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Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights

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SIGNS OF THE TIMES: HOW THE RECENT TEXAS LEGISLATION REGARDING HOMEOWNERS' ASSOCIATIONS DEPRIVES HOMEOWNERS OF THEIR FUNDAMENTAL FREE SPEECH RIGHTS

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I. INTRODUCTION

Homeowners in Texas may be surprised to learn that recent changes in the Texas Property Code[1] may have effectively deprived them of rights that many citizens would have considered unalienable.

As many Texas cities struggle to keep up with the costs associated with suburban sprawl, these cities are finding it difficult to provide new neighborhoods with essential services such as water, sewer, and trash removal. To help their bottom line, many Texas cities have transferred these responsibilities to homeowners' associations (HOAs). However, in doing so cities have inadvertently created vast patchworks of privately owned neighborhoods where many constitutional rights have been contracted away.[2] These de-constitutionalized zones are growing, and the law governing such quasi-municipalities is unclear.[3]

In 2001, the Texas Legislature intended to curb and regulate the power of HOAs by enacting the Texas Residential Property Owners Protection Act (TRPOPA).[4] However, the portion of this legislation that deals specifically with an HOA's right to ban political signs is problematic, and possibly in violation of the Texas Constitution. Although the legislature intended for section 202.009 of the Texas Property Code to clarify the TRPOPA statutes[5], and thereby decrease the number of lawsuits brought against HOAs, the legislation may have the opposite effect.

A. *A Homeowners' Hypothetical*

To illustrate the problem, let us start with a hypothetical case. We have two homeowners: Fred and Barney. Fred and Barney are longtime friends and lifelong Texas residents. The two friends recently bought houses located across the street from each other in Bedrock Park, a large subdivision in north Dallas. The Bedrock Park Homeowners' Association, referred to by most citizens simply as "Bedrock Park," controls and runs the Bedrock Park neighborhood.

On New Year's Eve 2007, the two friends, while at a holiday party with their families, were overtaken with a feeling of camaraderie and community spirit.

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1. TEX. PROP. CODE ANN. § 202.009 (Vernon 2007).

2. *See* James C. Harrington, *Homeowners Associations: Creating Deconstitutionalized Zones*, TEX. LAW., Oct. 18, 2004, at 34, *available at* 10/18/2004 TEX. LAW. 34 (Westlaw).

3. *See id.*

4. Matthew Taylor Morones & William G. Gammon, *Community Owners Associations, Their Dubious Power to Foreclose, and the Recent Legislation Curtailing That Power*, 66 TEX. B.J. 218, 218 (2003); TEX. PROP. CODE ANN. § 202.009.

5. *See* Morones & Gammon, *supra* note 4, at 222.

"Barney, my friend, I am feeling especially thankful this year and I want to make a pact with you to carry out some New Year's resolutions," Fred said while watching their children play together.

"I want to make a difference in the world in the upcoming year," Fred said. "You know I have always wanted to be more politically active, and this year I am going to put my money where my mouth is."

"I hear ya, Fred. I am feeling the same way," Barney replied. "You know how I am always talking about how I should do more recycling and stuff. Well, this year I really want to 'go green.' I really want to be more environmentally friendly. Maybe I can start composting this year."

"Barney, I hear what you're saying. Now that you and I have settled into our new neighborhood, let's hold each other accountable and do some good this year."

Barney agreed wholeheartedly with his friend, and the two made a pact to carry through with their New Year's resolutions.

Fred had been politically active in college, but after getting married and having a daughter, he rarely participated in a good political debate. Fred resolved to be more politically active, and in order to solidify that sentiment, Fred thought it was time he got back into the political dialogue. So, he went down to the local copy store and worked with a graphic designer to come up with a professional-looking yard sign. Fred knew there were some restrictive covenants regarding signs in his homeowners' association agreement—although he couldn't remember all the details—but he did remember that yard signs couldn't have flashing lights or balloons, and that they needed to be mounted to the ground. With this in mind, the store designed for Fred a simple red, white, and blue sign with a message that read: "End the War in Iraq." Fred put one sign up in his front yard and kept the remaining five in his garage, with hopes that maybe some of his new neighbors would also like to display a sign in their yard.

While Fred was at the copy store, Barney made good on his initial promise and built a small wooden structure to hold the compost. When finished, Fred and Barney beamed with pride over their new projects. To celebrate the completion of their goals, the two men hosted a neighborhood barbecue. To Fred's surprise, his yard sign was a big hit. Neighbors, including those he had only waved to before, came up to him at the party to ask him about his political views and to talk about world events. Fred felt good that night. He felt like he had really connected with some of his neighbors; and he was surprised at what a great means of communication one small sign could be.

Unfortunately, the good feeling came to an abrupt end. That next morning, Fred and Barney received letters from the Bedrock Park Homeowners' Association. Each man received a letter stating he was violating the HOA's covenants. In Barney's letter, the HOA reminded him that the association had a covenant banning composting.

As for Fred, the HOA informed him that his sign was in violation of the HOA's covenant that banned all yard signs. The letter stated that Fred would need to take the sign down immediately, or face a heavy fine.

Fred and Barney were disappointed and angry. The two of them went to visit their friend Gizmo, a local lawyer at the "Gizmo and Associates" law firm. Gizmo took a good, long look at the letters before making a pronouncement.

"I have some good news, and some bad news, gentlemen. Although both of you have violated covenants found in your HOA agreement, one of you is expressly protected by Texas law."

Fred looked at Barney and said, "Sorry ol' pal. We both knew that Texas just wasn't ready to start composting."

"Not so fast, Fred," said Gizmo. "I am afraid Barney's activity is explicitly protected in Texas, but your sign will need to come down."

"What are you talking about?" Fred retorted. "Don't I have some First Amendment rights here? What about my freedom of expression? I am going to sue! I am going to sue the HOA, because this is . . . unconstitutional!"

At that point, Gizmo explained to Fred that the federal Constitution only protects citizens from interference by a *state actor.* Gizmo informed Fred that the Bedrock Park HOA was a *private* entity, not a municipality.

