PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 38 | Issue 1 Article 2

12-15-2010

Religion-Free Environments in Common Interest Communities

Angela C. Carmella

Religion-Free Environments in Common Interest Communities

Angela C. Carmella*

I. INTRODUCTION

Sixty million Americans live in 300,000 common interest communities (CICs)—condominiums, planned residential subdivisions, and gated communities, governed by owners associations.[1] In a growing number of CICs, religious symbols and uses are banned from publicly visible areas, resulting in what this article calls a "religion-free" environment.[2] Such restrictions include prohibitions against religious symbols on doorframes or

* © Angela C. Carmella 2010. Professor of Law, Seton Hall University School of Law. I am grateful to Frank Alexander, Paula Franzese, Leslie Griffin, Paul Hauge, Catherine M.A. Mc Cauliff, Joseph Singer, Susan Stabile, Robert Tuttle, and Robert Vischer for comments on earlier drafts. Special thanks go to Laura Caillier, Misha Jacob-Warren, Annmarie Klimowicz, and Jason McLean for research assistance, and to the Seton Hall University School of Law for support provided by the summer research grant program.

1. *Industry Data*, THE CMTY. ASS'NS. INST., http://www.caionline.org/INFO/RESEARCH/Pages/default.aspx (last visited Sept. 24, 2010); Marilyn Lewis, *Delinquent Condo Dues Pressure Fellow Owners*, MSN REAL EST., http://realestate.msn.com/article.aspx?cp-documentid=13107847 (last visited Sept. 24, 2010) (reporting the findings of the Community Associations Institute).

2. *See* David M. Brown, *Fundamental Freedom and Democratic Right: Where Can I Pray? Sacred Space in a Secular Land*, 17 NAT'L J. CONST. L. 121, 147 (2005) (noting, in connection with the decision of Canada's Supreme Court in Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551 (Can.), that "while 'pet free' condos may be permissible, 'religion free' condos are not").

against religious objects in front of homes or on balconies, walls or patios.[3] They also include bans on religious symbols and services in common areas.[4] These restrictions produce an excessive privatization of religion, confining to interior spaces forms of expression and association that are usually public, and hiding the religious pluralism of the community. This article will argue that these restrictions violate human dignity, undermine the common good, and deny the critical role of private property in protecting religious exercise; as such, they contradict public policy and should not be enforced. Thus, this article makes a normative argument that, as between models of social life, it is better to allow the visible expression of religious identity on private property than to suppress it.

Existing statutory protections for religion do not prevent the enforcement of most restrictions that lead to religion-free environments. The Religious Land Use and Institutionalized Persons Act (RLUIPA) applies only to governmental land use controls, not to restrictions imposed by privately-governed communities like CICs.[5] The Fair Housing Act (FHA) applies to private as well as state actors and thus offers some protection to CIC residents.[6] Undoubtedly, some important victories have been won in cases of egregious animus aimed at residents of particular religious denominations.[7] But the "anti-discrimination" statutory model is simply not sufficient to address the growth of religion-free environments, which are typically created through religion-neutral restrictions.[8] Even facially discriminatory restrictions against religion, when applied equally to all faiths, have not been interpreted to fall within the statutory prohibition against discrimination.[9] The change must come through legislation[10] or by

3. *See infra* notes 52–55 and accompanying text.

4. *See infra* note 57 and accompanying text.

5. *See* 42 U.S.C. § 2000cc (2006) (prohibiting substantial burdens, discrimination, and exclusion in connection with regulation of religious land uses).

6. *See* 42 U.S.C. §§ 3601–3619 (2006) (prohibiting discrimination on the basis of race, color, religion, sex, national origin, disability, or familial status in the sale or rental of housing and in the terms and conditions of the sale or rental of housing).

7. *See infra* notes 198–208 and accompanying text.

8. The Seventh Circuit noted in dictum that application of a neutral rule with disparate impacts on particular faiths might constitute an FHA violation, but no case has developed such an interpretation in the CIC context. *See* Bloch v. Frischholz, 587 F.3d 771, 784 (7th Cir. 2009) (en banc). See *infra* notes 199–205 and accompanying text for a discussion of *Bloch v. Frischholz*.

9. The Civil Rights Division of the U.S. Department of Justice, which enforces the Fair Housing Act, currently interprets the FHA to prohibit religion-specific restrictions, i.e., to require equal access for religious and non-religious symbols and uses in common areas. *See Religious Discrimination in Housing*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/religious discrimination/ff_housing.html (last visited Sept. 24, 2010) ("[I]f people are permitted to put decorations on their apartment doors, religious individuals should be able to put religious items or decorations on their doors, such as a Jewish mezuzah or a cross. Similarly, when condominiums or apartments have a common room that can be reserved by residents for private activities like parties or book studies, residents seeking to hold a Bible study or other private religious activity may not be

judicial interpretation of traditional property doctrines.[11]

The phenomenon of the religion-free environment is particularly disturbing because it challenges the historic connection between religious exercise and private property and assumes that restraint, rather than freedom, is the starting point when considering the regulation of religion. This article is part of a series exploring this connection between religious exercise and property—particularly by way of the overarching constitutional design that directs theologically significant symbols and uses to private property[12] and concomitantly limits their presence on public property.[13] The series presents

---

discriminated against."); *see also* U.S. DEP'T OF JUSTICE, REPORT ON ENFORCEMENT OF LAWS PROTECTING RELIGIOUS FREEDOM, FISCAL YEARS 2001–2006, at 17 (2007), *available at* http://www.justice.gov/crt/religiousdiscrimination/report/report.pdf.

This is also the interpretation of the FHA given by the Department of Housing and Urban Development, which handles the administrative enforcement of the FHA. For public housing and apartment contexts, see Mel Martinez, Sec'y, Hous. & Urban Dev., Remarks at the Faith Based and Community Initiative Conference (Dec. 12, 2002), *available at* http://archives.hud.gov/remarks/martinez/speeches/faithbased02.cfm ("HUD's policy is not to discriminate against people of faith"); *Religious Freedom*, 6 PHILA. MULTIFAMILY HOUSING HUB NEWS (U.S. Dep't of Hous. & Urban Dev., Phila., Pa.), no. 1, Oct. 2006, *available at* http://www.hud.gov/local/pa/working/mfnews06oct.pdf (DOJ and HUD interpret the FHA to mean that tenants in apartments have equal right to use common areas for Bible study on the same terms as other uses).

In contrast to this proffered interpretation, the only court reviewing an FHA challenge to such a facially discriminatory restriction on religious use of a CIC common area found the restriction reasonable and not a violation of the FHA. *See* Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223 (S.D. Fla. 2005) (exclusion of all worship services from common space was not discriminatory, as all faiths were treated the same). Because religion-only restrictions on private property have not yet been interpreted by courts to violate the FHA, this article will consider them permissible.

10. There is precedent at the state and federal level for laws preventing the enforcement of servitudes that limit expressive rights. Note, for example, that CIC prohibitions on flying American flags have been rendered unenforceable by the federal Freedom to Display the American Flag Act of 2005 § 3, 4 U.S.C. § 5 (2006) ("[CICs] may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use."). This provision can be limited by "any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest" of the CIC. *Id.* § 4. Several state counterparts also exist. *See, e.g.*, CAL. GOV'T. CODE § 434.5 (West 2009); KY. REV. STAT. ANN. § 2.042 (West 2010).

11. *See infra* Part IV.B.

12. The Supreme Court has made clear that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, *which itself is promised freedom to pursue that mission.*" Lee v. Weisman, 505 U.S. 577, 589 (1992) (emphasis added).

13. The references to "public property" throughout this article do not include public property that is a traditional, designated, or limited public forum. Private religious expression is permitted on the same terms as nonreligious expression in public forums; such expression retains its private character

a normative argument in three parts for the protection of responsible religious exercise by groups and individuals on private and public property. The first piece focuses on *government* regulation of religious land use on private property.[14] That article analyzes RLUIPA, which provides federal statutory protection to religious exercise as against certain local zoning efforts.[15] This article, the second in the series, considers the *private* regulation of religious land use on private property through CIC restrictions. The third article describes limits to governmental involvement in religious symbolism on public property—limits that are necessary to preserve important functions of religious associations in civil society.[16] As in my previous work, the analysis that lies ahead explores religious freedom in the context of the common good of society—those conditions which support the development and flourishing of the human person.[17] In contrast to my prior work, however, this article does not focus on the jurisprudence of the Religion Clauses; it considers instead the role of private law in promoting religious freedom and the common good within a private property community and presents a particular normative construction of social life as it relates to residential property and religion.[18]

For an understanding of religious freedom within a private property community, and for help in constructing a normative argument, this article draws on the intellectual tradition of Catholic social thought as it is echoed in contemporary political philosophy and in constitutional scholarship.[19] That tradition offers a vision of the human person as being social by nature (as well as rational, responsible, and bearing dignity) and oriented toward life in community with others.[20] In keeping with this vision, the article draws upon the Second Vatican Council's Declaration on Religious Freedom

---

and is protected under the Free Speech Clause as long as the government does not operate the forum in a way that endorses religion in violation of the Establishment Clause. *See* Capitol Square Review & Advisory Bd. v Pinette, 515 U.S. 753 (1995).

14. Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485 (2009).

15. *See infra* notes 218–220.

16. Angela C. Carmella, *Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations*, 38 FLA. ST. U. L. REV. (forthcoming 2011).

17. *See infra* notes 76–126 and accompanying text. For prior work involving the common good, see, for example Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007) [hereinafter Carmella, *Responsible Freedom*]; Carmella, *RLUIPA*, *supra* note 14; Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella, eds., 2001) [hereinafter Carmella, *A Catholic View*].

18. For a detailed discussion of the importance of normative argument for legal professionals, see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

19. *See generally* Carmella, *Responsible Freedom*, *supra* note 17 at 408–11, 442–47.

20. *See generally* Carmella, *A Catholic View*, *supra* note 17 at 260–65.

(the Declaration), which calls for religious freedom, not only vis-à-vis the state, but also in civil society "as far as possible, and curtailed *only when and in so far as necessary*."[21] Agreeing with other scholars that an "opportunity for learning and development in [American law] might emerge from an encounter between [American law] and central elements of the tradition of Catholic social thought that are manifest in the Declaration,"[22] this author finds the document a useful framework for analyzing the private law concepts presented in the sub-constitutional CIC context. Because the tradition is not limited to the context of the person versus the state, its language is neither the "rights talk" nor the "rule-of-law talk" of constitutional jurisprudence, but rather a communitarian reflection on *responsible* religious freedom that is embedded in and accountable to society. This approach is especially well-suited to the CIC context, which is characterized by extensive interconnections among residents and their property interests, and at the same time reaffirms the deeply held assumption that freedom, not restraint, is the proper starting point for discussions about religious exercise.

Responsible religious freedom is connected to two large and related concepts: the common good of civil society and the role of private property in promoting that good. Catholic social thought, along with political and jurisprudential theory, recognizes the distinction between the public and private spheres and the location of vibrant religious life on private property in civil society.[23] Numerous non-state actors mediate between the person and the state—families, religious groups, neighborhoods, voluntary associations, and even market actors—and help create the social conditions necessary for human flourishing, thereby promoting the common good. The state coordinates the efforts of these actors "by setting minimum standards

21. *Declaration on Religious Freedom*, *in* THE DOCUMENTS OF VATICAN II 675, 687 (Walter M. Abbott, S.J., ed., 1966) (emphasis added).

22. Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 6 (2006).

23. *See, e.g.*, *Pastoral Constitution on the Church in the Modern World*, *in* THE DOCUMENTS OF VATICAN II 199, 280 (Walter M. Abbott, S.J. ed., 1966) ("Ownership and other forms of private control over material goods contribute to the expression of personality. Moreover, they furnish men with an occasion for exercising their role in society and in the economy. Hence it is very important to facilitate the access of both individuals and communities to some control over material goods. Private ownership or some other kind of dominion over material goods provides everyone with a wholly necessary area of independence, and should be regarded as an extension of human freedom. Finally, since it adds incentives for carrying on one's function and duty, it constitutes a kind of prerequisite for civil liberties." (footnotes omitted)); *see also* CIVIL SOCIETY AND GOVERNMENT (Nancy L. Rosenblum & Robert C. Post eds., 2002).

for economic and social relationships"[24] and intervenes when necessary to protect the common good.[25] Private property helps to preserve the distinction between the state and civil society and assists non-state actors in promoting the common good by generating economic and social development and, most relevant for purposes of this article, by facilitating the exercise of rights and defining correlative obligations.[26]

Within this philosophical framework, this article views CICs as powerful non-state actors in civil society that have the freedom to use private property to create social conditions for human flourishing—conditions like stable and secure neighborhoods. Obviously, in order to achieve this, CICs must be able to promulgate legally binding restrictions: security always requires limitations on freedom.[27] But CICs have additional obligations to the common good, such as respecting responsible religious exercise. When CICs fail to do so, state intervention to limit their contractual freedom is warranted. The FHA is one such intervention, designed in part to prevent religious discrimination in access to housing and the benefits of ownership.[28] This article contends that additional action is needed to address the more insidious problem of the religion-free environment. Thus, while a regulatory framework is essential to residential life in CICs, the current command-and-control approach to CIC governance overemphasizes security to the detriment of other fundamental human needs. In order to enable CICs to promote both security and religious exercise—which in this author's view are compatible—a new regulatory model, based on fewer rules and greater cooperation among residents, will be necessary.[29]

Preventing the spread of religion-free environments and promoting

---

24. Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 141 (2008).

25. Carmella, *A Catholic View*, *supra* note 17, at 268.

26. *See infra* notes 128–156 and accompanying text.

27. Singer, *Minimum Standards*, *supra* note 24, at 140.

28. *See* 42 U.S.C. §§ 3601–3619 (2006); *see also supra* note 6.

29. This vision is developed in the CIC literature. *See, e.g.*, Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1115 n.16 (2007) [hereinafter, Franzese & Siegel, *Trust and Community*]; Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002) [hereinafter, Franzese, *Village*]; Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for the "Nice"*, 37 URB. LAW. 335 (2005) [hereinafter Franzese, *Discontents*]. Note that the command-and-control regulatory approach (and the assertion of rights-based claims) so central to the functioning of governments is also facing challenges from the "new governance" movement, which substitutes a model in which the people affected are involved in drawing up the rules. *See* Jason M. Solomon, *Book Review Essay: Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 822 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US (Grainne de Burca & Joanne Scott eds., 2006)). Like the CIC reform literature noted, the new governance movement emphasizes participation of and collaboration among stakeholders in problem-solving and in devising best practices, and is characterized by flexibility and transparency. *See id.* at 823.

responsible religious exercise in CICs requires attention to the expectations for religious expression that are attached to various property interests.[30] This approach echoes the Declaration's presumption of freedom (restrained only when and to the extent necessary).[31] As governing principles, CIC restrictions on religious symbols or uses (1) should correlate with expectations commonly associated with particular property rights[32] and (2) should be enforceable only to eliminate identifiable negative impacts of the religious exercise, such as interference with neighbors' health and safety, access to their property, or use and enjoyment of their property.

For instance, with respect to property individually owned (such as a condominium unit or subdivision lot) or exclusively used (such as a balcony or patio), a resident is justified in expecting considerable freedom for religious exercise, subject to regulations to mitigate specific harms to neighbors. With respect to common property that is available for general use (such as a meeting room or auditorium), a resident is also justified in expecting equal access for both religious and non-religious association and expression.[33] Reasonable time, place, and manner regulations should be sufficient to ensure fair access to, and prevent the monopolization of and conflict regarding, common property. The proposal set forth below thus

---

30. *See infra* Part III.B.

31. *See Declaration*, *supra* note 21, at 687.

32. In a planned residential development, an owner:

> [H]olds title to both the exterior and interior of a residential unit and the plot of land around it. The [owners association] owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities. In a condominium, [an owner] holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. An [owners association] manages the common spaces but does not hold title to any real property. [Since condominiums usually are not detached homes], an owner of a condominium unit does not own, in individual fee, the ground under his or her unit, in contrast to the owner of a home in a planned single-family home development.

Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1115 n.16. CIC residents enjoy nonexclusive easements over common areas and exclusive use rights over common areas immediately adjacent or otherwise appurtenant to their units, like parking spaces, balconies, and patios. The owners association "is responsible for maintaining the common areas and the individual owners are responsible for maintaining their separate interests and any appurtenant exclusive use common areas." J. Thomas Cairns, Jr., *Formation of Common Interest Communities*, *in* LEGAL ASPECTS OF CONDOMINIUM DEVELOPMENT AND HOMEOWNERS' ASSOCIATIONS IN CALIFORNIA: FORMATION, CASE LAW, AND DOCUMENT PREPARATION, NAT'L BUS. INST. 15, 22 (2007) (discussing statutes and practices governing California CICs).

33. This justification is reflected in the interpretation of the FHA held by the DOJ and HUD. *See supra* note 9 and accompanying text. Note that in contrast to such commonly available spaces (in which the concept of equal access makes sense), property dedicated to a specific use, like a pool or tennis courts, should carry no such expectation of religious (or, for that matter, nonreligious) association or expression.

rejects flat prohibitions in favor of tailored controls that protect what are, in this author's view, the legitimate expectations of neighbors.

Admittedly, CIC residents who want to live in a religion-free environment are not accommodated under this proposal. Under the terms of purchase, they may have the general right to expect the absence of visual clutter or the specific right (beyond aesthetic concerns) to expect the absence of visible religious symbols and religious uses. They might consider the public manifestation of religion to be ugly, messy, offensive, divisive, discomforting, or even threatening. They even might dislike certain faiths or they might feel strongly that religion belongs inside the home or house of worship. The normative argument made here, however, does not validate these expectations; it does not permit the legal enforcement of the rules and covenants that create the environment they want.

