Sign Restrictions in Residential Communities: Does the First Amendment Stop at the Gate?

LAURA COON

On December 8, 1990, Margaret P. Gilleo placed on her front lawn a twenty-four by thirty-six-inch sign printed with the words, "Say No to War in the Persian Gulf, Call Congress Now."[1] After the sign disappeared, Gilleo put up another, but it was knocked to the ground. When she reported these incidents to the police, they told her that the town prohibited lawn signs. Unwilling to give up, Gilleo unsuccessfully petitioned the city council for a zoning variance and pursued the matter all the way to the U.S. Supreme Court.[2]

The rest is constitutional history. In *City of Ladue v. Gilleo*,[3] the Court struck down a municipal ordinance that restricted all signs on residents' property except "residence identification" signs, for-sale signs, and signs warning of safety issues.[4] In addition to its clear delineation of restricted content, according to the Court, the ordinance infringed on an essential mode of political speech.[5] Indeed, the Court acknowledged the particular significance of using one's own window or front lawn for such purposes:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile.[6]

If Margaret Gilleo had lived in a gated community of Willow Hill instead of a subdivision of the same name in Ladue, Missouri, the result would have been quite different. She would have been visited by a representative of her residential community association (RCA)[7] and reminded that the posting of political signs in residents' yards is forbidden. At first blush, the ban on signs appears to be a strictly private matter. Homeowners in such communities agree to various covenants as a condition of purchase, and the people enforcing the restrictions are private actors as well.

But two factors confuse the issue. First, RCAs in many communities perform the same functions as municipal governments, including the delivery of security, sewer, water, and fire service, and are funded by community dues. Second, the number of Americans who live in private residential communities is increasing daily. Although fewer than 500 RCAs existed before 1960, they now account for half of the housing sales in the country's fifty largest metropolitan areas.[8] Most new housing developments in California, Florida, New York, Texas, and suburban Washington, D.C., are private communities with RCAs.[9] Prospective homeowners may agree to such restrictions by choosing to live in such communities, but their choice is often made in the face of limited housing options.

Although many RCAs may resemble a municipal government in form and structure, the First Amendment protections against governmental interference with free speech do not apply in the absence of state action. This article examines the general issue of what elements are required for an institution to be considered a state actor. Two lines of cases appear to support designating RCAs as state actors, but in fact few RCAs will satisfy the state action requirement, thereby silencing an opportunity for political speech by a growing number of Americans.

The First Amendment and RCAs

The most significant hurdle in establishing and vindicating free speech rights for private community residents who want to post political signs on their property is the state action requirement for all constitutional claims. If residential community associations are state actors, bans on political signs are likely to violate the First Amendment.[10] Indeed, the ordinance struck down by the Supreme Court in *Ladue* is quite similar to restrictions found in numerous RCA deed covenants.[11] As the *Ladue* Court recognized, for many homeowners, a sign placed in a window or a yard is the most efficient and effective way to convey a political viewpoint.[12] For the many residents subject to RCA regulations, the opportunity to speak to their neighbors and passersby is jeopardized if the RCAs are free to impose sign restrictions without regard to the limitations imposed by the First Amendment on governmental actors. Whether the First Amendment prohibits RCA sign bans is essentially a question of whether RCAs may be treated as state actors under any recognized theory of state action.

It Looks Like Any Other Town

One potential avenue for establishing RCAs as state actors is the *Marsh* theory. In *Marsh v. Alabama*, the U.S. Supreme Court held that the Gulf Shipbuilding Corporation's operation of the company town of Chickasaw, Alabama, constituted state action such that a First Amendment claim could be asserted against the company.[13] Except for Chickasaw's private ownership, the Supreme Court noted that it had "all the characteristics of any other American town,"[14] including homes, streets, a sewer system, its own post office and police, and a business block consisting of merchants and service establishments.[15] Moreover, the town was open and freely accessible to the public.[16]

Laura Coon received her J.D. degree from Vanderbilt University Law School in 2001. She also is a recepient of a Forum scholarship to attend the 2001 Annual Meeting in Boca Raton, Florida. In August, she will start work as a law clerk for the U.S. District Court for the Southern District of California.

