

NOTE

UNGATING SUBURBIA: PROPERTY RIGHTS, POLITICAL PARTICIPATION, AND COMMON INTEREST COMMUNITIES

*Ross Thomas**

Most Americans no longer live in traditional communities. Instead, they live in suburban subdivisions littered with shopping malls, swimming pools, recreation centers, and private security forces. But improved living conditions, extra services, communal spaces, and increased property values come at a cost: we are now more segregated than ever. And in our isolation, the public realm eviscerates, the quality of public debate deteriorates, and the quality of American citizens degenerates. Courts and legislatures nonetheless have watched our communities become more homogenized and Balkanized with little interference, upholding all common interest community regulations deemed “reasonable.”

This Note explores previous solutions to the problem of common interest community homogenization and Balkanization and argues that they are inadequate. This Note therefore interrogates the historical roots of private property rights and contends that private property secures not only economic liberty, but also fosters the development of social, moral, and political characteristics essential to political participation in a democracy. As a result, this Note asserts that communities have a fundamental right to be reasonably heterogeneous because diverse communities foster the social, moral, and political development of democratic citizens. This Note then proposes an alternative solution to problematic CIC regulations by combining the federalist concept of “laboratories of democracy” with republican “civic virtue,” a solution that addresses both federalist and republican concerns regarding democratic legitimacy. This Note concludes with the view that when courts analyze CIC restrictions, they should consider whether or not a CIC restriction unreasonably interferes with a community’s right to be heterogeneous.

* J.D. candidate, Cornell Law School, 2013; B.A., Columbia University, 2009. I am grateful for the guidance of Cornell Law School professors Thomas McSweeney, Aziz Rana, and Laura Underkuffler, the insightful critiques of Chris Dickson and Antonio Haynes, and the support of my parents, Laurie and George Thomas.

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INTRODUCTION

Common interest communities¹ (CICs) have increasingly Balkanized and homogenized American neighborhoods. As of 2011, approximately 62.3 million Americans live in common interest communities.² Walled off from the outside world by private security guards, gates, and even moats, Americans isolate themselves in a private suburbia sprinkled with their own shopping malls and recreational facilities.³ CICs are gov-

¹ Common interest communities are defined by shared property, by restrictions built into their deeds limiting the uses of property, and by a mandatory homeowners' association that administers the property and enforces the restrictions on its use. Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in *COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST* 3, 3 (Stephen E. Barton & Carol J. Silverman, eds., 1994).

² This number has more than doubled since 1990 when only 29.6 million Americans lived in CICs. Cmty. Ass'n. Inst., *Industry Data: National Statistics*, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Mar. 2, 2012).

³ See David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 *YALE L.J.* 761, 765–66 (1995); Robert B. Reich, *Secession of the Successful*, *N.Y. TIMES MAGAZINE*, Jan. 20, 1991, <http://www.nytimes.com/1991/01/20/magazine/secession-of-the-successful.html?pagewanted=all&src=pm>; MICKEY KLAUS, *THE END OF EQUALITY*, 17 (1995) ("What really bothers liberals about Ameri-

erned by “covenants, conditions, and restrictions”⁴ (CC&Rs) and other regulations promulgated by the CIC’s governing board—called a homeowners’ association (HOA).⁵ Few legal restrictions govern these private regulations. Under federal law, CICs can be created on the basis of anything other than race, color, religion, sex, familial status, national origin, or handicap of person.⁶ Courts tend to uphold all other reasonable restrictions.⁷ These limited legal restrictions have consequently contributed to the “skyboxification of American life,”⁸ as an increasing number of Americans flee to the safety of these homogenous communities.⁹

By definition, all communities exclude non-members; however, CIC regulations are especially problematic because they result in legally enforced, semi-permanent land restrictions. CICs are therefore distinct from other forms of community organization in two ways. First, unlike *de facto* community organization, CIC regulations bear the imprimatur of the state.¹⁰ Second, CICs are more permanent because they regulate real property, which imposes duties and obligations on the land regardless of

can society? . . . Is it that the wealthiest 20 or 30 percent of Americans are ‘succeeding,’ as Robert Reich puts it, into separate, often self-sufficient suburbs, where they rarely even meet members of non-wealthy classes, except in the latter’s role as receptionists and repairmen? And is it the gnawing sense that, in *their* isolation, these richer Americans not only are passing on their advantages to their children, but are coming to think that those advantages are deserved, that they and their children are, at bottom, not just better off but better?”).

⁴ “Conditions covenants and restrictions set out restrictions on what owners can and cannot do with their own property . . . They typically govern dwelling units, even if the units themselves are individually owned . . . Not all details will be set out in the CC&R. Some will be set by the homeowners association who use the authority granted by the CC&R. But CC&Rs tend to give the association very little flexibility.” See Barton & Silverman, *supra* note 1, at 6.

⁵ See EVAN MCKENZIE, *BEYOND PRIVATOPIA: RETHINKING RESIDENTIAL PRIVATE GOVERNMENT* 114–19 (2011).

⁶ See Fair Housing Act, 42 U.S.C. § 3604 (2006).

⁷ See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 6 (1989).

⁸ Michael J. Sandel, Op-Ed., *If I Were President . . .*, N.Y. TIMES, Aug. 21, 2011, http://www.nytimes.com/interactive/2011/08/21/opinion/sunday/20110821_Kornbluth_President.html [hereinafter Sandel, Op-Ed] (“Not long ago, the ballpark was a place where C.E.O.’s and mailroom clerks sat side by side, and everyone got wet when it rained. Today, most stadiums have corporate skyboxes, which cosset the privileged in air-conditioned suites, far removed from the crowd below. Something similar has happened throughout our society. The affluent retreat from public schools, the military, and other public institutions, leaving fewer and fewer class-mixing places. Rich and poor increasingly live separate lives.”). See also MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 266 (2009) [hereinafter SANDEL, *JUSTICE*] (“A similar trend leads to the succession by the privileged from other public institutions and facilities. Private health clubs replace municipal recreation centers and swimming pools. Up-scale residential communities hire private security guards and rely less on public police protection. A second or third car removes the need to rely on public transportation. And so on. The affluent secede from public places and services, leaving them to those who can’t afford anything else.”).

⁹ See Kennedy, *supra* note 3, at 764–67.

¹⁰ See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

the owner. In other words, because courts enforce property restrictions, CICs legally and permanently alter the formation of community life.

Another problematic aspect of CICs is that they influence the development of residential life. Although Americans belong to numerous and overlapping communities,¹¹ residential communities furnish a fundamental mediating structure between private and public life.¹² Further, because CICs increase privatized spaces, CICs decrease the number and quality of traditionally public spheres.¹³ Thus, by excluding or marginalizing individuals from residential communities, CICs not only effectively prohibit excluded members from meaningfully participating in civic life, they also exacerbate civic life's demise.¹⁴

Homogenized residential associations also limit the social and political development of its internal group members because diversity promotes better learning outcomes, breaks down stereotypes, and prepares citizens for the challenges of an undeniably heterogeneous society.¹⁵ Moreover, without exposure to diverse viewpoints, CIC residents cannot envision the common good. And as neighborhoods become more Balkanized, its isolated members even fail to appreciate why democratic politics should care about the common good. Hence, CICs move democracy away from its deliberative ideal¹⁶ and deprives its residents of meaningful political participation.

¹¹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114 (Phillips Bradley ed., Vol. II Vintage Books 1945) (1840) ("Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds . . . Wherever at the head of some new undertaking you see the Government in France, or a man of rank in England, in the United States you will be sure to find an association.").

¹² See Stephen E. Barton & Carol J. Silverman, *Shared Premises: Community and Conflict in the Common Interest Development*, in *COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST* 132 (Stephen E. Barton & Carol J. Silverman, eds., 1994) ("Neighborhood organizations are the most visible means by which people get together to engage in public action . . ."); Jonathan R. Macey, *Packaged Preferences and the Institutional Transformation of Interests*, 61 U. CHI. L. REV. 1443, 1470 (1994) ("The reality is that mediating institutions provide a forum through which the self-interest of members can be amplified and directed. Indeed, a primary reason why these mediating institutions were formed in the first place was to provide a vehicle through which the self-interest of similarly situated individuals can find political expression in an effective, cost-effective manner.").

¹³ See SANDEL, *JUSTICE*, *supra* note 8, at 265–68.

¹⁴ See Alexander, *supra* note 7, at 5.

¹⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003).

¹⁶ See JOSHUA COHEN, *Deliberation and Democratic Legitimacy*, in *PHILOSOPHY, POLITICS, DEMOCRACY* 16, 25 (2009) ("[T]he aim of ideal deliberation is to secure agreement among all who are committed to free deliberation among equals While no one is indifferent to his/her own good, everyone also seeks to arrive at decisions that are acceptable to all who share the commitment to deliberation.").

