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Legal Memorandum Quotes
HOAs & Constitutional Law

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A. State Actions

1. 14th Amendment violations

a) Federal cases

(1) Brentwood v. Tennessee Athletic 531 US 288 (2001)

(a) State action may be found only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,* 419 U. S. 345, 351 . No one fact is a necessary condition for finding state action, nor is any set of circumstances sufficient, for there may be some countervailing reason against attributing activity to the government. The facts that can bear on an attribution's fairness--*e.g.,* a nominally private entity may be a state actor when it is entwined with governmental policies or when government is entwined in its management or control,

We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum*, 457 U. S., at 1004, when the State provides "significant encouragement, either overt or covert," *ibid*., or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar, supra* , at 941 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia,* 353 U. S. 230, 231(1957) *(per curiam)*, when it has been delegated a public function by the State, cf., *e.g.*, *West* v. *Atkins*, *supra*, at 56; *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 627-628 (1991), when it is "entwined with governmental policies" or when government is "entwined in [its] management or control," *Evans* v. *Newton,* 382 U. S. 296, 299, 301 (1966).

Clark v. *Arizona Interscholastic Assn.*, 695 F. 2d 1126 (CA9 1982), cert. denied, 464 U. S. 818 (1983), a challenge to a state high school athletic association that kept boys from playing on girls' interscholastic volleyball teams in Arizona. In each instance, the Court of Appeals treated the athletic association as a state actor.

[dissenting]. We have never found state action based upon mere "entwinement." Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. Like the state-action requirement of the Fourteenth Amendment, the state-action element of 42 U. S. C. §1983 excludes from its coverage "merely private conduct, however discriminatory or wrongful.

Under this theory, the majority holds that the combination of factors it identifies evidences "entwinement" of the State with the TSSAA, and that such entwinement converts private action into state action. *Ante* , at 7-8. The majority does not define "entwinement," and the meaning of the term is not altogether clear. But whatever this new "entwinement" theory may entail, it lacks any support in our state-action jurisprudence.

(2) Marsh v. Alabama 326 US 501 (1946)

Many people in the United States live in company-owned towns. 5 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 Four- [326 U.S. 501, 509] tenth Amendments than there is for curtailing these freedoms with respect to any other citizen. (Marsh v. Alabama).

Except for that it [company town] has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and [326 U.S. 501, 503] the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area.

Under this strict standard, the vast majority of territorial RCAs would not be deemed state actors, either because they do not contain a business district or because their streets are not held open to the public. (Marsh v. Alabama)

(3) Shelly v. Kraemer 334 US 1

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment (specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States). (Shelly v. Kramer).

Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in tne first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment. (Shelly v. Kramer).

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. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. (Shelly v. Kramer).

State action, as that phrase is understood for the 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. (Shelly v. Kramer).

The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue [334 U.S. 1 , 9] before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked, apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. (Shelly v. Kraemer, citing Corrigan v. Buckley).

This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process f law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. (Shelly v. Kramer, citing Hansberry v. Lee).

The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. (Shelly v. Kraemer, citing Corrigan v. Buckley).

Protecting your constitutional rights: State action, as that phrase is understood for the 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.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. (Shelly v. Kraemer).

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment**.** . (Shelly v. Kraemer).

(4) Lugar v. Edmondson457 US 922 (1982)

In making this determination [state action], the Supreme Court said that a court should examine three factors: '[1] the extent to which the actor relies on governmental assistance … [2] whether the actor l performing a traditional governmental function …. [3] and whether the injury caused is aggravated in an unique way by the incidence of government authority. The Court said THAT IT WOULD DETERMINE FIRST 'WHETHER CLAIMED CONSTItUTIONAL DEPRIVATION … resulted from the exercise of a right or privilege having its source in state authority … and second, whether the private party charged with the deprivation could be described in all fairness as a state actor' [Edmonson].

{This case concerns the relationship between the requirement of "state action" to establish a violation of the Fourteenth Amendment, and the requirement of action "under color of state law" to establish a right to recover under **42 U.S.C. 1983**, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State.

As this Court recognized in Monroe v. Pape, 365 U.S. 167, 172 (1961), the historic purpose of 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the Fourteenth Amendment.

Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. Sniadach v. Family Finance Corp., 395 U.S. 337 . And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that conduct is also action under color of state law and will support a suit under 1983. Pp. 926-935. [457 U.S. 922, 923]

Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Similarly, it is clear that in a 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in Adickes v. S. H. Kress & Co., supra, at 152, in the context of an equal protection deprivation: "`Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" quoting United States v. Price, 383 U.S., at 794 .

[Opposing: This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State.

The plain language of 42 U.S.C. 1983 establishes that a plaintiff must satisfy two jurisdictional requisites to state an actionable claim. First, he must allege the violation of a right "secured by the Constitution and laws" of the United States. Because "most rights secured by the Constitution are protected only against infringement by governments," Flagg Bros., Inc. v. Brooks, 436 U.S., at 156 , this requirement compels an inquiry into the presence of state action. Second, a 1983 plaintiff must show that the alleged deprivation was caused by a person acting "under color" of law. In Flagg Bros., this Court affirmed that "these two elements denote two separate areas of inquiry."
} (Lugar v. Edmondson)

Contrary to the position of the Court, our cases do not establish that a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the 1983 requirement of action under color of law. In Dennis v. Sparks, 449 U.S. 24 (1980), we held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In so holding, however, we explicitly stated that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." Id., at 28. This conclusion is reinforced by our more recent decision in Polk County v. Dodson, 454 U.S. 312 (1981). As we held to be true with respect to the defense of a criminal defendant, invocation of state legal process is "essentially a private function . . . for which state office and authority are not needed." Id., at 319. These recent decisions make clear that independent, private decisions made in the context of litigation cannot be said to occur under color of law. 8 The Court nevertheless advances two principal grounds for its holding to the contrary. [457 U.S. 922, 952] (Lugar v. Edmondson)

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of [457 U.S. 922, 937] their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.(Lugar v. Edmondson)

(5) Goldberg v. 400 E. Ohio 12 F Supp 2d 820

{We think the better view is that HN1 there is no state action inherent in the possible future state court enforcement of a private property agreement. See Quail Creek Property Owners Ass'n, Inc. v. Hunter, 538 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 1989) (per curiam). Put another way, Gerber is not good law. Since we know from Goldberg's complaint that her condominium association has not secured a state judgment against her, Compl. P 21, we hold that she cannot establish state action under Shelley.

Goldberg's second argument that the condominium association acted "under color of" law relies on the idea that condominium associations have powers "traditionally associated with the state. She points to the association's power to make rules, conduct hearings, issue decisions, and impose fines and liens. There are two problems with this line of reasoning. First, it "confuse[s] an entity and its attributes." RICHARD A. POSNER, OVERCOMING LAW 211 (1995). Dogs breathe, eat, sleep, run, and play, but they are not humans, who also do all of those things. And it is not as though the attributes that Goldberg cites are those which have been described by the Supreme Court as possibly exclusive state functions. See Flagg Brothers, Inc. v. Brooks. Second, it proves too much. The National Basketball Association makes rules, conducts hearings, issues decisions, and imposes fines, but it seems unlikely that the privately run sports league is a government actor. (This example misses the lien power of condominiums, but the private actor in Flagg Brothers had the power to impose and enforce its own lien, 436 U.S. at 151 n.1, 155.)**}** (Goldberg v. 400 East Ohio).

(6) Loren v. Sasser 309 F 3d 1296

Although the Supreme Court has held that the enforcement of a racially restrictive covenant constitutes state action, Shelley v. Kraemer, 334 U.S. 1, 19-20, 68 S.Ct. 836, 845 (1948), Shelley has not been extended beyond race discrimination, Davis v. Prudential Secs., Inc. , 59 F.3d 1186, 1191(11th Cir. 1995). The record in this case clarifies that Sasser, Hernando Beach Inc., and HBSPOA were not acting under state law. To succeed on a 42 U.S.C. § 1983 claim, a plaintiff must show that the violative conduct "was committed by a person acting under the color of state law" and that the "conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." (Loren v. Sasser)

(7) Virginia v. Rives 100 U.S. 313 (1879)

As the State, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the State; the inhibition, therefore, is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court: it cannot be imputed to the State, so as to make it evidence that she in her sovereign or legislative capacity denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. (Virginia v. Rives)

When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the

judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed [100 U.S. 313, 322] the court will redress the wrong. (Virginia v. Rives)

It is doubtless true that a State may act through different agencies,- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. (Virginia v. Rives)

(8) Flagg Bros. V. Brooks436 US 149 (1978)

{Though respondents contend that the State authorized and encouraged the storage company's action by enacting 7-210, a State's mere acquiescence in a private action does not convert such action into that of the State. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 . Pp. 164-166.

Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting 7-210. Our cases state "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." Adickes, 398 U.S., at 170 . This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State. The Court rejected a similar argument in Jackson, 419 U.S., at 357 **:**

"Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into `state action.'**}** (Flagg v. Brooks)

(9) Jackson v. Metropolitan 419 US 345 (1974)

We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, e. g., Nixon v. Condon, 286 U.S. 73 (1932) (election); Terry v. Adams, 345 U.S. 461 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Evans v. Newton, 382 U.S. 296 (1966) (municipal park). If [419 U.S. 345, 353] we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. (Jackson v. Metropolitan)

(10) Carey v. Brown 447 US 455 (1980)

{The Illinois statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Police Department of Chicago v. Mosley, 408 U.S. 92 . Pp. 459-471.

In prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the statute regulates expressive conduct that falls within the First Amendment's preserve, and, in exempting peaceful labor picketing from its general prohibition, the statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's

communication. On its face, the statute accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated but discussion of all other issues is restricted. The permissibility of residential picketing is thus dependent solely on the nature of the message being conveyed. Pp. 459-463.

(b) Standing alone, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute. The statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. More fundamentally, the exclusion of labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that [447 U.S. 455, 456] nothing in the content-based labor-nonlabor distinction has any bearing on privacy. Pp. 464-465.

(c) Similarly, the State's interest in providing special protection for labor protests cannot, without more, justify the labor picketing exemption. Labor picketing is no more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which appellees wished to demonstrate. Pp. 466-467.

(d) Nor can the statute be justified as an attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes, since such an attempt hinges on the validity of both of these goals, the latter of which - the desire to favor one form of speech over all others - is illegitimate. Likewise, the statute cannot be justified as an attempt to prohibit picketing that would impinge on residential privacy while permitting picketing that would not. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy. Pp. 467-469.

(e) While the State's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order, the crucial question is whether the statute advances that objective in a manner consistent with the Equal Protection Clause. Because the statute discriminates among pickets based on the subject matter of their expression, the answer to that question must be "No." Pp. 470-471.**}** (Carey v. Brown,447 US 455)

(11) Holden v. Hardy 169 US 392 (1898)

{In a case relating to work hour restrictions for miner, the court said: The validity of the statute in question is, however, challenged upon the ground of an alleged violation of the fourteenth amendment to the constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States, deprives both the employer and the laborer of his property without due process of law, and denies to them the equal protection of the laws. As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, perinent to the others, they may properly be considered together.

Rights of property, like all other social and conventional rights, are subject to such reasonable limitation in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations by law as the legislature, under the government and controlling power vested in them by the constitution, may think necessary and expedient.'

This power [police powers], legitimately exercised, can neither be limited by contract nor bartered away by legislation.**}** (Holden v. Hardy, 169 U.S. 366, 382)

b) State cases

(1) Brock v. Watergate 502 S 2d 1380

A homeowner's association lacks the municipal character of a company town. In the case of an association, the homeowners own their property and hold title to the common areas pro rata. Moreover, the services provided by a homeowners association, unlike those provided in a company town, are merely a supplement to, rather than a replacement for, those provided by local government. As such, it cannot be said that the homeowners' association in this case acts in a sufficiently public manner so as to subject its activities to a state action analysis. Moreover, the association's maintenance, assessment, and collection activities are not sufficiently connected to the State to warrant a finding of state action. The state cannot be implicated in the association's activities solely because the association is subject to State law. (Brock v. Watergate)

Under the public function test, state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature. Where the requirements of this test are met, the private activity under question will be subject to constitutional limitations. (Brock v. Watergate).

Two primary tests are applied in determining whether conduct performed by private persons or groups constitutes "State action"; the public function test and the state involvement test. Under the public function test, state action will be found where the functions of a private individual or group are so impregnated with a governmental character as to appear municipal in nature. Where the requirements of this test are met, the private activity under question will be subject to constitutional limitations. Under the state involvement test, there must be a sufficiently close nexus between the State and the challenged activity such that the activity may be fairly treated as that of the State itself. (Brock v. Watergate)

(2) Lee v. Katz 00-35755 (2002) (Cal App)

We conclude that, in regulating speech within the Commons, the OAC performs an exclusively and traditionally public function within a public forum. "[T]here being no offsetting reason to see the [OAC's] acts in any other way," Brentwood, 531 U.S. at 291, we need not consider whether
the implication of State action would be affected by other facts that "might not loom large under a different test." Id. At 303. In regulating free speech within the Commons, the OAC is a State actor.

The OAC's status as a State actor does not end this case, but it does, for the moment, end this court's inquiry. The OAC may still "impose reasonable restrictions on the time, place, or manner of protected speech [within the Commons], provided the restrictions `are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the
information.' "

(3) Westphal v. Lake Lotawana 95 SW 3d 144

{In contrast to Mr. Westphal's claim, the Supreme Court in Shelley did not hold that the ability of a private entity to avail itself of the court system to enforce any private restriction is state action. Rather, the Court held that the enforcement of racially restrictive covenants by state courts was a state action and, by granting judicial enforcement of the racially restrictive covenants, the state violated the

Fourteenth Amendment. Shelley, 334 U.S. at 18-20, 68 S. Ct. at 844-45. See Fed. Nat'l Mortgage Ass'n v. Howlett, 521 S.W.2d 428, 437 [**18] (Mo. banc 1975) (holding that Shelley does not "support the conclusion that mere availability of the courts means that the actions of the individuals with respect to the contract in question involve state action.") Here, there was no judicial enforcement of a racially restrictive covenant or of any covenant enacted by the Association.
While both cases discuss how a homeowner's association operates as a "quasi-governmental entity," neither is authority for the concept that an association's "quasi-governmental" actions are state actions. See Chesus, 967 S.W.2d at 108; Terre Du Lac, 737 S.W.2d at 215. Mr. Westphal fails to cite any authority to support his argument that the action of a quasi-governmental entity is state action.

Mr. Westphal did not include any of these facts in his petition. Moreover, he does not cite any authority for his argument that these actions create a sufficiently close nexus to treat the Association's action as state action. The test is "'whether there is a sufficiently close nexus between the state and the challenged action.'" Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310, 318 (Mo. banc 1978) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L. Ed. 2d 477 (1974))**}** (Westphal v. Lake Lotawana)

2. Due Process & Equal Protection

a) Federal

(1) Griswold v. Connecticut 381 US 479 (1965)

The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach -- indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.

The First Amendment has a penumbra where privacy is protected from governmental intrusion.

The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. The Third Amendment in its prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourth and Fifth Amendments have been described as protection against all governmental invasions of the sanctity of a man's home and the privacies of life. The Fourth Amendment creates a right to privacy, no less important than any other right carefully and particularly reserved to the people.

The marriage relationship lies within the zone of privacy created by several fundamental constitutional guarantees. Conn. Gen. Stat. § 53-32 (rev. 1958), which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. The very idea of allowing the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the notions of privacy surrounding the marriage relationship.

A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

b) State

(1) Golden Sands v. Waller 545 A 2d 1332 (1988)

{At the core of the procedural due process right is the guarantee of an opportunity to be heard and its instrumental corollary, a promise of prior notice.

Of course, to invoke the protections of procedural due process in a property context, the party asserting unconstitutionality must show that (1) state action has been employed (2) to deprive that party of a substantial interest in property.

The Maryland Contract Lien Act requires certain notice to be given to a party against whom (or against whose property) a lien is claimed. If there is a fair opportunity for judicial scrutiny before the lien attaches, the hearing requirement is satisfied.**} (**Golden Sands v. Waller).

(2) Foley v. Osborne 724 A 2d 436

The plaintiff stated: "Specifically, the additions in the 1982 Condominium Act that authorize Condominium Associations to impose fines and enforce fines without any preceding judicial action, violate substantive rights of the Appellant, obtained under the Condominium Ownership Act, Title 34 Chapter 36 of the Rhode Island General Laws, the Condominium Declaration and the By-Laws of the Osborne Court Condominium."(Foley v. Osborne)

(3) Wise v. Harrington Grove NC SC 428A02 (2003)

{The question presented to this Court is whether the North Carolina Planned Community Act (the PCA or the Act) retroactively authorizes defendant to fine plaintiffs for violations of restrictive covenants in the declaration despite the lack of express authorization in the declaration itself, in defendant's articles of incorporation, or in the corresponding bylaws (collectively referred to as "organizational documents"). We hold that the PCA does not automatically grant defendant such a power, and we therefore reverse.

These charges clearly constitute an annual contractual obligation of all association members, however, and are not punitive in nature. This interpretation is consistent with the common legal definition of an assessment: "the process of ascertaining and adjusting the shares respectively to be contributed by several persons towards a common beneficial object according to

the benefit received." Black's Law Dictionary 149-50. On the other hand, a "fine," as discussed above, is penal in nature. Neither party contends that article V is controlling, as this case clearly involves a fine rather than an assessment.

It is with these considerations in mind that we turn to the text of the relevant statute. Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein, the association may:

(12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association.

The language of N.C.G.S. § 47F-3-102 does not, in and of itself, authorize defendant to exercise the powers listed therein. First, the statute uses the word "may" when listing association powers. N.C.G.S. § 47F-3-102. The word "may," when used in a statute, is generally construed as permissive rather than mandatory. In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978); Felton v. Felton, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938). Therefore, the statute does not require homeowners associations to wield the enumerated powers, but merely provides them an option to do so.

In short, the organizational documents for Harrington Grove do not expressly empower defendant to fine plaintiffs for violations of the architectural standards. In light of the legal rule that restrictive covenants must be strictly construed, Rosi, 319 N.C. at 592, 356 S.E.2d at 570, we decline to create such a power by implication. "The courts are not inclined to put restrictions in deeds where the parties left them out." Hege, 241 N.C. at 249, 84 S.E.2d at 899.**}** (Wise v. Harrington Grove)

3. Secondary Sources

a) Constitutional Law

If the government delegates the operation of a traditional public function to a private person or private organization that person or organization will be subject to constitutional limitation. When a case does not involve a traditional government function, a court must simply look at the totality of facts and circumstances in determining whether: (1) the harm caused to the victim was somehow traceable to the private actor using a right granted to him by state law; and (2) whether the connection of the government to the state actor, and harm caused by the private actor, is such that it is fair to subject the private actor's actions to constitutional restrictions.

