PROTECTING THE MARKETPLACE OF IDEAS: ACCESS FOR SOLICITORS IN COMMON INTEREST COMMUNITIES

Margaret Farrand Saxton*

Over the past few decades, the number of Americans living in condominiums, master-planned communities, and other types of Common Interest Communities (CICs) has climbed to fifty million. In many of these communities, gates, leafleting bans, or no-solicitation rules prohibit solicitors from speaking or distributing written information to residents. In some, CIC governing boards reserve the exclusive right to distribute political and other literature. Because no-solicitation rules typically are contained in long and complex declarations of conditions, covenants, and restrictions (CC&Rs) that empirical studies have shown many purchasers fail to read or fully understand, or are subsequently adopted by association boards with less than unanimous consent from CIC residents, many residents may not have had actual notice of such rules, or of the boards' power to promulgate them, at the time the residents entered the community.

To the extent that CIC residents have not explicitly or knowingly agreed to no-solicitation rules, or to board decisions to enclose the community with a gate, such rules may infringe those residents' constitutionally protected right to receive and distribute information. In addition, rules that reserve to the governing association the exclusive right to solicit or distribute literature within the CIC may distort the range of political information residents use to guide their behavior. These two problems—unknowing waiver of First Amendment rights by residents and the potential for information control by homeowners' associations—call out for judicial resolution.

Existing state court decisions upholding gating rules on less than a showing of actual notice to property owners do little to address the problem of residents' unknowing waiver of the right to receive or distribute information. In addition, neither the Federal Constitution nor state constitutions appear likely to provide a basis for solicitor access to CICs under current case law. Therefore, to ensure that CIC residents do not unknowingly forfeit core First Amendment rights when they purchase their property, the author proposes that courts uphold no-solicitation or

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gating rules only when a CIC can demonstrate that all residents have affirmatively and specifically consented to such rules, or to the CIC association board's authority to pass them at a later date.

Rules that limit solicitation to CICs' governing associations appear less likely to survive review under current law, as shown by the decision in the New Jersey case Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n. *However, the subsequent New Jersey decision in* Mulligan Foundation v. Brooks *muddies the question of how far solicitors' speech rights extend in gated CICs, or what type of activities by a CIC association will give rise to a solicitor's right of reply. Thus, the author suggests that* Guttenberg *be clearly extended to prohibit selective enforcement of no-solicitation rules by CIC governing associations even in entirely private CICs, when a plaintiff can show that the rule causes significant politically distorting effects in the surrounding locale.*

Finally, this Comment explores the extent to which ideologically based CICs might and should be able to avoid judicial invalidation of no-solicitation rules on the grounds of the constitutional right of expressive association.

INTRODUCTION

Picture two towns, one within the other. The outer is Guttenberg, New Jersey: a working class community, population approximately eleven thousand.[1] The inner is an affluent private condominium complex composed of three high-rise towers, a residents-only park and health spa, and a public shopping mall, and home to one-fourth of Guttenberg's population.[2] Inside the complex, door-to-door soliciting and distribution of literature are forbidden. Before each local election, however, the condominium association deluges residents with fliers and phone calls in support of candidates it endorses. In local elections, association-endorsed candidates—even ones that that lose in Guttenberg's other districts—typically carry the complex's district by substantial margins, resulting in overall election victories. Yet, when solicitors from a local political group try to enter the Guttenberg towers to counterbalance the association's political influence, they are barred from entering by the complex's management.[3]

This condominium complex is what is known as a Common Interest Community, or CIC: a community in which individual units are privately owned and residents, instead of local government, collectively own and manage common property.[4] CICs include everything from condominium

1. *See* Guttenberg, New Jersey, *at* http://www.city-data.com/city/Guttenberg-New-Jersey.html.

2. *See* Galaxy Towers, Brochure, *at* http://www.galaxytowers.com/brochure.html. Professor Frank Askin of Rutgers Law School has described the Galaxy Towers' relationship to Guttenberg as that of a new, affluent, and politically aggressive interloper in an established blue-collar city. *See* WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES 227 (1998). According to Askin, the president of the Galaxy Towers organized the complex's affluent residents into a "formidable political machine" which succeeded in dominating local politics and extracting tax abatements and other concessions from the city. *Id.*

3. This hypothetical is based on the facts of *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156, 159 (N.J. Super. Ct. Ch. Div. 1996).

4. *See* WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 7–8 (3d ed. 2000); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000); Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS

complexes of only a few units to high-rise cooperative apartments to city-sized "master-planned communities" of freestanding homes with private streets and business districts.[5] Depending on the type of CIC, the common property that residents pay to maintain can consist of streets, parks, swimming pools, parking lots, roofs, elevators, or almost anything else.[6] The rules of the community are set forth in volumes of private use restrictions and servitudes[7] written into CICs' master deeds, which homeowners' association boards quickly supplement with a network of additional rules for residents' use of the common property.[8] Indeed, in this private residential landscape, CIC residents may contract to subject themselves to extensive regulation of almost every aspect of their lives.[9]

AND THE PUBLIC INTEREST 3 (Stephen E. Barton & Carol J. Silverman eds., 1994). The Restatement defines "common-interest community" as

> a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

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

5. *See* HYATT, *supra* note 4, at 13–19.

6. *See id.* at 8.

7. Robert G. Natelson defines "servitude" as "a private right (other than a future possessory interest or lien) held by a person or group . . . to use real property possessed by another or to limit the possessor's enjoyment of same, which right is, under certain defined circumstances, binding upon the property possessor's successors-in-interest." ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS 38 (1989). In a property owners' association, such a servitude might take the form of a rule that no homeowner may post a sign on his or her front yard, or that no homeowner can make any addition to her home that would increase the home's height above some specified level. Other homeowners in the homeowners' association, bound by the servitudes, would have the right to enforce this servitude against any noncompliant homeowner.

8. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 ("Except as otherwise provided . . . , an association in a common-interest community is governed by a board elected by its members."); *id.* § 6.7(1)(a)–(b) (setting forth CICs' rulemaking power to "govern the use of the common property, and govern the use of individually owned property to protect the common property"); *id.* § 6.7 cmt. b. Comment b states the following:

> The declaration is recorded before individual properties are sold and usually can be amended only with the consent of a supermajority of the property owners. By contrast, rules are usually adopted by the governing board, or by a simple majority of the owners who vote on the question, and are seldom recorded.

Id.

9. *See, e.g.*, David Willman, *Woman Faces Fine for Kissing Her Date*, L.A. TIMES, June 16, 1991, at A3 (telling the story of a homeowners' association that penalized a member for kissing her date in public, because the public display of affection violated an association rule).

CICs are spreading fast. From fewer than five hundred nationwide in 1964,[10] they currently number approximately 250,000[11] and are home to approximately fifty million residents.[12] Households located in gated CICs—communities surrounded by walls and fences—currently number more than seven million.[13] Of that number, four million are located within communities to which access is restricted by gates, entry codes, key cards, or security guards.[14]

The popular response to this huge growth in CICs has been mixed. In one author's view, it represents nothing less than "a collective decision [by Americans] to privatize local government"[15]—one that transfers excessive amounts of governmental authority away from elected officials and into the hands of real estate developers and inexperienced and unregulated property owners' associations.[16] CIC proponents, on the other hand, praise the communities' ability to promote the efficient use of land, maintain property values, eliminate crime, and provide services that public municipalities cannot,[17] such as pool cleaning, lawn mowing, and tennis-court maintenance.[18]

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10. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994). McKenzie attributes the rapid growth of CICs to local governments' desire to save money by "add[ing] property-tax payers at reduced public cost," since many homeowners' associations pay to provide their own street cleaning, security, and other services typically provided by local government. *Id.*

11. *See* Community Ass'ns Inst., Data on U.S. Community Associations, *at* http://www.caionline.org/about/facts.cfm.

12. *See id.* Residents of CICs tend to be older, college-educated, and relatively affluent. The "average" CIC resident is forty-eight years old and earns at least $45,000 annually. *See* Community Ass'ns Inst., Gallup Looks at Community Associations, *at* http://www.caionline.org/about/inside.cfm.

13. *See* Haya El Nasser, *Gated Communities More Popular, and Not Just for the Rich*, USA TODAY, Dec. 15, 2002, *available at* http://www.usatoday.com/news/nation/2002-12-15-gated-usat_x.htm.

14. *See id.*

15. MCKENZIE, *supra* note 10, at 180.

16. *See id.* at 184 (stating that CICs "plac[e] the fate of the [privatization] experiment in the hands of untrained, uncompensated amateurs . . . leaving the directors essentially free of public regulation").

17. *See, e.g.*, Community Assn's Inst., A Brief Explanation of Community Associations, at http://www.caionline.org/about/explanation.cfm (stating that houses in common interest communities "may even cost less than traditional housing due to more efficient use of land"); Reston Ass'n, Homepage, *at* http://www.reston.org (stating that the common interest community of Reston, VA "ensur[es] high standards of design and maintenance of commercial and residential development, directly contributes to . . . high growth in [members'] property values," and provides "excellent stewardship of Reston's *environmental* and *natural resources*" (emphasis added)); Leisure World, Homepage, *at* http://www.leisureworldarizona.com (describing Leisure World, a common interest retirement community located in Mesa, Arizona, as offering "a delicate blend of prestige and comfort, of exclusivity and security").

18. *See* Community Ass'ns Inst., A Brief Explanation of Community Associations, *at* http://www.caionline.org/about/explanation.cfm (stating that members of Community Associations

Whether CICs are good or bad, however, their soaring numbers have important implications for the public exchange of information and ideas.[19] Whereas municipal governments are subject to the requirements of the First Amendment, which prohibits general bans on door-to-door solicitation,[20] and various state constitutional free speech provisions, these constitutional rules have at most an extremely limited applicability to private CICs.[21] Thus, CICs—especially those with private streets—may be free under state and federal constitutions to prohibit door-to-door solicitation or distribution of printed material by residents as well as nonresidents.[22] Furthermore, state court decisions applying "reasonableness" review to CIC rules limiting access to CIC streets currently do not require that residents demonstrate explicit consent to such rules; it appears to be sufficient that owners of property in the CIC have constructive notice at the time they purchase their property of the board's authority to limit access to the community.[23] Also, as the Guttenberg scenario demonstrates, a CIC may attempt to make such activities the exclusive privilege of its governing association—a group that may not include all residents.[24] Such limited speech privileges

"[d]on't have direct responsibility for maintenance, so [they don't] have to clean the pool, fix the tennis nets, and . . . may not even have to mow [their own] lawn[s]").

19. *See* MCKENZIE, *supra* note 10, at 180 ("CID housing involves privatization of important public functions, with significant public consequences.").

20. *See* Martin v. City of Struthers, 319 U.S. 141 (1943).

21. *See* HYATT, *supra* note 4, at 67 ("In the absence of unusual circumstances . . . the [Federal] Constitution does not apply in common interest community situations today as the common interest community is typically constituted."). For a discussion of state constitutions' applicability to CICs, see *infra* Part II.C.

22. These so-called "private street" associations are governed by a trust arrangement that is attached to the deed for each piece of property. Under this arrangement, owners must pay assessments to maintain common grounds, including the private streets. Traffic flow and access to the streets are controlled by the property owners' association, and residents pay for street maintenance. *See* MCKENZIE, *supra* note 10, at 35. In almost all CICs, rules are promulgated and enforced by a board of directors elected by all owners. The original governing documents, however, are often crafted by developers and are unchangeable except by a supermajority of all homeowners eligible to vote. *See id.*

23. *See, e.g.*, Howorka v. Harbor Island Owners' Ass'n, Inc., 356 S.E.2d 433 (S.C. Ct. App. 1987) (upholding a CIC rule charging an entrance fee to nonresidents of the CIC on the grounds that the rule was not an unreasonable restriction on property owners' easements in the streets and that plaintiff property owner had constructive notice of the association's power so to limit his easement).

24. *See, e.g.*, Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 823–24 (Cal. Ct. App. 1982) (summarized in HYATT, *supra* note 4, at 69, describing a community in which the entity that owned and managed the common property, but did not include all residents, allowed distribution of one newspaper to residents but prohibited the distribution of any other newspaper with the exception of "dailies received under subscription"); William G. Mulligan Found. v. Brooks, 711 A.2d 961, 962 (N.J. Super. Ct. App. Div. 1998) (describing a private gated community which forbade solicitation or distribution of printed material by residents and nonresidents, but where the

may result in residents receiving skewed information, including information about political issues. The potential effects of CIC residents' insulation from the marketplace of ideas may reach far beyond the CIC gates, in the form of distorted election outcomes (as in Guttenberg).

How should the law address CICs' potential to inhibit the flow of political and other information by excluding solicitors? The *Restatement (Third) of Property: Servitudes* states that CIC rules may be invalidated when they "inhibit[] the exercise of rights that are important to the public good . . . [and] public harm results."[25] But this leaves open the question: How much does a CIC's exclusion of solicitors have to restrict residents' access to information before a court should invalidate the CIC's exclusionary rule?

This Comment proposes that states require CICs to admit solicitors when the CICs' exclusionary rules threaten to do either of two things: (1) deprive CIC residents, who have not given meaningful consent to no-solicitation rules, of their constitutionally recognized right to receive and distribute information,[26] or (2) distort electoral outcomes in the surrounding community by stifling political debate. To minimize such risks, courts should allow CICs to exclude solicitors only when 100 percent of their members have had actual notice of existing no-solicitation or gating rules or of the CIC board's authority to pass such rules, and have specifically consented to such rules or authority.[27] Even when a CIC makes such a showing, a court should decline to enforce no-solicitation rules when the party challenging such rules demonstrates that selective enforcement of those rules presents a significant risk of political distortion in the surrounding locale.

Part I of this Comment provides an overview of the different types of CICs, and of CIC boards' ability to restrict access to CIC streets and solicitation within the community. Part II outlines relevant federal constitutional and state law precedents regarding solicitor access to private property. Part III explains in more detail the proposal that states require CICs to admit solicitors in either of the situations listed above. Part IV explores when, and

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property owners' association printed and distributed its own newsletter within the community); Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 159 (N.J. Super. Ct. Ch. Div. 1996) (setting forth an example of a CIC that limited solicitation to that which came from the condominium association itself).

25. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. h (2000).

26. *See* Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (holding that the First Amendment protects the right of homeowners to decide whether or not to receive information imparted by solicitors).

27. This requirement could be met by a showing that all residents signed separate, clearly written provisions or documents explaining the existence or possibility of no-solicitation rules.

to what extent, ideologically based CICs should be entitled to exclude solicitors based on claims to a First Amendment right of expressive association.

I. TYPES OF CICS, AND HOMEOWNERS' ASSOCIATIONS' ABILITY TO RESTRICT ACCESS AND SOLICITATION

A. Types of CICs

The term CIC encompasses a wide variety of communal ownership arrangements—all of which combine individual ownership of units with shared ownership and management of common property. Virtually all CICs impose on unit owners an obligation to pay maintenance dues for the upkeep of communal property.[28] CICs can serve residential, commercial, industrial, resort, or other purposes, and can range from small condominium complexes to large, so-called "master-planned communities" the size of entire towns.[29] They can consist of adjoining or free-standing units, arranged vertically or horizontally, and managed either by corporate or non-corporate entities.[30] Common property is managed by a governing board of the homeowners' association, in which all homeowners normally gain automatic membership upon buying their homes.[31]

The labels used to describe different types of residential CICs are somewhat flexible. Indeed, depending on the state, different labels may even be used to refer to the same community.[32] However, it is useful to differentiate among four basic forms of residential CICs: condominiums,

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28. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.1 cmt. a ("Common-interest communities are usually created by a declaration of servitudes that, at a minimum, imposes use restrictions and assessment obligations and provides for creation of an association."); *see also* Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938) (holding that covenants burdening home-owners in a property owners' association with the obligation to pay dues to maintain common space "touches and concerns" the land, so a corporate property owners' association has the right and ability to enforce the servitude against noncompliant subsequent purchasers).

29. *See* HYATT, *supra* note 4, at 8.

30. *See id.* at 13–28; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. c ("Many common-interest-community associations are incorporated as nonprofit corporations, but unincorporated associations are also fairly common.").

31. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7(1) (stating that CICs normally have "implied power to adopt reasonable rules to govern the use of the common property"); *Id.* § 6.7 cmt. b ("Statutes and the governing documents of common-interest communities commonly grant rulemaking authority to the governing board of an association in furtherance of the association's power and responsibility to manage the common property.").

32. *See* HYATT, *supra* note 4, at 13.

cooperatives, "planned unit developments" (PUDs), and "master-planned communities" (MPCs).[33] Keep in mind that the examples of CICs defined here do not represent an exhaustive list, but rather a description of some of the most prevalent types of residential CICs.

1. Condominiums

Condominiums first became popular in the United States in the 1960s, a trend that scholars have attributed to a number of factors, including increased affluence of apartment renters, increased availability of mortgage insurance, and tax deductibility of mortgage interest for homeowners.[34] In a condominium, owners hold title to units separately in fee simple, and each owner secures mortgage financing and pays real estate tax separately on her unit.[35] Common areas such as halls, the underlying land, and exterior walls, however, are owned by all unit owners as tenants in common.[36]

Usually, upon purchasing a unit, each owner automatically becomes a member of the condominium owners' association—the body charged with making and enforcing rules for use of the common property,[37] keeping up the common areas, and determining the amount of the fee to be assessed against each unit owner for maintenance.[38] The association is created, and the condominium's governing servitudes are set forth, in a "Declaration of Condominium," which is recorded in the land records and is binding on subsequent unit purchasers.[39] Condominiums are regulated by statute in each state.[40]

33. *See id.* at 12.

34. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 925–26 (5th ed. 2002); NATELSON, *supra* note 7, at 29–31. As these authors explain, scholars disagree on which factors were most responsible for the condominium boom.

35. *See* DUKEMINIER & KRIER, *supra* note 34, at 926.

36. *See id.*

37. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 (2000) (setting forth CICs' power to "adopt rules to govern the use of the common property, and govern the use of individually owned property to protect the common property"). As a practical matter, this rulemaking authority is exercised either by a board of the CIC homeowners' association or, more rarely, by direct majority vote of all homeowners. *See id.* cmt. b ("[R]ules are usually adopted by the governing board, or by a simple majority of the owners who vote on the question, and are seldom recorded.").