The social life we construct through law requires that we make a normative choice between a society in which religious identity may be publicly expressed *where one lives*, or a society in which it cannot be. In this author's view, it is better to allow that expression. Residents should expect that religious exercise be responsible—that is, that it not threaten health or safety, or interfere with access to, or use and enjoyment of, others' property or a common element. They should even expect that religious exercise not involve extreme forms of permanently disruptive expression. But they should not expect their neighbors to hide their religious identity.

This article proceeds as follows: Part II describes the pervasiveness of CIC restrictions and the emerging problem of religion-free environments; Part III explains why servitude regimes that create religion-free environments are harmful to both the person and society, and develops a normative approach based on religious, philosophical, and jurisprudential insights; Part IV argues that reliance on statutory norms of non-discrimination is insufficient to halt the development of religion-free environments, that reliance on constitutional norms would actually produce such environments, and that only the traditional public policy analysis can prevent the growth of religion-free environments. In the end, the article rejects the attempt to rely on an anti-discrimination model or to constitutionalize important rights. Instead, it employs the rule of reason for the effective protection of those rights, on the theory that CICs correspond more closely to a model of neighborhood with collaboration and reciprocity as primary values,[34] rather than to one in which persons assert rights against a government.

---

34. *See generally* Franzese, *Village*, *supra* note 29 (discussing the need to recreate social capital and form authentic communities); Frank S. Alexander, *Property and Christian Theology*, *in* CHRISTIANITY AND LAW: AN INTRODUCTION 205, 214 (John Witte, Jr. & Frank S. Alexander eds., 2008) (discussing the capacity for other-regarding relationships in CICs).

II. THE EMERGENCE OF RELIGION-FREE ENVIRONMENTS IN CICS

CICs are widely accepted as the standard for newly constructed housing in the United States.[35] In the largest metropolitan areas, more than half of residential sales are within CICs.[36] Further, "[i]n many rapidly developing areas, particularly those in the West, nearly all new residential developments are under the jurisdiction of [property owners associations]. The trend shows no signs of slowing."[37] In fact, zoning regulations often mandate that new homes be built in CICs, "effectively requir[ing] that all new housing developments be governed by private associations."[38]

Religion-free environments result from multiple restrictions that are themselves only a part of a comprehensive web of aesthetic and lifestyle controls that characterize CICs.[39] The real estate developer that creates the CIC puts in place this comprehensive regime of "covenants, conditions and restrictions," and an owners association takes over management responsibilities and is empowered to enforce, modify, and supplement the restrictions, as well as collect maintenance fees.[40] Any violation of these restrictions or failure to pay fees can lead to fines, loss of rights to use common facilities, and even foreclosure to pay the lien resulting from unpaid fees and fines.[41] Typical covenants specify what colors your house

35. Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1111.

36. *Id.* at 1116–17.

37. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 57 (2008).

38. Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 237, 239–40 (2006).

39. In this article, the concern with "restrictions" is to be understood in its broadest sense. The critique is aimed at all CIC restrictions, those that exist at the creation of the CIC and those later enacted. These include (1) covenants that are part of the declaration or governing documents, and considered deed restrictions, which are typically put in place by the developer (although they can be later amended by a supermajority of owners) and (2) rules that are later promulgated by the owners association, made under its rulemaking powers or made by a majority vote of owners. Any reference to restrictions, covenants, servitudes, prohibitions, and the like shall be understood to include restrictions made at any time in the life of the CIC, that is, rules, as well as deed restrictions and amendments. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000); *see also infra* note 226.

40. Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1117. Owners associations derive their authority over residents from "covenants, conditions and restrictions" (CC&Rs) set out in a declaration and attached to all deeds of individually owned residences. *Id.* They have rulemaking authority by which they can promulgate rules relating to a host of topics, for example home occupancy, gatherings in streets and open areas, among other things, and establish a process to review proposed alterations. *Id.* at 1118.

41. *Id.* at 1118.

and window treatments can be, how many vehicles you can park in your driveway, whether you can have a pet, or the number and size of signs you can place in your window or on your lawn. Common area rules govern the use of common rooms, auditoriums, pools, and tennis courts. While it is obvious that prohibitions and rules are necessary for the operation and maintenance of the community, residents of CICs are often subject to numerous detailed controls, usually found in a declaration several inches thick, affecting multiple aspects of residential life.[42] Many of these have become standardized and widely used throughout the nation. Some controls can border on the absurd, like prohibitions on cracked flowerpots or overweight pets.[43] But even prohibitions that are reasonable, when considered on an individual basis, can in the aggregate create an oppressive servitude regime.[44]

Courts routinely accept the argument that an extensive web of restrictions is necessary to keep social and aesthetic order and to maintain property values in the CIC.[45] As the New Jersey Supreme Court has said, "[t]he mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that [CIC] residents enjoy."[46] Because a purchaser of a residence in a CIC becomes a member of the owners association and accepts the servitude regime and association governance,

---

42. *Id.* at 1125.

43. *Id.* at 1129–34; *see also* Franzese, *Discontents*, *supra* note 29, at 342–43.

44. *See generally* Franzese, *Discontents*, *supra* note 29. Critics refer to a "'command-and-control' rule regime that attempts to regulate all manner of land use and behavior. The legal straightjacket of rules, in many cases, has led to confusion, misunderstanding, inefficiency and the abridgment in some instances of the personal autonomy of CIC homeowners." Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1111–12. Another commentator noted:

> As the Restatement of Property: Servitudes observes, "[t]hrough their control of maintenance and assessment levels, rulemaking powers, and enforcement efforts, community associations often have substantial power to affect both the quality of life and financial health of their members." [Owners associations] can exercise detailed and rigid controls over their residents, limiting their use of common areas, regulating the interiors of their units, and even dictating their behaviors. Board members are advised to be aggressive and inflexible in their enforcement of CC&Rs because any leniency could be construed as a waiver and any relaxation of standards could reduce the property values of everyone who lives there. Most boards have the right to enter individual property if deemed appropriate and necessary.

Oliveri, *supra* note 37, at 53–54.

45. *See generally* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273 (1997).

46. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1073 (N.J. 2007); *accord* Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 181–82 (Fla. Dist. Ct. App. 1975) ("To promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.").

courts find that residents are on constructive notice of restrictions and therefore impliedly consent to them upon purchase.[47] While critics have raised important questions regarding the take-it-or-leave-it nature of this approach—something akin to contracts of adhesion—courts tend to ignore these concerns.[48] Additionally, critics have asked whether the command-and-control model of pervasive regulation fosters authentic community and neighborliness, or whether it fosters instead the suspicious monitoring of one's neighbors and overzealous enforcement of rules.[49] Despite these concerns, the only alternative given to the resident who cannot bear the restrictive climate is clear: do not live in a CIC.[50]

CIC restrictions on religious symbols and uses can take one of two forms: generally applicable, religion-neutral restrictions (such as a general rule against storage of items on the balcony) or restrictions targeted only at religious conduct (such as a ban on religious services in the common room). The first kind can impede publicly visible religious exercise as effectively as the second.[51] Indeed, whether a restriction generally prohibits all lawn

47. Conditions, covenants, and restrictions are treated as covenants that run with the land. *See* Franzese, *Discontents*, *supra* note 29, at 336.

48. *See* Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1112–15, 1125 (the notion that the CIC model simply reflects consumer demand "for privatized communities that incorporate a tightly controlled regime of rules aimed at maintaining and enhancing property values," *id.* at 1112, fails to take into account the fact that many factors conspire to diminish the reality of choice in the housing market). Further, constructive notice of servitudes set out in the declaration is not the same thing as knowing the implications of every covenant, or the exact range of conduct that will be governed by the owners association, or the zealous enforcement efforts of some owner associations. *See* John C. Kuzenski, *Making Room at the Table: The Public Policy Dangers of Over-Reliance on Black-Letter Contract Terms in State Common Interest Community Law*, 7 APPALACHIAN J.L. 35, 53 (2007).

49. *See generally* Franzese, *Discontents*, *supra* note 29, at 347–48; *see also supra* note 29 for a discussion on new governance.

50. Commentators have argued that, to do otherwise, to protect individual dissenters from CIC restrictions, "would result in organizational paralysis. Instead, analysis suggests—and case law generally supports—protection against redistribution of market value, but not against other harms suffered by unit owners." Sterk, *supra* note 45, at 276. As to the suggestion that dissenters try to change the rule by amendment, this is impracticable. *See* Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1114. In response to the suggestion that the Orthodox Jewish residents, who could not build temporary structures on their condominium balconies during a religious holiday due to aesthetic restrictions, simply buy property elsewhere, the Canadian Supreme Court wrote, "[i]t would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they took issue with a clause restricting their rights to freedom of religion." Brown, *supra* note 2, at 147.

51. Instead of a flat prohibition, the controls might require that the person or group obtain advance approval from the owners association. As noted in the RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.9 (2000), design controls of varying degrees of specificity and discretion are pervasive in CICs and "have given rise to substantial amounts of litigation." Courts require that

ornaments or excludes only religious ones, religious objects are banned in either case. Regardless of the restriction's form, aesthetic controls on signs, symbols, decorations, statuary, or items of any kind, together with social controls on assembly, are capable of producing a religion-free environment.

These restrictions affect religious exercise on three different kinds of property found in the CIC: property owned by the resident, common property to which the resident has an exclusive claim, and common property to which all residents have access. The first type, prohibitions on individually owned property, usually occurs in planned developments where the resident owns her home and the land under it.[52] Consider, for example,

---

these controls be exercised reasonably. *Id.* § 6.9 cmts. c & d.

52. Restrictions on individually owned property:

Hindu symbol on driveway: *See* Annie Gowen, *Driveway Painting Tests Religious Freedom; Loudoun Man Fined $900 for Hindu Art*, WASH. POST, Dec. 8, 2008, at B1 (Hindu religious symbol painted on driveway; resident ordered to paint over it even though neighbors did not object); *see also* Charles Haynes, *Understand Each Other*, MONTGOMERY ADVERTISER, Jan. 10, 2009, *available at* 2009 WLNR 20122016.

Hindu trellis in front of home: *See* Julie Kay, *Trellis Gets Reluctant OK; Group May Sue*, MIAMI HERALD, June 18, 1999, at 1B, *available at* 1999 WLNR 3378387 (variance received from city, but homeowners association may sue to have trellis removed; family claims "Hindu law requires certain areas of the house to be covered to protect occupants' health . . . ."); *see also* Julie Kay, *Faith, Rules Collide in Hollywood*, MIAMI HERALD, June 2, 1999, at 1B, *available at* 1999 WLNR 3379669 (association said Hindu family could build trellis in the back of their home, but family claims it must be placed in a specific location).

Crèche on front lawn: *See* Editorial, *Neighborhood Associations Shouldn't Censor Christmas; Let Homes Display Religious Expression Without Threats*, DETROIT NEWS, Dec. 3, 2005, *available at* 2005 WLNR 26932859 (owners association orders removal of crèche, but not of secular Christmas decorations); Novi Sub Backs Off, *Baby Jesus Stays Put*, DETROIT NEWS, Nov. 30, 2005, at A1, *available at* 2005 WLNR 26929665.

Peace sign inside a Christmas wreath: *See* Susan Paynter, Commentary, *Images of Season Evoke as Many Jeers as Cheers*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Dec. 10, 2006, at F4, *available at* 2006 WLNR 21308569 (homeowners association rescinds $1,000-a-day fine) (reported as $25/day fine in Editorial, *Peace on Earth, but Not the Subdivision*, DENVER POST, Nov. 28, 2006, at B6, *available at* 2006 WLNR 20585004).

Religious statues: *See Statue Pits Family Against Homeowners Association*, DETROIT FREE PRESS, Mar. 19, 2009, at B1, *available at* 2009 WLNR 18438236 (Virgin Mary statue in front yard for five years; association requiring owner to ask for permission to display it based on neighbor complaint); Editorial, *Compromise Needed in Canton Dispute*, DETROIT NEWS, July 27, 2001, at 10A (statue of Mary on front lawn; neighbor seeking removal by association); *Florida Homeowners Association Engages in Religious Discrimination: Bans Virgin Mary Statue, Allows Others—Lawsuit Ensues*, THOMAS MORE L. CTR. (Feb. 17, 2004), http://www.thomasmore.org/qry/page.taf?id=19&_function=detail&sbtblct_uid1=79&_nc=d9112b5542355e6651f4d625c6b09d85 (couple ordered to remove 3-foot tall statue of Virgin Mary from front of their home).

Lights: *See* Ryan Poliakoff, *Decking the Halls? Maybe Not in a Condo, Co-op or HOA*, TOLEDO LEGAL NEWS, Dec. 11, 2009, *available at* http://www.toledolegalnews.com/articles/index/id/5883 (noting that in 2008 a Southwest Florida homeowners association interpreted rules against signage to ban "all holiday lights and decorations, much to the distress of the mostly unaware residents").

Message on exterior of home: *See Michigan Appeals Panel Blesses Religious Message on Couple's House*, FIRST AMENDMENT CENTER, (Nov. 27, 2003), http://www.firstamendmentcenter.org/news.aspx?id=12271 ("Jesus is King" arranged in stone on home's three story turret).

the homeowners association that orders a Hindu family in the subdivision to remove the jhandi (a religious flag) from the front of their home because it violates the CIC's ban on religious symbols in front yards.[53] The second type, restrictions on exclusive use property, is more likely to occur in condominiums where balconies and patios are owned in common but used exclusively by the owner of the adjacent residence.[54] To illustrate, consider

53. Scott McCabe, *Hindu Flags Fly Against Dictates of Home Group*, PALM BEACH POST, Jan. 15, 2004, at 5B, *available at* 2004 WLNR 3028096; *see also Leila Persaud Wins Right to Fly the Flag*, INDIA ABROAD (New York), Feb. 13, 2004, at A12, *available at* 2004 WLNR 15144503 (homeowners association says she can fly flag in front of her house as long as it is not visible from the front of her house; suggests that she grow plants to hide the flag from public view). The year before, the owners association voted "to ban religious symbols from all 377 of the community's front yards," except during a few weeks around holidays like Christmas. Sam Tranum, *Board Disallows Hindu Symbols Neighborhood Bans Religious Displays Outside*, S. FLA. SUN-SENTINEL at 1A, Jan. 15, 2004, *available at* 2004 WLNR 20063408; *see also* Howard Goodman, Commentary, *Boca Might be Good Home for Tolerance Museum*, S. FLA. SUN-SENTINEL, Feb. 12, 2004, at 1B, *available at* 2004 WLNR 20052839.

54. Mezuzah on door post: Many conflicts involve a mezuzah on the exterior door frame. A mezuzah is a small marker, about three-to-six inches long which contains a small piece of rolled up parchment of biblical verses; posting is required by Jewish law.

Illinois: See *infra* notes 199–204 and accompanying text for a discussion of Bloch v. Frischholz, 533 F.3d 562 (7th Cir. 2008), *vacated by*, Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc); *see also* Chicago ordinance and Illinois statute, *infra* note 205.

New York: *See Cuomo Resolves Religious Discrimination Complaint Against Homeowners Association in Suffolk County*, OFF. ATT'Y GEN. (Nov. 2, 2009), http://www.oag.state.ny.us/media_center/2009/nov/nov2a_09.html (Jewish residents who affixed mezuzah to their door were ordered to either remove or purchase a screen door costing between $300–500 to conceal the object while residents with other objects, like wreaths, were not asked to remove them; owners association will issue new rules permitting residents to display religious objects on their properties); *see also* Bart Jones, *Condo Complex Relents, Agrees to Allow Mezuzahs*, NEWSDAY (USA), Oct. 31, 2009, at A05, *available at* 2009 WLNR 21725446.

Florida: Joe Kollin, *Condo Bans Religious Symbol on Doorposts*, S. FLA. SUN-SENTINEL, Feb. 3, 2007, at 1B, *available at* 2007 WLNR 2108877; Joe Kollin, *Human Rights Board Rules for Jewish Woman: Panel Says Condo Wrong to Order Mezuzah Removed*, S. FLA. SUN-SENTINEL, April 24, 2008, at 1B, *available at* 2008 WLNR 7592268 (Broward County Human Rights Board found reasonable cause to believe board discriminated against Jewish woman, as other religious symbols were allowed, raising possible fair housing violation); *see also Attorney General McCollum Hosts Roundtable Discussion on 2007 Accomplishments*, U.S. STATE NEWS, Dec. 19, 2007, *available at* 2007 WLNR 25082987 (noting Florida attorney general's involvement in the case). Florida's condominium statute was amended after this and the Illinois incident in *Bloch*. *See infra* note 205.

Connecticut: *See* Gabrielle Birkner, *Couple Wins Fight With Condo Group Over Mezuzah*, ADVOC. (Stamford, Conn.), Aug. 26, 2003, at A13, *available at* 2003 WLNR 16771712 (Connecticut Commission on Human Rights and Opportunities drew up a settlement; mezuzah allowed, $4,000 damages paid to couple).

Texas: *See* Corrie MacLaggan, *Lawmakers Seek to Prevent Homeowners' Associations from Banning Mezuzahs*, AM. STATESMAN (Austin, TX), May 6, 2009, *available at* http://www.statesman.com/news/content/region/legislature/stories/05/06/0506mezuzah.html; *see also* Douglas Wertheimer, *Illinois, then Florida—is Texas Next?*, CHI. JEWISH STAR, Apr. 3, 2009, at

the condominium association that orders Orthodox Jewish families to remove "succahs" (small shelters or booths with sides but no roof used for celebrating the nine day Festival of Tabernacles, or Succoth) from their balconies because they constitute prohibited alteration.[55] And the third type,

---

1, *available at* 2009 WLNR 7194045 (Texas couple ordered to remove mezuzah and fined $25/week for non-compliance; lost FHA claim before U.S. Dist. Ct., S.D. Tex., Judge Lynn Hughes; they pursue legislative relief).