{The Court determines whether there is sufficient nexus between the wrongdoer and the government by assessing the degree to which the government has commanded, encouraged or otherwise directed the complained of activity. It would appear that any significant encouragement of alleged wrongdoers to impair important rights of the aggrieved parties will be sufficient.

The existence of a state law which recognizes the legitimacy of an action taken by an otherwise private person will not give rise to 'state action' being present in the activity. To imbue an activity with state action there must be some non-neutral involvement of the state with the activity.

The Supreme Court ruled that the decision of a private insurance company to withhold payments for a worker's compensation claimant's medical bills di not constitute state action, even though the insurance company was acting in

accordance with state statutes that gave it the right to withhold such payments. [American Manufacturers]

When a private business hires an off duty police officer to act as a security guard, there is state action connected to his actions taken on behalf of the private business to the extent that he appears to be exercising the authority of a police officer. [Griffin]

The fact that an otherwise private actor is regulated or licensed by a government agency will not make all the actions of that person or business equivalent to actions of the government itself. Where the government has not specifically approved the alleged wrongful activity the degree of regulation of the actor is only one factor to consider when assessing the presence of state action in the challenged activity.

While there was no command or encouragement of its racially restrictive practices by the government, its location and status as a lessee of the government gave the appearance of government authorization of the practice [re Burton]. When the activities of the government and the private actor become so entwined for their mutual benefit, the private party has no basis for complaint when his decisions are subjected to constitutional limitations in the same manner as those of the government.
}(Constitutional Law)

When 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. (Constitutional Law)

When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees. The essential guarantee of the due process clause is that of fairness … there must be some type of neutral and detached decision-maker, be it a judge, hearing officer or agency. In addition … due process requires the government to give notice to individuals of government action which would deprive those individuals of a constitutionally protected life, liberty or property interest. (Constitutional Law)

{Equal protection is the guarantee that similar people will be dealt with in a similar manner. The equal protections clause … does no reject the governments' ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals. If the classification relates to a proper governmental purpose, then the classification will be upheld**.**

Those who are treated less favorably by the legislation are not denied equal protection of the law because they are not similarly situated to those who receive benefits of the legislation. Usually one must look to the end or purpose of the legislation in order to determine whether persons are similarly situated in terms of that governmental system. Once a court has found an end of government which does not in itself violate the Constitution, it can analyze the way in which the government has classified persons in terms of that end.

Classifications can relate to government 'ends' in one of five ways [see Tussman], any one of which may be determined to be constitutional or unconstitutional depending on the nature of the legislation in the specific case…. Third, the classification can be under-inclusive in that it includes a smaller number of persons who fit the purpose of the statute but excludes some who are

similarly situated [re homestead exemption, sub-class of homeowners was created by statute].

The Court will also used this standard of review [strict scrutiny] … when the governmental act classifies people in terms of their ability to exercise a fundamental right … Even if the government can demonstrate such an end, the Court will not uphold the classification unless the Justices have independently reached the conclusion that the classification is necessary, or narrowly tailored, to promote that compelling interest.

Under the intermediate standard of review, the Justices will not uphold a classification unless they find that the classification has a 'substantial relationship' to an 'important' government interest.

A classification within the law can be established in one of three ways … The law by its own terms [on its face] classifies persons for different treatment ... Finally, the law may contain no classification, or neutral classification, and be applied evenhandedly. Nevertheless the law may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons.
}(Constitutional Law)

b) J Land Use & Envir Law

The ability to structure one's private environment and to create a shelter from a society from which one cannot control becomes particularly valuable, especially around the home… Consequently, an apparent a paradox remains: the personal autonomy of some individuals entails joining other like-minded members to preserve the counter-culture nature of the associations. (7 jluel 203).

The contrasting jurisprudential policy implicated by common interest developments is the state's interest I reviewing substantive terms of a private bargain to ensure that parties preserve public values. First, residential associations may enact rules which society believes are completely inappropriate. Second, common interest development regulation may suppress the personal liberties of dissenting residents; thus state intervention may be necessary to protect individual freedoms… State statutes place few, if any, substantive limitations on the authority of common interest development boards. (7 jluel 203).

Legislatures, as institutions, represent the public interest. Private residential governments are essentially counter-culture; that is, they are explicitly created to provide a different combination of goods and services from the community at large. The US SC specifically has disallowed a property-based franchise as inconsistent with federal constitutional requirements for representative democracy. (7 jluel 203).

Too little state supervision of these documents also may undermine residential associations in certain circumstances … Without some guidelines for a residential association's exercise of its authority, an owner may be subject to unanticipated or gratuitous rulemaking, unrelated to the common needs and desires of the development residents… Imposing substantive limits on residential association powers is the only way that the common regulatory system gains internal consistency and legitimacy. To the extent that the legislature has codified societal values relating to common interest developments, those laws may be repealed, or amended, or new legislation passed. Judicial supervision of common interest development regulation is consistent with the current division of authority between legislators and judges. (7 jluel 203).

The court [in Marsh] refused to uphold the private covenant because such action by the judiciary 'bears the close and unmistakable imprimatur of the state'. The state's involvement in enforcing these covenants transformed private conduct into governmental action, thus triggering constitutional protection against racial discrimination. Thus, because the courts are available to enforce common interest development rules, those private communities are obligated to turn to Constitutional structures. (7 jluel 203).

The Supreme Court's recent erosion of the doctrines in Marsh and Shelly has severely undermined the precedential value of these opinions. In Flagg Bros v. Brooks, for example, the Court held that the existence of a state law permitting private property to be taken without due process was not state action. Employing Marsh and Shelly to impose constitutional restraints on common interest developments runs contrary to the Court's current state action jurisprudence, and does violence to the boundary between private autonomy and public principles. (7 jluel 203).

c) Steven Siegel

{The Shelly 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. Other courts interpret Shelly 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.
} (Siegel)

B. Federal

1. Constitutional

a) Barnett – presumption of constitutionality

The statute here questioned deals with a subject within the scope of the police powers. An underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. (Barnett)

The existence of facts supporting the legislative judgment is to be presumed … for regulatory legislation … is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Why is it that only the specific prohibitions of the Constitution may shift the presumption of constitutionality, when the Ninth amendment declares: 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people'? Footnote four runs afoul of the text of the Constitution, as does the modern Footnote Four Plus variation that lets judges pick those enumerated liberties they deem fundamental from those they dismiss as mere liberty interests.

"We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."(Griswold v. Connecticut). The Court … found that the statute in

question violated rights of privacy, a right not explicitly enumerated in the Constitution.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere which the Fourteenth Amendment protects" (Planned Parenthood v. Casey)

Footnote Four Plus approach that elevates some unenumerated rights to the exalted status of 'fundamental' while disparaging the other liberties of the people as mere 'liberty interests'. Because ignoring all the unenumnerated rights violates the mandate of the Ninth Amendment. The Ninth Amendment was added to the Constitution precisely because it was impossible to enumerate all the liberties we have and even undesirable to even try.

The Ninth Amendment and the Privileges and Immunities Clause can be viewed as establishing a general Presumption of Liberty, which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom. The Constitution makes no distinction between fundamental rights and mere liberty interests. This is pure construction that conflicts with the mandate of the Ninth Amendment that no right can be denied or disparaged just because it was not enumerated. But the Constitution does say that all laws shall be necessary and proper. (Barnett).

Courts are placed in the uneasy position of making moral assessments of different exercises of liberty. A liberty to use birth control pills is protected, but a liberty to use marijuana is not"

"It follows, as a regular consequence, that every power which concerns the right of a citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution" (Tucker)

First, if a particular action violates the rights of others, then it is not a rightful exercise of freedom. It is not liberty but license. Prohibiting such actions, though it restricts a person's freedom to do as he wills, does not violate the rights retained by the people. To the contrary, such prohibitions protect the liberty rights of others. Second, when the rightful exercise of freedom involves more than one person, it can be 'regulated' or made regular to facilitate its exercise and, if necessary, to protect the rights of others. A regulation of liberty is not an improper infringement of liberty if a legal system merely says that, to obtain its protection, contracts or other transactions must take a certain form. (Barnett)

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right to regulation cannot infringe. It may prescribe the manner of their exercise, but cannot subvert the rights themselves. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. (Barnett).

Allowing legislatures to deprive any person of life, liberty or property without providing a judicial forum in which the limits of legislative power can be contested and adjudicated is a denial of this due process. The established doctrine is that liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. (Barnett)

Nevertheless, the police power was not unlimited. 'Otherwise the Fourteenth AMENDMENT WOULD HAVE NO EFFACACY and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people. The court found in this scheme a surreptitious effort to revive peonage and involuntary servitude in violation of the Thirteenth Amendment. (Barnett)

This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation. An act must be within the police powers of a state, while on the national level it must be one of the enumerated powers. (Barnett)

Giving Congress the power to choose any means it deems to be necessary would be to expand improperly its power to invade the rights retained by the people. If 'necessary' is taken to mean 'convenient', it is easy to see how an exercise in discretionary a power could violate the background rights retained by the people. The era in which the Court attempted to scrutinize the necessary and propriety of state and federal legislation on liberty came to a close as the perceived legitimacy of legislative activism continued to grow. clause (Barnett).

b) Constitutional Law

These rights are those with textual recognition in the Constitution, or it Amendments, or values found to be implied because they are 'fundamental' to freedom in American society, as reflected by history and the interpretations of the Supreme Court. The most significant implied 'fundamental' rights are the right to freedom of association; the right to interstate travel; the right to privacy (including some freedom of choice in marital, family and sexual matters; and the right to vote.
In their procedural aspects the due process clauses require that the government not restrict a specific individual's freedom to exercise a fundamental right without a process to determine the basis for the restrictions.

