HEY, NEIGHBOR: HOMEOWNERS' ASSOCIATIONS, SUPER-PRIORITY LIENS, AND THE NEED FOR BALANCED RIGHTS IN NEVADA

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INTRODUCTION

"Houses are built to live in, and not to look on, therefore let use be preferred before uniformity, except where both may be had."—Francis Bacon[1]

Common-Interest communities and Homeowners' Associations ("HOAs") are as much a part of American history as Ford Motors. Initially created as a space for the elite to reside, common-interest communities soon gained popularity as a pleasant and affordable living option for lower-income families.[2] Over time, the option to purchase a home not regulated by a homeowners' association has become severely limited. In 2016, the number of homeowners' associations in the United States was estimated to be 342,000.[3]

With the rise of the homeowners' associations has come a complex set of problems. Nevada specifically has struggled to determine where the boundaries of power lie, as HOA-initiated foreclosures have risen exponentially since the Great Recession.[4] The foreclosure epidemic shines a spotlight on the imbalance of power that exists between homeowners' associations and the homeowner. The Covenants, Conditions, & Restrictions (CC&Rs) that bind homeowners' associations often give a small group of people nearly unlimited power to impose whatever restrictions they deem necessary.[5] These restrictions can infringe on even the most intimate details of a resident's life.[6]

This article will examine the imbalance of power between homeowners' associations and homeowners, and how the super-priority epidemic in Nevada is a symptom of this imbalance. Part I will examine the history of homeowners' associations in the United States before turning to an examination of the unique problems faced by Nevada in Part II. Part III will discuss the stark imbalance in power between the associations and homeowners. Part IV will discuss solutions to correct the imbalance of power in Nevada and restore homeowners' associations to the role that they were originally designed to fulfill.

I. ALL HAIL UNIFORMITY: THE HISTORY OF HOMEOWNERS' ASSOCIATIONS IN AMERICA

In modern America, homeowners' associations are as much a fixture in the suburban setting as the corner Starbucks. However, they are a relatively recent

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1 FRANCIS BACON, ESSAYS CIVIL AND MORAL 141 (Cassell & Company Ltd. 1905).
2 *See infra* Part I.
3 CMTY. ASS'NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2016 COMMUNITY ASSOCIATION DATA 1 (2016), https://foundation.caionline.org/wp-content/uploads/2017/07/2016StatsReviewFBWeb.pdf [https://perma.cc/8LAD-V97F] [hereinafter CAI REPORT] (showing increase in number of HOAs from 1970 to 2016).
4 Kylee Gloeckner, Note, *Nevada's Foreclosure Epidemic: Homeowner Associations' Super-Priority Liens Not So "Super" for Some*, 15 NEV. L.J. 326, 326–27 (2014).
5 Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice,"* 37 URB. LAW. 335, 336 (2005).
6 *See infra* Section III.A.

phenomenon and their rise to prominence and power has been meteoric.[7] Although HOAs do provide certain benefits to the neighborhood, such as protecting property values and providing residents with common spaces, their governmental structure also serves to deprive the homeowner of certain liberties traditionally possessed by property owners.[8]

American property law evolved from the English legal tradition, where an individual possessing property in fee simple absolute was free to do whatever he wished with his land.[9] A property owner could sell his land it, build on it, and assign a portion or all of his interests to another person.[10] As property law evolved, the use of "covenants" came to be frequently utilized in expanding neighborhoods.[11] A covenant could restrict land to be used only for certain purposes, and in some cases, covenants imposed restrictions upon land for the foreseeable future.[12] Originally, an individual could only enforce a restrictive covenant while maintaining ownership of the parcel bound by the covenant, but developers soon began to search for a solution that would allow them to impose and enforce covenants, despite selling all ownership interests.[13] Enter homeowners' associations.[14]

Homeowners' associations were organizations created by developers for the purpose of enforcing covenants, as well as promulgating new rules as the need arose.[15] One of the first cases to formally recognize the power of a homeowners' association was *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, in which the court held that a covenant requiring homeowners to pay fees for the purpose of maintaining common areas did "'touch or concern' the land."[16] The obligation to pay fees would therefore pass to future owners and was enforceable by the HOA.[17]

During their inception, HOAs were connected with the development of wealthy communities. However, after the Great Depression, the Federal Housing Administration and the Home Owners' Loan Corporation made it possible

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7 *See* CAI REPORT, *supra* note 3, at 1 (showing increase in number of HOAs from 1970 to 2016).
8 *See* David L. Callies et al., Ramapo *Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 184 (2003).
9 Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL'Y 479, 483 n.13 (2009).
10 *Id.*
11 *Id.* at 484.
12 *See Id.* (discussing Tulk v. Moxhay, 41 Eng. Rep. 1143 (Chanc. 1848)).
13 *Id.* at 485.
14 *Id.*
15 *Id.*
16 *Id.* (quoting Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938)).
17 *See Neponsit Prop. Owners' Ass'n*, 15 N.E.2d at 798.

for lower-income individuals to obtain financing for homes.[18] This in turn led to the rise of planned communities for the "average" American.[19] After World War II, large residential communities became the norm, and from 1940 to 1960, homeownership increased from 44 percent to 62 percent.[20] These new developments incorporated restrictive covenants dictating how homeowners could use their property, as famously illustrated by Abraham Levitt—one such developer who fined homeowners for failing to properly maintain their lawns.[21] During the 1960s and 1970s, prospective homeowners realized that by pooling their resources with others in the community, they could enjoy amenities they would otherwise be unable to afford.[22] This attraction contributed to the rise of common-interest communities, such as condominiums, co-ops, and planned unit developments ("PUDs").[23] The power of the restrictive covenant also allowed homeowners to control the type of individual that could purchase in their neighborhood.[24] Racially restrictive covenants became popular in neighborhoods where Caucasian individuals wanted to maintain the white-washed aesthetics of their communities.[25]

Over time, the HOAs' self-governing role caused it to be embraced by local municipalities as well as the State.[26] Because the HOA dictates the behavior and appearance of its community, it theoretically maintains the property value of the community's homes.[27] After the 1970s, mortgage securitization provided the dual advantage of allowing investors access to mortgage markets as a potential investment as well as giving lenders increased liquidity.[28] This development has decreased the autonomy that a homeowner once had—today, the homeowner is tied to a global market, which in turn shapes the community in which he lives.[29]

While the HOAs' rise in popularity was partially due to the image of stability and a homogeny that was appealing to many, today a potential homeowner often lacks a choice in whether to reside in an HOA community.[30] In 1970, 2.1

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[18] *See* Boudreaux, *supra* note 9, at 486; James Fraser et al., *The Privatization of Neighborhood Governance and the Production of Urban Space*, 48 ENV'T & PLAN. 844, 847 (2016).
[19] *See* Boudreaux, *supra* note 9, at 486.
[20] Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 197 (2015).
[21] Fraser et al., *supra* note 18, at 847.
[22] UNIF. COMMON INTEREST OWNERSHIP ACT prefatory note at 6 (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014) [hereinafter UCIOA].
[23] *Id.*
[24] Boudreaux, *supra* note 9, at 486–87.
[25] *Id.*
[26] *See* Fraser et al., *supra* note 18, at 848.
[27] *See* Callies et al., *supra* note 8, at 180–81.
[28] Fraser et al., *supra* note 18, at 848.
[29] *Id.*
[30] *See* CAI REPORT, *supra* note 3, at 1 (illustrating the number of homeowners' associations in 2016 as opposed to 1970).

million American residents lived in 10,000 community associations.[31] By 2016, 69 million residents lived in 342,000 community associations.[32] Some cities are so reliant on HOAs to maintain individual communities that they refuse to issue permits to developers who have not filed for an application to create CC&Rs and a homeowners' association.[33] As a result, most new residential developments involve a homeowners' association.[34] And, as HOAs have increased in prominence, they have also increased in power.[35] Often, the increase in power gives rise to an increase in problems.