Religious statues: *See* Richard Siegler, *Religious Freedom Challenges: What Prohibitions and When?*, 226 N.Y. L.J 3(2001) (discussing Vacca v. Bd. of Managers of Primrose Lane Condo., 676 N.Y.S.2d 188 (App. Div. 1998) where board of managers prohibited statues of Mary and St. Jude in the soil against the outside wall of the building, immediately adjacent to the unit).

Creche in front yard (exclusive use area): *See* Jim Woods, *Condominium Tells Resident to Take Down Nativity Display*, COLUMBUS DISPATCH (Ohio), Dec. 22, 2007, at 03B, *available at* 2007 WLNR 25294282 (resident disputes area is common space); *see also* Kristen Alloway, *Condos and Her Creche Don't Mix in Montville: Resident Ordered to Remove Statues*, STAR-LEDGER (Newark, N.J.), Dec. 15, 1998, at 48, *available at* 1998 WLNR 6959084 (figures were in small yard in front of her townhouse; condominium manager explained rule was for purpose of "uniformity and control over the common areas . . . . They want to control what is shared by everybody so no one person takes a common area and puts up something that might be offensive to others.").

Jhandi on balcony: *See* Boodram v. Md. Farms Condo., No. 93-1320, 1994 WL 31025 (4th Cir. Feb. 1, 1994) (general restriction against items on balcony did not violate FHA; religious flags could have been placed there as long as they were not visible).

Cross on patio: *See* Thao Hua, *O.C. Homeowner's Cross Brought to Bear; Religion: Condo Association Claims Christian Symbol is Against the Rules and Could Be Offensive*, L.A. TIMES, Jan. 28, 1998, at 1, *available at* 1998 WLNR 6357442 (Superior Court judge refused to enforce general ban on patio objects to require resident to remove five-foot tall wooden cross, dismissing the claim that the cross might be offensive).

55. Succah on Balcony: *See* Siegler, *supra* note 54, at 3 (discussing Greenberg v. Bd. of Managers of Parkridge Condo., N.Y. L.J., Sept. 19, 2000, at 31 (Sup. Ct. Queens County), *aff'd*, 742 N.Y.S.2d 560 (App. Div. 2002)); *see also* Scott E. Mollen, *Realty Law Digest*, 224 N.Y. L.J. 5 (2000); Andy Thibault, *Our Condos, Our Town*, CONN. L. TRIB., Jan. 27, 2003, *available at* 2003 WLNR 18278874 (condominium association specifically banning succahs and menorahs and other religious symbols after a rabbi celebrated holidays in public view); *Residents Upset After Condo Association Dismantles Sukkah*, VOS IZ NEIAS? (Oct. 6, 2009, 10:33 AM), http://www.vosizneias.com/39434/2009/10/06/bal-harbor-fl-residents-upset-after-condo-association-dimantles-sukkah/ ("The attorney for the owners association wrote in a statement: 'The board of directors is enforcing their documents prohibiting owners from making temporary alterations to the common element. It's Tantamount [sic] to a Christian making an alter [sic] by the pool during Lent. To allow one owner to do this we will have to allow 451 owners to do this.'"); *Jewish Family Fined for Sukkot Tent*, N.Y. TIMES, Nov. 16, 1999, at B18, *available at* 1999 WLNR 3080440; *Couple Settle Religion Discrimination Case for $27,500*, NAT'L FAIR HOUS. ADVOC. ONLINE (Nov. 8, 2005), http://www.fairhousing.com/index.cfm?method=page.display&pageid=3645 (succah on condominium unit's patio will no longer be treated as an outside decoration in violation of restrictions); Brown, *supra* note 2, at 126–47 (describing Canadian Supreme Court decision in Syndicat Northcrest v. Amselem, (2004) 2 S.C.R. 551 (Can.) requiring condominium association to allow succah on balconies for the nine day holiday because the intrusion on neighbors' rights were "minimal," and rejecting the concern that such a use would lower value or affect aesthetics). For a discussion of an owners association permitting religious display in contravention of rules, see Tower Forty-One Ass'n v. Levitt, 426 So. 2d 1290 (Fl. Dist. Ct. App. 1983) (affirming trial court's grant of injunction against condominium association that permitted the religious display of a succah booth; the bylaws provided for no religious use, and no religious display in or on a common element).

Succah on patio: *See* Richard Higgins, *Court Saves Holiday*, BOS. GLOBE, Oct. 9, 1990, at 17, *available at* 1990 WLNR 1620858 (county court grants restraining order against condominium

restrictions on common property (owned or managed by the CIC)[56] that is generally available to residents for meetings and recreation, occur in both planned subdivisions and condominiums.[57] In two litigated cases, after a

association enforcement of "no construction" bylaw; an Orthodox Jew is allowed to build and maintain sukkah during the holiday).

Succah on lawn outside condominium: *See* Mona Z. Browne, *Rules Beat Tradition in Rabbi-Condo Split Officials Say His Sukkah Violates Building Rules*, MIAMI HERALD 7, Sept. 27, 1985, at 7, *available at* 1985 WLNR 279323.

56. Common property is owned in a planned development and managed on behalf of common owners in a condominium. *See supra* note 32 and accompanying text.

57. Common area religious uses:

See Howard Friedman, *Suit Challenges Mobile Home Park's Prayer Ban*, RELIGION CLAUSE (Apr. 20, 2006), http://religionclause.blogspot.com/2006/04/suit-challenges-mobile-home-parks.html (reporting a lawsuit filed by the United States Justice Foundation seeking to force a California mobile home park to allow religious activity in its common areas); *see also* Editorial, *AG Answers Group's Prayers*, E. VALLEY TRIB., (Apr. 21, 2006, 11:00 PM), http://www.eastvalleytribune.com/article_49b2a7bb-7c0b-508a-9391-c98aed45b915.html (Arizona Attorney General settles state FHA suit brought by Mormons regarding access to meeting rooms; association banned all religious groups use of meeting rooms when group objected to a new fee requirement after using the room once each week for twelve years); Press Release, Off. Att'y Gen. Terry Goddard, Terry Goddard Settles Lawsuit with Mesa Homeowners Association (Apr. 19, 2006), *available at* http://www.azag.gov/press_releases/april/2006/SunlandVillageSettlement.pdf. For a case holding that a CIC rule banning religious use of common areas did not unreasonably restrict condominium owners, see Neuman v. Grandview at Emerald Hills, Inc., 861 So. 2d 494 (Fla. Dist. Ct. App. 2003); Noaki Schwartz, *A Community Divided*, S. FLA. SUN-SENTINEL, Jan. 18, 2002, at 1B, *available at* 2002 WLNR 12735403 ("[A]ging Orthodox residents who could no longer walk to services wanted to worship in their condominium auditorium," but residents voted to ban religious uses); *Orthodox Jews Sue Condo Over Prayer Ban*, ORLANDO SENTINEL, May 7, 2001, at B3, *available at* 2001 WLNR 10889705 (Forty Orthodox families held Sabbath prayer service, but after three weeks board voted to ban only religious uses. Most of other residents and entire board are Jewish). For another vote to ban religious uses in common areas, see Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Ass'n 456 F. Supp. 2d 1223 (S.D. Fla. 2005) (100 residents of 1,550-home subdivision worshipped at non-denominational service an hour each Sunday morning since 2001); Lindsay Jones, *Worshipers Complain to U.S. About Savanna Club Board*, PALM BEACH POST, Aug. 3, 2004 at 1B, *available at* WLNR 3031357. *But see* Elaine Matsushita, *Synagogue Makes Itself Right at Home*, MIAMI HERALD, Nov. 30, 1989, *available at* 1989 WLNR 1451373 (synagogue provided within the condominium to accommodate the building's 90% Orthodox Jewish population).

Common area religious symbols:

See Daveen Rae Kurutz, *Associations' Rules Can Really Hit Home*, PITTSBURGH TRIB. REV., Jan. 18, 2007, *available at* 2007 WLNR 1008227 (condominium banned all Christmas and Chanukah decorations in common areas, and required use of snowman decorations instead); *2006 Christmas Watch*, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, http://www.catholicleague.org/linked%20docs/christmas_watch.htm (last visited Oct. 10, 2010) (religious symbols banned from common areas of senior citizen home, reverses policy after lawsuit brought); Sarah Myrick, *Cascades No Longer Without Baby Jesus*, FORT PIERCE TRIB. (Fla.), Dec. 14, 2005, at A1, *available at* 2005 WLNR 20237746; Sarah Myrick, *Nativity Scene Finds Stable at Cascades*, STUART NEWS (Fla.), Dec. 7, 2005, at A1, *available at* 2005 WLNR 19697783 (noting that homeowner association refused to allow nativity scene next to lighted menorah and Christmas tree in clubhouse, then reversed itself); Letters to Editor, *Holiday Displays Best Reserved for Private Property*, ST.

religious group used the common room for a weekly religious service, some residents voiced concern that the service was both disruptive and an impediment to others' use of the space.[58] Rather than enact rules to prevent abuses by any group and to ensure fair access for all, the owners association held an election, and the majority voted to ban all religious services from the common room.[59]

What is the legal status of these various types of CIC restrictions? We know that restrictions relating to real property may be unenforceable on constitutional, statutory, or common law grounds, consent notwithstanding.[60] Despite their "private" nature, for instance, racially restrictive covenants violate the Equal Protection Clause and are thus invalid, on the theory that judicial enforcement constitutes state action.[61] Even without any finding of state action, legislation can directly render servitudes unenforceable.[62] Further, covenants that violate public policy are invalid under the common law.[63] Yet, in the CIC context, courts tend to bind residents to the restrictions. Rights restricted by the servitude regime are generally considered waived by the act of purchase.[64] Even for courts willing to

---

PETERSBURG TIMES (Fla.), Dec. 24, 2001, at 9A, *available at* 2001 WL 11039946 ("private" refers to the individual, not to common property); Mark Pearlstein, *No Holiday Board Hews to a Restrictive Stance Toward Religious Decorations*, CHI. TRIB., Sept. 20, 1998, at 4, *available at* 1998 WLNR 6564991 (a question-and-answer with a subscriber concerning the topic of holiday-season religious display); Kevin Krause, *Condo Says No Menorah: Jewish Residents Want their Decorations, Too*, S. FLA. SUN-SENTINEL, Dec. 14, 1996, at 1B, *available at* 1996 WLNR 5452040 (display of menorah not allowed, but Christmas tree permitted because it was deemed commercial); Norv Roggen, *North Palm Man May File Lawsuit over Menorah Flap*, PALM BEACH POST, Dec. 19, 1990, at 11B, *available at* 1990 WLNR 1127209 (resident who put menorah on common property ordered to remove it).

58. *Neuman*, 861 So. 2d 494; *Savanna Club*, 456 F. Supp. 2d 1223.

59. *Neuman*, 861 So. 2d at 496; *Savanna Club*, 456 F. Supp. 2d at 1225.

60. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000) (validity of servitudes).

61. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant constituted state action in violation of the 14th Amendment). Pressure to expand the state action doctrine waned because claims of this sort became actionable under the federal Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006), enacted in 1968, which prohibited discrimination by private as well as state actors in the sale and rental of housing.

62. The Fair Housing Act prohibits not only covenants that discriminate on the basis of race, but also those that discriminate on the basis of religion, national origin, sex, handicap, and familial status. *See supra* notes 6, 9 and *infra* Part IV.

63. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000). For further discussion, see *infra* notes 227–242 and accompanying text.

64. *See* Sterk, *supra* note 45 at 293. "If . . . she chooses to purchase in a community that restricts religious practice . . . she might be treated as waiving any constitutional protections she might otherwise have had." *Id.* at 293 n.80. For criticism of the "waiver" concept, see Kuzenski, *supra* note 48 at 51–56; Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472 (1985) and Brown, *supra* note 2, at 147 (because the condominium restriction was not negotiable, one judge found that "a right holder who has no other choice but to renounce a right—i.e., no opportunity to negotiate a contractual provision—cannot be said to have truly waived his or her right").

protect rights within CICs, the consent-based nature of the CIC, together with the perceived necessity of extensive restrictions to ensure order and protect property values, continues to be a formidable obstacle to judicial intervention.[65]

Few reported decisions address CIC restrictions on religion. In the successful challenges to enforcement of such restrictions, residents prevailed either because (1) the governing documents did not provide for the restriction in the first place[66] or (2) the facts demonstrated egregious religious discrimination proscribed by the FHA.[67] Indeed, discrimination against a particular religious group seems to be a controlling factor, whether the resident is prohibited by the enforcement of a general restriction or of a religion-only restriction.[68] So, in the examples above, unless the Hindu

65. *See* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1072–74 (N.J. 2007).

66. *See, e.g.*, *Michigan Appeals Panel Blesses Religious Message on Couple's House*, ASSOCIATED PRESS, Nov. 27, 2003, *available at* http://www.firstamendmentcenter.org/news.aspx?id=12271 (reversing lower court decision to remove words "Jesus is King" from home's three story turret; design approval requirements apply only to materials, not to their arrangement); Siegler, *supra* note 54, at 3 (discussing Vacca v. Bd. of Managers of Primrose Lane Condo., 676 N.Y.S.2d 188 (App. Div. 1998) and Greenberg v. Bd. of Managers of Parkridge Condos., N.Y. L.J., Sept. 19, 2000, at 31 (Sup.Ct. Queens County), *aff'd*, 742 N.Y.S.2d 560 (App. Div. 2002) (nothing in documents prohibited succah on balcony; owners association could not order removal or fine the residents, and did not act in good faith)). For more on *Greenberg*, see *Cooperatives and Condominiums: Condominium Board Exceeds Its Powers by Prohibiting Succah without Enacting Rule or Regulation*, 15 No. 1 N.Y. REAL EST. L. REP. 2 (2000). Although it did not go to litigation, one homeowners association dropped its demands for resident to remove a crèche when it realized that it had no authority. *See Novi Sub Backs Off, Baby Jesus Stays Put*," DETROIT NEWS, Nov. 30, 2005, at A01, *available at* 2005 WLNR 26929665; Editorial, *Neighborhood Associations Shouldn't Censor Christmas; Let Homes Display Religious Expression without Threats*, DETROIT NEWS, Dec. 3, 2005, at E06, *available at* 2005 WLNR 26932859 (on the basis of a complaint from another resident, owners association ordered the removal of a crèche—but not secular ornaments like Santa or Minnie Mouse—from resident's lawn and assessed weekly fines of $100 while it remained; after residents sued, association dropped threats, apologized, and admitted that no CIC rule had been violated because none governed temporary displays).

67. *See infra* notes 198–208 and accompanying text. State versions of the FHA are also involved. *See supra* notes 54, 57; *infra* notes 206–08.

68. Religion-only restrictions, though facially discriminatory, are not automatically considered discriminatory under the FHA. *See supra* note 9. Although the Civil Rights Division of the Department of Justice takes the position that the FHA requires equal access to CIC common areas for religious and non-religious meetings, no court has yet to apply the statute in this way to CICs. *See id.* Even the case in which a court focused on facial discrimination as between religious and nonreligious use of common areas was complicated by the existence of denominational discrimination. *See* Daily v. N.Y.C. Hous. Author., 221 F. Supp. 2d 390 (E.D.N.Y. 2002) (viewpoint discrimination in violation of the Free Speech Clause's public forum doctrine found where a tenant in *public* housing was barred from holding a Bible study in common space where non-religious uses were permitted; but also significant to analysis was that other religious uses were permitted while this religious use was not).

family, the Orthodox Jewish families, and the common area worshippers can demonstrate that they were singled out for discrimination or that there was particularly intense anti-denominational hostility in the enforcement of the restriction, they would not be protected under current judicial interpretations of the FHA.[69] Thus, CIC prohibitions on religious symbols and uses are acceptable, absent a strong showing of bias against a particular religious denomination.[70] Courts have avoided any innovative use of doctrines like public policy to constrain enforceability. Residents caught in these restrictions, unable or unwilling to exit the community, must move their symbols or uses to a place not visible to any passersby.[71] After all, they have constructively consented to a carefully controlled visual environment—one that does not include the recognition of religion.

Obviously, there is a demand for religion-free residential life, and that demand reflects something other than actionable discrimination. Those who want to live without reminders of religion might consider its public manifestation to be ugly, messy, offensive, divisive, discomforting, or even threatening; they might be a member of a religious minority who feels affronted by majority symbols; they might feel disturbed by the conduct of a highly visible religious minority;[72] they might believe strongly that religion belongs only inside the home and inside a house of worship; or they might fear that anything out of the ordinary will lower property values.[73] Are these legitimate grounds for allowing such environments? And even if some of these concerns are legitimate, are there other values that outweigh them?

---

69. Indeed, in the actual case of the exclusive ban on religious services in the common room, no FHA violation was found. *See* Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp.2d 1223, 1234 (S.D. Fla. 2005).

70. A CIC does run the risk of a federal investigation by the DOJ in the event that the condominium or homeowners association chooses to prohibit only religious symbols or religious conduct. *See supra* note 9. But if the association chooses instead to regulate symbols or uses by way of general, religion-neutral proscription applicable to all similarly situated residents, it is completely within its rights so long as no denominational targeting is involved in the enforcement of such proscriptions.