The clauses [due process clauses] also guarantee that each individual will have some degree of choice and action in all important personal matters. The Court has stated that the term 'denotes not merely freedom from bodily restraint but also the right … to establish a home … and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men [Board of Regents v. Roth].
So long as the government does not classify persons in such a way as to violate the equal protection clause, it may also regulate certain classifications of persons.

There has been a division among scholars concerning the legitimacy of the Court's interpretation of fundamental rights that mirrors the division of the Justices themselves. (Constitutional Law)

In each case [Meyer v. Nebraska, 262 US 390 (1923); Pierce v. Society of Sisters, 268 US 510 (1925)] the majority found that the law restricted individual freedom without any relation to a valid public interest. Freedom of choice regarding an individual's personal life was recognized as constitutionally protected. (Constitutional Law)

c) Steven Siegel

The analogy resulted un 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 generally not found in company towns …

A territorial RCA often may have more in common with a municipality that 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.(Siegel)

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. [Reynolds v. Sims 377 US 533 (1964); Avery v. Midland County 390 US 474 (1968); Hadley v. Junior College Dist. 397 US 50 (1970) relating to special purpose governmental organizations] (Siegel).

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 products of forces other than consumer choice, including local government land-use policies and fiscal pressures on local governments leading to privatization of local government services. Because of the traditional view, RCAs have rarely 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. (Siegel)

Moreover, from the perspective of the individual homebuyer in today's housing market [1998], 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. In the light of these factors … individual homeowner consent to the complex and comprehensive RCA servitude regime is illusory [see notes 477 – 480]. (Siegel)

d) Hyatt

Upon 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 … 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 members of the community, with powers vested in the board of directors … clearly analogous to the governing body of a municipality. (Hyatt)

2. USC

a) 42 USC 1983

Section 1983. Civil action for deprivation of rights

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

3. Case Law

a) Covenants

(1) Loren v. Sasser, 309 F 3d 1296

The district court granted partial summary judgment to the corporate developer and property owners' association on allegations of discrimination in violation of federal and state fair housing statutes and appellants' First and Fourteenth Amendment rights relating to placement of a chain-link fence and "For Sale" sign in their front yard. A jury determined that there was no discriminatory intent involved in the denial of appellants' application for a deck and wheelchair ramp to be constructed on the front of their home, which also is challenged for sufficiency of the evidence.

Appellees informed appellants that they would approve construction of a chain-link fence on the back or the side of their house. For the specific reasons of preventing Janke from wandering from the premises, prohibiting her guide dog from biting anyone entering onto the premises, and enabling Newbold and Janke the ability to be outside unsupervised, a chain-link fence on the back or side of the house would accomplish the same purposes by providing an opportunity to be outdoors safely within the deed restrictions of the subdivision. While a chain-link fence on the back or side yard of their property may not be appellants' preference, it nevertheless would be a reasonable accommodation for the asserted needs of the handicapped appellants. We conclude that the district judge properly granted summary judgment to appellees We affirm.
The operative deed restrictions provide in pertinent part as follows relative to signs:SIGNS . No signs or advertisements shall be displayed on the lots, right-of-way, or any other part of the Subdivision, except as specifically designated and approved by Hernando Beach, Inc. Hernando Beach, Inc. shall have the right to enter upon any vacant lot for the purpose of removing any sign displayed in violation of this Section, and shall not be liable in any way for such entry or removal.

(2) Gerber v. Long Boat Harbor 757 F Supp 1339 (1991)

Defendant's motion to dismiss is predicated upon its assertion that, since it is not a governmental entity and has not assumed substantially all of the functions of a governmental entity, n1 the provisions of the First Amendment as incorporated in the Fourteenth Amendment simply do not apply. This Court cannot agree with Defendants contention, and by applying the principles enumerated in Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1947), this Court found and continues to find that HN2 judicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states. (Gerber v. Long Boat Harbor)

b) Other

(1) US v. Carolene 304 Us 144 (1938)

FOOTNOTE FOUR: There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such a those of the first ten amendments, which are deemed equally specific when held to be embraced by the Fourteenth.

(2) Cleburne v. Cleburne, 473 US 432

The Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. Pp. 439-447.

(a) Where individuals in a group affected by a statute have distinguishing characteristics relevant to interests a State has the authority to implement, the Equal Protection Clause requires only that the classification drawn by the statute be rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. Pp. 439-442.

(b) Mentally retarded persons, who have a reduced ability to cope with and function in the everyday world, are thus different from other persons, and the States' interest in dealing with and providing for them [473 U.S. 432, 433] is plainly a legitimate one. The distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary than is afforded under the normal equal protection standard. Moreover, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. The equal protection standard requiring that legislation be rationally related to a legitimate governmental purpose affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. Pp. 442-447.

2. Requiring a special use permit for the proposed group home here deprives respondents of the equal protection of the laws, and thus it is unnecessary to decide whether the ordinance's permit requirement is facially invalid where the mentally retarded are involved. Although the mentally retarded, as a group, are different from those who occupy other facilities - such as boarding houses and hospitals - that are permitted in the zoning area in question without a special permit, such difference is irrelevant unless the proposed group home would threaten the city's legitimate interests in a way that the permitted uses would not. The record does not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. Requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the proposed group home and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. Pp. 447-450.

4. Secondary Sources

a) J Land Use & Envir Law

One traditional mechanism for interposing substantive public interests and values into private bargains is the common law public policy exception to freedom of contract and other private arrangements … The premise to these exceptions to private ordering is that in a civil society, all property and personal rights are held subject to the public good. An agreement may call for the commission of an act not contrary to law, but still be prohibited as inconsistent with greater societal values. As the Supreme Court has cautioned, these greater public interests would be unrepresented unless courts consider those values when they enforce private agreements. (7 jluel 203).

Individual civil rights are the guarantors of a democracy, and a true democracy cannot permit infringement of these rights least it cease to be democracy … Neither the government, not any majoritarian body like a residential association, nor any individual can deprive the resident of basic civil rights found in the federal constitution. This theory views the residential association as a true miniature government subject to the same constitutional safeguards as public governments. (7 jluel 203).

The private/public distinction protects the counter-societal foundation of residential associations. In order to create communities distinct from larger public society, the law permits private groups to act in ways forbidden to municipalities. (7 jluel 203).

b) Constitutional Law

If the law limits the ability of all persons to exercise a fundamental right it will be tested under due process. If the law restricts the ability of a class of persons to exercise a fundamental right, it will be tested under equal protection. The Williamson [post 1937 law] opinion suggests that the Court will not only presume that a legislation had a reasonable basis for enacting a particular economic measure, but will also hypothesize reasons for the law's enactment if the legislature fails to state explicitly the reason behind its judgment.

Today, the due process and equal protection guarantees are not sufficient restraints on the government's ability to act in matters of economics or social welfare. Where no such right [fundamental] is restricted, the law need only rationally relate to any legitimate end of government. As long as there is any conceivable basis for finding such a relationship, the law will be upheld.

When the Court reviews a law that does not involve a fundamental constitutional right and does not classify persons on the basis of traits such as race, resident alien status, gender or illegitimacy. The Supreme Court will give great deference to the decision of the legislature by in a manner that does not involve.

c) Barnett

Basically, there can be said to be three levels or degrees of scrutiny. Strict scrutiny, which is used to protect 'fundamental' rights, courts require that the legislature prove that it had a compelling interest for a restriction that is narrowly tailored to address that interest. Intermediate scrutiny … a law must be substantially related to an important governmental purpose. Rational basis scrutiny the courts accept any measure that is reasonably related to accomplish any legitimate state interest. Rational basis scrutiny is almost always satisfied as the courts will accept any hypothetical reason a legislature might have had to enact a statute (Williamson v. Lee Optical, 348 US 483, 1054). (Barnett)

In the 1993 case of Federal Communications Commission v. Beach Communications (508 US 307), 'Those attacking the Rationality of the legislative classification have the burden to negative every conceivable basis which might support it'. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. (Barnett).

d) Steven Siegel, W & M B Rts J Spring 1998

Homeowners' associations 'pose a threat to the constitutional rights of millions of Americans' from abuse of association power. Among these constraints are those encompassed by the unconstitutional conditions doctrine, under which a state may not grant a privilege or benefit subject to the condition that the recipient not exercise a constitutional right. 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. [see Epstein] (Siegel).

C. State

1. Statutory

2. Case Law

a) Covenants

(1) Inwood v. Harris 736 SW 2d 632 (1987)

Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant.

Enforcement of restrictive covenants rests upon equitable principles, and at times, at least, the violation of the restrictive covenant may be restrained at the suit of one who owns property, or for whose benefit the restriction was established, irrespective of whether there were privity either of estate or of contract between the parties, or whether an action at law were maintainable.

