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KRISTINA CAFFREY*

The House of the Rising Sun: Homeowners' Associations, Restrictive Covenants, Solar Panels, and the Contract Clause

ABSTRACT

Private land-use controls in the form of restrictive covenants promulgated by homeowners' associations prevent the effective use and expansion of alternative energy by prohibiting or restricting the use of solar energy devices based on concerns of uniformity and aesthetics. The problem of homeowners' associations discriminating against solar energy has received less attention than the problem actually merits. The best possibility for invalidating these covenants and moving renewable energy forward is legislative action. Although some states have taken action on this issue, state statutes have significant and serious deficiencies. Effective state statutes require both more breadth and more specificity. State statutes that invalidate restrictive covenants discriminating against solar energy implicate, but do not violate, the U.S. Constitution's Contract Clause. These statutes remain within the legitimate exercise of state police power.

I. INTRODUCTION

Imagine a world in which people live in happy, friendly neighborhoods—a world in which neighbors walk to each other's doors to borrow a cup of sugar, know each other's names, and even help each other with home improvements. Now imagine a world where neighbors fight each other in court over home improvement projects. The current snapshot of neighborhood life in Anytown, U.S.A. unfortunately resembles the latter picture, with neighbor arguing with neighbor over not just the future of an architectural addition, but in essence over the future of American energy use. These neighbors are not fighting about such hot issues as political advertising signs on lawns or religious displays. They are fighting about something that has the potential for enormous benefits for everyone: the placement of solar energy devices on private residences within community interest developments, colloquially known as

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planned neighborhood “subdivisions.”¹ Restrictive covenants promulgated by homeowners’ associations that prohibit or grossly limit the placement or use of solar energy devices provide the ammunition for this battle. Individual homeowners wishing to utilize renewable energy face resistance both from their neighbors and from the restrictive covenants of their neighborhoods.² These conflicts over residential solar energy use threaten not only the utilization of alternative energy at the individual level, but also threaten the dream of an idyllic American life that many neighborhoods attempt to achieve.

Fifty-nine percent of residents living in homes governed by community and/or homeowners’ associations believe that the community association should have the right to control the scope and placement of solar panels on individual homes in order to maintain aesthetic standards.³ In this situation the residential majority opinion is just plain wrong. Conflicts between community associations and individual homeowners over renewable energy installations have become a legal, not to mention social, problem. Governments must have the power to present a full and complete arsenal in the war against global climate change. This arsenal includes removing barriers to renewable energy.

State laws that override restrictive covenants and encourage individual homeowners to invest in solar energy installations are a necessary, vital part of renewable energy exploitation. Unfortunately, many of these statutes suffer from vague, noncommittal drafting, and many still give overzealous community associations easy “outs” that let them avoid following the true intent and spirit of the legislation. A survey of state laws invalidating restrictive covenants relating to renewable energy reveals clear advantages and disadvantages in drafting and effect. This article will survey these statutes and identify both problems and solutions to those problems. Because these state statutes invalidate contracts, they implicate the Contract Clause of the U.S. Constitution. An examination of Contract Clause jurisprudence will prove that these statutes are a constitutionally valid exercise of state police power.

1. “Subdivision” or “development” are colloquial terms for common interest developments. The term refers to planned, organized residential neighborhoods as opposed to neighborhoods that grow organically. For more information on common interest developments, including an official definition from the RESTATEMENT (THIRD) OF PROPERTY, please see *infra* Part I.B.

2. See, e.g., Scott Condon, *Solar Showdown in Some Neighborhoods*, VAIL DAILY, July 9, 2007, available at <http://www.vaildaily.com/article/20070709/NEWS/70709026>.

3. FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH, 2007 NATIONAL SURVEY, available at http://www.cairf.org/research//survey_homeowner.aspx [hereinafter FOUNDATION SURVEY].

This article begins by introducing the concepts of community interest developments and homeowners' associations. It then looks into the history of conflicts between individual homeowners and community associations over solar energy and considers the current problem and the possible solutions. The article then delves into the various state statutes that have attempted to remedy the conflict, before scrutinizing any possible constitutional disputes. The article ends with a model statute that incorporates lessons gathered from history, the survey of state statutes, and constitutional jurisprudence.

Disputes about solar energy at the residential level between individuals and community associations represent a problem, and while state statutes provide a partial solution, they still do not completely remedy the problem. The U.S. Constitution's Contract Clause appears as a potential obstacle in this route to solar energy exploitation, but with some careful argumentation the statutes can surmount that obstacle. This article intends to show states without a solar guarantee statute or a poorly drafted one (including New Mexico) the necessity for their existence, the benefits of their existence, and a progressive path forward. It also intends to educate Americans, whether homeowners or not, about the rights and responsibilities accruing from living as both a citizen and a neighbor. Hopefully, the sun *can* and *will* shine brightly on millions of roofs across America.

