cooperative corpora-

housing developments.⁷ The RCA, of which fewer than 500 were in existence in the United States before 1960,⁸ is now the fastest growing form of new housing and, in many metropolitan areas, accounts for over fifty percent of new home sales.⁹ The number of Americans living in RCAs is expected to double in the next decade,¹⁰ leading to predictions that twenty-five to thirty percent of Americans will be living in RCAs by early in the next century.¹¹ The emergence of RCAs as the dominant form of new housing has been called a "quiet revolution,"¹² which is already having a far-reaching effect on political and social arrangements within and among tens of thousands of residential communities throughout the United States.¹³

Residential community associations are nonprofit organizations established by real estate developers with the approval of state or local government officials.¹⁴ Although RCAs may take several different forms,¹⁵ all

tion, and the members of the cooperative own shares of stock in the corporation and hold leases that grant occupancy rights to their residential units. Housing cooperatives usually, but not always, are situated in apartment buildings.

⁷ In a planned housing development, a homeowner generally holds title to both the exterior and interior of a residential unit and the plot of land around it. The planned development association (often called a homeowners' association) owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities.

⁸ See C. James Dowden, *Community Associations and Local Governments: The Need for Recognition and Reassessment*, in U.S. ADVISORY COMM'N, *supra* note 2, at 27. The Community Associations Institute (CAI), an industry trade group, recently estimated that in 1992 there were 150,000 RCAs housing 32 million people. See COMMUNITY ASS'NS INST., *COMMUNITY ASSOCIATIONS FACTBOOK 13* (Clifford J. Treese ed., 1993). Because the U.S. Census Bureau does not maintain data on the number of individuals or housing units subject to RCA governance, no authoritative and comprehensive database on the subject exists. CAI membership lists and estimates generally have been considered the most reliable sources of information on the extent of RCAs in the United States. See ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 18 (1992).

⁹ See DILGER, *supra* note 8, at 18. According to CAI, RCAs govern 50% of all housing for sale in the 50 largest metropolitan areas of the country and nearly all new residential development in California, Florida, New York, Texas, and suburban Washington, D.C. See *id.*

¹⁰ See Timothy Egan, *Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at 1.

¹¹ See Evan McKenzie, *Welcome Home*, N.Y. TIMES, Aug. 18, 1994, at A23.

¹² COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST xi (Stephen E. Barton & Carol J. Silverman eds., 1994).

¹³ See *infra* text accompanying notes 32-39.

¹⁴ Government approval procedures and regulation of RCAs varies significantly among the states, as well as among municipalities within states. See *infra* text accompanying notes 310-20.

¹⁵ Most RCAs take the form of a condominium, cooperative, or planned single-fami-

RCAs share the distinguishing characteristic that their establishment and essential authority over constituent homeowners arise from covenants, conditions, and restrictions (commonly known as CC&Rs) attached to the deeds to the homeowners' real property.¹⁶ Once established, an RCA typically performs a variety of functions within a homeownership community. The association maintains commonly owned facilities and real estate, furnishes services to the homeowners, establishes rules governing the use of both common property and individual housing units, and it collects assessment fees to pay for its operations. All purchasers of property within the RCA community automatically become members of the RCA, and are required to obey its rules and pay its fees and special assessments. In this respect, an RCA is quite different from a voluntary civic or neighborhood association.¹⁷

RCAs may be broadly characterized as territorial or nonterritorial. Some associations, especially urban condominiums and housing cooperatives, are geographically limited to a single high-rise apartment building. These are nonterritorial RCAs. Other RCAs, such as homeowner associations in planned single-family home developments, manage a significant amount of real estate. These territorial RCAs¹⁸ may exercise authority over a network

ly home development. For a discussion of the distinguishing characteristics of these three different forms of homeownership, see *supra* notes 5-7.

¹⁶ See generally EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 19 (1994).

¹⁷ See U.S. ADVISORY COMM'N, *supra* note 2, at 9. An RCA homeowner's failure to pay an RCA assessment will result in a lien on the homeowner's residence and, ultimately, may lead to the forced sale of the residence through the enforcement of the lien. Once an individual chooses to purchase a home in an RCA community, the individual can no more escape payment of an RCA assessment than he can escape payment of a municipal real estate tax. In many ways, the RCA assessment is the functional equivalent of a municipal real estate tax. See *infra* text accompanying notes 382-88.

¹⁸ The distinction between territorial and nonterritorial RCAs is not grounded in law, nor is the distinction always clear in practice. There are doubtless some RCAs that own or maintain a relatively small amount of open land, and for which the classification of territorial or nonterritorial may appear arbitrary. Nevertheless, most RCAs can be clearly understood as territorial or nonterritorial. In a national survey of RCAs, the U.S. Advisory Commission on Intergovernmental Relations concluded that approximately 90% of RCAs are territorial. See U.S. ADVISORY COMM'N, *supra* note 2, at 11-12.

The territorial/nonterritorial classification is an important distinction in determining whether a particular RCA is the functional equivalent of a municipality. See *infra* text accompanying notes 19-20. As the U.S. Advisory Commission on Intergovernmental Relations noted:

One characteristic of local government is that it has clear geographical boundaries and is responsible for territory within its borders. [Territorial] RCAs are similar to local governments in this regard. They maintain, and in some instances own, real estate and facilities beyond a single high-rise building . . . RCAs possessing some territorial authority over land and activities outside of private residential units give rise to "intergovernmental" activities and issues

of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial RCAs typically provide services such as street cleaning, trash collection, maintenance of open space, and security.¹⁹ Territorial RCAs also exercise extensive land-use powers traditionally associated with the municipal zoning and police-power authority, such as review of proposed home alterations and enforcement of rules governing home occupancy.²⁰

Although territorial RCAs hold many of the powers traditionally associated with general units of local government, these RCAs rarely have been recognized as "state actors"²¹ and thereby subjected to the requirements of the Constitution.²² Instead, RCAs have been viewed as wholly private asso-

U.S. ADVISORY COMM'N, *supra* note 2, at 11.

This Article is concerned exclusively with territorial RCAs, except where the distinction between territorial and nonterritorial RCAs is at issue. *See infra* text accompanying notes 482-88. For this reason, whenever the term RCA is used, it refers to territorial RCAs, unless otherwise indicated.

¹⁹ *See* U.S. ADVISORY COMM'N, *supra* note 2, at 12-13.

²⁰ *See* DILGER, *supra* note 8, at 23-24. RCAs "exercise power over members and even nonmembers in vital areas of concern, in that their decisions govern what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings." MCKENZIE, *supra* note 16, at 135. RCA rules sometimes restrict the age of those who may own homes in an RCA community, the number and ages of overnight visitors, the color a homeowner may paint her house, and whether a homeowner may build an addition to her house. An infraction of RCA rules may lead to the imposition of a penalty against a homeowner or to the denial of the right to use RCA facilities backed by judicial injunction. *See infra* text accompanying notes 389-96.

²¹ In the *Civil Rights Cases*, 109 U.S. 3 (1883), decided fifteen years after the adoption of the Fourteenth Amendment, the Supreme Court determined that the guarantees of the Fourteenth Amendment apply only to actions taken by the government. *See* The *Civil Rights Cases*, 109 U.S. at 11. In general, private conduct, "however discriminatory or wrongful," does not come within the ambit of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). However, the Court, beginning in the 1930s, has come to recognize that the distinction between public and private conduct is not always clear-cut, and that, under some circumstances, the actions of private parties may be attributed to the state. *See, e.g., Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that state action was present in a defendant's use of a peremptory challenge in a criminal case); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) (holding that state action was present when a creditor obtained a prejudgment writ of attachment of a debtor's property); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that state action was present in the conduct of a privately owned restaurant that leased space from a government agency); *Shelley*, 334 U.S. 1 (1948) (holding that state action was present in the judicial enforcement of a private restrictive covenant); *Marsh v. Alabama*, 326 U.S. 501 (1946) (holding that state action was present in the operation of a company town that was the functional equivalent of a municipality); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that state action was present in political party primary elections).

²² *See, e.g., Anelli v. Arrowhead Lakes Community Ass'n*, No. 2450 C.D., Commu-

ciations that enforce a private set of rules on homeowners through the familiar common-law mechanism of real estate servitudes. The traditional view of RCAs holds that an individual consents to the RCA servitude regime when purchasing property subject to the RCA and that a prospective homebuyer who does not wish to subject herself to RCA rules may purchase property elsewhere.²³ The contemporary RCA, however, is not solely or even primarily the product of consumer choice in the housing marketplace, perhaps no more than company towns of an earlier era were the product of consumer choice.²⁴ In fact, RCAs are the product of many larger forces, including local government land-use policies²⁵ and what the U.S. Advisory Commission on Intergovernmental Relations has termed "the most significant privatization of local government responsibilities in recent times."²⁶

nity Ass'n L. Rep., June 1997, at 3 (Pa. Commw. Ct. Feb. 13, 1997) (holding that an RCA is not a state actor); *Brock v. Watergate Mobile Home Park Ass'n, Inc.*, 502 So. 2d 1380 (Fla. 1987); *Ross v. Hatfield*, 640 F. Supp. 708 (D. Kan. 1986). *But see* *Pitt v. Pine Valley Golf Club*, 695 F. Supp. 778 (D.N.J. 1988) (holding that an RCA restrictive covenant amounted to state action under the *Marsh* doctrine); *Laguna Publ'g Co. v. Golden Rain Found.*, 182 Cal. Rptr. 813 (1982) (holding that an RCA is not a state actor for federal constitutional purposes but is a state actor under the California Constitution); *State v. Kolcz*, 276 A.2d 595 (Middlesex County Ct. 1971) (holding that an RCA may be analogized to the company town in *Marsh*).

Some commentators have considered the application of state-action theory to RCAs and have rejected such an application as wholly foreign to notions of free choice and voluntary consent that these commentators believe lie at the core of the RCA servitude regime. *See* Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 275-77, 304-06 (1976); Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP., PROB. & TR. J. 1, 28-30 (1984). These commentators are mistaken because they fail to recognize that the free choice and voluntary consent of housing consumers are largely illusory in the context of RCAs. *See infra* text accompanying notes 477-80. Moreover, the exigencies of today's housing marketplace, not nearly as manifest as when these commentators reached their conclusions, further undercut the viability of notions of free choice and voluntary consent in the contemporary RCA. *See infra* text accompanying note 478.

²³ *See* Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in U.S. ADVISORY COMM'N, *supra* note 2, at 50.

²⁴ *See* *Marsh*, 326 U.S. at 506. For a discussion of *Marsh* and the relative position of company towns in the United States at the time of the *Marsh* decision, *see* note 70.

²⁵ *See infra* text accompanying notes 271-95.

²⁶ U.S. ADVISORY COMM'N, *supra* note 2, at 18. Although the U.S. Advisory Commission characterizes RCAs as partly the result of a trend toward privatization on the part of traditional local governments, it does not necessarily follow from this characterization that RCAs, as a product of privatization, are themselves to be viewed as wholly private. In fact, the U.S. Advisory Commission adopted a quite different view: "[F]or the purposes of understanding the place and role of RCAs in local governance, as well as the costs and benefits of RCAs for both citizens and governments, an *intragovernmental perspective* on RCAs is more useful than a traditional corporate or

Moreover, from the perspective of the individual homebuyer in today's housing market, the notion of consent to the RCA legal regime at the time one purchases RCA property is simply incompatible with the exigencies of the housing market. RCAs constitute nearly all new residential development in California, Florida, and Texas and fifty percent of all housing for sale in the fifty largest metropolitan areas.²⁷ One housing market analyst has declared, "If you want a new home, it is increasingly difficult to get one that doesn't come with a homeowners' association."²⁸ As previously noted, the dominance of RCAs as a form of housing and community governance will continue to increase in coming years, with predictions that twenty-five to thirty percent of Americans will be living in RCAs early in the next century, a doubling of the current RCA percentage of the U.S. population.²⁹ Just as significant, RCAs are often the most affordable housing available in many housing markets.³⁰ In light of these factors, the notion of individual homebuyer autonomy, and especially individual homebuyer consent to the complex and comprehensive RCA servitude regime, is illusory.³¹

As private entities not subject to the requirements of the Constitution's First and Fourteenth Amendments, RCAs apparently are free to impose a ban on posting signs inside or outside a home,³² to restrict public assembly

neighborhood association perspective." *Id.* at 13 (emphasis added). This Article reaches the same conclusion and, having done so, explores the necessary constitutional implications arising from this conclusion.

²⁷ See DILGER, *supra* note 8, at 18.

²⁸ GARREAU, *supra* note 3, at 189 (quoting Douglas Kleine, former research director of the Community Associations Institute). In one survey of the California housing market, researchers found that 84% of those who bought a home in an RCA had not been looking to buy in an RCA and that many RCA homebuyers purchased their homes "reluctantly because they could not afford a home in an ordinary neighborhood or because few 'ordinary' neighborhoods existed in the areas they wanted to buy in." Carol J. Silverman & Stephen E. Barton, *Shared Promises: Community and Conflict in the Common Interest Development*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at 129, 137.

²⁹ See *supra* notes 10-11 and accompanying text.

³⁰ See McKenzie, *supra* note 11, at A23. In Orange County California, for example, the median price of a home subject to an RCA is \$45,000 less than the median price of a non-RCA home. See *id.*; see also U.S. ADVISORY COMM'N, *supra* note 2, at 13.

³¹ See *infra* text accompanying notes 477-80.

³² Cf. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding unconstitutional a municipal ordinance that banned the posting of signs on residential property). *Ladue* would not be applicable to an RCA rule that banned the posting of signs on an RCA homeowner's property because RCAs typically have not been deemed state actors. The right of an RCA to prohibit RCA homeowners from posting signs generally has been held to be a reasonable restriction under established private-law principles. See *Anelli v. Arrowhead Lakes Community Ass'n*, No. 2450 C.D., Community Ass'n L. Rep., June 1997, at 3 (Pa. Commw. Ct. Feb. 13, 1997); *Midlake on Big Boulder Lake Condominium Ass'n v. Cappuccio*, No. 02139, Community Ass'n L. Rep., May 1996, at 4 (Pa.

on their streets,³³ to prohibit the distribution of newspapers on their streets,³⁴ to restrict the number and ages of overnight visitors,³⁵ to prohibit members of a homeowner's immediate family (including the homeowner's spouse) from cohabiting with the homeowner,³⁶ and even to ban sexually

Sup. Ct. Jan. 16, 1995); *see also* Randolph P. Smith, *Homeowner Pays Fine: Brandermill Said "Shrink-Swell" Sign Was Violation of Subdivision Covenants*, RICHMOND TIMES DISPATCH, Aug. 3, 1996, at B5 (reporting that an RCA imposed a monetary penalty on a homeowner for displaying a sign that disclosed an adverse environmental condition affecting property). *But see* Gerber v. Longboat Harbour N. Condominium, Inc., 724 F. Supp. 884 (M.D. Fla. 1989) (holding that judicial enforcement of an RCA covenant barring the display of a flag constituted state action under the doctrine of *Shelley v. Kraemer*), *vacated on other grounds*, 757 F. Supp. 1339 (M.D. Fla. 1991); Pittman v. Cohn Communities, 229 S.E.2d 526 (Ga. 1977), (declining to enforce a covenant restricting the displaying of signs under the theory that such a covenant is state action, but not discussing state-action theory).

³³ Cf. Hague v. Committee of Indus. Orgs., 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of [public] streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court extended the rights of free speech and assembly to streets held by certain private entities. *See id.* at 507. For a discussion of the application of *Marsh* to RCAs, *see infra* text accompanying notes 59-121. For examples of RCA restrictions on political gatherings, *see* MCKENZIE, *supra* note 16, at 15 n.59. It is noteworthy that one state has enacted a statute that expressly overrides RCA restrictions on assembly in RCA common areas. *See* FLA. STAT. ch. 617.304 (1993) ("No [RCA] shall unreasonably restrict any parcel owner's right to peaceably assemble or right to invite public officers or candidates for public office to appear and speak in common areas and recreation facilities.").

³⁴ *See* Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813 (1982) (holding that an RCA ban on the distribution of newspapers on RCA property is not cognizable under the Federal Constitution). In *Laguna*, an RCA consisting of 20,000 residents banned the unsolicited distribution of all newspapers except for its in-house paper. The ban was enforced by the RCA's private security guards. *See id.* at 823. The California court struck down the ban on state constitutional grounds. *See id.* at 829; *see also infra* note 50. For a description of a ban on newspaper distribution by a large RCA in Arizona, *see* GARREAU, *supra* note 3, at 190-91.

³⁵ *See* U.S. ADVISORY COMM'N, *supra* note 2, at 16.

³⁶ In one case, an RCA sued a married couple because the wife, at age forty-five, was three years younger than the RCA's age requirement for residency. According to a newspaper account, the court decided in favor of the RCA and ordered the husband to sell the unit, rent the unit, or live without his wife. *See* MCKENZIE, *supra* note 16, at 15. (This decision apparently is not reported in the major reporters or on-line services). Similarly, Joel Garreau described the efforts of a large Arizona RCA to enforce its age-restrictive covenants by preventing an *adult* child (age 42) from residing with his parents. *See* GARREAU, *supra* note 3, at 190. Note that the Federal Fair Housing Act, which among other things generally prohibits housing discrimination against families with children under 18 years of age, does not prohibit the particular age restrictions that

explicit films, books, and magazines from a homeowner's bedroom.³⁷ Moreover, the RCA governing board, although elected by RCA homeowners, is the product of an electoral system that is at substantial variance from the one-person, one-vote principle guaranteed by the Fourteenth Amendment.³⁸ The typical RCA electoral scheme employs a one-house, one-vote system, disenfranchises all renters, and employs weighted voting in favor of the developer. Not surprisingly, one commentator has characterized the typical RCA electoral scheme as "profoundly undemocratic."³⁹

These considerations call for a principled judicial response. Toward this end, this Article carefully assesses four established theories of state action, each of which offers a perspective that is directly applicable to the present task. Although many RCAs could well be deemed state actors by operation of one or more of the established theories of state action, a more comprehensive and systematic approach to state action should be developed—an approach that takes account of the special characteristics of the RCA form and the legal and political environment in which the RCA operates.

II. ESTABLISHED THEORIES OF STATE ACTION AND THEIR APPLICATION TO RCAS

A. *The "Functional Equivalent of a Municipality" Theory*

1. Overview

In 1946, less than a decade after the Supreme Court pronounced that publicly owned streets were to be treated as public forums for expressive activity,⁴⁰ the Court in *Marsh v. Alabama*⁴¹ extended the reach of the First

are the subject of these two examples. See 42 U.S.C. §3602(k) (1994).

³⁷ Such a restriction has been reported to exist in at least one RCA located in Phoenix, Arizona. See GARREAU, *supra* note 3, at 190. The restriction apparently has not been the subject of litigation.

³⁸ In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court held that the malapportionment of a state legislature violated the Fourteenth Amendment. See *id.* at 568. The one-person, one-vote principle subsequently was extended to other elected state instrumentalities, including municipalities, see *Avery v. Midland County*, 390 U.S. 474, 478-79 (1968), and certain special purpose governmental organizations that perform "important governmental functions," see *Hadley v. Junior College Dist.*, 397 U.S. 50, 53-54 (1970). Although no court has held that an RCA is subject to the one-person, one-vote principle, certain territorial RCAs indisputably perform general governmental functions. See *infra* text accompanying notes 62-86.

³⁹ COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at xii.

⁴⁰ The public forum doctrine first appeared in a famous concurring opinion by Justice Roberts:

Amendment to privately owned streets in certain company-owned towns. The town of Chickasaw, Alabama, was owned in its entirety by the Gulf Shipbuilding Corporation.⁴² Grace Marsh, a Jehovah's Witness, distributed religious literature on a street in Chickasaw and was subsequently arrested and convicted of trespassing.⁴³ The Supreme Court struck down the conviction, holding that a company-owned town that performed all of the functions of a traditional municipality was a "state actor" subject to the First Amendment.⁴⁴ The Court noted:

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed.⁴⁵

The Court reasoned that the residents of Chickasaw, as "free citizens of their State and country,"⁴⁶ were entitled to the same constitutional rights as all other citizens, even if this were to entail a subordination of the property rights of the Gulf Shipbuilding Corporation.⁴⁷

On its face, *Marsh* can be read as a sweeping expansion of constitutional protection to expressive activity carried out on private property held open

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee of Indus. Orgs., 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring). The Roberts concurrence subsequently was adopted by the Court in *Schneider v. Irvington*, 308 U.S. 147 (1939), and *Jamison v. Texas*, 318 U.S. 413 (1943).

⁴¹ 326 U.S. 501 (1946).

⁴² *See id.* at 502.

⁴³ *See id.* at 503.

⁴⁴ *See id.* at 508-09.

⁴⁵ *Id.* at 504.

⁴⁶ *Id.* at 508.

⁴⁷ *See id.* at 508-09. The Court noted, "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupies a preferred position." *Id.* at 509 (citations omitted).

for public use. Alternatively, *Marsh* can be understood as a much more narrow expansion of constitutional protection applicable only to company towns and other privately owned communities that are the “functional equivalent of . . . municipalit[ies]”⁴⁸—that is, private property that is held open to the public *and* that contains homes, businesses, streets, and other town-like facilities and services.

At first, the Supreme Court adopted the more expansive reading of *Marsh*. In *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.*,⁴⁹ the Court held that a privately owned shopping center held open to the public is subject to the requirements of the First Amendment. The Court noted that the Logan Valley Plaza shopping center was “clearly the functional equivalent of the business district of Chickasaw . . . in *Marsh*.”⁵⁰ This expansive reading of *Marsh* was to remain the law of the land for fewer than ten years.⁵¹

In *Hudgens v. NLRB*,⁵² the Court expressly overturned *Logan Valley*⁵³

⁴⁸ *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). *Hudgens* was the first case in which the Court enunciated this concept as a description of the state-action theory first recognized in *Marsh*.

⁴⁹ 391 U.S. 308 (1968).

⁵⁰ *Id.* at 318.

⁵¹ See *Hudgens*, 424 U.S. at 518.

⁵² 424 U.S. 507 (1976).

⁵³ See *id.* at 518. The overturning of *Logan Valley* actually was a two-step process. *Logan Valley* arose from the labor picketing of a nonunion store in a privately owned shopping center, see 391 U.S. at 311-12, a circumstance in which the purpose of the picketing was directly related to the operation of the shopping center. In *Logan Valley*, the Court expressly left open the question of whether the right to engage in expressive activity at a privately owned shopping center also extended to expressive activity not related to the operation of the shopping center. See *id.* at 320 n.9. Four years later, the Court in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), directly addressed this question, and answered it in the negative. *Lloyd* appeared to establish a two-tiered analysis of First Amendment rights, premised on the content of expression. As things were to turn out, the *Lloyd* formulation laid the seeds of destruction of the right first recognized in *Logan Valley* because the formulation placed the right at odds with the core First Amendment doctrine that forbids content-based regulation of speech in a public forum. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). In *Hudgens*, the Court squarely confronted the doctrinal conflict and elected to resolve the conflict by overturning the right recognized in *Logan Valley*—the right to engage in expressive activity in privately owned shopping centers—rather than to expand the right by overturning the content-based restriction on speech established in *Lloyd*. See *Hudgens*, 424 U.S. at 512-21.

In any event, the Court's reasoning in *Lloyd* and *Hudgens* left untouched the essential holding of *Marsh* because the content-based restriction on speech propounded in *Lloyd* was intended to be applied only to privately owned shopping centers, see *Lloyd*, 407 U.S. at 563, 569, and not to company towns and other private municipalities. Moreover, in *Hudgens* the Court was careful to distinguish *Marsh* from *Logan Valley* and to

and adopted the narrow reading of *Marsh*. Under this reading, which remains the prevailing constitutional standard, it is not enough that private property held open for public use is the functional equivalent of a *portion* of a town, such as a town's business district.⁵⁴ The private property must be the functional equivalent of an *entire* town.⁵⁵ Significantly, the Court in *Hudgens* determined that, for constitutional purposes, an "entire town" is equivalent to the totality of major features distinguishing the community of Chickasaw in 1946:

The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i.e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and 'business block' on which business places are situated."⁵⁶

Thus, the Court in *Hudgens* not only replaced the broad reading of *Marsh* with the narrow reading; in a sense, the Court memorialized *Marsh*'s Chickasaw as the paradigmatic town for constitutional purposes.

In the twenty years since *Hudgens*, the Supreme Court has not decided any case that included a claim that a private community should be deemed a state actor under the rule first recognized in *Marsh*. Consequently, the *Marsh* decision as modified by *Hudgens* remains the prevailing federal constitutional standard⁵⁷ for determining whether a private community is the

reaffirm *Marsh*'s vitality. See *Hudgens*, 424 U.S. at 514-20. The *Hudgens* reading of *Marsh* is now the prevailing constitutional standard governing the functional equivalent of a municipality doctrine. See *infra* text accompanying notes 54-58.

⁵⁴ See *supra* text accompanying notes 49-51. But see *Logan Valley*, 391 U.S. at 318.

⁵⁵ See *Hudgens*, 424 U.S. at 516-17.

⁵⁶ *Id.* at 516 (citation omitted) (quoting *Marsh*, 326 U.S. at 502 (Black, J., dissenting)).

⁵⁷ Although the *Marsh/Hudgens* standard represents the present outer boundary of federal constitutional protection of expressive activity on private property, some state courts have recognized a broader right to engage in expressive activity based on their own state constitutions. See *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Lloyd Corp. v. Whiffen*, 849 P.2d 446 (Or. 1993); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Alderwood Assocs. v. Washington Env'tl. Council*, 635 P.2d 108 (Wash. 1981); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). These decisions all arose from litigation concerning the right to engage in expressive activity in privately owned shopping centers. It will be recalled, however, that the United States Supreme Court denied *federal* constitutional protection to expressive activity undertaken in privately owned shopping centers. See *Hudgens*, 424 U.S. at 507.

The apparent conflict between federal and various state constitutional provisions

functional equivalent of a municipality.⁵⁸

affecting expressive activity on private property has been squarely addressed by the United States Supreme Court. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the Court upheld the authority of state courts to recognize free speech rights under state constitutional provisions that exceed free speech rights recognized under the Federal Constitution. See *id.* at 80-81. The Court also held that the recognition of a right to engage in expressive activity on private property under a state constitutional provision does not represent a taking of private property for public use under the Fifth Amendment of the Federal Constitution. See *id.* at 82-85.

The application of particular state constitutional provisions to expressive activities (or other fundamental rights) undertaken on property owned by an RCA is outside the scope of this Article.

⁵⁸ Although since *Hudgens* the Court has not passed on a claim directly implicating the “functional equivalent of a municipality” doctrine, the Court in dicta has made references to the doctrine on several occasions as part of an effort to explain and harmonize its disparate and seemingly ad hoc state-action jurisprudence. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court noted, “We have . . . found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State,” citing the company town of *Marsh* as an example. *Id.* at 352 (citations omitted). For discussion of the potential significance of the *Jackson* dictum, see *infra* text accompanying notes 130-35. In *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), the Court identified the “functional equivalent of a municipality” doctrine as a subset of a broader theory of state action that the Court referred to as “public-function doctrine.” *Id.* at 158. The “functional equivalent of a municipality” doctrine represents one of two “branches” of public-function doctrine; the other branch arose from a series of decisions establishing that state action extends to the primary elections of a dominant political party. See *id.* (citing *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932)). “These two branches of public-function doctrine,” the Court explained, “have in common the feature of exclusivity. . . . [T]he elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and *the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw . . .*” *Id.* at 159-60 (emphasis added) (footnote omitted).

This latter-day interpretation of *Marsh* turns not on the fact that Chickasaw contained the necessary physical features identified with a municipality, but, rather, on the purported fact that all of its streets were privately owned. This interpretation is not only inconsistent with the reasoning of *Marsh*, it also is inconsistent with the factual record of *Marsh*: The private community of Chickasaw contained a major street that was not owned by the Gulf Shipbuilding Corporation and was, in fact, a publicly owned road. See Record at 34-42, *Marsh* (No. 114-1945) evidencing that the deed for the property owned by the Gulf Shipbuilding Corporation indicated that a public road traversed the property). For this reason, the Court’s latter-day interpretation of *Marsh* must be termed a reformulation, not a mere restatement. Under the *Marsh* reformulation, a privately owned community would be deemed the functional equivalent of a municipality if the community were to contain streets, if the streets were to be held open to the public, and if *all* of the streets in the community were to be held in private ownership. It is worth noting that many RCAs would satisfy the requirements of this test, including RCAs that would fail the traditional *Marsh* test because of the lack of a business district. In any

2. *The Theory as Applied to RCAs*

As noted above, the *Marsh/Hudgens* doctrine requires that, for a private community to be deemed a state actor, the community's streets must be held open for public use *and* the community must encompass (in addition to public streets) residential buildings, a business district, and perhaps other facilities associated with a municipality, such as sewers and a sewage treatment plant.⁵⁹ Under this strict standard, the vast majority of territorial RCAs would not be deemed state actors, either because they do not contain a business district⁶⁰ or because their streets are not held open to the public.⁶¹

Before reaching the question of the specific application of the *Marsh/Hudgens* doctrine to various types of RCAs, it is useful to first consider the functional similarity of a territorial RCA to a municipality. Territorial RCAs exercise authority over a network of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial RCAs typi-

event, the *Marsh* reformulation, as noted above, is mere dictum and is a misstatement of the factual record of *Marsh*.

⁵⁹ While this Article strictly interprets the Court's enumeration in *Hudgens* of homes, streets, and businesses as conditions precedent to a determination that a private community is a state actor, one hesitates to extend this strict interpretation to sewage systems and sewage treatment plants. See *Hudgens*, 424 U.S. at 516. Many municipalities, particularly in rural areas, lack these facilities and rely instead on private septic systems. Because it is difficult to credit that the mere presence or absence of sewers should make a constitutional difference in the status of a private community, this Article liberally interprets this element of the *Marsh/Hudgens* doctrine and concludes that sewage systems and sewage treatment plants are merely illustrative of town-like infrastructure rather than a condition precedent to a finding of state action.