A covenant which runs with the land must affect the legal relations -- the advantages and the burdens -- of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land.

The corporate plaintiff has been formed as a convenient instrument by which the property owners may advance their common interests. We do not ignore the corporate form when we recognize that the Neponsit Property Owners Association, Inc., is acting as the agent or representative of the Neponsit property owners. As we have said in another case: when Neponsit Property Owners Association, Inc., "was formed, the property owners were expected to, and have looked to that organization as the medium through which enjoyment of their common right might be preserved equally for all."**}** (Neponsit v. Emigrant)

In Texas, a covenant runs with the land when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice. A covenant to pay for the maintenance of subdivision facilities both benefits and burdens the property of each individual landowner, and it is a covenant that runs with the land. A Declaration of Covenants evidences the intent of the original parties that the covenant run with the land, and the covenant specifically binds the parties, their successors and assigns. When property is conveyed in a succession of fee simple estates, the requirement of privity is satisfied. Purchasers with constructive notice of restrictive covenants becomes bound by them. A purchaser is bound by the terms of instruments in his chain of title. (Inwood v. Harris)

An owner of land may contract with respect to his property as he sees fit, provided the contracts do not contravene public policy. Therefore, the developer of a subdivision, as owner of all land subject to the declaration, is entitled to create liens on his land to secure the payment of assessments.

Interpretation of the homestead laws are to be made liberally. Homestead rights, however, may not be construed so as to avoid or destroy pre-existing rights. An

encumbrance existing against property cannot be affected by the subsequent impression of the homestead exception on the land. A previously acquired lien, whether general or special, voluntary or involuntary, cannot be subsequently defeated by the voluntary act of a debtor in attempting to make property his homestead. Thus, when a property has not become a homestead at the execution of the mortgage, deed of trust or other lien, the homestead protections have no application even if the property later becomes a homestead.

The homestead, however, will not operate to circumvent an inherent characteristic of the property acquired. The concept of community association and mandatory membership is an inherent property interest. The declaration defines the rights and obligations of property ownership.

(2) Agnelli v. Arrowhead 689 A 2d 357 (1997)

The court found that appellee was not a state actor simply because it was incorporated by state law, that the regulatory scheme did not sufficiently implicate the commonwealth, and that there was no action under color of law when appellee enforced its deed restrictions. Clearly, the requirements of the Commonwealth governing nonprofit corporations do not suggest that the Commonwealth discriminates against property owners and their rights to freedom of expression or to freely sell their property. The provisions found in the Nonprofit Corporation Law which require the Association to abide by their bylaws clearly falls far short of significantly involving the Commonwealth with invidious discriminations which may be committed by a private nonprofit corporation such as the Association. Consequently, we reject the Anellis' argument that the Commonwealth plays a part in establishing or enforcing the deed restrictions or covenants of the Association because the Association is a private nonprofit corporation created and organized under the Nonprofit Corporation Law. Therefore, we cannot hold that the Association's alleged discriminatory actions, with respect to the enforcement of the deed restriction prohibiting signs, were taken under the color of state law. See 15 Pa.C.S. §§ 5504; 5505. (Agnelli v. Arrowhead)

(3) Unit Owners v. Gillman

The Association argues that the requirement of the Condominium Act that "a set of bylaws providing for the self-government of the condominium by an association of all the unit owners" is designed to foster the evolution of a condominium into "a self-governing community" and a "fully self-governing democracy." It argues that there is no limitation inherent in the Condominium Act on the powers that may be created by the condominium documents, relying upon Code § 55-79.80(c), which provides: "This section shall not be construed to prohibit the grant, by the condominium instruments, of other powers and responsibilities to the unit owners' association or its executive organ."

We do not agree that it was ever the intent of the General Assembly of Virginia that the owners of units in a condominium be a completely autonomous body, or that such

would be permitted under the federal and state constitutions. Admittedly, the Act is designed to and does permit the exercise of wide powers by an association of unit owners. However, these powers are limited by general law and by the Condominium Act itself. provides that "[w]hen . . . any . . . number of persons, are authorized to make . . . bylaws, rules, regulations . . . it shall be understood that the same must not

be inconsistent with the Constitution and laws of the United States or of this State."
The Condominium Act also sets limits on the powers that may be created by the Condominium documents. All unlawful provisions therein are void. Code § 55-79.52(a). "Common expenses" mean expenditures lawfully made or incurred. Code § 55-79.41(b). (Unit Owners v. Gillman).

“Restrictions found in the declaration of condominium itself are clothed with a very strong presumption of validity which arises from the fact that each individual unit

owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land, and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right."

(4) Villa de las Palmas v. Terifaj CA SC S109123 (2004)

The questions we confront in this case are whether use restrictions added toa declaration through an amendment and recorded *after* a homeowner haspurchased an individual unit bind such an owner, and whether the rule of *Nahrstedt (Nahrstedt v. Lakeside Village Condominium Association* 878 P.2d 1275 *(1994) 8 Cal.4th 361*) — that restrictions in a development's declaration are presumed to be reasonable and are enforceable unless they are arbitrary, impose an undue burden on the property or violate fundamental public policy (*Nahrstedt*, *supra*, 8 Cal.4th 361, 386) — applies to subsequently enacted restrictions.

> We conclude that under the plain and unambiguous language of sections 1354, subdivision (a), and 1355, subdivision (b), use restrictions in amended declarations recorded subsequent to a challenging homeowner's purchase of a condominium unit are binding on that homeowner, are enforceable via injunctive

relief under section 1354, subdivision (a), and are entitled to the same judicial deference given use restrictions recorded prior to the homeowner's purchase.

A requirement for upholding covenants and restrictions in common interest developments is that they be uniformly applied and burden or benefit all interests evenly. (See, e.g., *Nahrstedt, supra*, 8 Cal.4th at p. 368 [restrictions must be "uniformly enforced"]; Rest.3d Property, Servitudes, § 6.10, com. f, p. 200.) This requirement would be severely undermined if only one segment of the condominium development were bound by the restriction. It would also, in effect, delay the benefit of the restriction or the amelioration of the harm addressed by the restriction until every current homeowner opposed to the restriction sold his or her interest. This would undermine the stability of the community, rather than promote stability as covenants and restrictions are intended to do.

(5) Cohen v. Kite Hill 142 Cal App 3d 642 (1983)

It is a settled rule of law that homeowners' associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith. (Hannula v. Hacienda Homes (1949) 34 Cal.2d 442, 447 [211 P.2d 302, 19 A.L.R.2d 1268]; Branwell v. Kuhle (1960) 183 Cal.App.2d 767 , 779 [183 Cal.Rptr. 767].) As the court in Hannula stated: "Each of the decisions enforcing like restrictions has held that the refusal to approve plans must be a reasonable determination made in good faith." (Hannula v. Hacienda Homes, supra, 34 Cal.2d 442 , 447.) The same requirement of good faith applies equally to the approval of plans. "The converse should likewise be true, ... '[T]he power to approve plans ... must not be exercised capriciously or arbitrarily.'" (Bramwell v. Kuhle, supra, 183 Cal.App.2d 767, 779; see also Norris v. Phillips (Colo.App. 1981) 626 P.2d 717, 719.)

Furthermore, in recognition of the increasingly important role played by private homeowners' associations in such public-service functions as maintenance and repair of public areas and utilities, street and common area lighting, sanitation and the regulation and enforcement of zoning ordinances, [142 Cal.App.3d 651] the courts have recognized that such associations owe a fiduciary duty to their members. (See Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal.App.3d 783, 799 [171 Cal.Rptr. 334].

(6) Brooks v. Northglen 76 S.W. 3rd 162 (2003)

Brooks argues that the assessment of a late fee would violate the U.S and Texas Constitutions' impairment-of-contracts provisions because the deed restrictions do not provide for late fees. The court of appeals examined the constitutionality of the statute and held that Section 204.010 Ais not directed to any specific kind of contracts, and it does not directly contradict any contractual provision. The court further noted that the statute is a permissible exercise of the State's police power because Ait was enacted to promote the public welfare with regard to the property owners associations' ability to better provide services to the homeowners, maintain the common area facilities, and provide for the common security and restriction enforcement. (Brooks v. Northglen)

A statute is presumptively constitutional. Barshop v. Medina Cty. Underground Water Conservation Dist., 925 S.W.2d 618, 625 (Tex. 1996). As such, we are obligated to avoid constitutional problems if possible. In this case, we must consider two factors: first, whether the statute substantially impairs the contract; and second, if so, whether the Legislature acted within its police powers in enacting the legislation. (Brooks v. Northglen).

Section 204.010 [Texas Prop.Code] does not substantially impair Northglen's deed restrictions. The statute operates only where the deed restrictions do not otherwise provide. It does not serve to withdraw or remove any contractual obligation. If the statute required the assessment of late fees where late fees were expressly prohibited by the deed restrictions, this would likely be a different case. (Brooks v. Northglen)

(7) Wise v. Harrington Grove NC SC 428A02 (2003)

As a general rule, "[r]estrictive covenants are valid so long as they do not impair the enjoyment of the estate and are not contrary to the public interest." Karner, 351 N.C. at 436, 527 S.E.2d at 42; cf. Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (describing freedom of contract generally). Restrictive covenants are "legitimate tools" of developers so long as they are "clearly and narrowly drawn." J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc., 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). The original parties to a restrictive covenant may structure the covenants, and any corresponding enforcement mechanism, in virtually any fashion they see fit. See Runyon v. Paley, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) ("an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose"). A court will generally enforce such covenants "`to the same extent that it would lend judicial sanction to any other valid contractual relationship.'" Karner, 351 N.C. at 436, 527 S.E.2d at 42 (quoting Sheets v. Dillon, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942)). As with any contract, when interpreting a restrictive covenant, "the fundamental rule is that the intention of the parties governs." Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967).