"Are you telling me that the city of Dallas couldn't send me a letter like this, but Bedrock Park can? What's the difference? Besides, I thought Bedrock Park *was* a city!" Fred said.

Fred then explained to Gizmo that everyone Fred knew assumed that Bedrock Park was its own independent city—and they had good reason for this assumption. Fred explained that when there was a pothole in front of his driveway, he initially called the city of Dallas to have them fix it, but the city directed him to call Bedrock Park. Moreover, when the Bedrock Park HOA fixed the pothole, it sent out *its own* maintenance vehicle to do the job. Furthermore, when Barney noticed a problem with some equipment at the playground, he also called the city of Dallas, but the city said the playground was the responsibility of Bedrock Park.

Fred and Barney told Gizmo that Bedrock Park was in charge of the neighborhood's snow removal; Bedrock Park mowed the medians; and Bedrock Park did the garbage collection. Furthermore, Bedrock Park even had its own security force which drove vehicles that looked nearly identical to those driven by the Dallas police force.

"How can Bedrock Park not be a city?" cried Fred. "And, hasn't anyone noticed that our neighbors who live outside of the HOA, well, they have like three signs each in their yards. How can that be right?"

Gizmo promised his friends he would look into the matter. With that, Fred and Barney thanked Gizmo for his time and drove back home.

This article examines the growth and function of community associations; the problems these organizations present when dealing with free speech issues; and the various legal theories under which Fred could possibly prevail in his suit against the Bedrock Park HOA.

B. *Thesis*

Because cities like Dallas have enacted ordinances that make HOAs a mandatory part of subdivision development,[6] the line between private and state action has been blurred. If a Texas court were to hold that HOAs are state actors, then it would be unconstitutional for these organizations to enforce a complete ban on political signs. Alternatively, even if a Texas court were to conclude that HOAs are *not* state actors, an HOA that enacts a total ban on political signs would possibly still be in violation of the Texas state constitution, even if such a ban does not invoke the federal constitution. Regardless of the decision regarding state action, it is time that lawmakers examine the municipal ordinances that *require* the creation of HOAs in new subdivisions. These practices deprive citizens of constitutional rights and constitutional remedies.

In order for a Texas homeowner to find legal relief from an HOA restriction on political signs, one of three things would need to happen:

- The HOA would need to be declared a state actor; OR
- A court would need to hold that this type of restrictive covenant was in violation of the Texas Constitution's free speech clause, independent of any decision regarding a state action; OR
- A Texas court would need to strike down the HOA's restrictive covenant on grounds that it violated public policy.

Part II of this article explores the background history of HOAs and the legal issues surrounding these types of organizations. Part III explains the connection between free speech and state action by analyzing Supreme Court decisions on the subject. Part IV outlines the differences between federal and Texas laws on these issues, while Part V examines how other states have ruled on HOAs. Finally, Part VI describes the public policy argument, and Part VII offers some potential solutions.

6. DALLAS, TEX., DEVELOPMENT CODE, ORDINANCE 22477 ch. 51, § 2(j) (1995).

II. BACKGROUND

A. *The Growth and Function of Community Associations*

Nearly one in six Americans lives in a community association.[7] These organizations have seen rapid growth since their inception in the 1960s.[8] In 1970, there were approximately 10,000 of these organizations in the United States.[9] By 2008, this number had grown to an estimated 300,800 community associations, with approximately 59.5 million Americans living within some type of community association.[10] Additionally, in the southwest and west, some municipalities have required that new residential developments be governed by an HOA.[11]

These types of organizations are often referred to as "community owners associations," or "common interest developments."[12] Typically, they are non-profit organizations made up of property owners from the subdivision.[13] A board of directors, elected by the members, usually oversees the organization.[14] The developer of the subdivision often establishes this type of organization, prior to final plat approval, in order to manage the common property of the subdivision and to protect the developer's interests.[15] At the heart of such organizations are the restrictive covenants that property owners must follow.[16] These restrictive covenants are private agreements, and as such, they "operate entirely outside of federal constitutional restrictions."[17]

As cities struggle to finance essential services such as water, sewers, and roads to fast-growing suburbs, many cities have entered into questionable "bargaining" agreements with HOAs.[18] Many municipalities now require the subdivision developer to establish a community association so that the association will be in charge of providing the municipal services to these new neighborhoods.[19] These agreements,

7. Community Associations Institute (CAI): Industry Data, http://www.caionline.org/about/facts.cfm (last visited Jan. 24, 2008) (stating that in 2008, nearly 60 million Americans lived in community associations).

8. *Id.*

9. *Id.*

10. *Id.*

11. Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 236 (2006).

12. *Id.* at 233; Morones & Gammon, *supra* note 4, at 220.

13. Morones & Gammon, *supra* note 4, at 220.

14. *Id.*

15. *Id.*

16. Chadderdon, *supra* note 11, at 234.

17. *Id.*

18. *See* Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 872–73 (2006).

19. *Id.* at 872.

although not prohibited by law, have created vast stretches of neighborhoods that are effectively controlled, not by the state, but by a "private government."[20]

As these associations have grown in size and power, and as more cities have mandated their formation, homebuyers may find that they have little choice but to purchase a home in an HOA-controlled community.[21] Additionally, homeowners may be surprised to learn that certain constitutional rights, such as freedom of expression, are not protected once they sign the HOA covenant agreement.[22]

1. Regulating HOAs in Texas

In 2001, the Texas legislature sought to regulate the actions of HOAs.[23] Prior to this legislation, Texas HOAs had broad power over homeowners, including the power to foreclose on homeowners for a failure to pay the fees stemming from the violation of community rules. For example, in 1997, HOAs filed more than 1,050 foreclosure suits in Harris County alone.[24]