⁶⁰ See DILGER, *supra* note 8, at 24. Many RCAs prohibit commercial uses within their territories. See *id.* Although Dilger does not cite statistical evidence concerning the prevalence of RCAs that prohibit commercial uses, he notes that "it is generally assumed RCAs enhance property values in urban areas by shielding low-density residential uses from the encroachment of . . . commercial . . . uses." *Id.*; see also Rosenberry, *supra* note 22, at 71.

⁶¹ RCAs that own and maintain streets that are not held open to the public generally are referred to as gated communities. It is estimated that four million people live in 30,000 gated communities in the United States. See generally EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED AND WALLED COMMUNITIES IN THE UNITED STATES* (1995). Approximately one in five RCAs is gated. See *id.* at 184 n.1; COMMUNITY ASS'NS INST., *supra* note 8, at 13. This percentage can be expected to increase, in light of predictions that the number of gated communities will double over the next five years. See Rebecca J. Schwartz, Comment, *Public Gated Residential Communities: The Rosemont, Illinois, Approach and Its Constitutional Implications*, 29 URB. LAW. 123, 124 (1997).

cally provide services such as street cleaning, trash collection, snow removal, and maintenance of open space.⁶² Territorial RCAs also exercise powers traditionally associated with the municipal zoning authority, such as review of proposed home alterations and enforcement of rules governing home occupancy.⁶³ All purchasers of property within an RCA community automatically become members of the RCA, and are required to obey its rules and pay its fees and special assessments.⁶⁴ A failure to pay an RCA fee, like the failure to pay a municipal real estate tax, can result in a lien on a homeowner's residence, and, ultimately, in the forced sale of the property through the enforcement of the lien.⁶⁵ Finally, an RCA community, like a municipality, is governed by officers who are elected by community residents.⁶⁶

In *Marsh*, the Supreme Court analogized company towns to municipalities and concluded that many company towns have "all the characteristics of any other American town."⁶⁷ The analogy resulted in the "functional equivalent of a municipality" standard; yet because the standard arose from the circumstances of a company town, the standard does not consider or give weight to *other* municipal characteristics found in some private communities but not generally found in company towns.⁶⁸ As the above listing of RCA

⁶² See U.S. ADVISORY COMM'N, *supra* note 2, at 12-13.

⁶³ See DILGER, *supra* note 8, at 23-24; see also *infra* text accompanying notes 389-98.

⁶⁴ See U.S. ADVISORY COMM'N, *supra* note 2, at 12-13.

⁶⁵ See GARREAU, *supra* note 3, at 184-85; see also *infra* text accompanying notes 382-88.

⁶⁶ See U.S. ADVISORY COMM'N, *supra* note 2, at 10. Note, however, that the voting franchise in an RCA is generally limited to homeowners. See *infra* notes 399-415 and accompanying text.

⁶⁷ *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

⁶⁸ Two commentators offered the following assessment of the functional similarities of RCAs and municipalities:

[U]pon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a "mini-government," the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality. Terminology varies from region to region; however, the duties and responsibilities remain the same.

Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owner Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976) (footnotes omitted).

characteristics makes clear, a territorial RCA often may have *more* in common with a municipality than would a company town because an RCA, in addition to being a human settlement, is a comprehensive system of service delivery, quasi-taxation, and community governance.⁶⁹ This observation suggests not only that the *Marsh* company-town paradigm may be ill-suited to RCAs, but also that a new, more inclusive, and up-to-date paradigm may be needed.⁷⁰ This undertaking is the subject of Part IV of this Article. For

It is noteworthy that the *Marsh/Hudgens* standard underlying the “functional equivalent of a municipality” theory of state action makes no reference to the power of local taxation or to the presence of an electoral system as indicia of state action. In contrast to RCAs, company towns presumably seldom contain an electoral system, and a company town’s system of employment compensation, fringe benefits, and deductions from benefits is much more difficult to directly analogize to a system of local taxation.

⁶⁹ The *Marsh/Hudgens* doctrine is grounded in the physical attributes of a town and, as a result, overlooks other attributes, including, most significantly, the nature and extent of powers a town exercises. These overlooked attributes are encompassed by other theories of state action, which are discussed in subsequent sections of this Article. For example, the power to control land use over a substantial amount of territory, and the power to collect and enforce assessments that are the functional equivalent of real estate taxes, can be understood as attributes of a municipality encompassed by the Supreme Court’s general governmental powers doctrine. See *infra* text accompanying notes 382-98. This Article ultimately proposes a unified state-action doctrine for RCAs that draws on aspects of four discrete state action theories. See *infra* Part IV. As for the *Marsh/Hudgens* town paradigm and its application to contemporary community development, the paradigm should be reconsidered in light of major changes in the physical as well as nonphysical attributes of towns in the five decades since *Marsh* was decided. See *infra* text accompanying notes 70, 76-82.

⁷⁰ In *Marsh*, the Supreme Court fashioned a state-action theory implicating company towns in part because “many” Americans then lived in company towns. *Marsh*, 326 U.S. at 508 & n.5 (citing data showing that “[i]n the bituminous coal industry alone, approximately one-half of the miners in the United States [about 330,000 workers] lived in company-owned houses . . .”). At the time of *Marsh*, few Americans lived in RCAs. See Dowden, *supra* note 8, at 27. Today, the situation is reversed: Few Americans live in company towns, and many Americans live in RCAs. See generally JAMES B. ALLEN, THE COMPANY TOWN IN THE AMERICAN WEST 140-45, 184-85 (1966) (describing the “gradual disappearance of the company town” in the western United States and also noting that there has never been a census or reliable survey of the population of company towns in the United States); COMMUNITY ASS’NS INST., *supra* note 8, at 10-13 (describing the ascendancy of the RCA over the past thirty years). Even if the total number of Americans living in company towns in 1946 were ten times the 350,000 bituminous coal miner workers expressly cited by the Court in *Marsh* as evidence that “many” Americans lived in company towns, the resulting estimate of 3,500,000 Americans living in company towns when *Marsh* was decided would constitute less than 3% of the 1940 United States population. See U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, 1940 CENSUS OF POPULATION 14 (1940) [hereafter 1940 CENSUS]. By contrast, the 32 million Americans estimated to have lived in RCAs in the early 1990s constitute 13% of the 1990 United States population, or over *four times* the population percentage

present purposes, the *Marsh/Hudgens* doctrine, as presently construed, is applied to several types of RCAs with a view toward exposing the conceptual limitations of the current doctrine.

a. *Large Mixed-Use RCAs*

Some larger RCAs probably would be deemed state actors under the *Marsh/Hudgens* standard. For example, Reston, an RCA in northern Virginia, is spread over 74,000 acres and has a population of over 35,000. It contains 12,500 residential units and over 500 businesses. It also has twenty-one churches, four shopping centers, eight public schools, and a sewage treatment plant. The streets and businesses are open to the general public.⁷¹ Sun City, an RCA in Arizona, has 46,000 residents and ten shopping centers, which are open to residents and nonresidents alike. The Sun City community association operates parks, libraries, and a fire department.⁷² Even under the most stringent application of the *Marsh/Hudgens* standard, there is little question that Reston and Sun City are the functional equivalents of a municipality and, consequently, are state actors.

b. *Exclusively Residential RCAs*

As noted above, the vast majority of RCAs probably would not be deemed state actors under the *Marsh/Hudgens* standard.⁷³ The principal reason is that most RCAs lack a business district, such as the block of stores in *Marsh*.⁷⁴ Significantly, the lack of commercial establishments in most RCAs parallels the lack of commercial establishments in most new suburban residential developments.⁷⁵ This observation suggests that the *Marsh*

possibly represented by company towns at the time *Marsh* was decided. See COMMUNITY ASS'S INST., *supra* note 8, at 13; U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING 1 (1990) [hereinafter 1990 CENSUS]. These observations not only suggest that RCAs have supplanted company towns as the dominant form of private community in the United States; they also perhaps suggest that state action theory applied today, in the same manner as the Court applied it in *Marsh* in 1946, would implicate RCAs as state actors.

⁷¹ See Katharine Rosenberry, *Condominium and Homeowner Associations: Should They Be Treated Like Mini-Governments?*, in U.S. ADVISORY COMM'N, *supra* note 2, at 71-72.

⁷² See GARREAU, *supra* note 3, at 184.

⁷³ See *supra* text accompanying notes 59-61.

⁷⁴ See *supra* note 60.

⁷⁵ The lack of commercial establishments in new residential developments was a major reason that the Supreme Court in 1968 held that a shopping center was the functional equivalent of a municipality. See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 317-18 (1968). Although *Logan Valley* subsequently was overruled by *Hudgens v. NLRB*, 424 U.S. 507 (1976), the following

“town” paradigm may need to be reconsidered.

In 1946, the year *Marsh* was decided, a human settlement consisting of homes, streets, and businesses could be fairly characterized as the sine qua non of a “town,”⁷⁶ and a human settlement entirely in private hands that contained homes, streets, businesses, and a modicum of public access could be fairly characterized as the functional equivalent of a town for constitutional purposes.⁷⁷ Today, for reasons that relate in part to increased reliance on the automobile⁷⁸ and in part to more restrictive zoning,⁷⁹ the *Marsh* “town” paradigm no longer is consistent with prevailing patterns of community development. The Thornton Wilder version of a small town exemplified in *Marsh* has been replaced by suburban sprawl,⁸⁰ regional shopping cen-

observation made in *Logan Valley* remains pertinent to the entirely different question of whether an exclusively residential community, in light of contemporary patterns of community development, may be deemed the functional equivalent of a municipality:

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of total retail sales in those two countries.

Logan Valley, 391 U.S. at 324 (footnote omitted). In the nearly thirty years since *Logan Valley*, growth in regional shopping malls has continued unabated. See New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766-67 (N.J. 1994) (noting that “from 1972 to 1992, the number of regional and super-regional malls in the nation increased roughly 800%”) (citation omitted). By 1993, there were nearly 40,000 shopping centers in the United States, accounting for over fifty-five percent of total retail sales. See INT'L COUNCIL OF SHOPPING CTRS., THE SCOPE OF THE SHOPPING CENTER INDUSTRY IN THE UNITED STATES 1992-1993, at 2 (1992). In turn, the development of regional shopping malls reinforced the trend toward physical separation of residential development from commercial development. See generally MARK BALDASSARE, TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA 7-8 (1986); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 259-61 (1985). In sum, prevailing land-use and development trends suggest that contemporary notions of what constitutes a “town” have been drastically altered from the time of *Marsh*.

⁷⁶ See JACKSON, *supra* note 75, at 100-02, 184-85, 238-43 (comparing the dominant patterns of suburban development in the United States over the past century).

⁷⁷ See *Marsh*, 326 U.S. at 505-09.

⁷⁸ See JACKSON, *supra* note 75, at 239 (describing low population density, made possible by the automobile, as a major characteristic of post-war suburban development).

⁷⁹ See *id.* at 242. Some suburban municipalities have adopted zoning ordinances that exclude commercial and industrial uses entirely from their jurisdictions. See 1 E.C. YOKLAY, ZONING LAW AND PRACTICE § 7-23 (4th ed. 1978) (noting that courts generally have upheld single-use zoning classifications).

⁸⁰ See BALDASSARE, *supra* note 75, at 7; JACKSON, *supra* note 75, at 239; RICHARD

ters far removed from residential areas,⁸¹ and zoning ordinances that separate commercial uses from residential uses—or even entirely prohibit commercial uses within a municipality.⁸² If the *Marsh* “town” paradigm were to be updated and made consistent with contemporary forms of community development, which typically exclude commercial uses from residential areas,⁸³ then many more territorial RCAs would be deemed the functional equivalent of municipalities.

In response to this formulation, some may argue that, even though the essential definition of an American town may no longer include a business district, the *Marsh/Hudgens* doctrine nevertheless should remain unchanged because extension of the state-actor doctrine to entirely residential private communities would implicate countervailing constitutional interests, such as residential privacy. These interests were not specifically addressed in *Marsh* because the decision arose from expressive activity undertaken in a commercial area.⁸⁴

This argument is best answered by posing the question: If Grace Marsh were to have been arrested for distributing religious literature in the residential, rather than the commercial, portion of Chickasaw, would the Court in *Marsh* have reached a different result? Substantial evidence in the *Marsh* opinion suggests that the Court would not have reached a different result, provided the privately owned residential streets of Chickasaw were held open to the public in the same way that publicly owned residential streets are held open to the public.⁸⁵ In any event, once a private community is determined to be the functional equivalent of a municipality, it follows that the private community should be subject to the same constitutional principles generally applicable to a municipality. Such constitutional principles, it should be stressed, already recognize homeowners’ privacy interest in the face of expressive activity conducted on residential neighborhood streets.⁸⁶

LOUV, AMERICA II, at 22-25 (1983).

⁸¹ See *supra* note 75.

⁸² See *supra* note 79.

⁸³ See *supra* notes 78-79.

⁸⁴ The plaintiff in *Marsh* was distributing religious literature on a sidewalk in the business district of the town of Chickasaw. See *Marsh*, 326 U.S. at 503.

⁸⁵ For example, the Court noted: “In short *the town* and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.” *Id.* at 503 (emphasis added). The Court’s statement suggested that not just the shopping district of Chickasaw was accessible to the plaintiff, but that other parts of the town were as well. Accordingly, if the plaintiff were to have distributed religious literature in these other parts of the largely residential town, the Court presumably would have reached the same result.

⁸⁶ For example, a municipality may, consistent with the First Amendment, enact an ordinance that prohibits “focused picketing” on a street in front of a particular residence. See *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Such an ordinance protects

c. RCAs with Restricted Access Policies

Many territorial RCAs restrict access to their streets and common areas to RCA residents and their guests. These RCAs typically are equipped with gates or guardhouses through which access to the community is carefully controlled.⁸⁷ Under the *Marsh/Hudgens* doctrine, there is no question that a nonresident of an RCA with a restricted-access policy would have no constitutional right to engage in expressive activity on the community's streets or common areas.⁸⁸ Less clear is whether a resident of a restricted-access private community (that otherwise satisfies the requirements of *Marsh* and *Hudgens*) would be precluded from making a constitutional claim against the community. A strict interpretation of the *Marsh/Hudgens* doctrine may lead to the conclusion that the requirement of public access to the private community is intrinsic to the doctrine, that is, the requirement applies as much to the resident claim as to the nonresident claim that gave rise to the *Marsh* decision. As will be discussed below, however, a strict interpretation of *Marsh*—one that limits its reach to the facts giving rise to its decision—may not be the most sensible or logical interpretation.

3. The Theory as Applied to RCA Residents

This Section discusses the application of the *Marsh/Hudgens* theory to RCA residents. For purposes of this Section, it is assumed that the RCAs under discussion contain all of the essential physical elements of a town as mandated by *Hudgens*, that is, the RCAs contain homes, streets, a business district, and municipal-like facilities such as sewers. The purpose of this Section is to highlight the significant unsettled questions arising from the application of the *Marsh/Hudgens* doctrine to RCA residents.

a. Residents of RCAs That Are the Functional Equivalent of a Municipality and That Provide Unrestricted Public Access to RCA Streets

Marsh arose from the assertion of a constitutional right against a private community by a nonresident of the community.⁸⁹ The decision, therefore, does not directly address the assertion of a constitutional right against a private community by a resident of the community. Still, even the bare holding of *Marsh* scarcely could justify a rule giving more constitutional

“residential privacy,” which, for First Amendment purposes, is a “significant government interest.” *Id.* at 484.

⁸⁷ See *supra* note 61.

⁸⁸ See *supra* text accompanying note 59; see also *supra* note 85.

⁸⁹ See *supra* text accompanying notes 40-47.

rights to nonresidents of a private community than to residents of the community. Moreover, much in *Marsh* suggests that the rights of community residents are at least coextensive with the rights of nonresidents. In fact, the right of Grace Marsh to engage in expressive activity in the private community of Chickasaw was premised, in large measure, on the right of Chickasaw residents to receive information to the same degree that residents of municipalities receive information.⁹⁰ If residents of private communities were to be entitled to the First Amendment right to receive information, then it follows that the same residents would be entitled to the right to engage in expressive activity protected by the First Amendment.⁹¹ For this reason, there is little question that the state-action principle recognized in *Marsh* implicitly extends both to residents and nonresidents of a private community.

b. *Residents of RCAs That Are the Functional Equivalent of a Municipality and That Restrict Public Access to RCA Streets*

Because *Marsh* arose from the assertion of a constitutional right against a private community by a nonresident of the community, a key issue was the significance of the right of the owner of the community to exclude the nonresident. In finding that the nonresident had a right to enter the property and to engage in expressive activity, the Court was careful to condition this right on the existence of a license, express or implied, that permitted the nonresident to enter the property at least for purposes other than expressive activity—for example, to walk the streets or to patronize a store.⁹² Absent

⁹⁰ Although Grace Marsh was a Jehovah's Witness who sought to distribute religious literature, the Court did little more than mention in passing *this* petitioner's free exercise and free speech rights. See *Marsh*, 326 U.S. at 505. The Court instead based its decision largely on private community residents' First Amendment right to *receive* information:

[Residents of company-owned towns], just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

Id. at 508-09 (footnote omitted).

⁹¹ The Court first expressly recognized the right to receive information, as a necessary corollary of the right to distribute information, in a decision issued three years before *Marsh*. See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); see also *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality opinion); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

⁹² See *Marsh*, 326 U.S. at 503 (“[T]he town and its shopping district are accessible to and freely used by the public in general . . .”).

this pre-existing license, the property owner could avail itself of the full panoply of trespass laws and exclude any unauthorized person from the property for any purpose, including expressive activity. Conversely, if the owner already were to have afforded broad public access to its property, then the trespass laws would be unavailable when a member of the public—a nonresident—sought to engage in protected expressive activity.⁹³

The Court's careful consideration in *Marsh* of the pre-existing right of a nonresident to enter a private community should have no relevance to the entirely different question of whether a resident of a private community may assert a constitutional claim against the community. The right of the resident to enter community property does not arise from a mere license, express or implied; rather, the resident's right is itself a property right arising from the resident's common-interest ownership of the community property.⁹⁴ Assuming that a private community is the functional equivalent of a municipality—that is, it contains homes, streets, a business district, and other town-like facilities—then the right of a resident to assert a constitutional claim against the community should not depend upon whether the community maintains unrestricted public access to its streets and other common areas.

In response to this broad interpretation of *Marsh*, some may argue that the requirement of public access is not severable from the doctrine of the functional equivalent of a municipality, in view of the undeniable fact that a defining characteristic of a municipality is that it gives residents and nonresidents alike access to the municipality's streets and parks.⁹⁵ This position finds some support in certain passages of the *Marsh* opinion.⁹⁶ As noted above, however, *Marsh* also can be interpreted as mandating a public-access

⁹³ See *id.* at 506 ("The more an owner, for his advantage, 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.") (citation omitted).

⁹⁴ See *supra* notes 5-7 and accompanying text. In a typical RCA, the CC&Rs attached to a homeowner's deed grant the homeowner access to RCA community property. In addition, a homeowner's access to the streets owned by a territorial RCA can be understood as a necessary incident of ownership, in view of the fact that the streets are usually the only means of access to the homeowner's residence.

⁹⁵ See *Hague v. Congress of Indus. Orgs.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

⁹⁶ For example, the Court stated: "The more an owner, for his advantage, 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." *Marsh*, 326 U.S. at 506 (citation omitted). It is possible to read this passage as supporting the proposition that the requirement of public access is intrinsic to the doctrine of the functional equivalent of a municipality, even when the person seeking to exercise a constitutional right is a resident of a private community.

analysis only to the extent that such analysis is relevant to the question of whether a particular First Amendment claimant has the right to enter upon a property in the first instance.⁹⁷ This interpretation finds strong support in the Court's stated concern in *Marsh* for the protection of constitutional rights of residents of private communities, and in the Court's unambiguous pronouncement that these residents are entitled to the same rights as residents of municipalities:

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.⁹⁸

Thus, the Court intended that residents of private communities be the primary beneficiaries of its theory of state action articulated in *Marsh*. This underlying concern of *Marsh* provides strong support for the propositions that the availability of constitutional protections to residents of private communities should not depend upon the degree of public access to the community, and that the public-access requirement in *Marsh* arises only because petitioner Grace Marsh was a nonresident.

Under this broad interpretation of *Marsh*, then, private communities that have unrestricted public access—and that are the functional equivalent of a municipality—should be deemed state actors with respect to residents and nonresidents alike, whereas private communities that have restricted access policies—and that are the functional equivalent of a municipality—should be deemed state actors, at least with respect to residents. This interpretation of *Marsh*, however, does not settle entirely the question of how, and to what extent, the *Marsh* standard applies to residents of private communities. A further consideration is the extent to which resident consent to RCA rules that are contrary to constitutional principles preclude the application of those principles. This is the subject of the following Section.

⁹⁷ See *supra* text accompanying notes 91-93.

⁹⁸ *Marsh*, 326 U.S. at 508-09 (footnotes omitted).

c. *Residents of RCAs That Are the Functional Equivalent of a Municipality: The Effect of Restrictive Covenants That Are Inconsistent with the Exercise of Rights Otherwise Guaranteed by the Constitution*

As noted above, RCAs traditionally are viewed as wholly private associations that enforce a private set of rules on homeowners through the familiar common-law mechanism of real estate servitudes.⁹⁹ Many RCAs have adopted rules that, for example, severely restrict the right of a homeowner to engage in expressive activity on RCA streets, or even on the homeowner's own property.¹⁰⁰ In the absence of a finding of state action under *Marsh* or under some other state-action doctrine, these rules are fully enforceable through judicial injunction.¹⁰¹ Implicit in the prevailing legal regime is the view that each homeowner consents to RCA servitudes when purchasing property subject to the RCA, and that a prospective homebuyer who does not wish to subject herself to RCA rules may purchase property elsewhere.¹⁰²

Because in *Marsh* the assertion of a constitutional right against a private community was made by a nonresident of the community,¹⁰³ the petitioner in *Marsh* was unencumbered by any contractual relationship with the community. *Marsh*, therefore, does not directly address the question of whether, in a community that is found to be the functional equivalent of a municipality, the contractual obligations of homeowners, including the obligation to adhere to the community's rules, preclude a homeowner from challenging one of these rules on constitutional grounds.

There are at least two possible approaches to addressing this question, each proceeding from a somewhat different set of assumptions. The first approach proceeds from the premise that an RCA that already has been determined to be the functional equivalent of a municipality under the

⁹⁹ See *supra* text accompanying note 23.

¹⁰⁰ See *supra* notes 32-34 and accompanying text.

¹⁰¹ Such enforcement, however, remains subject to common-law theories that require the party seeking enforcement to act reasonably and in good faith. See PATRICK J. ROHAN, 6 HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS—LAW AND PRACTICE § 8.05, at 8-37 (1996). Judicial interpretations of these standards vary considerably among jurisdictions, see *id.* at 8-37 to 8-49, but, in general, an "association's power in enforcing . . . restrictions can be immense, as illustrated by cases requiring the removal of a second story of a house or the relocation of the foundations for a house." WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 6.03(f), at 296 (2d ed. 1988) (citations omitted).

¹⁰² For a discussion of the conceptual difficulties with this view in light of contemporary economic and social trends and other considerations, see *infra* text accompanying notes 474-80.

¹⁰³ See *supra* text accompanying notes 40-47.

Marsh/Hudgens doctrine would, as a state actor, be subject to the same constitutional constraints to which the state itself is subject. Among these constraints are those encompassed by the unconstitutional conditions doctrine, under which a state generally may not grant a privilege or benefit subject to the condition that the recipient not exercise a constitutional right.¹⁰⁴ Thus, a state generally may not terminate an employee if it were to disagree with the employee's speech even if the state were free to terminate the employee for other reasons.¹⁰⁵ Similarly, a state may not impose unconstitutional conditions on out-of-state corporations even if the state otherwise were able to exclude entirely the corporation from doing business in the state.¹⁰⁶ The doctrine of unconstitutional conditions, as applied to an RCA operating as a state actor would, for example, invalidate an RCA restrictive covenant that conditioned the right to own property in an RCA on the waiver of one's constitutionally guaranteed right to freedom of expression or association. Such a condition would be unconstitutional even though prospective property owners have no per se constitutional right to own property in an RCA.

A second approach to addressing the question of the enforceability of RCA contractual obligations against RCA residents draws on a theory of state action, wholly distinct from the *Marsh/Hudgens* doctrine, that was first recognized in *Shelley v. Kraemer*,¹⁰⁷ a case decided by the Supreme Court two years after *Marsh*. The *Shelley* doctrine, and its application to RCAs, is discussed in detail in Part II.B. For present purposes, it is appropriate to briefly discuss *Shelley* as it applies to the narrow question of whether, in a community that is found to be the functional equivalent of a municipality under the *Marsh/Hudgens* doctrine, the contractual obligations of RCA residents, including the obligation to adhere to the RCA's rules, preclude a resident from challenging one of these rules on constitutional grounds.

In *Shelley*, the Supreme Court held that judicial enforcement of a racially restrictive covenant constituted state action.¹⁰⁸ The scope of the *Shelley*

¹⁰⁴ See generally Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 6-7 (1988); Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 100 (1988).

¹⁰⁵ See *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976) (holding as unconstitutional public officials' traditional patronage practice of replacing public employees who are not affiliated with the political party of the public official); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (finding that a state's refusal to renew a teacher's contract because he had been publicly critical of state policies imposed an unconstitutional condition on the receipt of a public benefit).

¹⁰⁶ See *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (holding that a state may not condition the right of an out-of-state corporation to conduct business in the state upon the corporation's waiver of its right to litigate in federal court).

¹⁰⁷ 334 U.S. 1 (1948).

¹⁰⁸ See *id.* at 19-20. For a separate and detailed discussion of the judicial-enforcement

principle remains unsettled: Some lower courts have confined *Shelley* largely to its facts;¹⁰⁹ other courts have interpreted the *Shelley* principle as extending to the 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.¹¹⁰ The broader interpretation of *Shelley*, as applied to RCA residents, would mean that RCA restrictive covenants would be unenforceable if, in their operation, they were closely analogous to an unconstitutional land-use ordinance of a municipality.¹¹¹ Thus, an RCA restrictive covenant prohibiting the display of signs on a homeowner's property would be unconstitutional to the same extent as a zoning ordinance with the same purpose. This would be true, under the *Shelley* principle, *notwithstanding the fact that the homeowner expressly agreed to be bound by the RCA's restrictive covenants*.¹¹²

The application of the *Shelley* doctrine to RCAs, unlike the application of the unconstitutional conditions doctrine to RCAs, does not necessarily depend upon a prior determination that an RCA is the functional equivalent of a municipality under the *Marsh/Hudgens* doctrine. The *Shelley* doctrine, as previously noted, turns on the mere act of judicial enforcement as state action,¹¹³ rather than on the status or attributes of the party against which judicial enforcement is sought. Still, it is possible to fashion a rationale, premised on prudential considerations, that would limit the application of

theory of state action, see *infra* Part II.B. For present purposes, discussion of the theory is limited to its potential application in nullifying the contractual obligations of homeowners, in circumstances when a private community already has been deemed the functional equivalent of a municipality under the *Marsh/Hudgens* doctrine. It is important to note that the judicial-enforcement theory of state action is entirely independent of the "functional equivalent of a municipality" theory of state action. See generally 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 16.2-4 (2d ed. 1992).

¹⁰⁹ See, e.g., *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *Parks v. "Mr. Ford,"* 556 F.2d 132, 135 n.6a (3d Cir. 1977).

¹¹⁰ See, e.g., *Gerber v. Longboat Harbour N. Condominium, Inc.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084, 1088 (Fla. Dist. Ct. App. 1978); *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 200 (Ohio Ct. C.P. 1969).

¹¹¹ Applying this principle, a court held invalid a restrictive covenant that prohibited the construction of a house of worship. The court reasoned that "if a zoning ordinance is in its operation, unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional." *Abbate*, 261 N.E.2d at 200 (citing *Shelley*).

¹¹² In *Shelley*, the seller of the real property subject to the racially restrictive covenant "consented" to the covenant when originally purchasing the property. Nevertheless, the seller's consent to the covenant had no effect on the Court's decision to hold unconstitutional the enforcement of the covenant. See *Shelley*, 334 U.S. at 19-20.

¹¹³ See *supra* text accompanying notes 108-12.

Shelley to only those RCAs that amount to the functional equivalent of a municipality under the *Marsh/Hudgens* doctrine.¹¹⁴ Alternately, the *Shelley* doctrine, as a theory of state action wholly independent of the *Marsh/Hudgens* state-action theory, can be understood as applying to a much broader range of RCAs, for reasons that arise from a careful reading of *Shelley* itself. This is the subject of Part II.B of this Article.¹¹⁵

¹¹⁴ For a discussion of the potential dangers to constitutional liberties that would result from an overly broad interpretation of *Shelley*, see *infra* text accompanying notes 169-76. For discussion of the proper scope of the *Shelley* doctrine as applied to RCAs, see *infra* Part II.B.3.

¹¹⁵ A third approach to addressing the question of enforceability of RCA contractual obligations against RCA residents, when the RCA already has been found to be the functional equivalent of a municipality under the *Marsh/Hudgens* doctrine, may be derived from constitutional analysis found in *Marsh*. The Court in *Marsh* expressly undertook a ranking of constitutional values and concluded that First Amendment values are paramount. See *Marsh*, 326 U.S. at 509. Conversely, the constitutional value deemed subordinate is a basic tenet of property rights, that is, the right of an owner to exclude others from his property. See *id.* at 500-01.

Applying the *Marsh* analysis to circumstances in which an individual plaintiff's asserted constitutional right is the same as the right asserted by the petitioner in *Marsh* (freedom of expression), and in which a defendant RCA's countervailing constitutional claim arises from the plaintiff's violation of the defendant's restrictive covenant (rather than on a trespass on real property as in *Marsh*), it would be difficult to reach a result other than the one reached in *Marsh*.

On the defendant's side of the ledger, the asserted violation of rights is more in the nature of a contract breach than a violation of a core property right. Under modern Supreme Court doctrine, contract rights appear to have a less compelling claim to constitutional protection than do property rights, especially the core constitutional right by which an owner may exclude another from his property. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . ."); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240-41 (1978) ("Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude . . . in modern constitutional history."). It may be that the contract right at issue does not even rise to the level of a constitutional right. See *Spannaus*, 438 U.S. at 244, 247 (holding that, among other predicates to a Contract Clause violation, the impairment of the contract must be "substantial" and the challenged government action must not be necessary to remedy an "important general social problem").