Originally the CC&Rs resembled zoning laws and governed issues such as whether developments would be limited to single-family homes and whether they could contain both one and two-story residences.[36] However, CC&Rs today govern a much broader swath of issues.[37] HOAs, although regulated by the state, are not governmental organizations and consequently lack the restrictions that bind public entities.[38] As long as the HOA board is "in accordance" with the original CC&Rs, an HOA is free to promulgate additional rules.[39] An HOA may govern what color a homeowner may paint their house, whether they may have a reduced-water landscape, whether they can put a "for-sale" sign in front of their house, what type of pets are allowed, and even the type of curtains hanging indoors.[40] While undoubtedly there are some that look askance at their neighbors and give thanks that Cousin Eddie won't be able to pull up in the RV and dump the contents into the sewer,[41] the fact remains that homeowners are severely limited as to how they can use their property.

In addition to imposing restrictions, HOAs have various methods of enforcing rules. Some communities utilize a stern letter or a targeted warning in the weekly newsletter, while other associations freely dispense fines in re-

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31 *Id.*

32 *Id.*

33 Fraser et al., *supra* note 18, at 848.

34 *See* Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 236–37 (2006).

35 *See infra* Section III.A.

36 *See* Boudreaux, *supra* note 9, at 491.

37 *Id.* ("The covenants in the experimental days of *Tulk* and *Neponsit* addressed only fundamental matters, such as assuring that the land remained residential and that payments be made to support the HOA and common areas. Today, however, sets of HOA covenants have grown increasingly complex and have intruded more deeply into the 'castle' of the homeowner.").

38 *Id.* at 493.

39 *Id.*

40 Barbara Holland, *Homeowner Blocked from Posting For-Sale Sign*, LAS VEGAS REV. J. (Dec. 20, 2015 5:05 AM), https://www.reviewjournal.com/homes/resale-news/homeowner-blocked-from-posting-for-sale-sign/ [https://perma.cc/C4DS-CFJ5]; *see* Boudreaux, *supra* note 9, at 509 (discussing amendment of Florida state code to allow homeowners to have a reduced-water landscape); Franzese, *supra* note 5, at 336.

41 *See* NATIONAL LAMPOON'S CHRISTMAS VACATION (Warner Bros. 1989).

sponse to actual or perceived violations.[42] These fines can pile up and—in some jurisdictions—allow the association to foreclose on the home without judicial approval, assuming first-lien position over the lending bank.[43] Initially proposed in the Uniform Common Interest Ownership Act, these "super-priority liens" have been heavily litigated with a number of different results.[44]

A. Let's Get Our Act Together: The Creation and Implementation of the Uniform Common Interest Ownership Act

In order to understand the legal power that HOAs today possess, it is best to start with a historical understanding of the laws that govern them, specifically: the Uniform Common Interest Ownership Act (UCIOA).[45] The National Conference of Commissioners on Uniform State Laws passed the UCIOA in 1982, after nine years of research and drafting.[46]

Prior to the UCIOA, condominiums were highly regulated by state statutes which typically lacked adequate consumer protection provisions.[47] Co-operatives and planned developments were regulated less stringently, and the governing laws often contained confusing language and misused terms, giving property owners different "bundles of rights" and causing difficulties for lenders attempting to assess the best method of financing for a particular state.[48]

1. Condominiums

The first uniform act—the Uniform Condominium Act—was adopted by the Conference in 1977.[49] Prior to 1977, many states modeled their statutes after Puerto Rico's 1958 statute concerning condominium governance, or the 1962 Federal Housing Administration's model condominium statute.[50] However, these statutes proved inadequate as condominiums gained in popularity, due to the notable absence of consumer protection provisions and lack of flexibility governing the use and creation of condominiums.[51] States, responding to these concerns, drafted a second-generation of statutes, which soon proved to highlight other areas lacking in regulation.[52] Furthermore, states varied widely in

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[42] Franzese, *supra* note 5, at 342; Daniel Goldmintz, Note, *Lien Priorities: The Defects of Limiting the "Super Priority" for Common Interest Communities*, 33 CARDOZO L. REV. 267, 283 (2011).
[43] Gloeckner, *supra* note 4, at 330.
[44] *See infra* Section I.B.
[45] UCIOA prefatory note at 6 (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014).
[46] *Id.*
[47] *Id.* at 7.
[48] *Id.* at 6.
[49] *Id.* at 7–8.
[50] *Id.* at 7.
[51] *Id.*
[52] *Id.*

their language and interpretations, causing the Conference to adopt the Uniform Condominium Act ("UCA").[53]

2. Planned Developments

The Conference adopted the second uniform act—the Uniformed Planned Community Act—in 1980.[54] Planned communities were partially a by-product of zoning laws intended to maximize available land by clustering together new housing.[55] Because these planned communities emerged from local governments and zoning ordinances, rather than state statutes, they operated for years under common law.[56] However, common law was unable to address all of the regulatory issues and consumer protection concerns that statutes were addressing for condominiums.[57] Developers also began to favor planned communities over condominiums in order to avoid the disclosure and escrow requirements, as well as restricted practices associated with the regulated condominiums.[58] Furthermore, lack of regulation meant that the HOAs that emerged with these planned communities came in all shapes and sizes. In response, the Uniform Planned Act, closely modeling the Uniform Condominium Act, was adopted.[59]

3. Cooperatives

The third Uniform Act adopted by the Conference was the Model Real Estate Cooperative Act, adopted in 1981.[60] In 1978, the Conference decided that the Uniform Planned Community Act and the Uniform Condominium Act should be identical whenever possible, envisioning a future where the two Acts would be consolidated.[61] Thus, the Model Real Estate Cooperative Act mirrored the two prior Acts wherever possible.[62] The Conference drafted the Act with the goal of providing lenders, developers, and consumers a "coherent and consistent pattern of rights and obligations applicable to all 'common interest' developments, whether organized as condominiums, planned communities or cooperatives."[63]

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53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 8.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*

4. Consolidation

The Conference's adoption of the UCIOA consolidated the three prior Acts and added generic definitions.[64] The "condominium" was defined as a common-interest community where "portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions."[65] The "cooperative" was defined as a common-interest community where "the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit."[66] "Planned community" was meant to include any type of common-interest community that was not a condominium or cooperative.[67] Most importantly, the "common-interest community" definition stated that " '[c]ommon-[i]nterest [c]ommunity' means real estate with respect to which any person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration."[68]

The language and section numbering of the UCIOA followed its predecessors as much as possible, but important differences between the Acts were preserved when necessary.[69] The result was designed to offer states choices when considering legislation for common-interest communities.[70] States desiring to implement legislation touching all common-interest communities could adopt the UCIOA.[71] States wanting to regulate for the first time or to modernize their regulations regarding condominiums, cooperatives, or planned communities were able to adopt one of the earlier acts.[72] Furthermore, the drafters wrote with the intent that a state having previously adopted one of the three original acts could, with few amendments, adopt the UCIOA, thereby extending coverage to all forms of community ownership.[73]

The important components of the UCIOA's definition of the common-interest community were (1) a "unit" must exist within the common-interest community that is a both a physical piece of the real estate and designed for

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64 Norman Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 REAL PROP. PROB. & TR. J. 757, 758–59 (1982).
65 *Id.* at 760 (quoting UCIOA § 1-103(8) (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014)).
66 *Id.* (quoting UCIOA § 1-103(10) (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014)).
67 *Id.* at 761.
68 *Id.* at 759 (quoting UCIOA § 1-103(7) (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014)).
69 UCIOA prefatory note at 10 (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014).
70 *Id.* at 11.
71 *Id.*
72 *Id.*
73 *Id.*

separate occupancy.[74] The unit's "owner must make the designated payments with respect to 'other real estate described in a declaration;' and (2) those payments must be mandatory."[75] These developments "thus exclude from UCIOA any development where there is no division of the property into 'units' and 'other real estate' and any such development organized on a voluntary rather than compulsory membership basis."[76]