38. *See* DUKEMINIER & KRIER, *supra* note 34, at 920; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (stating that the declarations of most CICs "provide[ ] automatic and mandatory membership in an association of property owners").

39. HYATT, *supra* note 4, at 24; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2(5) (defining "[d]eclaration," in the context of CICs, as "the recorded document or documents containing the servitudes that create and govern the common-interest community").

40. HYATT, *supra* note 4, at 11.

2. Cooperatives

Cooperatives, prevalent in New York City, place ownership in the hands of a corporation of which unit owners are shareholders.[41] The corporation holds title to the property, and its board of directors oversees the maintenance of that property.[42] Residents each receive long-term leases on their units, which they may renew.[43] Each unit owner's interest in the corporation gives her the right to exclusive possession of her unit.[44]

3. Planned-Unit Developments and Master-Planned Communities

PUDs and MPCs encompass large areas of land, including housing and open space, and require complex zoning measures and developer planning.[45] Known in the 1970s as "new towns," MPCs became popular in the 1980s and 1990s.[46] MPCs typically are larger than PUDs; whereas the latter usually comprise several hundred acres, the former may be "several times that size."[47] Moreover, MPCs commonly include at least two different types of CIC housing—for instance, single-family detached homes and condominiums.[48]

PUDs are "zoning device[s]."[49] From a developer's point of view, PUDs are attractive because they allow the developer to concentrate residential units in a higher density than would otherwise be allowed.[50] In a PUD, the developer may set aside an open, undeveloped area (such as a flood plain), and transfer to other areas units that would otherwise be built on the open land.[51] The density that would be allowed on the open area can be aggregated with the density of the developed area, and open space can be preserved.[52]

MPCs, by contrast, are more than zoning devices; they are actual towns. MPCs often entail extensive privatization of land and services that local governments would otherwise own and provide. In some of these communities, streets and sewers are private, and residents voluntarily impose

41. *See* DUKEMINIER & KRIER, *supra* note 34, at 942.
42. *See id.*
43. *See id.*
44. *See* HYATT, *supra* note 4, at 14.
45. *See id.* at 14–19.
46. *See id.* at 12, 18.
47. *See id.* at 19.
48. *See id.*
49. *See id.* at 14.
50. *See id.*
51. *See id.*
52. *See id.*

upon themselves special taxes, gun-control rules, and environmental regulations.[53] In some, private shopping areas and parks also are part of the package.[54] Others, such as Minnesota's Wedgewood Homeowners Association, even provide private schools.[55] The affluent, 96,000-person MPC of Columbia, Maryland, built in the 1960s with private financing by the Rouse company, boasts shopping malls, restaurants, retail stores, industrial firms, an "Interfaith Center," healthcare facilities, and schools.[56]

MPCs and PUDs are governed by homeowners' associations—entities that own and manage the common property in the community.[57] Indeed, in MPCs there may be a complex network of associations within associations; since MPCs usually contain more than one type of CIC housing, condominium associations and homeowners' associations may coexist within the same MPC, or within larger "umbrella" associations.[58] Homeowners' associations usually are incorporated,[59] and most provide that each homeowner automatically becomes a member upon purchasing a unit in the development.[60] However, some grant membership to residents only upon the fulfillment of some condition, such as the payment of an initiation fee and/or application and acceptance.[61] In such CICs it is possible that, at any given time, substantial numbers of residents may not be members of the governing homeowners' association.[62]

Like condominium associations, homeowners' associations are created by the CIC's governing documents. In a homeowners' association, these documents are most commonly called Declarations of Conditions, Covenants, and Restrictions (CC&Rs): complex documents setting forth the

53. *See* Timothy Egan, *The Serene Fortress: Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, § 1, at 1.

54. *See* Master Planned Communities, *at* http://www.masterplannedcoms.com.

55. *See* Wedgewood Homeowners Ass'n, Homepage, *at* http://www.wedgewood.com.

56. *See* Columbia, Maryland, Columbia: Its History and Vision, *at* http://www.columbia-md.com/columbiahistory.html; Columbia, Maryland, Retail Life, *at* http://www.columbia-md.com/colretaillife.html; Columbia, Maryland, 2003 Community Profile: Summary of Development, *at* http://www.columbia-md.com/colcommunity.html.

57. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. b. (2000) ("The common property may be owned by community members as tenants in common or it may be owned by the association."); *id.* § 6.2(3) (defining "[a]ssociation," in the context of CICs, as "an organization created to manage the property or affairs of a common-interest community").

58. *See* HYATT, *supra* note 4, at 21–22.

59. *See id.* at 23.

60. *See id.* at 19, 30.

61. *See, e.g.*, Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 818 (Cal. Ct. App. 1982) (describing Leisure World—a gated, private-street CIC in California, in which membership in the managing homeowners' association which owns and manages the streets and common property is not automatic).

62. *See id.* at 821.

layout of the development, owners' rights and responsibilities, and the association's duties and powers.[63] These CC&Rs, which impose duties on property owners to pay maintenance fees and abide by rules, are incorporated into each deed and thus "run with the land."[64] The association's powers are executed through an elected board of directors, whose power is partially cabined by a requirement of homeowner approval. While the boards do not need homeowners' consent to pass rules governing use of common areas, they must obtain such consent in order to enact use restrictions and amendments to the CC&R articles.[65]

4. Summary

As the above discussion shows, CICs exist in a variety of sizes and forms, and can serve a variety of purposes. The law governing these communal property arrangements is complex, and attempting to classify a given CIC can be a difficult task. The above descriptions provide only the most cursory overview of CICs' many forms. However, for the purposes of this Comment, it is not necessary to delve deeply into the intricacies of CIC law. Rather, this Comment is concerned only with residential CICs whose governing associations forbid solicitation or distribution of literature by residents or outsiders. For the rest of this Comment, therefore, the term "CIC" will be used to refer to CICs with residents-only access or in which solicitation is forbidden.

B. Homeowners' Associations' Ability to Restrict Access and Solicitation

Homeowners' associations may pass rules gating the community or restricting solicitation pursuant to their authority to pass reasonable rules governing the use of common property in the CIC.[66] "Gating" rules, which limit access to the CIC's streets to CIC residents and their guests, are valid

63. *See* HYATT, *supra* note 4, at 24.

64. *See* Neponsit Prop. Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797 (N.Y. 1938) (holding that covenants requiring homeowners to pay fees for the maintenance of commonly owned areas run with the land, and are "inseparably attached to the land which enjoys the benefit" of such maintenance); Columbia Ass'n, Villages and Covenants, *at* http://www.columbiaassociation.com (explaining that, in the CIC of Columbia, Maryland, the covenants binding homeowners are recorded in the county records and, "[a]t the time that they were filed . . . became a legal addition to each subsequent deed relating to property").

65. *See* HYATT, *supra* note 4, at 49–50, 81–82.

66. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 ("[T]he holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.").

so long as the gating does not unreasonably interfere with homeowners' easements in the common property.[67] As announced in the early case of *Drabinsky v. Sea Gate Ass'n*,[68] whether gating rules unreasonably interfere with residents' easements depends largely on whether residents can be said to have been on actual or constructive notice at the time they bought their units that their easements would be subject to access limitations by the community's governing association.[69]

The question of when a CIC purchaser should be considered to have had notice of a gating rule depends on the circumstances existing at the time of purchase.[70] In *Drabinsky*, the court held that the purchaser of a home in a private community, enclosed by an obvious gate with guard stations, purchased with notice that his easement in the CIC's commonly owned streets was subject to regulation. The gate, the court reasoned, alerted purchasers to the fact that the association, not the city, owned the CIC's streets and reserved the right to maintain those streets in a manner appropriate to a private gated community.[71] Since the gating rule merely required that the streets be used "in the manner that a street in such a private residential colony would be used," the court concluded that the owner's easement was limited by the right of the homeowners' association to gate the common property.[72]

Even when no gate is visible to residents at the time of purchase, however,[73] courts may in some circumstances still uphold association rules restricting access to CIC streets. For instance, the notice requirement may be met if the purchaser had "constructive notice," of the CIC board's power to gate the community—such as from a deed recorded by the county stating that a CIC owns common streets and has exclusive power to manage them,

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67. *See* Drabinsky v. Sea Gate Ass'n, 146 N.E. 614 (N.Y. 1925) (holding that homeowners' association that held title to streets in a subdivision had a right to make a rule restricting access to residents and "their families, guests and servants and by tradesmen with whom they may desire to do business" because the homeowners had bought their homes subject to reasonable access restrictions that the association might develop).

68. *Id.*

69. *Id.* at 616; *see also* Howorka v. Harbor Island Owners' Ass'n, Inc., 356 S.E.2d 433, 436 (S.C. Ct. App. 1987).

70. *See* Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 66–67 (1990).

71. *Drabinsky*, 146 N.E. at 616 ("It must . . . have been clear to [the plaintiff purchaser] that his grantor did not intend to grant him a right to use the street, except in the manner that a street in such a private residential colony would be used.").

72. *Id.*

73. Betsy Schiffman, *Most Expensive Gated Communities in America*, FORBES.COM, (stating that gated communities are "for the most part" . . . created by real estate developers"), *at* http://www.forbes.com/maserati/cx_bs_1114home.html.

subject to residents' easements.[74] In the case of *Howorka v. Harbor Island Owners' Ass'n*,[75] the court relied on such a recorded declaration to charge the purchaser of property accessible only through CIC-owned streets with constructive notice of the CIC's authority to limit access to those streets and charge reasonable entrance fees for nonresidents. *Howorka* establishes that where a CIC's declaration reserves power in the CIC to manage the common property, purchasers of lots in the CIC are likely to be charged with notice of the CIC's authority to limit access to the CIC.[76]

Short of gating themselves, CIC boards may use their power to manage the commonly owned property to prohibit solicitation or distribution of literature within their boundaries. For instance, the rules and regulations of Panther Valley, a 4000-person CIC in New Jersey, prohibit "soliciting of any kind."[77] No-solicitation rules may appear in either of two places: the master deed of the community, which is usually recorded by the developer before units are sold, or in subsequent rules adopted by the governing board of the homeowners' association or by majority vote of its members.[78] While many states give presumptive validity to rules embodied in the original declaration, courts typically analyze these subsequently adopted rules under the "reasonableness" standard—a standard discussed in more detail in Part III.A.[79]

The next part of this Comment examines the extent to which federal and state law might, and should, be applied to limit CICs' ability to restrict solicitation through gating and no-solicitation rules.

II. STATE AND FEDERAL LAW REGARDING SPEAKERS' RIGHTS ON PRIVATE PROPERTY

Courts wishing to grant solicitors access to CICs might do so on any of at least three grounds: the First Amendment, state constitutional free speech provisions, and a more stringent standard of scrutiny for CIC rules

74. *See Howorka*, 356 S.E.2d at 436.

75. *Id.*

76. Scholars have questioned whether constructive notice can truly be said to constitute homeowner consent to association-passed rules. *See, e.g.*, Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 892–93 (1988).

77. *See* William G. Mulligan Found. v. Brooks, 711 A.2d 961, 962 (N.J. Super. Ct. App. Div. 1998).

78. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275 (Cal. 1994) (distinguishing between these two types of rules).

79. *See, e.g., id.*; Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981); *see also infra* Part III.A.

that exclude solicitors.[80] As explained below, however, Supreme Court precedent largely forecloses the first option.[81] Although some states have exercised the second option, using their own constitutions to grant speakers access to certain types of private property, these precedents probably are not robust enough to support speaker access to CICs. Thus, as will be explained, courts should use the third option—greater scrutiny of CIC no-solicitation rules—to ensure that CIC residents do not unknowingly waive the right to receive and distribute information.[82]

A. Solicitors and the First Amendment

The issue of speaker access to private property is not a new one. In 1946 the U.S. Supreme Court decided the case of *Marsh v. Alabama*,[83] which held that solicitors had a First Amendment right to solicit in company towns. The case arose when Grace Marsh, a Jehovah's Witness, was convicted of trespass for distributing religious literature on the streets of Chickasaw, Alabama, a private town owned by the Gulf Shipbuilding Corporation. Apart from its private ownership, the Court stated, Chickasaw was identical to "any other American town."[84] In overturning Marsh's trespass conviction, the Court

80. In addition to these options available to courts, state legislatures could grant access to solicitors by using their general police power to limit private property rights in the public interest. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); ERNST FREUND, THE POLICE POWER § 511 (1904). I also would like to thank Professor Eugene Volokh for initially pointing out to me the First Amendment, state constitutional free speech provisions, and police power alternatives.

81. It has been suggested that, in addition to the "functional equivalent of a municipality" standard discussed *infra* Part III.A, the First Amendment could invalidate CIC no-solicitation rules under the doctrine of *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the U.S. Supreme Court held that judicial enforcement of a racially discriminatory private covenant was state action that violated the Fourteenth Amendment's Equal Protection Clause. Under this argument, the First Amendment would prohibit judicial enforcement of a CIC no-solicitation rule that would itself violate of the First Amendment if promulgated by a governmental entity. *See* Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 948 (1999). However, since courts generally have not expanded *Shelley v. Kraemer* beyond the context of racially discriminatory covenants, this theory does not appear likely to be a major avenue for granting First Amendment rights to solicitors in CICs. *See id.*

82. This argument, calling for stricter judicial scrutiny of CIC no-solicitation rules, can be seen as a specific application of the argument that courts should more strictly review CIC covenants and rules in general. At least one scholar has made such a broad argument. *See* David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 793 (1995) (arguing that courts should subject CIC rules to stricter "judicial review" so as "to limit the negative externalities that stem from the exercise of the association members' right to freedom of association").

83. 326 U.S. 501 (1946).

84. *Id.* at 502. Open to the public, Chickasaw included "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'" that included stores and a post

held that Gulf's property holdings were so extensive that Gulf's ownership rights had to yield to the public interest in keeping open the channels of communication. Under the First Amendment, Alabama could not use its trespass law to punish Marsh for soliciting there.[85]

The *Marsh* decision rested on several theories, each of which emphasized Gulf's obligations as the owner of land on which other people lived and conducted their daily activities. First, the Court referenced Gulf's position vis-à-vis Chickasaw's residents. By encouraging people to live on and use its property, the Court stated, Gulf had incurred an obligation not to infringe those people's constitutional rights.[86] These people, "just as residents of municipalities," had a right to receive information that could not be denied them by the owner of the land on which they lived.[87]

Second, the Court suggested that Gulf also had a duty to comply with the public's reasonable expectations as to the existence of public fora. Gulf had opened up the property to general public use "for [its] advantage."[88] Thus, Gulf's right to control what went on on its premises had to yield to "the statutory and constitutional rights" of nonresident members of the public who were just "passing through."[89] Under this reasoning, it seems, Gulf could not exclude solicitors like Marsh unless it excluded the public on a regular basis.

Last, the Court reasoned, Gulf could not exclude the solicitors because its town served a "public function."[90] That is, since Chickasaw's business block offered as many amenities as any municipal block, Gulf essentially had taken the place of the government. As government, it was "subject to state regulation," and could not restrict speech in what essentially was a traditional public forum.[91] Thus, *Marsh* established that when a company town took on all the attributes of a municipality, performed municipal functions, and

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office. *Id.* at 502–04. It even, at one time, included tennis courts, a golf course, and various churches. *See* City of Chickasaw, History of Chickasaw pt. 1–3, *at* http://www.ci.chickasaw.al.us/content/history/. This web site does not specify whether the golf course, tennis court, and churches existed in Chickasaw at the time the Gulf Shipbuilding Corporation owned the town. Gulf bought the town in 1940. *Id.* pt. 2. Gulf employees rented houses there, and lived and shopped in the town. *Id.*; *Marsh*, 326 U.S. at 502–03.

85. *Marsh*, 326 U.S. at 507–08.

86. *Id.* at 506 ("The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.").

87. *Id.* at 508–09.

88. *Id.* at 506.

89. *Id.* at 508.

90. *Id.* at 506.

91. *Id.*

opened itself to the public, the First Amendment's state action limitation no longer shielded the company town owner from the requirements of that constitutional rule.

B. The Limits of First Amendment Protection

1. *Marsh*: Does it Apply?

At first glance, *Marsh*'s holding might seem to have little direct application in present-day America, where the company town has become a mere relic of industrial history.[92] On the other hand, some might argue that the "company town" lives on in the form of the modern master-planned community. Although the new MPCs are controlled by homeowners' associations, rather than companies like the Gulf Shipbuilding corporation that invite residents onto their property for profit, many large MPCs do resemble entire towns, at least in some respects.[93] They may provide sewage and water services, private schools and streets, and commercial shopping areas, and may routinely allow the public to access their property.[94] It seems logical, therefore, to argue that such CICs could fall within *Marsh*'s "functional equivalent of a municipality" theory and be subject to the First Amendment. Under *Marsh*, these CICs then would be required to allow solicitation to the same degree as a public municipality.

There are, however, several problems with this argument. First, there are certain fundamental differences between CICs—even extremely large ones—and the company towns of old, which suggests that the language of *Marsh* might not apply to the former. That is, CICs do not invite people to live in them for the governing body's "advantage" in the same way that the Gulf corporation invited Chickasaw residents.[95] While modern CICs do exist to improve property values, their goal is not to use residents to generate profit for the governing body in the same way that Chickasaw provided homes to workers in order to promote Gulf's economic interests.

92. *See* HYATT, *supra* note 4, at 65 ("[T]he company towns prevalent in the first half of the twentieth century no longer exist (for the most part).").

93. *See, e.g.*, Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 843 (Cal. Ct. App. 1982) (drawing on the reasoning of *Marsh* to hold, under the California state constitution's free speech and press provisions, that a gated CIC's governing association had an obligation to allow equal access distribution of a giveaway newspaper within the community where the association already allowed one newspaper so to distribute).

94. *See* HYATT, *supra* note 4, at 65–66.

95. *See id.* at 65 ("[T]he totality of the work/life experience for the employees and their families in a company town is not similarly present in today's suburban common interest communities.").

Thus, the potential for coercion and control of residents is inherently much less grave in the CIC context than in the company town context. This factor would likely be significant to any *Marsh* analysis.