In any event, the rights at stake on the plaintiff's side of the ledger are, according to the Court in *Marsh*, "preferred" over other constitutional rights. *Marsh*, 326 U.S. at 509. Thus, *Marsh*'s ranking of constitutional values, at least as applied to the enforcement of restrictive covenants that would abridge an RCA resident's right of free expression, presumably would yield the same result as in the *Marsh* decision.

4. Summary

The “functional equivalent of a municipality” theory, exemplified by *Marsh v. Alabama*, arose from the limitations on personal freedoms imposed by company towns. The Court in *Marsh* established a paradigm of a municipality and found that a company town conformed, in essential respects, to the paradigm. The municipal paradigm consisted of streets held open for public use, and an amalgam of homes, a business district, and infrastructure.¹¹⁶ The paradigm would encompass some territorial RCAs that exist today.¹¹⁷ The paradigm, a construct of the 1940s, may need to be updated to reflect the typical contemporary suburban municipality, which often lacks a business district. Such an updated paradigm would encompass many more RCAs because the majority of RCAs lacks business districts.¹¹⁸

The underlying significance of *Marsh* lies not in its specific municipal paradigm but rather in its recognition that company towns—the dominant form of privatized municipal governance at the time *Marsh* was decided—should be subject to constitutional restraints as a matter of fundamental fairness. The Court observed that “[t]here is no more reason for depriving [the people who reside in company towns] of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.”¹¹⁹ In the fifty years since *Marsh*, company towns virtually have disappeared and RCAs have grown to encompass twelve percent of the United States population.¹²⁰ In the United States political economy today, RCAs may be said to occupy a similar, if not more dominant, position than that occupied by company towns some fifty years ago.¹²¹ Viewed from this perspective, the Court’s concern in *Marsh* over the major form of privatized local government that existed at the time of its decision would seem to apply, with equal force, to the major form of privatized local government that exists today.

B. The Judicial-Enforcement Theory

1. Overview

In *Shelley v. Kraemer*,¹²² the Supreme Court held that state action ex-

¹¹⁶ See *Marsh*, 326 U.S. at 502-03.

¹¹⁷ See *supra* text accompanying notes 59-61.

¹¹⁸ See *supra* text accompanying notes 62-70.

¹¹⁹ *Marsh*, 326 U.S. at 508-09.

¹²⁰ See COMMUNITY ASS’NS INST., *supra* note 8, at 13.

¹²¹ See *supra* note 70.

¹²² 334 U.S. 1 (1948).

ists when a court enforces a racially restrictive real property covenant. The facts of this well-known decision may be summarized in a few sentences. Shelley, an African-American, purchased real property that was subject to a covenant that restricted the ownership and occupancy of the property to persons of the "Caucasian race."¹²³ The same racially restrictive covenant bound the owners of forty-seven adjacent properties in a St. Louis neighborhood.¹²⁴ By its terms, the covenant permitted any of the co-covenantors to commence an action to enforce the covenant against any other co-covenantor, or against any successor in interest of a co-covenantor.¹²⁵ Kraemer, a co-covenantor, brought suit against Shelley, seeking enforcement of the covenant in the form of a judgment divesting Shelley of title to the property.¹²⁶ The Supreme Court of Missouri determined that the covenant was fully enforceable and ordered the trial court to grant the relief Kraemer requested.¹²⁷ The United States Supreme Court reversed, holding that judicial enforcement of the covenant amounted to state action and that such state action violated the Equal Protection Clause.¹²⁸

Shelley has been called "one of the most controversial and problematic decisions in all of constitutional law."¹²⁹ The controversy surrounding the decision results at least in part from the somewhat disingenuous way in which the Court reached its decision. The opinion, by Chief Justice Vincent, characterized its finding of state action as a straightforward application of established state-action principles, noting that the general proposition that judicial action is state action for purposes of the Fourteenth Amendment is "a proposition which has been long established by decisions of this Court."¹³⁰ The Court proceeded to cite no fewer than forty-one of its prior decisions in support of this general proposition.¹³¹ The cited decisions, however, arose either from violations of procedural due process in state

¹²³ *Id.* at 5.

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.* at 6.

¹²⁷ *See id.* (citing *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946)).

¹²⁸ *See id.* at 20.

¹²⁹ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1491 (1986). *Shelley* has spawned a voluminous literature. *See, e.g.*, Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); David S. Elkind, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

¹³⁰ *Shelley v. Kraemer*, 334 U.S. at 14.

¹³¹ *See id.* at 14-18 nn.13-22.

court criminal and civil proceedings¹³² or from violations of First Amendment rights in the judicial enforcement of substantive common-law rules in criminal prosecutions and tort actions.¹³³ The cited decisions provide scant support for the specific holding in *Shelley* that judicial enforcement of the *substantive provisions of a private agreement* could amount to state action and, solely by virtue of such state action, subject the substantive contractual provisions, under some circumstances, to constitutional constraints.¹³⁴ For this reason, the *Shelley* opinion has been harshly criticized as failing to recognize the distinction between the judiciary in its capacity as a public institution and the judiciary in its capacity as an enforcer of private transactions.¹³⁵ Far from being a straightforward application of well-established state-action principles, *Shelley* represents the recognition of an entirely new branch of state-action theory.

The failure of the Court in *Shelley* to address directly or even to acknowledge its own doctrinal disjuncture led inexorably to other critical shortcomings in the opinion. Thus, the Court failed to even consider the countervailing constitutional values at stake¹³⁶ and failed to articulate a coherent set of principles by which lower courts could apply the *Shelley* theory of state action in particular cases. In the absence of this guidance, the *Shelley* decision, taken literally, can be understood as subjecting to constitutional

¹³² See *id.* at 15-17 nn.14-18.

¹³³ See *id.* at 17-18 nn.20-21.

¹³⁴ See *id.* at 18-23. It is telling that the Court, following its exhaustive survey of its own precedent, went on to state the following proposition, almost as an aside: "Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." *Id.* at 20. Significantly, this statement was not accompanied by any citation to authority. This statement constitutes the theory of state action first recognized in *Shelley*.

¹³⁵ See Henkin, *supra* note 129 at 474-77.

¹³⁶ If the judiciary, acting in its capacity as an enforcer of private transactions, were deemed a state actor, then this determination would have a direct and substantial effect on the enforceability of private transactions, which, in turn, suggests that the contract rights and property rights secured by these transactions may well be abridged in particular cases. These contract rights and property rights themselves have a constitutional dimension. See *Peterson v. City of Greenville*, 373 U.S. 244, 249-50 (1963) (Harlan, J., concurring):

Underlying . . . [*Shelley*] is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from government interference.

See also *Edwards v. Habib*, 397 F.2d 687, 692-93 (D.C. Cir. 1968). For a discussion of the countervailing constitutional rights at stake in applying state-action theory to RCAs, see *infra* text accompanying notes 465-503.

constraints the entire sphere of private agreements whenever these agreements are subject to judicial enforcement. It is doubtful that the Court ever intended this result in *Shelley*, because such a result effectively would reduce the Fourteenth Amendment state-action requirement to a "meaningless formality."¹³⁷

The essential ambiguity of the *Shelley* opinion, and the apparent unwillingness of the Supreme Court to revisit the decision,¹³⁸ has ensured a legacy of doctrinal confusion. Although virtually all courts and commentators agree that the reach of the *Shelley* doctrine should be restricted, the search for a limiting principle has failed to produce anything approaching a consensus. Quite to the contrary, the *Shelley* decision has given rise to a welter of conflicting interpretation as to its essential meaning and application.¹³⁹

Some courts essentially limit the application of *Shelley* to the judicial enforcement of racially restrictive covenants.¹⁴⁰ Other courts interpret *Shelley* as proscribing the judicial enforcement of covenants that discriminate on grounds other than race as well as covenants that abridge fundamental rights guaranteed by the Due Process Clause and the first eight amendments to the Constitution.¹⁴¹ Other courts, whether accepting of a narrow or a broad interpretation of the rights protected by *Shelley*, limit the application of the *Shelley* holding to circumstances in which judicial enforcement of a private covenant is contrary to the wishes of parties to a transaction to which the

¹³⁷ LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 259 (1985).

¹³⁸ In the nearly fifty years since *Shelley* was decided, the Court has never defined the essential contours of the *Shelley* doctrine.

¹³⁹ See *infra* notes 142-76 and accompanying text.

¹⁴⁰ See, e.g., *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("The holding of *Shelley* . . . has not been extended beyond the context of race discrimination."); *Parks v. "Mr. Ford,"* 556 F.2d 132, 135 n.6a (3d Cir. 1977) ("[The *Shelley*] doctrine has been limited to cases involving racial discrimination."); *Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542, 549 (Pa. 1984) ("Where a state court enforces the right of private persons to take actions which are permitted but not compelled by law, there is no state action for constitutional purposes in the absence of a finding that racial discrimination is involved as existed in the *Shelley* case . . .").

¹⁴¹ See, e.g., *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (holding that the judicial enforcement of a discovery motion sought by a private party would amount to state action under the *Shelley* doctrine and, as such, its enforcement would violate the First Amendment rights of the litigant against whom the order would have been enforced); *Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1238-39 (5th Cir. 1981) (holding that the judicial enforcement of an injunction against the boycotting of a merchant would amount to state action under the *Shelley* doctrine); *Henry v. First Nat'l Bank*, 595 F.2d 291, 299 (5th Cir. 1979) (holding that the judicial enforcement of an injunction against the boycotting of a merchant would amount to state action under the *Shelley* doctrine); *Casa Marie, Inc. v. Superior Court*, 752 F. Supp. 1152, 1156 (D.P.R. 1990) (holding that judicial enforcement of discrimination against handicapped persons amounts to state action under the *Shelley* doctrine).

covenant applies,¹⁴² a circumstance that was present in *Shelley*. Still other courts, explicitly or implicitly recognizing the functional similarity of the restrictive covenant in *Shelley* to government land-use regulation, have applied the *Shelley* holding broadly when the matter at issue has been the enforcement of restrictive covenants that controlled the use and occupation of land.¹⁴³ Significantly, only a few commentators have called for the overturning of *Shelley*,¹⁴⁴ a fact that suggests that there is broad (if not unqualified) support for the *Shelley* doctrine, but very little agreement on the scope, and indeed the central meaning, of the doctrine. These matters are discussed at length in the next Section.

2. *The Shelley Doctrine and Its Application: The Search for a Limiting Principle*

The purpose of the present discussion is not to consider actual and potential applications of the *Shelley* doctrine to RCAs; that discussion comes later. The purpose, quite simply, is to consider the proper scope of the *Shelley* doctrine because, as noted above, this crucial issue of constitutional law has yet to be resolved.¹⁴⁵ Toward this end, this Article considers four distinct principles that, to varying degrees, would limit the scope of the *Shelley* doctrine. This discussion begins with the principle that would limit *Shelley* most narrowly and proceeds, in ascending order, to the principle that would apply *Shelley* most broadly. One of the four principles is then identified as appearing to best embody the complex considerations that gave rise to the *Shelley* decision. This article then discusses the actual and potential application of this principle to RCAs.

¹⁴² See, e.g., *Bell v. Maryland*, 378 U.S. 226, 330-32 (1964) (Black, J., dissenting); see also Pollak, *supra* note 129, at 13.

¹⁴³ See, e.g., *Gerber v. Longboat Harbour N. Condominium, Inc.*, 724 F.Supp. 884 (M.D. Fla. 1989); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978); *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196 (Ohio Ct. C.P. 1969); see also Lewis, *supra* note 129, at 1115-16.

¹⁴⁴ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 15-16 (1971) (“[*Shelley*] converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion.”); Lino A. Greglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 787-88 (1989) (“[*Shelley*] is disconcerting because it illustrates with stark clarity both the Court’s belief and the truth that it is exempt from any requirement that its opinions make sense.”).

¹⁴⁵ See *supra* text accompanying notes 138-39.

a. *Shelley Is Limited to the Enforcement of Racially Restrictive Covenants*

Some courts and commentators have limited *Shelley* to the judicial enforcement of racially restrictive covenants, a limitation that essentially confines *Shelley* to its facts.¹⁴⁶ There is little in *Shelley* that would support such a restrictive interpretation. Most of the opinion in *Shelley* is taken up with the question of whether judicial enforcement of a private covenant amounts to state action.¹⁴⁷ The Court answered this question in the affirmative¹⁴⁸ and, in doing so, did not expressly limit its newly recognized theory of state action to any particular subject matter.¹⁴⁹

Thus, in order to confine the judicial-enforcement theory of state action to racially restrictive private covenants, one must look beyond *Shelley* and consider other established principles of constitutional law. One need not look far; racial equality is, without question, a central concern of the Equal Protection Clause and of constitutional law generally.¹⁵⁰ However, the proposition that racial equality is a central concern of the Constitution is quite different from the proposition that the right to be free of racial discrimination is a right that is *superior* to all other constitutional rights including, for example, the right of free expression and the right to privacy. It is the latter proposition, and not the former, that would support a narrow reading of *Shelley* to the effect that the judicial-enforcement theory of state action is limited to racially restrictive covenants and may *never* apply to covenants that, for example, limit free expression or infringe the right to

¹⁴⁶ See *supra* note 140.

¹⁴⁷ See *Shelley*, 334 U.S. at 8-21.

¹⁴⁸ See *id.* at 23.

¹⁴⁹ In fact, the theory of state action first recognized in *Shelley* is articulated in sweeping language:

Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is *to deny rights subject to the protection of the Fourteenth Amendment*, it is the obligation of this Court to enforce the constitutional commands.

Id. at 20 (emphasis added). Note that "rights subject to the protection of the Fourteenth Amendment" encompasses the substantive rights guaranteed by the Fourteenth Amendment's Due Process Clause in addition to the rights guaranteed by the Fourteenth Amendment's Equal Protection Clause.

¹⁵⁰ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry.").

privacy. However, the latter proposition which amounts to an explicit ranking of constitutional values, is not a recognized principle of constitutional law.¹⁵¹

Those who advocate the limiting of *Shelley* to racially restrictive private covenants apparently would believe that judicial enforcement of a covenant that effectively prohibits a married couple from living together in a private residence¹⁵² is a constitutional exercise of judicial power as is the judicial enforcement of a private covenant that prohibits the displaying of signs in a private residence.¹⁵³ *Shelley* unquestionably is in need of a limiting principle, but as the above real-world examples of private covenants may demonstrate, the limiting principle should not be so confining as to recognize one and only one constitutional right—racial equality—when courts enforce private covenants.

b. *Shelley Is Limited to the Enforcement of Covenants Affecting Particular Transactions Under Circumstances in Which the Transaction Would Have Been Completed but for the Enforcement of the Covenant*

Shelley arose from the enforcement of a covenant against a particular sale of real property in which both the buyer and seller of the property were willing participants in the transaction.¹⁵⁴ Under these circumstances, the transaction would have been completed *but for* the intervention of the state court, which acted in this case not on behalf of either buyer or seller, but on behalf of a plaintiff co-covenantor of the seller.¹⁵⁵ In one passage in the *Shelley* opinion, the Court expressly noted that the transaction would have been completed but for the intervention of the state court, and suggested that this fact was a factor in its determination that state action was present in the judicial enforcement of the restrictive covenant.¹⁵⁶

¹⁵¹ The distinction is a subtle one and thus bears repeating: Although racial equality under law is, without doubt, a paramount constitutional value, it has never been held to be the supreme constitutional value, superior per se to the values guaranteed by the First Amendment, for example.

¹⁵² For a description of such an RCA covenant and of its judicial enforcement against an RCA homeowner, see *supra* note 36.

¹⁵³ For a description of such an RCA covenant, see *supra* note 32.

¹⁵⁴ See *Shelley*, 334 U.S. at 19.

¹⁵⁵ See *id.* at 6.

¹⁵⁶

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

Although in *Shelley* the Court did not unequivocally adopt a “but for” standard of judicial intervention as a necessary precondition to a finding of state action in the judicial-enforcement context, some courts, stressing the fact pattern of *Shelley* and the passage in the opinion noted above, have argued for the adoption of such a standard.¹⁵⁷ Alternatively, many other courts have ignored or declined to limit the judicial-enforcement theory of state action to the particular circumstances giving rise to the *Shelley* decision.¹⁵⁸ Indeed, much in the *Shelley* opinion suggests that the judicial-enforcement theory of state action extends beyond the narrow confines of a “but for” standard of judicial intervention.¹⁵⁹

Id. at 19. Although this passage from *Shelley* suggests that a “but for” standard was a factor in the Court’s determination that state action was present, the passage does not foreclose a broader reading of the *Shelley* holding. In fact, the opinion elsewhere seems to invite a broader reading, as in this passage:

Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

Id. at 20.

¹⁵⁷ For example, Justice Black, writing in dissent in *Bell v. Maryland*, 378 U.S. 226 (1964), argued for the proposition that *Shelley* protects the right of a property owner to “sell his property to whom he pleases . . . so long as both parties are willing parties . . .” *Id.* at 331. Justice O’Connor, dissenting in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), also adopted this characterization of the *Shelley* holding. *See id.* at 635-36.

¹⁵⁸ *See, e.g.*, *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (holding that the judicial enforcement of a discovery motion sought by a private party would amount to state action under the *Shelley* doctrine and, as such, its enforcement would violate the First Amendment rights of the litigant against whom the order would have been enforced); *Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1238-39 (5th Cir. 1981) (holding that the judicial enforcement of an injunction against the boycotting of a merchant would amount to state action under the *Shelley* doctrine); *Henry v. First Nat’l Bank*, 595 F.2d 291, 299 (5th Cir. 1979) (holding that the judicial enforcement of an injunction against the boycotting of a merchant would amount to state action under the *Shelley* doctrine); *Casa Marie, Inc. v. Superior Court*, 752 F. Supp. 1152, 1156 (D.P.R. 1990) (holding that judicial enforcement of discrimination against handicapped persons amounts to state action under the *Shelley* doctrine); *Gerber v. Longboat Harbour N. Condominium, Inc.*, 724 F.Supp. 884 (M.D. Fla. 1989); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978); *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196 (Ohio Ct. C.P. 1969).

¹⁵⁹ *See Shelley*, 334 U.S. at 20:

Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the

As a potential limiting principle intended to curtail the reach of the *Shelley* doctrine, the "but for" principle merits careful consideration. In essence, the principle characterizes the act of judicial enforcement as a supervening force, separate and distinct from the intentions of certain parties to a particular transaction. Because the judicial enforcement does not arise from the intentions of these parties, then, so the theory holds, the enforcement may be understood as arising not from a private third party but, rather, from the state itself.

This analysis depends upon how one chooses to define the entire matter in controversy. Although, under the above paradigm, the act of judicial enforcement arises from a third party to the subject *transaction*, e.g., the sale of the home in *Shelley*, it is equally true that the judicial enforcement arises from a party to the subject *litigation*, e.g., Kraemer of *Shelley* was the original plaintiff in the litigation and the party that sought the enforcement of the racially restrictive covenant. Therefore, at the risk of belaboring the obvious, should one choose to define the entire matter in controversy as the litigation rather than the transaction, then the act of judicial enforcement is not a supervening force but, rather, is the enforcement of the pleadings of one of the parties to the litigation. This observation suggests that the characterization of an act of judicial enforcement as a state act merely because it does not arise from either party to a bipolar transaction amounts to either a conceptual slight of hand or an instance of severe judicial myopia.

The "but for" principle has other conceptual difficulties. Taken literally, the principle has little, if any, applicability beyond the factual circumstances that gave rise to *Shelley*. As noted above, the principle is predicated upon the existence of a two-party transaction separate from the litigation as well as upon the existence of one party to the litigation that is not a direct party to the subject transaction. This model, however, is of limited or no value when the matter in controversy is a different type of transaction, even when the rights and interests at stake in such a transaction are identical to those in *Shelley*.

Consider this example, in which the facts in *Shelley* are somewhat altered, but the parties and historic circumstances surrounding the case remain the same. Imagine that the co-covenantors of *Shelley* have established a homeowners' association, of which membership among all co-covenantors is mandatory, and that the association maintains recreational facilities generally available to members of the association. Imagine further that Shelley, an African-American, was permitted to purchase a home within the homeowners' association, but that he was not permitted to use the recreational facilities because a restrictive covenant expressly limited use of the facilities to

purposes of the Fourteenth Amendment, refers to exceptions of state power in all forms.

See also *supra* note 156.

white members of the association. Shelley nevertheless attempted to use the facilities, and the association brought suit to enforce the restrictive covenant. What result under the “but for” principle of judicial enforcement, assuming the statutory and common-law regime that existed in 1948?¹⁶⁰

It would appear that the plaintiff homeowner association would prevail under a strict application of the “but for” principle because, under the facts in *Shelley*, there is no analogue to the willing seller. Instead, there is only the plaintiff homeowner association, which wishes to discriminate, and the defendant African-American, who wishes to be free of discrimination. Thus, a strict application of the “but for” principle to these facts yields a highly unsatisfactory result, one which elevates form over substance.

The formalistic difference between the above facts and the facts in *Shelley* should properly give way to the real issue, which is that the homeowners association, like the plaintiff co-covenantor in *Shelley*, sought to enforce a racially discriminatory restrictive covenant and that the judiciary, as an instrumentality of the state, was poised to undertake such an enforcement. If the *Shelley* holding were to stand for anything, it surely must stand for a principle that is sufficiently broad as to encompass the facts described above. If so, then it follows that the “but for” standard of judicial enforcement must be rejected as a potential principle that would limit the application of the judicial-enforcement theory of state action.

c. *Shelley Is Limited to the 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*

Shelley arose from the enforcement of a restrictive covenant affecting the use of real property. This simple observation suggests a principle by which the application of *Shelley* may be limited: that is the *Shelley* doctrine does not reach every act of judicial enforcement of private agreements, but, rather, the doctrine is confined to some private covenants that control the use and occupation of land. This interpretation of *Shelley* stresses the functional similarity of comprehensive schemes of private restrictive covenants that “run with the land” and of municipal zoning.¹⁶¹

¹⁶⁰ By 1973, the Supreme Court had struck down the form of racial discrimination described above, although on statutory rather than constitutional grounds:

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases, or holds this property, the same rights as . . . a white resident.

Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 437 (1973). Having disposed of this matter on statutory grounds, the Court did not pass on the constitutional question of whether the *Shelley* doctrine applied to these facts.

¹⁶¹ See generally Lewis, *supra* note 129, at 1115-16; see also *Petition for Writ of*

The zoning analogy draws strength from the suggestion in *Shelley* that the enforcement of racially restrictive covenants was merely an indirect way of accomplishing what legislatively determined zoning schemes had accomplished directly,¹⁶² prior to the Court declaring such zoning schemes unconstitutional.¹⁶³ On this view, *Shelley* can be read as standing for the proposition that, to the extent that a zoning scheme seeks to accomplish an unconstitutional purpose and is thereby invalid, the judicial enforcement of a restrictive covenant seeking to effectuate the same unconstitutional purpose also is invalid.¹⁶⁴

This reading of *Shelley* is premised on what may be fairly characterized as an unstated assumption of *Shelley* that comprehensive local land-use control is a sovereign function of government and that even partial delegation of this function to private parties is an appropriate subject of constitutional concern.¹⁶⁵ Note that this unstated assumption draws on the principles articulated in the public-function theory of state action first recognized in *Marsh*.¹⁶⁶ In this way, this interpretation of *Shelley* attempts to overcome some of the analytic weakness of the *Shelley* decision—such as the lack of an explicit limiting principle—by drawing on the principles articulated in another branch of state-action theory.

A land-use reading of *Shelley* offers a coherent and plausible principle by which the *Shelley* doctrine can be understood and applied. This principle will be returned to shortly, at which time the intrinsic and extrinsic factors supporting this reading of *Shelley* are more comprehensively discussed¹⁶⁷

Certiorari at 46, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 1947-72) (“Judicial enforcement by injunction of the restrictive covenant achieves precisely the same purpose as a zoning ordinance.”).

¹⁶² See *Shelley*, 334 U.S. at 11 (“It is . . . clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment *if imposed by state statute or local ordinance.*”) (emphasis added).

¹⁶³ See *Buchanan v. Warley*, 245 U.S. 60, 80-81 (1917).

¹⁶⁴ See *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 201 (Ohio Ct. C.P. 1969); see also *Gerber v. Longboat Harbour N. Condominium, Inc.*, 724 F. Supp. 884, 886-87 (M.D. Fla. 1989); *Franklin v. White Egret Condominium, Inc.*, 358 So. 2d 1084, 1088-89 (Fla. Dist. Ct. App. 1978); *Jackson v. Williams*, 714 P.2d 1017, 1023 n.24 (Okla. 1985); *Shaver v. Hunter*, 626 S.W.2d 574, 578-79 (Tex. App. 1981).

¹⁶⁵ See Brief for the United States as Amicus Curiae at 25, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 1947-72) (“The series of covenants becomes in effect a zoning ordinance binding those in the area subject to the restriction without their consent When a State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions.”); see also *Bell v. Maryland*, 378 U.S. 226, 329 (1964) (Black, J., dissenting).

¹⁶⁶ 326 U.S. 501 (1946).

¹⁶⁷ See *infra* Part II.B.3.

and a land-use reading of *Shelley* is adopted for the purposes of this Article.¹⁶⁸

d. *Shelley Applies to the Enforcement of Covenants That Would Be Unconstitutional if Such Covenants Were the Product of a State Instrumentality*

It is possible to read *Shelley* as standing for the sweeping proposition that “[w]hen judges command private persons to take specific actions which violate the Constitution if done by the State, state action will be present in the resulting harm to constitutionally recognized rights.”¹⁶⁹ This interpretation is not a limitation upon *Shelley*; it is *Shelley* unbound, a literal extrapolation of Chief Justice Vincent’s opinion. Brief reference to this interpretation is made at this juncture only for the purpose of rounding out the discussion of alternative readings of the *Shelley* holding.

A moment’s reflection reveals the conceptual weakness and, indeed, the potential dangers to constitutional liberties of an unbridled *Shelley*. If “every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated.”¹⁷⁰ Thus, *Shelley* unbound would preclude, for example, the probate of a will leaving a testator’s property to a particular religious organization;¹⁷¹ the enforcement of a trespass action in which a white homeowner seeks to exclude African-Americans from attending a private function in his home;¹⁷² the issuance of an injunction against labor picketing when such picketing is expressly proscribed by an employment agreement, but which otherwise would be permitted by law;¹⁷³ and the enforcement of an arbitration decision in which the arbitration procedure did not rise to the level of due process required in court proceedings.¹⁷⁴ In

¹⁶⁸ See *infra* Part II.B.4.

¹⁶⁹ ROTUNDA & NOWAK, *supra* note 108, § 16.3, at 545.

¹⁷⁰ *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968).

¹⁷¹ See Pollak, *supra* note 129, at 12-13.

¹⁷² See Henkin, *supra* note 129, at 498.

¹⁷³ For example, a labor organization that pickets an employer on a public street adjacent to the employer’s property ordinarily would be entitled to maintain such a picket under the First Amendment consistent with reasonable restrictions on the time, place, and manner of the protest. See, e.g., *United States v. Grace*, 461 U.S. 171, 177 (1983) (setting standards for regulating expression in a public forum). However, an employer could seek an injunction against the labor organization if the picketing were to amount to a violation of a collective bargaining agreement between the employer and the labor organization. An unbridled *Shelley* presumably would prevent a court from issuing an injunction in accordance with the terms of the collective bargaining agreement.

¹⁷⁴ See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 111 (1992).

each case, an unrestrained application of the *Shelley* doctrine would transform these private actions into state action and, in each case, the constitutional standards applicable to state action would preclude judicial enforcement.

In short, *Shelley* unbound would lead to the demise of an entire sphere of personal liberty, property, and privacy—a sphere that in many cases, has at least an equal claim to constitutional protection as do the very rights the *Shelley* doctrine sought to vindicate.¹⁷⁵ If the *Shelley* doctrine were to be applied at all, it must be applied only after careful consideration is given to countervailing constitutional principles. Because a broad unrestrained application of the *Shelley* doctrine does not prescribe a means by which to balance competing constitutional claims, it is untenable.¹⁷⁶

3. *Proposed Recognition of a Principle That Would Limit Shelley to the 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*

The preceding Section discussed the lingering ambiguity and confusion over the scope of the *Shelley* doctrine and considered four alternative principles that would resolve the ambiguity and, to varying degrees, limit the application of the doctrine. First considered was a narrow principle that would limit *Shelley* to the enforcement of racially restrictive covenants. This principle was rejected because it is inconsistent with other well-established principles of constitutional law. Racial nondiscrimination, while undeniably an important constitutional value, has never been held by the Supreme Court to be a higher value than, for example, free expression, such that a particular theory of state action could implicate the former but never the latter.¹⁷⁷ Considered second was a somewhat broader principle that would limit *Shel-*

¹⁷⁵

Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the [Fourteenth] Amendment were applied to governmental and private action without distinction.

Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

¹⁷⁶ While *Shelley* makes clear that judicial enforcement amounts to state action (and a later Supreme Court decision, *Barrows v. Jackson*, 346 U.S. 249, 254 (1953), makes clear that the award of damages amounts to state action), the Court in *Shelley* was careful to point out that the mere making of a contract does not amount to state action. See *Shelley*, 334 U.S. at 13. Left unanswered is the question of the residual legal significance, if any, of a technically valid contract that is unenforceable at law or in equity.

¹⁷⁷ See *supra* text accompanying notes 150-51.

ley to circumstances in which judicial enforcement of a private covenant is contrary to the wishes of the parties to a transaction to which the covenant applies. This principle was rejected because the terms “parties” and “transaction” are too narrowly defined, and a broader definition undercuts the conceptual basis for the principle.¹⁷⁸ Also rejected was the exceedingly broad principle that holds that *Shelley* applies to the enforcement of covenants that would be unconstitutional if such covenants were the products of a state instrumentality. This principle is plainly inadequate in that it fails to take account of countervailing constitutional values associated with actions generally considered private.¹⁷⁹

The remaining principle considered—limiting *Shelley* to the enforcement of covenants that restrict the use and occupation of land in ways that would be unconstitutional if such covenants were the product of a state instrumentality—occupies the middle ground of interpretation.¹⁸⁰ This reading of *Shelley* is not so constrained as to confine the decision essentially to its facts, nor is the reading so broad as to submit to constitutional constraints that which remains of the common law. Instead, the land-use reading of *Shelley* hews closely to *Shelley*’s grounding in the conflict between constitutional values and the common-law principles governing restrictive covenants and real-property transactions.