Therefore, under the common law, developers and lot purchasers were free to create almost any permutation of homeowners association the parties desired. Not only could the restrictive covenants themselves be structured as the parties saw fit, a homeowners association enforcing those covenants could conceivably have a wide variety of enforcement tools at its disposal. (Wise v. Harrington Grove)

(8) Rancho Santa Fe v. Dolan-King Cal App D040637 / D041486 (2004)

The fallacy of Dolan-King's argument is that it focuses mainly upon her subjective beliefs as a homeowner, while failing to account for the well-accepted power of an association operating under the land use covenant to clarify and define its terms, so long as it is operating within the straight reasonableness standard. Both as to the governing Covenant and subsequently enacted restrictions, the inquiry should be whether their provisions are reasonable "in light of 'the restriction's effect on the project as a whole,' not from the perspective of the individual homeowner. [Citations.] Accordingly, courts do not conduct a case-by-case analysis of the restrictions to

determine the effect on an individual homeowner; we must consider the reasonableness of the restrictions by looking at the goals and concerns of the entire development." (Dolan-King I, supra, 81 Cal.App.4th at p. 975.) (Rancho Santa Fe v. Dolan-King)

(9) Arizona Biltmore v. Tezak 868 P 2d 1030 (1993)

The cardinal principle in construing restrictive covenants is that the intention of the parties to the instrument is paramount. To determine this intent, we construe the document as a whole. While it is true that courts should not give a covenant a broader than intended application, it is well settled that a covenant should not be read in such a way that defeats the plain and obvious meaning of the restriction. (Arizona Biltmore v. Tezak)

Restrictive covenants are to be strictly construed against persons seeking to enforce them and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions. (Arizona Biltmore v. Tezak)

(10) Shamrock v. Wagon Wheel CA-CV 02-0403(AZ App Div) (2003)

For the reasons that follow, we hold that mandatory membership in a new homeowners' association can only be imposed on owners of lots within an existing subdivision by recording deed restrictions to that effect. Because such restrictions did not exist during the relevant time period in this case, the trial court correctly entered summary judgment for appellees. To begin, the Association, a non-profit corporation, could not have imposed membership on appellees absent their express or implied consent. A.R.S. -3601(B) (Supp 2003) ("No person shall be admitted as a member without that person's consent. Consent may be express or implied."). Thus, the amended bylaws recorded in 1999 did not, standing alone, confer membership status on appellees. (Shamrock v. Wagon Wheel)

The Act, adopted in 1994, governs the rights and obligations of homeowners' associations that impose mandatory membership on property owners within planned communities. A.R.S. Ë 33-1801 through -1808. The definitional section of the Act describes the characteristics of a planned community association as follows: (1) a non-profit corporation or unincorporated association, (2) created pursuant to a declaration, (3) and comprised of property owners within a real estate development, (4) who are mandatory members and are required to pay assessments to the association, (5) for purposes of managing, maintaining or improving property, (6) owned and operated by the association. A.R.S. Ë 33-1802(1) and (4). A "declaration" refers to "any instruments, however denominated, that establish a planned community and any amendment to those instruments." A.R.S. -1802(3).

The Association contends that its recorded articles of incorporation and amended bylaws, which mandated membership, were sufficient to constitute restrictive covenants that bind appellees' use of their Park lots. We disagree. Owners of lots within a community may modify or extinguish deed restrictions. Hueg, 122 Ariz. at 288, 594 P.2d at 542. However, the manner of making such modifications is governed by the declaration in effect. (Shamrock v. Wagon Wheel)

In order to impose automatic membership on owners of property located within a neighborhood or community development, this requirement must appear in a deed restriction embodied within a recorded instrument. See Duffy v. Sunburst Farms. The 1960 Declaration established the original deed restrictions for purchasers of lots within the Park. That declaration was replaced by the 1980 Declaration, which both modified and added restrictions. However, neither declaration required membership in a homeowners' association. (Shamrock v. Wagon Wheel)

(11) Maatta et al v. Dead River MI App No 248848 (2004)

Taking these words to mean that particular lots could be excepted permits the obviously unintended result that 51 per cent of the owners could exempt their own property and leave the other 49 per cent encumbered or could even impose more strict restrictions upon certain lots. Certainly such an interpretation could easily result in a patchwork quilt of different restrictions according to the views of various groups of 51 per cent and completely upset the orderly plan of the subdivision. [citing Riley v. Boyle, Ariz. 1967] 434 P2d at 528. [Id. at 268-273.]

We conclude that the logic of the many courts cited in Walton is sound and should be followed here: Non-uniform covenant amendments require the unanimous consent of the affected property owners. Holding otherwise would leave present property owners in an uncertain position whenever their covenants allowed for amendments with less than the unanimous consent of the affected owners. The fundamental premise that makes people willing to bind themselves to the burdens of restrictive covenants is that the resulting benefits are assured; each property owner relies on the fact that all are bound equally, so that no burden can be imposed on one that all are not willing to assume. Permitting non-uniform amendments and exemptions by majority or supermajority vote would destroy this crucial aspect of covenants and thus undermine the entire system of private regulation of real property in Michigan.

(12) OSCA Development v. Blehm, E032843, Cal. App 4th, DIV 2 (2003)

home park, and plaintiff OSCA Development Company (OSCA), who owned and operated the adjacent Desert Crest Country Club. The parties disagreed over a provision in the Desert Crest Community Association's (the Association) declaration of covenants, conditions, and restrictions (CC&R's) that required membership in the country club and the payment of maintenance fees. After this court previously held that, under the original version of article 19 of the CC&R's, the payment of maintenance fees was voluntary, the Association by majority vote amended this provision by stating explicitly that the payment of fees was mandatory. The sole question in this case is whether the amendment was a valid and enforceable covenant running with the land.

In resolving this question, we conclude that the Association adopted the amendment in accordance with the governing documents. The amendment, which required club membership and the payment of fees, benefited the homeowners by increasing their property values and providing access to the recreational facilities. Because we conclude that article 19 was a covenant running with the land, OSCA was entitled to enforce its lien for unpaid assessments.

b) Other

(1) Foley v. Osbourne

Consequently, we remand this case to the Superior Court with our instruction that the trial justice consider and rule on whether in this case the 1982 act represents an unconstitutional delegation of judicial or police power to the condominium association, a private entity. (Foley v. Osbourne)

(2) Villa Milano v. Il Davorge 84 Cal App 819 (2000)

Whether an agreement's clause "is characterized as an adhesion contract or not, the question of the enforceability of the clause remains . . . ." Further, "no contract, whether adhesive or otherwise, will be enforced if it is unconscionable." (Villa Milano v. Il Davorge)

(3) Damon v. Ocean Hill Journalism Club85 Cal. App. 4th 468; (2000)

{As our Supreme Court has recognized, owners of planned development units "comprise a little democratic subsociety . . . ." (Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 374; see Cohen v. Kite Hill Community Assn. (1983) 142 Cal.App.3d 642 , 651.) In exchange for the benefits of common ownership, the residents elect an legislative/executive board and delegate powers to this board. This delegation concerns not only activities conducted in the common areas, but also extends to life within "the confines of the home itself." (Nahrstedt v. Lakeside Village Condominium Assn., supra , 8 Cal.4th at p. 373) A homeowners association board is in effect "a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government." (Cohen v. Kite Hill Community Assn., supra, 142 Cal.App.3d at p. 651.)

In the published portion of this decision, we hold the trial court properly determined the anti-SLAPP statute applied because the evidence showed the alleged defamatory statements were made "in a place open to the public or in a public forum" and concerned "an issue of public interest" within the meaning of Code of Civil Procedure section 425.16, subdivision (e)(3)**.}**
(Damon)

(4) Midlake v. Cappuccio 673 A 2d 243 (2001)

{Condominium complex was not comparable to company town, and therefore condominium association's declaration prohibiting posting of signs on units, without approval of board of directors, was not subject to First Amendment, where facilities of condominium complex were entirely privately run, and complex included no facilities for community public use that were typically found in municipality, such as schools, libraries, and other public functions.

Midlake, however, is a private organization, and as
such, cannot abridge the rights of the First Amendment of the Constitution.

This court subsequently determined, after a thorough review of the relevant federal law, that Shelley v. Kraemer, supra, is not applicable to the enforcement of a restrictive covenant in a contract between private parties, by stating:

[W]here 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, supra.