Legislation to regulate HOAs came about primarily in response to a public outcry over these foreclosures.[25] Media coverage surrounding the plight of a Houston widow, Wenonah Blevins, increased the public's interest in HOA legislation.[26] The 84 year-old Blevins had fallen behind in her HOA dues by $876.[27] When Blevins was unable to pay the debt, and the additional $2,941.50 in HOA attorney fees, the HOA evicted Blevins from her home, and then sold the $150,000 home for $5000.[28] In 2001 the Texas legislature, in response to media coverage of Blevin's story, passed a measure to curb the power of HOAs.[29] The legislation was known as the Texas Residential Property Owners Protection Act (TRPOPA).[30]

TRPOPA created a detailed statutory scheme to regulate HOAs.[31] The legislation addressed hot-button issues including: procedural stan-

20. *See id.* at 866–67.
21. *See id.* at 866–69.
22. The issue of community associations and constitutional rights has been the subject of various scholarly writings. *See, e.g.*, Chadderdon, *supra* note 11; EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994); Karen Ellert Pena, Comment, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323 (2002); Siegel, *supra* note 18.
23. Morones & Gammon, *supra* note 4, at 218–20.
24. *Id.* at 221.
25. *Id.* at 218–22.
26. *Id.* at 218.
27. Ross Guberman, *Home is Where the Heart Is*, LEGAL AFF., Nov.–Dec. 2004, at 42, 44, *available at* 2004-Dec LegalAff 42 (Westlaw).
28. *Id.*
29. Morones & Gammon, *supra* note 4, at 218.
30. *Id.*
31. *Id* at 222.

dards for HOAs, public record filings, public disclosures, and regulation of foreclosure actions.[32] In 2003, the Texas legislature passed additional TRPOPA legislation that barred community associations from prohibiting water conservation, composting, or drip irrigation.[33] In 2005, the legislature again added to the TRPOPA legislation by creating a provision granting homeowners the right to display signs advertising a candidate or a ballot issue during an election.[34]

2. HOAs, Political Signs, and the 100-Day Election Window

In June 2005, the legislation regarding HOAs and political signs became effective.[35] Under Texas Property Code § 202.009, HOAs are prohibited from enforcing a *total ban* on political signs during an election season.[36] Under the statute, political signs are signs advertising a candidate or an issue that appears on an election ballot.[37] The statute provides that HOAs must allow "one or more" of these signs to be displayed for ninety days prior to the related election, and then for ten days after that election.[38] Unfortunately, under a plain reading of the statute, outside of that 100-day election window, the HOA can enforce a total ban on signs for candidates or ballot issues. Furthermore, because the statute defines "political signs" so narrowly, it appears that an HOA can enact a *total ban* on all signs with a *general* political message, like Fred's "End the War in Iraq" sign.

3. A Dallas City Ordinance Mandates the Creation of HOAs

In addition to the murky legal issues surrounding HOAs and free speech, some Texas cities have compounded this problem by mandating the creation of HOAs for new subdivisions. Take for example, the building codes for the city of Dallas. In Dallas, the law regulating planned unit developments (PUDs) contains the following language:

> Prior to final plat approval, the owner(s) of the Property must execute an instrument creating a homeowners association for the maintenance of common areas, screening walls, landscape areas, private streets and other functions. (Ord. Nos. 224777)[39]

Because Dallas has *required* the formation of these organizations, the line between state and private action has been muddled.

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32. Stephen Cochran, *Texas Practice: Consumer Rights and Remedies* § 7.16 (3d ed. & Supp. 2007).

33. TEX. PROP. CODE ANN. § 202.007 (Vernon 2007).

34. *Id.* § 202.009.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. DALLAS, TEX., DEVELOPMENT CODE, ORDINANCE 22477 ch. 51, § 2(j) (1995).

B. *Are HOAs State Actors?*

The threshold issue in the analysis of whether it is unconstitutional for an HOA to ban political signs depends on whether any state action is involved.[40] This question has been widely debated,[41] but for purposes of this article, I will focus on the status of HOAs in Texas. As of this writing, no court in Texas has ruled on the question as to whether an HOA is a state actor. Because it is only a matter of time before the state must weigh in on this issue, it is important to examine what the U.S. Supreme Court and other states have decided regarding this matter. To understand the issues involved, it is first necessary to give a brief survey of the five U.S. Supreme Court decisions that would most likely be implicated if, and when, a case involving an HOA restriction on free speech comes before a Texas court.

III. SUPREME COURT DECISIONS

A. *The* Ladue *Decision and Free Speech Protection*

The U.S. Supreme Court has been adverse to municipal ordinances that completely ban a homeowner's right to display political signs on their property. In 1994, in *Ladue v. Gilleo*, the Court struck down a municipality's anti-sign ordinance.[42] In that case, the plaintiff, Margaret Gilleo, wanted to protest against the first Gulf War by placing signs in her home's windows.[43] The city of Ladue prohibited these types of signs.

The Supreme Court stated that although cities could impose "reasonable time, place and manner restrictions," cities could not place a *total ban* on political signs.[44] The Court held that "governments may regulate the physical characteristics of signs."[45] However, the Court ruled that the city of Ladue went too far in this regulation by calling for a complete ban on political signs.[46] According to the Court, the city ordinance:

> [had] almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community.[47]

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40. Chadderdon, *supra* note 11, at 240.
41. Chadderdon, *supra* note 11, at 242; 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, 471–72 (1998).
42. City of Ladue v. Gilleo, 512 U.S. 43 (1994).
43. *Id.* at 45.
44. *See id.* at 56.
45. *Id.* at 48.
46. *See id.* at 58.
47. *Id.* at 54.

The City argued that their ordinance was constitutional because it sought merely to regulate the "time, place or manner" of speech, and the ordinance left open the possibility of homeowners using hand-held signs, handbills, bumper stickers, and other forms of communication.[48] The Supreme Court rejected this argument, stating that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same test or picture by other means."[49]

The Court went on to state that allowing residential signs has a special place in this country's concept of fundamental rights.[50] The Court noted that "[a] special respect for individual liberty in the home has long been part of our culture and our law."[51] The Court declared:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . A person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[52]

Consequently, under the holding of *Ladue*, it is clear that *a city* would be prohibited from following the provisions of Texas Property Code, section 202.009. The statute prescribes that HOAs must allow homeowners to post signs for *candidates* and *ballot issues* during a 100-day window surrounding an election. However, because the statute defines "political signs" as signs that relate specifically to a candidate or ballot issue, a sign, like the sign in *Ladue*, that expressed an opinion about foreign policy could be prohibited at any time.