The land-use reading of *Shelley* is consistent with many of the Court’s underlying concerns in *Shelley*. Three decades before *Shelley* was decided, the Court in *Buchanan v. Warley*¹⁸¹ held that racially restrictive municipal zoning ordinances were unconstitutional.¹⁸² In *Shelley*, the Court squarely confronted the legacy of its earlier decision that the enforcement of racially restrictive covenants arose as an indirect way of accomplishing what legislatively determined zoning schemes had accomplished directly.¹⁸³ At issue was the privatization of the municipal zoning authority.

In order to appreciate the full significance of the matter before the Court in *Shelley*, some historical background is necessary. In the aftermath of *Buchanan*, developers and homeowner associations, among others, established racially restrictive private covenants to achieve the same purposes of

¹⁷⁸ See *supra* text accompanying notes 154-55.

¹⁷⁹ See *supra* text accompanying notes 169-76.

¹⁸⁰ See *supra* text accompanying notes 161-68.

¹⁸¹ 245 U.S. 60 (1917).

¹⁸² See *id.* at 82.

¹⁸³ See *Shelley*, 334 U.S. at 11 (“It is . . . clear that restrictions on the right of occupancy of the sort sought to be created by these private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment *if imposed by state statute or local ordinance.*”) (emphasis added); see also Petition for Writ of Certiorari at 49, *Shelley* (No. 1947-72) (“The Record in this case discloses that private individuals got together to do what the state was forbidden to do, and created a ghetto solely because of race or color.”).

the zoning provisions the Court had declared unconstitutional.¹⁸⁴ By the time of *Shelley*, racially restrictive private covenants had become a common practice in new suburban subdivisions as well as in many older urban areas in the North.¹⁸⁵ One study of New York covenants in 1947 found that sixty-three percent of new developments with twenty or more homes had race restrictions.¹⁸⁶ A study of Chicago found that "over half the residential area not occupied by Negroes [was] covenanted against colored people."¹⁸⁷ Another study found that racial covenants "were widespread in cities from coast to coast,"¹⁸⁸ achieving a form of segregation as effective and as pervasive as if this land-use policy were enacted expressly by state legislatures and city councils. Against this background, the Court in *Shelley* was compelled to decide whether the partial delegation¹⁸⁹ of a key element of gov-

¹⁸⁴ The link between *Buchanan* and the widespread adoption of racially restrictive covenants is cogently described in the amicus curiae brief of the Solicitor General in *Shelley*:

[R]acial restrictive covenants came to be widely used only after this Court had ruled that racial residential segregation could not be imposed by state or municipal legislatures. They seem to have been adopted as a substitute for such legislation, and have, indeed, well fulfilled that role. Racial restrictive covenants have become so pervasive in this country that the consequences of their enforcement are hardly distinguishable from, and certainly no less serious than, the legislatively-imposed segregations invalidated in *Buchanan v. Warley*

. . . The result of the constantly increasing use of restrictive covenants has been large-scale compulsory segregation of racial groups with respect to housing. That segregation is not confined to Louisville, Kentucky, as it was in *Buchanan v. Warley*; it has become a national problem; the effects of such covenants are apparent in most of the major urban communities of our country.

Brief for the United States as Amicus Curiae at 78.

¹⁸⁵ See Petition for Writ of Certiorari at 49, *Shelley* (No. 1947-72) ("The extent to which [racially restrictive covenants] exist[] is stated in the decision of the Supreme Court of Missouri here sought to be reviewed. [Such covenants] extend[] from coast to coast."); see also MCKENZIE, *supra* note 16, at 69-74. For contemporary accounts of racial segregation in residential communities at the time of *Shelley*, see CHARLES S. JOHNSON, *NEGRO HOUSING* (1932); ROBERT C. WEAVER, *THE NEGRO GHETTO* (1948).

¹⁸⁶ See John P. Dean, *Only Caucasian: A Study of Race Covenants*, J. LAND & PUB. UTIL. ECON., 428, 429 (1947).

¹⁸⁷ WEAVER, *supra* note 186, at 247.

¹⁸⁸ MCKENZIE, *supra* note 16, at 69.

¹⁸⁹ The term "partial delegation" is used here because the state, through the judiciary, retained enforcement power, and this enforcement power was the state action implicated in *Shelley*. However, because mere judicial enforcement in many other contexts has not been held to be state action, see *supra* notes 170-74 and accompanying text, something more than judicial enforcement, standing alone, must have given rise to the *Shelley* holding. Accordingly, the additional element present in *Shelley* is the partial delegation of governmental land-use decision-making authority to private parties, an analysis which draws on the principles articulated in the public-function theory of state action recog-

ernmental land-use decision making was constitutionally permissible, and the Court, in essence, decided that it was not.¹⁹⁰

To be sure, *Shelley* is concerned both with the partial delegation of governmental land-use decision making and with invidious racial classifications. The practical result of this combination of concerns—racial apartheid—represents an exceptionally powerful threat to constitutional values.¹⁹¹ Still, to acknowledge this fact is also to recognize that the land-use component of *Shelley* is itself an essential and powerful element of the decision, an element that may properly shape the contours of the state-action principle first recognized in *Shelley*.

As noted earlier, the land-use reading of *Shelley* is premised on what may be fairly characterized as *Shelley*'s unstated assumption that comprehensive local land-use control is a sovereign function of government¹⁹² and

nized in *Marsh*.

¹⁹⁰ The phrase "in essence" is meant to emphasize that the Court in *Shelley* did not make reference to the issues discussed above: the explosive growth in the use of racially restrictive covenants in the wake of the Court's decision in *Buchanan*, and the effect of this trend on urban development and racial segregation throughout the nation. Unlike its decision six years later in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court in *Shelley* studiously avoided discussion of broader social and economic factors affecting its constitutional analysis. *Shelley* must be understood in terms of these factors because the Court's nominal basis for its decision—merely that judicial enforcement of private covenants amounts to state action—is plainly unsatisfactory. See *supra* text accompanying notes 135-39, 169-74.

¹⁹¹

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.

Shelley, 334 U.S. at 23 (citations omitted).

¹⁹² The question of whether zoning independently qualifies as a public function under the Supreme Court's public-function analysis set forth in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974), and *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-60 (1978), requires extended discussion. This Article takes the view that a large territorial RCA that exercises land-use powers in the form of a comprehensive scheme of restrictive covenants can be understood as exercising a public function under the *Jackson/Flagg Bros.* test. To reach this conclusion, however, certain assumptions must be made concerning this test because the Court has afforded only limited guidance as to the meaning of the test and its application.

Public-function analysis, it will be recalled, applies not merely to private municipalities such as the company town in *Marsh*, but also to any function that is "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352 (citations omitted); see *supra* text accompanying notes 48-58. The *Jackson* formulation leaves unanswered pre-

cisely how a particular function is to be defined. This is a significant omission because a narrowly defined function is more likely to satisfy the requirements of the test, whereas a broadly defined function is certain to encompass activities traditionally associated with the private sector. The *Jackson* formulation also leaves unanswered whether the exclusivity requirement applies to the entire United States or applies, for example, exclusively to the political subdivision particular to the circumstances of the case.

The importance of the first unanswered question—that is, whether a public function is defined narrowly or broadly—can be readily appreciated when considering whether zoning can be understood as a public function under the *Jackson* formulation. The power to zone is a police power of the state, see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974), and the zoning power, in its traditional form, is exercised exclusively by the state. See BLACK'S LAW DICTIONARY 1618-19 (6th ed. 1995). Alternately, if one were to define zoning as a form of land-use control, then the activity encompassed by that term undoubtedly includes activity traditionally undertaken by the private sector.

In this case, *Jackson's* first unanswered question can be resolved by characterizing the function under consideration as land-use control rather than zoning. Having characterized the function more broadly, it may appear that land-use control cannot then be characterized as a public function under the *Jackson* formulation. However, the matter cannot be settled until the second question left unanswered by the *Jackson* formulation is resolved.

The question whether a particular function is "traditionally exclusively reserved to the State" turns on how one chooses to define the territory to which a particular function is said to be exclusive. If the territory were the entire United States, then land-use control cannot be said to be a public function. However, if the territory were confined to the jurisdiction of a particular political subdivision, then a different answer may obtain.

On this question left open by *Jackson*, the Court has since provided some much-needed guidance. See *Flagg Bros.*, 436 U.S. at 157-60. In reviewing its prior public-function decisions, the Court in *Flagg Bros.* noted:

These two branches of the public-function doctrine [the conduct of certain primary elections, see *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932), and the operation of a company town, see *Marsh v. Alabama*, 326 U.S. 501 (1946)] have in common the feature of exclusivity . . . [T]he elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. [the owner of the company town in *Marsh*] were the only streets in Chickasaw . . .

Id. at 159-60. Thus, the Court in *Flagg Bros.* held that the correct scope of *Jackson's* exclusivity requirement is the territorial extent of the political subdivision particular to the circumstances of the case. Most significantly, the correct scope of exclusivity for the exercise of *municipal* powers, as in *Marsh*, is the territorial extent of the municipality. Under this analysis, then, a large territorial RCA exercising comprehensive land-use powers within its jurisdiction and occupying all, or substantially all, of the territory of a municipality would be exercising a public function. See *Pitt v. Pine Valley Golf Club*, 695 F. Supp. 778, 783 (D.N.J. 1988) (holding that restrictions of an RCA that occupied an entire municipality amounted to zoning power and that, as such, the RCA was exercising a public function).

A rigid requirement that a large territorial RCA occupy the *entire* territory of a

that even partial delegation of this function to private parties is an appropriate subject of constitutional concern.¹⁹³ Note that this unstated assumption draws on the principles articulated in the public-function theory of state action first recognized in *Marsh*. In this way, this interpretation of *Shelley* attempts to overcome some of the analytic weakness of the *Shelley* opinion—such as the lack of an explicit limiting principle—by drawing on the principles articulated in another branch of state-action theory.

The land-use reading of *Shelley* not only limits the subject matter of the *Shelley* doctrine in a principled way, it also suggests a coherent approach to applying the *Shelley* doctrine to the various types of claims that would fall within the subject matter limitation. Simply put, “[I]f a zoning ordinance is in its operation, unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional.”¹⁹⁴ Thus, this interpretation of *Shelley* would do no more than adopt the well-settled constitutional law principles affecting municipal zoning ordinances¹⁹⁵ and ap-

municipality is a bit too formalistic because some municipalities occupy hundreds of square miles while other municipalities are no larger than a few square blocks. But the basic principle underlying the *Flagg Bros.* test appears sound—that the scope of public-function analysis for traditional municipal powers, such as land-use control, is at the local, rather than national, level. Under a relaxed reading of *Flagg Bros.*, a large territorial RCA that dominates a local housing market or political subdivision would be deemed to exercise a public function when making and enforcing a comprehensive scheme of restrictive covenants. This reading is a proper reconciliation of public-function analysis and a land-use reading of *Shelley*.

A large territorial RCA also can be deemed a state actor by operation of the *Marsh/Hudgens* test, as distinct from the *Jackson/Flagg Bros.* test. See *supra* Part II.A.3. Moreover, it should be noted that the land-use reading of *Shelley* does not depend upon a specific determination that land-use control qualifies as a public function under the *Jackson/Flagg Bros.* test; rather, it is that the land-use reading of *Shelley* draws strength from the principles articulated in another branch of state-action theory.

¹⁹³ See *supra* note 165.

¹⁹⁴ *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 200 (Ohio Ct. C.P. 1969).

¹⁹⁵ In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court upheld the municipal power to zone. The Court noted, however, that particular zoning provisions would be unconstitutional when the “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Euclid*, 272 U.S. at 395. The Court later characterized the *Euclid* test as equivalent to the familiar rational basis standard, see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), under which most government action is presumed to be valid. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). If the zoning provision were to implicate a fundamental right or suspect class, however, the presumption of validity would no longer be applicable. See *id.* at 440-42 (citing examples of suspect classifications that, if present, would subject a zoning ordinance to heightened scrutiny); *Belle Terre*, 416 U.S. at 6-8 (citing examples of fundamental rights that, if present, would subject a zoning ordinance to heightened scrutiny). Thus, the Court invalidated a zoning ordinance that banned the posting of signs on residential

ply these principles to the judicial enforcement of restrictive covenants that run with the land.

The land-use reading of *Shelley* represents an important step toward the reining in of the judicial-enforcement theory of state action. However, this is not to suggest that this reading of *Shelley* necessarily would result in the nonenforcement of *all* 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. There may be circumstances in which exceptions to this rule are appropriate based on a balancing of competing constitutional values, such as when a covenant is established by the owner of a single residence and is limited in effect to the subject residence.¹⁹⁶ As is argued in the next Section, however, the land-use reading of *Shelley* applies with special force to territorial RCAs, which represent aggregations of land-use power and which promulgate restrictive covenants on a “wholesale” level in much the same way that racially restrictive covenants were promulgated on a “wholesale” level by real estate developers and RCAs in the pre-*Shelley* years.

property as contrary to the right of free expression guaranteed by the First Amendment. See *City of Ladue v. Gilleo*, 512 U.S. 43, 57-58 (1994). In addition, the Court long ago struck down racially restrictive zoning ordinances. See *Buchanan v. Warley*, 245 U.S. 60, 87 (1917). The Court also has, on occasion, struck down zoning provisions that did not implicate a fundamental right or suspect class but were found to lack a rational basis under the *Euclid* standard. See *Cleburne*, 473 U.S. at 450 (holding that a zoning restriction on the construction of a residence for mentally retarded persons lacked rational basis); *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-23 (1928) (holding that a zoning restriction on the construction of a residence for the aged lacked rational basis); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-89 (1928) (holding that a use restriction in a zoning district was irrational under the circumstances).

¹⁹⁶ The Court in *Shelley* admitted no exception to its holding that the judicial enforcement of racially restrictive covenants amounted to state action and, as such, violates the Fourteenth Amendment’s Equal Protection Clause. See *Shelley*, 334 U.S. at 20-23. The *Shelley* holding of per se unconstitutionality is fundamentally sound as applied to racially restrictive covenants because, as noted earlier, *Shelley* is concerned *both* with the partial delegation of governmental land-use decision making and with invidious racial classifications, and the practical result of this combination of concerns—racial apartheid—represents an exceptionally powerful threat to constitutional values. See *supra* note 191 and accompanying text. However, *Shelley*’s per se holding of unconstitutionality is not necessarily applicable in other contexts, such as, for example, judicial enforcement of covenants that discriminate against non-traditional households or against religion, especially when the covenant was established by the owner of a single residence and when the covenant is limited in effect to the owner’s residence. In this context, consideration of countervailing constitutional values is appropriate and necessary. For a discussion of the balancing of countervailing constitutional rights in the context of a territorial RCA, see *infra* text accompanying notes 215-21.

4. *The Theory as Applied to RCAs*

In the preceding Section, it was argued that a land-use reading of *Shelley* offers a coherent and plausible principle by which the *Shelley* doctrine can be understood and applied. This Section considers the specific application of the principle to RCAs.

As previously noted, the RCA and the historical circumstances giving rise to the *Shelley* decision are closely linked. In the period beginning with the 1917 Supreme Court decision that struck down racially restrictive zoning ordinances¹⁹⁷ and ending with the *Shelley* decision in 1948, homeowner associations were the “primary mechanisms”¹⁹⁸ for establishing legally enforceable racial segregation in residential communities.¹⁹⁹ In older urban neighborhoods, voluntary “neighborhood improvement associations” and the like²⁰⁰ were established for the purpose of excluding African-American homebuyers through restrictive covenants aimed at encompassing as many contiguous properties as organizers could achieve through the solicitation and, at times, coercion of neighborhood property owners.²⁰¹ In new large-scale suburban subdivisions, developers commonly established homeowner associations along with racially restrictive covenants. Establishing racially restrictive covenants was easier under these circumstances than in existing communities because the necessary legal steps could be taken before the new homes were constructed, meaning that the establishment of racially restrictive covenants in new subdivisions was the result of an initial and binding decision made solely by the developer.²⁰² Before *Shelley*, the connection between new large-scale suburban subdivisions, homeowner associations, and racially restrictive covenants was particularly striking: Over seventy percent of homes in pre-World War II developments of twenty or more homes were subject to racially restrictive covenants.²⁰³

¹⁹⁷ *Buchanan v. Warley*, 245 U.S. 60, 87 (1917).

¹⁹⁸ “Until 1948 homeowner associations, voluntary and mandatory, were the primary mechanisms developers used to enforce race restrictive covenants.” MCKENZIE, *supra* note 16, at 75.

¹⁹⁹ As a technical matter, racially restrictive covenants could be enforced in the name of an individual co-covenantor or in the name of the association of co-covenantors to which the constituent property owners had delegated the authority to sue. The racially restrictive covenant that gave rise to *Shelley* was of the first type: Thirty property owners in a neighborhood of St. Louis entered into a covenant permitting any of the co-covenantors to sue any other that violated the covenant. See *Shelley*, 334 U.S. at 5-6.

²⁰⁰ MCKENZIE, *supra* note 16, at 71.

²⁰¹ See *id.* at 73.

²⁰² See Dean, *supra* note 186, at 429.

²⁰³ See *id.*

Today, because of *Shelley* and subsequent decisions²⁰⁴ and enactments,²⁰⁵ racial discrimination in housing is no longer backed by the force of law. However, the regime of privatized land-use regulation that gave rise to *Shelley* has undergone a remarkable transformation. Today, comprehensive schemes of restrictive covenants administered by RCAs regulate the use and occupation of land, sometimes in ways that would violate the Constitution if the regulation were the product of a state instrumentality.²⁰⁶ Under prevailing constitutional principles, RCAs are free to impose a ban on posting signs inside or outside a home, to restrict public assembly in their streets, to prohibit members of a homeowner's family from cohabiting with the homeowner, and to ban sexually explicit material from a homeowner's bedroom.²⁰⁷

By the early 1990s, the RCA land-use regime encompassed nearly fifteen percent of the population of the United States.²⁰⁸ In most major metropolitan areas today, comprehensive privatized land-use decision making in new housing developments is the norm, not the exception.²⁰⁹ Just as privatized racial land-use decision making was pervasive in the period between the two World Wars, privatized land-use decision making that touches on many other sensitive constitutional issues²¹⁰ is pervasive today.²¹¹ If, as argued in the preceding Section, *Shelley* were to stand for something more than the ad hoc repudiation of racially restrictive covenants,²¹² then it must stand for a principle that implicates, under certain circumstances, the privatized land-use decision-making power that lies at the heart of the modern territorial RCA.

There is perhaps no better statement of the proposition that *pervasive* privatized land-use decision making is constitutionally suspect than these

²⁰⁴ See *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409, 413 (1968) (holding that the Civil Rights Act of 1866 "bars all racial discrimination, private as well as public, in the sale or rental of property").

²⁰⁵ See Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1994).

²⁰⁶ See *supra* text accompanying notes 32-37.

²⁰⁷ See *supra* text accompanying notes 32-37.

²⁰⁸ See COMMUNITY ASS'NS INST., *supra* note 8, at 13. The Community Associations Institute estimated that, in 1992, 32 million people lived in RCAs in the United States. See McKenzie, *supra* note 11, at A23. The total population in the United States in 1990 was approximately 250 million. See 1990 CENSUS, *supra* note 70, at 1. If current estimates were to prove correct, RCAs will encompass 30% of the United States population early in the next century. See McKenzie, *supra* note 11, at A23.

²⁰⁹ It has been estimated that 50% of all housing for sale in the 50 largest metropolitan areas of the country and nearly all residential development in California, Florida, New York, Texas, and suburban Washington, D.C., are governed by RCAs. See COMMUNITY ASS'NS INST., *supra* note 8, at 18.

²¹⁰ See *supra* text accompanying notes 32-37.

²¹¹ See *supra* notes 8-9.

²¹² See *supra* Parts II.B.2, II.B.3.

passages from the amicus curiae brief of the United States in *Shelley*:

Racial restrictive covenants on real property are of comparatively recent origin. If limited in number, and confined to insignificant areas, they would not have been of such public importance. But they have already expanded in large cities from coast to coast.

. . . .
 . . . The Court is not here concerned with the effect or validity of isolated racial restricted covenants. It is confronted by the existence of such a mass of covenants in different sections of the country as to warrant the assertion that private owners have, by contract, put into effect what amounts to legislation affecting large areas of land . . . thus presenting constitutional issues which must be resolved by weighing the interests of more than a single vendor or a single vendee.²¹³

Today, the pervasiveness of the RCA form of community suggests that the Solicitor General's articulation of a key constitutional issue underlying *Shelley* has assumed new significance. This is not to suggest that the RCA form of governance is itself unconstitutional. It is to suggest, rather, that RCA restrictive covenants should be reviewed, for constitutional purposes, as municipal zoning ordinances: If a zoning ordinance in its operation were unconstitutional, then an RCA restrictive covenant, in the same area and having the same effect, should likewise be unconstitutional.²¹⁴

What of the countervailing constitutional values of liberty and property that would be subordinated if RCA restrictive covenants were subjected to constitutional review? The constitutional values underlying the making and enforcement of restrictive covenants are premised on an overarching conception of individual choice: the "[f]reedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit."²¹⁵ Pervasive privatized land-use decision making in *Shelley* and in contemporary territorial RCAs, however, is fundamentally at odds with traditional notions of individual choice to use and dispose of property:

[M]ore was involved [in *Shelley*] than private choice protected and made meaningful by the courts. Machinery was provided by which concerted action extending even beyond the

²¹³ Brief for the United States as Amicus Curiae at 4, 79, *Shelley* No. 1947-72).

²¹⁴ See *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 200 (Ohio Ct. C.P. 1969).

²¹⁵ *Peterson v. City of Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring).

will of an existing group of property owners was possible. Since the covenants “run with the land” purchasers had no choice but to assent to an existing scheme or forego a purchase of land. Even this choice was largely nonexistent because of the widespread use of the covenants. The power exercised was greater than ordinary contracting powers. In a real sense the common law of the state functioned to delegate zoning powers to private parties. The effect of the covenants was to restrict the use of land not only beyond the power of an individual over his own land but beyond the period of ownership of the land by any of the parties initiating the restriction.²¹⁶

Restrictive covenants, by their very nature, impose temporal and spatial restraints that are inconsistent with notions of individual choice.²¹⁷ This inconsistency is magnified when a developer of a territorial RCA initially establishes an RCA servitude regime, and individual “consent” to the regime is essentially limited to the decision of whether to purchase property in the RCA.²¹⁸ Even this degree of “consent,” however attenuated, is becoming less available to vast numbers of homebuyers in the United States because of the increasing dominance of the RCA form of housing in many states²¹⁹ and because RCAs are usually the most affordable housing available in the community.²²⁰ As a practical matter, then, “consent” to the RCA form of community governance, and its customary limitation of rights that would be of a constitutional order if such limitations were undertaken by the state,²²¹ is less and less a matter of choice and more a matter of necessity. For this reason, the subjection of restrictive covenants of at least some territorial RCAs to constitutional review would, far from threatening individual freedom to use and dispose of property, actually enhance this freedom.

In sum, if *Shelley* were to stand for something more than the ad hoc repudiation of racially restrictive covenants, then it must stand for a principle that implicates, under certain circumstances, the privatized land-use decision-making power that lies at the heart of the modern territorial RCA. Implicit in the *Shelley* decision is the proposition that zoning is a public function, and that a private regime of aggregated land-use power is functionally equivalent to zoning.²²² It follows from this that a private regime of

²¹⁶ Lewis, *supra* note 129, at 1115 (footnote omitted).

²¹⁷ See *id.*

²¹⁸ See *infra* note 477 and accompanying text.

²¹⁹ See *infra* note 478 and accompanying text.

²²⁰ See McKenzie, *supra* note 11, at A23.

²²¹ See *supra* notes 32-37.

²²² See *supra* note 192.

land-use power that runs afoul of constitutional norms will be subject to searching judicial review.²²³

C. *The Mutual-Contacts/Symbiotic-Relationship Theory*

1. *Overview*

The Supreme Court has recognized state action in the conduct of a private party when there is a “sufficiently close nexus”²²⁴ between the private party and the government and when “[t]he state has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant”²²⁵ in the private conduct. Under these circumstances, the private party and the government can be said to be in a “symbiotic relationship,”²²⁶ and the challenged conduct will be subject to constitutional constraints.

The symbiotic-relationship theory is not supported by any single standard or by a consistent analytic framework.²²⁷ Instead, as the Court has candidly admitted, state action is determined by “sifting facts and weighing circumstances.”²²⁸ The ad hoc mode of decision making employed by the Court would seem to resist any effort at generalization. However, as we shall see, coherent principles do emerge from this branch of state-action theory,²²⁹ and these principles are readily applicable to RCAs.²³⁰

The “classic”²³¹ symbiotic-relationship case is *Burton v. Wilmington Parking Authority*.²³² In this decision the Court held that a privately owned restaurant that was a tenant in a government-owned public parking garage

²²³ Not incidentally, the land-use reading of *Shelley* provides a principled way to reconcile the *Shelley* doctrine with countervailing constitutional considerations, a critical task not undertaken by the Court in *Shelley* and a task never seriously attempted by the Court in the more than 50 years since *Shelley* was decided. See *supra* text accompanying notes 215-21.

²²⁴ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

²²⁵ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

²²⁶ *Jackson*, 419 U.S. at 357.

²²⁷ See *Burton*, 365 U.S. at 722.

²²⁸ *Id.*; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting) (“[O]ur cases deciding when private action might be deemed that of the state have not been a model of consistency . . . because the state action determination is so closely tied to the ‘framework of the peculiar facts or circumstances present.’”) (citation omitted).

²²⁹ See *infra* text accompanying notes 254-68.

²³⁰ See *infra* Part II.C.2.

²³¹ ROTUNDA & NOWAK, *supra* note 108, §16.4, at 560.

²³² 365 U.S. 715 (1961).

could not refuse service to African-Americans.²³³ The Court discerned state action in the discriminatory conduct of the restaurant by virtue of the high "degree of state participation and involvement" in the operation of the restaurant.²³⁴ The finding of a symbiotic relationship between the state and the restaurant was supported by a number of factors, including, most obviously, the fact that the restaurant leased space in a government-owned facility that otherwise was devoted to providing a service generally available to the public.²³⁵ Government funds paid for the maintenance and upkeep of the facility. The restaurant incidentally benefitted from its location in that the public parking facility provided a convenient place for the restaurant's patrons to park their cars. For its part, the government benefitted from the presence of the restaurant, not only through the rent monies received, but from the increased use of the parking facility attributable to restaurant patrons and employees.²³⁶ These factors, taken together, amounted to sufficient contact between the government and the restaurant to give rise to a finding of state action in the restaurant's discriminatory conduct.²³⁷

In *Evans v. Newton*,²³⁸ the Court discerned state action in the operation of a privately owned park. The park property was controlled by private trustees under the terms of a trust that required that use of the property be restricted to white persons.²³⁹ The property originally had been devised to a municipality, which for some years had operated the property in accordance with the terms of the trust.²⁴⁰ When it became apparent that continued municipal ownership and control of a racially segregated park was no longer consistent with constitutional requirements,²⁴¹ the municipality sought to be removed as trustee, and its removal was accepted by the Georgia courts;²⁴² however, even after its removal the municipality appeared to furnish some maintenance services to the park property.²⁴³ The Supreme Court held that these circumstances gave rise to a finding of state action

²³³ See *id.* at 726.

²³⁴ *Id.* at 724.

²³⁵ "[T]he restaurant is operated as an integral part of a *public* building devoted to a *public* parking service . . ." *Id.* (emphasis added). This is an "obvious fact" that, together with other considerations, suggests a sufficient "degree of state participation" to give rise to a finding of state action in the restaurant's conduct. *Id.*

²³⁶ See *id.*

²³⁷ See *id.*

²³⁸ 382 U.S. 296 (1966).

²³⁹ See *id.* at 298.

²⁴⁰ See *id.* at 297-98.

²⁴¹ See *id.* at 298.

²⁴² See *id.* (citing *Evans v. Newton*, 138 S.E.2d 573 (Ga. 1964)).

²⁴³ See *id.* at 301. Justice White vigorously disputed this point in a concurring opinion. See *id.* at 304 (White, J., concurring).

because of the property's "tradition of municipal control,"²⁴⁴ the continuing role of the municipality in the maintenance of the property, and the public nature of land used as a park within a city.²⁴⁵

Burton and *Newton* were decided at a time when the Court took an expansive view of the symbiotic-relationship theory. Subsequent decisions suggest that the Court has drastically narrowed the scope of the theory. For example, the Court failed to discern state action in the conduct of a private club notwithstanding its licensure by the state,²⁴⁶ in the conduct of a privately owned electric utility notwithstanding its extensive regulation by the state and its status as a government-approved monopoly,²⁴⁷ and in the conduct, respectively, of a private school²⁴⁸ and of a nursing home²⁴⁹ notwithstanding their licensure, regulation, and substantial funding by the state. In each case, the Court held that the challenged practices of the private entities were not subject to constitutional constraints because the practices could not be shown to be approved, encouraged, or even influenced by the state as a consequence of state licensure, regulation, or funding.²⁵⁰ By contrast, *Burton* and *Newton* seem to stand for the proposition that when there are sufficient contacts between a private actor and the government, then the approval, encouragement, or influence of the government in the challenged conduct of the private actor may be fairly inferred.²⁵¹ In its subsequent

²⁴⁴ *Id.* at 301.

²⁴⁵ *See id.* at 301-02. ("Like the streets of the company town in *Marsh v. Alabama* . . . the predominant character and purpose of this [private] park are municipal.") (citations omitted).

²⁴⁶ *See* *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163, 171-75 (1972).

²⁴⁷ *See* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974).

²⁴⁸ *See* *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982).

²⁴⁹ *See* *Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982).