Finding nothing but Chickasaw's private ownership to distinguish the town from any other, the *Marsh* Court determined Gulf Shipbuilding was a state actor because it had assumed all of the duties of operating a municipality.[17]

For a brief period after *Marsh*, the Supreme Court extended this theory of state action to shopping malls.[18] Just a few years after the Supreme Court held shopping mall owners to be state actors, however, it retreated from its expansive reading.[19] In distinguishing the operation of a shopping mall from that of a company town, the Court in *Lloyd Corp. v. Tanner* emphasized that the operation of the company town in *Marsh* involved "the assumption by a private enterprise of *all* of the attributes of a state-created municipality."[20] Thus, establishing state action under *Marsh* requires that a private entity perform the full spectrum of municipal powers, instead of merely dedicating private property to specific and isolated uses.

Numerous assertions of state action based on *Marsh* have been rejected based upon the relevant private entity's failure to assume all of the functions of a municipal government.[21] Even if a court determines that a private actor has assumed sufficient municipal functions, it may not be considered a state actor unless the allegedly unconstitutional action was undertaken in the actor's official capacity. For example, in *Robison v. Canterbury Village*, the Third Circuit determined that the defendant's eviction of certain borough council members did not constitute state action because, even if the defendant was operating a company town, it was acting as a private landlord rather than as a state actor.[22]

Several courts have found state action by applying the *Marsh* company town theory in a line of cases involving migrant labor camps. In *Petersen v. Talisman Sugar Corp.*, the Fifth Circuit determined that Talisman Sugar engaged in state action by operating a camp for its migrant workers.[23] The *Petersen* court noted that, similar to the company town in *Marsh*, the Talisman migrant labor camp had residential areas, streets, a store, eating facilities, a post office, and a chapel.[24] Moreover, Talisman Sugar also provided fire protection, postal services, sewage, garbage disposal, and electric services.[25]

Essentially, the migrant labor camp, like the company town in *Marsh*, was a self-contained community in which Talisman Sugar assumed the role of a municipality vis-à-vis camp residents.[26] Thus, the *Petersen* court determined that, because the camp was sufficiently similar to the company town in *Marsh*, Talisman Sugar's operation of the camp constituted state action.[27]

Marsh and Its Progeny

Many RCAs provide residents with services typically provided by local government, such as sewer, fire, water, and police service. Such services may be funded from community dues, much like municipal services are funded by taxes. In addition, these private communities may have their own post office and ZIP code. Thus, RCAs often assume the full spectrum of municipal services, similar to Gulf Shipbuilding in *Marsh.* On this basis, RCAs appear to fit well within the *Marsh* company town theory.

There are, however, a few problems with applying the *Marsh* theory to contemporary private residential communities. First, unlike the company town in *Marsh*, many private residential communities do not contain business blocks, one of the company town features emphasized by the *Marsh* Court.[28] Rather, private residential communities often exclude commercial uses.

Furthermore, these communities often are not open to the public, unlike the streets and sidewalks of the *Marsh* company town model.[29] Consequently, if a business block and public access are necessary to apply *Marsh*, this theory may not be a viable way to establish state action in the context of contemporary private residential communities.

Circuit court cases applying *Marsh* suggest, however, that open access may not be the sticking point. The Fifth Circuit, for example, determined in *Petersen* that the "mere enclosure" of a labor camp otherwise satisfying the *Marsh* requirements did "not make it less of a town."[30] Consequently, a gated community that is otherwise similar to a company town may not necessarily be shielded from a constitutional claim based on its exclusion of the public.