B. Everyone Has to Pay Their Dues: Unpaid Assessments and the Super-Priority Lien

Common-interest communities have historically imposed fees as a way to pay for community expenses such as property management, landscaping service, utilities, and insurance, as well as community amenities such as clubhouses and pools.[77] The drafters of the UCA, and later the UCIOA, foresaw that common-interest associations would need to protect their interest in these fees.[78] Thus, the UCIOA included a way for the association to collect delinquent fees: the UCIOA allows common-interest associations who are owed fees to move into "super-priority" status ahead of other creditors by recouping unpaid assessments in a foreclosure action.[79]

A lien operates by attaching to a property and serving as a flag that the titleholder has an unpaid debt, and that the property is collateral for that debt.[80] If the titleholder fails to repay what he owes, the lienholder may foreclose on the property, using the funds from the sale to attempt and recoup the cost of the debt.[81] When multiple liens exist on a property, they are ranked in order to determine who has priority in the repayment of the loans.[82] The debt with the highest priority is the senior lienholder, and all other liens are junior to it.[83] Should a senior lienholder foreclose on the property, all junior liens are extinguished.[84] However, if a junior lienholder forecloses, all senior liens remain intact, and the property passes to the new owner burdened by these encumbrances.[85] The traditional order of liens under statutory law is as follows: real estate taxes, and after the taxes are paid, the first mortgage, followed by any second-

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[74] Geis, *supra* note 64, at 759–60.
[75] *Id.* at 760.
[76] *Id.*
[77] *See* Goldmintz, *supra* note 42, at 268.
[78] *Id.* at 274.
[79] Gloeckner, *supra* note 4, at 329 (describing Nevada's statutory super priority lien provision).
[80] Goldmintz, *supra* note 42, at 270.
[81] *Id.*
[82] *Id.* at 268–69.
[83] *Id.* at 269.
[84] Andrea J. Boyack & William E. Foster, *Muddying the Waterfall: How Ambiguous Liability Statutes Distort Creditor Priority in Condominium Foreclosures*, 67 ARK. L. REV. 225, 227 (2014).
[85] *Id.* at 234–36.

ary mortgages and all other liens.[86] The prioritization of the mortgages is, in part, common sense—the mortgager typically has much more at stake than the other lienholders on the property, and common law has traditionally respected the principle of "first in time, first in right."[87]

The super-priority lien, however, breaks this traditional chain, allowing the HOA to assume position over the senior lienholders, both allowing foreclosure and extinguishing all subsequently subordinated liens.[88] Proponents of the super-priority lien assert that when one homeowner in a common owner association defaults, the burden of the unpaid assessments then falls to the remaining owners.[89] The HOA must either spread the cost to the homeowners or reduce the services and amenities it provides.[90] Additionally, pro-HOA groups assert that by allowing the mortgager to remain senior in such situations, the harm to the community only multiplies.[91] In a weak economy, a bank is incentivized to delay foreclosure proceedings until the market appears to recover, in order to get the biggest dollar amount possible.[92] This delay causes delinquent assessments to increase, furthering the burden on the association and community.[93]

The UCIOA created a limited priority over mortgages in first-lien position, providing associations with six months' worth of assessments due immediately upon a lien enforcement.[94] UCIOA provisions were intended to provide balance between the protection of lenders' security interests and the protection of the association's deficient operating expenses.[95] As of 2013, at least twenty jurisdictions, including Nevada, have put a statutory provision in place to provide associations with super-priority position for at least six months of unpaid assessments.[96] In theory, this provision was meant to encourage banks to simply institute foreclosure proceedings and pay off the nominal amount owed to the associations.[97] However, both the interpretations and implementation of the statutes have varied. The states differ widely on details, such as whether collection costs and attorneys' fees are included in the liens, whether the lien assumes

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[86] Casey Perkins, Note, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 NEV. L.J. 561, 569 (2010).
[87] Goldmintz *supra* note 42, at 270–71, 271 n.24.
[88] Perkins, *supra* note 86, at 569.
[89] *Id.* at 568.
[90] Boyack & Foster, *supra* note 84, at 239.
[91] Perkins, *supra* note 86, at 572–73.
[92] *Id.* at 570.
[93] *Id.*
[94] UCIOA § 3-116 (1982) (NAT'L CONFERENCE COMM'RS UNIF. STATE LAWS, amended 2014); Goldmintz, *supra* note 42, at 268–69.
[95] UNIF. CONDO. ACT § 3-116 cmts. 1 & 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1980).
[96] JOINT EDITORIAL BD. FOR UNIF. REAL PROP. ACTS, THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT 2–3 (2013); Boyack & Foster, *supra* note 84, at 262.
[97] UNIF. CONDO. ACT § 3-116 cmt. 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1980).

priority over first and second position mortgages, and whether the statute applies to homeowners' associations, condominium associations, or both.[98]

These differences and the uncertainty over what exactly the super-priority lien guarantees have resulted in widely varying interpretations in legislatures and courts across the country.[99] The Great Recession, followed by unemployment and foreclosures forced the vagueness surrounding the super-priority liens into the spotlight.[100] To lend some clarity to this struggle, the UCIOA was amended in 2014 to clarify that the super-priority lien is a true lien, not merely a payment-priority lien, and that when an association forecloses on a property, the lender's interest is not extinguished unless the association provided proper notice.[101]

II. THE COURTS SPLIT: NEVADA AND THE SUPER-PRIORITY LIEN

Nowhere was the debate about super-priority liens more heated than Nevada.[102] In 1991, Nevada adopted and modified the UCIOA.[103] The act was introduced as Assembly Bill 221, and after adoption, introduced by the legislature as Nevada Revised Statutes (NRS) Chapter 116, or the Nevada Uniform Common Interest Ownership Act.[104] NRS 116 governs common-interest associations and states in part:

> A lien under this section is prior to all other liens and encumbrances on a unit except: . . . [a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent . . . . A lien under this section is prior to all security interests described in paragraph (b) of subsection 2 to the extent of: [a]ny charges incurred by the association on a unit pursuant to NRS 116.310312 [and to the extent of t]he unpaid amount of assessments, not to exceed an amount equal to assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding the date on which the notice of default and election to sell is recorded pursuant to paragraph (b) of subsection 1 of NRS 116.31162 . . . ."[105]

Under NRS 116, nine months of delinquent assessments (six months prior to the statute's amendment), places an HOA into first-lien position over a

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98 Boyack & Foster, *supra* note 84, at 254–55, 254 n.164.
99 *See generally id.* at 255–58.
100 Aušra Gaigalaitė, Note, *Priority of Condominium Associations' Assessment Liens vis-à-vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 SEATTLE U. L. REV. 841, 848 (2017).
101 *Id.*
102 *See generally* Gloeckner, *supra* note 4, at 327–28.
103 *Id.* at 329.
104 *Id.*
105 NEV. REV. STAT. § 116.3116(2)–(3) (2017).

mortgage lender, enabling the HOA to institute a non-judicial foreclosure.[106] The foreclosure starts with the association recording a "notice of delinquent assessment ('NDA')."[107] Recording the NDA is optional, but most associations choose to record it.[108] Within thirty days of the mailing of the NDA, the association may record a "notice of default and election to sell the unit" (NOD).[109] Ninety days after the NOD is recorded, the association must give notice of the sale "in the manner and for a time not less than that required by law for the sale of real property upon execution."[110] The property is then sold at a cash auction to a third-party buyer who typically pays far below market value.[111] Once the association receives the funds from the sale, the proceeds are applied as follows:

> "(1) The reasonable expenses of sale; (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association; (3) Satisfaction of the association's lien; (4) Satisfaction in the order of priority of any subordinate claim of record; and (5) Remittance of any excess to the unit's owner."[112]

Originally, the bank's lien remained in place, and if the third-party buyer failed to satisfy this lien upon the purchase of the house, the bank would simply institute foreclosure proceedings upon the new owners.[113]

In response to this process, both mortgage lenders and third-party buyers began to institute proceedings challenging the vagueness of NRS 116, which set forth the provisions for foreclosure proceedings.[114] The first battle dealt with what types of costs could be included under the assessments.[115] In 2006, prior to the enactment of nine months of unpaid assessments, the Court held in *Korbel Family Trust v. Spring Mountain Ranch Master Ass'n* that the six months of unpaid assessments could include interest, legal fees, and collection costs.[116] In 2009, after complaints about excessive collection costs, the Nevada Legislature enacted a law limiting associations to fees "reasonable" to collecting delinquent obligations.[117] In 2012, the State of Nevada Department of

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106 *See* Gloeckner, *supra* note 4, at 330.
107 *Id.* at 333.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.* at 328.
112 *Id.* at 333 (quoting NEV. REV. STAT. § 116.31164(3)(c) (2017)).
113 *Id.* at 334.
114 *Id.*
115 *Id.* at 330.
116 *Id.* at 330 (citing Order, Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, No. 06-A-523959-C (Nev. Dist. Ct. Dec. 22, 2006)).
117 *Id.* at 330–31.