²⁵⁰ *See id.* at 1005-11; *Rendell-Baker*, 457 U.S. at 841; *Jackson*, 419 U.S. at 358-59; *see also* *NCAA v. Tarkanian*, 488 U.S. 179, 195 (1988) (holding that the conduct of a private sports association did not amount to state action notwithstanding the relationship of the sports association to the public university); *San Francisco Arts & Athletics, Inc. v. USOC*, 483 U.S. 522, 546-47 (1987) (holding that the conduct of the USOC, a private corporation, did not amount to state action notwithstanding the relationship of the committee to the federal government).

²⁵¹ *See* *Burton*, 365 U.S. at 725 ("The State has so far insinuated itself into a position of interdependence . . . that it must be *recognized* as a joint participant in the challenged activity.") (emphasis added). Note that in *Burton* the Court made no *specific* finding of state involvement in the challenged conduct of the private actor. It was enough that the generalized contacts between the state and the private actor amounted to a symbiotic relationship from which the approval, encouragement, or influence of the state in the challenged conduct of the private actor could be inferred. *See id.* at 724. *Newton* similarly turned on a generalized finding of a symbiotic relationship and not on a specific determination that the state was involved in the challenged conduct of a private actor. *See* *Newton*, 382 U.S. at 301.

state-action decisions, the Court generally has refused to make this inference,²⁵² and at least one Justice has suggested that the making of this inference should be expressly disavowed.²⁵³ If such a view were adopted by the Court, it would amount to a repudiation of the symbiotic-relationship theory and the overturning of *Burton* and *Newton*.

Under prevailing state-action principles, however, *Burton* and *Newton* remain good law.²⁵⁴ It is possible to reconcile *Burton* and *Newton* with later cases²⁵⁵ by recognizing that the later cases did not contain the type of mutual contacts between the state and private actors necessary to give rise to the crucial inferences made in *Burton* and *Newton*. In particular, the mutual contacts found in *Burton* and *Newton*, but not found in the later cases, were the furnishing of maintenance services by the state to facilities leased or owned by private actors.²⁵⁶ The provision of maintenance services by the state to a private establishment suggests a degree of entanglement between the state and a private actor that typically would not be present in a state regulatory, licensing, or funding scheme. Unlike state regulation, licensing, or funding, state provision of maintenance services to a private establishment generally would entail direct involvement of public employees in the operation of the establishment. This is far more than a mere government subsidy, which the Court rejected as a basis for a finding of state action in

²⁵² See *supra* text accompanying notes 235-40. But see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (6-3 decision). In holding that the exercise of a peremptory challenge by a private litigant in a civil case amounts to state action, the Court in *Edmonson* relied in part on the symbiotic-relationship theory. See *id.* at 621 (citing *Burton*). For a discussion of the potential significance of *Edmonson*, see *infra* text accompanying notes 261-68.

²⁵³ See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 980 (1995) (O'Connor, J., dissenting). Justice O'Connor opined that "a test of state action predicated upon public and private 'interdependence' sweeps much too broadly." *Id.* Other Justices, while not joining in Justice O'Connor's dissent in *Lebron*, on other occasions have signaled their discomfort with the symbiotic-relationship theory of state action. Chief Justice Rehnquist and Justice Scalia, for example, consistently have declined to recognize state action in the conduct of private parties. See, e.g., *Edmonson*, 500 U.S. at 631 (Rehnquist, C.J., Scalia, J., dissenting); *Tarkanian*, 488 U.S. at 195; *San Francisco Arts & Athletics*, 483 U.S. at 546-47.

²⁵⁴ As recently as 1991, the Court expressly relied on *Burton* in discerning state action. See *Edmonson*, 500 U.S. at 621. For a discussion of the possible significance of *Edmonson* in the evolution of the Court's state action doctrine, see *infra* text accompanying notes 261-68.

²⁵⁵ See, e.g., *San Francisco Arts & Athletics*, 483 U.S. at 522; *Blum*, 457 U.S. at 991; *Jackson*, 419 U.S. at 345; *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163 (1992).

²⁵⁶ See *Newton*, 382 U.S. at 301 ("So far as this record shows, there has been no change in municipal maintenance . . . over this facility."); *Burton*, 365 U.S. at 724 ("Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the [Wilmington Parking] Authority and were payable out of public funds.").

*Rendell-Baker v. Kohn*²⁵⁷ and *Blum v. Yaretsky*;²⁵⁸ it is an indication of joint involvement in the enterprise.²⁵⁹ As we shall see, this point takes on particular significance when the potential application of the symbiotic-relationship theory to RCAs is considered.²⁶⁰

Although the Court has declined to apply the symbiotic-relationship theory in most of its decisions of the past two decades, the Court did expressly rely on the theory in one recent line of cases. In *Edmonson v. Leesville Concrete Co.*,²⁶¹ the Court held that the exercise of a peremptory challenge by a private litigant in a civil case amounts to state action.²⁶² In discerning state action, the Court in *Edmonson* relied in part on the symbiotic-relationship theory and in part on the public-function and judicial-enforcement theories.²⁶³ In 1992 and 1994, the Court reaffirmed the *Edmonson* state-action formulation by applying *Edmonson* to other circumstances in which private litigants exercised peremptory challenges in judicial proceedings.²⁶⁴

²⁵⁷ 457 U.S. 830, 840 (1982) (holding that extensive state funding of a private school did not give rise to a finding of state action).

²⁵⁸ 457 U.S. 991, 1011 (1982) (holding that extensive state funding of a nursing home did not give rise to a finding of state action).

²⁵⁹ See *Newton*, 382 U.S. at 301 ("So far as this record shows, there has been no change in municipal maintenance and concern over this facility. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment."); see also *Burton*, 365 U.S. at 724.

²⁶⁰ See *infra* text accompanying notes 307-09.

²⁶¹ 500 U.S. 614 (1991).

²⁶² See *id.* at 621-22.

²⁶³

Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see . . . *Burton v. Wilmington Parking Authority* . . . ; whether the actor is performing a traditional governmental function, see . . . *Marsh v. Alabama* . . . ; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley v. Kraemer* Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

Id. (some citations omitted). The "three principles" of state action that the Court relied upon in *Edmonson* also are generally known, respectively, as the symbiotic-relationship theory, the public-function theory, and the judicial-enforcement theory. See generally ROTUNDA & NOWAK, *supra* note 109, §§ 16.2-4.

²⁶⁴ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128, 140-41 (1994) (applying the *Edmonson* state-action formulation and holding unconstitutional discrimination on the basis of gender in the exercise of peremptory challenges by private litigants); *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (applying the *Edmonson* state-action formulation and holding that the exercise of a peremptory challenge by a criminal defendant

Concededly, the circumstances surrounding a private litigant exercising a peremptory challenge may not be readily analogized to the circumstances that typically would give rise to a state-action claim that may implicate an RCA.²⁶⁵ The Supreme Court peremptory challenge cases are nevertheless relevant to the subject of this Article for two reasons: First, the cases reaffirm the continuing vitality of the symbiotic-relationship theory of state action,²⁶⁶ and second, the cases may be read as supporting the proposition that the determination of state action is made especially compelling when the challenged private conduct implicates more than one theory of state action.²⁶⁷ This proposition, which this Article terms "multiple-theory state action," may well be of considerable significance in determining whether the conduct of an RCA amounts to state action.²⁶⁸

2. *The Theory as Applied to RCAs*

The relationship between RCAs and local governments is not subject to easy generalization, given the great variety of state and local regulatory

amounts to state action).

²⁶⁵ Most obviously, a claim against an RCA would not be expected ordinarily to arise from the conduct of the RCA, or its attorneys, during the course of a judicial proceeding.

²⁶⁶ See *supra* note 271 and accompanying text.

²⁶⁷ In *Edmonson*, the Court held that the exercise of a peremptory challenge by a private litigant in a civil case amounted to state action because the private conduct implicated "three principles" of state action: the symbiotic-relationship theory, the public-function theory, and the judicial-enforcement theory. *Edmonson*, 500 U.S. at 621-22 (emphasis added).

In *Edmonson*, the Court did not speculate as to whether the implication of only one theory of state action would have been sufficient to support a finding of state action, nor did it assess the relative importance of the contribution of each theory of state action to the Court's overall finding that state action was present under the circumstances of the case. See *id.* at 621-28. Instead, the opinion suggested that the application of three theories of state action had the effect of making especially compelling a determination that state action was present. See *id.*

Evans v. Newton, 382 U.S. 296 (1966), provides further support for this proposition. *Newton* discerned state action in the management of park property that was owned by a private entity. See *id.* at 299-302. In determining that state action was present, the Court relied on the application of both the symbiotic-relationship theory and the public-function theory. See *id.* at 301-02. As to the first theory, the Court noted that the municipality in which the park was located was "entwined in the management or control of the park." *Id.* at 301. As to the second theory, the Court concluded that the park property was dedicated to a use that is "municipal in nature," that is, a public function. *Id.* at 301-02. Thus, *Newton*, like *Edmonson*, may be said to support the proposition that the determination of state action is made especially compelling when the challenged private conduct appears to implicate multiple theories of state action.

²⁶⁸ See *infra* notes 287-95, 310-12 and accompanying text.

regimes, the differences in corporate form among RCAs, and the variations in services performed by RCAs.²⁶⁹ Some RCAs are closely tied to municipal regulations and services; other RCAs operate with little or no governmental oversight and with only minimal reliance on services furnished by the local government.²⁷⁰ Nevertheless, it is possible to assess broadly the application of the Supreme Court's symbiotic-relationship theory to RCAs from two distinct perspectives: First, the *establishment* of the RCA viewed both as a consequence of policy choices made by a municipality pursuant to its land-use authority and as a delegation by the municipality of various public functions to a private entity, and second, the *operation* of the RCA under circumstances in which the RCA and the governing municipality act as partners in revenue collection or service delivery. As we shall see, the analytic framework underlying these two perspectives is quite different.

a. *A Symbiotic Relationship Discerned from the Role of Local Government in the Establishment of RCAs*

Several commentators have discerned a powerful connection between the rapid growth in the number of RCAs over the past two decades and the interests and policies of local government.²⁷¹ For example, Professor Evan

²⁶⁹ See, e.g., U.S. ADVISORY COMM'N, *supra* note 2, at 9-13; DILGER, *supra* note 8, at 16-30; Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at 4-12.

²⁷⁰ Very little empirical research has been conducted regarding the estimated 150,000 RCAs in the United States. The most comprehensive nationwide research effort to date is a 1988 survey of some 40 RCAs conducted jointly by the U.S. Advisory Commission on Intergovernmental Relations and the Community Associations Institute. See U.S. ADVISORY COMM'N, *supra* note 2, at 10-23. The survey respondents consisted almost entirely of "territorial RCAs," defined as RCAs that maintain real estate and facilities beyond a single high-rise building. See *id.* at 11; see also *supra* text accompanying notes 18-20. The survey queried RCAs on the types of services that RCAs provided to their residents. The survey found that 72% of responding RCAs provided trash collection, 65% provided water or sewer services, 65% provided street repair, 58% provided street lighting, 48% provided snow removal, and 31% provided a security patrol. See *id.* at 13. It may be assumed that the RCA survey respondents that answered "no" in reply to a question as to whether their RCA provided a particular service, were instead receiving such a service from their local governments. In any event, the U.S. Advisory Commission on Intergovernmental Relations concluded, on the basis of its survey, "There is considerable overlap between the services provided by RCAs and by local government." *Id.* at 10.

²⁷¹ See, e.g., C. JAMES DOWDEN, COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS 41-42 (1980); MCKENZIE, *supra* note 16, at 178-82; Barton & Silverman, *supra* note 269, at 11; James L. Winokur, *Choice, Consent, and Citizenship in Common Interest Communities*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at 87, 89.

McKenzie maintains that it was "no accident"²⁷² that RCAs began to proliferate in the 1970s, a period in which local governments were contending with increased demands for services, reduced federal aid, and burgeoning tax revolts.²⁷³ For some local governments, especially those in the high-growth areas of the country, the establishment of RCAs represents a seemingly ideal response to countervailing pressures to accommodate development and to restrain the growth in municipal outlays. RCAs allow these local governments to reap the benefit of an increased tax base without the need to build the infrastructure and to provide the services that the RCA provides.²⁷⁴ In light of these considerations, it is perhaps not surprising that the U.S. Advisory Commission on Intergovernmental Relations has termed the recent proliferation of RCAs "the most significant privatization of local government responsibilities in recent times."²⁷⁵

The critical and often unrecognized role that local governments have played in the establishment of RCAs²⁷⁶ derives from the plenary authority exercised by municipalities over the use and development of land within their jurisdictions.²⁷⁷ Municipalities have been accorded broad powers over land development through zoning, subdivision regulations, and the issuance of building permits.²⁷⁸ Under this broad authority, local governments, beginning in the 1960s, adopted planned unit development zoning amendments, commonly known as PUDs, in which subdivision developers were afforded greater flexibility in design and construction, including the right to construct higher densities of residential units than would otherwise be permitted under conventional zoning regulations.²⁷⁹ Significantly, the regulatory flexibility available under the PUD approval process also serves as the basis for many municipalities to encourage or to require developers to establish RCAs as a means of operating and maintaining infrastructure that otherwise would be the responsibility of the local government.²⁸⁰ Thus, for a

²⁷² MCKENZIE, *supra* note 16, at 178.

²⁷³ *See id.* at 178-79.

²⁷⁴ *See id.*; *see also* DOWDEN, *supra* note 271, at 41-42; U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: QUESTIONS AND ANSWERS FOR PUBLIC OFFICIALS 4-5 (1989).

²⁷⁵ U.S. ADVISORY COMM'N, *supra* note 2, at 18.

²⁷⁶ *See* Winokur, *supra* note 271, at 89.

²⁷⁷ *See* U.S. ADVISORY COMM'N, *supra* note 285, at 5.

²⁷⁸ *See* 8 THOMPSON ON REAL PROPERTY, THOMAS EDITION §§ 74.01-.07 (David A. Thomas ed., 1994).

²⁷⁹ *See* DOWDEN, *supra* note 271, at 7-10. In many cases, higher residential densities can make the difference between success or failure in the housing marketplace because higher densities reduce the land cost per residential unit. *See id.* at 8.

²⁸⁰ *See* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at xii ("[C]ommon interest developments are often forced upon reluctant private developers by local governments exercising their regulatory powers."); DOWDEN, *supra* note 271, at 42 ("[I]t is clear that in many instances homeowner

developer to win PUD approval and its attendant economic benefits, the developer may have little choice but to acquiesce to a municipality's preference for RCA control of subdivision infrastructure.²⁸¹ In this way, local governments draw on their substantial discretion, which they exercise as part of their land-use authority, in order to transfer responsibility for traditional municipal services and facilities,²⁸² thereby minimizing their own cash out-

associations have been created in cluster or PUD communities primarily for the purpose of meeting local government requirements to deliver services such as maintenance of private roads, streets, and open areas."); U.S. ADVISORY COMM'N, *supra* note 2, at 9-10 ("Although local governments encourage PUD housing, they are often less enthusiastic about accepting public dedication of open spaces and other facilities. . . . PUDs created with [private] facilities require a private organization, the RCA, to own and maintain them"); Winokur, *supra* note 271, at 89.

²⁸¹ See Barton & Silverman, *supra* note 269, at 11. ("Many local governments responded [to their own fiscal difficulties] by requiring the developer to provide such infrastructure as streets, street lighting, water and sewer lines, parks, playgrounds, and parking areas.") (emphasis added). This is not to suggest, however, that RCAs are the product solely of municipal regulatory decision making. The rapid growth in the number of RCAs over the past three decades also is a response to national economic and demographic trends, such as an upsurge in housing costs and an increase in the number of families with fewer children. These trends contributed to the increasing market demand for smaller and less expensive townhouses and low-rise apartments. See *id.* at 10-11. These housing types most often are owned in the condominium form of ownership, which requires an association of owners to manage the common property. See *supra* note 5. Another reason for the increasing number of RCAs is the preference of many homeowners to live and own property in a gated community. See generally BLAKELY & SNYDER, *supra* note 61; Timothy Egan, *The Serene Fortress: Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at 1. A gated community is necessarily an RCA community because the facilities and amenities within the community—typically available only to community residents and their guests—are held in common ownership by residents of the community. See BLAKELY & SNYDER, *supra* note 61, at 1-2. The fact, however, that the rapid growth in the number of RCAs is in part a market-driven phenomenon does not obviate the corollary fact that municipalities also have played a significant role in the growth of RCAs, especially with respect to the growth in the number of RCAs that have assumed responsibility for services traditionally provided by the municipality. Although it is certainly true that this assumption of responsibility by an RCA can be understood as a quid pro quo in the context of a gated community—i.e., the community's authority to regulate public access in return for the community's economic responsibility for facilities ordinarily owned or maintained by a municipality—this rationale does not hold true for nongated RCA communities. For nongated RCA communities, then, the role of the municipality in delegating responsibility for the provision of traditional municipal services seems fairly clear.

²⁸² A municipality's requirement that a subdivision developer establish an RCA for the purpose of providing traditional municipal services in a subdivision has never been held to be an unconstitutional exaction. Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that a municipal requirement that a developer dedicate a portion of its land to the municipality as a condition of municipal consent to development must satis-

lays and maximizing their own net reserves from an expanded tax base.²⁸³

Viewed from this perspective, the local government's role in the establishment of RCAs and the local government's delegation of traditional municipal functions to RCAs together give rise to a symbiotic relationship²⁸⁴

fy the test that the required dedication is roughly proportionate, both in nature and extent, to the proposed development); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that an "essential nexus" must exist between a legitimate state interest and an exaction). The term "exaction" generally applies to requirements that subdivision developers construct streets, utilities, and other infrastructure within the subdivision, and, upon completion of construction, transfer ownership of the facilities and the attendant real property to the municipality. See PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 9.01 (1996). The term "exaction" also applies to fees developers must pay to municipalities in lieu of dedicating facilities, with the money being set aside for the construction of the facilities. See *id.* It is not clearly established whether the *Nollan/Dolan* principles apply to the second form of exactions, commonly known as impact fees. See Daniel J. Curtin, Jr. et al., *Nollan/Dolan: The Emerging Wing in Regulatory Takings Analysis*, 28 URB. LAW. 789, 791-93 (1996). In any event, a municipal requirement that a developer establish an RCA for the purpose of providing traditional municipal services in lieu of dedicating facilities and the municipal operation of such facilities has not been characterized as an "exaction." Even if it were so characterized, it would be difficult to square this form of an "exaction" with the constitutional standards of *Dolan* and *Nollan* because those decisions arose from governmental determinations essentially mandating the transfer of an interest in *real property* to the government without payment of compensation. See *Dolan*, 512 U.S. 384-85, 396; *Nollan*, 483 U.S. at 831, 841-42. By contrast, a municipal requirement that a subdivision developer establish an RCA in order to provide services to the subdivision is premised precisely on the developer *retaining ownership and control over its real property*.

²⁸³ See DOWDEN, *supra* note 271, at 41-42:

The local government gets benefits as a result of increased population and increased tax base and yet does not have to assume all of the responsibility and costs for providing public services to the new residents. . . . [I]t is clear that in many instances homeowner associations have been created in cluster or PUD communities *primarily for the purpose of meeting local government requirements to deliver services such as maintenance of private roads, streets, and open areas*.

(emphasis added). See also U.S. ADVISORY COMM'N, *supra* note 274, at 4 ("When RCAs are significantly self-financing, local governments find their tax base expanded, potentially without comparable expansion in the demand for those public services the RCA provides itself.")

²⁸⁴ In this formulation, the second factor—the local government's delegation of traditional municipal functions to an RCA—can be understood as a factor *intrinsic* to an overall assessment of a symbiotic relationship. Alternatively, the second factor can be understood as *extrinsic* to the application of the symbiotic-relationship theory and as a concurrent application of the separate public-function theory of state action. Because public-function analysis is a well-established theory of state action, it is useful to treat that analysis as extrinsic but complementary to the symbiotic-relationship theory. The Supreme Court has been less than clear in sorting out the relative contributions of its various theories of state action in its decisions that implicate more than one theory of state action. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22

in that “[t]he state has so far insinuated itself into a position of interdependence with [a private party] that it must be recognized as a joint participant”²⁸⁵ with the private party. This reading of the local government-RCA relationship should not be understood as implicating all government contracts with private parties in which a private party assumes responsibility for a service traditionally provided by government.²⁸⁶ Instead, only a much narrower set of circumstances is necessarily implicated: that is, the local government-RCA relationship may amount to state action because (1) the establishment of an RCA is, in critical respects, the product of municipal land-use authority, and (2) such establishment entails the delegation of multiple traditional municipal functions to a single private entity in a geographically defined area.²⁸⁷

Significantly, this understanding of the local government-RCA relationship mirrors the two-part analysis that gave rise to a finding of state action in *Evans v. Newton*.²⁸⁸ In this case, state action was discerned in the management of a private park.²⁸⁹ In making this determination, the Supreme Court relied on the symbiotic-relationship theory, under which the Court found “entwine[ment]”²⁹⁰ between a municipality and the private owner of the park, *and* on the public-function theory, under which the Court determined that the “service rendered . . . by a private park of this character is municipal in nature.”²⁹¹ The finding of state action under the symbiotic-relationship theory was said to be “buttressed”²⁹² by the additional finding

(1991) (applying the symbiotic-relationship, public-function, and judicial-enforcement theories of state action). All that can be said with some degree of certainty is that the determination of state action is made especially compelling when the challenged private conduct implicates more than one theory of state action. *See id.*; *see also supra* text accompanying notes 261-68. This proposition provides considerable support to a finding of state action, based on the application of symbiotic-relationship and public-function theories, when an RCA is established as a consequence of policies enacted through a municipality’s land-use authority and when such establishment amounts to the delegation of multiple traditional municipal functions to a single private entity in a geographically defined area. *See supra* text accompanying notes 271-83.

²⁸⁵ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

²⁸⁶ *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (“Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”).

²⁸⁷ Note that the second prong of the proposed standard mirrors the “functional equivalent of a municipality” theory of state action first recognized in *Marsh v. Alabama*, 326 U.S. 501 (1946). For an extended treatment of *Marsh* and its application to RCAs, *see supra* Part II.A.

²⁸⁸ *See* 382 U.S. 296, 299-302 (1966).

²⁸⁹ *See id.*; *see also supra* text accompanying notes 238-45.

²⁹⁰ *Id.* at 301.

²⁹¹ *Id.*

²⁹² *Id.*; *see also supra* note 284.

of state action under the public-function theory.

Similarly, the Court in *Edmonson* discerned state action and placed considerable weight on the fact that its conclusion was supported by *multiple* theories of state action, including the symbiotic-relationship and public-function theories.²⁹³ As noted earlier, *Edmonson*, a recent decision, as well as *Newton* can be understood as standing for the proposition that the determination of state action is made especially compelling when the challenged private conduct implicates more than one theory of state action.²⁹⁴ This proposition provides considerable support to a finding of state action, based on the application of symbiotic-relationship and public-function theories, when an RCA is established as a consequence of policies enacted through a municipality's land-use authority and when such establishment amounts to the delegation of multiple traditional municipal functions to a single private entity in a geographically defined area.²⁹⁵

b. *A Symbiotic Relationship Discerned from the Role of Local Government in the Operation of an RCA*

This application of the symbiotic-relationship theory disregards the role of the local government in the *establishment* of the RCA and instead views the local government-RCA relationship strictly from the perspective of municipal involvement in the day-to-day *operations* of the RCA. For ease of reference, this Article refers to this application of the theory as the "operational" perspective and the previously discussed application as the "establishment/delegation" perspective.

Local government has no standard role in the operation of RCAs.²⁹⁶ The local government-RCA relationship is as much a product of local administrative practice as it is of state law.²⁹⁷ Thus, the relationship may

²⁹³ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991).

²⁹⁴ See *supra* text accompanying notes 267, 292.

²⁹⁵ See *supra* text accompanying notes 271-83.

²⁹⁶ See U.S. ADVISORY COMM'N, *supra* note 2, at 10-11.

²⁹⁷ In general, the broad discretion of local government officials to provide traditional public services to RCAs arises because RCA streets are privately owned and local officials typically are not *required* by state law to provide public services, such as roadway maintenance, street light repair, and snow removal, on private streets, even private streets held open to the public. See, e.g., CAL. STS. & HIGH. CODE, § 1806 (West Supp. 1997) ("No city shall be held liable for failure to maintain any road until it has been accepted into the city street system . . ."); FLA. STAT. ANN. § 177.081(2) (West 1987) ("[N]othing herein shall be construed as creating an obligation upon any governing body to perform any act of . . . maintenance within such dedicated areas [including streets and public areas] except when the obligation is *voluntarily* assumed by the governing body.") (emphasis added). Alternately, a few states by statute or through common-law principles explicitly *permit* local government officials to provide local government services on streets, notwithstanding the fact that the streets are privately owned.

vary widely not just among the fifty states, but also among municipalities and RCAs within a state.

For example, some local governments and RCAs have entered into agreements authorizing the local government to provide particular services, such as routine police patrols, refuse collection, and animal control on RCA property.²⁹⁸ Other local governments require RCA covenants to state the right of local governments to take over the functions of the association in circumstances when the RCA is unable to perform, such as when the RCA becomes insolvent.²⁹⁹ Conversely, some local governments flatly decline to provide most public services to RCAs under any circumstances.³⁰⁰

In 1990, New Jersey became the first state to require all of its municipalities to provide certain municipal services to qualifying RCAs themselves, or, in the alternative, to require municipalities to reimburse RCAs for the value of the services furnished by the RCAs.³⁰¹ Covered services include refuse collection, snow removal, and street lighting.³⁰² The annual cost to all New Jersey municipalities of complying with this state mandate was estimated at sixty-two million dollars.³⁰³ Although no other state has

See N.J. STAT. ANN. § 40:67-23.1 (West 1992); *Nemours v. City of Clayton*, 175 S.W.2d 60, 65 (Mo. Ct. App. 1943) (holding that a city has an inherent authority to undertake traffic control measures on streets held open to the public, even if the streets were privately owned). However, a review of state statutes and case law discloses that the authority of local governments to maintain private streets and furnish other public services on those streets has not been clearly established. In the absence of a controlling statute or case law, it appears that the provision of public services on private streets is largely a product of local administrative practice. *See* U.S. ADVISORY COMM'N, *supra* note 2, at 14 ("Local governments may refuse to provide services to an RCA community that they provide for other subdivisions.").

²⁹⁸ *See* DOWDEN, *supra* note 271, at 45; U.S. ADVISORY COMM'N, *supra* note 2, at 14.

²⁹⁹ *See* DILGER, *supra* note 8, at 30.

³⁰⁰ *See* DOWDEN, *supra* note 271, at 45 ("From the local government perspective, long-standing practice and precedent has been not to provide such services [such as street maintenance, refuse collection, and routine police patrols] on private property."). A local government's refusal to provide certain public services to an RCA may result either from a determination that the municipality is without legal authority to provide such services, *see supra* note 301, or from a political decision not to expend additional funds for services when the provision of such services to RCAs is permitted but not required by law. In many cases, however, mounting political pressure from RCA boards and residents has led to a reversal of prior municipal policy either through express agreements between RCAs and local governments authorizing the latter to furnish services to RCAs, *see* U.S. ADVISORY COMM'N, *supra* note 2, at 10, or through legislation mandating that local governments provide municipal services to RCAs. *See* N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992 & Supp. 1997). *See infra* notes 301-05 and accompanying text.

³⁰¹ *See* N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992 & Supp. 1997).

³⁰² *See id.* § 40:67-23.3 (West 1992).

³⁰³ *See* SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE STATEMENT,

yet followed New Jersey's lead, certain local governments, such as Houston,³⁰⁴ and Montgomery County in Maryland,³⁰⁵ have adopted similar measures in which direct government aid is provided to RCAs.³⁰⁶

The operational symbiotic-relationship theory seems particularly applicable to those RCAs that are direct recipients of services furnished by local government when such services normally are furnished by local government only on publicly owned streets.³⁰⁷ When a local government maintains RCA streets, including roadway repair, streetlight maintenance, street cleaning, and snow removal, then the mutual contacts between the government and the RCA are far more pervasive than a mere licensing or regulatory scheme. Under these circumstances, government employees and equipment enter upon and maintain private property, a state of affairs giving rise to both the perception and the actuality of entanglement between public and private entities. Indeed, if *Burton* and *Newton* were to be understood as standing for any single proposition in the wake of the Supreme Court's subsequent decisions narrowing the scope of the symbiotic-relationship theory,³⁰⁸ it would be that the provision of maintenance services by the state to a private facility is a talisman of a symbiotic relationship.³⁰⁹ Thus, public

No. 2869—L. 1989, c. 299, *reprinted in* N.J. STAT. ANN. § 40:67-23.2 (West 1992).

³⁰⁴ Houston makes available to qualifying RCAs a property tax rebate for RCAs that furnish their own residential refuse removal. *See* DOWDEN, *supra* 271, at 46.

³⁰⁵ Montgomery County provides tax reimbursements for private street maintenance for RCAs that provide public access to their streets and satisfy certain other criteria. *See* U.S. ADVISORY COMM'N, *supra* note 274, at 16.

³⁰⁶ According to Robert Dilger, most local governments have refused to provide tax rebates to RCAs because to do so would require local government "to either raise taxes or reduce services in other areas" of the municipality. DILGER, *supra* note 8, at 29. However, the political attractiveness of offering property tax rebates to RCAs may well become irresistible to state and local elected officials as the number of RCAs continue to increase. The potential political potency of the issue is vividly sketched by a lobbyist working on behalf of a group of California RCAs:

No issue is [more] likely . . . to galvanize a constituency where once there was no constituency, than that of the taxation/double taxation of community associations. And yet this issue is being all but ignored by policy-makers It is only a matter of time before the tax-and-equity bomb blows As yet there is no clearly identified champion for the people who live in [RCAs] The politician who manages to capture this constituency, speak to its needs and offer it a voice, will be amply rewarded with gratitude and votes. Those time bombs are ticking, but is anyone listening?

MCKENZIE, *supra* note 16, at 195 (quoting Robyn Boyer Stewart).

³⁰⁷ Examples of such services include street repair and maintenance, refuse collection, and routine police patrols. *See* U.S. ADVISORY COMM'N, *supra* note 2, at 12-14.