Although numerous scholars present solutions to problematic CIC regulations,¹⁷ none of their solutions adequately address the homogenization or Balkanization problem. Part I of this Note contextualizes this dilemma. Part II of this Note proposes that a historical analysis of property rights will suggest a more workable solution to problematic CIC restrictions. A historical analysis demonstrates why property rights are important and analyzes previous solutions to avoid re-inventing the wheel. This Note further contends that the nation's founders expressed a universal interest in the interaction between property rights and meaningful political participation. As such, any solution to CIC restrictions should keep this universal interest in mind. Further, because the debate between pluralism and communitarianism¹⁸ dates back to the founding debates between federalist and republican political philosophies, a solution incorporating both federalist and republican theories may help address problematic CIC restrictions.

Part III of this Note continues the use of a historical analysis to suggest why current solutions have failed to remedy the homogenization and Balkanization problem. For example, scholars who advocate a state action solution¹⁹ do not adequately address the issue because they do not engage with both federalist pluralism and republican communitarianism—both of which are necessary to address the consequences to political participation. Gregory Alexander, who argued that the current reasonableness standard of review was adequate,²⁰ did not engage with the underlying rationale for property rights, a system devised to protect self-rule.

Part IV then uses the historical analysis to suggest an alternative solution. It argues that combining the federalist concept of “laboratories of democracy” with a republican emphasis on civic virtue better addresses federalist and republican concerns with meaningful political participation. It contends that communities should be, and have a right to be, reasonably heterogeneous because diverse laboratories of democracy better approximate the deliberative ideal. This Note concludes with the

¹⁷ See, e.g., Kennedy, *supra* note 3 (applying state-action doctrine); Alexander, *supra* note 7 (applying a reasonableness standard of review); Lisa J. Chadderdon, Note, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. Land Use & Envtl. L. 233 (2006) (applying state-action doctrine); Paula A. Franzese, *Does It Take A Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002) (suggesting the need for more legislative guidelines).

¹⁸ Pluralist theorists believe that individuals associate with each other only to achieve specific ends coincidentally shared. Communitarian theorists believe that group activity and individuality are simultaneously present aspects of the human personality, or self. Alexander, *supra* note 7, at 2–3.

¹⁹ See, e.g., Chadderdon, *supra* note 17; Kennedy, *supra* note 3.

²⁰ See Alexander, *supra* note 7, at 58–59.

view that when courts analyze CIC restrictions, they should consider whether or not the CIC restriction unreasonably interferes with a community's right to be heterogeneous under a reasonableness standard of review.

I. BACKGROUND

A. *Conceptualizing the Problem*

Over the last two decades, common interest communities have proliferated throughout America.²¹ Although CICs existed earlier,²² early CICs were primarily enclaves for the wealthy.²³ New developments have, however, made CICs accessible to people from varying socio-economic backgrounds.²⁴ As a result, CICs not only reflect different economic classes²⁵ but also diverse interests such as religious affiliations,²⁶ retirement communities,²⁷ and families who just cannot get enough of Disney World.²⁸

Ostensibly, CICs innocuously generate a greater sense of community.²⁹ Nevertheless, they exist to exclude.³⁰ For example, a New Jersey CIC precluded Tier 3 sex offenders from residing in the development.³¹ Similarly, an Illinois CIC prevented property owners from running their business out of their homes.³² A California CIC told a condominium

²¹ See MCKENZIE, *supra* note 5, at 1–2.

²² For a fuller development on the history of CICs see Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 95, 95 (1989).

²³ See MCKENZIE, *supra* note 5, at 18.

²⁴ *Id.*

²⁵ See Reich, *supra* note 3.

²⁶ Although overt exclusion on the basis of religion would be illegal under the Federal Fair Housing Act, CC&Rs may be structured to create restrictions that result in de facto religious exclusion. For example, the town of Ave Maria limits access to birth control and forbids the sale of pornography. See Charles E. Rice, *The Controversy Behind Monaghan's Ave Maria Town "Scheme,"* FREE REPUBLIC (Feb. 13, 2010, 10:10 AM), <http://www.freerepublic.com/focus/f-religion/2450566/posts>. But see Fair Housing Act, 42 U.S.C. § 3604 (2006).

²⁷ The Federal Fair Housing Act exempts "housing for older persons" from some of its prohibitions. Fair Housing Act, 42 U.S.C. § 3607(b)(1).

²⁸ Celebration, a community founded by the Walt Disney Company, took over eight years to plan and design. During this time Disney obtained input from various sources to determine Celebration's focus: health, education, technology, place, and community. See *Cornerstones*, CELEBRATION, <http://www.celebration.fl.us/town-info/cornerstones/> (last visited Apr. 1, 2012).

²⁹ See Franzese, *supra* note 17, at 553.

³⁰ Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQ. L. 161, 161 (2009).

³¹ See *Mulligan v. Panther Valley Prop. Owners Ass'n.*, 766 A.2d 1186, 1189 (N.J. App. Div. 2001).

³² See *Amoco Realty Co. v. Montalbano*, 478 N.E.2d 860, 863 (Ill. App. Ct. 1985) (upholding restriction against use of property for business purposes). Although this restriction

owner that she would either have to ditch her beloved pet cat or live elsewhere.³³ CICs could also theoretically ban individuals who identify as queer³⁴ or (gasp!) lawyers.³⁵

The problem with CIC restrictions is two-fold. First, homogenous communities deprive some members of our political community from any meaningful opportunity to participate in civic life.³⁶ As Judge Wefing pointed out in *Mulligan v. Panther Valley Prop. Owners Ass'n*, although sex offenders do not constitute a protected group, this does not inevitably lead to the conclusion that CICs can entirely exclude non-protected groups from private life.³⁷ In other words, all people, not simply individuals within a predetermined protected class, should have the opportunity to participate in some residential communities.³⁸

Moreover, because residential associations furnish a fundamental mediating structure between private and public life,³⁹ CICs may effectively prohibit excluded members from any meaningful participation in civic life.⁴⁰ As private spaces for communal interaction increase, the number and quality of public spheres decrease.⁴¹ Many CICs now have their own police forces, fire departments, parks, playgrounds, swimming pools, tennis courts, and community centers.⁴² When CIC members no longer depend on these government services, they become less willing to

applies to activities rather than people, restrictions that ban specific activities necessarily result in restrictions that limit the types of people willing to live in the community.

³³ See *Nahrstedt v. Lakeside Vill. Condo. Ass'n.*, 878 P.2d 1275, 1278–79 (Cal. 1994). Here, the restriction on cats and dogs was actually in the CC&R, but one could argue that a HOA could have reasonably created this type of restriction.

³⁴ Although the proper standard to be applied to sexual minorities is open to debate, under a rational basis review, these types of enforcements would be upheld. See *Lawrence v. Texas*, 539 U.S. 558, 586 (Scalia, J., dissenting) (“Instead the Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”).

³⁵ Property restrictions traditionally needed to “touch and concern” the land. However, because the law of contracts is also implicated, CIC restrictions avoid such complications and therefore can reach groups. See Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 279–80 (1976).

³⁶ See Alexander, *supra* note 7, at 55.

³⁷ *Mulligan v. Panther Valley Prop. Owners Ass'n.*, 766 A.2d 1186, 1193 (N.J. Super. Ct. App. Div. 2001) (“It does not necessarily follow, however, that large segments of the State could entirely close their doors to such individuals, confining them to a narrow corridor and thus perhaps exposing those within that remaining corridor to a greater risk of harm than they might otherwise have had to confront.”).

³⁸ Although a specific CIC is a minority, CICs as a whole are increasingly becoming the norm. If all CICs ban sex offenders, sex offenders have fewer places to live. Combined with the fact that CICs tend to be more affluent, CIC restrictions may force excluded individuals to live in undesirable neighborhoods.

³⁹ See Macey, *supra* note 12.

⁴⁰ See Alexander, *supra* note 7, at 5.

⁴¹ See SANDEL, *JUSTICE*, *supra* note 8, at 265–68.

⁴² See Kennedy, *supra* note 3.

support public services and spaces with their tax dollars.⁴³ Excluded members are therefore not only deprived of the specific private institutions within a CIC, but public institutions as well.⁴⁴ Thus, Balkanized communities exclude individuals from meaningful participation in civic life because they eviscerate the substance of the public realm.⁴⁵

Second, diversity matters for internal members of the community because it promotes better learning outcomes, breaks down stereotypes, and prepares citizens for the challenges of an undeniably heterogeneous society.⁴⁶ Heterogeneity also avoids concentrating the passions, prejudices, and local interests⁴⁷ within communities, which ultimately lead to problems associated with the psychological concept of groupthink.⁴⁸ The problem is, therefore, not only that CIC restrictions could result in de jure ghettoization of, for example, queer people or lawyers, but also that members inside a CIC may never have the opportunity to meet or interact with a queer person or a lawyer, drastically limiting their social and political development.