Business and Industry, Real Estate Division ("NRED"), issued an advisory opinion stating that "costs of collecting" are not included in a lien under NRS 116.3116.[118] If the association incurs more than nine months of delinquent assessments and other costs associated with the foreclosure process, the homeowner becomes personally liable for the expenses.[119] If the homeowner fails to pay these expenses, the HOA is limited to recouping its costs from the foreclosure sale.[120]

The second issue to be widely litigated was whether the mortgage lender's lien survived the super-priority lien, or whether it was extinguished in the foreclosure, allowing the third-party buyer to assume title free of encumbrances.[121] The litigants were split into two groups: the first group supported the interests of the HOAs and the third-party buyers, and argued that the bank's liens were extinguished in the foreclosure.[122] The second group supported the interests of the banks and argued that the subordinate liens survived the foreclosure—giving banks both the potential to collect some proceeds from the auction *and* the right to foreclose on the third-party buyer should they fail to satisfy the property's existing encumbrances.[123]

Nevada courts interpreting NRS 116 were split into pro-HOA and pro-bank camps as well.[124] The courts debated over the language of NRS 116, with the pro-HOA litigants arguing that because the CC&Rs were recorded prior to the lender recording the deed of trust, the HOAs' liens were "first in time and, therefore, first in right."[125] However, pro-bank courts asserted that a first mortgage that is recorded prior to a deficiency in the assessments assumes seniority to all except the nine months of delinquent assessments.[126]

Additionally, the courts have looked to legislative intent in trying to determine how to interpret NRS 116.[127] From 1991 to 2009, the legislature did not make any changes to the super-priority-lien language, with the exception of the

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118 Nev. Dep't of Bus. & Indus., Real Estate Div., Advisory No. 13-01, The Super Priority Lien at 10 (Dec. 12, 2012).

119 Press Release, Nev. Dep't of Bus. & Indus., Real Estate Division Issues Super Priority Lien Advisory Opinion (Dec. 13, 2012), http://business.nv.gov/News_Media/Press_Releases/2012/Real_Estate/Real_Estate_Division_Issues_Super_Priority_Lien_Advisory_Opinion/ [https://perma.cc/P82N-Q6V9].

120 *Id.*

121 Gloeckner, *supra* note 4, at 335.

122 *See* Order Denying Defendant's Motion to Dismiss at para. 17, First 100, LLC v. Burns, No. 13A677693 (Nev. Dist. Ct. May 31, 2013), 2013 WL 8365157, at *4; Gloeckner, *supra* note 4, at 335.

123 Order Denying Defendant's Motion to Dismiss, *supra* note 122, at para. 17; Gloeckner, *supra* note 4, at 335.

124 Gloeckner, *supra* note 4, at 335.

125 Appellant's Opening Brief at 14, SFR Invs. Pool 1, LLC v. Bank of Am., N.A., 334 P.3d 408 (Nev. 2014) (No. 63313).

126 Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d. 1222, 1225 (D. Nev. 2013).

127 Order Denying Defendant's Motion to Dismiss, *supra* note 122, at para. 33.

increase from six months to nine.[128] Because the language of NRS 116 was nearly identical to the UCIOA, courts studied the comments of the UCIOA for clarity.[129] Section 3-116, Official Comment 1 states that the holder of the senior lien could simply pay the delinquent assessments, thus preventing foreclosure and maintaining their own interests.[130] However, the drafters either failed to include or purposely omitted any mention of extinguishment should the first lienholder fail to pay the HOA's assessments.[131]

Even seeking out clarity from one of the UCIOA drafters failed to resolve the issue. The Common-Interest Committee of the Real Property Section of the Nevada State Bar ("Committee") sought direction from Carl H. Lisman, one of the UCIOA's drafters.[132] In a letter to the Committee, Lisman stated "[t]he association enjoys a statutory limited priority ahead of a first security interest similar to the priority given to property taxes and other governmental charges. Because of the statutory priority, foreclosure by the association extinguishes the first security interest and all other junior interests."[133]

Although clear, pro-bank groups assert that Lisman's letter establishes that extinguishment is only proper when the bank has been properly joined or notified, ignoring the fact that under the Statute, notice to the lender is not required.[134] Additionally, pro-bank groups assert that, as Lisman's letter conflicts with the UCIOA's official comments, it should be disregarded by courts.[135]

Conversely, pro-HOA groups argued that pursuant to NRS 40.462, NRS 107.080, or NRS 107A.260, any foreclosure sale extinguishes junior liens.[136] Because NRS 116 was enacted after NRS 40.462 and NRS 107A.260 and fails to mention extinguishment, the legislators must have intended that foreclosures pursuant to NRS 116 be conducted the same as all other foreclosures.[137]

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128 Gloeckner, *supra* note 4, at 337–38.
129 Order Denying Defendant's Motion to Dismiss, *supra* note 122, at para. 23–25.
130 *Id.* at para. 42.
131 Gloeckner, *supra* note 4, at 338.
132 Letter from Carl H. Lisman, Comm'r, Unif. Law Comm'n, to Michael E. Buckley & Karen D. Dennison, Co-Chairs, Common-Interest Comm., Nev. State Bar Real Prop. Section, (May 29, 2013), https://www.nvbar.org/wp-content/uploads/RP_Lisman%20on%20Super%20Priority%20May%202013.pdf [https://perma.cc/48LY-RNXL].
133 *Id.*
134 Gloeckner, *supra* note 4, at 339.
135 Amicus Curiae Brief of the Nevada Bankers Association in Support of Motion to Dismiss at 30, SFR Invs. Pool 1, LLC v. U.S. Bank Nat'l Ass'n, No. A-13-678858-C (Nev. Dist. Ct. Aug. 1, 2013), 2013 WL 12357521.
136 Order Denying Defendant's Motion to Dismiss, *supra* note 122, at para. 30 ("For example, the holder of a mortgage may initiate a judicial foreclosure via NRS 40.430 et seq. The holder of a deed of trust may also initiate a non-judicial foreclosure (commonly known as a 'Trustee's Sale') pursuant to NRS 107.080 et seq. A landlord . . . may also seek the appointment of a receiver to initiate a foreclosure upon a security instrument pursuant to NRS 107A.260.").
137 *Id.* at para. 33.