71. This was the outcome of the Hindu family's case: they were allowed to place their jhandi in the front yard, but it had to be hidden by bushes. *See supra* note 53; *see also* Boodram v. Md. Farms Condo., No. 93-1320, 1994 WL 31025 (4th Cir. Feb. 1, 1994) (Hindu resident prohibited from placing flags on balcony could have done so if they "were placed out of sight" and not visible to any passerby).

72. Aesthetic assimilation often hides not only religious identity but also cultural and ethnic identity. *See* Michael W. McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90 (Nancy L. Rosenblum ed., 2000).

73. From the news items noted *supra* in notes 52–57, negative publicity and threats of litigation can sometimes make an owners association rethink its decision. But, the news items tell a story. *See* Charles C. Haynes, Opinion, *Understand Each Other*, MONTGOMERY ADVERT., Jan. 10, 2009, *available at* 2009 WLNR 20122016 ("[T]he real cautionary tales are the small stories, the little-noted religious tensions in neighborhoods and workplaces that are barometers of how well we are addressing religious differences on a daily basis.").

Below, this article attempts to address these questions and sets forth the building blocks for a normative argument in favor of a social world that does not suppress religious identity.

III. THE PROBLEM WITH RELIGION-FREE ENVIRONMENTS

Developers and owners associations can legally create religion-free environments as long as their governing documents support the restrictions and as long as they avoid anti-denominational animus that would lead to actionable claims under the FHA.[74] Such toleration of religion-free environments is grounded in the "social contract" of the CIC, which has been described as:

> [A] sort of quid pro quo where unit owners give up certain of their fee rights, hand over the regulation of the units to an association in order to best maintain the entire community. In exchange, unit owners know that their neighbors will maintain their property in a suitable fashion and that the common areas will be kept in proper order for the use and enjoyment of all residents.[75]

As we have seen, however, this superficially reasonable bargain makes public forms of religious expression and association vulnerable to prohibition by owners associations. In this author's view, such a bargain cedes too much freedom to private restriction and is contrary to the dignity of the human person, the common good of society, and one of the major purposes of private property: providing the locus for religious exercise. Drawn from both the Catholic intellectual tradition and American property law, this normative argument is presented below.

A. The Dignity of the Person and the Common Good of Society

The CIC's religion-free environment must be measured against the common good of society. The common good—a normative vision central to Catholic social thought, but overlapping much of contemporary political theory—focuses on social conditions as they affect human development.[76]

---

74. *But see supra* notes 9, 70 and accompanying text.

75. Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005).

76. For discussion of the various approaches to the common good, religious and philosophical, see ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 104–18 (2010) and McConnell, *supra* note 72, at 90.

The common good is neither the state's interest nor the interest of the majority or a particular group. It refers to:

> [T]he totality of goods that create the conditions in which persons flourish. In its fullest sense, the common good describes social conditions designed to enable "the total human development" of the person, such as human rights for individuals, social health and development of the community, and a just, stable, and secure order.[77]

In Catholic social thought, the state plays "a limited, subsidiary role" in promoting the common good.[78] It ensures the public order—civil rights, public peace, and public morality—but it also coordinates and assists non-state actors in *their* promotion of the common good.[79] Indeed, all institutions of civil society—including intermediary associations like CICs—are supposed to create social conditions that are good for the human

---

77. Carmella, *A Catholic View*, *supra* note 17, at 266 (citing to the United States Conference of Catholic Bishops, Catechism of the Catholic Church nos. 1906–09 (1994)); *see also Declaration*, *supra* note 21, at 683–84 (The common good of society "consists in the entirety of those conditions of social life under which men enjoy the possibility of achieving their own perfection in a certain fullness of measure and also with some relative ease. Hence [it] consists chiefly in the protection of the rights, and in the performance of the duties, of the human person." (citation omitted)); *Pastoral Constitution*, *supra* note 23, at 284 ("[T]he common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way." (citation omitted)); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154 (1980) (the common good refers to "the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development"); JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 50, 53–54 (1947) ("The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of *human persons*, just as the social body itself is a whole of human persons, this conception also would lead to other errors of a totalitarian type. . . . The common good is something ethically good. Included in it, as an essential element, is the maximum possible development, here and now, of the persons making up the united multitude to the end of forming a people, organized not by force alone but by justice." (emphasis in original)); Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 87–88 (2007) ("The common good is inextricably bound to the good of individual persons, as Maritain explains in his classic work, *Man and the State* . . . 'that each concrete person, not only in a privileged class but throughout the whole body politic, may truly reach that measure of independence which is proper to civilized life and which is ensured alike by the economic guarantees of work and property, political rights, civic virtues, and the cultivation of the mind.'"). *See generally* C.M.A. Mc Cauliff, *The Friendship of Pope Paul VI and Jacques Maritain and the Declaration on Religious Freedom*, 41 SETON HALL L. REV. (forthcoming 2011); Patrick McKinley Brennan, *Jacques Maritain (1882–1973)*, *in* THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS, & HUMAN NATURE 106, 124–28 (John Witte, Jr. & Frank S. Alexander eds., 2006); Angela C. Carmella, *John Courtney Murray, S.J. (1904–1967)*, *in* THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS, & HUMAN NATURE 181, 188–91 (John Witte, Jr. & Frank S. Alexander eds., 2006).

78. Kalscheur, *supra* note 22, at 24.

79. *See generally* Carmella, *Responsible Freedom*, *supra* note 17, at 408–11, 442–47.

person, with state assistance where needed but without state takeover.[80] The state respects the integrity of the institutions of civil society and intervenes only when non-state actors thwart the common good in a way that threatens public order.[81] The term "subsidiarity" refers to this model of an activist and moral, yet limited, state that coordinates non-state actors toward the common good. [82] As local, largely unregulated, non-state actors, CICs fit easily into the model of subsidiarity—state intervention occurs primarily when CICs fail to follow their own rules or discriminate on illegal grounds.[83]

How might we think about CICs and the common good? Since the common good is "inextricably bound to the good of individual persons,"[84] we have to decide "what is good for the person."[85] So we ask, what social conditions precede and facilitate human development and human flourishing, and what role does the CIC play in their creation? Obviously, while it is the obligation of all persons and groups in civil society to promote the common good, they must do so "in the manner proper to each."[86] We can easily see that a proper role for CICs in the promotion of the common good is the creation of stable, secure neighborhoods, as they can provide not only a safe place to live, but housing "that fulfill[s] a deep and natural human yearning for community in both a social and political sense."[87] The literature on CICs offers a mixed record on this—certainly stable, secure neighborhoods are created, but whether they are truly places of authentic community has been a question at the heart of scholarly criticism and calls

80. *Id.*

81. *Id.*

82. *See* Vischer, *supra* note 76, at 104–05 ("Subsidiarity is . . . premised on the empowerment of individuals and groups to meet the needs around them, with the state acting, not as the primary locus of social action, but in a supportive, secondary role. This dispersal of social authority represents the 'bottom up' ordering of society in which needs are met, where possible, by the moral agents who are closest to them. . . . Only if the lower bodies cannot address a problem effectively should the higher bodies step in.").

83. *Id.* at 103 ("The state, as society's only legitimate purveyor of coercive force, must act with deference toward the dimension of the common good that is not defined by the collective will. . . . The state's self-restraint helps ensure that the common good is not defined and imposed from above . . . but is instead realized from the bottom up, constituted by the conscience-driven decisions and day-to-day actions of individuals and the communities to which they belong. The state's self-restraint cannot be absolute, of course, for the common good requires a level of social justice and order that only state authority can ensure.").

84. Duncan, *supra* note 77, at 88.

85. Richard W. Garnett, *The Rights Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1312 (2002).

86. *Declaration*, *supra* note 21, at 684.

87. Douglas W. Kmiec, Book Review, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 753 (1999).

for CIC reform.[88] What about religious freedom? Is religious freedom an aspect of the common good? And if it is, are CICs responsible for its protection?

Religious freedom is indeed an essential element of the common good, a condition critical to the flourishing of the human person. It is a fundamental right in the U.S. Constitution, enshrined in the First Amendment,[89] and considered one of the universal human rights.[90] From the earliest days of the republic, the free exercise of religion has been protected so long as it did not threaten peace or order.[91] Many state and federal statutes now protect religious exercise generally, and thousands more contain religious exemptions to allow for religious freedom in specific contexts.[92] As part of its public order function, the state protects the free exercise of religion as a civil right—not only as against state actors but as against private actors as well.[93] Though religion no longer holds the place it once did, it continues to be recognized through its institutions, ideas, and adherents as a significant contributor to society—in social services, in education and health care, in protest movements and legal reform, in the generation and transmission of ethical norms, and in the formation of communities of moral meaning and the moral formation of persons. Moreover, religious freedom qua freedom is a good as well.[94] Because religious freedom recognizes the transcendent commitments of the human person, it is critical to preventing claims asserted by the state and the market, indeed by any human power, to the whole human person.[95] In this way it is often said to provide a "bulwark" against

---

88. *See* Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1150–56; Franzese, *Discontents*, *supra* note 29, at 339–47; Franzese, *Village*, *supra* note, 29, at 569–71.

89. U.S. CONST. amend. I (providing in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

90. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); *see also* C.M.A. Mc Cauliff, *Cognition and Consensus in the Natural Law Tradition and in Neuroscience: Jacques Maritain and the Universal Declaration of Human Rights*, 54 VILL. L. REV. 435 (2009); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998).

91. *See* McConnell, *supra* note 72, at 102–07.

92. *See* Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (2006) (applicable to federal law only under City of Boerne v. Flores, 521 U.S. 507 (1997)); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006). Additionally, twelve states have enacted state legislation that mirrors the federal RFRA, another twelve have interpreted their constitutions to protect religious exercise with a strict scrutiny standard of review, and one did so by constitutional amendment. Nicholas Nugent, Note, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027, 1052 & n.146 (2008); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992); Carmella, *Responsible Freedom*, *supra* note 17, at-404 & nn.6–7.

93. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (2006) (prohibiting discrimination in employment on the basis of religion and requiring reasonable accommodation of religion in employment); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006).

94. John H. Garvey, WHAT ARE FREEDOMS FOR? (1996).

95. In the United States, rights are not granted by the government but are antecedent to the state

the state and other institutions.[96] In short, religious freedom provides essential structural conditions as well as specific social goods that contribute to human flourishing.[97]

The Second Vatican Council's Declaration on Religious Freedom presents a compelling and coherent case for responsible religious freedom. The Declaration's overarching theme is the strong presumption in favor of freedom "as far as possible, and curtailed only when and in so far as necessary."[98] Under that document, the right to religious freedom is grounded in the dignity of the human person, in the person's "very nature."[99] The Declaration teaches that "the social nature of man itself requires that he should give external expression to his internal acts of religion; that he should participate with others in matters religious; that he should profess his religion in community."[100] Thus, all people:

> [A]re to be immune from coercion *on the part of individuals or of social groups and of any human power*, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. *Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.*[101]

The quoted language notes first that religious freedom consists in freedom from both coercion and restraint; second, that religious exercise is understood to be a multidimensional phenomenon—personal and communal, private and public; and finally, that the entire civil society is involved in the protection and promotion of religious freedom.[102] As Professor Gregory Kalscheur notes, the Declaration "insists that it is not the function of government acting through law to take total responsibility for the promotion of the common good of society."[103] Therefore, wholly aside from any

---

and inhere in the nature of the person. The state cannot make claim to the whole person because it recognizes another authority, prior to and different from the state. *See generally* McConnell, *supra* note 72, at 102–07.

96. Carmella, *Responsible Freedom*, *supra* note 17, at 410.

97. *Id.* at 403–12.

98. *Declaration*, *supra* note 21, at 687.

99. *Id.* at 679. "The right to religious freedom articulated by the Council is rooted in a commitment to respect the exercise of responsible freedom that is demanded by human dignity." Kalscheur, *supra* note 22, at 28.

100. *Declaration*, *supra* note 21, at 681.

101. *Id.* at 679 (emphasis added).

102. *See id.*

103. Kalscheur, *supra* note 22, at 14.

considerations of state action, non-state actors are charged with respecting religious freedom and should neither coerce nor restrain public religious conduct.[104]

Obviously no freedom is absolute, and the Declaration is clear that religious freedom must be exercised responsibly.[105] To explain the meaning of restricting freedom "only when and in so far as necessary," the document states:

> The right to religious freedom is exercised *in human society*; hence its exercise is subject to certain regulatory norms. In the use of all freedoms, the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all.[106]

Precisely because religion is exercised *in human society*, obligations to others that limit religious freedom become part of its very definition. Naming those obligations can be difficult, but the Declaration gives some guidance. The state appropriately constrains religious freedom, for instance, when "abuses [are] committed on [the] pretext of religious freedom,"[107] or when the religious practice directly interferes with the rights of others, civic peace, or public morality.[108] Similarly, groups within civil society that

---

104. All social groups and religious communities, in addition to government and the people as a whole, must respect religious freedom. *See Declaration*, *supra* note 21, at 684. Despite its source in one religious community, the Catholic intellectual tradition gives voice to ecumenical and indeed universal ideas. *See infra* notes 147–156 and accompanying text (concerning Joseph William Singer's democratic approach to property law); McConnell, *supra* note 72, at 91–100; MARITAIN, *supra* note 77; MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 333 (2008).

105. *See Declaration*, *supra* note 21, at 685–86.

106. *Id.* (emphasis added) (citation omitted).

107. *Id.* at 686.

108. *Id.* at 686–87; *see also*, Kalscheur, *supra* note 22, at 20 n.91 ("The foundation of human society lies in the truth about the human person, or in its dignity, that is, in its demand for responsible freedom. That which in justice is preeminently owed to the person is freedom—as much freedom as possible—in order that society thus may be borne toward its goals, which are those of the human person itself, by the strength and energies of persons in society bound together with one another by love. Truth and justice, therefore, and love itself demand that the practice of freedom in society be kept vigorous, especially with respect to the goods belonging to the human spirit and so much more with respect to religion. Now this demand for freedom, following as it does from the objective truth of the person in society and from justice itself, naturally engenders the juridical relationship between the person and the public power. The public power is duty bound to acknowledge the truth about the person, to protect and advance the person, and to render the justice owed to the person." (quoting John Courtney Murray, S.J., *Arguments for the Human Right to Religious Freedom*, *in* RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 229, 241 (J. Leon Hooper, S.J. ed., 1993)).

govern themselves must set limits only "when and in so far as necessary" in order to ensure the reciprocity of rights and duties.[109] Indeed, the CIC, as a non-state "social group" and "human power" within civil society, is responsible for protecting the religious freedom of its residents "in the manner proper to" it, which includes the allowance of religious exercise in public and in association with others.[110] Freedom can be curtailed—but only when justified by necessity. In the CIC context, religious freedom can be restricted when it is irresponsible—that is, when it threatens the security and stability that can be reasonably expected, as when it interferes with neighbors' safety, access, or the exercise of their civil or property rights.

The insights of the Declaration provide a radically different starting point for thinking about religion in the CIC. Rather than assuming that every aesthetic and social control incorporated within the "contract" for the protection of property values is a social good, the Declaration starts with the dignity and social nature of the person, the importance of social groups that mediate between person and state, and the claim that no one should be restrained from the publicly visible practice of religion unless necessity demands it.[111] That perspective counsels rejection of the notion that all of social life is contained within and governed by the contract. It challenges the need for a comprehensive web of controls and expansive interpretations of those controls.[112] Indeed, the Declaration's perspective dovetails with that of CIC reformers who would reduce regulation and allow only those restrictions essential to life in common, with an eye toward promoting neighborliness.[113] Like the "new governance" reform movement that

109. *Declaration*, supra note 21, at 687.

110. *Id.* at 684 ("[T]he care of the right to religious freedom devolves upon the people as a whole, upon social groups . . . in virtue of the duty of all toward the common [good], and in the manner proper to each.").

111. *Id.* at 679, 687.

112. "Law shapes social relations, and to avoid unjust and oppressive power relationships, it must rule certain kinds of contractual arrangements as out of bounds." Singer, *Minimum Standards*, *supra* note 24, at 156.

113. *See* Franzese, *Village*, *supra* note 29, at 591 ("Instead of imposing an exhaustive litany of covenants, conditions and restrictions from the start, the declaration should contain only those few rules deemed essential to promoting the community's basic structure and well-being."); Franzese & Siegel, *Trust and Community*, *supra* note 29, at 1137–38 ("[T]he classic model of CIC organization and governance is flawed because it presupposes that law and rules can do all of the work—that is, the work that law does most successfully when in partnership with, if not deference to, appropriate social norms. The standard cookie-cutter regime does not give organic norms of 'neighborliness,' residing in systems of reciprocity and built on stocks of social capital, a chance to develop. Rather, it encourages, tacitly or explicitly, prospective buyers, and then residents, to trust the developer's template, and then to trust the homeowners association, and then to trust the association's governing board to oversee a system predicated, from its very inception, on a lack of trust. This disjuncture

challenges the command-and-control approach of the regulatory state with an emphasis on participation and collaboration among stakeholders, the Declaration's perspective on freedom and the common good reflects the rich story of human sociability and community.[114]

The Declaration's perspective on freedom that is accountable to the community requires us to ask normative questions: what do we owe our neighbors, and does it involve hiding one's religious identity? Obviously, we are not supposed to undermine neighborhood security and stability. But what level of security and stability should be reasonably expected? Surely, the neighbors who want a religion-free environment would confine religious exercise to the inside of homes. For them, neighborhood stability is better achieved when religion is hidden—living in a residential community without reminders of religion preserves aesthetics and economic value, avoids the potential for offensive or threatening symbols, and prevents social division based on religious identity. In a religion-free environment, religious minorities need not be confronted by majoritarian symbols, and residents need not be confronted by unfamiliar practices of religious minorities.