Moreover, without exposure to diverse viewpoints, homogenized and Balkanized CICs move democracy away from its deliberative ideal. Under a deliberative theory of democracy, democracy requires citizens to deliberate and offer rationales that appeal to the common good.⁴⁹ Homogeneous CICs blind their members to the common good because it deprives members of interactions with individuals outside their increasingly myopic milieu. Balkanized communities also create incentives to eschew the common good because each residential association seeks to benefit only themselves under a system of interest-group pluralism. Thus, homogenized and Balkanized CICs potentially deprive their members of meaningful participation in political life as political discourse degenerates into skirmishes over “what’s good for me” rather than “what’s good for us.”

B. *How CICs Derive Legal Authority*

Common interest communities derive their coercive power from the law of servitude and contracts⁵⁰ and may be organized as condominiums,

⁴³ See SANDEL, *JUSTICE*, *supra* note 8, at 267.

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 331–34.

⁴⁷ See MARCHETTE CHUTE, *THE FIRST LIBERTY: A HISTORY OF THE RIGHT TO VOTE IN AMERICA, 1619–1850*, 255 (1969) (quoting Ben Franklin on the wisdom of homogenous groups).

⁴⁸ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 *YALE L.J.* 71, 114 (2000).

⁴⁹ See COHEN, *supra* note 16.

⁵⁰ See Reichman, *supra* note 35, at 279.

cooperatives, or planned developments.⁵¹ In a typical planned community, a developer begins with a large tract of land and imposes specific CC&Rs on the land before subdividing and selling the land into individual lots.⁵² Additionally, individual property deeds provide that the powers described in CC&Rs will be vested in a homeowners' association,⁵³ and that the HOA will have the power to enforce, amend, and create additional obligations.⁵⁴ HOA powers are derived from a property owner's freedom of contract and law of servitude.⁵⁵ Purchasers voluntarily agree to be bound by CC&Rs and the possibility that the HOA may amend or add restrictions in the future.⁵⁶ Thus, by voluntarily agreeing to accept servitudes that "run with the land" and bind subsequent purchasers, HOAs legally exercise coercive power over their residents.⁵⁷

Property owners in CICs give up certain property rights in exchange for improved living conditions, extra services, communal spaces, and increased property values.⁵⁸ However, tension arises in two situations:⁵⁹ Under the first scenario, property owners may not wish to abide by CC&Rs or amended HOA regulations and ask courts to protect them from the consequences of their voluntary agreements.⁶⁰ In the second situation, property owners voluntarily agree to abide by CIC restrictions, but the restrictions interfere with a fundamental value of the external community.⁶¹ Members of the external community may then seek to prevent the private agreement from being enforced through adjudication or legislation.⁶² Although the external community and contract breakers both gain substantial liberty when restrictions are struck down, these rules impinge on the liberty of developers and contract-abiding property

⁵¹ For the purposes of this Note, the differences between these forms are unimportant. This Note, instead, focuses on their shared characteristics—shared property, restrictions built into their deeds limiting the uses of property, and a mandatory homeowners' association that administers the property and enforces the restrictions on its use.

⁵² See MCKENZIE, *supra* note 5, at 10–11.

⁵³ See Barton & Silverman, *supra* note 1, at 6.

⁵⁴ See Reichman, *supra* note 35, at 279–80.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 292; Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 318 (1998).

⁵⁹ Hyatt has identified the eight main criticisms of CICs. However, this note focuses only on the first three: (1) the current concepts do not advance the idea of communities; (2) CICs are coercive, rather than voluntary; (3) CICs create a tension between the group and the individual. This Note considers these three critiques so interrelated that to distinguish between them is unnecessary. Hyatt, *supra* note 58, at 312–14.

⁶⁰ See, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n.*, 878 P.2d 1275 (Cal. 1994); *Rocek v. Markowitz*, 492 So. 2d 460 (Fla. Dist. Ct. App. 1986).

⁶¹ See Hyatt, *supra* note 58, at 341–42.

⁶² See *id.*; see, e.g., *Mulligan v. Panther Valley Prop. Owners Ass'n.*, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

owners.⁶³ Therefore, American property law has always been concerned with striking a balance between these two freedoms.⁶⁴

C. *Current Solutions and Why They Are Unsatisfactory*

Scholars have proposed different solutions to negotiate between the rights of the individual and the rights of the community. For example, some scholars argue that CICs advance pluralist values.⁶⁵ Paula A. Franzese argues that CICs have the potential to enhance political participation through the collective articulation of individual preferences.⁶⁶ Therefore, rather than subjecting CICs to enhanced judicial scrutiny, which creates animosity within the community, legislatures should develop more structural guidelines.⁶⁷ Franzese's pluralist rationale, nevertheless, does not adequately address the problem of homogenization because her solution concerns developing internal community standards rather than external ones.⁶⁸

Other scholars argue that CICs are private governments, perform government functions, or bear a sufficiently close nexus to the State⁶⁹ and therefore constitutional protections should apply to CIC regulations under the state action doctrine.⁷⁰ This solution, however, fails to adequately address the homogenization and Balkanization problem because constitutional provisions may be both under- and over-inclusive. Constitutional provisions are under-inclusive because the Supreme Court has

⁶³ Hyatt, *supra* note 58, at 313 (“At the root of this theme is society’s preoccupation with the individual’s ‘rights’ and society’s disregard for the rights of the group.”).

⁶⁴ See Alexander, *supra* note 7, at 3 (“The central problem with which much recent communitarian theory struggles is how the polity may harmonize the dual aspects-social and individual-of the self, encouraging group life without sacrificing individual identity. The polity’s harmonizing responsibility requires that it recognize the principle of group autonomy, but not in the form defined by pluralist theory.”).

⁶⁵ See, e.g., Franzese, *supra* note 17, at 592.

⁶⁶ See *id.* at 592–93.

⁶⁷ See *id.* at 593 (“Reinvention of the common interest community requires a comprehensive, nationwide rethinking of association goals and missions. Community associations must be redefined so that their central agenda is cast in terms of the very conscious resolve to rebuild withering social bonds. Careful, deliberate and sustained attention must be given to the arduous task of finding ways to guide community engagement so that in time a strong social fabric will become the principal determinant of compatible harmonious land use and behavior that is respectful of the rights of others.”).

⁶⁸ See *id.* 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. The declaration should empower associations to carefully and deliberately supplement its skeletal frame with appropriate regulations on an as-needed basis. Residents’ involvement in the augmentation process should be actively solicited and encouraged, as should their entitlement to participate in subsequent modification and amendment procedures.”).

⁶⁹ See, e.g., Kennedy, *supra* note 3, at 767–68; Chadderon, *supra* note 17, at 242.

⁷⁰ See Kennedy, *supra* note 3, at 778.

recognized only a few protected groups.⁷¹ Moreover, because equal protection requires an intentional actor, only the most egregious forms of CIC exclusion will be remedied.⁷² Constitutional provisions may be over-inclusive because certain desirable regulations may be forbidden, undermining any rational basis for CICs.⁷³

In *Dilemmas of Group Autonomy: Residential Associations and Community*, Alexander reorients this debate by discussing both communitarianism and pluralism rationales.⁷⁴ Pluralists and communitarians both recognize the legitimacy of inalienable entitlements, but disagree about which entitlements should be inalienable.⁷⁵ Pluralists usually find racially exclusionary covenants to be one area where legal intervention is justified because racially exclusionary covenants diminish rather than enhance economic efficiency.⁷⁶ Under a pluralist theory, although people would be willing to pay more to prevent racially discriminatory restrictions, the prohibitive transactional costs associated with organizing a large and dissociated group makes this transaction impossible.⁷⁷

⁷¹ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (race); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (race, color, or national origin); *Reed v. Reed*, 404 U.S. 71 (1971) (gender); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation).

⁷² See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 84 (2011) (“Discrimination law primarily conceptualizes the harm of racism through the perpetrator/victim dyad, imagining that the fundamental scene is that of a perpetrator who irrationally hates people on the basis of their race and fires or denies service to or beats or kills the victim based on that hatred. The law’s adoption of this conception of racism does several things that make it ineffective at eradicating racism and help it contribute to obscuring the actual operations of racism.”). The problem isn’t that CICs are explicitly racist, theophobic, ableist, xenophobic, transphobic, or homophobic. The problem operates on a more systemic and nebulous level. For example, although CICs cannot explicitly prohibit Hispanics from living in their gated community, specific restrictions may make it unlikely that Hispanics will live there. The goal, therefore, is to think more broadly about the causes of and solutions to exclusion without assigning blame—something currently unimaginable and arguably undesirable under an application of the Fourteenth Amendment.

⁷³ For example, we might want to allow CICs to ban firearms because the community is arguably less safe when its residents carry handguns. If the state action doctrine applied, gun ownership limitations may be deemed unconstitutional. See *MacDonald v. City of Chicago*, 130 S.Ct 3020, 3050 (2010).