Moreover, in almost any CIC case, specific factual differences will likely prevent *Marsh* from having direct applicability. Although many CICs do offer water and sewage services and schools, courts have shown reluctance to apply *Marsh* if a residential community or other entity contains anything less than all the attributes of a municipal town.[96] Without a showing of substantial commercial areas, schools, hospitals, police and law enforcement entities, and perhaps other attributes, CICs are not likely to be found to fit within the demands of *Marsh*. In other words, the bar has been set very high.[97]

The case of *Illinois Migrant Council v. Campbell Soup Co.*[98] illustrates this point. In *Campbell*, the Seventh Circuit applied the *Marsh* doctrine to a company farm that included residential areas for workers.[99] The farm in question, known as Prince Crossing, belonged to the Campbell's Soup Company and consisted of 201 acres in DuPage County, Illinois.[100] Approximately eighty-eight of the farm's 140 employees resided on-site, while others lived in West Chicago (3/4 mile away), or elsewhere.[101] Employees were not required to live on-site.[102]

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96. Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 376 F. Supp. 357 (D. Del. 1974) (rejecting union's claim of a First and Fourteenth Amendment right to enter a company owned labor camp to solicit membership, where the camp was not open to the general public and contained no business facilities); Fairfield Commons Condo. Ass'n v. Stasa, 506 N.E.2d 237, 247 (Ohio Ct. App. 1985) (upholding permanent injunction of picketing in front of a condominium that had been rented to an abortion clinic, where trial court could have found the property at issue to contain fewer indicia of a public municipality than a shopping mall); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that a homeowners' association, which provided sewer service, private streets, and private maintenance, was a private organization not subject to the First Amendment under *Marsh* because the association did not include schools, libraries, or "other public functions"); *see also* Laura T. Rahe, *The Right to Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW. 521, 545 (2002) ("Courts do not tend to find homeowners' associations state actors based on similarity to *Marsh*'s company town.").

97. *See, e.g.*, *Laguna Publ'g Co.*, 182 Cal. Rptr. at 824–25 (holding that gated retirement community "Leisure World" did not constitute a company town under *Marsh* because it contained "no retail businesses or commercial service establishments," and was merely "a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred").

98. 574 F.2d 374 (7th Cir. 1978).

99. *Id.* at 378.

100. *Id.* at 377–78.

101. *Id.* at 378.

102. *Id.* Prince Crossing provided its residents with basic food and shelter. The residential area consisted of four structures containing sixteen apartments, four dormitory structures that housed

When a nonprofit corporation that provided services to migrant farm workers was denied access to the farm's housing area, the Seventh Circuit declined to hold, under *Marsh*, that the farm had a First Amendment obligation to allow the corporation's workers onto its property. The court reasoned that, despite Prince Crossing's sewage, garbage collection, residential, and other facilities, it did not merit company-town status. Specifically, the court emphasized that the farm's business district fell far short of that in *Marsh* because it lacked any "post office, school, or medical care facility."[103] The little store, to the court, was inadequate to provide residents with basic necessities, which they typically drove into town to buy.[104] Also, the court pointed out that the farm was dependent on surrounding cities for basic fire protection and police services: Other than enforcement of Campbell's disciplinary code, police duties were performed by the DuPage County County Sheriff's Office.[105] Campbell's had "no authority . . . to promulgate civil or criminal codes, to arrest individuals, or to impose any civil or criminal punishment."[106] On the whole, because Prince Crossing lacked a true business district and did not provide its own municipal services, the court held that Prince Crossing did not constitute a company town within the holding of *Marsh*.[107]

Campbell shows that, in order to make out a First Amendment claim under *Marsh*, plaintiffs seeking access to CICs bear quite a heavy burden. The Seventh Circuit's holding suggests that plaintiffs would have to show that the CIC was basically self-sufficient: Residents apparently would have to buy most of their necessities within the CIC, and the CIC would have to provide more than just water, sewage, and garbage disposal. Indeed, if Campbell's enforcement of its disciplinary code within Prince Crossing can be analogized to homeowners' association enforcement of CIC rules, *Campbell* seems to suggest that this is not enough to constitute company town–style governance.

While it is possible that other courts could set the *Marsh* standard lower than the Seventh Circuit did in *Campbell*, most CICs do not provide enough services to merit company-town treatment under *Marsh* as *Campbell*

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employees without families, and a kitchen and dining area. *Id.* The farm provided water, sewer, and garbage collection services, set speed limits within the farm, and provided routine police functions. *Id.* The farm also contained a small store that was open for a few hours each week and sold surplus Campbells' goods at a discount. *Id.*

103. *Id.*
104. *Id.*
105. *Id.* at 377.
106. *Id.*
107. *Id.* at 377–78.

interprets it. Moreover, the few cases to have addressed the *Marsh* issue have not found company-town status.[108] Only the largest MPCs, such as Columbia, Maryland, would be likely to meet the *Marsh* threshold, because only these CICs provide the extensive retail districts, hospitals, and other services the *Campbell* court appeared to require. Even in the case of CICs like Columbia, however, it is unclear whether a court would expand *Marsh* beyond the employer-landlord context to the context of a CIC, in which residents do not work for the governing entity. Indeed, as the next part explains, courts have proven quite reluctant to expand *Marsh*'s holding in the decades since that decision was handed down.

2. Life After *Marsh*: The Rollback of First Amendment Protection

Although, as shown above, direct analogies to *Marsh* appear quite difficult to make for most CICs, one might argue that the *Marsh* doctrine should be expanded beyond the company-town context to include private property with fewer indicia of a municipality. Indeed, for a few decades after *Marsh* was decided, it appeared that the Supreme Court might do just that. From the 1960s through the early 1980s, the Court drew on *Marsh* to hold that speakers had a First Amendment right to solicit in privately owned shopping malls, even over owners' objections. As explained below, however, this First Amendment right ultimately proved quite limited.

a. *Amalgamated Food Employees v. Logan Valley Plaza*

In 1968, the U.S. Supreme Court decided the case of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[109] The facts of the case centered on events in the parking lot of the Weis grocery store, which was located inside the Logan Valley Shopping Mall near Altoona, Pennsylvania. In 1965, Weis opened for business with a completely nonunion work force. When unionized employees of competitor stores began picketing in Weis' parking lot, Weis and Logan sued to enjoin them. Rejecting the picketers' First Amendment claim, the state Court of Common Pleas relegated the picketers to the public sidewalks. The Pennsylvania Supreme Court affirmed the injunction.[110]

The U.S. Supreme Court reversed, holding that the First Amendment prohibited the state from applying its trespass law to the picketers' activities.

108. *See* sources cited *supra* note 96.
109. 391 U.S. 308 (1968).
110. *Id.* at 313.

The Court stated that the mall was the "functional equivalent" of the Chickasaw business block in *Marsh*. Specifically, the Court pointed out that the mall, like Chickasaw's business block, was open and freely accessible to the public, contained stores and was adjacent to public sidewalks, and had a perimeter of about a mile.[111]

Stating that malls cannot exclude speakers who are conducting activities that are consistent with the property's normal use, the Court held that the mall was not entitled to an injunction. Since the picketers were speaking to Weis customers about the operation of the market, the Court said, their speech was related to the mall's purposes, and thus was protected by the First Amendment.[112] By forcing the picketers to stand in a place where their signs could not easily be read by Weis customers, and where they potentially were in danger from passing traffic, the Court held, the injunction significantly infringed on the picketers' First Amendment rights.[113] Thus, the injunction was unconstitutional.[114] The Court specifically reserved the question of whether the picketers would be protected if they were speaking about subjects not related to activities at the mall.[115]

b. *Lloyd Corp. v. Tanner*

This victory for solicitors was short-lived. Four years later, the Court narrowly limited *Logan Valley Plaza*'s holding in the case of *Lloyd Corp. v. Tanner*.[116] The facts of *Lloyd* arose in a mall near Portland, Oregon, which had a strict policy against handbilling. According to the mall owners, the policy was intended to prevent litter, disorder, and annoyance to customers, and to preserve the mall's atmosphere.[117]

Trouble ensued when Vietnam War draft protesters began distributing handbills in the mall. After being told to leave by security guards, and

111. *Id.* at 317–18. Interestingly, the Court's majority decision made little of what would seem to be a key distinction between *Marsh* and *Logan Valley Plaza*: Whereas the landowner in *Marsh* had owned title to Chickasaw's surrounding residential areas, Logan Valley did not own title to any such areas. *Id.* at 318–19. Chickasaw was a whole village, Logan Valley merely a mall. The Court dismissed this distinction, however. Because the mall was functionally equivalent to a public business block, the Court stated, the First Amendment prohibited Pennsylvania from allowing the mall's owner to use state trespass law to exclude speakers who were acting on the property consistently with its normal use. *Id.* at 319–20.

112. *Id.* at 319–23.

113. *Id.* at 323–25.

114. *Id.* at 325.

115. *Id.* at 320 n.9.

116. 407 U.S. 551 (1972).

117. *Id.* at 555–56.

doing so to avoid arrest, the handbillers sued in district court for declaratory and injunctive relief. The district court granted both, holding that the First and Fourteenth Amendments prevented the mall from using state trespass law to deny access to the handbillers.[118] On the basis of the *Marsh* case and *Logan Valley Plaza*, the Ninth Circuit Court of Appeals affirmed.[119]

The Supreme Court reversed, distinguishing the situation from *Logan Valley Plaza*. First, unlike the union's picketing of the Weis store in that case, the war protesters' speech in *Lloyd* did not relate to activities at the mall and was not directed specifically at mall customers. Second, the Court emphasized structural differences between the two malls: Whereas the picketers in *Logan Valley Plaza* could not easily communicate their messages from public sidewalks, the numerous sidewalks around the mall in *Lloyd* made it less of a burden on the protesters' speech to have to distribute fliers from those public areas.

Finally, the Court rejected the idea that the mall in *Lloyd* had assumed a public function. Seemingly contradicting its reasoning in *Logan Valley Plaza*, the Court stated that the mall's size and openness to the public did not make it the equivalent of the *Marsh* business block. Unlike the Gulf company in *Marsh*, the Court said, the mall in *Lloyd* had not taken on all the attributes of a city or the "full spectrum of municipal power."[120] Nor did its openness to the public constitute a public dedication; the mall had only invited the public onto its premises to shop—essentially a private purpose. The Court closed by emphasizing the mall owner's Fifth Amendment right to control the use of its property.[121] The district court's injunction against the mall was reversed.[122]

c. *Hudgens v. NLRB*

Four years after *Lloyd*, the Court explicitly overruled *Logan Valley Plaza* in the case of *Hudgens v. NRLB*.[123] In doing so, the Court held that a mall owner could prohibit even speech that was related to the mall's operation, because the owner of the shopping center was not a state actor. In that case, the owner of a suburban Atlanta mall prevented peaceful picketing by employees of a shoe store located

118. *Id.* at 556.
119. *Id.* at 556–57.
120. *Id.* at 569.
121. *Id.* at 569–70.
122. *Id.* at 570.
123. 424 U.S. 507 (1976).

within the mall. The employees' union filed an unfair labor practice charge with the NLRB, which ruled that the employees' activities were protected by the First Amendment under *Logan Valley Plaza* and *Lloyd*.[124] The Fifth Circuit Court of Appeals affirmed.[125]

On appeal, the Supreme Court declared that *Lloyd* had not just limited *Logan Valley Plaza*—it had completely overruled it. The Court emphasized that *Lloyd* had rejected *Logan Valley Plaza*'s holding that malls were the functional equivalent of the Chickasaw business block.[126] If the Court in *Lloyd* had considered the mall to be subject to the First Amendment, the Court pointed out, then the content of the war protesters' speech should not have mattered; under First Amendment doctrine, governmental regulation is subject to strict scrutiny whenever it makes legal consequences hinge on the content of speech.[127] Since the *Lloyd* Court had distinguished between speech that was related to the mall's activities and speech that was not, the *Lloyd* Court must not have considered the mall to be subject to the First Amendment. Thus, the Court concluded, the First Amendment had no application to shopping malls whatsoever.[128]

Hudgens thus effectively limited the holding of *Marsh* to its facts. It appears from the Court's decision that any private property owner who performs less than all of the public functions performed by a full-fledged company town is not subject to the First Amendment. Thus, those who would speak on privately owned property, short of a company town, must now look to laws other than the Federal Constitution.

C. State Constitutional Right to Free Speech on Private Property

In 1980, the U.S. Supreme Court's decision in the case of *PruneYard Shopping Center v. Robins*[129] opened up another potential source of speech rights on private property: state constitutions. Specifically, *PruneYard* held that California was free to interpret its own constitution to grant broader speech rights to individuals than they enjoyed under the federal Consti-

124. *Id.* at 509–11.
125. *Id.* at 511–12.
126. *Id.* at 518–19.
127. *Id.* at 520–21.
128. *Id.* at 521.
129. 447 U.S. 74 (1980).

tution.[130] For California to grant speakers a state constitutional right to gather signatures peacefully at a shopping mall, the Court held, violated neither the mall owner's Fifth Amendment property rights nor his First Amendment speech rights.[131] Thus, the U.S. Supreme Court upheld a California Supreme Court order compelling a mall owner to allow students to solicit on his property.[132]

Speech in California shopping malls, it appeared, was safe for the foreseeable future. However, one key question remained unanswered by the California court's holding: Did the California Constitution prohibit the mall owner from excluding the students because the mall was a state actor—the functional equivalent of the business block? Or did the California Constitution regulate the mall as a private entity? Indeed, the California court completely failed to specify whether California's constitutional free speech provision contained a state action limitation.[133]

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130. *Id.* at 81 ("It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.").

131. *Id.* at 83, 87–88. The facts of the case arose at the PruneYard shopping center, where one Saturday a group of students set up a small card table to solicit support for a petition expressing opposition to a United Nations resolution against Zionism. The California Supreme Court held that the free speech provisions of the California Constitution (CAL. CONST. art. I, §§ 2, 3) "protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979). The student group was engaging in such a "reasonable" exercise, the California court held, because the students were few in number, were behaving peacefully, and were subject to reasonable regulations by the mall owner. *Id.* at 347–48.

The U.S. Supreme Court upheld the decision, holding that the California Supreme Court's requirement that the mall accommodate the students did not amount to either a Fifth Amendment taking or an infringement on the mall owner's First Amendment right not to endorse the students' point of view. 447 U.S. at 83, 87–88. There was no taking, the Court held, because the mall was vast, the solicitors confined their activities to the common areas, and the California Supreme Court allowed the mall owner to subject the solicitors to reasonable time, place, and manner restrictions to "minimize any interference with [the mall's] commercial functions." *Id.* at 83. Therefore, there was no "unreasonable impair[ment]" of the "value or use" of the mall property. *Id.*

The U.S. Supreme Court similarly dismissed the mall owner's claim that the California court's order violated his First Amendment right not to use his property to express the solicitors' message. *Id.* at 87–88. The Court reasoned that, since the mall owner's property was not merely personal property but a large business complex, it was unlikely that the public would attribute any solicitor's message to the mall owner himself. *Id.* Secondly, the Court reasoned, the fact that solicitors' messages were not prescribed by the state itself eliminated the danger of state discrimination in favor of any particular message. *Id.* at 88. Furthermore, the mall owner was always free to post a sign indicating his disagreement with solicitors' messages. *Id.* The mall owner therefore had no First Amendment right to exclude solicitors from his mall.

132. 447 U.S. at 88.

133. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 801 (Cal. 2001) ("*Robins* [*v. PruneYard*] did not address the threshold issue of whether California's free speech clause protects against only state action or also against private conduct.").

The California Supreme Court recently answered this question in the case of *Golden Gateway Center v. Golden Gateway Tenants Ass'n.*[134] The court held that California's constitution only bars state actors from prohibiting speech on their property.[135] For purposes of California's constitution, the court stated, a private property owner becomes the equivalent of a state actor only when it makes its property open to, and freely accessible by, the public.[136] Under *Golden Gateway*, then, the California Supreme Court's decision in *PruneYard* must be read as regulating the mall as a state actor. The decision cannot be read as requiring private property owners generally to admit solicitors.

After *PruneYard*, a few states began to interpret their constitutions to grant solicitors broader rights on private property than the First Amendment provided. However, many more states declined *PruneYard*'s invitation, holding that their constitutional free speech provisions remained limited to state actors and that malls were not such actors.[137] Oregon, Massachusetts, Colorado, Washington, and New Jersey all joined California in requiring mall owners to open their property to certain types of expressive conduct.[138] Of

134. 29 P.3d 797.

135. *Id.* at 808–09.

136. *Id.* at 810.

137. *See, e.g.*, Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1989) (declining to find any state constitutional right to free speech in a privately owned shopping center); *Golden Gateway Ctr.*, 29 P.3d at 801, 802 n.5 (citing state cases rejecting *PruneYard*'s invitation to grant free speech rights on privately owned shopping malls under state constitutional provisions); Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984); Cahill v. Cobb Place Assocs., 519 S.E.2d 449, 450–51 (Ga. 1999); Woodland v. Mich. Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co., 515 A.2d 1331, 1338 (Pa. 1986) (holding that state constitution did not confer a right on individuals to solicit signatures for political purposes in privately owned shopping mall); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987).