However, the exclusion of commercial uses may pose a more serious obstacle. In *Marsh*, the Court explicitly highlighted the existence of a commercial district in determining that the operation of the company town was indistinguishable from that of any other municipality for state action purposes. The separation of commercial and residential uses, of course, is now a common result of zoning laws. Whether *Marsh* should be applied to private residential communities may depend on whether it is appropriate to make homeowners choose between protecting their neighborhoods' residential character and safeguarding their ability to use their property for speech purposes.

Going to Court May Be Sufficient

An RCA's attempt to enforce its restrictions in court may be tantamount to state action. In *Shelley v. Kraemer*, the Supreme Court determined that a residential association was a state actor in a case where owners of property subject to a racially restrictive covenant sought judicial enforcement of the covenant against an African-American family.[31] Despite the fact that private parties executed the agreement with no involvement from the state, the *Shelley* Court determined that once a party called upon the judicial system to enforce the covenant, state action was present.[32]

Other courts have also determined that judicial enforcement of an RCA's regulations may constitute state action. For example, in *Gerber v. Longboat Harbour North Condominium, Inc.*,[33] a federal district court allowed a homeowner to assert a First Amendment claim against judicial enforcement of a private condominium association's rule against displaying the flag.[34] Other courts, however, have refused to expand *Shelley*'s application beyond its facts.[35] Interpreted so narrowly, *Shelley* might simply be viewed as the Supreme Court's partial solution to race discrimination in housing before Congress dealt with the problem.

An additional twist to the use of the *Shelley* state action theory is that the alleged state actor must first pursue judicial enforcement of the challenged regulation.[36] Establishing state action under *Shelley* imposes two significant burdens: it requires waiting for the community association to pursue judicial enforcement of the restriction and then convincing a court that *Shelley* should not be narrowly limited to its facts.

The Role of State Constitutional Law

If the absence of a business block or open public access precludes a finding of state action under *Marsh*, and if courts are unwilling to extend *Shelley* beyond the imposition of racially restrictive covenants, do private community residents have any recourse to the enforcement of RCA sign bans? Probably not, although state courts may hold a glimmer of hope.

In *Pruneyard Shopping Center v. Robins*, the U.S. Supreme Court held that states are free to provide more expansive individual liberties in state constitutions than the U.S. Constitution would provide under the same circumstances.[37] The appellant in *Pruneyard*, a California shopping center owner, argued that states may not mandate access to private property for speech purposes in excess of the balance between property and speech rights reached by the Supreme Court in *Lloyd Corp. v. Tanner*.[38]

The Court, however, rejected the argument that *Lloyd*'s failure to extend speech protection to shopping malls under the U.S. Constitution also precluded states from doing so in their respective state constitutions.[39] The *Pruneyard* Court noted that there would be no significant danger that any of the speech occurring on private property could be attributed to the landowner in the context of shopping malls.[40] The Court also emphasized that the state government was not compelling any particular message in this case.[41] Furthermore, the appellant could adequately dissociate itself from the speech by posting disclaimers.[42] For these reasons, the *Pruneyard* Court determined that neither the speech nor the property rights of a private property owner would be violated by state protection of speech exceeding the U.S. Constitution's protections.[43]

After *Pruneyard*, state constitutional law is an important avenue for challenging speech restrictions imposed on private property. To what extent have other states followed California's lead in extending speech protections beyond those provided by the federal Constitution? To a private residential community resident searching for an alternative state action argument, states' responses must seem disappointing. Only a few states have determined that their state constitutional speech protections extend beyond the confines of the U.S. Constitution with respect to this type of speech,[44] but those states have limited this extension to large shopping centers[45] or private university campuses.[46] Thus, while state constitutional protections may provide an alternative argument for state action in theory, the lukewarm state response to the *Pruneyard* invitation has rendered this possibility doubtful in practice.