Furthermore, courts have considered public policy when raising a flag in either the pro-HOA or pro-bank camp.[138] Proponents of the HOAs have argued that because NRS 116 requires associations to provide multiple notices to lenders, the banks have time to intervene in any proceedings.[139] The NRS sets forth the requirements for non-judicial foreclosures as: (a) "thirty days between mailing the notice of delinquent assessments and recording and mailing of the notice of default and election to sell";[140] (b) "ninety days between recording and mailing the notice of default and recording and mailing the notice of sale";[141] and (c) "twenty-one days['] notice between the notice of sale and the actual sale."[142] Additionally, the HOA's notice of Trustee's Sale informs lenders:

> "WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY."[143]

Banks argue that it is grossly unfair for a third-party buyer to obtain a property for a nominal amount, thereby extinguishing a lien that could potentially be worth far more.[144] In response, the HOAs assert that the unfairness lies in letting an innocent third-party obtain a property only to have the bank foreclose on it once more.[145] To this, lenders assert that a third-party buyer should be savvy enough to understand that the amount paid for the property is almost certainly less than what is needed to satisfy any encumbrances, and they should therefore take into consideration the fact that they could potentially lose the property.[146] Proponents of bank interests further argue that the delinquent assessments are almost always a nominal amount in comparison to the existing mortgage, and that rather than creating a court system where banks feel compelled to foreclose at the first sign of trouble, instead, banks should be incentivized to help homeowners remain in their property.[147] Furthermore, "[t]he services provided by an HOA are luxuries, not necessities," and HOAs both

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138 Gloeckner, *supra* note 4, at 343.
139 Appellant's Opening Brief, at 33, SFR Invs. Pool 1, LLC v. US Bank, N.A., 334 P.3d 408 (Nev. 2014) (No. 63078).
140 *Id.* at 34 (citing NEV. REV. STAT. §§ 116.31162(1)(b)–(c), 116.31163, 116.31168 (2017)).
141 *Id.* (citing NEV. REV. STAT. §§ 116.311635, 116.31163, 116.31168 (2017)).
142 *Id.* (citing NEV. REV. STAT. §§ 116.311635(1)(a), 21.130(1)(c) (2017)).
143 *Id.* at 36 (citing NEV. REV. STAT. § 116.311635(3)(b) (2017)).
144 *See* Gloeckner, *supra* note 4, at 345.
145 Order Denying Defendant's Motion to Dismiss, *supra* note 122, at para. 39.
146 *Id.* at para. 40.
147 Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, No. 2:13-cv-895-JCM (GWF), 2013 WL 4048573, at *5 (D. Nev. Aug. 9, 2013).

provide the least amount of services to a homeowner and assume the least amount of risk in comparison to other lenders.[148]

A. *The Judicial System Provides Clarity?*

Finally, on September 18, 2014, in *SFR Investments Pool 1 v. U.S. Bank*, the Nevada Supreme Court resolved the dispute, decisively ruling that a super-priority lien is a true lien in first position, rather than a first payment position, and that even a non-judicial foreclosure extinguishes a mortgager's claim.[149] The Court's opinion stated that the HOA lien is divided into two pieces, the "super-priority piece" and the "sub-priority piece."[150] The super-priority lien is the piece that is the true lien, and includes the nine months of unpaid assessments, maintenance, and nuisance-abatement charges.[151] The sub-priority piece, however, is subordinate to the mortgage, and includes all other fees and assessments owed to the HOA.[152]

The Court, however, failed to discuss what would happen if the bank did not receive notice, or if the HOA was uncooperative in either communication or the reasonableness of the amounts demanded.[153] Furthermore, the Court failed to discuss the validity of HOA foreclosures where the bank attempts to settle the amount owed and the HOA refuses to comply.[154] The Court also did not clarify if banks could take any action against third-party buyers.[155] In response, the Governor of Nevada signed Senate Bill 306, which drastically changed foreclosure proceedings when it took effect in October 2015.[156] The law created a sixty-day redemption period after a foreclosure sale for both homeowners and lenders, clarified the amounts that could be included in the super-priority lien, and mandated that associations notify subordinate lienholders of the foreclosure proceedings.[157]

Complicating matters further, in *Bourne Valley v. Wells Fargo*, the Ninth Circuit interpreted the pre-2015 NRS statute, which required lenders to "opt-in" for affirmative notices regarding foreclosures in favor of banks.[158] In *Bourne*, an HOA foreclosed on a property that was delinquent on assessment fees, and the property was sold at auction and the interest conveyed to Bourne Valley

148 *Id.*
149 SFR Invs. Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408, 413–14 (Nev. 2014).
150 *Id.* at 411.
151 *Id.*
152 *Id.*
153 Gloeckner, *supra* note 4, at 348.
154 *Id.*
155 *Id.*
156 Gaigalaitė, *supra* note 100, at 855.
157 *See* NEV. REV. STAT. §§ 116.3116–116.31168 (2017); S.B. 306, 78th Leg., Reg. Sess. (Nev. 2015).
158 *See* Bourne Valley Court Tr. v. Wells Fargo Bank, NA, 832 F.3d 1154, 1156 (9th Cir. 2016).

Court Trust.[159] Bourne Valley attempted to file a quiet title action, and the district court ruled that in accordance with the Court's decision in *SFR*, Wells Fargo's interest was extinguished by the foreclosure.[160] When the Ninth Circuit Court of Appeals heard the case, they derided the burden placed on lenders to stay abreast of potential delinquencies in property-holders' HOA fees.[161] The Ninth Circuit was puzzled "[h]ow the mortgage lender, which likely had no relationship with the homeowners' association, should have known to ask [about potential delinquencies] . . . ."[162] The Ninth Circuit ultimately held that the pre-2015 statute did not incorporate the notice requirements from NRS 107.090.[163] This distinction led the Court to declare that NRS 116 was a facially unconstitutional violation of mortgage lenders' due process rights, and that the mere enactment of the statute was enough to satisfy the state action requirement.[164]

The Nevada Supreme Court, in *Saticoy Bay v. Wells Fargo*, expressly declined to follow the Ninth Circuit's *Bourne Valley* decision.[165] The Court held that neither the Due Process or Takings Clause of the Constitution were implicated in HOA nonjudicial foreclosures, but did not determine whether NRS 116 incorporated the notice requirements in NRS 107.090.[166] However, the Nevada Supreme Court did agree to answer the certified question of:

> "Whether NRS § 116.31168(1)'s incorporation of NRS § 107.090 required a homeowner's [sic] association to provide notices of default and/or sale to persons or entities holding a subordinate interest even when such persons or entities did not request notice, prior to the amendments that took effect on Oct 1, 2015?"[167]

While awaiting the answer to this question, the potential resolution did nothing to lessen the existing strain on the court system. Because of the split in authority, many cases that were already years into litigation were stayed awaiting the Court's opinion.[168]

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159 *Id.*

160 *Id.* at 1156–57.

161 *Id.* at 1158.

162 *Id.*

163 *Id.* at 1159. *See also* NEV. REV. STAT. § 107.090 (2017) (requiring that notice of default be sent to "[e]ach person who has recorded a request for a copy of the notice; and [e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust.").

164 *Bourne Valley Court Tr.*, 832 F.3d at 1160.

165 Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., 388 P.3d 970, 974 n.5 (Nev. 2017).

166 *Id.* at 971, 974.

167 Order Accepting Certified Question, Directing Briefing and Directing Submission of Filing Fee, SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon, No. 72931 (Nev. Jun. 13, 2017).

168 *See, e.g.*, U.S. Bank Nat'l Ass'n v. King, No. 2:17-cv-01102-JAD-GWF, 2017 WL 5466617, at *3 (D. Nev. Nov. 14, 2017) (order staying case and denying motion for summary judgment); Bank of N.Y. Mellon v. Trust, No. 2:16-cv-02721-JAD-GWF, 2017 WL 5466616, at *3 (D. Nev. Nov. 14, 2017) (order staying case and denying all pending motions); Bank of N.Y. Mellon v. Northgate Homeowners Ass'n, No. 2:17-cv-02192-JAD-

The Court eventually answered that NRS 116 *had* incorporated the notice provisions of NRS 107.090 and required that notice be provided to all persons whose liens were subordinate to the super-priority lien.[169] However, this did not mean that the express notice provisions of NRS 116—requiring notice be provided to those who had previously opted in—were rendered superfluous.[170] Rather, those who could *choose* to opt-in to notice were not necessarily the same as *required* to receive notice; therefore both the opt-in and express notice provisions served a specific purpose.[171] This, the Court stated, "eliminated the redundancy of both incorporating NRS 107.090 and requiring notice to all known lienholders . . . ."[172] Thus, NRS 116's incorporation of NRS 107.090 included the mandate to provide notice to all subordinate interests.[173] The Court declined to address the issue of whether notice was properly given; however, the issue of whether NRS 116 deprived banks of due process was neatly dismissed.[174] With the resolution of this question, Nevada continues its creeping towards resolution of the super-priority chaos, one issue at a time.