³⁰⁸ *See, e.g.,* San Francisco Arts & Athletics, Inc. v. USOC, 483 U.S. 522 (1987); Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge Number 107 v. Irvis, 407 U.S. 163 (1972); *see also supra* notes 246-50 and accompanying text.

³⁰⁹ As noted earlier, the mutual contacts found in *Burton* and *Newton* but not found

maintenance of RCA facilities may well give rise to a finding of state action by virtue of the symbiotic-relationship theory.

For somewhat different reasons, the symbiotic-relationship theory also may be applicable to those RCAs that receive municipal tax funds as "reimbursement" for the municipal-like services that these RCAs provide to their own residents. Under these circumstances, the mutual contacts between the local government and the RCA can be extensive: for example, the local government's establishment of standards governing the type and level of RCA service delivery qualifying for reimbursement, municipal inspections of RCA service delivery, and an accounting by the RCA of its expenditures in connection with service delivery.³¹⁰ It is true that the Court has held that a private contractor's mere use of taxpayer funds is insufficient to give rise to a finding of state action;³¹¹ but, in this example, there is much more: An RCA delivering multiple municipal-like services—as well as regulating land use and architecture within its jurisdiction—may well be understood as a state actor, even in the absence of its receipt of public funds, by operation of the public-function theory of state action.³¹² It would follow that an RCA conforming substantially to the above description, but also furnishing its municipal-like services with the assistance of taxpayer funds, would be even more likely to be understood as a state actor. Such an RCA would not only be providing services traditionally associated with government, it would be providing these services with funds provided by the government. Under these circumstances, the RCA could be viewed as implicating the symbiotic-relationship theory as well as the public-function theory, and held to be a state actor under the combined strength of the two theories.³¹³

in later cases were the state's furnishing of maintenance services to facilities leased or owned by private actors. The state's provision of maintenance services to a private establishment suggests a degree of entanglement between the state and a private actor that typically would not be present in a state regulatory, licensing, or funding scheme. Unlike state regulation, licensing, or funding, state provision of maintenance services to a private establishment generally would entail direct involvement of public employees in the operation of the establishment. See *supra* notes 256-59 and accompanying text.

³¹⁰ See, e.g., N.J. STAT. ANN. § 40:67-23.5 (West 1992) (providing that an RCA that receives municipal "reimbursements" for qualifying services provided by the RCA shall be required to furnish to the municipality an annual accounting of its expenditure of municipal funds).

³¹¹ See *Blum*, 457 U.S. at 1010-11 (holding that state payment of more than 90% of the medical expenses of patients in a private nursing home did not give rise to a finding of state action in the conduct of the nursing home); *Rendell-Baker*, 457 U.S. at 840 (holding that state payment of most of the expenses of a private school did not give rise to a finding of state action in the conduct of the school).

³¹² For a discussion of public-function theory and its application to RCAs, see *supra* Part II.A.2.

³¹³ For a discussion of Supreme Court decisions that found state action and placed

D. The General Governmental Powers Theory Arising from the Application of the Constitutional Principle of One Person, One Vote to Nominally Private Entities

When an elected policymaking body exercises general governmental powers, the body becomes subject to the constitutional principle of one person, one vote first recognized in *Reynolds v. Sims*.³¹⁴ The standard of general governmental powers was not conceived as a theory of state action, but rather as a means by which to apply a constitutional principle to certain government entities and not others.³¹⁵ However, as will be argued here, the standard of general governmental powers, when applied to a nominally private, elected entity, takes on the formal characteristics of a state-action test.³¹⁶ For this reason, the standard of general governmental powers is treated as a distinct theory of state action for purposes of this article.

As a theory of state action, the standard of general government powers differs from other theories of state action in that it is expressly intended to be applied in connection with one—and only one—constitutional right.³¹⁷ The discussion that follows does not attempt to alter the focus of this theory of state action on a single constitutional right. Because this theory of state

considerable weight on the fact that the finding was supported by multiple theories of state action, see *supra* text accompanying notes 288-95.

³¹⁴ 377 U.S. 533 (1964). In *Reynolds*, the Supreme Court held that the Equal Protection Clause requires election districts comprising a state legislature to have approximately equal populations. See *id.* at 565. This principle universally became known by its shorthand description “one person, one vote.” *Ball v. James*, 451 U.S. 355, 362 (1981). The principle applies to elected policy-making bodies exercising “general governmental powers.” *Avery v. Midland County*, 390 U.S. 474, 485 (1968); see also *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970). For a discussion of *Reynolds* and its progeny, see *infra* Part II.D.1.

³¹⁵ See, e.g., *Board of Estimate v. Morris*, 489 U.S. 688 (1989) (holding that the one-person, one-vote principle applied to a quasi-executive, quasi-legislative body with broad authority over the City of New York); *Ball*, 451 U.S. at 355 (holding that the principle does not apply to a water storage district with limited administrative authority); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (holding that the principle did not apply to a water storage district with limited administrative authority); *Hadley*, 397 U.S. at 50 (holding that the principle applied to the elected board of trustees of a public educational authority); *Avery*, 390 U.S. at 474 (holding that the principle applied to a governing body of a county).

³¹⁶ See *infra* Part II.D.2.a.

³¹⁷ By contrast, the public-function theory of state action, for example, has been employed in the service of a variety of constitutional rights, including equal protection of the laws, see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); freedom of expression, see *Marsh v. Alabama*, 326 U.S. 501, 508-09 (1946); and voting rights, see *Smith v. Allwright*, 321 U.S. 649, 661-63 (1944).

action is uniquely bound up with the right guaranteed by the principle of one person, one vote, the following discussion gives considerable attention to the right at issue³¹⁸ as well as the theory of state action to which it relates.

1. Overview: *Reynolds v. Sims and Its Progeny*

In *Reynolds*, the Supreme Court established the constitutional principle of one person, one vote by holding that the Equal Protection Clause requires election districts comprising a state legislature to have approximately equal populations.³¹⁹ The decision led to the restructuring of most of the nation's state legislatures, which previously had been comprised of election districts with wide variations in population.³²⁰ *Reynolds* has been generally regarded as among the Court's most significant decisions in this century, a decision that affirmed and gave strength to "a growing awareness of political equality as a legitimating foundation for our form of government."³²¹

The Court subsequently applied the principle of one person, one vote to elected local government bodies that exercise general governmental powers.³²² The Court found "little difference . . . between the exercise of state power through [state] legislatures and its exercise by elected officials in cities, towns, and counties."³²³ The Court also determined that the one-person, one-vote principle was not solely applicable to government bodies exercising legislative, as distinct from executive or administrative, power.³²⁴ It is sufficient for a local government body to have "general responsibility and power for local affairs"³²⁵ without regard to whether the power

³¹⁸ The attention given to the one-person, one-vote principle has the additional purpose of highlighting the extent to which the typical RCA voting scheme is inconsistent with the principle. This fact is important not only to the immediate discussion but also to the more general concerns of this Article and to the discussion *infra* Part IV of proposed principles governing the public/private line of demarcation in RCAs.

³¹⁹ See *Reynolds*, 337 U.S. at 565.

³²⁰ See RICHARD C. CORTNER, *THE APPORTIONMENT CASES 253* (1970); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 100 n.32 (2d ed. 1988).

³²¹ TRIBE, *supra* note 137, at 192. Professor Tribe notes, "It is thus not surprising that the Court has applied its most exacting equal protection scrutiny to enforce the principle of 'one person, one vote'"; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980) ("[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.") Former Chief Justice Earl Warren characterized the decisions leading to the recognition of the one-person, one-vote principle as the most important decisions made during his tenure. See CORTNER, *supra* note 320, at 253.

³²² See *Avery v. Midland County*, 390 U.S. 474 (1968).

³²³ *Id.* at 481.

³²⁴ See *id.* at 482-83.

³²⁵ *Id.* at 483.

is formally classified as legislative, executive, or administrative.

The application of the one-person, one-vote principle to local government bodies, then, turns on whether the body exercises "general governmental powers."³²⁶ Of course, the term "general governmental powers" is not subject to precise definition. Instead, a court must determine, on a case-by-case basis, whether a particular local government body exercises powers that are sufficiently important and diverse to meet this standard.³²⁷

In *Avery v. Midland County*,³²⁸ the Court considered whether a county commission exercised general governmental powers. The commission, the Court noted, established the county tax rate, issued bonds, adopted a budget, appointed local officials, built roads, and maintained public buildings.³²⁹ In short, the commission "[made] a large number of decisions having a broad range of impacts on all the citizens of the county,"³³⁰ thereby coming within the constitutional mandate of one person, one vote.³³¹

In *Hadley v. Junior College District*,³³² the Court considered whether an elected board of trustees of a public junior college exercised general governmental power. The trustees were authorized to "levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students . . . , and in general manage the operations of the junior college."³³³ Although the Court conceded that the powers exercised by the trustees in *Hadley* were not as broad as those exercised by the county commission in *Avery*,³³⁴ the Court never-

³²⁶ *Id.* at 484-85 ("We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.").

³²⁷ See *supra* note 315.

³²⁸ 390 U.S. 474 (1968).

³²⁹ See *id.* at 477, 483.

³³⁰ *Id.* at 483.

³³¹ See *id.* at 484-85.

³³² 397 U.S. 50 (1970).

³³³ *Id.* at 53. More recently, the Court determined that the New York City Board of Estimate, a quasi-executive, quasi-legislative body, was subject to the one-person, one-vote principle because the board exercised the following powers that were collectively deemed to constitute general governmental powers: "The board manages all city property; exercises plenary zoning authority; dispenses all franchises and leases on city property; fixes generally the salaries of all officers and persons compensated through city moneys; . . . grants all city contracts;" "calculat[es] sewer and water rates, [and] tax abatements;" and "approv[es] the city's capital and expense budgets." Board of Estimate v. Morris, 489 U.S. 688, 695-96 (1989). The last enumerated power was shared with the local legislative body. See *id.* at 696. The scope of governmental powers of the New York City Board of Estimate appears somewhat less broad than the powers of the county commission in *Avery*, although somewhat more extensive than the powers of the education district in *Hadley*.

³³⁴ See *Hadley*, 397 U.S. at 53 (citing *Avery*).

theless concluded that the powers exercised by the trustees were “general enough and have sufficient impact”³³⁵ to give rise to the constitutional mandate of one person, one vote.

Note the evolution of the principle of “general governmental powers” from *Avery* to *Hadley*. In *Avery*, the body exercising the powers was a body that controlled a *general* unit of government that provided a broad range of services to its residents.³³⁶ In *Hadley*, the body exercising the powers was a body that controlled a *special* unit of government that provided only one service: education.³³⁷ In *Hadley*, however, the Court emphasized that education is a “traditional” and “vital” government service.³³⁸ *Hadley* thus stands for the proposition that, for an elected body to be subject to the constitutional mandate of one person, one vote, the body need not be diverse in the *services* that it delivers so long as it is diverse in its *powers* used in connection with the delivery of its service and so long as the service itself is sufficiently important.³³⁹

The Court in *Hadley* left open the question of whether “there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with [the one-person, one-vote principle] might not be required”³⁴⁰ In *Salyer Land Co. v. Tulare Lake Water Storage District*,³⁴¹ the Court had occasion to apply the *Hadley* dictum. In that decision, the Court upheld a statutory scheme governing the election of members of an agricultural water storage district.³⁴² The statute restricted the right to vote to landowners and weighted the votes according to the amount of land that each voter owned.³⁴³ The primary purpose of the district was “to provide for the acquisition, storage, and distribution of water for farming.”³⁴⁴ The one-person, one-vote principle was not implicated, the Court held, because the purpose and powers of the district were so limited³⁴⁵ and, moreover, the weighted voting scheme was consistent with the overall purpose of the dis-

³³⁵ *Id.* at 54.

³³⁶ *See Avery*, 390 U.S. at 483.

³³⁷ *See Hadley*, 397 U.S. at 53-54.

³³⁸ *Id.* at 56.

³³⁹ Put another way, *Hadley* suggests that, in applying the doctrine of “general governmental powers,” the term “general” is intended as a direct modifier of “powers” rather than of “governmental.”

³⁴⁰ *Hadley*, 397 U.S. at 56.

³⁴¹ 410 U.S. 719 (1973).

³⁴² *See id.* at 728-35.

³⁴³ *See id.* at 724-25.

³⁴⁴ *Id.* at 728.

³⁴⁵ *See id.* at 728-29.

trict, which, the Court noted, disproportionately affected landowners.³⁴⁶

In *Ball v. James*,³⁴⁷ the Court again considered the application of the one-person, one-vote principle to a property-based voting scheme of a water storage district.³⁴⁸ The water district in this case, unlike the district in *Salyer Land Co.*, furnished electricity as well as water and supplied its services to urban areas as well as to agricultural areas.³⁴⁹ These differences, however, did not alter the constitutional analysis or the result reached in *Salyer Land Co.* The Court in *Ball* held that the furnishing of electricity was only an incidental purpose of the water storage district³⁵⁰ and that, in any event, the furnishing of electricity is not a "general or important governmental function."³⁵¹ As to the district's water supply function, the Court observed that the district's powers in this regard were exceedingly limited, noting that the district does "not own, sell, or buy water nor . . . control the use of any water [once] . . . delivered."³⁵² The Court upheld the property-based voting scheme because the functions of the district were "peculiarly narrow"³⁵³ and because the voting scheme was consistent with the special relationship of the district to one class of citizens—the landowners.³⁵⁴

It is important to note that apart from the water storage district cases,³⁵⁵ the Supreme Court consistently has invalidated property-ownership requirements for voting.³⁵⁶ For example, property-ownership requirements were struck down in the context of school district elections,³⁵⁷ referenda on the issuance of general obligation bonds,³⁵⁸ and referenda on the issuance of municipal utility bonds.³⁵⁹ In light of these decisions, there can be little doubt that a property-ownership requirement applied to the election of

³⁴⁶ See *id.*

³⁴⁷ 451 U.S. 355 (1981).

³⁴⁸ The district in *Ball* was termed a "water reclamation district" rather than a "water storage district," as in *Salyer Land Co.* In both cases, however, the respective districts were described as storing and distributing water for the benefit of certain landowners. See *Ball*, 451 U.S. at 357, 367; *Salyer Land Co.*, 410 U.S. at 723. For the sake of clarity, therefore, this Article refers to both districts as water storage districts.

³⁴⁹ See *Ball*, 451 U.S. at 365.

³⁵⁰ See *id.* at 368.

³⁵¹ *Id.*

³⁵² *Id.* at 367.

³⁵³ *Id.* at 357.

³⁵⁴ See *id.* at 370-71.

³⁵⁵ A third water storage district case, *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973) (per curiam), decided on the same day as *Salyer Land Co.*, reached the same result and applied the same rationale as *Salyer Land Co.* and *Ball*.

³⁵⁶ See ROTUNDA & NOWAK, *supra* note 108, at 446-47 n.24.

³⁵⁷ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 633 (1969).

³⁵⁸ See *Phoenix v. Kolodziejski*, 399 U.S. 204, 214 (1970).

³⁵⁹ See *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969).

an entity exercising general governmental powers would not survive constitutional scrutiny.³⁶⁰

2. *The One-Person, One-Vote Principle as Applied to RCAs*

The Supreme Court has not applied the one-person, one-vote principle to elected bodies that are denominated as private-sector entities, such as RCAs. The principle has been applied only to elected *government* bodies—and, more specifically, only to those elected government bodies exercising general governmental powers.³⁶¹ This Section nevertheless argues that the principle of one person, one vote could be extended to RCAs, in a manner substantially consistent with established constitutional precedent, because RCAs can be understood as exercising general governmental powers notwithstanding their legal status as nominally private entities.³⁶² On this view, the test of general governmental powers is a test of function, not a test of legal status—a view consistent with state-action theory generally.³⁶³ As a test of function, the theory of general governmental powers, when applied to a nominally private entity, takes on the formal characteristics of a state-action test.

a. *The Theory of General Governmental Powers Construed as a State-Action Test*

Although the Supreme Court has not applied the one-person, one-vote principle to elected bodies that are denominated as private, the Court has recognized, in a different context, that the nominal legal status of an entity—that is, whether the entity is denominated as public or private—is not dispositive as to the reach of the one-person, one-vote principle.³⁶⁴ Thus, the Court, in determining that a water storage district was not subject to the one-person, one-vote principle, noted that the “[Arizona] state legislature has allowed water districts to become *nominal public* entities in order to obtain inexpensive bond financing, [but that] the districts remain essentially busi-

³⁶⁰ See *Salyer Land Co.*, 410 U.S. at 727-28 (suggesting that an elected body’s exercise of general governmental powers, as in *Cipriano* and *Phoenix*, precludes an electoral scheme that would limit the franchise to landowners of the geographic area served by the body).

³⁶¹ See *supra* text accompanying notes 314-39.

³⁶² See *infra* Part II.D.2.b.

³⁶³ See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (holding that a company town was the functional equivalent of a municipality and, as such, was deemed to be a state actor); *Smith v. Allwright*, 321 U.S. 649, 662-64 (1944) (holding that a primary election system was a public function regardless of whether a private political party conducted the election); see also *supra* notes 58, 200.

³⁶⁴ See *Ball v. James*, 451 U.S. 355, 368 (1981).

ness enterprises”³⁶⁵ Put another way, the fact that the districts were nominally situated in the public sector was of less importance than the underlying function of the districts. Conversely, it may follow from this functional approach that a *nominally private* entity exercising general governmental powers may be subject to the one-person, one-vote principle notwithstanding its nominal legal status.³⁶⁶

More recently, the Court has applied an essentially functional analysis and discounted the legal status of a nominally private entity in a different state-action setting. In *Lebron v. National Railroad Passenger Corp.*,³⁶⁷ the Court concluded that Amtrak was a governmental entity for constitutional purposes notwithstanding the statute authorizing the establishment of Amtrak, which expressly provided that Amtrak is “‘not . . . an agency or establishment of the United States Government.’”³⁶⁸ *Lebron* can be understood as standing for the proposition that the final determination of whether an entity is public or private for constitutional purposes is for the courts, not for those who actually establish the entity and confer its nominal status as public or private.³⁶⁹ In this way, *Lebron* reaffirms the constitutional principle recognized in *Marsh v. Alabama*³⁷⁰ and generally underlying the public-function theory of state action.³⁷¹ It is argued here that the same form of functional analysis is implied in the test of general governmental powers giving rise to the constitutional mandate of one person, one vote when the test is applied to a nominally private entity.

Alternately, one can reach the same conclusion by adopting an analysis that is less expansive and that adheres more closely to the strict confines of the Court’s constitutional precedent. The disadvantage of this analysis is that it seems unnecessarily complex as a workable test of state action to be used when deciding whether the one-person, one-vote principle should be applied to elected entities that are denominated as private. Under this alternate analysis, it may be stated that the principle of one person, one vote could be extended to certain private entities such as RCAs because (1) RCAs, al-

³⁶⁵ *Id.* (emphasis added).

³⁶⁶ Concededly, the converse of the proposition in *Ball* does not necessarily follow from the proposition. It may be that *Ball*’s elevation of function over nominal legal status is limited only to nominally public, as distinct from nominally private, entities. It is worth noting, however, that the Court in *Ball* need not have characterized the water storage district as nominally public in order to support its conclusion that the district did not exercise general governmental powers.

³⁶⁷ 513 U.S. 374 (1995).

³⁶⁸ *Id.* at 391 (emphasis added) (quoting 45 U.S.C. § 541 (1988) (repealed 1994)).

³⁶⁹ See *id.* at 392 (“[I]t is not for Congress to make the final determination of Amtrak’s status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions.”) (emphasis added).

³⁷⁰ 326 U.S. 501 (1946); see also *supra* Part II.A.1.

³⁷¹ See *supra* note 58.

though nominally private entities, can be understood as state actors for constitutional purposes by operation of well-established theories of state action such as the public-function theory,³⁷² and (2) these RCAs, as a consequence of their status as state actors, become subject to the principle of one person, one vote assuming further that *Hadley's* test of general governmental powers³⁷³ is satisfied. But to articulate this alternate analysis is to appreciate its needless complexity as a workable constitutional standard. It would hardly seem necessary for any entity found to exercise *Hadley's* general governmental powers to be also subjected to a separate test of state action. The *Hadley* test, when applied to nominally private elected entities, can be presumed to operate as a test of state action in addition to its traditional function as a test of whether the one-person, one-vote principle applies to elected governmental bodies.

b. *Whether RCAs Exercise General Governmental Powers*

The test of general governmental powers, as recognized in *Hadley*, may be stated as whether an elected entity delivers a traditional or vital public service³⁷⁴ and, in connection with the delivery of the service, whether the powers exercised by the entity are "general enough and have sufficient impact."³⁷⁵ A single-purpose educational district satisfied both prongs of the *Hadley* test,³⁷⁶ whereas a water storage district failed to satisfy either prong of the test.³⁷⁷

By this measure, RCAs would appear to exercise general governmental powers. RCAs deliver vital and traditional public services to their members and other residents and, in doing so, exercise broad powers.

As a "mini-government," the [residential community] association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon

³⁷² See *supra* Parts II.A.2, II.A.3.

³⁷³ See *Hadley v. Junior College Dist.*, 397 U.S. 50, 53-56 (1970).

³⁷⁴ See *id.* at 56.

³⁷⁵ *Id.* at 54.

³⁷⁶ See *id.* at 54-57; see also *supra* text accompanying notes 332-39.

³⁷⁷ See *Ball v. James*, 451 U.S. 355 (1981); *Associated Enters., Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973) (per curiam); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); see also *supra* text accompanying notes 340-54.

the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality. Terminology varies from region to region; however, the duties and responsibilities remain the same.³⁷⁸

This concise statement of RCA power makes clear that RCAs deliver multiple services, more types of services, in fact, than the educational district in *Hadley* that was found to be in violation of the one-person, one-vote principle.³⁷⁹ So too, the power exercised by RCAs in connection with the delivery of their services is also broad, and includes, as noted in the above passage, the authority to levy mandatory assessments on residences and the authority to impose rules that are binding on all homeowners and other residents within the RCA subdivision.³⁸⁰ These are powers traditionally associated with sovereignty.³⁸¹

The power to levy mandatory assessments on residential real property is a key feature of RCAs, and one that distinguishes the RCA from a mere civic or neighborhood association.³⁸² The RCA assessment power is, for practical purposes, a taxing power,³⁸³ and RCA assessments are functionally equivalent to municipal real estate taxes. The amount of an RCA assessment, like the amount of a real estate tax, typically varies in proportion to the relative value of a residence.³⁸⁴ The establishment of the rate underlying RCA assessments and municipal real estate taxes is determined, in each case, by a local elected body.³⁸⁵ The proceeds of RCA assessments,

³⁷⁸ Hyatt & Rhoads, *supra* note 68, at 918 (footnote omitted).

³⁷⁹ The Junior College District of Metropolitan Kansas City—the elected body in *Hadley*—was established to deliver one and only one type of service to its constituents: higher education. See *Hadley*, 397 U.S. at 55-56.

³⁸⁰ Hyatt & Rhoads, *supra* note 68, at 918-19.

³⁸¹ See *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978) (holding that tax collection is a traditional function of government); see also MCKENZIE, *supra* note 16, at 134-35 (RCAs exhibit “fundamental political characteristics” in that “they exercise power over members and even nonmembers in vital areas of concern.”).

³⁸² See Hyatt & Rhoads, *supra* note 68, at 918.

³⁸³ See U.S. ADVISORY COMM’N, *supra* note 274, at 5 (reasoning that RCA “[d]ues and fees resemble taxes, in that payment is involuntary.”).

³⁸⁴ In condominium RCAs, assessments usually are based on the size of the unit. Some homeowner association RCAs, however, charge equal fees regardless of the size of the unit. See U.S. ADVISORY COMM’N, *supra* note 2, at 18; see also MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 44.109.10 (3d ed. 1994) (stating that real property valuation for assessment purposes must “have some relation to actual value”).

³⁸⁵ See DILGER, *supra* note 8, at 23 (noting that an RCA board typically establishes the amount of assessment); MCQUILLIN, *supra* note 384, § 44.96, at 392-93 (noting that a municipal legislative body typically levies municipal taxes, including real estate tax-

like the proceeds of real estate taxes, are commonly used to pay for local services.³⁸⁶ Most importantly, a homeowner's failure to pay an RCA assessment, like the failure to pay a municipal real estate tax, results in a lien on the residence and, ultimately, may lead to the forced sale of the residence through the enforcement of the lien.³⁸⁷ Once an individual chooses to purchase a home in an area subject to an RCA, the individual can no more escape payment of an RCA assessment than he can escape payment of a municipal real estate tax.³⁸⁸ As the functional equivalent of the municipal real estate tax, the RCA assessment power is a significant indicia of the exercise of general governmental powers by an RCA.

The RCA rulemaking power also provides strong evidence that the scope of RCA power satisfies the requirements of *Hadley*. RCAs "exercise power over members and even nonmembers in vital areas of concern, in that their decisions govern what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings."³⁸⁹ An RCA's rules sometimes restrict the age of those who own homes in the RCA community,³⁹⁰ the number and ages of overnight visitors,³⁹¹ the color a homeowner may paint her house,³⁹² whether a homeowner may build an addition to her house,³⁹³ whether a homeowner may post signs inside or outside her home,³⁹⁴ and whether publications can be sold or distributed on RCA streets.³⁹⁵ An infraction of RCA rules may lead to the imposition of a penalty against a homeowner or to the denial of the right to use RCA common facilities backed by judicial injunction.³⁹⁶ Thus, a homeowner dissatisfied with an RCA rule generally has but three choices: obey the rule, mount a drive among RCA members to change the rule through a majority or supermajority vote,³⁹⁷ or sell his residence and move

es).

³⁸⁶ See DILGER, *supra* note 8, at 23 (stating that an RCA "tax[es] its members . . . to pay for the provision of the association's amenities and services"); MCQUILLIN, *supra* note 384, § 44.35, at 141-42; U.S. ADVISORY COMM'N, *supra* note 2, at 12-13 (providing an overview of typical services provided by RCAs). Many services provided by RCAs are traditionally provided by municipalities. See *id.* at 14.

³⁸⁷ See GARREAU, *supra* note 3, at 184-85, 189.

³⁸⁸ See *id.*

³⁸⁹ MCKENZIE, *supra* note 16, at 135.

³⁹⁰ See GARREAU, *supra* note 3, at 190; MCKENZIE, *supra* note 16, at 15.

³⁹¹ See U.S. ADVISORY COMM'N, *supra* note 2, at 16.

³⁹² See DILGER, *supra* note 8, at 23.

³⁹³ See *id.* at 23-24.

³⁹⁴ See Diana Jean Schemo, *Escape from Suburbia: Community Associations Thrive Amid Debate on Freedom, Privacy and Democracy*, N.Y. TIMES, May 3, 1994, at B1.

³⁹⁵ See GARREAU, *supra* note 3, at 190-91; MCKENZIE, *supra* note 16, at 15.

³⁹⁶ See Hyatt & Rhoads, *supra* note 68, at 919.

³⁹⁷ If the RCA board of directors were to promulgate the objectionable rule, then changing the rule would be a matter of lobbying the incumbent board or, if that were to

elsewhere. Significantly, the stark choices faced by a dissatisfied RCA homeowner mirror the choices faced by a resident of a municipality who feels aggrieved by a municipal ordinance.³⁹⁸

In sum, RCAs deliver vital and traditional public services to their members as well as to other residents within their jurisdiction. The powers exercised by RCAs in connection with the delivery of their services are broad and include the power to levy mandatory assessments on residences and the power to impose rules of general applicability within their jurisdiction. Taken together, these attributes of RCAs amount to the exercise of general governmental powers within the meaning of *Hadley*.

c. *The RCA Electoral System*

If RCAs were deemed to exercise general governmental powers, then they would be subject to the constitutional principle of one person, one vote.³⁹⁹ This Section considers the implications of this determination by assessing the extent to which RCA electoral systems deviate from the one-person, one-vote principle.⁴⁰⁰

fail, unseating the incumbent board in the annual elections, a task usually requiring a majority of the voting members. If, however, the objectionable rule were incorporated in the CC&Rs recorded with the deed to each RCA residence, then changing the rule may prove considerably more difficult. A majority, supermajority, or even a unanimous vote of the RCA members may be required. *See infra* notes 399-415.

³⁹⁸ RCA rulemaking authority, in addition to being broad in scope and substantial in impact, is noteworthy because of its locus: the home. Rulemaking authority affecting the home and family life traditionally has been exercised by government, acting through its police power. *See generally* *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (listing a variety of offenses that, when committed in the home, do not escape the reach of government authority). Few private organizations other than RCAs "govern what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings." MCKENZIE, *supra* note 16, at 135.

The home and family life is an area of heightened constitutional concern, and government rulemaking authority in this area is limited by a number of constitutional provisions. *See, e.g.,* *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (holding that a municipal ordinance that banned the posting of signs on residential property was unconstitutional in part because of the "special respect for individual liberty in the home"); *Payton v. New York*, 445 U.S. 573, 585-86 (1980) (holding that a warrantless seizure made in the home was unconstitutional in part because of the location of the seizure); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that a criminal conviction for the possession of obscene material was unconstitutional because the defendant possessed the material in his home). An RCA, generally considered a private actor under current law, is not necessarily limited in its rulemaking authority over the home to the same extent as government is limited through constitutional restraints. *See supra* notes 32-37 and accompanying text.

³⁹⁹ *See Hadley v. Junior College Dist.*, 397 U.S. 50, 54-57 (1970).