Conclusion

For a resident of a private residential community subject to strict sign restrictions, the likelihood of asserting a successful First Amendment free speech claim appears doubtful. Significant obstacles stand in the way of establishing state action under each of the applicable theories. In order to make a successful *Marsh* argument, a challenger would have to convince a court that neither open public access nor the inclusion of a business block was essential to the *Marsh* Court's holding. Although some circuit courts have been receptive to the argument that mere enclosure does not defeat the company town theory, the absence of a business block in most private residential communities may still be troublesome for *Marsh*'s application.

The alternative state action theory provided by *Shelley* is equally problematic, particularly because many courts have been unwilling to apply *Shelley* to cases that do not involve racially restrictive covenants. Furthermore, a challenger would have to wait until the community association sought judicial enforcement of the particular restriction.

Finally, although *Pruneyard* seems to offer a promising alternative theory upon which to establish state action, states have hesitated to accept the Supreme Court's invitation to extend state constitutional speech protections in this area beyond those provided for by the U.S. Constitution.

Consequently, the prospect of asserting a First Amendment claim against a residential community association for bans on political signs appears remote. Until courts adapt the *Marsh* company town model to contemporary private residential communities or apply *Shelley* outside the context of racially restrictive covenants, the increasing number of homeowners subject to RCA restrictions may not be able to freely express their political viewpoints through yard signs.

Endnotes

1. City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994).
2. *Ladue*, 512 U.S. at 45.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id*. at 56.
7. The term "residential community association" includes private residential communities that have an internal governance structure, including condominiums, housing cooperatives, and planned single-family housing developments.
8. 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, 465 n.9 (1998) (citing COMMUNITY ASS'N INST., COMMUNITY ASSOCIATIONS FACTBOOK 13 (Clifford J. Treese ed., 1993)). Siegel notes that CAI membership lists are considered to provide the most reliable statistics regarding RCAs. *Id.* at 465 n.8. One commentator explains the recent proliferation of private gated communities as a product of the 1980s, in which "heavy real estate speculation, combined with a fear of crime, led to the gated explosion that has increased dramatically ever since." John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1132 (1997).
9. Siegel, *supra* note 8, at 465 n.9.
10. City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994).
11. *Ladue*, 512 U.S. at 45.
12. *Id.*
13. Marsh v. Alabama, 326 U.S. 501, 505–08 (1946).
14. *Marsh*, 326 U.S. at 502.
15. *Id.*
16. *Id.*
17. *Id.* at 502–10. In addition to the operation of a "company town," the Supreme Court has held that the exercise of certain other functions "traditionally exclusively reserved to the State" satisfy state action. *E.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (involving peremptory challenges in jury selection); Evans v. Newton, 382 U.S. 296 (1966) (involving the operation of a municipal park); Terry v. Adams, 345 U.S. 461 (1953) (involving the administration of elections).
18. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (holding that operating a shopping mall could be considered state action for purposes of asserting a First Amendment free speech claim).
19. Hudgens v. NLRB, 424 U.S. 507 (1976) (rejecting shopping mall operators as state actors); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (same).
20. *Lloyd*, 407 U.S. at 569 (emphasis added).

21. *See, e.g.*, UAW v. Gaston Festivals, Inc., 43 F.3d 902, 907–08 (4th Cir. 1995) (determining that the organization, management, and promotion of a municipal festival was not a traditional and exclusive government function); Cable Invs., Inc. v. Woolery, 867 F.2d 151 (3d Cir. 1989) (rejecting theory of state action under *Marsh* because there was "no allegation that the two complexes in this case [were] anything more than apartment buildings with some associated shopping facilities and office space"); United States v. Francoeur, 547 F.2d 891, 893–94 (rejecting the *Marsh* state action theory as applied to Disney World); Family Planning Alternatives, Inc. v. Pruner, 15 Cal. Rptr. 2d 316, 321 (Cal. Ct. App. 1993) (holding that abortion protesters could not assert a constitutional right of access to a family planning clinic under *Marsh*'s theory of state action because the private property in this case had not "assumed *all* the attributes of a municipality"); Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340, 342 (Sup. Ct. Pa. 1996) (rejecting *Marsh* as applied to a condominium association).