A. A Local Example

In the unusually warm autumn months of 2010, the High Desert homeowners' Board of Directors in Albuquerque, New Mexico, exploded in controversy. The issue? A resident complained about the solar panels on a neighbor's roof.⁴ At this date⁵ the homeowners, the Board, and the Modifications Committee are still embroiled in fact finding: working out what happened and when and the interests of each party. In this dispute between individual neighbors, the governing body of the High Desert development will eventually have to take a position on the future of solar energy in the neighborhood—if not an actual substantive position, then at least a position on resolving disputes between neighbors over solar energy. The homeowners' board position may or may not sympathize with solar energy, it may or may not draw guidance from

4. Interview with John Caffrey, member, High Desert Board of Directors, in Albuquerque, N.M. (Oct. 15, 2010). Due to the particular geography of the relevant area, the complaining neighbor's house actually looks down on the solar panels. Due to the ongoing controversy over this situation, I have decided not to give the residents' names. The e-mails recounting the development of the problem are on file with the author.

5. Oct. 2010.

the covenants, conditions, and restrictions of High Desert, and it may or may not prescribe fair conflict resolution practices. New Mexico's solar-siting-guarantee statute will also likely come into play, although it may prove more of a problem than a solution. Given the extremely problematic language of New Mexico's statute,⁶ this small-scale controversy could easily erupt into a huge mess with both sides arguing over statutory construction and public policy. One board member even warned, "We'll end up in court if someone doesn't get a handle on this."⁷

B. What Are Homeowners' Associations and Restrictive Covenants?

A homeowners' association (HOA) is the governing body of a "common interest development" (CID).⁸ The Restatement (Third) of Property defines a CID as "the obligation that binds the owners of individual lots or units to contribute to the support of common property, or other facilities, or to support the activities of an association, whether or not the owner uses the common property or facilities, or agrees to join the association."⁹ CID communities surged after World War II and celebrated the nuclear family and suburban living in single-family housing units.¹⁰ CIDs and their accompanying HOAs rose dramatically in the 1970s, from 10,000 in 1970 to 55,000 in 1980.¹¹ Local governments found them attractive because they provided many traditional government functions and services via a private organization.¹² The federal government also encouraged the formation of CIDs and HOAs—the Federal Housing Administration issued guides for establishing CIDs beginning in the 1970s.¹³

The kinds of restrictive covenant that concern this article "are established by property developers when they create new developments."¹⁴ A CID (the developer's planned subdivision) will form a governing body, an HOA, to manage the community.¹⁵ The HOA enforces "covenants, conditions, and restrictions" (CCRs).¹⁶ These cove-

6. See *infra* Part V.

7. Caffrey, *supra* note 4.

8. Mark A. Pike, *Green Building Red-Lighted by Homeowners' Associations*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 923, 924 (2008–2009).

9. *Id.* at 929.

10. *Id.* at 929.

11. *Id.* at 930.

12. *Id.* at 930.

13. Pike, *supra* note 8, at 930.

14. John Wiley, *Private Land Use Controls as Barriers to Solar Development: the Need for State Legislation*, 1 SOLAR L. REP. 281, 283 (1979–80).

15. *Id.*

16. 34 AM. JUR. PROOF OF FACTS 3D *Violation of Restrictive Covenant* §3 (1995).

nants run with the property and may appear in the deed or title; a new buyer of an existing residence may find himself beholden to a covenant for which he did not bargain.¹⁷ Of course, restrictive covenants can also exist on an individual property and will appear in the deed to that property.¹⁸ The restrictive covenant transfers along with the property and binds each successive owner.¹⁹ A paper intended for lay readers and residents of CIDs described CCRs as such:

a restrictive covenant is a promise made by one property owner to limit the use of his or her realty so as to benefit other parties. Restrictive covenants are commonly used by planned communities to ensure that all units adhere to a common design theme and to prevent activities deemed to be undesirable by the community at large.²⁰

Theoretically, CCRs “enhance and protect the investment of homeowners and developers by taking the uncertainty out of the nature, extent, and ‘look’ of future development within a planned community.”²¹

In 2007 the Foundation for Community Association Research commissioned a poll by Zogby on the subject of CIDs and HOAs.²² Seventy-four percent of respondents believe that CIDs and HOAs protect and enhance community values.²³ While 36 percent could say nothing bad about their community, 15 percent expressed disfavor with their community associations’ ability to restrict exterior home improvements.²⁴ And although for 61 percent of the poll group the existence of a HOA made no difference in their decision to purchase a home, the presence of an HOA made 30 percent more likely to make the purchase.²⁵

The numbers on HOAs tell only one side of the story, and the numbers on the other side have power all their own. The potential renewable energy from residential solar use and the potential legal barriers to utilizing that energy are staggering. In 2009, 305,400 “association-gov-

17. THOMAS STARRS, LES NELSON & FRED ZALCMAN, BRINGING SOLAR ENERGY TO THE PLANNED COMMUNITY: A HANDBOOK ON ROOFTOP SOLAR SYSTEMS AND PRIVATE LAND USE RESTRICTIONS 12 (1999), available at http://www.consumerenergycenter.org/erprebate/documents/CC+Rs_and_solar_rights.pdf. [hereinafter BRINGING SOLAR ENERGY].