But this is not the vision of the Declaration, which flatly rejects such privatization of religion.[115] The Declaration announces that people should be free to celebrate their religion publicly and in association with others.[116] This freedom is for all, for religious majorities and minorities.[117] In short, religious pluralism is taken as a fact of social life that is better exposed than hidden—you should have freedom to be yourself *where you live*. Indeed, from this perspective, we see that the overvaluing of stability and uniformity actually undermines the neighborliness and spontaneity needed for life in community. The obsession with security renders it enormously difficult for CICs to create authentic neighborhoods, to promote sociability, or to allow people to work together "in justice and civility."[118] The religion-free visual and social environment for the CIC is simply not an option under the Declaration, and residents have no justified expectation to such an environment. Thus, a three-foot tall statue of Mary on a resident's front lawn need not be banished to the back yard;[119] a four-inch mezuzah on one's doorframe need not be removed or covered with a screen;[120] a Hindu jhandi

---

constitutes one of several fundamental paradoxes implicit in the CIC form." (citations omitted)).

114. *See Solomon*, note 29, at 821–23; Carmella, *John Courtney Murray, S.J.*, *supra* note 77, at 201–06. *See generally* McConnell, *supra* note 72.

115. *Declaration*, *supra* note 21, at 681.

116. *Id.*

117. *Id.* at 679.

118. *Id.* at 686.

119. *See supra* note 52.

120. *See supra* note 54.

need not be hidden by bushes;[121] a painted image of a goddess need not be removed from the driveway;[122] and a prayer meeting need not be banned from the common room.[123]

What social expectations *are* justified? In other words, what is responsible religious freedom in the CIC context? First, it is important to note that the Declaration recognizes no right to oppress one's neighbor: "society has the right to defend itself against possible abuses committed on pretext of freedom of religion."[124] A resident who uses a religious symbol against a neighbor like one might use a spite fence gets no protection.[125] Further, looking to settled expectations in property law, we know a resident should not (1) pose threats to their neighbors' safety and health; (2) impede access or use of property; or (3) unreasonably interfere with the use and enjoyment of property.[126] Religious exercise that creates a hazard, trespass, or nuisance, or that visually overwhelms the neighbors' properties would be irresponsible. In such cases, CICs would be justified in enforcing regulations tailored to prevent such harms—but not to hide religious identity. Thus, for instance, reasonable controls on the size of symbols would be permissible, but controls that resulted in prohibition would have to be specifically justified by necessity. Under this approach, a general ban on stone structures, which would include religious statues along with other heavy objects, would be justified in a hurricane-prone area. And of course, CICs would be justified in making rules regarding the use of common facilities, but would be required to ensure fair and equal access for religious and nonreligious uses so that no group monopolized or impeded access to those facilities. From the Declaration's perspective, responsible religious freedom means religious exercise subject to regulation that is directly responsive and proportional to the negative impacts it causes.[127]

B. Religious Freedom in a Private Property Community

Professor Joseph Singer suggests that, when we determine the contours of property relationships, we "evaluate the legitimacy of claims on both

121. *See supra* note 71.
122. *See supra* note 52.
123. *See supra* note 57.
124. *Declaration*, *supra* note 21, at 686.
125. When a structure is erected for the sole purpose of vexing one's neighbors, it is not religious exercise but rather an enjoinable nuisance.
126. *See generally* JESSE DUKEMINIER ET AL., PROPERTY 639–66 (6th ed. 2006).
127. *See Declaration*, supra note 21, at 687.

sides by reference to norms underlying the framework of a free and democratic society."[128] The analysis to this point has employed the Declaration's articulation of those norms.[129] In this sub-section, the analysis shifts to American property law and notes some fundamental parallels. Property norms, like the "religious freedom-necessary restraint" norms of the Declaration,[130] place a high value on freedom, with restrictions on that freedom intended to mitigate negative impacts of land use.

In addition to violating human dignity, the severe restrictions on religion that could easily become the norm in CICs violate our fundamental legal and political presumption that religious exercise occurs on private property. This presumption has two facets. First, private property provides "a setting within which individuals can exercise liberties . . . such as free speech, religious activity, and private family life, without undue government interference."[131] And second, inasmuch as the Establishment Clause interpretation limits government involvement in religious exercise on public property, it points to private property as the appropriate location for such activity.[132] Moreover, the Free Exercise Clause, as well as RLUIPA and other religion-protective statutes, apply to religious exercise on private property.[133] Thus, widespread acceptance of religion-free environments in CICs will subvert not only the strong presumption in favor of religious freedom in private communities, as seen above, but also the strong presumption that religious exercise—especially vibrant, theologically significant symbolism and use—should occur, and indeed be encouraged, *on private property*.[134]

---

128. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1060 (2009).

129. *See supra* notes 76–127 and accompanying text.

130. *See Declaration*, supra note 21, at 687.

131. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 23 (2000).

132. Religious symbols are permitted on governmental property that is not a traditional, designated, or limited public forum only so long as they can be understood in civic, historic, or secular terms. *See infra* notes 163–96 and accompanying text. Indeed, the reason this article focuses exclusively on *religious* expression (and not expression generally) in CICs relates directly to its unique limitation on public property. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993) (arguing that certain limitations on religion under the Establishment Clause lead to more robust Free Exercise protection). Although my focus is only on protection of religious exercise, note that under a paradigm of fewer CIC restrictions, as some reformers propose, *see supra* note 29, religious *and* non-religious expressive rights would likely gain protection.

133. *See* Carmella, *RLUIPA*, *supra* note 14 at 503–16.

134. Obviously, the use of private property can be regulated, either by government (e.g., zoning) or by private enforcement of covenants and nuisance claims. *See, e.g.*, Rodrigue v. Copeland, 475 So. 2d 1071 (La. 1985) (enjoining a homeowner from operating a display consisting of loud and extravagant music and lights during the Christmas season); Osborne v. Power, 890 S.W.2d 570 (Ark. 1994) (holding that a massive display of Christmas lights created a nuisance). But religious exercise on private property continues to enjoy protection in the absence of important state interests, with

Under the normative argument developed here, private property, as an institution of civil society, is supposed to promote the common good by creating and supporting the social, economic, and political conditions that enable human development and flourishing. Property:

> [S]ecures individual autonomy from government coercion, prevents an over-concentration of political authority generally, and encourages investment and economic development. . . . [P]roperty is itself merely a means to the protection of person and family and the freedom associated with both family life and economic initiative. . . . *The private nature of property is protected not because ownership is a good in itself, but because it fulfills higher goods*, including: the security against theft, civil disorder, and violence; the incentive to work and to find worth in that work and the efforts of others; and the development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense.[135]

The notion that property facilitates the exercise of rights and protects social groups explains the presumption in our jurisprudence that religious expression and association are properly located on private property. Of course, property ownership is not a prerequisite to the possession of rights—rights inhere in the person. But exercising certain rights requires a physical space, and in the exercise of rights, place matters. For instance, some rights can be exercised on government property, like when people gather in a park

---

government regulation of religious land uses specifically constrained by case law in many states and now by federal statute. *See* Carmella, *RLUIPA*, *supra* note 14; Angela C. Carmella, *Land Use Regulation of Churches*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 565 (James A. Serritella ed., 2006); Angela C. Carmella, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37 J. CHURCH & ST. 573 (1995). Moreover, private restrictions of religious use of private residential property are constrained by the FHA's prohibition on religious discrimination and some targeted state legislation. *See infra* notes 195–198, 210. Additionally, courts tend to be careful in applying zoning to home worship situations. *See, e.g.*, Konikov v. Orange Cnty., Fla., 410 F.3d 1317 (11th Cir. 2005) (rabbi's use of home for services 2–3 times per week did not make his home a synagogue, where nonreligious meetings of similar frequency did not need a permit); State v. Cameron, 498 A.2d 1217 (N.J. 1985) (minister's temporary use of his home for weekly services did not make it a "church" or "place of worship" under the zoning code); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (zoning out home synagogues violates FHA). *But see, e.g.*, Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983) (rabbi using garage as home synagogue violated zoning code), *superseded by statute*, RLUIPA, 42 U.S.C. § 2000cc (2006), *as recognized in* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225–26 (11th Cir. 2004).

135. Kmiec, *supra* note 87, at 753 (emphasis added).

for a protest.[136] Some rights can be exercised on someone else's private property, like leafleting in shopping malls and universities.[137] But an individual or group with rights to real property can use that location for the exercise of a host of additional rights. An owner of a home can erect a religious display on that property or invite others to gather there for prayer. A religious organization can build a house of worship on property it owns. Religious symbols and uses on private property can be explicitly devotional, catechetical, or worshipful. To the extent that property rights give the holders of those rights a physical locus for the exercise of other rights, they enable greater self-determination and greater religious freedom.

Because the CIC is an innovative creation of private property law, sensitivity to religious freedom seems to fit quite naturally. Indeed, property norms themselves suggest a close relationship to the norms of responsible freedom under the Declaration. The first norm essential to the CIC's promotion of religious freedom and creation of safe, stable, and neighborly living arrangements is the taxonomy of traditional property interests. Each resident owns either a condominium unit or a home and land, has exclusive use to some features of the common space, and enjoys non-exclusive access to other common features. This taxonomy can be used to determine the expectations for religious expression and association appropriate to each category so that freedom and restraint correlate with those expectations and respect the reciprocal nature of the property ownership. When we consider property that is individually owned, we typically recognize a high expectation for religious exercise. Though home ownership in a CIC no longer fits the traditional model, the expectation of the human person for expression and association at one's home has not changed.[138] And this includes the common features to which a resident has exclusive rights, which residents treat like their individually owned property.[139] Regardless of the ownership of the underlying fee of the ground and the walls, the resident still has exclusive use of her front door, her balcony, and her patio,

---

136. *See* Hague v. Comm. for Indust. Org., 307 U.S. 496 (1939).

137. Robins v. Pruneyard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (shopping mall); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995) (shopping mall); State v. Schmid, 423 A.2d 615 (N.J. 1980), *appeal dismissed sub nom*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982) (university).

138. Courts have acknowledged the distinction in other contexts. *See, e.g.*, Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007) (noting a particular concern for expressive rights on private property; with respect to the sign restrictions, "it is the private homeowner's property and not that of the Association that is impacted." *Id.* at 1073).

139. *See* Gerber v. Longboat Harbour N. Condo., Inc., 757 F. Supp. 1339, 1342 (M.D. Fla. 1991) (whether railing immediately adjacent to unit and exterior wall of unit, to which plaintiff had exclusive use, was considered common or individual property was an issue of material fact precluding summary judgment). Note that with respect to exclusive use rights, the terms of the easement define the nature of the use, not the holder of underlying fee. *See* First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002).

as provided in her deed, and still thinks of those areas as extensions of herself.[140] The outside of a door, the outside of a home, the space in front of her home, the balcony and patio—any of those visible spaces to which the resident has exclusive claim—should be considered property of the resident, whether owned or managed by the owners association, and should be treated like the inside of the unit or home is treated. Much like a person is free to control his outward appearance and wear religious garb, a resident should be free to control the outward appearance of her home to the extent it expresses religious identity.[141] Even the U.S. Supreme Court considers the freedom to express views from one's home to be a unique form of expression rooted at a particular location.[142] Thus, placing a mezuzah on the doorframe or a crèche on the front lawn should be considered a legitimate expectation for such property.

Additionally, while expectations for religious exercise in common spaces should be lower than expectations related to individually-owned and exclusively-used spaces, residents should still expect equal access to generally available spaces for religious and non-religious uses and displays. Clubhouse facilities, meeting rooms, auditoriums—anywhere gatherings are accommodated—should have an equal access policy.[143] Reasonable time, place, and manner regulation should be sufficient to ensure fair and equal access to (and prevent monopolization of and conflict regarding) common use property.[144]

---

140. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) ("Most people possess certain objects they feel are almost part of themselves.").

141. *See, e.g.*, Michelle Cole & Betsy Hammond, *Governor Signs Repeal on Teachers' Religious Dress; Ban will Lift in July 2011*, OREGONLIVE.COM (Apr. 1, 2010, 1:08PM) http://www.oregon live.com/ education/index.ssf/2010/04/governor_signs_repeal_on_teach.html.

142. The Court struck down an ordinance that prohibited signs on residential property as a violation of the Free Speech Clause. *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views." *Id.* at 58 (emphasis in original) "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.* at 56 (citations omitted)).

143. Note that this is the interpretation of the FHA proffered by the Civil Rights Division of the U.S. Department of Justice. *See supra* note 9.

144. The concept of time, place, and manner restrictions has developed under the Free Speech Clause of the First Amendment. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (picketing without a license on public streets is not justified when statutory prohibition is not aimed at restraining free speech); Grayned v. City of Rockford, 408 U.S. 104, 115–17 & n.30 (1972) ("[R]easonable 'time, place and manner' regulations may be necessary to further significant

In addition to the taxonomy of interests and the attached expectations, a second property norm gives voice to the contours of restraint—since land uses in a given area can conflict, a high value is placed on preventing or mitigating negative impacts of incompatible land uses.[145] This fundamental insight from more than a century of land use law coincides with the Declaration's perspective on the human person and religious freedom. The notion that conduct on private property can be restrained when necessary to control or eliminate its negative impacts on neighbors is parallel to the Declaration's structure of responsible freedom—freedom can be restrained when and insofar as it is necessary.[146] Religious exercise with negative impacts on neighbors' safety, access, and exercise of rights should also be curtailed.

Professor Singer recognizes the normative task involved in articulating "the appropriate contours of property relationships in a free and democratic society."[147] No one value or right trumps all others. To describe this "democratic model" of property, he uses the example of a CIC resident posting a political sign in her yard:

> [We] would first ask whether denying someone the right to put up a political sign on her property violates basic norms governing social, political, and economic relationships in a polity that treats each person with equal concern and respect. [And even if not] . . . we should still consider whether such a regulation should be

---

governmental interests, and are permitted.").

145. The Restatement notes that the rulemaking powers of a CIC are generally limited to prevention of nuisance-like impacts on surrounding properties. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000). It provides that with respect to the CIC's rulemaking powers, the CIC:

> [H]as the power to adopt reasonable rules designed to (a) protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units . . . . Absent specific authorization in the declaration, the [CIC] does not have the power to adopt rules . . . that restrict the use . . . of, or behavior within, individually owned lots or units.

Id. § 6.7(2)(a)–(3). The Restatement notes further that:

> [T]he rationale for not giving an expansive interpretation to an association's power to make rules restricting use of *individually owned property* is based in *the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with the neighbors' use and enjoyment of their property.* People purchasing property in a [CIC], which is usually subject to specific use restrictions set forth in the declaration, are *not likely to expect that the association would be able, under a generally worded rulemaking power, to impose additional use restrictions on their property.* On the other hand, they are likely to expect that the association will be able to protect them from neighborhood nuisances by adoption of preventative rules. Securing private protection from nuisance-like activity is one of the frequently cited attractions of [CICs].

Id. § 6.7 cmt. b (emphasis added).

146. *Declaration, supra* note 21, at 687.

147. Singer, *Democratic Estates*, *supra* note 128, at 1057.

> imposed . . . either because it protects justified expectations or because it accords with settled convictions about rights that ought to go along with possession of land. . . . The question then is whether owners should be free to waive those protections when they buy property regulated by a homeowners association. . . . *Do we value the rights of . . . neighbors to live in a setting without such signs more than we value the right to post signs relevant to political contests?* . . . These questions revolve around a core normative issue: Is the right to post a political sign on one's property one of those self-evident inalienable rights that democracies should recognize? . . . Answering these questions requires us to make substantive choices about the interests at stake, the values those interests implicate, the relative strength, relevance, and cogency of those values in particular social settings, the social relationships that will result from the choice of legal rule, the opportunities that will be enabled or cut off, and the relation between property rights and political and social life. . . . We are obligated to recognize that the definition of property rights does not merely involve promoting the autonomy of the owner . . . . Property owners have obligations to use their rights in ways that are compatible with the basic norms of our society . . . . My own view is that it is hard to see why the [neighbors'] interests would outweigh the [resident's] interest in participating in the political process in a manner that is customary in the United States . . . . [The neighbors] may wish to live in a tranquil neighborhood that does not exhibit contentious political views. *But my point is that the democratic model requires us to evaluate the legitimacy of claims on both sides by reference to norms underlying the framework of a free and democratic society.*[148]

Religious exercise on one's property, like political participation through the posting of yard signs, represents a basic societal norm. Prohibiting it does not "accord[] with settled convictions about rights that ought to go along with possession of land"[149]—in contrast, the settled convictions actually support *freedom* of religion on one's property.[150] If property owners have the obligation to use their property in a way that comports with the basic norms of society, then they will not ask their neighbors to hide their religious identity; religious exercise should represent a non-waivable right

148. *Id.* at 1057–60 (emphasis added).
149. *Id.* at 1058.
150. See *infra* Part III.B.

within a democracy.[151] Because the intellectual tradition of Catholic social thought focuses primarily on responsibility rather than autonomy, it promotes a vision of responsible religious exercise that is compatible with the security and stability that can be reasonably expected within a CIC. Such a balanced perspective, known to religious, philosophical, and legal traditions, is in step with the dignity of the person and the common good.