⁷⁴ See Alexander, *supra* note 7, at 2–3.

⁷⁵ See *id.* at 3–4.

⁷⁶ See *id.* at 29 (“Public choice theorists define social welfare in economic (i.e., wealth-maximizing), rather than political terms, although many of these writers see the two aspects of social welfare as mutually reinforcing.”). To be sure, pluralism, and its cognate public-choice theory, are not always rationalized in such instrumental terms. Some pluralists make non-instrumental (i.e. liberty) arguments. *Id.* at 2. However, as Alexander and other scholars have noted, the economic efficiency rationale dovetails perfectly with arguments about economic liberty. *Id.* at 2. See also, Reichman, *supra* note 35, at 284 (“Thus, those who regard economic freedom as the primary goal would largely oppose government intervention and would disapprove of protecting anyone from the consequences of property transactions.”).

⁷⁷ See Reichman, *supra* note 35, at 283 (“But to argue as they do that (a) if certain transactions were allowed many people would be upset and (b) thus would be willing to pay more money to the seller for not consummating the deal than he could have otherwise ob-

The Court in *Shelley v. Kraemer* struck down these types of exclusionary entitlements.⁷⁸ Congress further added that exclusionary entitlements on the basis of religion, sex, familial status, national origin, or handicap status are also impermissible.⁷⁹ Under a communitarian theory, however, entitlements could be extended to protect currently unprotected groups because communitarians support stronger group autonomy.⁸⁰ As a result, depending on how the pluralist or communitarian scholar balances competing fundamental values or conceptualizes the fundamental normative value, they will disagree about the limitations of judicial interference when analyzing controversial CIC restrictions.

After discussing both communitarianism and pluralism, Alexander argues that the current judicial reasonableness review strikes the appropriate balance between these competing values.⁸¹ The current reasonableness standard of review, however, does not adequately protect against community encroachments because reasonableness is highly malleable and does not encompass external community values.⁸² Alexander's reasonableness standard of review, without clearer indicia of reasonableness, fails to answer the homogenization and Balkanization challenge because reasonableness provides no guidance on how CIC regulations

tained, but that (c) prohibitive transaction costs make such an outbidding procedure impossible and therefore (d) the law invalidates these types of transactions—seems not only highly artificial but without any foundation in law.” (internal citations omitted). Put another way, when someone cannot sell land to an entire race of people, the land is less alienable. Because the land is less alienable, it is less valuable because the number of potential buyers significantly decreases. Rational people would see this happening and be willing to pay the people writing this contract to prevent them from executing a deal that will make the land inalienable. However, finding this group of people and negotiating the costs is prohibitive. Thus, the transaction costs are too high to envision such a scenario, so the law steps in.

⁷⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nevertheless, it seems more plausible that the Court struck down the racially restrictive covenant here because the ruling was “essential to ensure human well-being, dignity and freedom.” Reichman, *supra* note 35, at 283.

⁷⁹ See Fair Housing Act, 42 U.S.C. §§ 3601, 3602 (2006).

⁸⁰ See Alexander, *supra* note 7, at 2–3. To be sure, a communitarian theory could be used to justify racially exclusive covenants. However, the argument is not that communitarian theory is automatically better for excluded groups, but rather that communitarian theory could be used to encourage inclusion because the theory does not advocate for strong personal autonomy, which would prohibit the community from interfering with an individual's property rights even to protect a liberty interest of the external community.

⁸¹ See *id.* at 60.

⁸² Although courts have argued that they need to encompass external community values, given the nature of judicial proceedings it is hard to argue that without a clearer standard of what the external community standards are, a court will be able to conduct a review of anything other than internal reasonableness. See, e.g., *Mulligan v. Panther Valley Prop. Owners Ass'n.*, 766 A.2d 1186 (upholding a restrictions against Tier 3 sex offenders because *the record was insufficient* to establish how this related to external standards). But see Alexander, *supra* note 7, at 6 (“Courts have tended substantively to review these rules, applying a standard of reasonableness that 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.”).

affect democratic participation. The current reasonableness standard of review, therefore, does not solve the problem.

II. A HISTORICAL ANALYSIS

A. *Why is a Historical Analysis Helpful?*

Because none of the solutions, discussed above, adequately address the Balkanization and homogenization dilemma, a historical analysis may suggest a more workable solution. A historical analysis is useful when evaluating problematic CIC restrictions for two main reasons: first, a historical analysis connects universal interests with more specialized or novel issues⁸³ and, second, current legal debates include “juridical notions and theories which have descended, and been multiplied from generation to generation.”⁸⁴

Law, as an intellectual endeavor, becomes meaningless unless the scholar can connect his or her esoteric interest, which by definition concerns very few people, with universal subjects.⁸⁵ A historical analysis illuminates universal human interests and demonstrates how seemingly esoteric interests have repeatedly been connected to the universal.⁸⁶ According to Holmes, universal interests give the legal mind a sense of purpose.⁸⁷ Here, grounding a discussion of CIC restrictions in history highlights some fundamental and universal questions: what is the relationship between the government and its citizens? How does the government create a meaningful political life? What structures best encourage citizen engagement and participation?

Historical consciousness also protects against the “false light of universality and originality” because historical study severs continuity from anomaly.⁸⁸ Thus, history not only illuminates the truly universal, but also prevents the scholar from losing sight of his or her individual

⁸³ See FRIEDRICH KARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 135 (Abraham Hayward trans., Arno Press Inc., 2d ed. 1975) (1831) (arguing that we lose sight of our individual connection with the great entirety of the world without knowledge of history).

⁸⁴ *Id.* at 131.

⁸⁵ See *id.* at 135 (“Yet we meet with people daily who hold their juridical notions and opinions to be the offspring of pure reason, for no earthly reason but because they are ignorant of their origin.”).

⁸⁶ See *id.*

⁸⁷ Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 478 (1897) (“The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”).

⁸⁸ See SAVIGNY, *supra* note 83, at 134 (“The historical spirit, too, is the only protection against a species of self-delusion, which is ever and anon reviving in particular men, as well as in whole nations and ages; namely, the holding that which is peculiar to ourselves to be common to human nature in general.”).

connection with the world.⁸⁹ Any solution to CIC restrictions that ignores history may lose sight of why anyone should care about property rights or CICs.

Second, whether consciously or not, current legal debates include “juridical notions and theories which have descended, and been multiplied from generation to generation.”⁹⁰ All legal discussions contain words, phrases, and concepts that are essential to a common language for legal scholarship.⁹¹ Moreover, it is impossible to eliminate the historical foundations from our current legal structures because judges and legislators build with these tools and operate within this framework.⁹² In other words, the scholar ignores the past at his or her own peril.⁹³

Here, both pluralist and communitarian theorists derive their rationales from long-standing debates over private property systems. The founders wanted to establish a private property system but could not agree on a singular rationale.⁹⁴ As a result, the founders’ competing visions of the “good society” clashed when they deliberated fundamental questions such as property rights and the right to vote. These concerns were present throughout this country’s history and appear in contemporary constitutional debates, judicial opinions, and legislative decisions. Thus, the modern debate not only reflects debates that occurred over two hundred years ago, it also adopts similar words, phrases, and concepts that make older debates comprehensible.⁹⁵ To meaningfully engage in this discussion, it is therefore helpful to interrogate the historical roots of private property rights.

B. *History?*

Before proceeding into a discussion of what history “reveals,” it is important to state at the outset that there is no authoritative historical narrative. Historical narratives—especially those concerning the found-

⁸⁹ See *id.*

⁹⁰ *Id.* at 131.

⁹¹ See *id.*

⁹² See *id.* at 131–32; see also Holmes, *supra* note 87, at 478 (“Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte.”).

⁹³ See SAVIGNY, *supra* note 83, at 131–33; Holmes, *supra* note 87, at 478.

⁹⁴ Compare Eric Foner, *Radical Individualism in America: Revolution to Civil War*, LITERATURE OF LIBERTY, JULY–SEPT. 1978, at 11 (“Jeffersonianism rested, therefore, on a commitment to ownership of landed property as the basis of independence.”), with Thomas Ross, *Taking Takings Seriously*, 80 Nw. U. L. REV. 1591, 1593–95 (“Individual property was justified by [Locke’s] labor theory: when one mixed one’s labor with God’s gift the resulting value could be attributed mostly to one’s labor ‘It is very clear that the founders shared Locke’s and Blackstone’s affection for private property’”) (quoting R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 26–27 (1985)).

⁹⁵ See SAVIGNY, *supra* note 83, at 131–32.

ing—are highly contested.⁹⁶ However, previous scholars, who rely on a pluralist rationale, have focused primarily on one interpretation of the history—a history where the founders were classical liberals and classical liberalism was the sole theoretical influence in the American legal and political tradition.⁹⁷ These legal scholars are misguided because the history is contestable and complicated.⁹⁸ Thus, treating classical liberalism as the only theory in the American political tradition is overly simplistic in attempting to create an authoritative history. Because there is no authoritative history, this Note seeks to point out a different historiography, one that is useful when contemplating a solution to problematic CIC restrictions.