The courts of this Commonwealth have vigorously defended the rights which are guaranteed to our citizens by both the federal and our Commonwealth's constitutions. One of the fundamental precepts which we recognize, however, is the individual's freedom to contractually restrict, or even give up, those rights. The Cappuccios contractually agreed to abide by the provisions in the Declaration at the time of purchase, thereby relinquishing their freedom of speech concerns regarding placing signs on this property.**}** (Midlake v. Cappuccio)

(5) Goldberg v. 400 East Ohio 12 F Supp 820

A less creative plaintiff, after observing that Illinois's Condominium Property Act forbids condominium boards of managers from adopting any rule which "impair[s] any rights guaranteed by the First Amendment to the Constitution" and provides that any such rule is "void as against public policy and [is] ineffective," 765 ILCS 605/18.4, 18.4(h) (West), would have brought suit under that law in state court after her condominium's board enacted a rule which barred all "canvassing or distributing of materials to individual units" other than those materials related to political campaigning Compl. P 15; *see* Board of Directors of 175 E. Delaware Place Homeowners Ass'n v. Hinojosa, 287 Ill. App. 3d 886, 679 N.E.2d 407, 409, 223 Ill. Dec. 222 (Ill. App. Ct. 1997) (noting the filing of this type of suit). She would have prevailed if she showed that the regulation impaired a First Amendment right or even that the regulation was simply unreasonable -- and to that end it would have been the board's burden to prove that the canvassing or distribution was "'antagonistic to the legitimate objectives of the condominium association.'"

(6) New Jersey v. Kolcz 276 A 2d 595

This court believes that decisions relating to municipalities are equally applicable to Rossmoor, since it is in many essential regards a self-sufficient community. The corporate officers may speak for the citizens of Rossmoor on matters [***13] relating to health, welfare and safety. These officers may believe [*416] that it is their duty to protect the Rossmoor residents from annoying or obnoxious sales methods, but the court cannot allow the corporation to decide to bar what it knows to be a bona fide political endeavor.

In *Breard, supra*, the court quoted from *Martin, supra*, stating: Freedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. [341 *U.S.* at 643, 71 *S. Ct.* at 933, 95 *L. Ed.* at 1248].

Although the guaranties of free speech and free press will not be used to [**600] force a community to admit peddlers or solicitors of publications to the homes of its residents, *Breard, supra*, such guaranties should be used to insure that each individual alone decides what political and religious information he wishes to receive.

(7) Bryan v. MBC Partners 541 SE 2d 124 (2000)

It is well settled that the grantor of real property may restrict the use of it by restrictive covenants contained in or incorporated into the deed. By accepting a deed, the grantee is bound by the covenants contained therein. The limitation on the validity of restrictive covenants is that they must be clearly established and they cannot be contrary to public policy.

(8) Pardee v. Rodriquez Cap App D039272 (2003)

"'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'"

'Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [Citations.] The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."'

'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'

Procedural unconscionability "focuses on factors of oppression and surprise. [Citation.] The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party." (Kinney, at p. 1329.) "The second component of procedural unconscionability encompasses an aspect of surprise, with the terms to which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce them."

With respect to the surprise component of procedural unconscionability, the essential elements of the judicial reference provisions, including the waiver of jury trial, were buried in the form contracts drafted by Pardee. "While courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (Pardee v Rodriquez)

Further, although plaintiffs may "certainly" waive their constitutional right to a jury trial, "'the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived.'" (Villa Milano Homeowners Assn. v. Il Davorge, supra, 84 Cal.App.4th at p. 829; Marsch v. Williams (1994) 23 Cal.App.4th 250, 254.) Hence, before upholding the provisions of the parties' agreements purporting to effect a waiver of plaintiffs' constitutional right to trial by jury, we must closely scrutinize the impact of the waiver on the parties. Moreover, nothing in the record suggests that buyers otherwise gained anything from waiving their substantial constitutional right to a jury trial. (Villa Milano Homeowners Assn. v. Il Davorge, supra, 84 Cal.App.4th at p. 829; Marsch v. Williams, supra, 23 Cal.App.4th at p. 254.) Thus, as giving buyers nothing in return for such waiver, the judicial reference provisions of the parties' agreements were so one-sided as to be substantively unconscionable.

In sum, the superior court properly concluded the judicial reference provisions of the parties' agreements were unconscionable. (Pardee v. Rodriquez)

Instead, the court simply indicated such statute expressed a legislative statement of public policy favoring a trial with full procedural and constitutional rights over alternative dispute resolution in the context of construction defect litigation. (Pardee v. Rodriquez)

(9) Hidden Harbour v Norman 309 S 2d180 (1979)

Inherent in condominium concept is principle that to promote health, happiness, and peace of mind of majority of unit owners, since they are living in such close proximity and using facilities in common, each unit owner must give up certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Although condominium association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to health, happiness and enjoyment of life of various unit owners, association can adopt reasonable rules under particular facts and circumstances thereto

appertaining; it is not necessary that conduct be so offensive as to constitute nuisance in order to justify regulation thereof. (Hidden Harbour v. Norman).

3. Secondary Sources

a) Barnett

Unlike the enumerated powers of Congress, the powers of the states are unwritten. The courts began using the Due Process and Equal Protection Clauses to provide much the same constraint on state power that was originally intended to result from the Privileges and Immunities Clause. Owing to the Fourteenth Amendment … any state abridgement of the privileges and immunities should be subject to challenge in federal court. The exercise of liberty by the citizen should not be restricted unless the state can show, to the satisfaction of an independent tribunal of justice, that such a restriction is both necessary and proper. (Barnett).

The traditional term for appropriate state power is the 'police power'. The police power is the legitimate authority of states to regulate rightful and to prohibit wrongful acts. 'The object of government is to impose that degree of restraint upon human actions, which is necessary to uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights [Tiedeman, Treatise on Police Power]. In particular, police power was typically construed to empower states to protect, not only the health and safety of the general public, but its morals as well.(Barnett).

The propriety of the laws made by legislatures is dictated by the rationale for yielding the lawmaking power to the government. '…Men, when they enter into Society, give up the Equality, Liberty and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislature, as the good of the Society shall require … the power of the Society, or Legislative constituted by them, can never be supposed to extend farther than the common good.' [Locke, Two Treatises]. This ' good of society', however, is no open-ended grant of power simply to do good; it is defined and limited by the rights retained by the people when they surrender their powers of enforcement, and this is what makes it a genuine common good or good for everyone, not merely a segment or fraction of society. (Barnett)

We now understand much better (or are more willing to admit) than our post-New Deal predecessors on the left and on the right that both minorities and majorities can successfully assert their interests in the legislative process to gain enactments that serve their own interests rather than being necessary and proper. (Barnett)

Rather, legislation restricting 'liberty interests' is typically defended, not on the ground that such liberty is wrongful, but because the restrictions achieve some desirable social policy or 'legitimate state interest'. When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can insure that the rights of citizens are protected and that justice holds the balance between the legislature or executive branch and the people. Of course, if legislatures do take pains to regulate the rights of citizens only when it is necessary and proper to do so, he can expect them to be able to justify their actions. Regrettably, our actual experience with legislatures has not been so utopian. For this reason, meaningful scrutiny of legislative and executive branch actions by an impartial magistrate is required if the laws imposed on the citizens are to bind in conscience. (Barnett)

How can a proper regulation of rightful activity be distinguished from an improper abridgement of the private rights of the people? As with the federal laws, the key

is whether state laws are a pretext for purposes other than the prevention of future or rectification of past rights violations. **One sign that a law is pretextual is when it benefits a particular group rather than the general public.** Building on the Lockean idea of 'common good', courts examined whether a particular law benefited every person in the community as a whole or whether it instead was implemented for the benefit of a majority or minority faction. (Barnett).

Specifically, it came to be determined, first, that laws that singled out specific groups or classes for special treatment would withstand constitutional scrutiny only if they could be justified as really related to the welfare of the community as a whole … and were not seen a corrupt attempts to use the powers of government to advance purely private interests; and second, that acts that interfered with an individual's property or market liberty would be considered legitimate so long as they wee not designed to advance interests of just certain groups or classes' [Gillman, The Constitution Besieged]. (Barnett)

State laws may properly protect the rights of A from infringement by B. The actual infringement of rights by private parties is wrongful and may justly be prohibited. Restrictions on Liberty that are unnecessary to accomplish an enumerated power or end, or the state power of police, are not binding in conscience. First, the government must show that there is sufficient 'fit' between the liberty-restricting means it chose and the proper purposes it was seeking to attain. Second, the government must show that there were no less attractive alternatives to the liberty-restricting means that were chosen. (Barnett)

In the 1984 case of City of Cleburne v. Cleburne Living Center (473 US 432) … the federal district court required the city to articulate reasons for such a restriction. The Supreme Court rejected … as based on 'mere negative attitudes, or fear, unsubstantiated by facts … because these same considerations would apply equally to other group homes …." Notice that placing the burden on the city to articulate its purposes and the necessity for its restrictions on liberty revealed the tenuousness of the city's claim of power … [and] **also bolstered the conclusion that the real motivation for this restriction was not the public or common good but the good of a faction of the community who disliked having a group home in their neighborhood.** (Barnett).

b) J Land Use & Envir Law

Consequently, residential associations, like those agencies, are subject to the administrative non-delegation doctrine requiring a court to examine the rulemaker's scope of authority to act. Under the non-delegation doctrine, courts will uphold a statutory grant of authority to an agency if the legislature puts forth intelligible limiting principles to govern agency action. A court must be able to determine if an agency is behaving within its statutory mandate. Once a court decides that the agency or residential association is acting within its authority, the court doesn't second guess the rulemaker's decisions unless procedural irregularities or arbitrary or capricious regulation occurs. (7 jluel 203).

The broad range of permissible goals for residential associations, coupled with the wide latitude given governing boards to implement their goals, means that state supervision of common interest developments is undemanding. Thus, public governments should exercise direct oversight to ensure that these private developments maintain public procedural and substantive values. (7 jluel 203).