Ladue clarified the law regarding free speech and state actors. Under *Ladue*, a state actor can make some "reasonable time, place and manner restrictions," but a state actor cannot completely ban a homeowner's right to free expression on their property. The question then becomes: "Is an HOA a state actor?".

B. *Federal State Actor Tests: Four Case Studies*

The Supreme Court has advanced a number of different tests to determine when a private entity, like an HOA, becomes a state actor. The four tests include: (1) *Shelley v. Kraemer,* and the "judicial enforcement" theory of state action; (2) *Marsh v. Alabama,* and the "company town" approach; (3) *Jackson v. Metropolitan Edison,* and the "sufficiently close nexus" test; and (4) *Brentwood Academy v. Ten-*

48. *Id.* at 56.
49. *Id.*
50. *Id.* at 58.
51. *Id.*
52. *Id.* at 57.

nessee Secondary School Athletic Association, and the "entwinement" theory of state action.[53]

It seems likely that before a Texas court would hear a case involving free speech and an HOA, a few factors would hypothetically need to be in place. First, the facts would need to be such that, arguably, the plaintiff had little choice but to live in and accept the terms of an HOA.[54] Second, the HOA would need to be attempting to enforce a restrictive covenant that bans all political signs.[55] If these facts were present, a Texas court would most likely begin their analysis with the question of whether the HOA is a state actor, and therefore under the authority of the U.S. Constitution.

1. *Shelley v. Kraemer*: The "Judicial Enforcement" Theory of State Action

The U.S. Supreme Court determined that judicial enforcement of a racially discriminatory covenant in a private contract qualified as state action.[56] In *Shelley*, an African-American purchased property in Missouri.[57] The property had attached to it a restrictive covenant limiting ownership to Caucasians.[58] The purchased property and nearly fifty neighboring properties were bound by this covenant.[59] After the sale to an African-American, one of the other owners within that group brought action seeking to have the racially restrictive covenant enforced.[60] The Supreme Court of Missouri decided that a racially restrictive covenant *could* be enforced.[61] The U.S. Supreme Court disagreed.[62] The Supreme Court reversed the decision stating that such a covenant violated the Equal Protection Clause.[63] The Court held that when the state of Missouri attempted to enforce the covenant, this amounted to *state action*, and therefore the private agreement was subject to constitutional review.[64]

The *Shelley* decision was, and remains, controversial. On the surface, the holding seems to stand for the idea that private agreements are subject to constitutional constraints whenever these agreements

53. Chadderdon, *supra* note 11, at 242; Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501, 503–04 (1946); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

54. Chadderdon, *supra* note 11, at 243.

55. *See id.*

56. *See Shelley*, 334 U.S. 1.

57. *Id.* at 5–6.

58. *Id.* at 5.

59. *Id.*

60. *Id.* at 6.

61. *See id.*

62. *See id.* at 23.

63. *Id.*

64. *Id.*

are subject to judicial enforcement.[65] Many lower courts have concluded that the *Shelley* ruling should be applied only to racially restrictive covenants.[66] However, there are a number of cases where courts have applied *Shelley* to other types of restrictive covenants.[67]

Legal scholar, Steven Siegel, has proposed that courts should apply a "land-use reading" of *Shelley*.[68] Under this interpretation of *Shelley*, the ruling would be limited to situations where the private covenants, if they had been a product of the state, would be found unconstitutional.[69] In these situations, Siegel proposes that courts should intervene in certain private contracts and strike down such agreements as being unconstitutional.[70]

In applying this theory to Texas HOAs and political signs, if a Texas court were to adopt this "land-use" interpretation of *Shelley*, it is likely that the court would conclude that section 202.009 was unconstitutional. Under this reading of *Shelley*, if a *city* were given the power that section 202.009 gives HOAs, that city could effect a total ban on signs with messages such as "Stop the War in Iraq." As the decision in *Ladue* demonstrates, the First Amendment prohibits this type of total ban.[71]

2. *Marsh v. Alabama*: The "Company Town" Theory of State Action

The case of *Marsh v. Alabama* demonstrates the second possible analogy that a court might use when analyzing HOAs and free speech rights. The ruling in *Marsh* is known as the "company town" theory of state action.

In *Marsh*, the plaintiff, a Jehovah's Witness, was convicted of trespass after distributing religious material while standing on a sidewalk in Chickasaw, Alabama.[72] Chickasaw was a "company town," privately owned and managed by the Gulf Shipbuilding Corporation.[73] The Gulf Shipbuilding Corporation had posted a public notice stating that solicitation was not permitted within the company town.[74] Marsh was warned that if she continued to distribute religious material in violation of the company's rule, she would be charged with trespassing

65. Chadderdon, *supra* note 11, at 244.

66. *Id.*

67. *See generally* Gerber v. Longboat Harbour N. Condo., Inc., 757 F. Supp. 1339 (M.D. Fla. 1991); West Hill Baptist Church v. Abbate, 261 N.E.2d 196 (Ohio Ct. Com. Pl. 1969).

68. Siegel, *supra* note 41, at 501.

69. *Id.*

70. *See id.*

71. City of Ladue v. Gilleo, 512 U.S. 43, 52–58 (1994).

72. Marsh v. Alabama, 326 U.S. 501, 503–04 (1946).

73. *Id.* at 502.