138. *See* State v. Schmid, 423 A.2d 615, 628 (N.J. 1980) (holding that New Jersey's state constitution protects freedom of speech "against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property"). Massachusetts and Oregon relied on other constitutional provisions. *See* Batchelder v. Allied Stores Int'l, 445 N.E.2d 590, 593 (Mass. 1983) (relying on the free and equal elections provision in article nine of the Massachusetts Constitution to grant free speech rights on privately owned shopping mall); Lloyd Corp. v. Whiffen, 849 P.2d 446, 453–54 (Or. 1993) (relying on the Oregon constitution's initiative and referendum provision, and declining to rule on whether the state's free speech provision also granted citizens a right to collect signatures at a shopping mall). Colorado has held that speakers' right of access to privately owned shopping malls derives from those malls' characters as state actors. *See* Bock v. Westminster Mall Co., 819 P.2d 55, 62–63 (Colo. 1991). California has held that its constitution's free speech provisions constrain owners of privately owned property only when that

these states, however, only New Jersey has based its decisions on the ground that its constitution's free speech provision applies to private property owners.[139] The other states either have rested their mall decisions on some other constitutional provision or on the ground that malls are the equivalent of state actors for purposes of their constitutions' free speech provisions.[140]

Because most states have declined to follow New Jersey's interpretation of its constitution to protect speech on private property besides shopping malls,[141] state constitutional free speech provisions appear unlikely to provide a solid basis for solicitor speech rights in CICs. In fact, since even New Jersey requires that private property be somehow open to the public before its courts will prevent the owner from excluding solicitors on state constitutional grounds, it seems that most gated CICs are exempt even from New Jersey's free speech provisions.[142] While it is conceivable that some states could hold CICs to be "state actors," and thus subject to their constitutions' free speech requirements, courts have not proven amenable to this idea. Certainly, under *Golden Gateway*, gated CICs in California are not state actors because they are not open to the public. Moreover, most courts in other states that have addressed the issue have held that CICs are not state

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property is open and accessible to the public. *Golden Gateway Ctr.*, 29 P.3d at 810 (holding that the owner of a private apartment complex was not subject to the California constitution's free speech provision because access to the complex was "carefully limit[ed] . . . to residential tenants and their invitees" and thus the complex was not a state actor for purposes of California's constitution). Washington has held that its constitutional free speech provision does not protect free speech on private property, but that its initiative provision does. *See Southcenter Joint Venture*, 780 P.2d at 1291–92.

139. *See* sources cited *supra* note 138.

140. *See* sources cited *supra* note 138.

141. *But see* Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 829 (Cal. Ct. App. 1982) (holding that the gated community Leisure World violated California's free speech and press provisions by "discriminating" against one newspaper when it barred the newspaper publisher from distributing the publication within the community but permitted distribution of a different newspaper, where substantial numbers of homeowners were not residents of the homeowners' association). To the extent that *Laguna* subjected Leisure World as a private actor to California's free speech provision, however, it may have been undermined by *Golden Gate*'s subsequent holding that the free speech provision is limited to state actors and that owners of private property are state actors only when their property is freely accessible to the public. *See* Rahe, *supra* note 96, at 543 ("*Golden Gateway Center* . . . reached a conclusion that casts Laguna into some doubt.").

142. *See* William G. Mulligan Found. v. Brooks, 711 A.2d 961, 966 (N.J. Super. Ct. App. Div. 1998) (holding that a CIC that did not admit the public onto any part of its property did not satisfy the "public dedication" requirement of New Jersey's test for applying its constitutional free speech provisions to private property, quoting *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156, 158 (N.J. Super. Ct. Ch. Div. 1996)); *see also* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1573 (1998) (stating that New Jersey's *Schmid* test, "[f]or all its brave talk . . . does little more than move the line to capture a few entities that the federal courts have placed on the private side").

actors because they lack all the indicia of a municipality.[143] Thus, solicitors wishing to enter gated communities probably cannot claim a right to do so under state constitutions.

III. STATE COURTS SHOULD BALANCE CIC RESIDENTS' PROPERTY RIGHTS AGAINST THE PUBLIC INTEREST IN ACCESS

Apart from the First Amendment and state free speech provisions, there is yet another way for states to grant solicitors access to gated CICs: by decreasing the level of deference they show towards CIC rules when the effect of those rules is to exclude solicitors.

Currently, many state courts show considerable deference to CIC rules embodied in the declaration of conditions, covenants, and restrictions written by the developer.[144] In some states, courts apply the deferential Business Judgment Rule to decisions made by cooperative and condominium boards, thus shielding them from judicial examination to the extent that they were made in good faith, and in an honest attempt to further the corporation's interest through legal means.[145] While a widespread "public policy" excep-

143. *See, e.g.*, Brock v. Watergate Mobile Home Park Ass'n, 502 So. 2d 1380, 1381–82 (Fla. Dist. Ct. 1987) (holding that a mobile home park homeowners' association lacked municipal character of a company town and thus did not stand in the position of government, and that the state was not sufficiently involved in the association's activities to subject the association's activities to constitutional limitations); Linn Valley Lakes Prop. Owners Ass'n v. Brockway, 824 P.2d 948, 951 (Kan. 1992) (holding that a private agreement restricting signs in a private residential community did not constitute improper state action, and declining to apply the *Shelley v. Kraemer* judicial enforcement theory to the restriction); Devine v. Fischer, No. 941809B, 1996 WL 1249885, at *1, *5–*6 (Mass. Super. Ct. Mar. 29, 1996) (holding that condominium complex was not a state actor because, though it did provide services such as road maintenance and snow and trash removal, it did not have the exclusive right to provide these services, and because there was no evidence that the Pennsylvania commonwealth coerced the condominium association to impose the restriction at issue); Fairfield Commons Condo. Ass'n v. Stasa, 506 N.E.2d 237, 247 (Ohio Ct. App. 1985) (holding that a business condominium complex was not a public forum under *Lloyd*, because the complex at issue had even fewer indicia of a town than did the mall in *Lloyd*, which itself was held not to be a public forum); Midlake on Big Boulder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Pa. Super. Ct. 1996) (holding that a condominium association was not made a state actor by virtue of being incorporated under the laws of the Pennsylvania commonwealth, nor was it a state actor under *Marsh*).

144. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275 (Cal. 1994) (adopting a rule whereby rules contained in a planned community's master deed or declaration are treated as presumptively reasonable, while rules promulgated by majority vote of homeowners or by a governing association are evaluated under a reasonableness standard); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981); Noble v. Murphy, 612 N.E.2d 266 (Mass. App. Ct. 1993).

145. *See, e.g.*, Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317 (N.Y. 1990).

tion to enforceability exists,[146] there is scant case law on the applicability of this exception to CICs' no-solicitation rules.[147]

This part briefly addresses state approaches to CIC governing rules, and explains why state courts should decrease the level of deference they currently give to CIC rules when those rules would operate to deny access to solicitors. I argue that, to protect residents' right to receive information, courts should require a showing that 100 percent of CIC residents have affirmatively consented to CIC no-solicitation rules, or to board authority to promulgate them, before they uphold such exclusions. I further argue that, even when a CIC demonstrates such consent, courts should prohibit CIC boards from enforcing such rules in a selective manner when a challenger can show that such enforcement creates a substantial risk of politically distorting effects in the surrounding locale. This part concludes with an example of a state court that has limited CICs' ability to exclude solicitors, so as not to deprive residents of information from a variety of sources.

A. Current State Court Approaches to CIC Rules

Most state courts currently treat CIC rules with relative deference. Some states, such as Arizona, evaluate recorded use restrictions under a "reasonableness" standard.[148] This standard varies considerably in stringency, so that cases with similar facts may yield opposite results.[149] Other states, such as Florida, California, and Massachusetts, grant greater deference to rules contained in the planned community's master deed, or declaration, than to

146. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) (stating that servitudes are enforceable if they do not, among other things, violate public policy).

147. Askin, *supra* note 81, at 957 (stating that "there are very few . . . cases in the law reports from around the country" dealing with issues of solicitor access to CICs).

148. Riley v. Stoves, 526 P.2d 747, 752 (Ariz. Ct. App. 1974) (evaluating a use restriction by asking whether it is "a reasonable means to accomplish the private objective").

149. Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989). The author states:

> There simply is no general pattern or model that emerges from the cases applying the reasonableness standard. While some decisions appear to involve substantive review, courts in other cases have followed just the sort of inquiry that critics of reasonableness review endorse, a minimalist review of instrumental fit with the development's internal goals.

Id. at 13 (footnote omitted). Alexander points to examples of cases in which courts, seemingly applying identical standards of "reasonableness," nevertheless reach drastically different results. *See* Baum v. Ryerson Towers, 287 N.Y.S.2d 791 (Sup. Ct. 1968) (holding that a cooperative apartment rule that limited to certain hours the use of the community pool and the playing of music therein was not unreasonable); Justice Court Mut. Hous. Coop, Inc. v. Sandow, 270 N.Y.S.2d 829, 823 (Sup. Ct. 1966) (invalidating as "arbitrary and unreasonable" a housing cooperative rule prohibiting the playing of musical instruments after 8 p.m. and limiting the playing time to 90 minutes per person).

rules subsequently promulgated by the community's governing board.[150] In these jurisdictions, the former type of rule is treated as presumptively reasonable: Since residents are deemed to have been on constructive notice of rules embodied in the master declaration of the community, courts treat these rules deferentially.[151] States that follow this two-tiered approach decline to invalidate such rules unless they are arbitrary or contravene some public policy or "fundamental constitutional right."[152] However, residents cannot necessarily be said to have agreed to rules that are not embodied in the governing deed but adopted by the board of the CIC's governing association, possibly after the residents bought their houses.[153] Hence the somewhat less deferential "reasonableness" standard applied to this latter category of rules.

Cases addressing the validity of CIC no-solicitation rules under the reasonableness standard are few.[154] As mentioned in Part I.B, courts have analyzed the "reasonableness" of decisions to gate CICs by determining the extent to which residents can be said to have actual or constructive notice that the community was gated or subject to being gated at a later date.[155] Thus, the cases involving gating decisions appear to uphold gating

150. *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275 (Cal. 1994) (adopting a similar two-tiered standard of review); Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) (adopting a similar standard); *see also* Noble v. Murphy, 612 N.E.2d 266, 270 (Mass. App. Ct. 1993) ("A condominium use restriction appearing in originating documents which predate the purchase of individual units may be subject to even more liberal review than if promulgated after units have been individually acquired."); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 reporter's note ("Under the rule of [Restatement] § 6.10, most restrictions in a residential common-interest community may be amended by less than unanimous vote of the members. Such an amendment may be subjected to a higher 'reasonableness' standard [than is applied to restrictions contained in the CIC's governing deed].").

151. *See Basso*, 393 So. 2d at 639 (stating that rules in a condominium association's declaration or master deed are "clothed with a very strong presumption of validity"); *Noble*, 612 N.E.2d at 270 (stating that homeowners had "[c]onstructive knowledge of the regulatory scheme of the condominium" because "[t]he master deed expressly made unit ownership subject to attached rules and regulations that contained the restriction").

152. *Nahrstedt*, 878 P.2d at 1283–84 ("Nonenforcement would be proper only if such restrictions were arbitrary or in violation of public policy or some fundamental constitutional right.").

153. *See, e.g.*, *Basso*, 393 So. 2d 637 (adopting a reasonableness test for rules promulgated by a condominium owners' association's governing board in an attempt to "somewhat fetter the discretion of the board of directors"); Askin, *supra* note 81, at 955 (stating that people who join CICs "do not necessarily agree to accept changes in the governing rules adopted by fifty-one per cent of their neighbors after they have moved in").

154. Askin, *supra* note 81, at 957 (stating that "there are few . . . cases in the law reports from around the country" dealing with issues of solicitor access to CICs). Two important cases addressing solicitor access to CICs are discussed in this Comment *infra* Parts III.B.5 and III.C.2: *State v. Kolcz*, 276 A.2d 595 (N.J. Super. Ct. Law Div. 1971) and *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996).

155. *See supra* Part I.B.

restrictions based on some notion that homeowners knew of the restrictions and consented to them at the time they bought. This consent requirement may be met even if the purchaser's notice was only constructive.

When courts analyze CIC rules that deal with issues other than gating, however, it is not clear whether they necessarily equate "reasonableness" with homeowner notice or consent. According to Professor Robert Natelson, courts applying the reasonableness standard to rules adopted by homeowners' associations look not to whether residents have consented, but to whether the rule achieves a pareto superior efficient outcome for the community.[156] Thus, to the extent Natelson is correct, a court might uphold as "reasonable" even a gating or no-solicitation rule that residents did not have notice of at the time they bought their units, provided that the court determines the overall outcome meets a certain efficiency standard.

The relative scarcity of case law applying the reasonableness standard to CIC no-solicitation rules makes it difficult to predict the likely outcome of such an inquiry. However, to the extent that courts have upheld association rules limiting access to CIC streets based on the idea of constructive notice, as in *Howorka*,[157] courts do not seem to require that CIC residents demonstrate affirmative, knowing consent to such access limitations. Indeed, as the court in *Drabinsky* expressed, residents who buy homes in CICs are deemed to do so subject to the governing association's power to pass rules regulating the use of common property rules that individual residents may not always prefer.[158] But, as scholars have pointed out, constructive notice of CIC rules, or of the CIC board's power to regulate the common property, is not the same thing as affirmative homeowner consent to rules banning solicitation.[159]

The next subpart suggests an alternative approach for state courts to take when evaluating the validity of CIC's no-solicitation rules.

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156. Natelson, *supra* note 70, at 44.

157. Howorka v. Harbor Island Owners' Ass'n, Inc., 356 S.E.2d 433, 436 (S.C. Ct. App. 1987).

158. *See* Natelson, *supra* note 70, at 67 (stating that *Drabinsky* and later cases reflect the idea that people who buy homes in CICs with notice that the CIC governing board has discretion to pass rules governing the common property "accept[ ] the risk" that such rules may disadvantage individual residents for the good of the community); *see also* Drabinsky v. Sea Gate Ass'n, 146 N.E. 614, 617 (N.Y. 1925) ("[N]one can complain if the new [gating] regulations are reasonable and adapted solely to this purpose and are equally applied, so long as they do not prevent but merely regulate access to abutting property.").

159. *See* Natelson, *supra* note 70, at 58–65 (pointing out that many purchasers in CICs lack actual notice of CC&R provisions, and that the deed recording system is woefully inadequate to ensure that homeowners will actually be apprised of relevant conditions when they purchase their property); Alexander, *supra* note 76, at 894–95.

B. CICs Should Be Required to Admit Solicitors to Avoid Depriving Residents of Information They Wish to Receive.

This part argues that courts should decline to enforce CICs' no-solicitation rules when fewer than all of a CIC's residents have, before entering the community, given written consent to such rules or to board authority to promulgate them. Courts should do this to ensure that CIC residents do not unknowingly contract away their First Amendment right to receive information by entering a CIC with less than full notice of no-solicitation rules. Although the First Amendment, under *Hudgens*, may not give solicitors a right to solicit in CICs, homeowners' First Amendment right to choose whether or not to receive information remains viable in the CIC context to the extent they have not knowingly waived it. To ensure that homeowners have the opportunity to exercise this choice, courts should apply stricter judicial scrutiny to no-solicitation rules embodied in lengthy CC&Rs.

The *Restatement (Third) of Property: Servitudes* takes the position that courts may refuse, on public policy grounds, to enforce servitudes such as those embodied in CIC master deeds or promulgated by CIC governing boards.[160] Moreover, the sources of that public policy are not limited to statutes passed by legislatures but may be based on "judicial development . . . legislation, or . . . the provisions of state or federal constitutions."[161] Therefore, just as courts historically have attempted to protect the market for land by refusing to enforce servitudes that constituted restraints on alienation,[162] so should courts attempt to protect the marketplace of ideas by refusing to enforce servitudes that threaten to deprive CIC residents of their constitutional right to receive and distribute information.[163] The following subpart develops this point.

160. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e, f (2000) (stating that courts may decline to enforce servitudes based on public policy, and that the source of such public policy may be "judicial development . . . or . . . the provisions of state or federal constitutions").

161. *Id.* cmt. f.

162. *See* DUKEMINIER & KRIER, *supra* note 34, at 227–28 (describing the historic rule against direct restraints on alienation, and stating that its purpose was to avoid rendering land unmarketable, to prevent the concentration of land, to encourage improvements to land, and to prevent landowners from shielding their property from creditors).

163. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the First Amendment "embraces the right to distribute literature, and necessarily protects the right to receive it" (citation omitted)).

1. CICs Should Not Be Permitted to Enforce No-Solicitation Rules Unless 100 Percent of Their Members Specifically Agree to Such Rules or Board Authority to Pass Them

While the First Amendment is commonly thought of as protecting the rights of speakers, it also protects the right of people to *receive* information, particularly information distributed by solicitors.[164] Indeed, under the Supreme Court's ruling in *Martin v. City of Struthers*, the First Amendment does not allow public municipalities to institute total bans on door-to-door solicitation.[165] Under this ruling, a majority of a town's residents may not use majoritarian political processes to keep solicitors from distributing information to a minority of citizens who wish to receive it.[166] Residents who wish not to, *Martin* counsels, can simply post a "no soliciting" sign.[167]

Although *Martin* applies only to public municipalities, its underlying principles are applicable to private CICs as well. In a CIC, just as in a public town, decisions regarding access for solicitors may be made by an elected governing body, the board of directors, with less than unanimous support from residents.[168] If a minority of CIC residents actually wanted to receive solicitors, their preference would be overridden. Given the importance of residents' right to receive political and other information—an importance

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164. *See id.*

165. In *Martin* the Court struck down, on First Amendment grounds, a municipal ordinance that prohibited door-to-door distribution of "handbills, circulars, or other advertisements." *Id.* In reaching its decision, the Court weighed the municipality's interest in excluding the solicitors against residents' right to decide whether to receive the solicitors' message, as well as the solicitors' right to speak. *See id.* at 147 (stating that the First Amendment requires municipalities to "leav[e] to each householder the full right to decide whether he will receive [solicitors]" and thus to use reasonable time, place, and manner restrictions instead of total bans on solicitation); State v. Kolcz, 276 A.2d 595, 597–98 (N.J. Super. Ct. Law Div. 1971) (paraphrasing the Court's reasoning in *Martin*).

166. *Martin*, 319 U.S. at 148 (stating that "the decision as to whether distributers [sic] of literature may lawfully call at a home" properly belongs "with the homeowner himself" and not to the municipality).

167. *Id.* According to the Court, the small inconvenience to residents of requiring them to post a no-solicitation sign was easily outweighed by residents' right individually to choose whether to receive information and by solicitors' right to distribute it. *Id.* at 148.

168. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000) ("[R]ules [for use of common property and regarding use of private property to protect the common property] are usually adopted by the governing board, or by a simple majority of the owners who vote on the question . . . ."). Professor Natelson disputes that CICs are readily analogizable to public municipalities, pointing to differences in size and function between cities and most CICs, and to the fact that CIC governing boards are typically elected by their constituents whereas many city managers are not so elected. Natelson, *supra* note 70, at 49–50. While this Comment does not dispute any of those points, it argues that the process by which a CIC's rules and regulations are passed is in relevant respects similar to the process by which ordinances are passed in public municipalities.

reflected in this right's First Amendment stature—CICs should have to show that 100 percent of their residents have affirmatively and explicitly consented to exclude solicitors before they are permitted to implement no-solicitation rules. A CIC could make such a showing by requiring each new purchaser to sign a clearly printed, simply written document acknowledging that she understands either that solicitation in the community is currently prohibited, or that the governing board has the authority to prohibit it at a later time and is reasonably likely to do so.

At this point, a key distinction must be made between residents' right to receive information and solicitors' right to distribute it. These two rights carry unequal weight in the CIC context, and consequently a unanimous consent requirement for no-solicitation rules should be adopted to protect the former right more than the latter. This is because, in CICs, Supreme Court precedent directly protects the former right, but not the latter: Under *Martin*, homeowners actually have a First Amendment right individually to decide whether to receive information on their own property. If residents have not consciously consented to a no-solicitation rule upon entering a CIC, their *Martin* right remains intact because they have not yet made their choice. Thus, while *Martin* may in fact be limited to public municipalities, the right it confers on homeowners to decide whether to receive information should remain viable inside the CIC bounds.

Solicitors' right to *distribute* information in CICs, however, stands on shakier ground. Under *Hudgens*, solicitors have no First Amendment right to distribute information on property owned by others when those property owners have designated the property as off-limits to them. So, although *Martin* does protect solicitors' right to solicit in public municipalities at houses where residents have not posted no-solicitation signs, *Hudgens* counsels that that protection ends at the CIC gate.[169] Thus, while CIC residents' *Martin* right to choose whether to receive information retains currency until those residents consciously waive it, the First Amendment under *Hudgens* provides no protection for solicitors who wish to speak to them. The former right's greater constitutional validity in the CIC context therefore makes it the more compelling basis for judicial invalidation of CIC no-solicitation rules that are supported by less than unanimous consent.

Although the possibility of limited market alternatives and other factors may still constrain buyers' decisions whether or not to accept a no-solicitation term—and in that sense buyers' decisions may be less than

169. *See supra* Part II.B.2.c.

completely voluntary[170]—the actual notice requirement will at least ensure that the decision whether or not to accept solicitation is, in some sense, left to the homeowner. A purchaser who assents to a no-solicitation rule upon purchase can thus legitimately be deemed to have posted a figurative no-solicitation sign outside of her own house, rather than the association placing one there on her behalf.[171] At the same time, the reliance interests of other homeowners will be protected because the consent form will bind the signer.[172]

2. CIC Residents May Not Want to Exclude Solicitors

Some readers might find it odd that a court should question whether CIC residents—and especially gated community residents—want to exclude information. After all, it seems logical that people would buy into a CIC to attain privacy and security—goals arguably antithetical to the presence of solicitors. Thus, it could be argued that the fact that each resident buys a home in a community that either prohibits soliciting or reserves the right to do so later is proof that all members already have consented to exclude solicitors from their property.[173] Can't we infer from the fact that residents choose to live in a gated community, or one with a no-solicitation rule, that they want to be left alone?[174]

The answer is "not necessarily," for two reasons. First, in a large CIC with thousands of members, it seems risky from a public policy standpoint simply to allow property owners associations to waive thousands of resi-

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170. *See infra* note 182 and accompanying text.

171. If a CIC does not meet the unanimous consent requirement for a no-solicitation rule, *Martin* would seem to require that residents be allowed to post no-solicitation signs. To the extent that an architectural covenant prohibiting such signs would force residents against their will to allow solicitors onto their property, it would likely be held invalid for unreasonableness. It could also be argued that, since the right recognized in *Martin* is the right to choose whether to receive information or not to receive it, a ban on no-solicitation signs would impair that right just as much as a no-solicitation rule that lacks unanimous resident consent. Thus, under this proposal's reasoning, neither a no-solicitation rule nor a ban on no-solicitation signs in the absence of such a rule would be valid under *Martin* unless backed by such consent.

172. Reliance of CIC homeowners on rules contained in CC&Rs or governing documents is one factor that courts consider, and which weighs against judicial invalidation of CIC rules. *See* Drabinsky v. Sea Gate Ass'n, 146 N.E. 614, 617 (N.Y. 1925) (upholding an access limitation to a CIC, and stating that "some doubtless purchased in justified reliance that [access limitation] restrictions will be continued").

173. *See, e.g.*, Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1526–27 (1982) (arguing that members of CICs "unanimously consent to the provisions in the association's original documents," and thus that courts should not subject such provisions to review for reasonableness).

174. *See* Egan, *supra* note 53.

dents' right to receive information by enforcing a no-solicitation rule in court.[175] Moreover, the probability that any given CIC resident knowingly has consented to all the restrictions set forth in her CC&Rs is far from certain. Abundant empirical evidence shows that many CIC residents buy into CICs without understanding the terms of the agreement.[176] Though the terms are always spelled out in a contract that the homebuyer signs or in the CC&Rs, such agreements are often confusing adhesion contracts written by lawyers for real estate developers.[177] Because of the complexity of the documents, homebuyers may be unaware when they buy a home in a CIC that soliciting is prohibited—a possibility that is especially strong if the CIC lacks an obvious gate or mechanism for checking entrants' identification.

In addition, it is possible that a resident might buy a home in a CIC that is not gated, and does not prohibit solicitation at the time the resident buys, but whose governing document gives the governing board discretion to pass a no-solicitation rule or to "gate" the community at a future date. In such a case, it is quite possible that a buyer could miss such a provision while looking over the CC&Rs. Alternatively, she might buy her home knowing that the community was subject to being gated or that solicitation could be prohibited, but not believing that the governing board would actually take

175. Many CICs do contain thousands of members. For instance, Reston, VA's population numbers over fifty thousand. The Reston Ass'n, Homepage, *at* http://www.reston.org. Sun City West, Arizona, is home to over thirty thousand. Sun City West, History, *at* http://www.suncitywest.org/history.htm. This is not to say that either Reston or Sun City West actually prohibits solicitation currently. The point is merely that the community association of either one could decide at any time to do so—a possibility that poses the risk that members who may not fully have understood the CC&Rs or the possibility of no-solicitation rules may be deprived of information they wish to receive.

176. According to a recent survey by the Community Associations Institute, one of the top three reasons for unhappiness among CIC members was their ignorance of governing restrictions. WAYNE S. HYATT, CREATING COMMUNITY IN COMMUNITY ASSOCIATIONS (ABA Continuing Legal Educ., 2000), *available at* SE60 ALI-ABA 443, 451; *see also* James L. Winokur, *Choice, Consent, and Citizenship in Common Interest Communities*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 4, at 87, 99 ("Available evidence further suggests that few prospective owners intelligently review the restrictions to which they subject themselves upon acceptance of a deed to land burdened by servitudes."); Laura Castro Trognitz, *Co-Opted Living*, A.B.A. J., Oct. 1999, at 54, 56 (quoting one attorney as saying: "[Y]ou wouldn't believe how many people buy condo units, even lawyers and professionals, without ever reading the declaration or bylaws . . . ."); Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 650–51 (1981) ("[M]ost disclosure statements are neither read nor understood. . . . [M]any are long, densely written treatises that discourage buyer inspection. Even lucidly written ones, however, are ignored by most buyers . . . ." (footnote omitted)); Natelson, *supra* note 70, at 62 (summarizing an empirical study conducted by Dr. Vivian Walker of condominium owners in Chicago, which concluded that few were fully aware of the terms of condominium documents at the time they purchased their units).

177. *See* Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 398 (1998); *see also* HYATT, *supra* note 4, at 203–08 (describing the practice of drafting CC&Rs for condominiums).

such a step. Finally, a resident might buy a home in a non-gated CIC that does not bar solicitation, unaware that the CIC's governing board has the authority to pass no-solicitation rules pursuant to its power to regulate the community's common property.[178]

All of these problems could be effectively addressed by a rule that all CIC residents are notified of and consent to no-solicitation rules. To obtain this consent, a CIC could require that buyers read and sign a clearly written separate notice that states either that the community currently bans solicitation or reserves the right to do so at a future date and is reasonably likely to do so for security or other reasons. Where, as is often the case, a CIC's CC&Rs require a supermajority vote for residents to amend rules in the original declaration,[179] this requirement should also be clearly stated to alert the buyer to the risk that she might later want to amend a no-solicitation rule in her contract but will not be able to muster sufficient support among other CIC residents to do so.

Of course, as mentioned in Subpart B.1.a, the requirement of separate consent to no-solicitation restrictions will not necessarily make CIC purchasers' consent completely unconstrained. One reason for this is that, as Professor Gregory Alexander has argued, the "bundling" of servitudes in CIC deeds makes it unlikely that purchasers will be completely free to select a combination of terms they find ideal.[180] Also, since purchasers who agree to large numbers of servitudes probably cannot negotiate for each term individually, it cannot necessarily assumed that any undesirable term the purchaser agrees to will have been counterbalanced by a decrease in price.[181] Thus, even when a resident fully understands the servitudes set forth in the CIC's declaration and the rules promulgated by the governing association, that group of terms may not have been her first choice. Indeed, one survey conducted by the resale buyers in California found that 84 percent of people who bought homes in CICs "did so only by default" and due to a "scarcity of alternatives."[182] From this is appears that residents who buy into a CIC

178. *See* Natelson, *supra* note 70, at 65 (citing the possibility that rules adopted by a CIC's governing association could be founded on provisions in the original deed but not "clearly inferable" from such provisions).

179. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000) ("The declaration [of a CIC] . . . usually can be amended only with the consent of a supermajority of the property owners); McKenzie, *supra* note 177, at 398.

180. Alexander, *supra* note 76, at 883.

181. *Id.* at 894–95 ("[The purchaser] might have demanded a higher level of compensation for the servitude term, had that term been negotiated individually rather than as part of a package containing many items.").

182. Paula A. Franzese, *Does It Take a Village? Privatization Patterns of Restrictiveness, and the Demise of Community*, 47 Vill. L. Rev. 553, 559–60 (2002); *see also* Winokur, *supra* note 176, at 98

knowing that solicitation is prohibited, or that the CC&Rs allow the governing board to gate it at a later time, may not have opted for such a term in an ideal world. Perhaps a resident actually would prefer a nongated community, or would prefer to receive solicitors, but makes her decision to buy based on the physical characteristics of her individual home, the home's proximity to quality schools, or some other factor.[183]

While a unanimous consent requirement cannot ensure perfectly voluntary consent to no-solicitation rules in all cases, it can at least ensure that buyers take account of such rules before deciding to purchase a home and waive their rights to receive information and disseminate it to their neighbors. Indeed, ensuring that homebuyers are informed of no-solicitation rules before they buy may in the long run help correct any undersupply of CICs that allow solicitation that might exist; if homebuyers are better able to express their preferences regarding CIC no-solicitation rules, developers may respond more accurately to demand. Thus, a separate disclosure requirement for no-solicitation rules may in the long run help to address any lack of market alternatives that might initially diminish the voluntariness of purchasers' consent to no-solicitation rules or board authority to promulgate them.

3. The *Martin* Principle Should Apply in CICs Where Fewer Than all Residents Have Consented to No-Solicitation Rules

Given the importance of the First Amendment rights discussed in *Martin*, courts ought at least to ensure that homeowners' waiver of those rights is informed before they uphold no-solicitation rules. Mere constructive notice, or a small term hidden in a complex declaration, is not enough to satisfy *Martin*'s requirement that each homeowner independently decide what information she will receive, or whether she may solicit within her

(stating that the proliferation of homeowners' associations, and the standardization of servitude restrictions among different associations' governing documents often leaves homebuyers little choice but to assent to servitude regimes that they do not necessarily find desirable). A number of scholars have argued that homeowners' regimes coerce homeowners to abide by rules they do not necessarily prefer and have not fully consented to. *See, e.g.*, Alexander, *supra* note 149; Alexander, *supra* note 76, at 894 ("The pervasive inclusion of restrictions in residential developments may reflect not the similarity of preferences held by thousands of purchasers but the purchasers' belief (based on the widespread use of detailed restrictions) that ownership in a residential development without a particular restriction is unavailable."); Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 577–79 (1991) (replying to Alexander); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273 (1997).

183. *See* sources cited *supra* note 176.

community. Before agreeing to CC&Rs that would give a CIC board the discretion to ban solicitation at a later date, a homeowner should be given actual notice that she is waiving her right to receive and distribute information. Absent a showing that all of its members have affirmatively agreed to a no-solicitation rule or to board authority to promulgate such a rule, a CIC should not be able to exclude solicitors.

It might be argued that *Martin* is simply not applicable in CICs because CICs are not the state.[184] As the *Lloyd* and *Hudgens* line of cases demonstrates, the First Amendment simply does not apply on privately owned property.[185] Furthermore, courts have declined to extend the theory of *Shelley v. Kraemer*—that judicial enforcement of a contract limiting the exercise of constitutional rights constitutes state action—to the CIC context, except in the case of racially discriminatory covenants.[186] Thus individuals usually can, through private servitudes, bargain away their freedom to engage in activities the exercise of which the constitution protects from government infringement.[187]

The problem with this argument is that, unless CIC residents have knowingly consented to no-solicitation rules or to an association's authority to pass such rules, the fact that an individual chooses to live in a CIC should not make her any different from a resident of a public municipality in terms of the right to receive information. As professor Robert Ellickson has pointed out, homeowners' association boards have "regulation and taxation" powers analogous to those of a public municipality.[188] While it is true that even purchasers who buy into a CIC without a no-solicitation rule do consent to be governed by the reasonable regulations of the governing association, it is quite possible that people who buy into a CIC would not expect that the CIC's power would extend to questions of speech—a fundamental value that

184. *See, e.g.*, Ellickson, *supra* note 173, at 1528 ("[B]ecause original membership in an association is more voluntary than original membership in a city, an association's constitution should be allowed to contain substantive restrictions not permissible in a city charter.").

185. *See supra* Part II.A, and sources cited therein.

186. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (2000) ("[T]here are few cases holding that enforcement of particular servitudes, other than racial covenants, is prohibited by the Fourteenth Amendment.").

187. *See id. But see* Gerber v. Longboat Harbour N. Condo., Inc., 724 F. Supp. 884 (D. Fla. 1989), *aff'd on rehearing*, 757 F. Supp. 1339 (1991) (holding that judicial enforcement of a covenant prohibiting the display of American flags violated the First Amendment under the theory of *Shelley v. Kraemer*); Gittleman v. Woodhaven Condo. Ass'n, 972 F. Supp. 894 (D. N.J. 1997) (holding that the theory of *Shelley v. Kraemer* applies to private covenants that discriminate against the handicapped); W. Hill Baptist Church v. Abbate, 24 Ohio Misc. 66 (Ohio Ct. Com. Pl. 1969) (invalidating a covenant prohibiting construction of a church on the ground that enforcement would constitute unconstitutional state action).

188. Ellickson, *supra* note 173, at 1522.

many prospective CIC unit purchasers in the United States might not suppose could be limited even by a private CIC board. Thus, a CIC purchaser who has not consented to a CIC board's authority to ban solicitation within the community is basically in the same position as a resident of a public city who becomes subject to a no-solicitation ordinance. The fact that the CIC resident has chosen to move into the CIC is irrelevant to this comparison; by and large, residents of public cities are not forced to live where they do any more than are residents of CICs.[189]

And, just as CIC members vote for the association's board of directors, who pass CIC rules, residents of public communities vote for the officials who pass various municipal ordinances. But the fact that an individual chooses to live in a community—private or public—and to be bound by that community's particular mix of laws does not necessarily mean that individual would have contracted or opted for each provision, rule, or law standing alone.[190] Additionally, just as residents of a municipality may not agree with every ordinance the city council passes, so may CIC residents disagree with individual decisions of the CIC's governing board. The no-solicitation rule in *Martin* is in this way analogous to a no-solicitation rule passed by the governing board of a CIC. Thus, whether a person lives in a public or private town with a no-solicitation rule should not determine whether or not she is given an opportunity to decide for herself whether to receive or distribute information.

4. The Unanimous Consent Rule Should Not Vary According to the Content of Solicitors' Messages

First Amendment doctrine has traditionally privileged political speech above commercial speech, subjecting government regulation of commercial speech to somewhat less rigorous constitutional scrutiny.[191] It might thus be argued that courts subjecting CICs' no-solicitation rules to a unanimous consent requirement on First Amendment public policy grounds should only

189. Alexander, *supra* note 76, at 902 (disputing the idea that CIC residents are more able than residents of public municipalities to choose the mixture of regulations to which they will be subject).

190. *See* sources cited *supra* note 176.

191. *See, e.g.*, Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (setting forth a test for the First Amendment validity of restrictions on commercial speech which falls somewhat short of strict scrutiny: whether it is "lawful and not . . . misleading . . . whether the asserted governmental interest is substantial . . . whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

do so when the solicitation in question relates to politics.[192] Because the purpose of a unanimous consent requirement is to strike a constitutionally appropriate balance between individuals' First Amendment rights and CICs associations' and homeowners' power to regulate use of CIC property, the argument would go, the rule ought only to apply when core political speech is at issue.

There is, in fact, no reason why the applicability of a unanimous consent requirement should vary according to the content of solicitors' speech. True, it might be said that political solicitors serve a more important public purpose than do commercial solicitors—such that even a community in which all residents have posted no-solicitation signs might still be required to admit political, but not other, solicitors in order to prevent the negative external effects that would result from the formation of a "political isolation booth."[193] Since the external effects of allowing the community to reject commercial solicitors would be less grave than those of allowing it to reject political ones, it may make sense to allow a political, but not a commercial, solicitor to access private property against the wishes of the owner.

It cannot similarly be said, however, that the content of solicitors' information should affect CIC residents' right to *receive* it. A CIC that places a flat ban on solicitation with less than unanimous consent from residents squelches the preferences of residents who wish to receive information of *all* kinds—political, religious, commercial, and otherwise. Absent unanimous consent, why should a CIC be allowed to override the preferences of residents who wish to receive commercial information, but not information about politics? Unlike the public interest in preventing political isolation booths, which counsels for special protection of political solicitors, the public interest in preserving individuals' *Martin*-based First Amendment right to choose what information they receive does not counsel for any particular differentiation between the subject matter of solicitors' speech. In a CIC where fewer than all of the residents have consented to a no-solicitation rule, therefore, courts should not enforce the rule regardless of the type of solicitation sought to be prohibited.[194]

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192. Under this approach, a CIC that could not show unanimous consent by residents to a no-solicitation rule would still be able to prohibit door-to-door soliciting by salespeople, but not by political campaigners.