III. BANKS HAVE RIGHTS. HOMEOWNERS' ASSOCIATIONS HAVE RIGHTS. WHAT ABOUT THE HOMEOWNERS?

With the abundance of litigation regarding HOAs, banks, and super-priority liens and the questionable violation of home lenders' constitutional rights, it is easy to overlook the potential violations of homeowners' rights. Although Nevada legislation recognizes that one's home is his castle,[175] that refrain loses its luster when the castle resides within the confines of a common-interest community. For better or worse, an individual seeking to buy a home in the Las Vegas metro area will likely have no choice but to purchase a home that is controlled by an HOA.[176] Although it is unknown how many communities exist in Nevada, as of December 2017, 3,201 HOAs were registered with

GWF, 2017 WL 5466615, at *3 (D. Nev. Nov. 14, 2017) (order staying case and denying all pending motions); Ditech Fin. LLC v. Res. Grp. LLC, No. 2:17-cv-01823-JAD-CWH, 2017 WL 5467729, at *3 (D. Nev. Nov. 14, 2017) (order staying case and denying pending motions); Ditech Fin. LLC v. Lockmor Holdings, LLC, No. 2:17-cv-01829-JAD-PAL, 2017 WL 5467732, at *3 (D. Nev. Nov. 14, 2017) (order staying case and denying pending motions). The District Court stayed these cases on the same day due to the authority split and awaited the Nevada Supreme Court decision.

169 SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon, 422 P.3d 1248, 1252 (Nev. 2018).

170 *Id.*

171 *Id.*

172 *Id.* at 1252 n.4.

173 *Id.*

174 *Id.* at 1250 n.2, 1251, 1253 n.5.

175 *See* NEV. REV. STAT. § 200.120 (2017) (the Castle Doctrine).

176 *See* Chadderdon, *supra* note 34, at 237–39.

the state Ombudsman, and from July through December, twenty-seven new associations were listed.[177]

Even if an individual chooses to purchase a home in a common-interest community, her daily life could be drastically impacted should the board of directors change or impose new rules. Although the regulations that guaranteed homogeny were an initial factor in the attractiveness of early common-interest communities, today the amount of control exercised by HOAs is staggering. Actions that would be constitutional violations if committed by a state government are allowable because they are conducted within a private neighborhood.[178] While the Fourth Amendment protects private citizens against unreasonable search and seizure by a public officer, those same protections do not extend to a private security guard employed by the community.[179] Neither does the Fourth Amendment protect homeowners from their HOA ordering a search when a resident is reportedly a "hoarder."[180]

What about First Amendment rights? Free speech doesn't seem to be a priority within many communities, as many HOAs prohibit residents from placing any kind of sign on their front yards.[181] Furthermore, even the existence of gated communities may impinge on the Constitutional right to travel by preventing "outsiders" from accessing what once were public streets, an issue that was litigated in *Citizens Against Gated Enclaves v. Whitney Heights Civic Ass'n*.[182] There, the court held that a street lined with historic homes could only be removed from public use if unnecessary for transit; and the street in question was deemed necessary.[183] "The streets of a city belong to the people of the state, and the use thereof is an inalienable right of every citizen . . . ."[184]

Additionally, the basic concept of living in a community where individuals are forced to conform to a set of rules by established individuals who may or may not possess a drop of originality (or taste, for that matter) overlooks the

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177 NEV. DEP'T OF BUS. & INDUS. REAL ESTATE DIV., COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS OMBUDSMAN'S OFFICE REPORTING PERIOD JULY 1–DECEMBER 31, 2017, at 9 (2018). http://red.nv.gov/uploadedFiles/rednvgov/Content/Meetings/CIC/2018/Supporting_Materials/March/Ombudsman's%20Report.pdf [https://perma.cc/TJL2-53RW].

178 *See* Callies et al., *supra* note 8, at 188–89 ("[I]n order to wage a constitutional challenge against a gated community for discrimination, exclusion, or a violation of civil rights and liberties, the gated community must be deemed a 'state actor.' ").

179 *Id.* at 190.

180 *Cf. HOA Wants to Inspect Homes of People Suspected of Hoarding*, ORANGE COUNTY REG. (Jan. 18, 2011, 9:58 AM), https://www.ocregister.com/2011/01/18/hoa-wants-to-inspect-homes-of-people-suspected-of-hoarding/ [https://perma.cc/6MCK-TN34.] (describing proposed HOA policy allowing board members to inspect residents' homes following reports of suspected hoarding).

181 Chadderdon, *supra* note 34, at 234.

182 Citizens Against Gated Enclaves v. Whitney Heights Civic Ass'n, 28 Cal. Rptr. 2d 451, 453 (Cal. Ct. App. 1994).

183 *Id.* at 445.

184 *Id.* at 454 (quoting City of Lafayette v. Cty. Of Contra Costa, 154 Cal. Rptr. 374 (Cal. Ct. App. 1979)).

truth that our country is far from homogenous. The very differences that HOAs are designed to quash have led to many of the nation's greatest achievements. Furthermore, in a community where external perfection is demanded, and failure to adhere is met with fines (and potentially foreclosure), it is easy to forget that the residents are individuals with struggles, such that a weed-free yard may not be first on their list of priorities.

A. HOAs Gone Wild

HOAs frequently enforce rules that would otherwise be clear constitutional violations if committed by a state agency. Even apart from the constitutional aspect, the examples of HOAs promulgating regulations that lack common sense are, unfortunately, easy to find and range from the ridiculous to the tragic.

In Palm Springs, California, a HOA imposed a conduct code that held residents responsible for their own behavior, as well as the behavior of their guests and even vendors.[185] One resident was charged fifty-dollars when her carpet installer was caught driving seven miles over the thirty-five miles per hour speed limit.[186] Although homeowners complained that they should not be held accountable for the behavior of a third party, the HOA responded by purchasing a radar gun.[187]

In Tennessee, a three-year-old girl was nearly strangled to death by the cord on the blinds mandated by the neighborhood HOA.[188] Her family spent several thousand dollars fighting the association about the requirement, and after losing chose to move to a neighborhood without an HOA.[189]

After losing a leg when he stepped on a landmine, a Georgia Purple Heart veteran was confined to a wheelchair and subsequently gifted a home where he raises two children.[190] However, his failure to properly edge his yard and his placement of trash cans in a location easily accessed in a wheelchair led to his HOA assessing thousands of dollars in fines and attorney's fees and placing a lien on his home.[191]

A California homeowner had her home burglarized, and accordingly requested additional outdoor lights—a request denied by her HOA.[192] After

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185 Jay Root, *Retirees Have Carona's Company in Crosshairs*, TEX. TRIBUNE (May 21, 2013, 6:00 AM), https://www.texastribune.org/2013/05/21/california-retirees-rebel-against-hoa/ [https://perma.cc/QG5D-Q6CT].

186 *Id.*

187 *Id.*

188 Judy L. Thomas, *HOAs from Hell: More Horror Stories, More Fraud—and Prospect of Legislative Action*, KAN. CITY STAR (Dec. 24, 2016 8:44 PM), http://www.kansascity.com/news/special-reports/hoa/article122547749.html [https://perma.cc/7AC3-H8AP].