74. *Id.* at 503.

on private property.[75] After Marsh refused to comply, a deputy sheriff arrested her.[76]

Marsh argued that the city's actions violated her First Amendment right to free speech.[77] The Alabama Court of Appeals held that Chickasaw was a private entity and not a state actor subject to the First Amendment; the U.S. Supreme Court reversed that decision.[78]

The U.S. Supreme Court declared that if Chickasaw belonged to a municipality, "it would have been clear that appellant's conviction must be reversed."[79] The Court went on to state that the corporation's property interest did not settle the question as to whether the company town was a state actor.[80] Writing for the majority, Justice Black concluded that no matter who owned Chickasaw, it was imperative that the "channels of communication remain free."[81] The Court noted that a ruling in favor of Gulf Shipbuilding would disenfranchise many U.S. citizens because, at the time of the *Marsh* ruling, many people in the United States lived in company-owned towns.[82] Justice Black held that there was no reason to deprive the citizens of company-owned towns of their First Amendment liberties when individuals in state-run municipalities enjoyed such freedoms.[83]

The fact that Chickasaw had "all the characteristics of any other American town"[84] appears to have been dispositive in this case. In concluding that Chickasaw was a state actor, the *Marsh* Court noted that, except for private ownership, the company town functioned just like any other town.[85]

In applying the *Marsh* ruling to Texas HOAs, it is possible that under this analysis a Texas court could conclude that an HOA is a state actor. A Dallas Morning News article from February 9, 2008, illustrates the way in which one Texas HOA is quite similar to the company town described in *Marsh*.[86] The newspaper article centers on the HOA known as the "Valley Ranch Association" of Irving, Texas.[87] This association is described as a "mega-homeowners' association" that includes "more than 30 subdivisions and 30,000 re-

75. *Id.*
76. *Id.* at 503–04.
77. *Id.*
78. *Id.* at 504, 509–10.
79. *Id.* at 504.
80. *Id.* at 505–06.
81. *Id.* at 507.
82. *See id.*
83. *Id.* at 508–09.
84. *See id.* at 508–10.
85. *Id.* at 506–08.
86. Brandon Formby, *Valley Ranch Homeowners' Association Election Less Than Neighborly,* DALLAS MORNING NEWS, Feb. 9, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/021008valleyranch.330caac.html.
87. *Id.*

sidents."[88] While some people may view HOAs as small community organizations that simply regulate paint colors and trash pick-up days, the Valley Ranch Association goes far beyond that. The Valley Ranch Association collects $180 per $100,000 of assessed property value and manages a $2 million budget.[89] Additionally, the Valley Ranch Association is concerned with far more than regulating mailbox placement; the Valley Ranch Association maintains the neighborhood's infrastructure, including parks and canal walkways.[90] In describing Valley Ranch, one resident said, "we're really like our own city."[91]

Because some Texas HOAs, like Valley Ranch, encompass such a large population, have such comprehensive duties, and appear—essentially—like an independent city, it is possible that under the "company town" theory of *Marsh*, such an HOA would be deemed a state actor, and its residents entitled to First Amendment protections.

3. *Jackson v. Metropolitan Edison*: The "Sufficiently Close Nexus" Test

Alternatively, even if a Texas court were to reject the state actor tests of *Shelley* and *Marsh*, a Texas HOA could qualify as a state actor under the "sufficiently close nexus" test of *Jackson v. Metropolitan Edison*. In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[92] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[93] The plaintiff based her suit on the theory that because the state licensed the private utility, and because the utility was essentially a statewide monopoly, the utility was a state actor.[94] The U.S. Supreme Court disagreed.[95] The Court concluded that the essential inquiry was whether there was a "sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[96]

Under *Jackson's* "sufficiently close nexus" test, state regulation is not enough to create a state actor. The fact that Texas's legislature has chosen to regulate HOAs would not by itself make an HOA a state actor. However, the *Jackson* Court concluded that when the state has "insinuated itself into a position of interdependence" with the private actor, that private entity may be considered a state actor.[97] Under this theory, it is possible for an HOA covenant to qualify as a

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. Jackson v. Metro. Edison Co., 419 U.S. 345, 346–47 (1974).
93. *Id.* at 347–48.
94. *Id.* at 351.
95. *Id.* at 349–51, 358.
96. *Id.* at 351.
97. *Id.* at 357–58.

state action.[98] Because the city of Dallas has required the creation of HOAs in new developments,[99] it is possible that a Texas court could find that this requirement, and the interdependence that follows, is evidence of a "sufficiently close nexus," and therefore, state action.

4. *Brentwood Academy*: The "Entwinement" Theory of State Action

The fourth, and final, federal state actor test pertinent to this analysis comes from the U.S. Supreme Court decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.[100] In that case, Brentwood Academy was a member of the non-profit Tennessee Secondary School Athletic Association ("Athletic Association").[101] The Athletic Association regulated high school sports in Tennessee.[102] After the school and the association had a disagreement over recruitment policies, the Athletic Association sued Brentwood Academy, alleging that the school had violated the Athletic Association's football recruitment policies.[103] Brentwood Academy countersued the Athletic Association, claiming that the organization was a *state actor*, and that as a *state actor*, it had violated the First and Fourteenth Amendments.[104]

The Supreme Court concluded that although the Athletic Association was a not-for-profit private corporation, the association qualified as a state actor.[105] The Court held that its decision was based largely upon the excessive "entwinement" between Tennessee public school administrators and the Athletic Association.[106] As evidence of this "entwinement," the Court cited the fact that nearly all of the public high schools in Tennessee belonged to the Athletic Association.[107] Furthermore, public state-funded schools made up an overwhelming majority of the voting membership of the Athletic Association.[108] The Court concluded that because the Athletic Association was essentially managed by public school officials, the Athletic Association was an extension of the public schools.[109] The public schools that belonged to the Athletic Association were "seen as exercising their *own authority* to meet their *own responsibilities*."[110]

98. *See id.*
99. DALLAS, TEX., DEVELOPMENT CODE, ORDINANCE 22477 ch. 51, § 2(j) (1995).
100. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).
101. *Id.* at 290–93.
102. *Id.*
103. *Id.* at 293.
104. *Id.*
105. *Id.* at 291.
106. *Id.* at 302.
107. *Id.* at 299–300.
108. *Id.*
109. *Id.*
110. *Id.* at 299 (emphasis added).