193. In fact, this Comment makes just this argument *infra* Part III.C. The phrase "political isolation booth" has been used by a New Jersey court in connection with a CIC that attempted to exclude political solicitors. State v. Kolcz, 276 A.2d 595, 599 (N.J. Super. Ct. Law Div. 1971).

194. Perhaps because it emphasizes residents' right to choose what information to receive, in addition to solicitors' right to distribute information, the majority decision in *Martin* does not

5. The Unanimous Consent Requirement for No-Solicitation Rules Is Not Unduly Burdensome to CICs

The obvious argument against a requirement of unanimous consent to no-solicitation rules or board authority to pass them is that it is simply too burdensome to CICs. From a practical standpoint, it can be argued, 100 percent of homeowners in a CIC are not likely to agree on anything, including a no-solicitation rule or authorization of the governing association to promulgate one.[195] The 100 percent rule, then, essentially becomes a ban on no-solicitation rules in CICs—an outcome with severe implications for self-governance in private communities. Residents who do want no-solicitation rules, the argument would go, should be able to rely on them without fear that they will be invalidated by a court because one resident failed properly to express agreement or consent.[196] The community's ability to protect members' privacy and security should not depend on a practically impossible requirement of unanimous approval among homeowners.

This argument is ultimately unpersuasive, however, because the unanimous consent rule should not be a difficult standard for CICs to meet. First, since many people move into CICs precisely for the purpose of isolating themselves from solicitors and other urban nuisances, CIC unit purchasers are already likely to be predisposed to agree to no-solicitation terms. Second, residents are considerably less likely to refuse to agree to terms giving the CIC board discretion to adopt a no-solicitation rule in the future under reasonable circumstances than they are to refuse to agree to the rules themselves; if a CIC does not have a no-solicitation rule currently in place, the purchaser will likely reason that the status quo will be maintained unless some need for a contrary rule arises. In addition, since the possibility of subsequent rules will likely seem relatively remote, a purchaser will likely be more inclined to acquiesce to board authority to promulgate such rules at a future time than to consent to a current rule.

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differentiate between political and other types of speech in striking down the city's flat ban on door-to-door solicitation.

195. Thank you to Professor Taimie Bryant for making this point.

196. *See* Drabinsky v. Sea Gate Ass'n, 146 N.E. 614, 616 (N.Y. 1925) (expressing concern that if rules promulgated by CIC associations which residents were on notice of were invalidated by courts, it would deprive other residents who relied on those restrictions of part of the value of the purchase of their property); Natelson, *supra* note 70, at 64 (stating that rules of which residents had notice should be upheld because the "potentially dissatisfied unit purchaser" who can move from the community is a less-cost avoider than other members of the community who purchased units in reliance upon the rules in question).

A homeowners' association can ensure that the required unanimity is maintained by monitoring sales of units to successive occupants.[197] Associations, seeking to ensure that their no-solicitation rules are not vulnerable to judicial invalidation, would of course have an incentive to ensure that all purchase agreements contain the proper provisions for consent to no-solicitation rules or board authority to promulgate them. Such consent could be indicated by a signature on a separate page or next to a clearly stated term setting forth the CIC's no-solicitation policy. Although, except in the case of cooperatives,[198] CIC governing associations typically do not monitor sales of units, this is not to say that associations could not insert themselves into the sale transaction. Indeed, CICs' governing associations sometimes do require residents to communicate with the association before transferring their units—either to allow the association to approve the transferee or to exercise a right of first refusal.[199] Although requirements that CIC associations approve prospective purchasers have been invalidated by courts as unreasonable restraints on alienation,[200] requirements that sellers of property obtain buyers' explicit consent to no-solicitation rules seem unlikely to be held invalid on that ground. Whereas courts may view requirements that associations approve prospective purchasers as giving CIC boards arbitrary power to restrain unit transfers,[201] there would seem to be no such potential for arbitrariness in a requirement that a seller show the CIC board that the buyer of her property has given written consent to a no-solicitation rule. Either the buyer has given written consent, or she has not. Thus CIC boards

197. Courts should not require consent to no-solicitation rules from children who inherit property in a CIC from their parents. There are two reasons for this. First, the burden that would be placed on a child beneficiary's right to receive information in the absence of the beneficiary's consent to a no-solicitation rule is much lighter than the burden that a purchaser would bear. This is because the beneficiary who has not consented to a no-solicitation rule can avoid the rule's effect by exiting the community more easily than can the nonconsenting purchaser. *See* Alexander, *supra* note 76, at 888 ("Exit is at best an imperfect strategy for disgruntled land owners because the immobility of their asset limits their options."). Whereas a purchaser would have invested money in CIC property and might have to sell the property at a loss to avoid living under a no-solicitation rule, a beneficiary would not have invested any money in inherited property. Second, it would be much more difficult for a homeowners' association to obtain consent from a beneficiary: Whereas a sale is a clear, identifiable transaction that the homeowners' association can monitor, no such transaction takes place in the case of an inheritance. For these reasons, homeowners' associations should not be required to obtain new members' consent to no-solicitation rules where the new member inherits the property.

198. *See* NATELSON, *supra* note 7, at 594–96 (discussing cooperatives).

199. *See id.* at 598 (discussing the right of first refusal).

200. *See, e.g.*, Tuckerton Beach Club v. Bender, 219 A.2d 529 (N.J. Super. Ct. App. Div. 1966); Mountain Springs Ass'n of N.J. v. Wilson, 196 A.2d 270 (N.J. Super. Ct. Ch. Div. 1963); Lauderbaugh v. Williams, 186 A.2d 39 (1962).

201. *See* authorities cited *supra* notes 198, 200.

could insert themselves into the sale process relatively easily, by requiring sellers to produce signed writings from buyers demonstrating the buyers' consent to no-solicitation rules or board authority to pass them at a later date.[202]

Moreover, the likelihood that a unanimous consent requirement will operate as a practical ban on no-solicitation rules is much less significant in small CICs than in large ones. Because they contain relatively few people and would need to monitor fewer unit sales to ensure the required consent, small CICs will probably not have difficulty meeting the 100 percent test. A CIC with hundreds or thousands of members, however, would face a more significant possibility that its no-solicitation rules would be subject to invalidation because some of its purchasers had neglected to provide the required assent.

But perhaps this is as it should be. To the extent that courts assess "reasonableness" by asking whether the overall benefit to the community outweighs possible detriment to individual homeowners,[203] no-solicitation rules appear much less justifiable in larger communities than in smaller ones. No-solicitation rules passed by governing boards of huge CICs are less likely to represent residents' preferences than no-solicitation rules passed by the boards of smaller communities, which may be better able to get to know residents and gauge those residents' preferences. Also, large CICs that prevent solicitation may create negative externalities by closing off public debate within their bounds—consequences not as grave in the case of a small CIC with fewer people.

Even when large CICs cannot show unanimous consent, however, purchasers' reliance on no-solicitation rules will not necessarily be thwarted.

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202. Professor Susan French has suggested that, if a CIC board requires sellers to show that transferees have given written consent to no-solicitation rules, CIC boards may also want to call buyers' attention to a variety of other terms in the CC&Rs, such as architectural covenants. This raises the possibility that a no-solicitation rule could be buried among other terms. As a result, the effectiveness of the written consent requirement would be diluted.

While such an outcome is certainly possible, it is not a reason not to require written consent to no-solicitation rules. Indeed, a disclosure form that buries no-solicitation rules among other terms should not be sufficient to satisfy the written consent requirement. This is because the potential for uninformed waiver of First Amendment rights makes no-solicitation rules more important to disclose than other restrictions, such as architectural covenants, that do not pose the same constitutional problems. In addition, there will likely be less need in most instances to draw purchasers' attention to covenants relating to the physical appearance of property, because such covenants are likely to be more visually apparent to potential purchasers than no-solicitation rules: Whereas a prospective homebuyer might be able to tell by looking at homes in a CIC that the CC&Rs require certain colors of paint, for instance, it is less likely that such a homebuyer would immediately notice the absence of solicitors.

203. *See* Alexander, *supra* note 76, at 888.

While the problem of nonconsenting holdout members is potentially significant in a large CIC, large CICs are also the ones most likely to have the resources to negotiate with holdouts around the unanimity requirement. And even if a court ultimately invalidates a large CIC's no-solicitation rule, that CICs' greater resources decrease the burdensomeness of the invalidation; large CICs are more likely than small ones to be able to afford any substitute measures, such as additional policing, that might be required to maintain privacy and security in the absence of a no-solicitation rule. Indeed, the marginal cost of such additional policing may well be small, since large CICs are likely already to employ some type of private security force.

Ultimately, then, a unanimous consent requirement is most likely to invalidate no-solicitation rules in CICs that need those rules the least. In a large CIC, residents' privacy and security can be amply protected in the same way that the court suggested in *Martin*: through direct regulation of crime and harassment. CICs that already provide policing services likely can enforce such regulations without much effort. And, in any event, the CIC would still be able to enforce its no-solicitation rule provided that it was able to reach an agreement with any holdouts.

Finally, invalidation of CICs' no-solicitation rules would not destroy those CICs' ability to protect residents' privacy and security. As pointed out by the *Martin* majority, valid time, place, and manner ordinances are sufficient to address these concerns in the public arena.[204] For instance, cities remain free under *Martin* to promulgate regulations prohibiting people from ringing the doorbells of homes in front of which "no soliciting" signs are posted.[205] There is no reason this should not be true in private CICs as well. For instance, the problem of people using the pretense of solicitation to gain entrance to people's houses or canvass potential robbery victims' homes could be addressed by traditional policing. The burden on a CIC of having directly to regulate crime should not be excessive: Since policing would be needed in any event to enforce a no-solicitation rule or to enforce access limitations, requiring direct policing of crime is unlikely to add significant effort or expense.

6. New Jersey Courts Have Prevented CICs From Excluding Solicitors

New Jersey courts provide a model of how courts can apply *Martin*'s rationale to cases involving solicitor access to CICs. In the 1971 case of *State*

204. *See* Martin v. City of Struthers, 319 U.S. 141, 144 (1943).
205. *See id.* at 148.

v. Kolcz,[206] a New Jersey trial court required a private retirement community to admit solicitors who sought to petition in favor of changing the municipal government.[207] The facts of the case arose when a group of nine solicitors sought to enter Rossmoor to circulate a political petition.[208] On arrival at the community's gate, the solicitors were met by the president of one of Rossmoor's "holding companies" and a lawyer, and told to leave.[209] Undeterred, however, the solicitors entered Rossmoor anyway and proceeded to solicit residents.[210] The community filed a complaint against the solicitors for trespass.[211]

The court ordered Rossmoor to admit the solicitors. Without explicitly calling the community a state actor, the court noted that it functioned as "a self-sufficient community." The court also noted that the canvassers' speech was political, and "there is no substitute for door-to-door communication." Thus, the court held, the members of the community's governing board should not be allowed to decide for residents what speech they would be exposed to or to trap residents in a political "isolation booth."[212] However, the court limited its holding to "political or religious" information, assigning lower priority to commercial solicitation.[213]

Kolcz demonstrates how state courts can balance the public interest in the free flow of information, together with residents' right to receive information,

206. 276 A.2d 595 (N.J. Super. Ct. Law Div. 1971).

207. *But see* William G. Mulligan Found. v. Brooks, 711 A.2d 961, 967 (N.J. Super. Ct. App. Div. 1998) (holding that a CIC was not obligated, under New Jersey's constitutional free speech provisions, to include an outside organization's advertisement in a newspaper it distributed to residents, because no part of the property was dedicated to the public use). Rossmoor, the community at issue in *Kolcz*, had been created by a developer and enabled by a special zoning ordinance. *Kolcz*, 276 A.2d at 596. Residents each owned stock in the community's governing corporation, which granted the residents permission to live in the CIC. *Id.* In addition to houses, Rossmoor contained a church, community hall, and small shopping district. *Id.* The community's rules and regulations, set forth in a "welcome booklet," stated clearly that "solicitors and unauthorized persons will not be admitted." *Id.*

208. *Kolcz*, 276 A.2d at 596.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 599 ("[The corporate officers of the Rossmoor community] may believe 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.").

213. *Id.* at 599–600. The court stated:

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

Id. (citation omitted).

against CIC owners' right to control the use of their property. Rather than grounding its decision on the federal or state constitutions per se, the court took it upon itself to apply First Amendment principles in furtherance of CIC residents' right to decide for themselves whether to receive information.[214] Regardless of whether *Kolcz* is limited to cases of discriminatory enforcement of no-solicitation rules, the case stands as an example of courts taking the initiative in protecting CIC residents' right to choose the information they receive.

C. CICs Should Be Required to Allow Solicitation to Prevent Political Distortion

Apart from the danger that property owners' associations will deprive their own residents of information, CICs' exclusion of solicitors can distort political outcomes in the surrounding public community. This is most likely to occur when a CIC's governing board forbids solicitation within the community, but itself engages in active political campaigning targeted at residents. The recent case of *Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*,[215] also from New Jersey, starkly illustrates this risk. In that case, as explained in the introduction to this Comment, residents of a CIC with a no-solicitation rule, and whose governing board actively campaigned in the CIC before local elections, exhibited dramatically different voting patterns than residents of the surrounding community.[216] To prevent such political distortion, courts should prohibit CIC boards from selectively enforcing no-solicitation rules when it can be shown that electoral outcomes otherwise would be significantly affected by residents' restricted access to political information. Such a showing could be made, for instance, by evidence that residents receive political information only from a CIC governing body, that distribution of information from outside sources is prohibited in the CIC, and that electoral outcomes within the CIC differ from those in the surrounding locale.

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214. *Id.* at 599. Another factor, which the court did not explicitly rely on but that nevertheless seems significant, is that Rossmoor's governing corporation previously had allowed one of the community's *residents* to solicit door-to-door in the community for his own public campaign. *Id.* at 597. This fact may suggest that *Kolcz* applies only in cases of selective enforcement of a no-solicitation rule by a CIC's governing board. However, the court did not so limit its holding.

215. 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996).

216. *See supra* Introduction.

1. Inferring Causation of Political Distortion From No-Solicitation Rules and Political Activity by CIC Boards

It might be argued that a showing that a CIC prohibits political solicitation, that the governing body engages in such solicitation, and that the CIC's residents exhibit different voting patterns than members of the surrounding community should not be sufficient to show that the no-solicitation rule is the cause of the difference. After all, it is quite likely that political differences between residents of a CIC and those of the surrounding locale will result from demographic differences, such as income level and age. How can courts tell when differences in electoral outcomes between CIC residents and residents of the surrounding community should be attributed to CIC boards' selective enforcement of a no-solicitation rule? And how should courts determine when electoral outcomes are likely to be "significantly affected" by residents' limited access to information?

Direct evidence of the influence of CIC boards' activity on residents' behavior would, of course, provide the most solid basis for a finding of causation. Statements from CIC residents showing that political campaigning by their CIC board swayed their political decisions, or that they might have voted differently had they had access to opposing candidates' materials, could serve as evidence of political distortion resulting from selective enforcement of a no-solicitation rule. When differences in voting between CIC residents and residents of the surrounding community vary to an extreme degree, that disparity might in itself provide a basis for a finding, at least prima facie, that political campaigning by the CIC board caused the difference, in the absence of any other explanation.

If the above types of evidence are not available, however, a plaintiff could rely on regression studies similar to those commonly used by Title VII plaintiffs to eliminate possible nondiscriminatory reasons for challenged employment decisions.[217] Such a study might compare CIC residents to residents of the surrounding locale by reference to a variety of criteria that are commonly linked to voting behavior. This list might include such factors as age, income level, education level, and political affiliation. If a study

217. *See* Bazemore v. Friday, 478 U.S. 385, 400 (1986) (holding that the failure of a Title VII plaintiff's regression study to account for all potential nondiscriminatory factors in a given employment decision does not make the study inadmissible but rather lowers its probative value); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 247 (6th ed. 2003) ("Multiple regression expands [the notion of matched pairs with regard to different traits] so it is possible to compare the influence of many variables among a large group of employees.").

that has controlled for such factors indicates that voting behavior in a CIC cannot be explained by any of them, a factfinder might then infer that the disparity is due to the political activity of the CIC board and the board's enforcement of a no-solicitation rule in a way that obstructs residents' access to alternate points of view.[218] Once causation has been inferred, the burden might then shift to the CIC to show that the disparity is due to some factor other than political influence by the CIC board. For instance, the CIC could attempt to show that voter differences on a given issue can be explained by the status of CIC membership alone—that is, that the issue being voted on somehow affects CIC members differently than nonmembers.

Once causation is shown, it remains for courts to determine whether electoral outcomes are likely to be "significantly affected." Here, a CIC's size is relevant. If some threshold percentage, say 10 percent, of a political unit's population resides in a CIC in which voting patterns are shown to be distorted by selective enforcement of a no-solicitation rule, the "significantly affected" test would be met.[219] Regardless of what threshold a court selects, when causation is shown and the no-solicitation rule's effect on election outcomes is more than de minimus, courts should act to preserve the integrity of the political process by enjoining selective enforcement of no-solicitation rules by CIC boards even when a CIC can show unanimous consent to such a rule.

2. *Guttenberg* and *Mulligan*: The Need to Clarify New Jersey's "Public Dedication" Test

Two recent cases from New Jersey have attempted, on state constitutional grounds, to address the problem of political distortion resulting from solicitation bans plus active solicitation of residents by CIC boards. While this direction is encouraging, the New Jersey courts have yet to clearly establish the point at which the effects of a CIC board's solicitation of residents and prohibition of other solicitation become severe enough to justify invalidation of a CIC's no-solicitation rule. Even so, these cases set forth the principle that active political campaigning by a CIC's governing

218. Of course, the CIC might be able to rebut this inference by arguing that some other factor not accounted for in the study explains the disparity.