1. Property Rights and Political Participation

The Founders inherited an intellectual tradition that connected private property rights to political participation.⁹⁹ The concept of owning property as a voting requirement was common to both the colonists and the Britons.¹⁰⁰ The British and colonial ruling classes believed that property owners “were and should remain the backbone of state and society because they were the repository of virtues not found in other classes.”¹⁰¹ The seventeenth-century ruling class also believed that the relatively poor who lacked education and standing in the community could not develop an active interest in the state’s affairs.¹⁰²

For example, Blackstone adhered to Montesquieu’s idea that all inhabitants should be permitted to vote “except such as are in so mean a situation as to be deemed to have no will of their own” and incorporated this notion into his *Commentaries on the Laws of England*.¹⁰³ Henry Ireton, a conservative spokesman during the Putney Debates, argued that persons who did not have a fixed interest in the country should not be

⁹⁶ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 219 (1980).

⁹⁷ See MARC STEARS, DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS 138 (2010) (“Literary commentators such as Lionel Trilling noted that ‘liberalism is not only the dominant but even the sole intellectual tradition’ in the United States. Historians also adopted the argument as their own: both Louis Hartz and Richard Hofstadter employed it in their efforts to explain the course of American reform Political scientists, too, submitted to it.”).

⁹⁸ See Joyce Appleby, *The Social Origins of American Revolutionary Ideology*, 64 J. AM. HIST. 935, 956 (1978).

⁹⁹ See CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760–1860, 5 (1960) (“Generally speaking, political theorists, particularly of the eighteenth century, agreed that the freeholder should comprise the bulk of the electorate of governments with a democratic element.”).

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

¹⁰² *Id.* at 6–7.

¹⁰³ *Id.* at 10.

allowed to vote.¹⁰⁴ In the colonies, one of the proprietors of West Jersey expressed a similar theory: “Those persons are fittest to be trusted with choosing and being legislators who have a fixed, valuable and permanent interest in lands.”¹⁰⁵ The intellectual tradition therefore sprang from a society that conceived a limited franchise based on property qualifications.

However, in the years leading up to the American Revolution, the American colonies underwent a period of striking economic growth,¹⁰⁶ leading to increased landholding among colonists. As a result of this pervasive eighteenth-century colonial landholding, the electorate fundamentally changed.¹⁰⁷ Property restrictions did not heavily restrict the average colonist’s ability to participate politically because a colonist could easily obtain land.¹⁰⁸ The colonial electorate therefore was proportionately larger than it was in seventeenth-century Britain.¹⁰⁹ In 1772, Benjamin Franklin proudly claimed that every New Englander was a freeholder.¹¹⁰ Although this was surely an “exaggeration pardonable in a man who was traveling abroad,” his statement contains an element of truth:¹¹¹ the size of the colonial electorate was categorically different from seventeenth-century Britain.

Moreover, the commercial transformation of the colonial economy in the eighteenth century politicized the colonial electorate by adding broad economic concerns into politics.¹¹² During the middle decades of the eighteenth century, American colonists from all walks of life became infected with “new economic ambitions.”¹¹³ Possessing strong affinities to Adam Smith’s view of economic life, the individualist definition of freedom was interjected into national politics.¹¹⁴ Madisonian politics adopted this viewpoint and argued that the public good emerged from

¹⁰⁴ See *id.* at 64 (“He that is here today, and gone tomorrow, I do not see that he hath such a permanent interest.”).

¹⁰⁵ Appleby, *supra* note 98, at 949.

¹⁰⁶ See CHUTE, *supra* note 47, at 161–62.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 162.

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 162.

¹¹² See Appleby, *supra* note 98, at 950 (“Economic issues almost always became political ones. As community after community became embroiled in factional disputes the inner spring of profit and power came under the scrutiny of the plain members of society. Awareness of the self-interested response of elite officeholders sapped the moral base of deference in the colonies, but it also suggested a commonality upon which a new political system might be built.”).

¹¹³ *Id.* at 949.

¹¹⁴ See *id.* at 949–51.

free competition and the private pursuit of gain.¹¹⁵ On the other hand, Hamilton argued against this economic notion:

There are some, who maintain, that trade will regulate itself, and is not to be benefitted by the encouragements, or restraints of government. Such persons will imagine, that there is no need of a common directing power. This is one of those wild speculative paradoxes, which have grown into credit among us, contrary to the uniform practice and sense of the most enlightened nations.¹¹⁶

These competing visions demonstrate that some colonists now believed economic issues were a part of politics.

Reflecting an enlarged electorate and new concerns over the economic order, the Pennsylvania Constitution of 1776 included “broad suffrage, a unicameral legislature, and annual elections.”¹¹⁷ Nevertheless, even its most radical members believed that property remained an important element of the franchise.¹¹⁸ Rather than do away with property qualifications, radicals proposed that the state discourage large concentrations of wealth because the accumulation of large amounts of property “is dangerous to the Rights, and destructive of the Common Happiness of Mankind.”¹¹⁹ Moreover, during the constitutional convention, the Committee of Detail suggested that “the qualifications of the electors shall be the same . . . as those of the electors in several states, of the most numerous branch of their own legislature, that is to say the lower house.”¹²⁰ When the committee suggested leaving the voting qualification up to the states, no state entirely divorced property qualifications from voting.¹²¹

Given the fundamental changes happening to the colonial electorate over the seventeenth and eighteenth century, why were property qualifications maintained? Some historians have posited that the founders wanted to limit political diversity.¹²² For example, Chute argued that a property qualification demonstrated that although most Americans could tolerate religious diversity, few Americans would have seriously suggested that political diversity was tolerable.¹²³ Others have contended that the colonists maintained property qualifications because private property developed the social, moral, and political qualities necessary to

¹¹⁵ See Foner, *supra* note 94, at 8.

¹¹⁶ Appleby, *supra* note 98, at 956.

¹¹⁷ Foner, *supra* note 94, at 9.

¹¹⁸ See *id.*

¹¹⁹ *Id.*

¹²⁰ CHUTE, *supra* note 47, at 252.

¹²¹ WILLIAMSON, *supra* note 99, at 135.

¹²² See CHUTE, *supra* note 47, at 163.

¹²³ *Id.*

democratic citizenship.¹²⁴ Nevertheless, under both historical theories, property qualification was the backbone of meaningful political participation.

Current solutions to CIC restrictions should therefore adequately address one or both of these theories because history demonstrates the universal interest at stake: the connection between property rights and meaningful political participation. Consequently, a solution that analyzes how CICs affect political participation might suggest why other solutions do not adequately address homogenization or Balkanization problems and posit a better solution.

2. The Founders' Rationale For Private Property

This Note's historical analysis also contends that the founders maintained no singular rationale for connecting private property and political participation. Although progressive historians have argued that Lockean emphasis on private property captured the revolutionary spirit of the founders,¹²⁵ new research has suggested a "more complex and atavistic intellectual tradition growing out of the right English intellectual traditions of the Dissenters, radical Whigs, Classical republicans, commonwealthmen, country party, or more simply the opposition."¹²⁶ Therefore, authoritative historiographies that argue the founders universally believed in classical liberalism when discussing private property systems can no longer dominate a historical approach to conceptualizing property systems.¹²⁷ The historical reality is more complex and reflects numerous ideologies, which ossified only after framing the constitution.¹²⁸

Republican¹²⁹ politics reflected one primary rationale for private property systems.¹³⁰ The republican commitment to self-government

¹²⁴ See Appleby, *supra* note 98, at 956 ("Encoded as it was in a gloss on English history, it could provoke only resistance, but the American Revolution developed its revolutionary character not by redeeming the rights of Englishmen, but by denying English sovereignty and the conceptual order which tied liberty to the English constitution."); Foner, *supra* note 94, at 11 ("[I]t was simply the livelihood of the farmer but his social, moral, and political qualities which made the yeoman the basis of Jeffersonian republicanism.").

¹²⁵ See Appleby, *supra* note 98, at 935.

¹²⁶ *Id.*

¹²⁷ See *id.* at 935–38.

¹²⁸ See Foner, *supra* note 94, at 13.

¹²⁹ I use republican here not to refer to the current Republican Party or its ideology, but classical republican political theory.