189 *Id.*

190 *Id.*

191 *Id.*

192 Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573, 575 (Cal. 1986).

choosing to install the lights anyway, the HOA forced her to dismantle them, a process which required her to shut off all other outdoor lights.[193] The night the lights were shut down, a burglar again broke into her home, robbing and raping her.[194]

These stories illustrate the horror that can arise from living in a community whose directors lack common sense. However, there are less dramatic stories about individuals who are ordered to paint their homes or make repairs and lack the financial means to do so. Should a homeowner be jailed for failing to comply with his HOA's landscaping mandates, after an increase in his adjustable rate mortgage left him short on cash?[195] Is it right for a man to lose his home after incurring fines for planting too many roses?[196] Should a woman whose husband is serving in Iraq be fined $1,000 for displaying a sign that says "Support Our Troops"?[197] Is it right for a woman raising five foster children to face eviction, because the association equated her state aid of $2,028 a month with running a business?[198] Every story features real people who have faced real distress as a result of their HOA.

At the heart of Nevada's super-priority epidemic are the people who have lost their homes. Some homeowners certainly made poor financial choices, overextending themselves and purchasing homes in communities that were far too expensive. However, the above stories illustrate the plethora of reasons that HOAs can and do impose fines, adding exponentially to the burdens of individuals already struggling.

B. Hands in the Cookie Jar

In addition to promulgating rules that defy common sense, HOAs, by nature, provide a large opportunity for financial abuse, a situation that seems to occur far too often in Nevada. In Las Vegas, two homeowners, one of them a board member, living in an age-qualified community became suspicious that the HOA was not returning excess dues to its homeowners.[199] The men unwisely chose to lodge an allegation of forgery with the local police, and after conducting an investigation, the police arrested the two homeowners for lodging a

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193 *Id.* at 576.
194 *Id.*
195 Erin Sullivan, *Residents Break Out Green Thumb*, TAMPA BAY TIMES, Oct. 13, 2008, at 1A.
196 Paul Bannister, *Homeowner Horror Stories: Associations are Heaven or Hell*, BANKRATE (Jan. 1, 2004), https://www.bankrate.com/finance/real-estate/homeowner-horror-stories-associations-are-heaven-or-hell.aspx [https://perma.cc/AR3A-HF8N].
197 Stephanie Hayes, *Under Public Eye, Sign Disappears*, TAMPA BAY TIMES, Apr. 29, 2006, at 3B.
198 Bannister, *supra* note 196.
199 J. Patrick Coolican, *Don't Question Your HOA or You Might Get Arrested*, LAS VEGAS SUN (Mar. 30, 2012, 2:00 AM), https://lasvegassun.com/news/2012/mar/30/dont-question-your-hoa-or-you-might-get-arrested/ [https://perma.cc/3T93-ZTRG].

false complaint.[200] However, the IRS conducted an audit of the HOA and determined that the association was in fact holding funds that should have been returned to the homeowners, in excess of $1 million.[201]

In another instance, a common-interest association manager embezzled $1.6 million from various HOAs by using electronic signatures to transfer money not approved by HOA boards into her own business accounts.[202] Yet another property manager hired by an HOA wrote checks to her construction company for work done to the community properties.[203] The checks were signed by herself and a man who she claimed was an HOA board member.[204] However, far from being a homeowner—his association with the community was limited to the janitorial services he provided to them.[205]

The biggest scandal to rock the common-interest communities occurred when a local construction boss, Leon Benzer, was convicted of accomplishing HOA takeovers by hiring straw men to apply for board positions, and then rigging the elections to ensure his candidates were elected.[206] The HOAs then proceeded to engage in construction defect litigation, directing the cases towards law firms complicit in the arrangement.[207] The corrupt boards would then hire Benzer's construction company who, rather than fixing the alleged defects, passed the funds along to Benzer instead.[208]

C. *No More Block Parties*

In addition to presenting opportunities for fraud, common-interest communities often serve to deter the creation of what their name would suggest: community.[209] Planned developments originally gained popularity in part because of the homogeneity that they provided; soon, communities realized that they could use the restrictive covenant to control not just the appearance of homes, but of the residents as well. The restrictive covenant "runs with the land" and has the power to bind future homeowners to its provisions. At one point, cove-

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200 *Id.*
201 *Id.*
202 Darcy Spears, *Community Manager Ordered to Pay $1.6 Million to HOAs*, KTNV (July 10, 2017, 7:36 AM), https://www.ktnv.com/news/contact-13/contact-13-community-manager-ordered-to-pay-16-million-to-hoas [https://perma.cc/5CW8-ZEPV].
203 Chandra v. Davis, Case Nos. 2016-3771, 2016-3832, 2017-290 (Nev. Comm'n for Common-Interest Cmtys. and Condo. Hotels Dec. 1, 2017), http://red.nv.gov/uploadedFiles/rednvgov/Content/Meetings/CIC/2017/Orders/DAVIS%20HELLEN%20AMANDA%202016-3771%202016-3832%202017-290.pdf [https://perma.cc/4LAN-TP9P].
204 *Id.*
205 *Id.*
206 Jeff German, *Once-Secret Papers Reveal How HOA Scheme Widened*, LAS VEGAS REV. J. (Aug. 16, 2015, 7:05 PM), https://www.reviewjournal.com/local/local-las-vegas/once-secret-papers-reveal-how-hoa-scheme-widened/ [https://perma.cc/T9KT-MVEF].
207 *Id.*
208 *Id.*
209 Franzese, *supra* note 5, at 346.

nants were created that prohibited non-white families from purchasing homes in certain neighborhoods, and this practice continued until 1948 when the Supreme Court, in *Shelley v. Kraemer*, expanded the state action doctrine to provide that courts could not enforce racially restrictive covenants.[210]

However, the sentiments that existed in 1948 still manifest themselves in common-interest communities today. Although communities may not be for "whites only," the mentality of "us versus them" is alive and well.[211] The decline of the middle class has sparked a fear to preserve "niceness," a concern that notably is more prominent "for those who only recently attained middle-class status."[212] Furthermore, communities with more prominent social and cultural diversity tend to have more rules and regulations.[213] Some communities have rules preventing trucks, discouraging residents who work in labor positions.[214] Gates, both literal and figurative, exist to keep "us" from "them," both inside and outside the community.[215] One author aptly describes the common-interest community as "a metaphor to describe the two Americas."[216]

Although some scholars have suggested that common-interest communities be subject to the analysis in *Marsh v. Alabama*, courts have been reticent to consider common-interest communities and HOAs as state actors, and thus subject to the same Constitutional limits as a municipality.[217] The rationale underlying courts' reluctance to apply significant restraints to HOAs arises partly out of the freedom to contract.[218] The theory is that individuals choose to reside in common-interest communities, and by entering into a contract with an HOA freely choose to be bound by its terms.[219]

This logic however, only prevails if individuals have a choice to purchase in a non-HOA community, and if individuals are fully aware of the rights they are relinquishing to their neighbors when they choose to purchase within an

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210 Shelley v. Kraemer, 334 U.S. 1, 22 (1948); *see also* Aaron R. Gott, Note, *Ticky Tacky Little Governments? A More Faithful Approach to Community Associations Under the State Action Doctrine*, 40 FLA. ST. U. L. REV 201, 209 (2012) ("Racial segregation was a marketing tool for early common interest community developers, and racial restrictive covenants were an intentional result of the planned community movement to which all community associations owe their existence.").

211 *See* Franzese, *supra* note 5, at 346.

212 *Id.* at 345.

213 *Id.*

214 *See* Boudreaux, *supra* note 9, at 492–93.

215 Franzese, *supra* note 5, at 346.

216 *Id.* at 347.

217 Gott, *supra* note 210, at 206–07. The Court determined in *Marsh v. Alabama* that a company-owned town could not "govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute." Marsh v. Alabama, 326 U.S. 501, 509 (1946). The town functioned like any other municipality but was privately owned. *Id.* The Court held that the town's ownership was not enough to justify depriving its residents or visitors of constitutional rights. *Id.*

218 Gott, *supra* note 210, at 204.

219 *Id.* at 211.