219. While the court in *Guttenberg* implicitly determined that the threshold percentage was met where the CIC in question housed one-fourth of the city's population, this is not to say that a court could not find the "substantiality" requirement to be met when a CIC contains some lesser percentage. *Guttenberg*, 688 A.2d at 157–58.

board, combined with a no-solicitation rule, merits increased judicial scrutiny.

In *Guttenberg*, a New Jersey court required a CIC to admit solicitors to avoid the formation of a "political 'isolation booth'" that warped local electoral outcomes.[220] At issue was the Galaxy Towers condominium complex—the same one referenced in the introduction to this Comment. The complex, located in Guttenberg, New Jersey's sixth electoral district, housed approximately one-fourth of Guttenberg's registered voters.[221] Active campaigning within the CIC by the CIC's board, which otherwise forbade solicitation within the CIC, appeared to exert a formidable influence over election outcomes in Guttenberg as a whole: Residents of the CIC voted overwhelmingly for association-endorsed candidates, even ones who lost in all of the city's other electoral districts.

While the condominium association forbade all political solicitation by residents,[222] the association actively promoted an agenda of its own. Before elections, it would regularly distribute fliers and candidate endorsements, supply tower residents with absentee ballots, organize telephone squads to encourage residents to vote, and conduct voter registration drives. Each election day, the association provided poll volunteers, who distributed "reminder" fliers to residents to encourage them to vote. In addition, the Galaxy mall contained polling booths for federal and state elections.[223]

The association's efforts were not for nothing. For several years before the case's hearing, association-supported candidates, who consistently lost by substantial majorities in Districts One through Five, nevertheless won their respective contests by winning overwhelming majorities in District Six.[224] The court considered this political effect excessive. In finding that the Galaxy Towers had an obligation to grant access to an outside political group, the court stated that the residents of the complex had no "meaningful substitute for 'door-to-door' communication with the residents of Galaxy."[225] Stressing the distortion that the Guttenberg voters exerted on the outcome of municipal elections, the court ordered the condominium to admit the solicitors.[226]

220. *Id.* at 159.
221. *Id.* at 157–58.
222. *Id.* at 157.
223. *Id.*
224. *Id.* at 158.
225. *Id.* at 159.
226. *Id.*

New Jersey's constitution, rather than *Kolcz*'s public policy rationale, formed the basis for the *Guttenberg* decision. Applying the test for free speech rights on private property set forth by the New Jersey Supreme Court in *State v. Schmid*,[227] the *Guttenberg* court balanced three factors: "'(1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon the property in relation to both the private and public use of the property.'"[228] In addition, the court pointed out, this test required some type of public dedication of the property before the court could limit the property owner's right to exclude.[229]

The *Guttenberg* court found all these factors satisfied. The "public dedication" requirement was met by the fact that the complex had frequently opened itself up for political (thus, to the court, "public") purposes: the political campaigns before local elections.[230] In addition, the court held, allowing an outside group to solicit in the complex comported with the property's "normal" use because it had so often been used for political campaigning by the association in the past.[231] Thus, any invasion of residents' privacy would be diminished.[232] The constitutional importance of the right to speak, and the need to prevent political "company town" status from forming inside the complex, motivated the court to require the Galaxy Towers to admit solicitors.[233] Thus, while the *Guttenberg* court did not explicitly state how it was able to infer causation between the CIC board's selective enforcement of its no-solicitation rule and residents' voting patterns, the case at least established that a CIC becomes subject to state constitutional scrutiny, via the "public dedication" test, when the governing association engages in selective political campaigning. *Guttenberg* left open the question of whether and how causation could be similarly inferred from less extreme facts.

Despite *Guttenberg*'s seemingly aggressive stance towards political "company towns," its holding on the "public dedication" requirement has been limited, and somewhat muddled, by the subsequent New Jersey case of *William G. Mulligan Foundation v. Brooks*.[234] In that case, the court held that

227. 423 A.2d 615 (N.J. 1980).
228. *Guttenberg*, 688 A.2d at 158 (quoting *Schmid*, 423 A.2d at 630).
229. *Id.*
230. *Id.* at 158.
231. *Id.*
232. *Id.*
233. *Id.* at 159.
234. 711 A.2d 961 (N.J. Super. Ct. App. Div. 1998).

a private association that prohibited distribution of newsletters, except subscription papers, to CIC residents, was free to publish and distribute its own newsletter to residents and had no obligation to accept editorials from residents.[235] The court held the New Jersey constitution did not grant any free speech rights to the plaintiff organization in that case, which sought to compel the homeowners' association board to include its point of view regarding the quality of a local first-aid squad.[236] The association, through its newsletter, regularly promoted the squad and encouraged residents to use it.[237]

The court declined to compel the association to include the plaintiff's antisquad advertisement, finding that *Schmid*'s "public dedication" requirement was unmet.[238] According to the court, the Mulligan CIC did not engage in activities similar to the political campaigning which had given rise to the public dedication finding in *Guttenberg*; the fact that the newsletter accepted advertisements from local businesses did not suffice. Also, the court stated, the CIC did not make a public dedication by inviting the public onto any part of its property.[239] Elaborating on this point, the court pointed out that unlike Guttenberg's Galaxy Towers, which had a public shopping mall, the CIC was "a gated community with access only by invitation."[240]

To the extent the *Mulligan* court suggests that the outcome of the "public dedication" test depends on whether the public is allowed on any part of a CIC's property, the decision appears incongruous with that of *Guttenberg*. The *Guttenberg* court based its finding of "public dedication" on the fact that the association engaged in extensive political, "public"-type activities, not on the presence or absence of the adjoining public shopping mall. Indeed, the mall had little to do with the *Guttenberg* court's real concern: the fact that the CIC association had succeeded in confining its residents within "a political isolation booth." Thus, *Mulligan*'s reference to the mall as a basis for a relevant distinction between the Galaxy Towers and a gated CIC regarding the public dedication requirement appears misplaced.

In future cases, New Jersey courts should clarify exactly what the threshold "public dedication" requires in the CIC context. At what point between the Mulligan CIC's acceptance of local advertisements from businesses and the Galaxy Towers' political campaigning should a CIC be deemed to have made a "public dedication" of its property? Also, to remain

235. *Id.* at 967.
236. *Id.* at 962.
237. *Id.*
238. *Id.* at 966–67.
239. *Id.* at 966.
240. *Id.*

true to *Guttenberg*'s anti–political isolation booth ideal, courts should not make the public dedication test hinge on whether a CIC is accessible to the public. Rather, even gated CICs should be deemed to have engaged in a "public dedication" when their governing associations have engaged in political solicitation while denying the same privilege to residents or outside groups. In addition, courts should articulate a test for when aberrant voting patterns by CIC residents can be attributed to selective enforcement of no-solicitation rules by CIC governing bodies. By clarifying when substantial political distortion can be said to result from such selective enforcement, courts can identify the situations in which invalidation of no-solicitation rules is necessary to ensure informed political outcomes in the larger public sphere.

3. Alternative Means of Communication Do Not Obviate the Need for Scrutiny of Selectively Enforced No-Solicitation Rules

One counterargument to the idea that courts should invalidate selectively enforced no-solicitation rules is that modern technology obviates the need for face-to-face contact with solicitors. After all, it could be said, we live in an age of Internet and telephone communication, where there is little need to speak to residents in person. Political campaigners physically excluded from CICs, the argument would go, can simply use other means to convey their message.

This argument fails for several reasons. First, there is the problem of immediacy: While solicitors can seek out their targets, disseminators of information on the Internet must depend on the initiative of individuals who might look for their messages. Even assuming that CIC residents did decide to search the Internet for information about local politics, there is no guarantee they would find it.[241] Even if they did find it, they could not engage in a dialogue with the speaker the way they could with a solicitor. The sterile interfaces between listener and automated caller, or websurfer and Internet text, simply cannot substitute for actual human conversation.

Apart from residents' reluctance to seek out information, the Internet and other modes of communication may simply not be feasible for political speakers. Local political coalitions may form too quickly, or too soon before election time, to mount effective Internet campaigns. Mass mailings, mass calling, and television and radio ads are no less problematic in this regard.

241. This problem might be particularly acute in retirement CICs, whose residents may be relatively unfamiliar with the Internet or less willing to use it as a source of political information.

Indeed, poorly financed political groups—those most likely to be active in local elections—are unlikely to be able to afford means of communication other than in-person solicitation. In sum, as both the *Guttenberg* court and the Supreme Court have pointed out, there is no substitute for face-to-face communication.[242] While it might be said that the Internet provides local groups with a more affordable means of disseminating their messages, this ultimately does little to correct the relative advantage of an aggressively campaigning CIC board that has the ability to preclude solicitation by its competitors.

IV. POSSIBLE CIC CLAIMS TO A RIGHT OF EXPRESSIVE ASSOCIATION

Of course, many CIC residents may not appreciate state courts forcing them to admit solicitors. After all, many people move to CICs precisely to avoid solicitors and other nuisances of daily life. Faced with the prospect of having to open their streets and their doors, CIC residents will likely attempt to assert constitutional rights of their own. One strong claim that a CIC could make to resist a state order to admit solicitors is based on the First Amendment right of expressive association.

This part argues that certain CICs—ones that exist specifically to further ideological beliefs—should be able to use the right of expressive association to resist state orders to admit solicitors when forcing them to do so would inhibit the CICs' ability to advocate the values upon which they are based.[243] Moreover, this protection should apply even when an ideological CIC cannot show that 100 percent of its residents want to exclude solicitors. Subpart A describes the right of expressive association—a First Amendment doctrine that protects groups' public advocacy of ideas and internal communications among their members. Subpart B argues that the right should protect communications among members of certain ideologically based CICs. Finally, Subpart C argues that CICs that can claim protection

242. Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943); Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 159 (N.J. Super Ct. Ch. Div. 1996) ("Defendant's contention that plaintiff is able to carry a campaign to the residents by mail and leafleting on public property and at the public voting place . . . misses the point."). Even when no-solicitation rules are not selectively enforced, the existence of the Internet, mass mailings, mass callings, television, and radio do diminish the importance of individuals' right to receive information. This is because, for the reasons listed above, some types of information may be available only through face-to-face communication with solicitors. Moreover, the potential for dialogue between speaker and recipient is unique to in-person solicitation.

243. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988).

under the right of expressive association should be able to resist state orders to admit solicitors when the solicitors espouse ideas directly contrary to those on which the CICs are based.

A. The Right of Expressive Association

1. *NAACP v. Alabama ex rel. Patterson*

In the case of *NAACP v. Alabama ex rel. Patterson*,[244] the Supreme Court first held that the First Amendment gives groups of individuals a right to associate for expressive purposes.[245] Subsequent cases have termed this right the freedom of "expressive association."[246] The right, which protects groups' expression of views on "political, economic, religious or cultural matters,"[247] is twofold. It covers public advocacy of ideas as well as internal communications among group members.[248]

In *Patterson*, the Court held that the NAACP could assert the right of expressive association to resist an order by the state of Alabama that it disclose the names of all of its members and agents within the state.[249] The

244. 357 U.S. 449 (1958).

245. *Id.* at 460 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). The Court held in that case that the NAACP's First Amendment right to associate for the purpose of advocating its beliefs could not be infringed by the state of Alabama's demand that it produce its membership lists.

246. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association [as would occur if the Boy Scouts were required to retain an openly gay scout leader]."); *see also* City of Dallas v. Stranglin, 490 U.S. 19, 23–24 (1989) (stating that the U.S. Supreme Court has recognized two different forms of freedom of association but that the opportunity for a minor to dance or socialize with adults, or vice versa, "simply do[es] not involve the sort of expressive association that the First Amendment has been held to protect"); *N.Y. State Club Ass'n*, 487 U.S. at 2 (holding that a New York state antidiscrimination law did not facially infringe the right of expressive association of every member in a large consortium of clubs, where no evidence had been presented that the admittance of people with different religious backgrounds or genders would prevent club members from effectively expressing their viewpoints); Bd. of Dirs. of Rotary, Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544, 548–49 (1987) (stating that "the [U.S. Supreme] Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech" but that the Rotary Club could not claim more than a "slight infringement on [its] members' right of expressive association" because the club did "not take positions on 'public questions'"); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (stating that "the [U.S. Supreme] Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment" and that this right is "what could be called . . . [a] freedom of expressive association").

247. *Patterson*, 357 U.S. at 460.

248. *See id.* at 462–63.

249. *Id.* at 466.

Court reasoned that the NAACP was protected by the right of expressive association because the NAACP engaged in expressive activity: advocating on behalf of civil rights for its members.[250] Alabama's order would infringe the NAACP's ability to engage in that advocacy, the Court reasoned, because disclosure of members' names likely would result in threats and intimidation directed towards group members, and thus deter membership in the group.[251] Since Alabama's asserted interest—determining whether the NAACP was conducting business within the state—was not sufficiently compelling to justify the burden on the NAACP's expression, the Court invalidated the order.[252]

2. The Right of Association Protects Internal Communications Among Group Members

In subsequent cases, the Court has made clear that the right of expressive association applies to internal communications among group members, as well as public advocacy of ideas. This fact is demonstrated starkly in the Court's recent controversial decision in *Boy Scouts of America v. Dale*.[253] In that case, the Court held that the Scouts fell within the right of expressive association because they engaged in the "expression" of "instill[ing] values in young people."[254] Thus, even though the Scouts did not exist to advocate issues publicly, its internal communications entitled it to protection under the right of expressive association.

3. Courts Give Broad Deference to Groups' Definition of Their Internal Values and of What Would Inhibit the Inculcation of those Values

In addition to establishing that the right of expressive association protects communications among group members, the *Dale* ruling established that group leaders are entitled to broad deference in defining the nature of a group's values. That is, rather than closely scrutinizing the individual group

250. *Id.* at 460–63.
251. *Id.* at 462–63.
252. *Id.* at 463–66.
253. 530 U.S. 640 (2000).
254. *Id.* at 649. As evidence of the Scouts' expressive nature, the Court pointed to the Scouts' mission statement, which listed several characteristics of a good scout and proclaimed that the organization strove to inculcate such values in its charges. The Court determined that the Scouts instilled these values by having its leaders spend time with the Scouts conducting outdoor activities such as camping, archery, and fishing. *Id.*

members' beliefs, courts will defer to leaders' description of those beliefs.[255] Furthermore, courts also defer to groups on the question of what types of state action inhibit internal group expression.[256]

The Court in *Dale* deferred to the Boy Scouts' leaders in two ways: by adopting their description of the Boy Scouts' values and by accepting their assertion that the New Jersey order would impair the Scouts' expression of those values. In doing the latter, the Court held that ordering the Scouts to admit Dale, an openly gay individual, would force the Scouts to send a message, "both to [its] members and the world" that it accepted homosexuality as a viable form of behavior.[257] According to the Court, not even the antidiscrimination principle motivating the New Jersey public accommodations law could justify such an infringement on the Scouts' right of expressive association.[258] Thus, the application of the law to the Scouts was struck down.

The *Dale* decision dramatically expanded groups' ability to define the nature of their internal communications protected by the right of association. Even though many individual members of the Boy Scouts likely did not disapprove of homosexuality at all, the Court deferred to the group's leaders on the nature of the group's beliefs. In addition, the Court deferred

255. *Id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

256. *Id.* The facts of *Dale* arose when a chapter of the Boy Scouts fired an assistant scoutmaster after he declared that he was homosexual. The discharged scoutmaster, James Dale, sued the Boy Scouts under a New Jersey law that prohibited places of public accommodation from discriminating on the basis of sexual orientation. Finding for Dale, the New Jersey Supreme Court required the Boy Scouts to readmit him. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1230 (N.J. 1999).

On appeal, the Boy Scouts argued that New Jersey's order violated its right of expressive association by inhibiting its ability to instill its peculiar brand of values in its members. *Dale*, 530 U.S. at 644. According to the Scouts, one of the values it attempted to instill was the idea that homosexuality was immoral. *Id.* at 650–51. Although homosexuality was not specifically mentioned anywhere in the Scouts' Mission Statement, Oath, or Scout Law, the Court nevertheless accepted the Boy Scouts' representatives' claims that homosexual conduct was incompatible with the Scout Oath and Law's demand that its members be "morally straight" and "clean." *Id.* at 650.

While acknowledging that many people do not consider homosexuality to be at all inconsistent with moral "straightness" or "cleanliness," the Court accepted the Boy Scouts' claim that the organization believed the opposite. *Id.* at 660. The Court declined to inquire further into the nature of the Boy Scouts' values; rather, it deferred to the Scouts' leaders' claim that the organization interpreted "morally straight" and "clean" to mean heterosexual. As evidence that the Boy Scouts sincerely held this view, the Court pointed to two position statements issued by the Boy Scouts in 1978 and 1991, which stated that homosexuality was contrary to the organization's values. *Id.* at 651–53.

257. *Id.* at 653.

258. *Id.* at 659.

to the group's leaders on the issue of what type of state action would infringe the Boy Scouts' ability to express its professed values.

B. Some Types of CICs Should Be Able to Claim a Right of Expressive Association

After *Dale*, it seems likely that the right of expressive association should be claimable by at least some types of CICs ordered to admit solicitors. To claim such a right under *Dale*, a group must engage in expression—a test that is met when a group communicates values to its members. Once the right is claimed, state action that hinders group members' ability to engage in intragroup expression is subject to strict scrutiny.[259] Thus, if a CIC exists to inculcate particular values, and if a state order to admit solicitors would impede that inculcation, the CIC should be able to resist the order based on the right of expressive association.

Of course, not all CICs can claim to endorse any particular values. Most simply are conglomerations of houses or condominiums. However, as the next subpart shows, some CICs are expressive in nature. It is this latter category of CICs that should be able to claim expressive associational protection.

1. Commercial versus Ideological CICs

CICs can be divided into two categories: commercial and ideological. The former includes CICs that exist primarily to offer residents secure property values and a crimeless existence. For example, one large CIC in Reston, Virginia advertises "4th level government type services" and "high growth in property values."[260] A retirement community in California emphasizes security, boasting over three hundred guards and six-foot concrete walls.[261] No particular ideology is implicated—just residents' desire for an insulated, or insular, existence.