¹³⁰ See Foner, *supra* note 94, at 11 ("Jefferson perceived self-sufficient farming as the surest basis for republican independence and virtue. Like so many Americans of the era, Jefferson distrusted large cities with their population of wealthy nonproducers and dependent, impoverished laborers. Thus . . . as Leo Marx argues, it was simply the livelihood of the farmer but his social, moral, and political qualities which made the yeoman the basis of Jeffersonian republicanism.").

rested on a belief that the basis of independence was real property ownership.¹³¹ In other words, political liberty springs from the independence of the individual. Republicans were passionately averse to debt and credit because debt and credit enmeshed individuals in a web of dependence.¹³² They believed that self-sufficient farming was the surest basis for republican independence and virtue, which led Jefferson to argue that society had a responsibility to promote the widest diffusion of landed property.¹³³ “Where uncultivated land and poverty coexisted . . . the natural right of all men to a portion of the land had been violated.”¹³⁴ Jeffersonian republicans believed that private property developed the social, moral, and political qualities necessary for political participation.¹³⁵ In other words, only free men that could place constitutional duties above private concern could be trusted to exercise their political rights.¹³⁶

Federalism embodied another way to conceptualize politics and property. Hamilton insisted that government should give free rein to the competition of conflicting interests rather than stifle competition in the pursuit of a unitary good.¹³⁷ However, federalists did insist on an elaborate system of checks and balances that ensured protection against the tyranny of the majority. In *The Federalist, Paper Number Ten*, Madison wrote,

To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. . . . The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local, and particular to the state legislatures.¹³⁸

The federalists solved their growing concern about political diversity and factions by allowing the states to determine which of its citizens were eligible to vote.¹³⁹ As stated above, the founders had two theories at

¹³¹ *See id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Appleby, *supra* note 98, at 938.

¹³⁷ *See* THE FEDERALIST NO. 10, at 57 (Alexander Hamilton) (1961) (“It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”).

¹³⁸ THE FEDERALIST NO. 10, at 57–60 (James Madison) (1961).

¹³⁹ *See* CHUTE, *supra* note 47, at 252.

their disposal: the federalist concept of constitutional balances and the republican concept of civic virtue.¹⁴⁰

These two popular theories connecting private property and political participation now resemble the current debate between communitarianism and pluralism. The Jeffersonian commitment to creating citizens able to place constitutional interests above private ones bear resemblance to a communitarian rationale, which emphasizes that group identity is intrinsically valuable to the human experience.¹⁴¹ The federalist emphasis on creating an arena to argue over competing goods bear resemblance to a pluralist rationale that emphasizes participation through the collective articulation of individual preferences.¹⁴² Not only do modern private property debates resemble those debates which occurred over two hundred years ago, the current debate also utilizes similar words, phrases, and concepts that make the founders' debate comprehensible to the modern day observer.¹⁴³

However, despite the founders' two theories, the narrative is not so simple. Both federalists and republicans were still largely formulating how to think about property rights and the franchise within a revolutionary construct.¹⁴⁴ As a result, there were no ardent pluralists who believed that laissez-faire property rights created the best political system.¹⁴⁵ Nor were there any pure communitarians who emphasized that the collective interest should always trump the individual interest regarding property rights.¹⁴⁶ In other words, neither federalists nor republicans articulated an economic system that the Constitution should support.¹⁴⁷ A historical analysis therefore demonstrates that the founders did not attach themselves purely to either pluralist or communitarian values.

Nevertheless, this Note's historical discussion of the property rights makes no normative claim that the founders' solved our problems. However, the historical discussion is important for two reasons. First, the founders' debate highlights some issues which are still present in the CIC

¹⁴⁰ See Appleby, *supra* note 98, at 955.

¹⁴¹ See Richard Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1344–45 (1992–1993) (“[C]ommunitarians doubt if humans can flourish in atomized social environments. Communitarians value multi-stranded and enduring social relationships, something that group ownership of land can plausibly be thought to foster.”).

¹⁴² See Alexander, *supra* note 7 (“The theory of interest-group pluralism and its cognate, public-choice theory, in their normative moments seek to secure for social groups a strong form of autonomy from collective intervention.”).

¹⁴³ See SAVIGNY, *supra* note 83, at 131–32.

¹⁴⁴ See Appleby, *supra* note 98, at 955–56.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”).

debate and that we would not have otherwise noticed. Second, it demonstrates that current frustration with CIC regulations is far from novel. Thus, these historical rationales for private property systems should be incorporated into any modern solution, not because they are strictly necessary but rather because communitarian and pluralist perspectives offer helpful ways to conceptualize the problem and construct an agreeable solution.

III. CURRENT DOCTRINES AND WHAT THEY MISS

Before proceeding, a summary of the discussion thus far is in order. First, the founders evidenced a universal interest in the interaction between property rights and meaningful political participation. Thus, any solution to CIC restrictions must keep this universal interest in mind. Second, a modern debate should include both republican and federalist ideals because, whether cognizant or not of the historical foundations, the scholar entered a debate which began a long ago. Thus, by engaging with federalist pluralism and republican communitarianism, the scholar does not overlook potential solutions to problematic CIC restrictions.

A. *Judicial Enforcement as State Action*

One potential solution to the problem of CIC restrictions is to apply the state action doctrine. The Supreme Court first raised this question in *Shelly v. Kraemer*.¹⁴⁸ In that case, the African-American petitioners purchased property subject to a racially restrictive covenant.¹⁴⁹ The covenant declared that the property could not be “occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian race.”¹⁵⁰ Respondents, owners of another property in the community, brought suit in an attempt to restrain the petitioners from taking possession.¹⁵¹ The Supreme Court of Missouri held that the Fourteenth Amendment did not apply because the restrictive covenant was the product of private agreement.¹⁵²

On appeal, the Supreme Court reversed and held that the Fourteenth Amendment prohibits judicial enforcement of restrictive covenants based on race or national origin.¹⁵³ The court stated that the Fourteenth Amendment was designed to protect “the right to acquire, enjoy, own

¹⁴⁸ 334 U.S. 1 (1948).

¹⁴⁹ *Id.* at 4.

¹⁵⁰ *Id.* at 9–10.

¹⁵¹ *See id.* at 6.

¹⁵² *See id.*

¹⁵³ *See id.* at 19.

and dispose of property,”¹⁵⁴ and that petitioners were denied these rights with the “*clear and unmistakable imprimatur* of the State.”¹⁵⁵ The Court further asserted that, “it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials.”¹⁵⁶

Despite the Court’s holding, a state-action solution presents difficulties because it fails to engage both federalist pluralism and republican communitarianism. First, *Shelley v. Kraemer* only raised the question of judicial enforcement of racially restrictive covenants.¹⁵⁷ Because the Supreme Court has yet to decide another restrictive covenant case on the basis of state action, lower courts disagree on the limits of state action.¹⁵⁸ Even if the state action doctrine applied only when CICs violate equal protection rights, constitutionally protected groups are limited.¹⁵⁹ Further, the state action doctrine cannot remedy more systemic forms of segregation and exclusion because equal protection requires a discriminatory purpose.¹⁶⁰ Thus, the state action doctrine would not go far enough under a republican communitarian theory because CICs can still restrict non-protected groups, unintentionally exclude protected groups, and prohibit valuable political speech.¹⁶¹ The state action doctrine does not engage republican communitarianism because it fails to create a workable standard that distinguishes which groups and speech deserve legal protection.

Second, if all constitutional provisions applied under the state action doctrine, the restrictions could potentially go too far. For example, due process protections may void beneficial and innocuous HOA regulations,

¹⁵⁴ *Id.* at 10.

¹⁵⁵ *Id.* at 20 (emphasis added).

¹⁵⁶ *Id.* at 18.

¹⁵⁷ *See id.* at 8 (“Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.”).

¹⁵⁸ *See, e.g., Gerber v. Longboat Harbour N. Condo. Inc.*, 757 F. Supp. 1339 (M.D. Fla. 1991) (“[J]udicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the states.”); *Goldberg v. 400 E. Ohio Condo. Ass’n*, 12 F. Supp. 2d 820, 823 (N.D. Ill. 1998) (“We think the better view is that there is no state action inherent in the possible future state court enforcement of a private property agreement. Put another way, *Gerber* is not good law.” (citation omitted)).

¹⁵⁹ *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1879) (race); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (race, color, or national origin); *Reed v. Reed*, 404 U.S. 71 (1971) (gender); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual orientation).

¹⁶⁰ *See SPADE, supra* note 72.

¹⁶¹ *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding that speech regulations are valid so long as “ample alternative channels for communication” exist).

such as restrictions on architectural style.¹⁶² Applying all constitutional provisions, through a state action lens, might unduly restrict our ability to foster and preserve our differences that check majoritarian impulses.¹⁶³ Thus, the state action doctrine cannot adequately address the problems of CIC restrictions.