⁴⁰⁰ The fact that RCAs' electoral systems deviate significantly from the one-person,

In an RCA, everyone who purchases a home automatically becomes a member of the association.⁴⁰¹ Thus, although the decision to buy a home may be voluntary, membership in the association is mandatory.⁴⁰² This fact distinguishes RCAs from voluntary neighborhood or civic associations and makes membership in an RCA, in some crucial respects, analogous to residency in a municipality.⁴⁰³

RCAs are governed by boards of directors, which are elected by a vote of RCA members.⁴⁰⁴ In homeowner associations, each residential unit has one vote, regardless of the number of adults who reside in the unit. When an individual owns more than one unit, he or she receives more than one vote.⁴⁰⁵ In condominium associations, votes often are apportioned according to the size of the individual unit, with larger units receiving greater weight. As with homeowner associations, owners of multiple condominium units have the right to cast multiple votes.⁴⁰⁶

Those who live in RCAs but who are not owners generally are ineligible to vote in RCA elections.⁴⁰⁷ In many areas, the number of renters residing in RCAs constitutes a significant percentage of the population of the RCAs. For example, a 1987 survey of California RCAs reported that in almost fifteen percent of the RCAs the majority of the units were occupied by renters and that the median RCA participating in the survey had twenty percent of its units occupied by renters.⁴⁰⁸ RCA renters are directly affected by RCA policies and services but, for the most part, have no voice in the formation of these policies and the delivery of these services.⁴⁰⁹

Many RCAs deviate from the one-person, one-vote principle in another significant way. In the early years of an RCA, the RCA developer usually dominates the board of directors. Typically, "the developer staffs all board positions with his own employees and . . . retains *three* votes for every

one-vote principle does not, in and of itself, amount to evidence that RCAs do not exercise general governmental powers. Once an elected body is determined to exercise general governmental powers based on a careful assessment of its functions and its authority, electoral schemes that fail to substantially conform to the one-person, one-vote principle will be deemed unconstitutional. See *Avery v. Midland County*, 390 U.S. 474, 484-85 (1968).

⁴⁰¹ See MCKENZIE, *supra* note 16, at 127.

⁴⁰² See *id.*

⁴⁰³ See DILGER, *supra* note 8, at 3.

⁴⁰⁴ See U.S. ADVISORY COMM'N, *supra* note 2, at 15.

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

⁴⁰⁷ See *id.*; see also MCKENZIE, *supra* note 8, at 128; Barton & Silverman, *supra* note 269, at 35.

⁴⁰⁸ See Barton & Silverman, *supra* note 69, at 35. The California survey also reported that only 21% of the RCAs participating in the survey reported being entirely owner-occupied. See *id.*

⁴⁰⁹ See *id.*

unsold unit, so the developer is effectively in control of the association until nearly the entire project is sold."⁴¹⁰ The developer's power is manifested in other ways, such as in the fact that the developer is solely responsible for the establishment of the CC&Rs that fundamentally govern the RCA.⁴¹¹ Once adopted, the CC&Rs may be amended usually only by a supermajority vote of all members.⁴¹²

In sum, RCAs almost invariably employ a one-*house*, one-vote electoral system, disenfranchise renters, and employ weighted voting in favor of the developer. Not surprisingly, one leading commentator has characterized RCAs as "profoundly undemocratic."⁴¹³ If the constitutional principle of one person, one vote were to apply to RCAs, there can be little doubt that the RCA electoral system would run afoul of the requirements of *Reynolds v. Sims*⁴¹⁴ and its progeny.⁴¹⁵

E. Summary

This Article so far has attempted to show that RCAs can be understood as state actors through a robust application of the Supreme Court's established theories of state action. Each of these four theories, in a different way, highlights the multiple public functions and the complex intergovernmental relationships that underpin the modern RCA. All of the theories, taken together, provide a more complete understanding of the proper place of RCAs in the constitutional scheme. Still, the theories, taken together, are not without their conceptual limitations and practical problems in integrating and applying state-action doctrine to RCAs. Before embarking on a discussion of these limitations and problems, it is useful to briefly recapitulate each theory and its application to RCAs.

⁴¹⁰ MCKENZIE, *supra* note 16, at 128 (emphasis added).

⁴¹¹ *See id.* at 127.

⁴¹² *See id.* Some RCAs are burdened with CC&Rs that may not be amended except by unanimous consent of RCA members, a requirement that, as a practical matter, is nearly impossible to achieve on most issues. *See* U.S. ADVISORY COMM'N, *supra* note 2, at 16. Still other RCAs are governed by CC&Rs that contain no express provisions setting forth their amendment procedures. Under these circumstances, an RCA seeking to amend its CC&Rs would be compelled to commence a judicial proceeding for that purpose, a proceeding that is "difficult and expensive . . . and one possibly fraught with danger for the continued viability of the organization." *Id.*

⁴¹³ COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 12, at xii.

⁴¹⁴ 377 U.S. 533 (1964).

⁴¹⁵ *See, e.g.,* Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).

The “functional equivalent of a municipality” theory, exemplified by *Marsh v. Alabama*,⁴¹⁶ arose from the limitations on personal freedoms imposed by company towns. The Court in *Marsh* established a paradigm of a municipality and found that a company town conformed, in essential respects, to the paradigm. The municipal paradigm consisted of streets held open for public use and an amalgam of homes, a business district, and infrastructure.⁴¹⁷ This paradigm would encompass some territorial RCAs that exist today.⁴¹⁸ The paradigm, a construct of the 1940s, may need to be updated to reflect the typical contemporary suburban municipality, which often lacks a business district. Such an updated paradigm would encompass many more RCAs because the majority of RCAs lacks a business district.⁴¹⁹

The underlying significance of *Marsh* lies not in its specific municipal paradigm, but rather, in its recognition that company towns—the dominant form of privatized municipal governance at the time *Marsh* was decided—should be made subject to constitutional restraints as a matter of fundamental fairness. The Court observed, “There is no more reason for denying [the people who reside in company towns] of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.”⁴²⁰ In the fifty years since *Marsh*, company towns virtually have disappeared and RCAs have grown to encompass twelve percent of the United States population.⁴²¹ RCAs may be said to occupy a similar, if not more dominant, position in the United States political economy today as company towns occupied some fifty years ago.⁴²² Viewed from this perspective, the Court’s concern in *Marsh* over the major form of privatized local government that existed at the time of its decision would seem to apply with equal force to the major form of privatized local government that exists today.

The judicial-enforcement theory of state action approaches the state-action inquiry from a perspective quite different from that of *Marsh*. The leading decision, *Shelley v. Kraemer*,⁴²³ conceivably may be read as standing for the proposition that “[w]hen judges command private persons to take specific actions which would violate the Constitution if done by the State, state action will be present in the resulting harm to constitutionally recognized rights.”⁴²⁴ This sweeping proposition has been harshly criticized—quite rightly—as failing to recognize the distinction between the

⁴¹⁶ 326 U.S. 501 (1946).

⁴¹⁷ See *id.* at 502-03.

⁴¹⁸ See *supra* text accompanying notes 59-61.

⁴¹⁹ See *supra* text accompanying notes 62-70.

⁴²⁰ *Marsh*, 326 U.S. at 508-09.

⁴²¹ See COMMUNITY ASS’NS INST., *supra* note 8, at 13.

⁴²² See *supra* note 70.

⁴²³ 334 U.S. 1 (1948).

⁴²⁴ ROTUNDA & NOWAK, *supra* note 108, § 16.3, at 545.

judiciary in its capacity as a public institution and the judiciary in its capacity as an enforcer of private transactions.⁴²⁵ Today, *Shelley* has been consigned to a sort of jurisprudential limbo, rarely invoked as precedent, yet recognized by many as a landmark of constitutional law notwithstanding its conceptual flaws.⁴²⁶ Few would repudiate the judicial-enforcement theory of state action as it applies to the facts of the case giving rise to *Shelley*.⁴²⁷ The unanswered question remains how to limit the *Shelley* doctrine in a principled way. This Article has attempted to answer this question by considering four possible limiting principles and concluding that the principle that would limit *Shelley* to covenants governing the use and occupation of land would achieve a proper balance among the conflicting constitutional issues at stake and, as well, would occupy the middle ground among the potential limiting principles.⁴²⁸

The land-use reading of *Shelley* holds that *Shelley* is generally limited to the 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.⁴²⁹ This reading is consistent with one of the underlying concerns of the Court in *Shelley*, which, in essence, was condemning a form of racial apartheid made possible by the wholesale and pervasive privatization of municipal land-use authority.⁴³⁰ The terms “wholesale” and “pervasive” are used because racially restrictive private covenants blanketed the country at the time of *Shelley* and many of these restrictive covenants were put in place by nascent homeowner associations that were created expressly for this purpose.⁴³¹ This observation points to *Shelley*’s conceptual links to RCAs today. First, the contemporary RCA regime of wholesale land-use regulation encompasses nearly fifteen percent of the population of the United States, and, if current estimates were to prove correct, will encompass thirty percent of the U.S. population early in the next century.⁴³² Second, just as privatized *racial* land-use decision making was pervasive in the period between the two World Wars, privatized land-use decision making that touches on many other sensitive constitutional areas is pervasive today.⁴³³ If *Shelley* were to stand for something more than the ad hoc repudiation of racially restrictive covenants, then it must stand for a principle that implicates, under certain circumstances, the privatized land-use decision-making power that lies at the heart of the modern territorial RCA.

⁴²⁵ See Henkin, *supra* note 129, at 474-77.

⁴²⁶ See *id.*; see also Elkind, *supra* note 129, at 677-78.

⁴²⁷ See *supra* note 144 and accompanying text.

⁴²⁸ See *supra* Parts II.B.2, II.B.3.

⁴²⁹ See *supra* Part II.B.2.c.

⁴³⁰ See *supra* text accompanying notes 184-90.

⁴³¹ See *supra* text accompanying notes 197-203.

⁴³² See *supra* notes 10-11 and accompanying text.

⁴³³ See *supra* notes 32-37 and accompanying text.

The mutual-contacts/symbiotic-relationship theory of state action offers another perspective by which to assess RCAs and their proper position in the constitutional scheme. Although this branch of state-action theory has fallen out of favor among leading commentators in recent years,⁴³⁴ the doctrine has not been judicially repudiated.⁴³⁵ Indeed, the Supreme Court has expressly relied on the symbiotic-relationship doctrine as recently as 1991.⁴³⁶ In any event, the notion of a symbiotic relationship between a public and private entity seems peculiarly applicable to the relationship that typically exists between a local government and an RCA that is situated within the local government's territorial jurisdiction.⁴³⁷

The symbiotic-relationship theory of state action is applicable to RCAs in two distinct ways. First, the *establishment* of the RCA can be understood as a consequence of the policy choices made by a municipality pursuant to its land-use authority. Second, the *operation* of the RCA can be understood as giving rise to a symbiotic relationship with the municipality at least under circumstances in which the RCA and the governing municipality act as partners in revenue collection and service delivery. As to the first application, this Article has discussed how local government land-use policies create substantial inducements, even de facto or de jure requirements, for developers of new residential subdivisions to establish RCAs.⁴³⁸ Moreover, these municipal land-use policies often are the product of a policy choice made by local government officials to transfer responsibility for traditional municipal services and facilities to the private sector.⁴³⁹ As to the second application of symbiotic-relationship theory, many RCAs are direct recipients of services furnished by local government even when such services are otherwise furnished by local government *only* on publicly owned streets.⁴⁴⁰ When local government employees actually maintain RCA streets, including roadway repair, streetlight maintenance, street cleaning, and snow removal, the mutual contacts between government and the RCA are far more pervasive than is the case with typical government licensing or regulatory schemes⁴⁴¹—of which the Supreme Court generally has held that the mutual contacts contained within these schemes do not give rise to a symbiotic relationship between public and private actors.⁴⁴² The same may be said of RCAs that receive municipal tax funds as “reimbursement” for the munic-

⁴³⁴ See, e.g., *TRIBE*, *supra* note 321, § 18-3, at 1701 n.13.

⁴³⁵ See *supra* text accompanying notes 246-64.

⁴³⁶ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22 (1991).

⁴³⁷ See *supra* Part II.C.2.

⁴³⁸ See *supra* text accompanying notes 276-81.

⁴³⁹ See *supra* note 280 and accompanying text.

⁴⁴⁰ See *supra* text accompanying notes 301-06.

⁴⁴¹ See *supra* text accompanying notes 307-09.

⁴⁴² See *supra* text accompanying notes 246-50.

pal-like services that these RCAs provide to their own residents.⁴⁴³ Little wonder, then, that the U.S. Advisory Commission on Intergovernmental Relations undertook a major study of RCAs and concluded that “for the purposes of understanding the place and role of RCAs in local governance, as well as the costs and benefits of RCAs for both citizens and governments, an *intergovernmental perspective* on RCAs is more useful than a traditional corporate or neighborhood association perspective.”⁴⁴⁴

The general governmental powers theory provides yet another perspective on the proper place of RCAs in the constitutional scheme. This theory was developed by the Supreme Court as a test of the application of the one-person, one-vote principle to elected government bodies.⁴⁴⁵ As such, the test was not conceived as a theory of state action. However, the standard of general governmental powers, when applied to a nominally private elected body, takes on the formal characteristics of a state-action test.⁴⁴⁶ As a state-action test, it bears some resemblance to *Marsh*'s public-function test, but differs from *Marsh* in crucial respects. *Marsh* focused on the physical characteristics of a company town; the test of general governmental powers, as set forth in *Avery v. Midland County*,⁴⁴⁷ however, concentrated instead on the authority of a governing body.⁴⁴⁸ Applying the general governmental powers test to RCAs revealed that RCAs delivered a broad range of traditional municipal services to their members as well as to other residents within their jurisdiction.⁴⁴⁹ RCAs also have exercised the power to levy mandatory assessments on homeowners—which are real estate taxes in all but name⁴⁵⁰—and the power to impose rules of general applicability within their jurisdiction.⁴⁵¹ These attributes of RCAs collectively amount to the exercise of general governmental powers.

Taken together, the four theories of state action discussed in this Article establish that RCAs: (1) are, in many cases, the functional equivalent of municipalities with respect to physical features and infrastructure, and the natural inheritor of the historical legacy of an earlier form of privatized local government—company towns—implicated in *Marsh*; (2) are the primary legal vehicle used to establish a privatized and aggregated land-use regime, a privatized public function implicated in *Shelley*; (3) often develop as the direct consequence of policy choices made by local government officials; (4)

⁴⁴³ See *supra* text accompanying notes 310-13.

⁴⁴⁴ U.S. ADVISORY COMM'N, *supra* note 2, at 13 (emphasis added).

⁴⁴⁵ See *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁴⁴⁶ See *supra* text accompanying notes 361-73.

⁴⁴⁷ 390 U.S. 474 (1968).

⁴⁴⁸ See *supra* text accompanying notes 327-40.

⁴⁴⁹ See *supra* Part II.D.2.b.

⁴⁵⁰ See *supra* text accompanying notes 382-88.

⁴⁵¹ See *supra* text accompanying notes 389-98.

often are intertwined with local government policies, programs, services, and taxation in their daily operations; and (5) are, in many cases, the functional equivalent of municipalities with respect to the exercise of power and authority over members and other residents within their territorial jurisdiction. More important than the specific applicability of each theory of state action to RCAs is the fact that RCAs are situated at the nexus of four different theories. This observation leads to the generalized conclusion that, in light of the traditional treatment of RCAs as private actors subject to private law, and in light of the recent ascendancy of the RCA as a form of private-community governance that may soon encompass twenty-five percent of the U.S. population,⁴⁵² some reassessment of the RCA and its proper place in the constitutional scheme is warranted.

III. PRACTICAL PROBLEMS AND CONCEPTUAL DIFFICULTIES OF THE ESTABLISHED STATE-ACTION THEORIES AS APPLIED TO RCAS

The fact that RCAs are situated at the nexus of four different theories of state action suggests, of course, that many RCAs could be deemed state actors under one or another test. However, this same fact also suggests the practical and conceptual difficulties that may arise when a court considers the applicability to RCAs of four distinct but overlapping theories of state action. The successive application of the four theories—as well as consideration of the state-action issues implicated by each theory and by all of the theories considered as a whole—borders on the judicially unmanageable. Moreover, the successive application of the four established state-action theories to a particular RCA may well lead to determinations that the RCA is a state actor by operation of one theory but is not a state actor by operation of another theory. Although a single determination of state action is sufficient to subject a private actor to constitutional restraints,⁴⁵³ the varying thresholds of state action among the different theories would lead, as a practical matter, to a great deal of uncertainty and confusion in the litigation sphere as well as in the primary conduct of all those affected by RCA transactions and activities. Based on these practical considerations alone, it would seem that the multiple functions and complex legal relationships associated with the contemporary RCA would call for a form of state-action analysis that is less generic and more attuned to the RCA form and the legal and political environment in which RCAs operate.

The need for a new approach to determining the proper place of RCAs in the constitutional scheme is fueled by other concerns as well. As earlier noted, the ascendancy of the RCA as a form of housing and community governance and the new-found dominance of RCAs in many regional hous-

⁴⁵² See *supra* notes 10-11 and accompanying text.

⁴⁵³ See ROTUNDA & NOWAK, *supra* note 108, § 16.5, at 573.

ing markets in the United States justifies careful reassessment of state-action theory in light of these developments.⁴⁵⁴ This reassessment is warranted not only because of RCAs' growing importance in and of themselves, but also because of a number of subsidiary issues that have arisen as a consequence of RCAs' prominence in many regional housing markets. These issues include the question of the voluntariness of homebuyer consent to the RCA legal regime in an RCA-dominated local housing market and the question of whether a small territorial RCA, not otherwise the functional equivalent of a municipality, may nevertheless be deemed a state actor by virtue of RCA dominance of a particular local housing market. These considerations are of recent origin and are unique to RCAs, meaning that they are without precedent in the historical circumstances giving rise to the established state-action theories.

In sum, the established state-action theories, whether considered separately or in combination, do not provide an explicit and coherent mechanism by which to balance the conflicting constitutional values at stake. The balancing mechanism that this Article proposes for RCAs explicitly accounts for the special characteristics of the RCA form and the legal and political environment in which the RCA operates. Because the ascendancy of the RCA is an exceedingly important legal and political development that touches core constitutional issues and because RCAs are, in essence, *sui generis*, this Article concludes that a *sui generis* constitutional doctrine is necessary to properly assess the constitutional issues at stake.

IV. A UNIFIED STATE-ACTION DOCTRINE FOR RCAS

A. *The Balancing of Constitutional Values: The Expansion of Constitutional Safeguards to "Private Government" Versus the Preservation of Property Rights, Contract Rights, and Rights to Private Association*

State-action analysis implies a balancing of constitutional values. A private entity found to be a state actor is subject to one constitutional regime, a regime that normally applies to government itself. That regime carries with it affirmative obligations, such as the obligations to afford due process and equal protection. Conversely, a private entity found *not* to be a state actor is subjected to another constitutional regime, that is, the ordinary constitutional protections available to any citizen. These protections include the right to be free of government actions that excessively limit property rights or abrogate contract rights. Therein lies the paradox of state-action analysis: A finding of state action against a private entity often leads to the abrogation of constitutional values that otherwise would be guaranteed to the private entity. In a particular case, therefore, state-action analysis must ex-

⁴⁵⁴ See *supra* text accompanying notes 24-31.

plicitly or implicitly balance one set of constitutional values against the other.⁴⁵⁵

In light of the above, any formulation of a state-action test that is designed specifically for application to RCAs must begin with an assessment of the conflicting constitutional values at stake. On the private side of the constitutional ledger, we begin with the simple observation that the RCA is a form of private property ownership. Indeed, much of the authority of the RCA derives from the hallmark and legal embodiment of private ownership: the deed. The CC&Rs attached to the deed impose a set of rules on those who choose to purchase property within the RCA.⁴⁵⁶ These rules—and the promise of their enforcement—are firmly rooted in the common law of property and contract. It is true that the RCA form presents an unusually complex and sophisticated application of traditional property and contract law, in that it subjects many parcels of residential real estate to common covenants; requires all owners of the real estate to become members of an association; and provides the association with wide-ranging authority to

⁴⁵⁵ See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (holding that, in the context of a company town, the constitutional right of free expression of both nonresidents and residents of the town was superior to the constitutionally protected property interests of the owner of the company town). For a more recent and a more intricate weighing of competing constitutional values, see *PruneYard Shopping Center v. Rhins*, 447 U.S. 74 (1980). In *PruneYard*, the United States Supreme Court accepted an appeal from the California Supreme Court in which the latter court had determined that the California Constitution protected speech and petitioning in privately owned shopping centers. In effect, the California court had concluded that the shopping center was a state actor under the California Constitution even though the United States Supreme Court previously had held that privately owned shopping centers were not state actors under the Federal Constitution. See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976). The question for the United States Supreme Court was whether the California constitutional provisions, as interpreted by the California Supreme Court, amounted to a taking of property without just compensation under the Fifth Amendment of the Federal Constitution or amounted to a violation of the free speech rights of the shopping center owner under the First Amendment to the Federal Constitution. The Court decided both of these questions in the negative. See *PruneYard*, 447 U.S. at 82-89. As to the Fifth Amendment claim, the Court concluded that the shopping center owner had “failed to demonstrate that the right to exclude others is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a taking” *Id.* at 84 (internal quotations omitted). As to the First Amendment claim, the Court noted that the views expressed by members of the public in a shopping center are not likely to be identified with those of the shopping center owner, nor, for that matter, are the views in any way attributable to the government. See *id.* at 87. *PruneYard* thus vividly illustrates the clash of competing constitutional values that may arise from a state-action determination. Of course, the competing constitutional values at stake are particular to each setting, and the alignment of constitutional values in the RCA setting differ markedly from that of the shopping center setting. See *infra* text accompanying notes 471-93.

⁴⁵⁶ See *supra* text accompanying notes 14-17.

maintain property held in common, to collect assessments from its members, and to establish rules governing both commonly held and individually held property.⁴⁵⁷ However, *all* of this authority derives from private, not public, law, as those terms traditionally have been understood.⁴⁵⁸

As we have seen, much about RCAs is decidedly not private, including the policy choices made by municipal officials that induced, even compelled, real estate developers in many areas of the country to establish RCAs as a means of securing building permits;⁴⁵⁹ the types of services, including street maintenance and refuse collection, that an RCA typically provides;⁴⁶⁰ the extensive land-use planning functions assumed by many RCAs and exercised over a substantial amount of territory;⁴⁶¹ the unusually broad rule-making authority exercised by many RCAs over the home and family life of RCA residents;⁴⁶² and the in-kind government services and taxpayer funds used by some RCAs to support their own operations.⁴⁶³ Not *all* RCAs, however, manifest all of these public attributes or even some of them.⁴⁶⁴ Any RCA state-action test therefore must make careful distinctions between RCAs based on the presence or absence of these attributes.

There may be more to the "private" side of the constitutional ledger than property rights and contract rights. An RCA may be viewed as a group of like-minded homeowners that have come together to manage their jointly held property, to govern themselves through an elected board of directors and a system of rules, and generally to share their common interests and values. As such, an RCA might appear to be the type of organization that is entitled to a high degree of protection from government interference by virtue of the constitutionally guaranteed freedom of association. If an RCA were deemed a state actor and subjected to the constitutional restraints to which government is subject, then its presumed associative rights undoubtedly would be infringed.

However, a close reading of the leading Supreme Court decisions delineating the constitutionally guaranteed freedom of association discloses that RCAs simply are not the type of association to which the Court has accorded a high level of constitutional protection. For example, individuals claiming a right of association based on personal or intimate relationships, includ-

⁴⁵⁷ See *supra* text accompanying notes 14-17.

⁴⁵⁸ See BLACK'S LAW DICTIONARY 1076, 1106-07 (5th ed. 1979).

⁴⁵⁹ See *supra* text accompanying notes 276-83, 271.

⁴⁶⁰ See *supra* text accompanying note 378.

⁴⁶¹ See *supra* text accompanying notes 204-10.

⁴⁶² See *supra* text accompanying notes 389-98.

⁴⁶³ See *supra* text accompanying notes 301-10.

⁴⁶⁴ For example, nonterritorial RCAs do not typically exhibit these public attributes. For a discussion of the attributes of nonterritorial RCAs and the distinction between territorial and nonterritorial RCAs, see *supra* note 18 and accompanying text; see also *infra* text accompanying notes 482-88.

ing marriage and family relationships, are entitled to a high degree of constitutional protection.⁴⁶⁵ It is perhaps unnecessary to state that an RCA, although an association of individuals who own homes in a geographically proximate area, is not, in any accepted legal sense, an extended family.⁴⁶⁶ Also entitled to a high degree of constitutional protection are associations that are founded primarily for the purpose of engaging in expressive or religious activity.⁴⁶⁷ RCAs cannot fairly be said to come within this de-

⁴⁶⁵ See *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."); see *id.* at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").

⁴⁶⁶ Compare *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-06 (1977) (plurality opinion) (holding unconstitutional a housing ordinance that limited occupancy of a dwelling unit to members of a single family because the ordinance defined "family" to exclude some forms of traditional, but extended, families), with *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (upholding a zoning ordinance that limited the occupancy of a dwelling unit to a single family because the ordinance defined "family" in sufficiently broad terms to pass constitutional muster). The constitutional difference between *Belle Terre* and *Moore* is explained by Justice Powell in the latter case:

But one overriding factor sets this case [*Moore*] apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson . . .

431 U.S. at 498-99 (plurality opinion) (citation omitted). Thus the *Moore* ordinance was struck down because it prohibited cohabitation among certain individuals related by blood, marriage, or adoption. *Moore* made clear that individuals related by blood, marriage, or adoption are entitled to special constitutional protection. *Belle Terre* held that unrelated individuals are not entitled to special constitutional protection. RCAs, as an association of unrelated individuals owning homes in a geographically proximate area, are subject to the rule set out in *Belle Terre* rather than *Moore*.

⁴⁶⁷ See *Roberts*, 468 U.S. at 622 ("An individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort towards these ends were not also guaranteed."). The type of associations that have been accorded a high level of constitutional protection as a consequence of their close connection to expressive activity include a political party, see *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 124-26 (1981); a group organized to advance ballot measures, see *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-99 (1981); a law practice engaged in public interest litigation, see *In re Primus*, 436 U.S. 412, 432 (1978); and a group devoted to sponsoring and organizing an annual parade,

scription. Like all organizations, RCAs may incidentally engage in expressive activity. However, the primary purpose of RCAs is to manage physical assets and to establish rules governing the use and occupation of real property.⁴⁶⁸ As such, RCAs are entitled to no more constitutional protection in matters of association than business organizations or labor unions, which is to say very little.⁴⁶⁹

Strict constitutional considerations aside, what of the general public policy claim that RCAs represent the coming together of like-minded homeowners who share interests and values, that this phenomenon is all for the good, and that subjecting these associations to constitutional restraints is unfair and unwarranted?⁴⁷⁰ The difficulty with this argument is that it fundamentally mischaracterizes RCAs as nothing more than the expression of consumer choice in the housing marketplace. In fact, RCAs are "often forced upon reluctant private developers by local governments exercising regulatory powers."⁴⁷¹ Once established, RCAs often operate in a manner that is undemocratic⁴⁷² and unresponsive to resident concerns.⁴⁷³ More-

see *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338, 2348-51 (1995). Conversely, individuals who associate to engage in commercial activities or to achieve economic goals are not entitled to a high level of constitutional protection. See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945) (upholding a state law restricting the membership practices of a labor union).

⁴⁶⁸ See *supra* notes 14-17 and accompanying text.

⁴⁶⁹ See *ROTUNDA & NOWAK*, *supra* note 108, at 250 ("[T]he Court has refused to substitute its judgment for the legislature's as to the legitimate basis for restricting [economic associations]."). Professor Rotunda has characterized associational rights "as proceeding on a continuum . . . from the least protected form of association (for example, the associational rights related to commercial activities) to the most protected forms of association (for example, the associational rights related to political or religious speech . . .)". *Id.* at 254.

⁴⁷⁰ This perspective is presented, for example, in Mark Frazier, *Seeding Grass Roots Recovery: New Catalysts for Community Associations*, in U.S. ADVISORY COMM'N, *supra* note 2, at 63-68; Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in U.S. ADVISORY COMM'N, *supra* note 2, at 45-51.

⁴⁷¹ COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST, *supra* note 12, at xii.

⁴⁷² As previously noted, RCAs almost invariably employ a one-house, one-vote electoral system (as distinct from a one-person, one-vote electoral system), disenfranchise renters, and employ weighted voting in favor of the developer. See *supra* Part II.D.2.c. Moreover, the most significant RCA rules usually are incorporated in the RCA servitude regime, a regime initially established solely by the RCA developer and, once adopted, subject to amendment only by a supermajority or even unanimous vote of all RCA members. See *supra* text accompanying notes 411-12. As a practical matter, supermajority or unanimous consent is difficult, if not impossible, to achieve on most issues, meaning that the RCA rules established solely by the developer are highly resistant to change even if a majority of RCA members were dissatisfied with these rules.

⁴⁷³ In this regard, it is instructive to quote at length the observation of a social scien-

over, restrictive covenants, the primary source of RCAs' authority, can be seen as antithetical to notions of consumer choice in several respects. By their very nature, RCA restrictive covenants impose temporal and spatial restraints on each RCA homeowner's property.⁴⁷⁴ These covenants are exceedingly difficult to modify, more difficult, it has been argued, than the most rigid local zoning ordinances.⁴⁷⁵ In the context of most RCAs, the disjuncture between a covenant regime and consumer choice is magnified because a detailed and comprehensive covenant regime is put in place solely by the RCA developer at the time that the RCA is established⁴⁷⁶ and individual homebuyer "consent" to the regime is essentially limited to the decision of whether to purchase property in the RCA.⁴⁷⁷ Even this degree of

tist who has conducted extensive empirical research of RCAs:

CIC [common interest community] residents reflect great dissatisfaction with the community associations that govern their communities. Attendance at association meetings is often sparse, with perhaps a majority of members actually attending only very rarely. Conversations with member residents suggest a view of the association not as each resident's democratic workshop, but rather at arm's length from the individual residents—both a vendor of community services in return for association dues, and the strongly resented regulator of the residents' personal activities at home. This dissatisfaction has spurred a mushrooming spate of litigation. CIC boards, composed and often managed by resident amateurs, have often seemed inept in the crucial tasks of enforcing restrictions against neighbors while maintaining the community association's financial strength. As the structuring of servitude-regimes moves progressively toward vesting more discretionary power in the governing associations, an individual resident's influence over the restrictions to which he is subjected is particularly shaky where the association actively discourages member participation in association deliberations, or engages in harassment of its members. *In the face of such abuses, resident autonomy becomes illusory*

Winokur, *supra* note 271, at 115-16 (citations omitted) (emphasis added).

⁴⁷⁴ See Lewis, *supra* note 129, at 1115.