The second category includes CICs that exist for more ideological reasons: to create a community of people who share common lifestyles or beliefs. At the most extreme end, this category might encompass cults such as the 1970s Synanon compound near Bakersfield, California. However, there also

259. *See id.* at 658–59 (discussing cases that weigh compelling state interests against the right of expressive association and rejecting an intermediate standard of scrutiny for the case at hand).

260. Reston Ass'n, Homepage, *at* http://www.reston.org.

261. This CIC is the Leisure World Retirement community in Southern California. Of its residents, 92 percent rated security as "very important" when surveyed. RICHARD LOUV, AMERICA II, at 101 (1983).

exist other, less cultish communities that nevertheless are ideologically based. For instance, one CIC in California caters to elderly members of the American Theosophical Society: an organization formed for the purpose of exploring universal truths and "human brotherhood."[262] In another group of CICs, known as Cohousing communities, residents' lifestyles center on environmentalism, and all residents collectively plan the community's architecture.[263] Yet another ideological CIC is the town of Kiryas Joel in Orange County, New York—a private community whose residents practice a strict form of Judaism known as Satmar Hasidim.[264]

2. Commercial CICs Likely Cannot Claim a Right of Association

It is unlikely that the first category—commercial CICs—can lay claim to the right of association. This is because commercial CICs do not exist to advocate ideas or to promote communication among group members.[265] Indeed, far from promoting members' speech, many commercial CICs actually prohibit it; yard signs and soliciting often are banned entirely.[266] In some

262. The Theosophical Society was founded in New York City in 1985 for the purpose of "investigat[ing] the nature of the universe and humanity's place in it, to promote understanding of other cultures, and to be a nucleus of universal brotherhood among all human beings." The basic tenets of Theosophy are (1) "the fundamental unity of all existence," (2) "the regularity of universal law," and (3) "the progress of consciousness developing through the cycles of life to an ever-increasing realization of Unity." Theosophical Soc'y in Am., FAQs on Theosophy, *at* http://www.theosophical.org/theosophy/faqs/index.html#Q.

263. The Cohousing movement is an environmental housing movement whose members join together in search of a mutually supportive community and an ecologically sound way of life. *See* The Cohousing Ass'n of the U.S., What is Cohousing?, *at* http://www.cohousing.org/resources/whatis.html; *see also* Songaia Cohousing Ass'n, Sustainable Lifestyle, *at* http://songaia.com/why/default.htm#lifestyle (describing a Cohousing community called Songaia, in which a shared value is "living lightly on the land" and conserving natural resources); Sunward Cohousing, *at* http://www.sunward.org/ (describing a cohousing community in Ann Arbor, Michigan, where "resources are shared, lives are simplified, the Earth is respected, diversity is welcomed, children play together in safety, and living in community with neighbors comes naturally").

264. The village was created in the early 1970s, when a group of Satmars bought an approved but undeveloped subdivision in the town of Monroe. *See* N.Y. Bd. of Educ. v. Grumet, 512 U.S. 687, 690–91 (1994).

265. *See* Rahe, *supra* note 96, at 547 ("Homeowners are not as expressive a group as many.").

266. For examples of "economic" Residential Communities that restrict residents' speech within the community, see Country Club of La. Prop. Owners' Ass'n v. Dornier, 691 So. 2d 142 (La. Ct. App. 1997) (evaluating the reasonableness of a restrictive covenant prohibiting residents from displaying signs or advertising posters, including real estate signs); Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 157 (N.J. Super. Ct. Ch. Div. 1996) (reviewing condominium covenants that banned residents as well as nonresidents from distributing literature inside the condominium complex); Midlake on Big Bounder Lake, Condo. Ass'n v. Cappuccio, 673 A.2d 340 (Pa. Super. Ct. 1996) (enforcing condominium's restrictive

"master-planned" CICs, renter-residents do not even have a voice in the management of the CIC.[267]

3. Ideological CICs Probably Can Make Such a Claim

Ideological CICs, however, stand a good chance of laying claim to a right of expressive association. Why? Because they exist to foster "a wide variety of political, social, economic, educational, religious, and cultural ends."[268] CICs founded on environmentalist ideals, religious beliefs, or the search for philosophical truths aim to instill values in their members—activity that almost certainly falls within the right of expressive association.

CICs' ability to claim the right of expressive association seems particularly likely in light of the fact that the Supreme Court has held the right to cover groups that arguably are much less expressive than those advocated by expressive CICs. For instance, the Court has stated that the the Junior Chamber of Commerce (Jaycees), engages in activities protected by the right of expressive association because it advocates civic, educational, and related values.[269] If the Jaycees, whose values appear relatively superficial, can claim the right of expressive association, it seems that CICs founded on religious, philosophical, or environmental values also should be able to claim such a right.

C. The Right of Expressive Association Should Allow Ideological CICs to Exclude Solicitors Whose Messages Are Directly Contrary to the CICs' Foundational Beliefs

Assuming that ideological CICs can claim the right of expressive association, would a state law or court decision ordering the CIC to admit solicitors work an unconstitutional infringement of that right? Under current Supreme Court precedent, the answer likely is yes, where the values disseminated by the solicitors run directly contrary to the values upon which the CIC is based. If allowing solicitors would inhibit a CIC's ability to

covenant, which prohibited residents from displaying signs visible from outdoors without prior approval of the board of directors).

267. *See* McKenzie, *supra* note 177, at 398 ("Absentee owners, who rent their units and live elsewhere, can vote, but the people who rent their units and live in the development cannot.").

268. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

269. *Id.* at 621–27 (stating that "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression," but holding that the Jaycees' right of expressive association would not be unconstitutionally infringed by application of a Minnesota law requiring the organization to admit women as members).

inculcate particular values in its members, a state should not be able to order the community to admit solicitors absent a compelling interest in doing so.

1. Requiring Ideological CICs to Admit Solicitors With Opposing Views is Likely to Inhibit CICs' Ability to Foster Their Foundational Ideals

If ideological CICs are required to admit speakers who advocate values opposed to their basic philosophies, those CICs' ability to promote those core philosophies will likely be hindered. Two examples will illustrate this concept. First, take an environmentalist CIC. To allow pro-industry solicitors or commercial advertisers to distribute literature and/or products to that CIC's members likely would hinder the group's ability to sustain its members' environmental values. If residents regularly are bombarded by solicitors advertising environmentally harmful products, some probably will be induced to buy them. Having bought them, the CIC members probably will use them. This would gradually cause the CIC's environmentalist character to deteriorate. In addition, solicitors espousing antienvironmental, pro-industry points of view likely would induce at least some CIC members to question their own environmental values. The result would be a deterioration in the CIC's unique ideological character.

Likewise, requiring a religious CIC, such as the Jewish CIC of Kiryas Joel, to admit solicitors of other religions, or possibly even of particular political persuasions, might well hinder that community's ability to inculcate its particular beliefs. If solicitors periodically urge Kiryas Joel residents to consider switching their religious affiliation, it is likely that at least a few of them (especially younger members) will do so. The result will be detrimental to the community's very existence. Thus, the right of expressive solicitation should protect expressive CICs against solicitors whose messages would hinder the group's ability to promote their foundational values.

2. The Right of Expressive Association Should Protect CICs Against State Orders to Grant Access to Solicitors With Directly Opposing Views

Absent a compelling state interest, a state should not be able to force ideological CICs to admit solicitors whose values directly contravene the values the CIC seeks to promote and inculcate in its members. This concept is justified by both policy and prededent. First, it is sound policy in a democratic society to promote unique communities with varying ideologies. Because such communities enrich the marketplace of ideas, they should not

have to admit speakers who might jeopardize their promotion of particular belief systems. Second, application of the right to ideological CICs is proper under the Court's decisions in *NAACP v. Alabama ex rel. Patterson* and *Boy Scouts of America v. Dale*.[270]

a. Policy

The right of expressive association is grounded in the policies underlying the First Amendment. Protecting groups' ability to express differing values and instill them in their members promotes the political and cultural diversity essential to any democracy. In addition, it prevents government from suppressing dissident or unpopular points of view.[271] By allowing the proliferation of private groups with varying viewpoints, the right of expressive association enhances the democratic marketplace of ideas. For these reasons, ideological CICs should be allowed to exclude solicitors whose presence contravenes those communities' core ideals.[272]

b. Precedent: Allowing CICs to Exclude Solicitors Based on the Right of Expressive Association is Consistent With Supreme Court Precedent

In addition to policy justifications, Supreme Court precedents counsel that CICs should be allowed to claim the right of expressive association to resist orders to admit solicitors. This subpart analyzes, under the *Dale* and *Patterson* precedents, a potential right of expressive association claim by a CIC under such an order. It concludes that CICs should be allowed to claim the right of expressive association to prevent misapprehension of the CIC's message by group members and deterrence of membership in the CIC that might result from the compelled admission of solicitors advocating views that conflict with those of the CIC.

(1) Members' Misapprehension of Group Values

Orders that ideological CICs admit solicitors with opposing views should be invalidated under *Dale* to obviate the risk that CIC members will

270. *See supra* Part IV.A for a discussion of these cases.

271. *See* NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 460 (1958).

272. At least one scholar has suggested generally that *Dale* might be applicable in the CIC context. *See* Rahe, *supra* note 96, at 548 ("According to the logic of [*Dale*], a homeowners' association would not only have to prove that it engages in expressive activity to gain First Amendment protection, it would also have to prove that abrogation of the right to exclude would harm the expression.").

misattribute solicitors' values to the CIC itself. Recall that in *Dale*, the Court found that requiring the Boy Scouts to admit Dale was unconstitutional because it hindered the Scouts' ability to express its values to its own members. The Court implicitly reasoned that, since members of a group naturally attribute the values of leaders to the organization itself, members of the Boy Scouts would attribute Dale's views on homosexuality to the Boy Scouts if that organization were required to keep him on as a scout leader.[273] This, the Court determined, would interfere with the Scouts' ability to choose not to propound Dale's views.[274] Therefore, the right of expressive association barred application of New Jersey's order.

In a similar fashion, members of an ideological CIC might misattribute the views of solicitors to the CIC itself if the CIC were ordered to admit solicitors whose views it opposed. For instance, if a member of an environmental CIC sees that the community has allowed a pro-industry solicitor to go door-to-door, the member might presume that the CIC's leaders let the solicitor in because they approved of her message. Since most members of gated communities are likely to believe that the community has the ability to choose who to let in, members naturally would presume some type of affinity, or at least a lack of inconsistency, between the CIC's views and the views of solicitors in the CIC. Thus, under *Dale*, to prevent group members from misconstruing the views of the group itself, ideological CICs should be permitted to exclude solicitors whose particular views run contrary to those of the community.

(2) Admitting Members versus Admitting Speakers

Some might argue that, under *Dale*, the right of association should not allow ideological CICs to exclude solicitors. Proponents of this view would distinguish the CIC situation from that presented in *Dale*: Merely forcing a CIC to admit a door-to-door solicitor to enter the community for a limited time to speak to residents, the argument would go, inhibits expression much less than requiring the Boy Scouts to accept a permanent, high-level associate whose values the organization does not endorse. Therefore, it could be argued, *Dale* does not mandate that the right of expressive association allow CICs to exclude solicitors with opposing views.

273. Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000) ("[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.").

274. *Id.* at 656.

This argument, however, is ultimately unpersuasive. First, under *Dale*, courts must defer to groups' definition of what infringes its ability to communicate with its members. Thus, the determination of whether a solicitor's presence actually infringes on a CICs ability to foster its particular values should be largely up to the group itself. If Kiryas Joel's leaders claim that forcing it to admit Mormon solicitors causes residents to question the community's commitment to Satmar Hasidim, or to cause some group members to question their commitment to Judaism, *Dale* requires courts to grant broad deference to that contention. If an environmentalist CIC claims that allowing salespeople to tempt residents with new types of household cleaners that are harmful to the environment inhibits the community's ability to carry out its environmentalist mission, a court similarly should defer.

(3) The Deterrence of Group Membership

In addition to the potential for group members to misattribute a particular message to a group, groups' rights of expressive association can be infringed by state action that is likely to deter group membership. As explained in Part IV.A.1, the Court in *NAACP v. Alabama ex rel. Patterson* ruled that Alabama's order to the NAACP to produce membership lists infringed the group's right of expressive association because it threatened to discourage membership in the organization. Because past disclosure of members' names had subjected members to threats and intimidation, the Court held, it was likely that publicizing members' names again would deter members from joining the NAACP and cause its current members to quit.

The risk of deterring membership extends to the CIC context. As explained above, one thing that would deter membership in a CIC would be if a court required the CICs to admit solicitors who advocate values contrary to those of the CIC. Such a requirement likely would deter membership by causing at least some CIC members to abandon the values that led them to join the CIC in the first place. Having abandoned those values, members might leave the community. As in *Patterson*, the group's integrity and survival would be threatened and the right of expressive association infringed. Under *Patterson*, then, ordering ideological CICs to admit solicitors with opposing viewpoints so as to discourage CIC membership should be found an unconstitutional infringement of their right of expressive association.

It might be argued that *Patterson*'s reasoning does not comfortably extend to the context of a CIC forced to admit an unwanted solicitor. In *Patterson*, the argument would go, the issue was whether the relevant organization should be compelled to disclose members' names, not whether it should be required to

admit an unwanted member or solicitor into its ranks. Thus, it might be contended, the NAACP's ability to advocate the points of view it was formed to advocate—to exercise its right of expressive association—would not be compromised in the same way that an ideological CIC's expressive capacity would be compromised were it forced to admit solicitors whose views it did not endorse. Thus, *Patterson* should not control the application of the right of expressive association to a CIC forced to admit solicitors.

This argument, however, fails. The relevant question is not the *method* by which the right of expressive association is impaired in each case, but rather the *effect* of the state action on the relevant organization's ability to engage in its expressive activities. The effect of forcing the NAACP to disclose its members' names, so as to expose its members to intimidation, and the effect of forcing an ideological CIC to admit a solicitor whose views it does not endorse are the same in kind, if not in degree. In both situations, the effect is deterrence of membership in the relevant organization. It is this deterrence that prohibits each organization from exercising its expressive rights; if there are no members, there can be no expression! It matters not whether the deterrence of membership stems from disclosure of members' names, as in *Patterson*, or the forced admittance of an unwanted visitor, as in the CIC context. In both cases, the right in issue is impaired because membership is deterred.

c. The 100 Percent Rule Should Not Apply to Ideological CICs

It might be argued that the unanimous consent rule that this Comment advocates for commercial CICs should apply to ideological CICs as well.[275] Since people in an ideological CIC are more likely to hold similar beliefs than those in a commercial CIC, it may even be more likely in the former case that the 100 percent threshold will be met. Furthermore, the argument would go, it would be more efficient and less burdensome for a CIC to require it to show that 100 percent of its members prefer to exclude solicitors than to require it to make a showing that it is an ideological CIC, explain the nature of its ideology, and show that the solicitation in issue would interfere with its expression. In light of these factors, no-solicitation rules in ideological CICs should be tested under the same 100 percent rule that would apply in other contexts.

This argument misses the point. Ideological CICs, just as commercial ones, *should* be able to exclude solicitors when 100 percent of their members

275. I thank Professor Taimie Bryant for suggesting this argument, as well as the rest of the points in this paragraph.

want to. But this Comment argues that ideological CICs should be able to go further than that: Since in an ideological CIC the community itself engages in expression deserving of constitutional protection, the individual's right to receive information is no longer the only First Amendment concern implicated. Rather, the individual's right to receive information must be weighed against the community's right to speak. In the event that the community can demonstrate that it exists for a particular expressive purpose, it ought to be allowed to pass no-solicitation rules to protect that expression, even over the objections of individual members.

Of course, the question of when dissenting members become so numerous as to undermine the CIC's characterization of its own ideology has no easy answer. As critics of the *Dale* decision have pointed out, individual members of organizations cannot necessarily be deemed to agree to all views that the organization's leaders attribute to it, especially since those members may not have known the organization's positions on all relevant issues at the time they joined.[276] At some point, it is clear, so many members may disagree with the governing body's characterization of the group's values that that body can no longer legitimately claim to represent the group. The question of just how much a governing body should have to show to establish itself as the CIC's representative is beyond the scope of this Comment. Suffice it to say that, at least under the *Dale* ruling, the CIC's power of definition appears to be quite broad.

CONCLUSION

The proliferation of gated CICs over the past several decades, and residents' lack of familiarity with the details of their CC&Rs threaten to compromise many Americans' ability to choose whether to receive information and ideas disseminated by solicitors or to distribute information themselves. Since current federal and state constitutions are unlikely to afford solicitors the right to speak in CICs, and since state courts have upheld gating rules on less than a showing of actual notice to the purchaser, additional protection is needed to ensure that purchasers of CIC homes do

276. *See, e.g.*, Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 482 (2002). Brown states:

> What is astonishing in Dale is how easily a private organization can establish that its members understand it to be a discriminatory organization. At stake are the rights of people who disagree with discriminatory behavior: the right to detect their disagreement with an organization's policies and the right to act upon it.

Id.

not unknowingly waive their rights to receive and distribute information through adhesion contracts. To counter the possibility that would-be CIC purchasers may unknowingly waive core First Amendment rights when they purchase homes within CICs, courts should not enforce CIC no-solicitation rules unless the CICs can demonstrate that all residents have been given actual notice of, and have affirmatively agreed to, no-solicitation rules or the authority of the CIC's governing body to pass such rules. In addition, courts should follow *Guttenberg*'s lead in addressing the problem of homeowners' associations exercising decisionmaking authority over what types of information will be made available to residents. To counter the potential of gated CICs' to deprive residents of information they wish to receive, and to prevent distorting political effects, states should require CICs to demonstrate that all residents consent and that no political distortion is likely to result from such exclusion, before allowing a gated CIC to invoke state trespass laws.

On the other hand, however, ideologically based CICs contribute in their own way to the marketplace of ideas. When a CIC can be said to be a speaker in its own right, it becomes less problematic for the governing association to make decisions about what information residents receive. This is so both because the community itself has an expressive purpose and because in an ideological CIC it is arguably more likely than in a commercial CIC that residents agree with the organization's governing body on ideological matters. Therefore, courts should afford these CICs the protection of the right of expressive association when forcing them to admit solicitors would threaten their ability to express their communal values.

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