Courts should examine residential association regulations through a two-step system: first, a primarily procedural, ultra vires analysis; second, a public policy review which candidly considers substantive values. The ultra vires review recognizes the state's interest in procedural regularity and fidelity to the contractual limits on residential association authority. Preserving limits on residential association governance and enforcing fidelity to those limits are important state supervisory goals. Courts should permit common interest

development governing boards to choose among a wide range of means to accomplish their goals. (7 jluel 203).

Note that the central question in these examples is the strength of the government's public interest versus private agreements concerning land use. Public policy exception is a tool for government intervention into private residential governance regulation. Further, some argue that the amorphous contours of public policy inappropriately invite judges to decide the legitimacy of voluntarily-created residential rules based upon their own beliefs and biases. A state can blunt the force of these critiques by limiting the scope of the public policy exception to those values clearly articulated in state law. The public policy exception to private ordering is the obverse of constitutional state action doctrine. Thus, both state action and the exemption for public policy delimit the permissible parameters of private and public ordering and values, and reviewing courts must appropriately circumscribe both. (7 jluel 203).

Their decision to purchase in a common interest development means that they have determined that they are better off, or at least no worse off, in a community with those restrictions than in one without them. Their decision to purchase in a common interest development means that they have determined that they are better off, or at least no worse off, in a community with those restrictions than in one without them. (7 jluel 203).

If unanimous consent is the cornerstone of market consent theory, then later, non-unanimous consent and additions to the original residential association declarations pose special problems. In large developments, unanimity may make such alterations impossible. In theory, however, as long as a resident has notice that the homeowners' association subsequently modify residential restrictions and covenants, those later amendments should be within the scope of the resident's original consent. (7 jluel 203).

"He proposes coupling supermajority voting requirements with the insertion of a 'takings' clause, conceptually akin to the just compensation provisions of the 5th amendment. Therefore, instead of having the ability to prevent the amendment of residential association restrictions, the hold-out is compensated monetarily for the forced relinquishment of rights. Thus the wealth-enhancing amendment is permitted while the hold-out receives remuneration for the coerced taking. (7 jluel 203).

Residential association rules derive their legitimacy from residents' participation in the democratic decision-making process., even if their views are ultimately rejected. Participatory consent substitutes substitutes the decisionmaking and consensus building for state regulation over substantive terms. (7 jluel 203).

[Problems with consent theory include] empirical evidence [that] indicates that most purchasers neither read nor understand those documents [restrictions], nor do they fully comprehend what common ownership entails. Another flaw … is their assumption that there is sufficient variety of housing in the desired location to permit a voluntary consumer choice between common interest developments and their regulations, or between a common interest development and traditionally unrestricted housing. (7 jluel 203).

Stating that condominium living inherently required certain sacrifices in personal liberty for the greater community good. Accordingly, the residential association could enact reasonable rules relating to 'health, happiness, and enjoyment of life of the various unit owners'.

Twelve jurisdictions that they [covenants] not be unconscionable [as of 1992], AL, CT, WV for planned communities; AZ, ME, MN, MS, NM, NC, PA, RI, VA, WA for condos]. (7 jluel 203)

The state' view that a knowledgeable consumer "is protected by evaluating her options and deciding to enter these communities … Therefore, consumer preference and market pressures suffice to regulate residential communities. Disclosure is the predicate for informed consumer choice and efficient market. (7 jluel 203).

In classic contract jurisprudence, duress, fraud, or mistake render contracts unenforceable because the interference with the formation of a true agreement between two individuals. (7 jluel 203).

The state statutes regulating condominiums and other common interest developments focus on consumer disclosure information. (7 jluel 203).

Classic 19th century contract law … the paradigm for contracts was an economic model of free market transactions in which individuals bargained with others for greater total benefits … consequently the primary role of the state in this theory was to enforce privaTE AGREEMENTS AS WRITTEN WITHOUT INQUIRING INTO SUBSTANTIVE Fairness of the bargain. Accordingly, the government's role is essentially to uphold the original agreement and any modifications. (7 jluel 203).

c) Amer Juris POF 3d

The essential premise of a residential private government is that it is fully consensual. (am jur pof).

Residential associations derive their legitimacy and claim to judicial enforcement by virtue of the fact that residents have agreed to bind themselves to the associations' regulations … unanimity of consent substitutes for federal constitutional limits on municipal powers. [This consent theory is justified by economic analysis in that] unanimous consent assures that a collective choice will result in a Pareto-superior outcome. A policy meets this criteria when it would make no one worse off, and at least one person better off. The essential premise of a residential private government is that it is fully consensual. (am jur pof).

d) Steven Siegel, W & M B Rts J Spring 1998

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 constraints is unfair and unwarranted? 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. A detailed and comprehensive covenant regime is put into place solely by the developer at the time that the RCA is established and individual homebuyer consent to the regime is essentially limited to the decision of whether to purchase the property in the RCA.

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. (Siegel)

{If a zoning ordinance is in its operation, unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional [West Hill v. Abbate]. The Court noted [Village of Euclid v. Ambler], however, that particular zoning provisions would be unconstitutional when 'provisions are clearly arbitrary and unreasonable, having no substantive relation to the public health, safety, morals or general welfare'.

Shelly 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. 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. [US Amicus Curiae brief in Shelly,

It [the Court] is confronted by the existence of such a mass of covenants in different parts 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].}

The power to zone is a police power of the state (see Village of Belle Terre) and the zoning power, in its traditional form, is exercised exclusively by the state (See Black's Law Dictionary). If we were to define zoning as a form of land-use control, then the activity encompassed by that term undoubtedly includes activity traditional undertaken by the private sector. 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. (Siegel)

For a 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. (A municipality's requirement that a subdivision developer establish an RCA for the purpose of providing traditional municipality services in a subdivision has never been held to be an unconstitutional exaction.) In this way local governments draw on their substantial discretion … in order to transfer responsibility for traditional municipal services and facilities, thereby minimizing their own cash outlays and maximizing their own net reserves from an expanded tax base.

Viewed from this perspective, the local government's delegation of traditional municipal functions to RCAs together give rise to a symbiotic relationship in that 'the state has so far insinuated itself into a position of interdependence with [a private party] that it must be recognized as a joint participant' [Burton] with the party.

The local government-RCA relationship may amount to state action because (1) the establishment of an RCA is, in critical aspects, the product of municipal land-use authority, and (2) such an establishment entails the delegation of traditional municipal functions to a single private entity in a geographically defined area.

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. (Siegel)

{Since the covenants 'run with the land' purchasers had no choice but to assent to an existing scheme or forego a purchase of land. And even this choice was largely nonexistent because of the widespread use of 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. [Lewis] As a practical matter, then, 'consent' to the RCA form of community governance, and its customary limitations of the rights that would be of a constitutional order if such limitation of rights were undertaken by the state, is less and less a matter of choice and more a matter of necessity. For this reason, the subjection of restrictive covenants oa at least some territorial RCAs to constitutional review would, far from threatening individually freedom to use and dispose of property, actually enhance this freedom.

Implicit in the Shelly 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. **}**(Siegel)

e) Barton & Silverman

CIDS 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 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. (Barton & Silverman).

f) The Law of Property, 3rd

If the promisor's legal relations in respect to the land in question are lessened – his legal interest as owner rendered less valuable by the promise – the burden of the covenant touches or concerns the land; if the promise's legal relations in respect to that land are increased – his legal interest as owner rendered more valuable by the promise – the benefit of the covenant touches or concerns the land. [Citing C. Clark , Real Covenants and Other Interests which "Run with the Land" 97 (2d. 1947); See Restatement of Property – Servitudes, §3.2, 5.2; 479].

Section 3.1, which would allow a court to invalidate a covenant if the court concluded it "unreasonably burden[s] fundamental constitutional rights" or, more broadly, "violates public policy [reference to Law Of Property – Servitudes §3.1 and §4.1; 479].

On the other side [as opposed to a contract theory view] are scholars who consider equitable restrictions as creating servitudes on the burdened land, similar to easements; hence the name "equitable servitudes". Under this theory, the land itself, not estates in it, becomes burdened with the covenant […] [492]. While neither theory can completely explain the operation of equitable restrictions as they have developed in the courts, the servitude theory has the better of it. [493].

Most recent litigation concerning running covenants involves subdivision covenants whose operation can be explained best, or only, be equitable theory [494].

"No one purchasing with notice of that equity can stand in a different situation from the party from whom he purchases" [citing Tulk v. Moxhay].

It is settled, to the point of being commonplace, that one who acquires an interest in the land is charged with notice of an equitable restriction that is contained in a duly recorded prior instrument in his chain of title. [constructive notice]. Finley v. Glenn says yes … Glorieux [v. Lighthipe] finds it an intolerable burden to require C to examine deed A has given to land other than [that he has purchased. [Issue relating to events relating to another non-purchased property that are a covenant in the deed to the property purchased by C, requiring C to have examined deeds to all properties owned by A] [500].

Sanborn v. McLean … apparently held that, because of the uniform appearance of the area, a purchaser of a lot in a subdivision was charges with knowledge that all lots were restricted to private dwellings. The court said that anyone purchasing would thereby have either constructive notice of the uniform restriction or at least inquiry notice to make a further investigation to determine if the restriction had been recorded. [See Shalimar v. DOC Enterprises] [501].

But there is not much question that covenants to join homeowners associations and to support them and pay their dues, all affirmative undertakings, will run with the land [496] [See footnote 5 for list of cases].

D. Table of Authorities

Cases