What social life is generated by the proposed property regime? In Professor Singer's words, what "opportunities [for social relationships] will be enabled or cut off"?[152] First, residents would enjoy (1) a high degree of religious freedom on property they own or to which they have exclusive claim and (2) an equal degree of freedom with other residents on common property to which they have non-exclusive general access. Second, identifiable negative impacts on neighbors would be addressed by controls tailored to fit those specific impacts. Expressive and associational freedoms for people of all different faiths make the CIC a better community than one in which religious identity is suppressed. Because CICs emphasize reciprocity and interdependence among residents and their property interests, they are capable of recognizing the social character of the person. And because residents can enjoy religious freedom and flexibility in interpersonal relationships, CICs are capable of honoring the dignity of the person. Further, because CICs can structure their governance in a way that provides opportunities for meaningful participation of residents to determine appropriate restrictions on freedom, CICs are capable of supporting the rational and responsible dimensions of the person.[153] CICs thus present the opportunity for dynamic life in a private property community, for "the protection of person and family and the freedom associated with . . . family life" and "development of neighborhoods that fulfill a deep and natural human yearning for community in both a social and political sense."[154] By protecting religious expression and association for all in the community, the CIC takes a step closer to being the kind of community that promotes civility without denying differences.

But expansively interpreted and zealously enforced restrictions that

---

151. The New Jersey Supreme Court upheld CIC controls on political yard signs, but would not have upheld a flat prohibition. *See* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1073–74 (N.J. 2007) ("Notably, the Association permits expressional activities to take place on plaintiffs' property but with some minor restrictions" that were found not to be unreasonable, oppressive, or confiscatory).

152. *See supra* note 148 and accompanying text.

153. This point regarding human agency comports with the understanding of the person in the Catholic intellectual tradition, which notes that "[t]he person is 'an active participant in the fashioning of his [or her] own social and political destiny.' The person is not 'a merely passive element in the social order,' but is 'its subject, its foundation and its end.'" Carmella, *A Catholic View*, *supra* note 17, at 262–63 (citation omitted).

154. Kmiec, *supra* note 87; *see also* supra note 34.

yield the religion-free environment of the CIC neither respect the dignity of the person nor create social conditions for human flourishing. They impede the creation of true community and generate resentment toward the owners association and the entire community.[155] Indeed, the servitude regime subverts the normal presumption in favor of freedom by substituting a presumption in favor of restraint. By prohibiting responsible public exercises of religion, the CIC privatizes religion in ways unrelated to the protection of justifiable expectations.[156] Once both public property *and* substantial numbers of private property communities are restricted in religious exercise, one may begin to wonder just where religion *is* allowed.

IV. PREVENTING THE GROWTH OF RELIGION-FREE ENVIRONMENTS

Human dignity and the common good demand a new respect for responsible religious freedom in CICs. In order to halt and reverse moves toward religion-free environments, courts should refuse to enforce CIC restrictions that prohibit religious association or expression when those restrictions (1) interfere with reasonable expectations of use and access attached to various types of property and (2) are not directly and narrowly responsive to an impact caused by the religious conduct. On what grounds could courts do this? If legislation were enacted to protect religious exercise in CICs, obviously courts would not be able to enforce covenants and rules

155. *See generally* Franzese & Siegel, *Trust and Community*, *supra* note 29.

156. *See* Brown, *supra* note 2, at 158 (discussing the Canada Supreme Court decision which announced that "freedom of religion is indeed a freedom exercisable in public."). The privatization of religion has been noted occasionally by the U.S. Supreme Court, but usually without realizing that its own decisions have provided the engine for it (or confusing the public exercise of religion with government-sponsored exercises of religion). See Justice Scalia's dissent in Lee v. Weisman, 505 U.S. 631, 645 (1992), in which he describes the majority's treatment of religion as "some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room." *Id.* (Scalia, J., dissenting). The privatization thesis has been discussed in the context of governmental attempts to remove religious groups from public forums. *See* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 374–75 (2001). They quote theologian David Tracy, who wrote that religion is:

> [T]he single subject about which many intellectuals can feel free to be ignorant. Often abetted by the churches, they need not study religion, for "everybody" already knows what religion is: It is a private consumer product that some people seem to need. Its former social role was poisonous. Its present privatization is harmless enough to wish it well from a civilized distance. Religion seems to be the sort of thing one likes "if that's the sort of thing one likes."

Id. at 374 (quoting DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM 13 (1981)).

that contravened the law.[157] In the absence of such legislation, however, courts can invoke the traditional property doctrines of unenforceability[158]—restrictions on responsible religious freedom violate public policy and are unreasonable because they violate the dignity of residents, undermine the common good, and subvert the settled presumption of religious freedom on private property.

This more traditional property approach gives concrete legal expression to the concepts expressed in the Declaration. The Declaration embeds religious freedom within civil society, calls for the public exercise of religion, and requires attention to the welfare of others affected by that religious exercise.[159] It accepts restrictions when necessity dictates, and recognizes that the determination of "necessity" is a normative judgment of society.[160] The public policy analysis undertaken by courts invites consideration of the same concerns. It involves a balancing of interests, assessing factors such as the impact of the restriction on religious practice, the societal interests negatively affected by enforcement, and the harms experienced by neighbors who want enforcement.[161] This traditional approach also comports with the principle of subsidiarity and with the state's public order role in protecting civil rights and public peace—courts are justified in intervening to protect persons when non-state actors use their coercive powers to suppress responsible religious exercise.[162]

The more traditional property approach of holding covenants unenforceable on public policy grounds avoids any consideration of state

---

157. *See, e.g.*, Freedom of Religious Expression in the Home Act of 2008, H.R. 6932, 110th Cong. (2008). This bill, which was designed in part to overturn Bloch v. Frischolz, 533 F.3d 562 (7th Cir. 2008), was proposed to amend the FHA to prevent discrimination relating to the display of religious symbols. *See* Wertheimer, *supra* note 54. But, the Seventh Circuit vacated the decision en banc and issued a new decision in Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009). No further action was taken on the legislation; it has not been reintroduced in subsequent sessions of Congress.

One possibility involves amending the FHA to include a religious accommodation provision (like that found in Title VII) applicable to the CIC context. Title VII provides the only mandatory accommodation for religion by private actors, unless such accommodation would impose an undue hardship on the employer. *See* 42 U.S.C. § 2000e (2006); *see also* Trans World Airlines v. Hardison, 432 U.S. 63 (1977). Under such a statutory model, residents would be able to challenge general CIC restrictions that impeded their religious use or display; owners associations would have to demonstrate the necessity of the restriction. Evaluating the wisdom of such an amendment is outside the scope of this article.

158. For a similar argument, see generally Shelley Ross Saxer, Shelley v. Kraemer's *Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61 (1998) (arguing against the use of the state action theory as articulated in *Shelley* to fight racially restrictive private covenants).

159. *See supra* notes 21, 77, 98, 111 and accompanying text.

160. *See supra* notes 107–109 and accompanying text.

161. *See infra* notes 226–233 and accompanying text.

162. *See supra* notes 101–110 and accompanying text.

action and the thorny jurisprudence of the Religion Clauses.[163] Some commentators have argued that religious exercise (and other rights) in CICs would be better protected if owners associations were treated as state actors or if judicial enforcement of private restrictions were treated as state action.[164] Others have suggested the application of constitutional norms even in the absence of state action.[165] This author rejects those positions. The Constitution is the standard against which religious exercise on public property and public restrictions on religious exercise are measured, but the common good of the civil society must be the standard against which private regulation of religious exercise on private property is measured.[166] Constitutionalizing the CIC would lead not to the protection of religious exercise, but instead to the wholesale adoption of the religion-free environment as the constitutional norm. In the process of borrowing constitutional norms, courts are more likely to apply the norm of restraint—from the Establishment Clause—than norms of freedom.[167] Even the Free Exercise Clause offers no countervailing vision of religious freedom. It offers only a non-discrimination norm, which might ensure equal access in some situations but does little to address most instances of CIC restrictions on religious exercise.[168]

By considering the owners association a state actor, or CIC governance state action, courts would treat common property as if it were government property.[169] Religious symbols and uses are allowed on government property only if they are secularized by context or are otherwise understood

163. *See supra* note 89.

164. *See, e.g.*, Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after* Marsh v. Alabama, 6 WM. & MARY BILL RTS. J. 461 (1998); Kuzenski, *supra* note 48, at 57–59; Janet M. Bollinger, *Homeowners' Associations and the Use of Property Planning Tools: When Does the Right to Exclude Go Too Far?*, 81 TEMP. L. REV. 269, 275–84, 289–97 (2008); Chadderdon, *supra* note 38, at 233; Note, *supra* note 64, 473–77; 76 AM. JUR. 3D *PROOF OF FACTS* § 89 (2009).

165. *See, e.g.*, Paula A. Franzese & Steven Siegel, *The* Twin Rivers *Case: Of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 5 RUTGERS J. L. & POL'Y 729 (2008) (discussing Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007), where the court found that constitutional norms apply to CICs even in the absence of state action).

166. The only plausible state action argument would involve the following types of situations: if local zoning authorities required the enactment of particular private restrictions, RLUIPA might strike down the zoning action, thereby affecting the private restrictions indirectly; additionally, one might argue state action if private restrictions excluded religious uses from an entire municipality.

167. *See infra* notes 181–96 and accompanying text.

168. *See infra* notes 211–214 and accompanying text.

169. *See supra* notes 32–33 and accompanying text.

primarily in civic or historical terms.[170] All the property the CIC owns or manages on behalf of residents—technically all property within the CIC other than individually owned units or subdivision lots—would thus be subject to this establishment norm. And applying this norm to CIC common property would mean the mandate of a religion-free environment. This outcome would be inevitable because CIC residents' conduct heightens, rather than minimizes, the theological significance of religious symbols and uses; religious symbols are put on display and people gather for unabashedly religious reasons. Under the establishment norm, however, such explicit theological expression, undiminished by alternative interpretations, is not allowed. Thus, in CICs, where much if not all of the external visual environment is common property owned or managed by the CIC, the religion-free norm would govern land use decisions, even those affecting exclusive use areas and common areas available to all residents.

But establishment norms should not apply to CICs. They have been specifically developed in the context of, and with restrictions relevant to, governmental actors and government property.[171] They fail to take into account the nature of the CIC as a non-state actor, with obligations to promote the common good of civil society and the free religious exercise of its residents.

A. Constitutionalizing CICs: A Bad Idea

Throughout the 20th century, many state courts began to accord constitutional protection to religious land uses and to strike down zoning ordinances that barred houses of worship from residential zones.[172] Churches began to argue, relying on a *Shelley* state action claim,[173] that private covenants creating residential neighborhoods (and thereby similarly preventing houses of worship) should also be unenforceable as applied to them. With one exception,[174] no court accepted the state action argument.[175]

---

170. *See infra* note 183–84 and accompanying text.

171. *See infra* notes 181–196 and accompanying text; *see also* Carmella, *Symbolic Expression on Public Property*, *supra* note 16.

172. *See* Angela C. Carmella, *Land Use Regulation of Churches*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 565 (James A. Serritella ed., 2006).

173. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant constituted state action in violation of the Fourteenth Amendment).

174. *See* W. Hill Baptist Church v. Abbate, 261 N.E.2d 196 (Ohio Ct. Com. Pl. 1969).

175. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); Bd. of Zoning Appeals of Meridian Hills v. Schulte, 172 N.E.2d 39, 44 (Ind. 1961); Church of Christ v. Metro Bd. of Zoning Appeals, 371 N.E.2d 1331 (Ind. Ct. App. 1978); Ginsburg v. Yeshiva of Far Rockaway, 358 N.Y.S.2d 477, 482 (N.Y. App. Div. 1974); Christ Methodist Church v. Macklanburg, 177 P.2d 1008 (Okla. 1947) (citing numerous cases holding that churches are bound by title restrictions); McDonald v. Chaffin, 529 S.W.2d 54 (Tenn. Ct. App. 1975) (house used as a

Private restrictions were repeatedly held to bind any owner with notice (including churches), regardless of any impact on the free exercise of religion.[176]

The resistance to adopting the state action argument or to holding covenants to constitutional standards persists.[177] Some courts have bestowed constitutional protections to some activities on private property, but the efforts remain quite narrow in scope.[178] Simply put, most state courts "recognize either explicitly or implicitly the principle that 'the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-à-vis each other.'"[179]

Though it appears to defeat religious freedom, refusing to constitutionalize the CIC is paradoxically a good decision for religious freedom. The Constitution, as currently understood, would offer no bulwark against the trend toward religion-free environments. Though (for reasons explained in Section III above) covenants that create and sustain a religion-free environment should be unenforceable, norms of specific constitutional provisions should not be employed to accomplish that end. The structural analogy between governmental property and common property has already

---

church violated residential only restriction); Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners, 160 S.W.3d 657 (Tex. App. 2005) (church is bound by restrictive covenant limiting uses to commercial/industrial); Ireland v. Bible Baptist Church, 480 S.W.2d 467 (Tex. App. 1972) (injunction to compel removal of church structures that violate single family residential covenants); *see also* Peter L. Maroulis, Note, *Restrictive Covenants as a Device to Control Religious Uses*, 12 SYRACUSE L. REV. 347 (1961) (collecting cases); Robert G. Ritz, Note, *Restrictive Covenants and Religious Uses: The Constitutional Interplay*, 29 SYRACUSE L. REV. 993 (1978) (collecting cases).

176. *See supra* note 47.

177. *See, e.g.*, Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007).

178. In the CIC context, see Gerber v. Longboat Harbour N. Condo., 757 F. Supp. 1339 (M.D. Fla. 1991) (state action found when court enforced CIC restriction against American flag); Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007) (no state action found but state constitutional norms applicable nonetheless). Outside the CIC context, cases involve the issue whether free speech protections require owners of private facilities that are open to the public (like shopping malls and college campuses) to allow solicitation or leafleting by the public. A few states—California, Massachusetts, New Jersey—have found free speech and related rights applicable in these circumstances. *Id.* at 1070–71.

179. *Twin Rivers*, 929 A.2d at 1071 (quoting Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P2d 1282, 1286 (Wash. 1989)). Resistance to holding CICs to constitutional standards exists even among the few states that have indicated a willingness to do so. *See Twin Rivers*, 929 A.2d at 1071 (applying norms of free speech and association to CICs even in the absence of state action, but restrictions are still enforceable when property is not open generally to public and when residents agree to abide by them, which are common characteristics of every CIC).

been adopted by courts dealing with rights claims in other contexts.[180] In the religious exercise context, the analogy would result in the Establishment Clause serving as the primary source of values governing the CIC property, which in turn would inexorably lead to a religion-free environment.[181] This outcome would violate the only constitutional norm that *is* relevant to the CIC: the overarching constitutional design that directs religious exercise away from governmental property and towards private property.

The Establishment Clause, which restricts government speech, does not permit the display of theologically significant religious symbols on public property[182] unless in a given instance the placement, context, or shared interpretation gives primacy to a civic, historic, or secular meaning.[183] Similarly, religious uses occurring on public property must be primarily understood in civic, historic, or secular terms.[184] Of course, the clause "does not compel the government to purge from the public sphere all that in any

---

180. This analogy was employed in *Twin Rivers*, 929 A.2d 1060. Although the case did not involve the Religion Clauses, it did involve the New Jersey Constitution's protection of free speech. *Id.* at 1076. The homeowners' association had restricted free speech on both individually owned property and on commonly owned property. *Id.* at 1063–64. The New Jersey Supreme Court noted the distinction between the resident's property and the CIC's property. *Id.* at 1072. The issue of whether the CIC had met its free speech obligations to the resident was framed in terms of its authority to govern its own property, as well as to restrict the individual resident's property. *Id.*

181. One particularly harmful appropriation of establishment norms has occurred in the CIC context: the notion of religion's inherent divisiveness. Courts have interpreted the Establishment Clause as a mechanism to prevent social conflict attributable to religious divisions. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005). By repeated invocation, the "divisiveness" of religion has entered our legal discourse, and it is easy for courts to assume it is pervasive. Two courts have upheld the banning of religious services in common rooms and assumed the divisive nature of religion. *See* Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1233 (S.D. Fla. 2005) ("The right to religious freedom must encompass the right to be free from religion."); Neuman v. Grandview at Emerald Hills, Inc., 861 So. 2d 494, 498 (Fla. Dist. Ct. App. 2003) ("Prohibiting those types of assembly which will have a particularly divisive effect on the condominium community is a reasonable restriction. The Board found that permitting the holding of regular worship services and the competition among various religious groups for use of the auditorium would pose such conflict.").

182. "Public property" in this analysis does not include government-owned property used as a traditional, designated or limited public forum, in which private expression is permitted. For discussion of the public forum doctrine, see Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) and Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

183. *See generally* Salazar v. Buono, 130 S.Ct. 1803 (2010) (latin cross); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (Ten Commandments); Van Orden v. Perry, 545 U.S. 677 (2005) (Ten Commandments); Lynch v. Donnelly, 465 U.S. 668 (1984) (crèche); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (crèche and menorah); Carmella, *Symbolic Expression on Public Property*, *supra* note 16. When a person puts a religious symbol on property to which she has exclusive claim or uses common property of the CIC for religious assembly, we can presume that she acts primarily for religious purposes and not primarily for civic or historic purposes because only governments are bound by such conditions.

184. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18, 34 (2004) (O'Connor, J., concurring in judgment; Rehnquist, C.J., concurring in judgment) ("under God" in pledge of allegiance); Lee v. Weisman, 505 U.S. 577 (1992) (graduation prayer); Marsh v. Chambers, 463 U.S. 783 (1984) (legislative prayer).

way partakes of the religious,"[185] but the Supreme Court's doctrine is quite clear that religious objects on public property must be definable in nonreligious terms. These norms, when applied to the common property owned or managed by the owners association, would make religious objects or uses suspect wherever they might appear—on a patio or balcony, in the hallway, on one's door, on the grounds, on the exterior walls, inside or outside the clubhouse, or even on the soil right outside the front door.[186] The temptation to treat all common property the same, without making important distinctions based on the nature of the use and access, would render the prohibitions universal.[187] Thus, even "exclusive use" property (such as doors and balconies) and common property to which general access is allowed (such as meeting rooms) would be treated like government property. Putting this together with extensive, generally applicable aesthetic restrictions on individually owned property (which are allowed under the Free Exercise Clause), the "protection" of constitutional norms would yield a religion-free environment.