B. *Performing Government Functions*

Another potential solution suggests that CICs essentially perform government functions and should therefore be subjected to the same types of restrictions as local governments. The Supreme Court raised this question in *Marsh v. Alabama*.¹⁶⁴ In that case, the Gulf Shipbuilding Corporation owned the town of Chickasaw, Alabama.¹⁶⁵ A Chickasaw deputy sheriff requested that the appellant, a Jehovah's Witness, cease distributing her religious literature without a permit and to leave the company premises.¹⁶⁶ Appellant refused, and was arrested and charged under Title 14, § 426 of the 1940 Alabama Code which criminalized "enter[ing] or remain[ing] on the premises of another after having been warned not to do so."¹⁶⁷ Appellant contended that the town's prohibition violated her First and Fourteenth Amendment rights.¹⁶⁸ The court stated that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."¹⁶⁹ Therefore, the Court subjected the town to the same restrictions as local governments because the private town performed so many municipal functions that the town became indistinguishable from a local government.¹⁷⁰

¹⁶² See, e.g., *Anderson v. City of Issaquah*, 851 P.2d 744 (Wash. Ct. App. 1993) (holding that even though aesthetic designs are an appropriate component of land use governance, the building design provisions of the municipal code were unconstitutionally vague). In other words, applying the state action doctrine might disallow vagueness in situations where it might be beneficial. For example, what if the CC&R said no pink houses? This would not be considered vague. The problem with this, however, is that the state action doctrine encourages communities to create specific CC&Rs, which can only be overridden by a supermajority. Instead, if we encourage HOAs to make these decisions on an ad hoc basis, architectural styles can change with the times and be subject to an ongoing political conversation rather than permanently encouraging communities to dictate changing aesthetic choices.

¹⁶³ See *DE TOCQUEVILLE*, supra note 11, at 310 ("The second [circumstance leading to contribution to the maintenance of a democratic-republic] consists in those township institutions which limit the despotism of the majority and at the same time impart to the people a taste for freedom and the art of being free.").

¹⁶⁴ 326 U.S. 501 (1946).

¹⁶⁵ *Id.* at 502.

¹⁶⁶ *Id.* at 503.

¹⁶⁷ *Id.* at 503–04.

¹⁶⁸ *Id.* at 504.

¹⁶⁹ *Id.* at 506.

¹⁷⁰ See *id.* at 507–09.

Nonetheless, a solution based on *Marsh v. Alabama* inadequately addresses the problem associated with CIC restriction for two reasons. First, similar to a state action doctrine solution, constitutional provisions are both under- and over-inclusive. Second, not all CICs resemble municipalities to the same degree as the town in *Marsh v. Alabama*.¹⁷¹ Even if the doctrine expands to encompass CICs performing some government functions, it fails to regulate many smaller CICs. Thus, a “performing government functions”¹⁷² solution cannot adequately address homogenization and Balkanization problems.

C. *Jackson v. Metro. Edison Co.: The “Sufficiently Close Nexus” Test*

Another potential solution to CIC restrictions suggest that CICs bear a “sufficiently close nexus” to the state and should therefore be subject to the same types of limitations as local governments. In *Jackson v. Metro. Edison Co.*, a privately held utility company terminated the plaintiff’s electricity service.¹⁷³ The plaintiff claimed that the utility company violated her procedural due process rights when it failed to provide adequate notice or any hearing with regard to the termination of her electricity.¹⁷⁴ The plaintiff argued that because the electrical company terminated her electricity for “alleged nonpayment, [an] action allowed by a provision of its general tariff filed with the Commission” that the company’s action constituted a state action.¹⁷⁵ The Court rejected her argument and held that due process rights only apply when “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”¹⁷⁶

A “sufficiently close nexus” solution would be even less workable than the previous two solutions. First, similar to a solution under the state action doctrine, constitutional provisions are both under- and over-inclusive. Second, and more importantly, very few CICs actually bear a “sufficiently close nexus to the state.”¹⁷⁷ Undoubtedly, the state is involved in the creation of CICs;¹⁷⁸ however, none of these actions bears any greater nexus to the state than the private utility company in *Jackson*.

¹⁷¹ See *id.* at 502 (“The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a “business block” on which business places are situated.”).

¹⁷² See Chadderdon, *supra* note 17, at 255.

¹⁷³ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 347 (1974).

¹⁷⁴ See *id.* at 348.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 350–51.

¹⁷⁷ See *id.*

¹⁷⁸ State law controls CIC creation and the types of activities CICs are allowed to create.

In fact, a state-controlled monopoly is arguably subject to more state control than are CICs.¹⁷⁹ Thus, a “sufficiently close nexus” solution cannot adequately address problematic CIC restrictions because too few CICs will bear a sufficiently close nexus to the state.

D. Reasonableness Standard of Review

Gregory Alexander supports a reasonableness standard of review. And, outside of the narrow confines of protected classes, courts have tended to review CIC restrictions under a reasonableness standard of review.¹⁸⁰ For example, the Supreme Court of California upheld pet restrictions contained in the CC&R of a condominium complex.¹⁸¹ Although the court believed that the restrictions were unreasonable when specifically applied to the homeowner, the general restrictions on cat and dog ownership were generally reasonable.¹⁸² In New Jersey, the superior court adopted the reasonableness standard of review when passing on the validity of a CIC restriction preventing tier three sex offenders from living in the community.¹⁸³ In Florida, a court upheld as reasonable a CC&R that restricted occupancy to persons over sixteen years of age.¹⁸⁴

Alexander cogently argues that ‘standards’ for evaluating these restrictions are preferable to ‘rules’ because “standards set out the message that the question is never closed.”¹⁸⁵ Nevertheless, the current reasonableness standard of review is insufficient for two reasons. First, as the dissent in *Nahrstedt* makes clear, the concept of reasonableness is subject to substantial disagreement.¹⁸⁶ Although a restriction might be reasonable under a pluralist rationale, other communitarian values might be lost. Therefore, before settling on a reasonableness standard of review, this “reasonableness” must encompass specific values.

Second, unless reasonableness implies an external community standard, courts will uphold most rules as reasonable for the purpose of the internal community, depriving dissenters within and without the group of

¹⁷⁹ See Chadderdon, *supra* note 17, at 255.

¹⁸⁰ See Alexander, *supra* note 7, at 6.

¹⁸¹ See *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1292 (Cal. 1994).

¹⁸² *Id.*

¹⁸³ See *Mulligan v. Panther Valley Prop. Owners Ass’n*, 766 A.2d 1186, 1190 (N.J. Super. Ct. App. Div. 2001).

¹⁸⁴ See *Rocek v. Markowitz*, 492 So. 2d 460, 461 (Fla. Dist. Ct. App. 1986).

¹⁸⁵ See Alexander, *supra* note 7, at 56.

¹⁸⁶ See *Nahrstedt*, 878 P.2d at 1292–1293 (Arabian, J., dissenting) (“Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals. Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract.”).

the laudable opportunity to “continuously attack its boundaries.”¹⁸⁷ Although Alexander argues that reasonableness should and does encompass external values, recent decisions suggest otherwise.¹⁸⁸ Because courts can examine only the factual record between the litigants, courts have difficulty analyzing how regulations affect the external community.¹⁸⁹ Specific fundamental values must therefore be included in the reasonableness standard of review to help guide judicial decisions. The current reasonableness standard of review fails to tackle the problem that individuals within CICs will lack the “capacity to develop sympathy for others and thereby contradict the communitarian ideal itself.”¹⁹⁰

IV. A NEW SOLUTION

A. *Locating a Right to Heterogeneous Communities*

Because the current proposed solutions to CIC restrictions do not address the consequences of political participation or the role of federalist pluralism and republican communitarianism, this Note uses its historical analysis to suggest what value is missing from current solutions: meaningful political participation.

The right to vote is an essential element of democracy. A broad franchise yields a political system that allows ultimate power be distributed among many.¹⁹¹ However, a broad franchise is a necessary but not a sufficient condition for a well-functioning political system. Other elements must be in place, “including (but not limited to) freedom to organize politically, institutions that facilitate political choice, a politically aware voting population, and above all, citizens who vote.”¹⁹² This is exactly the balance both federalist pluralists and Jeffersonian communitarians sought to achieve by limiting the franchise to citizens of property. Thus, the founders were concerned with more than just the ability to participate in the political process; the founders intended that political participation be meaningful.¹⁹³

Because restricting the franchise to property owners can no longer be justified, history helps provide a framework for incorporating this fundamental goal of meaningful political participation. The founders rea-

¹⁸⁷ See Alexander, *supra* note 7, at 58.

¹⁸⁸ See, e.g., *Mulligan*, 766 A.2d at 1192. (“We do not know from the record how many common interest communities exist within the State and we do not know from the record how many of those communities have seen fit to adopt comparable restrictions and whether they have determined to include a broader group than Tier 3 registrants.”).

¹⁸⁹ *Id.*

¹⁹⁰ Alexander, *supra* note 7, at 52.

¹⁹¹ DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 1 (2004).