HOA community. Yet, with planned communities becoming the norm, the choice whether to reside in a common-interest community is becoming non-existent.[220] Furthermore, many individuals have stated that they were unaware of the scope of their community's CC&Rs when they purchased their home.[221]

IV. WHERE DO WE GO FROM HERE?

While HOAs do serve some positive roles, such as alleviating some of the burden from local municipalities and providing communities with assurances of a stable neighborhood aesthetic, they also possess the power to infringe on many individual rights.[222] The super-priority lien epidemic in Nevada demonstrates how much power these associations have, and how frequently the power is wielded.[223] The question now becomes: how do we move forward? It is unlikely that developers and cities will suddenly decide to cease the construction of common-interest communities, and the judicial system has thus far shown itself unwilling to drastically curtail the HOA's reach. The task, then, falls to our legislature to consider implementing safeguards which would not strip HOAs of their power, but rather ensure that the rights and power of the HOA and the homeowner are equitably balanced.

A. The Path Forward is Paved with Legislation

One approach to constrain HOAs is to adopt the approach proffered by the Restatement (Third) of Property. The Restatement would dictate that HOAs "treat members fairly" and that they "act reasonably in the exercising of its discretionary powers including rulemaking, enforcement, and design-control powers."[224] Additionally, the Restatement would constrain HOAs to "govern the use of individually owned property to protect the common property."[225] Furthermore, HOA boards would only possess the power to "adopt reasonable rules designed to . . . protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units . . . ."[226] HOAs would lack the power to inhibit "the use or occupancy of, or behavior within" a home, unless authorized by the master declaration.[227]

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220 *See* Gott, *supra* note 210, at 211–12 ("Empirically, residential property not subject to community association governance is increasingly scarce, raising a question of whether its purchase is truly a voluntary acquiescence to community association governance.").
221 Franzese, *supra* note 5, at 340.
222 *See* Chadderdon, *supra* note 34, at 237–38 (discussing Las Vegas zoning requirements); Gott, *supra* note 210, at 202.
223 *See supra* Part II.
224 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13(1) (AM. LAW. INST. 2000).
225 *Id.* § 6.7(1)(b).
226 *Id.* § 6.7(2).
227 *Id.* § 6.7(3).

Other scholars have suggested practical approaches to the HOA dilemma, several of which Nevada would be wise to consider. First, the State should require that all HOA board members undertake annual ethics and financial training.[228] This would ensure that board members otherwise unsuited to run a large community would at least have a foundation of knowledge about their responsibilities to their community members.[229] Furthermore, every HOA should be required to build into their budget a portion that would pay for regular third-party audits.[230] The results of the audit and a breakdown of how the community's funds are being spent should be distributed to each homeowner. This would both provide board members with accountability, and homeowners with transparency.

Finally, Nevada should create a statutory memorialization of homeowners' rights. Because courts have been reluctant to assign HOAs the same limitations that municipalities are bound by, it is difficult for a homeowner to prevail should they challenge their board of directors about an alleged violation.[231] Nevada is a national example of the legal maelstrom that can be created by an imbalance of power between homeowners and HOAs.[232] The reality exists that HOAs in Nevada, as well as the rest of the country, do commit acts that would be Constitutional violations if undertaken by a state government.[233] The irony of this situation is that federal courts have recognized that HOAs violated *banks'* rights by not providing notice of an impending foreclosure. How then, can the State ignore the infringement of individual rights committed by HOAs?

To combat this situation, the State must recognize that homeowners have specific rights upon which HOAs cannot encroach, and that can be enforced in a court of law if necessary.[234] These rights need not be as broad as those granted by the Constitution, but they should include a right to free speech, or expression.[235] This right should allow homeowners some limited ability to share their beliefs with the outside world.[236] This freedom need not allow a resident to cover their yard with hundreds of political signs or paint a flag on their garage, but it should create a limited ability for individual expression.[237] Homeowners

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[228] *See* Franzese, *supra* note 5, at 351–52.
[229] *Id.* at 351 (discussing ways to remedy the ignorance of board members).
[230] *See, e.g.*, *id.* at 353–54 (discussing states that have implemented a third-party watchdog approach to HOAs).
[231] Gott, *supra* note 210, at 203.
[232] *See supra* Part II.
[233] *See* Chadderdon, *supra* note 34, at 234 (discussing associations' violation of what would be First Amendment rights in a municipal context).
[234] See Boudreaux, *supra* note 9, at 515–34, for a detailed proposal of a homeowners' Bill of Rights.
[235] *Id.* at 521–22.
[236] *Id.* at 522.
[237] *Id.*

should be free to support the troops, advertise their candidate of choice in the upcoming election, or express their spirituality.[238]

States must also recognize a right to privacy.[239] The State should expressly recognize that the HOA can constrain only the exterior of a property. Anything that occurs within the house—any activity, decoration, or paraphernalia—should be entirely within the control of the homeowner and not subject to comment or criticism by the HOA.[240] Homeowners can build forts in their entryway, walk around naked, invite company over for weeks at a time, and hang purple curtains in the living room if that is how they wish to spend their time and money. These two simple rights would provide homeowners some choice whether to conform to a sterile aesthetic or to maintain some enjoyment in the property that they own. These rights, coupled with the reasonableness requirements suggested by the Restatement, would serve to provide balance to common-interest communities and restore to homeowners a little of the freedom intended by purchasing land in fee simple absolute.

CONCLUSION

Nevada is a perfect example of the widespread problems that can result when homeowners' associations wield too much power. Super-priority liens have been litigated for years, and still, associations, banks, and homeowners are uncertain of what will happen in the event of an HOA foreclosure. Even those who have not faced a nonjudicial foreclosure or do not live in a common-interest community have been affected. A recent study showed that HOA foreclosures have reduced property values in Nevada's two most populated counties by over $1 billion.[241] Homes foreclosed by an HOA in Clark County over the last few years were sold at an average discount of 42 percent.[242] Thankfully, home values in Nevada have begun to increase, and HOA foreclosures did begin to slow slightly after the Court's decision in *SFR*.[243] The dust is beginning to settle: now is the time to step back and look at the big picture. Nevada's unique situation perfectly captures the irony of the HOA: organizations that were originally created to preserve the value of neighborhoods now are contributing to a decrease in neighborhood values because of their active role in the foreclosure process.[244] The potential for harm—to homeowners, banks, and

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238 *Id.*
239 *Id.* at 534.
240 *Id.*
241 *Real Estate Briefs: Nevada Association of Realtors Studies HOA Foreclosures*, LAS VEGAS BUS. PRESS (July 10, 2017, 10:21 AM), https://businesspress.vegas/columns/real-estate-note-book/real-estate-briefs-nevada-association-of-realtors-studies-hoa-foreclosures/ [https://perma.cc/4B6Y-D8AR].
242 *Id.*
243 *Id.*
244 *See id.*; *see also supra* Section I.A (discussing the conception of HOAs).

the economy—will always exist so long as HOAs exercise too much control. This problem cannot be allowed to continue.

Although Nevada has made some efforts towards correcting the existing imbalance of power, such as the creation of the Office of Ombudsman, it is not enough.[245] HOAs will always hold the upper hand until the State recognizes that homeowners have rights that demand to be enforced. And, ultimately, so too do HOAs. The ultimate goal should not be to put the reins solely into the hands of homeowners, but rather to distribute power equally. At the end of the day, for every horror story of an HOA run by blue-haired busybodies who seek to strip their communities of any trace of personality, there is an HOA truly committed to keeping its community a pleasant place to live. HOAs exist for the purpose of maintaining common spaces, protecting property values, and eliminating major problems that could become a neighborhood nuisance. Should the power between homeowners and HOAs be equally shared, there is a better chance of this purpose being achieved. Will communities remain shining pictures of homogeny? Probably not. Hopefully not. But, the destruction of perfection may serve a more important goal—people may just have to talk to each other and relearn how to resolve issues amongst themselves, rather than running to their board of directors. And perhaps, in letting go of perfection, common-interest communities will regain community.

[245] *Office of the Ombudsman*, NEV. REAL ESTATE DIVISION, http://red.nv.gov/Content/CIC/Office_of_the_Ombudsman/ [https://perma.cc/4PGJ-S5HM] (last visited Oct 11, 2018).

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