If a Texas court were to rely on the "entwinement" test, it is possible that an HOA could be found to be a state actor. This result is more likely to be found in a case involving a city, like Dallas, where the city's own ordinance has effectively made HOAs a mandatory part of new development. This arrangement is similar to the facts in *Brentwood Academy*. The HOA is ostensibly a private organization, but it has been created under the mandate of the city's *authority*, in order to carry out the city's *responsibilities*.

It is evident from a brief summary of the four predominant state action theories that a Texas court could hold that an HOA is a state actor under the U.S. Constitution. However, our state action analysis does not end there; an examination of Texas state law is also required.

IV. TEXAS LAW

The U.S. Supreme Court concluded that a state may grant more expansive rights to free speech than those provided by the U.S. Constitution.[111] Furthermore, even if a court concludes that a private entity has not violated the U.S. Constitution's free speech clause, it is still possible that the entity may have violated the Texas Constitution's free speech clause. To make a determination on this issue, it is necessary to examine two elements: (1) the free speech clause of the Texas Constitution, and (2) the Texas test for state action.

A. *Free Speech and the Texas Constitution*

The Texas Constitution frames its free speech clause in the affirmative. This phrasing, while subtle, creates important differences between the state constitution and the federal provisions. The Texas Constitution states:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.[112]

This provision in the Texas state constitution can be contrasted with the provision in the U.S. Constitution.[113] The U.S. Constitution frames "freedom of expression" in negative terms and restricts the government from interfering with such freedoms.[114] Rather than simply prohibiting the government from restricting free speech, the Texas Constitution affirmatively grants its citizens the right to express themselves.[115]

111. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
112. TEX. CONST. art. I, § 8.
113. *Id.*
114. *Id.*
115. Harrington, *supra* note 2.

In underscoring these differences, a federal court declared that the Texas Constitution's free speech clause was "broader" in scope than the corresponding provision in the U.S. Constitution.[116] This idea was echoed by a Texas appellate court which concluded that the "Texas Constitution provides broader rights of free speech than those granted by the First Amendment."[117] Consequently, under Texas law, when a court is evaluating statutes that place restrictions on speech, these statutes must be strictly scrutinized.[118] Statutory restrictions on free speech are not permitted unless the restrictions are necessary to serve a compelling state interest and narrowly drawn to achieve such ends.[119]

Thirty-five of the states have free speech clauses that, like Texas's, are framed in the affirmative. In such states, this affirmative language has enabled some plaintiffs to prevail in "free speech" claims against community associations. In California, a court held that under this type of affirmative free speech clause, a community association was a state actor.[120] Moreover, in New Jersey, a state court determined that New Jersey's affirmative free speech clause granted its residents broader protection than the First Amendment.[121]

As with the federal Constitutional provisions, in order to analyze if an HOA has violated the state's free speech clause, it is first necessary to determine if the HOA is a state actor under Texas law. There are two factors weighing in favor of a Texas court holding that an HOA is a state actor under the state constitution: (1) the test to determine a state actor is relatively easy to satisfy, and (2) there is precedent from other states with similar constitutional language.

B. *The Texas Test for State Action*

Under Texas law, the state actor test appears to be a rather liberal standard. The analysis focuses on the level of *involvement* between the government and the private entity. Although Texas courts have not produced a bright-line rule, it seems that "interdependence" and performance of state responsibilities figure prominently in the analysis.[122]

When a government has inserted itself into a position of interdependence with a public entity, it must be recognized as a joint participant

116. Finch v. Fort Bend Indep. Sch. Dist., 333 F.3d 555, 563 n.4 (5th Cir. 2003).

117. Maloy v. City of Lewisville, 848 S.W.2d 380, 383 (Tex. App.—Fort Worth 1993, no writ).

118. Operation Rescue v. Planned Parenthood of Houston and Se. Tex., Inc., 975 S.W.2d 546, 559–60 (1998).

119. *Id.*

120. Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813 (1982).

121. Comm'n for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (2007).

122. Jones v. Mem'l Hosp. Sys., 746 S.W.2d 891, 894 (Tex. App.—Houston [1st Dist.] 1988, no writ).

with that entity.[123] Moreover, when the state entrusts a private group with performance of functions that are traditionally governmental in nature, the conduct of the private entity is converted into a state action for purposes of a free speech analysis under the Texas Constitution.[124] Additionally, when a court is analyzing First Amendment issues, a private group becomes a state actor when a government official *coerced, encouraged, or suggested actions* taken by the group.[125]

The "state actor" test in Texas, as shown by Texas case law, is a liberal test. Certainly, under this test some HOAs would qualify as state actors. To succeed under this legal theory, a homeowner would first argue that in enacting section 202.009, the Texas legislature has encouraged a private entity to deprive Texas citizens of their free speech rights.

Second, a homeowner would point to the broad range of services that HOAs provide. Because many cities have effectively transferred the responsibility for providing services such as water, sewer, and trash removal to HOAs, these cities have become so intertwined with and dependant upon the HOAs as to effectively convert the HOA into a government agent.

Furthermore, because cities like Dallas require an HOA to be established *before* the city grants certain building permits, a plaintiff could argue these requirements amount to state action. With such laws in place, cities like Dallas have "essentially foreclosed the option of constructing residential subdivisions in which all traditionally municipal services are provided by the municipality."[126] The existence of such ordinances undermines the assertion that the rise and proliferation of HOAs is purely market driven.[127] These types of zoning policies have a "coercive and limiting effect on housing consumers and producers."[128] Such development requirements subject a large number of homeowners to "a private land use regime that many neither desire nor understand."[129]

When fast growing cities have these types of ordinances, it certainly weakens the argument that homebuyers have a choice to live within an HOA. In many instances, the more- affordable single-family homes are located in the suburbs and the planned unit communities. Furthermore, even in the city's core, older neighborhoods are often coming under the control of newly formed HOAs that may attach restrictive covenants to the property. Consequently, prospective

123. *Id.* (describing a federal court test used to determine how government actions are viewed under "state action" doctrine).