The main Establishment Clause inquiry asks a reasonable observer

185. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

186. The notion that residents would be protected by the public forum doctrine is interesting, but ultimately unpersuasive. Like municipalities, owners associations would be under no obligation to open or designate particular spaces to be used as public forums. Carmella, *RLUIPA*, *supra note* 14, at 508. Even if some spaces were so designated, religious exclusions may nonetheless be wholly constitutional. *See* Daily v. N.Y.C. Hous. Auth., 221 F.Supp.2d 390, 398 (E.D.N.Y. 2002) (applying public forum doctrine to common areas in public housing but noting that, under Supreme Court precedent, the state may reserve the forum for certain groups or for the discussion of certain topics). It is also critical to note that the Establishment Clause governs the public forum doctrine: a common area that allows private expression may nonetheless be subject to a finding that the forum itself endorses religion from the perspective of a "reasonable observer." *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995).

As to the possibility that establishment norms would not apply to exclusive use areas because "private" religious exercise of residents cannot be attributed to the CIC, note that the CIC restrictions are made precisely on the assumption that these areas are *common areas* within its control. Indeed, if the CIC took no action to remove the symbols, those symbols would likely be understood as the CIC's expression. For an example of the analogy, see the facts and procedural history of Salazar v. Buono, 130 S. Ct. 1803 (2010) (acknowledging decision in Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) that religious symbol on government property, which had been placed there by a private party, was an unconstitutional government endorsement of religion).

187. See, for example, VOS IZ NEIAS?, *supra* note 55, in which attorney for the condominium provided a statement that read: "The board of directors is enforcing their documents prohibiting owners from making temporary alterations to the common element. It's Tantamount [sic] to a Christian making an alter [sic] by the pool during Lent. To allow one owner to do this we will have to allow 451 owners to do this." This concern fails to understand that prohibiting religious symbols at the pool is entirely different from prohibiting them on one's balcony. The expectation on property to which one has exclusive rights should be treated differently from common property that is already dedicated to a specific, non-expressive use for all residents in common.

whether the government's action can be viewed as an endorsement of religion—that is, whether one's religion is made relevant to her standing in the political community. The "endorsement test" is highly nuanced, so its application in cases involving religious symbols leads to highly variable and subjective outcomes.[188] While not all claims of offense prove an endorsement,[189] fear of such claims easily creates a chilling effect.[190] In the CIC context, where claims of offense are already common,[191] the imposition of establishment norms would compel a religion-free common environment.[192] Any complaint to the owners association—that someone was offended by a statue of Buddha on a balcony or a menorah in the common room during Chanukah—would be enough to trigger concern of CIC endorsement. CICs would likely respond by imposing blanket exclusions on religious expression, which are attractive as an easily administrable bright line rule.[193] Such exclusions go too far. While it would not be appropriate, for instance, for the CIC to associate itself with a permanent religious symbol at the entrance alongside its identifying signage,[194] the notion that *any* religious symbol on *any* common property

188. The "reasonable observer" is asked whether the government has endorsed or disapproved of religion in a way that makes (or would be understood to make) religion relevant to a citizen's standing in the political community. Applying the test involves examining "both the subjective and objective components of the message communicated by a government action . . . to determine whether the action carries a forbidden meaning." Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring). This approach focuses on "whether a reasonable observer may fairly understand government action to send a message to non-adherents that they are outsiders, not full members of the political community." *Id.* at 687–88 (O'Connor, J., concurring).

189. "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." Lee v. Weisman, 505 U.S. 577, 597 (1992).

190. See, for example, the government's rationale for excluding religion in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 845–46 (1995).

191. *See supra* notes 52–55.

192. *See* Poliakoff, *supra* note 52 (noting environment free of any holiday decorations may be completely within the authority of owners association); G. Robert Kirkland & Michael A. Inman, *Association Should Clearly Define Rules for Holiday Decorations*, VIRGINIAN-PILOT (Norfolk, Va.), Nov. 23, 2002, (Real Estate Weekly), at 2, *available at* 2002 WLNR 2421415 (advice to condominium association for holidays: allow lights and greenery, have a time limit, avoid religious decorations in common areas).

193. "Generally, to avoid being involved in arbitrarily deciding which displays are appropriate and which are not, many boards have decided to ban any individual displays observable from outside the building." Jay Romano, *Your Home: Why Some Americans Can't Fly the Flag*, N.Y. TIMES, June 11, 2006, *available at* 2006 WLNR 9971582 (quoting Arthur L. Weinstein, an attorney and vice president of the Council of New York Cooperatives and Condominiums). Weinstein noted further that "the issue typically arises over displaying Nativity scenes, menorahs and other religious symbols . . . ." *Id.*

194. Religious housing that is exempt from the FHA (housing operated or controlled by religious organizations) would of course be free to have such symbols, but the exemption is narrow. *See, e.g.*, United States v. Columbus Country Club, 915 F.2d 877 (3rd Cir. 1990); *see also* Taormina Theosophical Comty, Inc. v. Silver, 140 Cal. App. 3d 964 (Cal. Ct. App. 1983) (court refuses to

could be unlawful[195] fails to consider the different levels of expectation on different types of property and illustrates the chilling effect of the endorsement approach.[196]

The FHA has sometimes helped to stem the tide of religion-free environments,[197] but only where particular religious denominations have been singled out.[198] The Court of Appeals for the Seventh Circuit recently

---

enforce subdivision covenant that restricted residence to members of religious group).

195. In the apartment building context, the U.S. Department of Housing and Urban Development says secularized holiday symbols in common areas do not violate the FHA. *See* Steven J. Edelstein, *Fair Housing v. The Easter Bunny: If Decorating for the Holiday Season Caused You Legal Conflict, This Year Don't Let Fair Housing Violations Rain on Your Easter Parade*, UNITS, Apr. 1, 2006, at 34. Indeed, in the CIC context, one sees examples of owners associations making decisions based on Supreme Court Establishment Clause precedent in the public-religious-display context—allowing a menorah on the assumption that it is not religious, but prohibiting a crèche on the assumption that it is religious. *See, e.g.*, Adam Lisberg, *Her Holiday Wish Trumped*, N.Y. DAILY NEWS, Dec. 13, 2005, at 22, *available at* 2005 WLNR 25302899; Rae, *supra* note 57. But, that categorization is not an accurate reflection of the case law, even if it were applicable. *See* Lynch v. Donnelly, 465 U.S. 668 (1984); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

196. In contrast to exclusive use property and common property to which residents have access for assembly purposes, CIC property that identifies the community—such as the landscaped entrance—carries very little expectation for resident religious exercise. However, an owners association is free to erect temporary displays for major religious holidays. Such displays should be representative and inclusive. *See, e.g.*, Siegler, *supra* note 54, at 3; Ann Givens, *Hanukkah Bows Go Up at Gate on Court's Order: A Jewish Couple Persuaded a Judge to Overrule their New Smyrna Beach Homeowners Association's Resistance*, ORLANDO SENTINEL, Dec. 22, 2000, at A1, *available at* 2000 WLNR 8640561 (court required addition of blue and white bows to subdivision entrance where red bows, wreaths, and Christmas tree banner had been placed); Stan V. Jezierski, *Holiday Decorations and the Fair Housing Act*, COLORADO HOME OWNERS ASS'N L. (Dec. 2, 2008), http://www.cohoalaw.com/governance-holiday-decorations-and-the-fair-housing-act.html ("[I]f the association's membership demands to exhibit religious symbols . . . they can be displayed. However, the association should take extra care to give equal treatment [to other faiths]."); *see also* Angie Francalancia, *Holiday' Display Prompts Fight for Menorah*, PALM BEACH POST, Dec. 10, 1993, at 1C, *available at* 1993 WLNR 1377012 (white lights at gatehouse represent Christmas to Jewish residents who want menorah displayed); *cf.* Janice De Jesus, *Religious Leaders Help Rossmoor Residents with Creche; Meeting Opens Up Discussion of What Type of Holiday Symbols, If Any, Should Be Allowed at the Retirement Community*, CONTRA COSTA TIMES (Walnut Creek, CA), Dec. 11, 2003 at 5, *available at* 2003 WLNR 9505989 (reporting that many CICs do not allow religious symbols at entrance, describing concerns especially if only one religion represented).

197. The Civil Rights Division of the Department of Justice has been active in investigating condominium associations and landlords for what it has viewed as discriminatory restrictions to make sure residents can use common rooms for religious purposes and display religious statues and mezuzahs. *See* U.S. DEP'T OF JUSTICE, *supra* note 9, at 17; *see also* Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 TEX J. C.L. & C.R. 1, 7–8 (2005).

198. Section 3604(a) of the FHA prohibits discrimination in the sale or rental of a dwelling because of race, color, national origin, religion, sex, handicap, or familial status. 42 U.S.C. § 3604(a) (2006). Obviously, refusal to sell or rent property to a person because of his or her religion would violate this provision of the statute. *See id.*

More directly relevant to the context of CIC covenants, FHA section 3604(b) also prohibits

held in *Bloch v. Frischholz* that an aggressively enforced CIC prohibition of a mezuzah on a condominium resident's doorframe presented genuine issues for trial on intentional discrimination under the FHA.[199] The owners association had reinterpreted a rule (originally prohibiting items cluttering common hallways) to prohibit placement of *any* item, including a mezuzah (with dimensions of six inches long, one inch wide, and one inch deep).[200] Issues for trial existed because the rule as reinterpreted was a marked departure from prior practice and because of a record replete with anti-Semitic conduct on the part of the CIC's leadership.[201] Because the rule was

---

discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." *Id.* § 3604(b). When CICs restrict access to or use of common areas, for instance, such restriction can be challenged as unlawful discrimination "in the provision of services or facilities." *See id.*; *see, e.g.*, Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223 (S.D. Fla. 2005) (ban on religious services in common room does not violate FHA because it does not single out any one religious group). The *Savanna Club* court rejected the notion set forth in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n.*, 388 F.3d 327 (7th Cir. 2004), that the FHA was limited to acquisition (not post-acquisition) discrimination. The *Savanna Club* court wrote, "[p]art and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community. . . . In the context of planned communities, where association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the FHA." *Id.* at 1230. For commentary critical of *Halprin*, see generally Oliveri, *supra* note 37.

Halprin's narrow reading was rejected by the Seventh Circuit en banc in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009), which found that "in some circumstances homeowners have an FHA cause of action for discrimination that occurred after they moved in." *Id.* at 772. The Blochs' placement of a mezuzah on their doorpost was repeatedly removed by the condominium association, and the Blochs sued under the FHA. *Id.* at 773. The court reasoned that the Blochs' agreement to be governed by the condominium association was a "term or condition" of sale (because the agreement was made at the time of purchase) that brought the case within section 3604(b); the association's power to restrict the unit owners' rights flows from the terms of sale. *Id.* at 780. Thus, the Blochs could allege post-acquisition discrimination when the association restricted rights in a discriminatory manner. *Id.*

199. Bloch v. Frischolz, 533 F.3d 562 (7th Cir. 2008), *vacated by* Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc) (reversing district court's grant of summary judgment to condominium association).

200. *Bloch*, 587 F.3d at 772.

201. *Id.* After the hallways were repainted and the rule reinterpreted to prohibit any item on the door frame, for over a year association staff "repeatedly confiscated" each successive mezuzah the Blochs placed on their door; the facts alleged anti-Semitic actions by the board president as well. *Id.* at 773–74. But the panel of the Seventh Circuit (whose decision was vacated) focused not on these alleged facts but on the general applicability and facial neutrality of the hallway rule. *Bloch*, 533 F.3d at 564 ("Generally applicable rules that do not refer to religion differ from discrimination."). Note that generally applicable, facially neutral laws are constitutional under the Free Exercise Clause of the First Amendment, regardless of the impairment or prohibition of religious practice. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).). The *Bloch* panel viewed the Blochs' complaint as a request for an exemption from an otherwise general, neutral rule; the court refused it, since the FHA has no provision for religious accommodation. *Bloch*, 533 F.3d at 565. The dissent of Judge Diane Wood provided a much better articulation of the situation because it recognized the strong allegations of discrimination. *See id.* at 566 (Wood, J., dissenting).

general and neutral (at least facially), the court made clear that under the FHA, the Blochs must show that the reinterpretation was made "'because of' and not merely 'in spite of' their religion. In other words, the evidence must indicate that the Association was not simply indifferent when it reinterpreted the Hallway Rules; the evidence must show that the Association reinterpreted the Rules with Jews in mind."[202] They must prove that the restrictions, "though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment."[203] It is not enough to show an "adverse impact" resulting from the application of a general rule.[204] In reaction to *Bloch* and similar cases, Illinois and Florida have enacted legislation protecting religious symbols like mezuzahs.[205]

---

202. *Bloch*, 587 F.3d at 785 (quoting in part and citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)). Even despite *Smith*'s focus on form and not effect, *Lukumi* made clear that a general rule might still be discriminatory. Discrimination under *Lukumi* includes "laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). The Seventh Circuit, in its en banc opinion, noted that "the hallway rule might have been neutral when adopted . . . but the Blochs' principal argument is that the Rule isn't neutral anymore." *Bloch*, 587 F.3d at 783. The Court thus placed the burden on the Blochs to prove that condominium association's reinterpretation of the rule was the product of anti-religious discrimination—that the reinterpretation singled out Jews for discriminatory treatment. *Id.* Although the decision relies on some of the reasoning of Judge Wood's dissent in the vacated decision, it sets an unnecessarily high bar to meeting the *Lukumi* standard. *See id.*

203. *Bloch*, 587 F.3d at 785–86 (quoting *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring)).

204. *Id.* at 785. The court notes that this requirement is driven by *Employment Division v. Smith*, 494 U.S. 872 (1990), because "[u]nder *Smith*, the denial of a religious exception is not intentional discrimination." *Bloch*, 587 F3d at 785. The Free Exercise Clause protects against anti-religious discrimination, but not against burdens to religious practice that result from general, neutral rules. *See id.* at 785–86.

205. In response to the facts of *Bloch*, Chicago enacted an ordinance prohibiting landlords and condominium associations "from placing or affixing a religious sign, symbol or relic on the door, door post or entrance of an individual apartment, condominium or cooperative housing unit" unless necessary to "avoid substantial damage to the property or an undue hardship to other unit owners." Chi., Ill., Mun. Code § 5-8-030(H) (2008). Then Illinois amended its condominium law. *See* Ill. Stat. Sec. 765 ILL. COMP. STAT. 605/18.4(h) (West 2008) (concerning the adoption and amendment of rules regarding operation and use of property) ("[N]o rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments. No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit."). *Id.*

In response to a similar mezuzah ban in a Florida condominium, Florida enacted a law that provides: "An association may not refuse the request of a unit owner for a reasonable accommodation for the attachment on the mantel or frame of the door of the unit owner of a religious object not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep." FLA. STAT. ANN.

Others have used state versions of the FHA to challenge CIC restrictions. New York's Attorney General Andrew Cuomo used the state's Human Rights Law successfully in 2009 to end a mezuzah ban;[206] Arizona's Attorney General Terry Goddard used the Arizona Fair Housing Act successfully in 2006 to ensure that Mormons could use a community room for a weekly meeting;[207] and in Connecticut, the Commission on Human Rights and Opportunities won a settlement in 2005 for an Orthodox Jewish couple to permit the display of their succah on their balcony during Succoth.[208] But the facts at issue in these situations, like the facts of *Bloch*, were replete with anti-denominational harassment that easily demonstrated intentional discrimination falling within the statutory proscription. In cases that lack this record of anti-denominational animus, the FHA claim has not been successful. Courts have typically not considered CIC enforcement of generally applicable restrictions to be discriminatory;[209] even facially discriminatory restrictions that proscribe only religious conduct have survived FHA challenge.[210]

Returning to the larger concern regarding the possible application of constitutional norms to the CIC context, one might wonder whether the norms of the Free Exercise Clause would protect religious residents in those cases where the FHA does not. Free exercise norms, like the FHA, protect residents only against hostile restrictions enacted or enforced because of—not in spite of—religion.[211] Under a broad reading of the clause, free

---

§ 718.113 (West 2009) (Title 40, Real and Personal Property, Chapter 718 Condominiums, Part 1 General Provisions. Subpart (6)). *See* Joe Kollin, *Condo Bans Religious Symbol on Doorposts*, *supra* note 54, at 1B. Texas is considering similar legislation. *See* MacLaggan, *supra* note 54; Wertheimer, *supra* note 54.

206. *See* OFF. ATT'Y GEN., *supra* note 54 ; *see also* Jones, *supra* note 54, at A05.

207. *See* Press Release, Off. Att'y Gen. Terry Goddard, *supra* note 57; Editorial, *AG Answers Group's Prayers*, *supra* note 57.

208. *Couple Settle Religion Discrimination Case for $27,000*, *supra* note 55.