22. Robison v. Canterbury Village, 848 F.2d 424, 429 (3d Cir. 1988) (noting that "no case has held that all of the actions of a private party who operates a company town are necessarily state action").

23. Petersen v. Talisman Sugar Corp., 478 F.2d 73, 82–83 (5th Cir. 1973) (determining that the operator of a migrant labor camp was a state actor under the *Marsh* company town theory).

24. *Petersen*, 478 F.2d at 82.

25. *Id.*

26. *Id.* In addition to emphasizing the camp's provision of municipal services, the *Petersen* court noted that the labor camp was located on a large tract of land unlike the shopping malls in *Logan Valley* and *Lloyd. Id.*

27. *Id.*

28. Marsh v. Alabama, 326 U.S. 501, 505–08 (1946); Siegel, *supra* note 8, at 476 n.60 (noting that the exclusion of commercial uses in territorial RCAs appeals to many homeowners, whose property values may be protected).

29. Siegel notes that approximately one in five private communities is gated and thus does not provide open access to the public, unlike the company town in *Marsh.* Siegel, *supra* note 8, at 476 n.61.

30. *Petersen*, 478 F.2d at 82–83; *see also* Associacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 518 F.2d 130, 138 (3d Cir. 1975); Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, 396–97 (7th Cir.1975).

31. Shelley v. Kraemer, 334 U.S. 1 (1948).

32. *Shelley*, 334 U.S. at 13–20.

33. Gerber v. Longboat Harbour North Condominium, Inc., 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) (asserting that judicial enforcement of private covenants abridging protected speech constitutes state action, just as judicial enforcement of racially restrictive covenants did in *Shelley*).

34. *Id.*

35. *E.g.*, Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) ("The holding of *Shelley* . . . has not been extended beyond the context of race discrimination."); Midlake on Big Boulder Lake Condo. Ass'n, 673 A.2d 340, 342 (Sup. Ct. Pa. 1996) (distinguishing *Shelley* from the case at bar on the grounds that it involved a covenant restricting speech rather than a racially restrictive covenant as in *Shelley*).

36. *E.g.*, Goldberg v. 400 East Ohio Condominium Ass'n, 12 F. Supp. 2d 820 (N.D. Ill. 1998) (rejecting the *Shelley* theory of state action as applied to the facts of the case because there was "no indication . . . that the condominium association *actually* secured any sort of judgment or order from a state court"); Quail Creek Prop. Owners Ass'n, Inc. v. Hunter, 538 So. 2d 1288, 1289 (Dist. Ct. App. Fla. 1989) (holding that neither the recording of a homeowners association's protective covenant in public records, nor the *possible* enforcement of the covenant in state court was sufficient to establish state action).

37. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87–88 (1980).

38. *Pruneyard*, 447 U.S. at 80–81 (citing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

39. *Id.* at 87–89.

40. *Id.* at 87.

41. *Id.* at 87–88. Absent a particular message compelled by the state, the *Pruneyard* Court noted, the case at bar was distinguishable from previous cases holding compelled speech unconstitutional. *Id.* (citing West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down government-compelled saluting of the United States flag) and Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding a state right of reply statute unconstitutional because it intruded on newspapers' editorial functions)).

42. *Id.*

43. *Id.* at 88.

44. *See generally* William Burnett Harvey, *Private Restraint of Expressive Freedom: A Post-*Pruneyard *Assessment,* 69 B.U. L. REV. 929, 944 (1989) (concluding that "in the flow of post-*Pruneyard* litigation, the state courts' tillage of their own constitutional acreage has produced a disappointing crop.").

45. *E.g.*, Alderwood Assoc. v. Wash. Envtl. Council, 635 P.2d 108 (Wash. 1981); Robins v. Pruneyard Shopping Center, 592 P.2d 341, *aff'd,* 447 U.S. 74 (1979).

46. *E.g.*, State v. Schmid, 413 A.2d 615 (N.J. 1980).