124. Weaver v. AIDS Servs. of Austin, Inc., 835 S.W.2d 798, 800-03 (Tex. App.—Austin 1992, writ denied).

125. *Id.* at 801.

126. Siegel, *supra* note 18, at 893.

127. *Id.*

128. *Id.* at 906.

129. *Id.*

homebuyers may argue that city zoning provisions have effectively denied them the option of purchasing a home that is *not governed* by an HOA.

All of these factors: the city mandates, the transfer of municipal responsibilities, and the lack of choice, could influence a Texas court to hold that an HOA is a state actor. Texas courts are also likely to look to other state court decisions for guidance. Although state courts have not been unanimous, a number of jurisdictions have concluded that an HOA can be a state actor.

V. OTHER STATES' DECISIONS

A. *California and the* Laguna *decision*

A California court ruled that a community association qualified as a state actor under the California Constitution's free speech clause in *Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills*.[130] In *Laguna*, a community association refused to allow an outside publishing company to distribute its newspaper in the association's neighborhood.[131] The community association produced its own give-away newspaper and stated that the prohibition against outside publications was necessary for the association to recoup its losses.[132]

The *Laguna* court looked to the Supreme Court's decision in *Pruneyard Shopping Center v. Robins* for guidance.[133] In *Pruneyard*, the U.S. Supreme Court held that a state constitution *could* provide greater rights on free speech than the federal Constitution.[134] The *Laguna* court declared that, "it could be argued that the [*Pruneyard*] decision, by implication, stands for the proposition, in California, that a *private individual* can be held to have violated the state constitutional rights of another, at least the latter's free speech rights."[135]

The *Laguna* court stated that although it chose a narrower interpretation of *Pruneyard*, even under that interpretation the community association qualified as a state actor.[136] After determining that the community association was a state actor, the court stated that the association impermissibly discriminated against the free speech rights of the plaintiff—rights given to the plaintiff by the California Constitution.[137]

Under the reasoning of *Laguna*, when a state constitution's free speech clause is broader than that of the federal Constitution, the state has broad police power to enforce its own constitutional provi-

130. Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 829 (1982).
131. *Id.* at 815.
132. *Id.* at 819–820.
133. *Id.* at 825–26.
134. *Id.* at 825 (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).
135. *Id.* at 825–26.
136. *Id.* at 826.
137. *Id.* at 829.

sions.[138] Additionally, although the *Laguna* court noted that the community association was not a "company town" as seen in *Marsh v. Alabama*, the association was also not a traditional municipality.[139] The *Laguna* court described the association as a "hybrid" mix between company town and municipality, and it concluded that because the association was a *quasi-municipality*, and because the association discriminated against outside publications, the scales tipped in favor of finding the community association to be a state actor.[140]

If a Texas court were to adopt the reasoning of *Laguna*, it seems possible that an HOA could be held to be a state actor. Because Texas and California both have state constitutions that frame a free speech clause in the affirmative, and because many Texas HOAs, like the community association in *Laguna*, could arguably be characterized as quasi-municipalities, it is possible that if a case with similar facts came before a Texas court, the court could conclude that a Texas HOA is a state actor. Under the law of *Laguna*, a total ban on political signs by an HOA would be struck down for violating the Texas State Constitution.

B. *Florida*

A Florida case illustrates another possible application of Supreme Court precedent to a case involving a community association and First Amendment rights. In *Gerber v. Longboat Harbour North Condominium, Inc.*, condominium owners successfully sued their condominium association when the association sought to prohibit them from flying the American flag.[141] The Florida district court held that when the state attempted to enforce the association's flag ban, this transformed the private covenant agreement into a state action governed by the First Amendment.[142] The Florida court cited the U.S. Supreme Court's decisions in *Shelley* and *Marsh* as controlling.[143]

In light of the persuasive authority of the *Gerber* decision, it is possible that a Texas court could use similar reasoning to hold that an HOA is a state actor.

C. *Kansas*

It is worth noting a Kansas case where the court ruled that an HOA was *not* a state actor. Although this outcome would not be desirable for a Texas homeowner in a suit against an HOA, the Kansas court's reasoning could actually prove helpful for the homeowner's argument.

138. *See id.*
139. *Id.* at 843.
140. *Id.*
141. Gerber v. Longboat Harbour N. Condo., Inc., 757 F. Supp. 1339 (M.D. Fla. 1991).
142. *Id.* at 1341.
143. *Id.*

In *Ross v. Hatfield*, the homeowners sued their HOA, claiming that an HOA covenant banning satellite dishes was unenforceable because the covenant violated the First Amendment.[144] In *Ross*, the court said the critical issue was whether the HOA was a state actor.[145] The plaintiffs relied on *Shelley v. Kraemer*, arguing that a state court's enforcement of the covenant would transform the covenant into a state action.[146] Alternatively, the plaintiffs argued that even if *Shelley's* holding on unconstitutional covenants did not apply, *Marsh's* "company town" theory did.[147] The court rejected the *Shelley* claim, but focused its attention on comparing the facts of the case to the company town in *Marsh*.[148]

The Kansas court ultimately rejected the *Marsh* "company town" theory,[149] but the court's reasoning may be dispositive in future cases involving HOAs. The court stated that the subdivision in question was not "sufficiently similar to the company-owned town in *Marsh* to make that case applicable."[150] To support this decision the court declared that the subdivision lacked:

> [t]he attributes of a regular American town. For example, it does not provide its own police or fire protection, its own schools or its own system of trash collection or sewage disposal, which are functions of a typical municipality.[151]

The court distinguished the facts of *Ross* from the facts in *Marsh* by declaring that traditional municipalities provide a broader range of amenities than HOAs.[152] However, this line of thinking may not adequately reflect the realities of today's HOA. If such services are the sign of state actor, maybe HOAs are state actors after all. Large HOAs provide services such as "street cleaning, trash collection, maintenance of open space, and security."[153] In fact, some HOAs provide all of the services mentioned by the *Ross* court, with the exception of public schools. Under the standard put forth by the *Ross* court, it is possible that a Texas court could find that a large HOA, which provided many traditional municipal services, was indeed a state actor.