¹⁹² *Id.*

¹⁹³ See Appleby, *supra* note 98, at 956.

soned that our federalist system should encourage experimentation and self-government.¹⁹⁴ In *The Federalist Number 10*, Madison argued that federalism makes it “less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength.”¹⁹⁵ The concept of laboratories of democracy derives from Justice Brandeis’ dissenting opinion in *New Ice Co. v. Liebmann*.¹⁹⁶ He argued, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁹⁷ In other words, because the best solution is not always clear, a federalist system allows local governments to explore various solutions so that the most practical outcome prevails.¹⁹⁸

The Court has recognized the federalist concept of “laboratories of democracy” as a fundamental right enshrined in the Tenth Amendment.¹⁹⁹ In *United States v. Lopez*, the Court stated:

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as *laboratories for experimentation* to devise various solutions where the best solution is far from clear.²⁰⁰

The Court has also asserted that laboratories of democracy enable greater political participation because federalism involves decision making at the local level.²⁰¹ Therefore, one particular value that should be kept in mind when evaluating CIC restrictions is the federalist concept of laboratories of democracy.

However, to take the laboratories of democracy rationale seriously, the vision of our communities must also be taken seriously. In addition to recognizing a need for laboratories of democracy, we must also ensure that our communities are exposed to diverse viewpoints. Homogenous communities are prone to the psychological phenomenon of groupthink,

¹⁹⁴ See Madison, *supra* note 138.

¹⁹⁵ *Id.* at 60.

¹⁹⁶ 285 U.S. 262, 311 (1932).

¹⁹⁷ *Id.*

¹⁹⁸ See *United States v. Lopez*, 514 U.S. 549, 581 (1995).

¹⁹⁹ U.S. CONST. amend. X, § 1. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see *Lopez*, 514 U.S. at 581.

²⁰⁰ *Lopez*, 514 U.S. at 581.

²⁰¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1972).

which undermines the rationale for experimentation.²⁰² Without the moderating effects of exposure to different value systems, members of the community radically restrict their ability for moderation because alternate viewpoints, outside of those accepted as tolerable, are not addressed. Thus, for political participation under a federalist system to be meaningful, we need communities roughly as diverse as our political body because citizens must be able to engage in a national rather than local dialogue.²⁰³ Members of each community should be encouraged to confront the larger community's disparate beliefs and value systems because the federalist experiment was designed for adaptation and adoption.²⁰⁴ Considering how CIC restrictions affect diversity within the community prevents unproductive experimentation.

As a result, this Note suggests that the federalist emphasis on laboratories of democracy should be combined with the republican emphasis on civic virtue to ensure that the vision of our communities is taken seriously. The republican commitment to self-government rested on a belief that real property ownership was the basis of independence.²⁰⁵ Under the republican theory, political participation required members of the political body to be possessed with civic virtue—the ability to place constitutional duties above private concerns.²⁰⁶ Although the means to achieve the virtues of citizenship have changed over the last two hundred years, the goal that members of our society possess the ability to place constitutional duties above private concerns remains the same.²⁰⁷

Diversity provides a novel means to achieve this fundamental goal. It has been recognized as a compelling government interest in constitutional jurisprudence.²⁰⁸ For largely the same reasons that diversity is

²⁰² See Sunstein, *supra* note 48, at 113–14. Although not exposed to modern day psychology theory, Alexander Hamilton noted the beneficial effects of tempering extremes through exposure to different ideas in the Federalist Papers. See THE FEDERALIST NO. 70, at 458 (Alexander Hamilton) (1961) (“The differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection, and serve to check the excesses in the majority.”).

²⁰³ See Alexander, *supra* note 7, at 52–54.

²⁰⁴ *Id.* at 54–55. (“As the basic framework for communities, pluralism implies that a multiplicity of diverse communities must be allowed to exist so that the good remains subject to reformulation through continual public conversations among the groups.”); G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS 37, 38 (2001).

²⁰⁵ See Foner, *supra* note 94, at 11.

²⁰⁶ See Appleby, *supra* note 98, at 938.

²⁰⁷ See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg trans., 1992). Habermas has argued the democracy requires the assent (*Zustimmung*) of all citizens involved in a discursive process. Democratic legitimacy therefore rests on the ability of citizens to debate the common good and acknowledge each citizen's status as an equal.

²⁰⁸ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) (“In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body

crucial to the university's mission to serve the common good, heterogeneous residential communities are essential to democracy. Diverse communities make the best laboratories of democracy because diversity promotes the civic virtues of classical republicanism. As Ben Franklin suggested, "when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views."²⁰⁹ Although appeals to personal interest should not be wholly avoided, democracy requires that members deliberate and offer rationales that appeal to the common good.²¹⁰ Heterogeneous communities help approximate this deliberative ideal by avoiding the concentration of prejudices within our laboratories.

Similar to genetic diversity, diversity within our communities serves as a way for those communities to adapt to changing environments. Diversity makes it more likely that some communities will possess attributes that are suited for the rapid transformation of our political and social culture. Recognizing the need for heterogeneous laboratories of democracy would ensure meaningful political participation and limit restrictions, which exclude some members of our society from participating in internal group life.

B. Incorporating the Right to Heterogeneous Communities Into the Current Reasonableness Standard of Review

The debate on what constitutes a reasonable CIC restriction will be more profitable if the fundamental right to heterogeneous communities is incorporated into the current reasonableness standard of review. Judicial reasonableness review will achieve balance because it will deny communal autonomy strong enough to be unnecessarily exclusive, but also allow each community to develop some of its own standards.²¹¹ In other

diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle[sic]mission to provide national security.'" (citations omitted).

²⁰⁹ CHUTE, *supra* note 47, at 255.

²¹⁰ See EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 26 (1997) ("In exhibiting reciprocity, I begin by putting before you what I take to be fair. But I must also be ready to seriously discuss the opposing proposals that you take in the hope of moving, through the discipline of dialogue, toward a common perspective that each of us could adhere to in good conscience. Your viewpoint is as good as mine to the fulfillment of that hope, and only through emphatic identification with your viewpoint can I appreciate what reason might commend in what you say.").

²¹¹ See Alexander, *supra* note 7, at 60.

words, the community will be able to join the conversation with the court to consider each question of diversity anew.²¹² Moreover, because reasonableness is an open-ended question, there is no bright-line requirement for how diverse a community should be. Courts can also consider new types of diversity—diversity outside of constitutionally protected groups. Therefore, incorporating the value of heterogeneous laboratories of democracy “progressively reiterates and reinforces the ideal of community.”²¹³

Incorporating a right to heterogeneous laboratories of democracy into a reasonableness standard of review eliminates another problem: if courts required every community to be a microcosm of our nation, experimentation would be less likely and less fruitful. However, because diversity would only be one factor considered when reviewing whether or not CIC restrictions are reasonable, courts would not require perfect diversity—only that our communities are reasonably heterogeneous. Including this fundamental right in a reasonableness standard of review achieves a balance not currently available under any scholarly solution to CIC regulations. Recognizing a right to heterogeneous communities provides the much-needed guidance for courts to analyze how CIC restrictions affect our sense of community.

CONCLUSION

In the Gettysburg Address, Abraham Lincoln best articulated the core values of the American experiment: “that government of the people, by the people, for the people, shall not perish from the earth.”²¹⁴ A gated suburbia jeopardizes the cause to which the “honored dead . . . gave their last full measure of devotion.”²¹⁵ A government “of the people” includes all its members. A government “by the people” requires that its members be afforded equal opportunity to participate in the decision-making process. Homogenous communities shelter their members from the outside world and blind them to the common good. A government “for the people” cannot stand unless its members deliberate about the common good and arrive at decisions acceptable to all. By appealing to a historical discussion of property rights and political participation, this

²¹² *See id.*

²¹³ *See id.*

²¹⁴ The full quote reads: “It is rather for us to be here dedicated to the great task remaining before us, that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion; that we here highly resolve that these dead shall not have died in vain; that the nation shall, under God, have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.” President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in LOIS J. EINHORN, ABRAHAM LINCOLN THE ORATOR: PENETRATING THE LINCOLN LEGEND 177, 177 (1992).

²¹⁵ *Id.*

Note seeks to avoid the recent disintegration of the American social fabric attributable to CIC exclusionary practices.

A solution to the current skyboxification of American life lies in realizing that the founders devised a system to protect self-rule rather than property rights. The founders designed laboratories of democracy to encourage meaningful political participation. However, laboratories of democracy alone cannot solve the problem because federalist pluralism provides no guidance for the laboratory's composition. To provide more guidance, a republican emphasis on civic virtue was added to recognize a right to heterogeneous communities. The best solution to problematic CIC restrictions recognizes a right to diversity under a reasonableness standard of review. Although this solution alone cannot protect against the disintegration of the American social fabric, preventing CICs from legally and permanently altering the formation of community life in calamitous ways helps to ensure that our "government of the people, by the people, for the people, shall not perish from the earth."²¹⁶

²¹⁶ *Id.*