209. *See* Tien Tao Ass'n. v. Kingsbridge Park Cmty. Ass'n, 953 S.W.2d 525 (Tex. Ct. App. 1997) (affirming enforcement of residential-only covenant against church did not violate FHA); Boodram v. Md. Farms Condo., No. 93-1320, 1994 WL 31025 (4th Cir. Feb. 1, 1994). In *Boodram*, a Hindu owner placed a religious symbol (jhandee) on the balcony in violation of a prohibition on balcony storage. *Boodram*, No. 93-1320, 1994 WL 31025, at *1. The court found the prohibition "an altogether typical and reasonable attempt by a condominium association to ensure an attractive and uniform appearance." *Id.* at *2. The very requirement of "discrimination" renders the FHA the wrong vehicle for addressing general, religion-neutral servitudes that create religion-free environments.

210. *See* Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223 (S.D. Fla. 2005) (holding that a ban on religious services does not violate FHA because it does not single out any one religious group).

211. *See supra* notes 201–204 and accompanying text. Interpreting "discrimination" under the FHA looks to the meaning of discrimination under the Free Exercise Clause. *See, e.g.*, Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc). While the clause does not apply directly to private actors, case law can offer guidance on whether a restriction is neutral or discriminatory. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 426 (2d Cir. 1995).

exercise norms would help to ensure equal access to common areas as between religious and non-religious uses,[212] but they would offer no protection from neutral, generally applicable restrictions which are the most prevalent form of CIC restriction.[213] Since free exercise norms are currently interpreted narrowly,[214] they do not appear to provide a counterweight to the pressure from establishment norms to create a religion-free visual environment. In sum, the best way to break free from the consent model at one end and the constitutional norms model at the other is to employ traditional property doctrines for rendering restrictions on land use unenforceable.

B. The Traditional Property Argument: Servitudes Cannot Violate Public Policy

Religion-free environments undermine the common good of civil society because the flourishing of the human person requires *both* neighborhood stability *and* religious freedom. Framing the concern in societal terms is not an exaggeration—if servitudes that yield religion-free environments become the standard norm for CIC governing documents, millions of Americans will live in religion-free private communities.[215] In this way, private law would construct a social world that severely compromises a basic overarching social and constitutional principle: that religious freedom is the presumptive position on private property. But courts are not powerless to change this, even if other CIC restrictions have been deemed part of the bargain. The judicial power to invalidate covenants

212. This is the current DOJ interpretation. *See supra* note 9.

213. Such CIC restrictions run no risk of an investigation by the Civil Rights Division. *See supra* notes 9, 72, 197.

214. The scope of the Free Exercise Clause, like the scope of the FHA, is limited to situations of discrimination. *See supra* note 204.

215. CC&Rs can become standardized, so that restrictions used in some CICs can spread quickly through the declarations and governing documents of others. *See supra* note 40 and accompanying text. The argument that the market will facilitate the creation of alternative "religion-friendly" CICs is unrealistic. Developers are conservative, adopting restrictions (especially religion-neutral ones) that appear in documents of other CICs. Furthermore, this notion of the market providing different kinds of housing for different tastes misunderstands religious land use as a *unique* feature of residential life that has to be bargained for, rather than a fundamental, universally recognized aspect of residential life. *But cf.* Jo Anne P. Stubblefield, *Summary of Secondary Mortgage Market Requirements for PUDS, in* DRAFTING (AND RE-DRAFTING) DOCUMENTS FOR CONDOMINIUMS AND PLANNED COMMUNITIES IN TROUBLED TIMES: PRACTICE AND PRINCIPLES, A.L.I.-A.B.A. CONTINUING LEGAL EDUC. (2008) (recognizing an owner's right to display religious symbols subject to time, place and manner restrictions, but the extent of the right is unclear).

that violate public policy becomes the vehicle for remaking the social world into one in which responsible religious exercise is protected, for it is this doctrine that encourages courts to scrutinize the effects of religious exercise in CICs and of servitudes that suppress it.[216]

What are the sources of public policy to protect religion, even when it is not targeted in a way actionable under the FHA? Of course, the argument relies heavily on the overarching constitutional design that locates vibrant, theologically significant religious exercise primarily on private property. But beyond this, the federal RLUIPA, which on its face is applicable only to state actors that make land use decisions, is relevant.[217] The argument is not that RLUIPA should apply to private land use decisions. The argument is instead that courts can distill basic policy from the statute to determine whether and how it should be applied in the private CIC context. The statute provides for the protection of religious land use absent a compelling governmental interest, even if that means an exemption from a general, religion-neutral rule.[218] It also requires non-discriminatory treatment under land use laws to prevent religious land uses from being treated differently from comparable non-religious land uses.[219] Finally, it prohibits the exclusion or unreasonable limitation of religious uses.[220] The policy expressed in the first provision is that religious land use that does not harm neighbors should be allowed—prohibitions are justified when its negative impacts cannot be mitigated or eliminated.[221] The policy expressed in the second is that religious land use should not be excluded from areas where

---

216. For a discussion of public policy (rather than state action) as a way to protect constitutional rights, see Saxer, *supra* note 158, at 103–09.

217. The sources of public policy include not only constitutions and court decisions, but legislation as well. The Restatement notes that "[c]ourts may apply the policies manifested by legislation more broadly than the legislation provides." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. f (2000) (sources of public policy); *see also* Saxer, *supra* note 158, at 103.

218. 42 U.S.C. § 2000cc(a)(1) (2006) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."). More than half the states, which require strict scrutiny review of burden on free exercise by statute or constitutional interpretation, would also have such a public policy. *See supra* note 92.

219. 42 U.S.C. § 2000cc(b)(1)–(2) (2006) ("(1) No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. (2) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.").

220. 42 U.S.C. § 2000cc(b)(3) (2006) ("No government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.").

221. Carmella, *RLUIPA*, *supra* note 14, at 525–35.

similar non-religious uses are allowed.[222] And the third provision, a catch-all of sorts, represents a clear rejection of a religion-free environment.[223] Applying these policies to the CIC context would yield protections for responsible religious exercise. Neutral, general restrictions resulting in the prohibition of religious uses or symbols would be justified only if they were necessary to prevent identifiable harms to neighbors.[224] Restrictions that target only religious uses or displays would be unenforceable.[225] As a matter of public policy, then, we see that religious exercise must be treated at least as well as comparable activity, and that even beyond that, religious exercise under certain circumstances must be given even greater protection. These legal and societal norms serve as the backdrop to the Restatement balancing set forth below.

On a showing that religion-free environments violate public policy, courts will invalidate the restrictions that produce and sustain them to the extent those restrictions are applied to religious expression and association.[226] Under the Restatement, servitudes that violate public policy include any CIC restrictions that "unreasonably burden a fundamental constitutional right."[227] However, the Restatement does not simply import constitutional law—indeed, it asserts that the analysis is "a matter of property law, not of constitutional law."[228] Significantly, although

222. *Id.* at 519–24.

223. *See* 42 U.S.C. § 2000cc(b)(3) (2006).

224. *See infra* note 233 and accompanying text.

225. The Free Exercise interpretation in *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520 (1993) *should* lead courts to the same interpretation, but in *Bloch v. Frischolz*, 533 F.3d 562 (7th Cir. 2008), *vacated by*, Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc) and *Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223 (S.D. Fla. 2005) *Lukumi* has been limited to its facts and understood to protect only a particular religious denomination. *See Bloch*, 533 F.3d at 564–65. The DOJ, on the other hand, has adopted a broader interpretation. *See supra* note 9.

226. As noted in *supra* note 39, restrictions creating religion-free environments include both servitudes established in the declaration as well as rules later enacted by the owners association (or by vote of the owners). While "[s]ervitudes included in the declaration are valid unless illegal, unconstitutional, or against public policy . . . . [r]ules are not valid unless they are also reasonable." RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000). Because the public policy argument here applies to all such restrictions, whether servitudes or rules, no separate analysis for the unreasonableness of rules has been undertaken.

227. *Id.* § 3.1. The Restatement notes that a violation of public policy occurs when covenants (1) are arbitrary, spiteful or capricious; (2) unreasonably burden a fundamental constitutional right; (3) impose an unreasonable restraint on alienation; (4) impose an unreasonable restraint on trade or competition; or (5) are unconscionable. *Id.* Courts will invalidate restrictions that "inhibit[] the exercise of rights that are important to the public good" when their enforcement would result in public harm. *Id.* at cmt. h.

228. *Id.* § 3.1 cmt. h; *see also* Comm. for a Better v. Twin Rivers Homeowners' Ass'n, 929 A.2d

constructive notice of restrictions is relevant, it is not the end of the inquiry.[229] This allows courts to engage in the normative task of deciding whether and in what circumstances restraints on religious exercise in a community are permissible—essentially a decision about which terms of the CIC contract should be enforceable and which ones should not.

As a matter of property law, the public policy analysis involves a balancing of the interests of those burdened by the restriction against the interests of the beneficiaries of the restriction, a task which is "necessarily imprecise."[230] In general, the Restatement notes that courts consider whether the risks of harm to society from enforcement outweigh the benefits of enforcement.[231] Judges evaluate the covenant's impact, identify public interests negatively affected by enforcement, and weigh those harms against the interest in enforcement. They also query whether validating the servitude will encourage wider adoption of similar servitudes and greater harm.[232] When CIC restrictions affect fundamental rights like religious exercise, the beneficiaries' interest in enforcement is circumscribed:

> [T]he legitimate interest of the landowners in controlling activities of other landowners are generally limited to controlling use of common areas and controlling activities that create external effects in the neighborhood. Use of servitudes to control activity involving

---

1060, 1071–72 (N.J. 2007) (claiming that a public policy analysis protects CIC residents from unreasonable restriction in the exercise of fundamental rights under the state constitution and that such an unreasonable restriction violates public policy and is unenforceable). CIC residents "are protected under traditional principles of property law—principles that specifically account for the rights afforded under our constitution's free speech and association clauses." *Id.* at 1075. In regards to religion-free environments, the important constitutional norm here is not simply religious freedom, but the general, overarching constitutional design that places religious exercise on private property. Thus, in this author's view, it is more accurate to frame the issue as whether the servitudes that support the religion-free environment burden the constitutional right to use one's private property as the location for responsible religious exercise.

229. The greater the notice to the burdened party, the stronger the beneficiary's claim that the restriction should be enforced; if the restriction is buried in a document or, in cases where "an ordinary purchaser would not necessarily understand that it would apply to the situation in question," less weight is given to the beneficiary's claim. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. h (2000).

230. *Id.* § 3.1 cmt. i; *see also* Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275 (Cal. 1994) (noting that a covenant is not enforceable when harm caused is disproportionate to the benefit produced by its enforcement).

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

232. *Id.* § 3.1 cmt. i. The focus on the covenant's impact is a traditional consideration of the common law. Indeed, one of the factors courts use to assess the reasonableness of a covenant is "[w]hether the covenant interferes with the public interest." *Twin Rivers*, 929 A.2d at 1076; *see, e.g.*, Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 12–17 (1989) (defending reasonableness review because it "requires the rules of the group to conform not only to the association's own internal values but to external values as well—i.e., values that, in the court's judgment, are widely shared throughout the rest of the polity." *Id.* at 6).

> the exercise of fundamental rights on individually owned property is generally not legitimate *unless the activity produces spill-over effects that have an adverse impact on other property owners* in the [CIC].[233]

Neighbors who want a religion-free environment—and who are the beneficiaries of servitudes that create it—must show how the placement of religious symbols on individually owned or exclusively used property[234] causes "spill-over effects that have an adverse impact on them."[235] Their reasons for wanting to prohibit symbols might be primarily aesthetic—that is, that some public manifestations of religion are ugly or messy and result in lower property values. Or their reasons might be primarily social or psychological—perhaps that public displays of religion are offensive, divisive, or annoying. Minorities might feel threatened by the symbols of a visible majority. Even co-religionists might feel threatened by symbols of a highly visible minority.[236] Others might feel strongly on principle that religion is so intensely private that it should be practiced only inside the home and inside a house of worship.[237] A central question, then, is whether these harms should be considered legitimate, and if legitimate, whether they outweigh the interests of other residents in religious freedom.

For those burdened by the restrictions, publicly visible religious exercise is restrained—but for the servitude, they would still be able to practice their religion. Given the likelihood that such restrictions, when upheld, become standardized and more widely used, these restrictions implicate not just religious freedom for the residents, but the broader religious freedom and common good of civil society. As an additional public harm, these

---

233. RESTATEMENT, *supra* note 39, § 3.1 cmt. h (emphasis added).

234. This article continues to interpret common areas to mean physical spaces to which all residents have access, and *not* those elements to which residents are given rights to exclusive use, even though such elements may be owned or managed by the CIC. *See supra* note 32 and accompanying text.

235. *See* RESTATEMENT, *supra* note 39, § 3.1 cmt. h; *supra* note 233 and accompanying text.

236. *See, e.g.*, Schwartz, *supra* note 57; *Orthodox Jews Sue Condo Over Prayer Ban*, *supra* note 57.

237. As one commentator noted:

> Many people never exercise some of the rights they possess, and do not value living in a community in which others exercise these rights. Others, although valuing certain basic rights, would nevertheless prefer on balance to live in a community in which no one exercises those rights. For both sorts of people, freedom from others exercising the rights . . . may seem necessary for activities or communities they do value. . . . It is only because they perceive conformity by their neighbors as necessary to maintaining a desirable community that people turn to a legal device such as the residential covenant.

Note, *supra* note 64, at 484.

restrictions render large areas of private property—the constitutionally designated domain of religious expression—off-limits to the public manifestation of that expression. Courts will weigh the harm to residents whose religious expression and association is restricted (and the more general harm to society) against the residents' interest in enforcement. The normative approach to this balancing has been described earlier, in Section III, which is informed by Catholic social thought and basic property law concepts.[238]

Consider also the specific guidance of the Restatement itself, which is remarkably consistent with the normative approach discussed earlier. The Restatement provides illustrations concerning the application of restrictions ranging from a CIC prohibition of signs and banners visible from the street to political yard signs and American flag displays.[239] While such a prohibition maintains aesthetic uniformity, the Restatement concludes that the harm to the public interest (participation in political debate through the yard sign and symbolic expression via the flag) outweighs the interest in validating the covenant. In both cases, alternative means of expression are not available, and "adverse impacts on other subdivision lot owners are not likely to be substantial."[240] In some cases, however, the balancing might favor aesthetic interests over expressive freedom. For instance, if the sign or flag were unusually large, the court would more likely enforce the covenant because a smaller sign or flag would constitute a reasonable, alternative means of expression.[241] Furthermore, the large size could have "spill-over effects that could affect the aesthetics of the neighborhood and the use and enjoyment of adjacent properties."[242] Note, however, that the interest in not seeing your neighbor's political expression is not given any weight in the analysis.[243] The Restatement approach, like the Declaration's approach to responsible religious exercise, favors expressive freedom while restricting

238. *See, e.g.*, *supra* Part III.

239. RESTATEMENT, *supra* note 39, § 3.1 cmt. h, illus. 7, 8; *see also* Comm. for a Better v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1075–76 (N.J. 2007); federal Freedom to Display the American Flag Act of 2005 § 3, 4 U.S.C. § 5 (2006) (discussed *supra* note 10).

240. RESTATEMENT, *supra* note 39, § 3.1 cmt. h, illus. 8.

241. *Id.* § 3.1 cmt.h, illus. 9.

242. *Id.* This analysis suggests that the economic harm suffered by aesthetic disruption is more appropriately restricted than psychological harm suffered by one who considers political speech to be inappropriate or offensive. "Although [restrictions that do not necessarily increase the value of the benefited property] are no longer categorically invalid, strong justification is required for a servitude that burdens fundamental rights of successive landowners for a purpose unrelated to the use or value of the beneficiary's land." *Id.* § 3.1 cmt. h.

243. Indeed, in *Twin Rivers*, the fact that public political speech, though limited, was not completely banned was critical to upholding the actions of the owners association. *Twin Rivers*, 929 A.2d at 1073–74. Political signs were permitted within flower beds adjacent to homes and in windows. *Id.*

identifiable negative impacts on surrounding properties.[244] Reasonable regulations (e.g., size limits) are sufficient to protect the legitimate interests of neighbors, but neighbors do not have the right to expect a social world devoid of political signs or American flags.

Courts should refuse enforcement of CIC restrictions that create and sustain religion-free environments on public policy grounds. In this way, courts would construct a social world open to responsible expression of religious identity. Considering the public policy that protects responsible religious exercise on private property, courts would be justified in finding that public expression, rather than suppression, of religious symbols and uses better promotes the dignity of the person and the common good of society.

V. CONCLUSION

When CICs exclude religious association and expression from the publicly visible areas, they do so on the assumption that they are protecting property values by enforcing aesthetic and social uniformity. But they should consider other values that are violated by religion-free environments: the dignity of the person, the common good of society, and the fundamental expectations that attach to private property. Because a religion-free environment denies responsible religious freedom to residents and impedes the creation of authentic neighborhoods, this article has argued that courts should refuse to enforce the restrictions that yield such an environment. This type of state intervention is fully consistent with the principle of subsidiarity, which generally allows freedom to intermediary, non-state actors in civil society but justifies intervention when those actors thwart the common good. In this author's view, the use of traditional property doctrines—the unenforceability of servitudes that violate public policy—is the appropriate vehicle to challenge these restrictive environments, because statutory norms of non-discrimination are insufficient to address them and constitutional norms would actually require them.

The normative argument calls for a particular construction of social life in CICs as it relates to property and religion: one in which residents can express their religious identity in symbolism and practice *where they live*, much like we allow people to express their religious identity in the way they dress. Unlike France, we do not ban public wearing of religious garb. Neither should the law permit the restriction of public expression of

244. *See supra* Part III.B.

religious identity on private property. Expression, rather than suppression, coincides with the nature of the human person and the nature of community. While religious expression should be subject to regulation in order to mitigate negative impacts on neighbors, it should not be flatly prohibited—a world in which religious freedom flourishes on private property is a better world indeed.