Alternatively, even if a Texas court were to declare unambiguously that an HOA was *not* a state actor, it is possible that a restrictive covenant could be struck down in two situations: (1) if a court determines that under a broad application of the Texas Constitution's free speech

144. Ross v. Hatfield, 640 F. Supp. 708, 709–10 (D. Kan. 1986).
145. *Id.* at 709.
146. *Id.* at 710.
147. *Id.* at 711.
148. *Id.* at 711–12.
149. *Id.*
150. *Id.* at 711.
151. *Id.*
152. *See id.*
153. Siegel, *supra* note 41, at 467.

clause, the clause applies not just to state actors, but also to private entities like HOAs; or (2) if, regardless of the question of state action, the covenant violates public policy.

VI. The Public Policy Argument

A restrictive covenant that violates public policy is *void and unenforceable.* If a Texas homeowner is unable to find relief under either the "state actor" test or the "broad power of the Texas Constitution" theory, a homeowner may argue that a total ban on political signs is bad public policy.

A New Jersey court acknowledged that the public policy argument was a viable legal remedy for homeowners seeking relief from unreasonable HOA covenants. In 2007, the New Jersey Supreme Court decided *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association.*[154] Although the case was ultimately decided in favor of the HOA,[155] the public policy argument is instructive.

In *Twin Rivers*, the New Jersey Supreme Court concluded its opinion with a public policy analysis.[156] The court stated it had enumerated eight "factors that courts should consider in determining whether restrictive covenants are 'reasonable' and thus enforceable."[157] One of the eight factors included, "whether the parties had a viable purpose which did not at the time interfere with existing . . . public policy."[158] Another factor examined "[w]hether the covenant interferes with the public interest."[159] The court declared that in evaluating these issues the "highest source of public policy" was the state's constitution.[160]

The *Twin Rivers* court ultimately decided to uphold the association's restrictive covenant primarily because the covenant *did allow* homeowners to "post a sign in any window of their residence and outside in the flower beds so long as the sign was no more that three feet from the residence."[161] Because the association did not enact a total ban on political signs, and because the covenant allowed for ground-mounted political yard signs, the covenant was upheld.[162]

The *Twin Rivers* ruling is especially instructive when analyzing the recent Texas TRPOPA legislation. The *Twin Rivers* statute can be distinguished from the Texas statute because *Twin Rivers* explicitly al-

154. Comm'n for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (2007).
155. *Id.* at 1076.
156. *Id.* at 1075–76.
157. *Id.*
158. *Id.* at 1064.
159. *Id.* at 1075–76.
160. *Id.*
161. *Id.* at 1064.
162. *Id.* at 1073–74.

lowed for yard signs.[163] On the other hand, under a plain reading of the Texas statute, an HOA could ban all signs that were not advertising a candidate or ballot issue.[164] In *Twin Rivers*, the court declared that the state's own constitution was the standard by which a court should evaluate the public policy of free speech restrictions.[165] In Texas, because the state Constitution provides broad free speech protection, a Texas court could rightly hold that a total ban on political signs violated public policy, and was therefore unenforceable.

In sum, a homeowner could win a suit against their HOA under a number of possible legal theories. A Texas court could hold that the HOA is a state actor and that an HOA's ban on all political signs violated the federal constitution. More likely, a Texas court could hold that the HOA is a state actor for purposes of the Texas free speech clause, and therefore a total ban of political signs would be prohibited because it violates the Texas Constitution. Finally, a Texas court could strike down such restrictive covenants on the grounds that they violate public policy.

Regardless of the relative strengths and weakness of each legal theory, the Texas TRPOPA legislation is flawed. The TRPOPA legislation has made specific provisions for *composting*, but has failed to allow for political speech.

VII. CONCLUSION

A. *Remedies*

The Texas TRPOPA legislation is flawed and two actions must be considered in order to remedy this section of the Texas Property Code.

First, section 202.009 needs to be modified in order to prevent unnecessary litigation and to avoid conflict with the state constitution. This modification could be as simple as prohibiting HOAs from banning *all* political signs. An amendment giving homeowners the right to display at least one political sign on their property is an appropriate "time, place, manner" restriction that avoids completely depriving homeowners of a valuable means of communication.

Second, municipalities need to reevaluate their policies on HOAs. Although granting HOAs greater control has saved cities money, it has inadvertently created a large patchwork of privately-controlled neighborhoods where Constitutional protections do not apply. For this reason, the time is right for the Texas legislature to revisit the Texas Property Code and create a more detailed statutory framework to guide cities and govern HOAs, so that citizens are not deprived of their fundamental rights or constitutional remedies.

163. *Id.*
164. *See* TEX. PROP. CODE ANN. § 202.009 (Vernon 2007).
165. *Twin Rivers*, 929 A.2d at 1076.

B. *A Return to the Homeowners' Hypothetical*

Back in Bedrock Park, Barney cheers at the news that the HOA cannot prevent him from composting. Meanwhile, Fred is dejected to learn that under Texas law, he cannot keep his one small sign posted in his yard.

After hearing the news, Fred and Barney stand on Fred's front lawn. The two friends look out at their neighbors' homes across the street. These neighbors live outside the Bedrock Rock boundary and are not governed by the HOA, and for that reason Fred and Barney are able to witness a diverse political dialogue taking place. One red brick house has a sign protesting the war, while the house next to it has a sign supporting the president. A large ranch-style home has a sign warning drivers to: "Slow down, Children at Play," while an adjacent homeowner has put up a sign encouraging residents to use the local recycling center.

"Doesn't seem fair," says Barney looking out at the other houses. "Those guys get to express their opinions. The Bedrock Park ban seems completely un-American."

Fred doesn't respond to his friend. He just picks up his sign, folds it in half, and places it in the trashcan. Fred's yard is now just a flat expanse of grass. Barney looks to Fred, but Fred remains silent.