⁴⁷⁵ See COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST, *supra* note 12, at xii.

⁴⁷⁶ See MCKENZIE, *supra* note 16, at 127.

⁴⁷⁷ Empirical research belies the theory that homebuyers provide "consent" to the RCA servitude regime at the time buyers purchase their homes. For example, a study of California RCA residents found a "widespread lack of understanding" on the part of RCA homebuyers of the complex private law regime to which the homebuyers had become subject by virtue of purchasing their homes. Barton & Silverman, *supra* note 28, at 137. This lack of understanding was evident even though California law requires sellers of RCA units to provide buyers with a copy of the RCA governing documents before the sale is closed. See *id.*; see also DILGER, *supra* note 8, at 38 ("[M]any consumers are not fully aware of the RCA's powers or their own role in RCA governance when they purchase their home. As a result, the homeowners' consent to the RCAs' CC&Rs is often reduced to a purely theoretical premise and, unfortunately, often does not reflect their autonomous will."). Moreover, as discussed below, notions of consent are further vitiated by the lack of alternatives to RCAs in many regional housing mar-

“consent,” however attenuated, has become, in the past two decades, unavailable for vast numbers of homebuyers in the United States because of the dominance of the RCA form of housing in many major regional housing markets, the relative affordability of housing in RCAs in many communities, and the relative uniformity of the types of restrictions and conditions imposed by RCA covenants.⁴⁷⁸ As a practical matter, then, “consent” to the RCA form of community governance, and its customary limitation of rights that would be of a constitutional nature if such limitations were undertaken by the state,⁴⁷⁹ has become largely illusory in many regional housing markets.⁴⁸⁰ For this reason, the subjection of restrictive covenants of at least some territorial RCAs to constitutional review, far from threatening individual freedom to use and dispose of property, actually would enhance this freedom.⁴⁸¹

Although these considerations argue in favor of the application of a public regime of constitutional values to RCAs, this Article has stressed repeatedly that public constitutional values should not apply to all RCAs

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CIDs [common interest developments] are often in some difficulty at the very start, because they have owners who, if they understood the restrictions on homeowners' individual freedom that are inherent in a CID, did not really want to purchase in a CID in the first place and did so only reluctantly because *they could not afford a home in an ordinary neighborhood or because few “ordinary” neighborhoods existed in the area they wanted to buy in.* Many other owners certainly do not understand the nature of the CID in which they have bought. In a 12-county survey in California of resale buyers, we found that 84 percent of those who bought a home in a CID were not looking for a CID to buy in.

Barton & Silverman, *supra* note 28, at 137 (emphasis added). See also DILGER, *supra* note 8, at 38 (“Although RCAs do provide more consumer options in the abstract, in many areas of the country RCAs now dominate the local housing market and are increasingly offering fairly uniform levels and types of services.”); GARREAU, *supra* note 3, at 189 (“If you want a new home, it is increasingly difficult to get one that doesn’t come with a homeowners’ association.”) (quoting Douglas Kleine); McKenzie, *supra* note 11.

⁴⁷⁹ See *supra* notes 32-39 and accompanying text.

⁴⁸⁰ See *supra* note 9.

⁴⁸¹ The extent of RCA homeowner dissatisfaction with RCA rules governing the use and occupation of the home is highlighted in the results of the California Common Interest Development (CID) Study:

Whether because [RCA] members do not know the rules, or know them but reject them, associations have to deal with widespread rule violations. In the California CID Study, 41 percent of associations reported major problems with rule violations. . . . The most intractable problems, in which associations were often unable to gain compliance, involved the last category, violations of architectural controls—*reflecting the depth of feeling attached to control over the home.*

Barton & Silverman, *supra* note 28, at 137-38 (emphasis added).

under all circumstances.⁴⁸² To begin with, some RCAs never should be subject to public constitutional values. Such a per se exclusion should apply to nonterritorial RCAs, which have been described as urban condominiums and housing cooperatives that are geographically limited to a single high-rise building.⁴⁸³ The reason for this per se exclusion is rooted in *Marsh*: Nonterritorial RCAs, lacking streets and substantial tracts of land, simply cannot be analogized to an entire public municipality,⁴⁸⁴ nor do nonterritorial RCAs provide the broad array of municipal-like services that are typically provided by territorial RCAs.⁴⁸⁵ Moreover, nonterritorial RCAs are concentrated in older urban areas,⁴⁸⁶ and, though they may constitute an important segment of the housing market in those areas, they do not dominate the *entire* local housing market,⁴⁸⁷ as many territorial RCAs do in the newer suburban areas, particularly of the South and West.⁴⁸⁸

⁴⁸² The four established theories of state action apply "in many cases" to RCAs. See *supra* text accompanying note 453.

⁴⁸³ See U.S. ADVISORY COMM'N, *supra* note 2, at 11; see also *supra* note 18 and accompanying text.

⁴⁸⁴ *Marsh*'s "functional equivalent of a municipality" test was construed in *Hudgens v. NLRB*, 424 U.S. 507, 516-17 (1976), to mean that a private community could be deemed a state actor if the community were to encompass, at a minimum, residential buildings, streets, retail stores, and other municipal infrastructure. An alternate construction of *Marsh* may be found in *Flagg Bros. v. Brooks*, 436 U.S. 149, 159-60 (1978), in which the Court opined that the state-action determination in *Marsh* turned on the fact that all of the streets in the company town were owned by the company. See *supra* note 58. Either interpretation of *Marsh* obviously would preclude a finding of state action against a nonterritorial RCA. *Marsh* aside, there are common sense reasons why the interior of a building never should be deemed the functional equivalent of a municipality, even if the determination were to affect only the rights of residents of the building and not the access rights and other possible rights of nonresidents. See *infra* text accompanying note 495.

⁴⁸⁵ See U.S. ADVISORY COMM'N, *supra* note 2, at 11; see also *supra* text accompanying notes 18-20.

⁴⁸⁶ Many nonterritorial RCAs take the form of housing cooperatives. See DILGER, *supra* note 8, at 16. Housing cooperatives "are typically associated with multi-family, high-rise buildings in urban areas." *Id.* Of the estimated 824,000 housing units in the United States held in the cooperative form of ownership, see COMMUNITY ASS'NS INST., *supra* note 8, at 13, over one-half of these units are located in New York City. See N.R. Kleinfeld, *In Flat Market, Co-op Life Has Steep Ups and Downs*, N.Y. TIMES, Oct. 30, 1995, at A1. All, or virtually all, of these New York City housing cooperatives may be characterized as nonterritorial. See *id.*

⁴⁸⁷ New York City, for example, contains a substantial number of nonterritorial RCAs, most of which take the form of housing cooperatives. See *supra* note 507. Only 15% of New York City's population, however, resides in housing cooperatives. See Kleinfeld, *supra* note 486. Older urban areas in the United States generally contain a broad variety of housing types and forms of tenure. See generally 1990 CENSUS, *supra* note 70.

⁴⁸⁸ A 1990 survey by the Community Associations Institute reported that 70% of

It is instructive to consider the specific application of constitutional values to the other extreme of the RCA typology, i.e., large territorial RCAs. In this setting, the application of public constitutional values is made especially compelling by the numerous ways in which large territorial RCAs implicate established state-action doctrine⁴⁸⁹ and by the relative weakness of countervailing constitutional considerations.⁴⁹⁰ By way of example, consider this description of Sun City, an Arizona RCA of 46,000 residents:

Sun City . . . is a privately owned development that has fervently resisted incorporation into any municipality in order to avoid a new level of taxation. But, though private, it has taken on many trappings of a city. It runs everything from libraries to parks to swimming pools to an art museum to a crisis-counseling hotline to a fire department to a symphony orchestra. The squad cars of its legally franchised, armed, unpaid private posse routinely patrol the public streets. Its innocuously named Recreation Association, meanwhile, has the power to assess fees that are functionally indistinguishable from taxes. If a homeowner does not pay the fees, the association has the legal right . . . to slap a lien on that person's house and sell it at auction.⁴⁹¹

If *Marsh* were to mean anything fifty years after it was decided, it means that a resident of a large territorial RCA such as Sun City deserves no less constitutional protection than a resident of a public municipality.⁴⁹² It also means that a resident of Sun City can no more "consent" to a lesser degree of constitutional protection by the simple act of choosing to live there than can a resident of a public municipality exercise such consent.⁴⁹³

RCAs in the United States were located in the South and the West. See DILGER, *supra* note 8, at 19. RCAs govern early all new residential development in California, Florida, and Texas. See *id.* at 18.

⁴⁸⁹ For a discussion of the application of established state-action doctrine to RCAs, especially large territorial RCAs, see *supra* Parts II.A.2, II.A.3 (discussing the application of the "functional equivalent of a municipality" or public-function theory); Part II.B.4 (discussing the application of the judicial-enforcement theory); Part II.C.2 (discussing the application of the symbiotic-relationship theory); Part II.D.2 (discussing the application of the general governmental powers theory).

⁴⁹⁰ See *supra* text accompanying notes 455-81.

⁴⁹¹ GARREAU, *supra* note 3, at 184-85.

⁴⁹² See *supra* text accompanying notes 59-70.

⁴⁹³ For a discussion of the illusory nature of resident consent to the RCA legal regime, see *supra* text accompanying notes 470-81. In *Marsh*, the Court assumed without discussion that resident "consent" to company towns was irrelevant to a determination that company town residents were entitled to constitutional protections. See *Marsh*, 326

Having considered the application of constitutional values to nonterritorial RCAs on the one hand, and to large territorial RCAs on the other, what remains is the vast middle range of territorial RCAs. It is in this setting that an explicit case-by-case balancing of constitutional values becomes necessary, a balancing best achieved through the application of a comprehensive state-action test designed especially for this purpose.

B. *Proposed Principles*

A state-action test designed especially for application to RCAs should be based primarily on the factors contained within the four established theories of state action. The factors already have been discussed individually and at some length as part of this Article's earlier analysis of the application of the four established state-action theories to RCAs.⁴⁹⁴ These factors should be organized into the following multi-part test of state action designed specifically for application to RCAs:

1. The nature and extent of RCA property, including the number of housing units; housing tenure; and the ownership of streets, facilities, and real estate: Does the RCA encompass a substantial tract of land that incorporates streets and other infrastructure?⁴⁹⁵
2. The nature and extent of RCA services to RCA residents, including street cleaning, trash collection, snow removal, street repair, sewage treatment, park administration, and security.⁴⁹⁶ Are these services a supplement to municipal services or a substitution for such services?
3. The nature and extent of RCA authority over RCA residents: Does the RCA exercise comprehensive land-use powers over a substantial number of landowners such that the land-use scheme is the functional equivalent of municipal zoning?⁴⁹⁷ Does the RCA levy

U.S. at 508; *see also supra* Part II.A.3.

⁴⁹⁴ *See supra* Part II.

⁴⁹⁵ As previously noted, nonterritorial RCAs, that is, RCAs that are geographically limited to a single high-rise apartment building, would be subject to a per se exclusion from this test of state action. *See supra* text accompanying notes 482-88.

⁴⁹⁶ A nationwide survey of RCAs conducted in 1989 by the U.S. Advisory Commission on Intergovernmental Relations found that among the survey respondents 72% were responsible for trash collection, 65% were responsible for water and sewer services, 65% were responsible for street repair, 58% were responsible for street lighting, 48% were responsible for snow removal, 33% were responsible for outdoor play and recreation areas, and 31% were responsible for providing a security patrol. *See U.S. ADVISORY COMM'N, supra* note 2, at 13. RCAs that provide many or most of these municipal-like services to their residents would be more likely to be subject to constitutional restraints.

⁴⁹⁷ This prong of the multi-part test is derived from the land-use reading of *Shelley v.*

and collect mandatory assessments on real property that amount to the functional equivalent of municipal real estate taxes?⁴⁹⁸

4. The availability of comparable non-RCA housing in the local housing market: Is the choice to live in an RCA truly voluntary?⁴⁹⁹

5. The local government in-kind contributions of services to RCAs or local government contributions of taxpayer funds in connection with RCA services: Are the contacts between government and an RCA so pervasive as to warrant a finding of state action even if the RCA otherwise were deemed not to be the functional equivalent of a municipality?⁵⁰⁰

Kraemer, 334 U.S. 1 (1948), as well as the application of public-function theory to the exercise of private land-use authority, the functional equivalent of municipal zoning. See *supra* Part II.B.3.

⁴⁹⁸ For a discussion of the functional equivalence of typical territorial RCA assessments and municipal real estate taxes, see *supra* text accompanying notes 382-88.

⁴⁹⁹ This prong of the multi-part test builds on the observations of Stephen Barton and Carol Silverman, who found in their study of the California housing market that a substantial number of RCA residents had not wished to purchase a home subject to an RCA:

CIDs [common interest developments] are often in difficulty at the very start, because they have owners who, if they understood the restrictions on homeowners' individual freedoms that are inherent in a CID, did not really want to purchase in a CID in the first place and did so only reluctantly because *they could not afford a home in an ordinary neighborhood or because few "ordinary" neighborhoods existed in the area they wanted to buy in.* Many other owners certainly do not understand the nature of the CID in which they have bought. In a 12-county survey in California of resale buyers, we found that 84 percent of those who bought a home in a CID were not looking for a CID to buy in.

Barton & Silverman, *supra* note 28, at 137 (emphasis added). These astonishing conclusions are not likely to be confined to a portion of California. As previously noted, RCAs govern 50% of all housing for sale in the 50 largest metropolitan areas of the country and nearly all residential development in Florida, Texas, New York, and suburban Washington, D.C. See DILGER, *supra* note 8, at 18.

⁵⁰⁰ New Jersey, for example, requires all of its municipalities to provide certain municipal services to qualifying RCAs or, in the alternative, requires municipalities to reimburse RCAs for the value of the services the RCAs themselves furnished. See *supra* notes 301-03 and accompanying text. For other examples of symbiotic relationships that exist between some municipalities and RCAs, see *supra* text accompanying notes 298-99, 304-13.

Not included within this multi-part test is any consideration of a symbiotic relationship between a municipality and an RCA arising from the role of local government in the *establishment* of the RCA. Although in many cases the policies of local government play a significant, if not primary, role in the establishment of an RCA, see *supra* text accompanying notes 271-83, the factual and evidentiary issues that would be necessary to a proper judicial determination in this matter are excessively complex. The matter is further complicated by the fact that as an RCA ages, the role of a municipality in the original establishment of the RCA becomes more remote in time and presumably less

6. Nonresident access to RCA property: Does the RCA hold open portions of its property, such as streets, retail establishments, or common areas, to members of the public? The question of nonresident access to an RCA is complex. The fact that an RCA holds its streets open to the public would be an important factor that would favor a determination that the RCA is the functional equivalent of a municipality. However, an RCA that did not hold its streets open to the public nevertheless could be found to be the functional equivalent of a municipality *as to its own residents*.⁵⁰¹ Also, an RCA that did not open its streets to the public and was the beneficiary of local government taxpayer funds or in-kind services could be determined to be the functional equivalent of a municipality as to its residents and nonresidents.

A determination of state action under this multi-factor test would not depend upon a particular RCA satisfying all of these standards or any particular standard. As with state-action analysis generally, such a determination would rest upon the totality of facts and circumstances applicable to each case.⁵⁰² This multi-part test represents a modest attempt to consider these facts and circumstances in a systematic way.

This Article has shown that many RCAs could be deemed state actors by means of a robust application of one or more of the established state-action theories. However, these theories, whether considered separately or in combination, do not provide an explicit and coherent mechanism by which to balance the conflicting constitutional values at stake.⁵⁰³ The proposed multi-part test does provide such a mechanism by expressly taking into

relevant to a determination of state action under present conditions. For these practical reasons, consideration of this factor has been omitted from the proposed multi-part test of state action.

⁵⁰¹ In *Marsh*, the Court held that in order for a private community to be deemed the functional equivalent of a municipality, the community's streets must be held open to the public. This formulation should apply to cases such as *Marsh* when the party aggrieved by the private community is a nonresident of the community. As argued earlier in this Article, however, the public access element of *Marsh* should not be applicable when the party aggrieved by the private community is a *resident* of the community and the community otherwise satisfies a rigorous functional equivalent of a municipality standard. See *supra* Parts II.A.2.c, II.A.3.a, II.A.3.b. The proposed multi-part test essentially adheres to this view, although, under the test, the determination of what amounts to a "functional equivalent of a municipality" in a particular case is not strictly the product of the remaining elements (other than the public access element) of the *Marsh/Hudgens* standard, see *supra* text accompanying note 59, but, rather, is the product of factors one through five of the multi-part test.

⁵⁰² See *Evans v. Newton*, 382 U.S. 296, 299-300 (1966) ("Only by sifting facts and weighing circumstances' can we determine whether the reach of the Fourteenth Amendment extends to a particular case.") (citation omitted).

⁵⁰³ See *supra* text accompanying notes 453-74.

account the special characteristics of the RCA form and the legal and political environment in which RCAs operate.

At least two major objections to the proposed multi-part test are anticipated. The first objection is that the complexity of the test is not judicially manageable.⁵⁰⁴ The second objection, related to the first, is that the objective of the test is more properly and effectively accomplished through statutory means. These objections are addressed in turn.

The multi-part test is concededly complex, but so too are the tests that determine whether a government action affecting religion runs afoul of the Establishment Clause;⁵⁰⁵ whether government must pay compensation to one whose property has suffered a loss in value as a result of a land-use or environmental regulation;⁵⁰⁶ whether a warrantless search of an automobile is permissible under the Fourth Amendment;⁵⁰⁷ whether an elected gov-

⁵⁰⁴ The term "judicially manageable" is not meant to invoke the political question doctrine, which holds that the courts may not intrude on certain matters concerning the structure and organization of political institutions or matters concerning war or foreign affairs in the absence of clear constitutional standards. See *Baker v. Carr*, 369 U.S. 186, 209-37 (1962). Although the term "judicially manageable," also referred to as "judicially cognizable," has been used in connection with the political question doctrine, see *id.* at 233, the doctrine itself, as noted above, concerns subject matter wholly different from the subject matter of present concern. Moreover, the political question doctrine is premised in part on the recognition of *insufficient* judicial standards. See *id.* at 222-23. In employing the term "judicially manageable" this Article intends to underscore only the *complexity* of the judicial standards at issue, not their insufficiency. See *infra* text accompanying notes 502-12.

⁵⁰⁵ Under the three-part test propounded in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), a government action affecting religion was invalid unless it (1) had a secular purpose, (2) had the primary effect of neither advancing nor inhibiting religion, and (3) avoided causing an excessive entanglement between government and religion. *But see* *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (casting doubt on the continuing vitality of the *Lemon* test).

⁵⁰⁶ Under a two-tier analysis established by a recent line of Supreme Court cases, a government regulation affecting real property constitutes a *per se* "taking" under the Fifth Amendment if (1) the regulation authorizes the government to occupy physically the property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or (2) the "regulation denies" the owner of the land "all economically beneficial or productive uses of land," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). A government regulation that does not conform to either of these two standards nevertheless may be deemed a "taking" when considered in light of three factors: (1) the effect of the regulation on the claimant, (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁵⁰⁷ A warrantless search of an automobile being operated on a public highway is permissible upon probable cause, regardless of whether the driver is subject to lawful arrest, see *Carroll v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399

ernment body exercises general governmental powers and, if so, whether the electoral scheme evidences a significant deviation from the equality of population of voting districts so as to violate the one-person, one-vote principle;⁵⁰⁸ whether a state regulation unduly burdens the right to an abortion;⁵⁰⁹ whether a government action to enforce time, place, and manner restrictions on speech in a public forum is sustainable under the First Amendment;⁵¹⁰ whether a school district subject to a desegregation decree

U.S. 42 (1970). The rule of automobile searches, however, does not automatically extend to a search of a person occupying an automobile. *See* *United States v. Di Re*, 332 U.S. 581 (1948). The more lenient automobile search rule *does* extend to containers found in automobiles, provided there exists probable cause to search the entire car. *See* *United States v. Ross*, 456 U.S. 798 (1982). Note that the automobile container rule is an exception to the general rule governing warrantless searches of containers, which provides that such searches must satisfy a higher standard of probable cause, that is a search may not be undertaken absent a showing of exigent circumstances. *See* *United States v. Chadwick*, 433 U.S. 1 (1977). The more lenient automobile container rule extends even to circumstances in which the police previously had removed the container from the vehicle and the container remained in police custody. *See* *United States v. Johns*, 469 U.S. 478 (1985).

⁵⁰⁸ Under the one-person, one-vote principle first recognized in *Reynolds v. Sims*, 377 U.S. 533 (1964), and further delineated in decisions such as *Hadley v. Junior College District*, 397 U.S. 50 (1970), an elected governmental body is subject to the principle if the body exercises general governmental powers, which are defined as powers exercised in connection with the delivery of a traditional or vital public service, provided that the powers are "general enough and have sufficient impact." *Id.* at 54. If the elected governmental body were to exercise general governmental powers, then the constitutionality of its electoral scheme would turn on the degree to which it deviates from maintaining equal populations in its voting districts. The Court has let stand some relatively small deviations, *see* *Mahan v. Howell*, 410 U.S. 315 (1973) (discussing 16.4% deviation); *Abate v. Mundt*, 403 U.S. 182 (1971) (discussing 11.9% deviation), while generally striking down more significant deviations, *see* *Board of Estimate v. Morris* 489 U.S. 688 (1989) (discussing 78% deviation); *Connor v. Finch*, 431 U.S. 407 (1977) (discussing 19.3% deviation).

⁵⁰⁹ The finding of an undue burden on a woman's right to choose to have an abortion "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," provided however that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn [may be] permitted" and "[r]egulations designed to foster the health of a woman seeking an abortion [may be] valid." *Planned Parenthood v. Casey*, 505 U.S. 833, 877-78 (1992).

⁵¹⁰ The validity of time, place, and manner restrictions on speech in a public forum turns on the application of a four-part test. The restrictions will be upheld only if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication," *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The restrictions may absolutely prohibit "a particular type of

has made progress toward achieving unitary status,⁵¹¹ and whether race-based legislative redistricting undertaken with the intent to comply with the Voting Rights Act amounts to unconstitutional racial gerrymandering.⁵¹² In other words, if particular subject matter implicates a core constitutional concern, then the complexity of the interests and issues at stake does not preclude judicial review.⁵¹³ That the test implicates a core constitutional concern is evidenced by the fact that it draws largely on extensive constitutional doctrine established over the past fifty years.⁵¹⁴ The test focuses this doctrine on what amounts to a large-scale, but piecemeal and incremental,

expression" only if the prohibition is "narrowly drawn to accomplish a compelling governmental interest." *Id.*

⁵¹¹ In general, a district court supervising a school desegregation plan should look to six factors in determining whether a unitary school system has been achieved: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *See Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968).

⁵¹² Under section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), a plaintiff may allege a violation in the drafting of an election district "if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 116 S. Ct. 1894, 1905 (1996) (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994)). To prevail on this claim, a plaintiff must show that "the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district'; that the minority group 'is politically cohesive'; and that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Id.* (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). All of the foregoing statutory standards, however, are subordinate to the constitutional standards set out in the Court's recent decisions in *Shaw*, 116 S. Ct. 1894, *Bush v. Vera*, 116 S. Ct. 1941 (1996), and *Miller v. Johnson*, 515 U.S. 900 (1995). These decisions established that strict scrutiny applies when race is the predominant consideration in drafting district lines such that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. Under equal protection analysis, strict scrutiny generally requires that a government action employing a race-based classification must be supported by a compelling state interest and must be narrowly tailored to accomplish a purpose embodied by the compelling state interest. *See Shaw*, 116 S. Ct. at 1902. The Court in *Shaw* and *Vera* assumed that a state's claimed interest in avoiding voter dilution liability under section 2 of the Voting Rights Act could be a compelling state interest. *See Shaw*, 116 S. Ct. at 1905; *Vera*, 116 S. Ct. at 1960. In both *Shaw* and *Vera*, however, the Court held that the redistricting plans drawn in contemplation of section 2 liability did not survive strict scrutiny because the districts as drawn were not narrowly tailored to effectuate section 2 objectives. *See Shaw*, 116 S. Ct. at 1904; *Vera*, 116 S. Ct. at 1961-62. These recent decisions demonstrate that line-drawing—both cartographic and jurisprudential—can be exacting indeed.

⁵¹³ If anything (and as the above listing makes clear), most core constitutional concerns demand a complex treatment in order to fairly balance the competing interests and issues at stake.

⁵¹⁴ *See supra* Part II.

privatization of local government in the United States.⁵¹⁵ The test determines whether a considerable portion of United States citizens may be entitled to constitutional protections in the localities in which they live and in connection with services traditionally thought of as governmental.

A separate but related objection to the multi-part test is that the objective sought to be achieved by the test is more properly and effectively accomplished through statutory means. It is no doubt true that comprehensive statutory reform could be more effective in this area, at least in the short run,⁵¹⁶ but it is important to point out that this charge could be leveled in equal measure against virtually every substantive area in which the Supreme Court has enforced constitutional norms. A legislative remedy to de jure school segregation in 1954 may well have been preferable to the judicial remedy, but the legislation was not then forthcoming. In the end, the Supreme Court's decision in *Brown v. Board of Education*⁵¹⁷ became a major precipitating factor in the eventual enactment of the Civil Rights Act of 1964.⁵¹⁸

V. CONCLUSION

In 1946, the Supreme Court considered the question of whether residents of company towns were entitled to the same degree of constitutional protection as residents of public municipalities.⁵¹⁹ The Court concluded:

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country There is no

⁵¹⁵ See *supra* notes 2, 3.

⁵¹⁶ See, e.g., Federal Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602 (1995) (generally prohibiting discrimination in the sale or rental of housing to households with children, and making such prohibition applicable to RCA restrictive covenants); § 3604 (prohibiting discrimination in the sale or rental of housing on the basis of handicap, and making such prohibition applicable to RCA restrictive covenants). At the state level, a noteworthy enactment is Florida's 1992 statute expressly overriding any RCA restrictive covenant that "unreasonably restrict[s] any parcel owner's right to peaceably assemble . . . in [RCA] common areas" FLA. STAT. ch. 617.304 (1993).

More recently, Congress provided the Federal Communications Commission with express authority to pre-empt RCA restrictive covenants that ban or restrict the use of satellite dishes by RCA homeowners. See Telecommunications Act of 1996, 47 U.S.C. § 151 (1996).

⁵¹⁷ 347 U.S. 583 (1954).

⁵¹⁸ See 42 U.S.C. §§ 2000a to h-6 (1995) (prohibiting racial discrimination in employment, public education, and public accommodations). For the influence of *Brown* on subsequent social and political events, including the enactment of the Civil Rights Act of 1964, see RICHARD KLUGER, *SIMPLE JUSTICE* 748-78 (1975).

⁵¹⁹ See *Marsh v. Alabama*, 326 U.S. 501 (1946).

more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.⁵²⁰

Today, many people in the United States live in RCAs, probably a far greater percentage of the current United States population than the percentage of the United States population in 1946 that lived in company towns.⁵²¹ The number of Americans living in RCAs is expected to double in the next decade, leading to predictions that twenty-five to thirty percent of Americans will be living in RCAs by early in the next century.⁵²² If this were solely the product of consumer choice in the housing marketplace, then the constitutional currents implicated by the trend would be less compelling. The RCA phenomenon, however, is not solely or even primarily the product of consumer choice,⁵²³ perhaps no more than the company towns of an earlier era were the product of consumer choice. In fact, RCAs are the product of many larger forces, including local government land-use policies⁵²⁴ and what the U.S. Advisory Commission on Intergovernmental Relations has termed "the most significant privatization of local government responsibility in recent times."⁵²⁵

Against this background, RCAs have established a complex system of rules governing their residents, which, among other things, may restrict the age of those who own homes in the RCA community,⁵²⁶ the number and ages of overnight visitors,⁵²⁷ whether a homeowner may build an addition to her house,⁵²⁸ whether a homeowner may post signs inside or outside her home,⁵²⁹ and whether publications may be sold or distributed on RCA streets.⁵³⁰ In many cases, an infraction of these rules may lead to the imposition of a penalty against a homeowner, the assessment of a lien against a homeowner's residence, or the denial of the use of RCA common facilities backed by judicial injunction.⁵³¹ Moreover, the RCA governing board, while elected by RCA homeowners, is the product of an electoral system

⁵²⁰ *Id.* at 508.

⁵²¹ See *supra* note 70.

⁵²² See McKenzie, *supra* note 11.

⁵²³ See *supra* text accompanying notes 470-81.

⁵²⁴ See *supra* text accompanying notes 271-83.

⁵²⁵ See U.S. ADVISORY COMM'N, *supra* note 2, at 18.

⁵²⁶ See GARREAU, *supra* note 3, at 190; MCKENZIE, *supra* note 16, at 15.

⁵²⁷ See U.S. ADVISORY COMM'N, *supra*, note 2, at 16.

⁵²⁸ See DILGER, *supra* note 16, at 23-24.

⁵²⁹ See Schemo, *supra* note 414; see also *supra* note 32.

⁵³⁰ See GARREAU, *supra* note 3, at 190-91; MCKENZIE, *supra* note 16, at 15; see also *supra* note 34.

⁵³¹ See GARREAU, *supra* note 3, at 184-85.

that deviates substantially from the one-person, one-vote principle, employing instead a one-house, one-vote system, disenfranchising all renters and frequently employing weighted voting in favor of the RCA developer.⁵³²

These circumstances call for a principled judicial response through a reassessment and reformulation of state-action doctrine. Toward this end, this Article has carefully assessed the four established theories of state action, each of which offers a perspective that is directly applicable to the present task.⁵³³ Although many RCAs could well be deemed state actors by operation of one or more of the established theories of state action, this Article has argued instead for a more comprehensive and systematic approach to state action as applied to RCAs, an approach that takes account of the special characteristics of the RCA form and the legal and political environment in which the RCA operates. Because the ascendancy of the RCA is an exceedingly important legal and political development that touches core constitutional values and because RCAs are, in essence, *sui generis*, this Article concludes that a *sui generis* constitutional doctrine is necessary to properly assess the constitutional issues at stake.⁵³⁴

⁵³² See *supra* Part II.D.2.c.

⁵³³ See *supra* Part II.

⁵³⁴ See *supra* text accompanying notes 494-501.