18. 34 AM. JUR. PROOF OF FACTS 3D *Violation of Restrictive Covenant* §3 (1995).

19. Wiley, *supra* note 14, at 282.

20. BRINGING SOLAR ENERGY, *supra* note 17, at 12.

21. *Id.* at 12.

22. FOUNDATION SURVEY, *supra* note 3.

23. *Id.*

24. *Id.*

25. *Id.*

erned communities” existed in the United States.²⁶ These communities include 24.4 million “housing units” with 60.1 million residents.²⁷ The value of all these residences put together totals nearly \$4 trillion, or 20 percent of all the residential value in the United States.²⁸ This means that 24.4 million households in the United States potentially face some kind of alternative energy obstacle in the form of restrictive covenants relating to solar installations or other home improvements. This also means that state statutes that address residential solar energy exploitation can make a statistically significant difference in removing those restrictive covenants. And besides the actual dollar savings of switching to renewable energy, the property values of these housing units—currently valued at \$4 trillion—could rise dramatically based on their potential to use renewable energy.

The U.S. Supreme Court has confronted certain restrictive covenants with suspicion. The landmark 1948 case *Shelley v. Kraemer*²⁹ invalidated racially motivated restrictive covenants. Chief Justice Vinson, writing for the majority, found that the 14th Amendment not only explicitly protected property, but that “equality in the enjoyment of property rights was regarded by the framers [of the 14th Amendment] as an essential precondition to the realization of other basic civil rights and liberties.”³⁰ While discrimination against racial minorities provides an inappropriate comparison to the right to put solar panels on one’s house, the point regarding property’s connection to other civil rights is well taken. Certain theories such as the environmental justice movement have begun to emphasize climate change and environmental regulation as ultimately social issues that involve civil rights and liberties.

Shelley may prove useful for residential solar rights for an entirely different reason. Constitutional law casebooks³¹ include *Shelley* in “state action” sections to show that judicial enforcement of discriminatory private policies can qualify as state action.³² Homeowners’ relations to their HOAs and CCRs may in fact implicate state action. In 1946’s *Marsh v. Alabama*,³³ the Supreme Court found implicit state action in a so-called “company town.” Even though a private entity owned the town, it per-

26. Community Association Institute, Industry Data, available at <http://www.caionline.org/info/research/Pages/default.aspx>.

27. *Id.*

28. *Id.*

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

30. *Id.* at 10.

31. See, e.g., *Constitutional Law* (Kathleen M. Sullivan & Gerald Gunther eds., 16th ed. 2007).

32. *Kraemer*, 334 U.S. at 14.

33. *Marsh v. Alabama*, 326 U.S. 501 (1946).

formed an essentially public function—running a municipality.³⁴ For all intents and purposes, it functioned as a public entity.³⁵

The argument that HOAs and CIDs perform public functions and operate as public entities, and therefore qualify as “state actors,” may have some bite. HOAs and CIDs are in many ways the modern equivalent of the “company town” of the previous century. The HOA basically governs a small population and may provide parks, playgrounds, and community activities.³⁶ But the legal argument would likely end there. *Marsh* involved distribution of religious pamphlets, a constitutionally protected activity.³⁷ The Supreme Court will most likely never decide that renewable energy exploitation falls under constitutional protection. Although the extremely contentious *Massachusetts v. EPA*³⁸ did push EPA to take the crucial first step to combat global climate change, the majority had to fight back legitimate complaints from fierce dissents by Chief Justice Roberts and Justice Scalia.³⁹ Justice Stevens authored the majority and did express a “special solicitude” for Massachusetts’ climate-change-caused injury.⁴⁰ But Stevens has departed the Court, leaving the conservative wing to potentially rain on the renewable energy and global climate change parade. And while racial classifications like the one at issue in *Shelley* attract strict scrutiny from the Court, environmental regulations (or the lack thereof) tend to receive administrative deference from the Court.⁴¹

II. PUTTING THE CART BEFORE THE HORSE: A HISTORY OF THE PROBLEM

Before we can consider the current practical problems of HOAs, we must examine the issue from theoretical and historical perspectives in

34. *Id.* at 502–503.

35. *Id.* at 507.

36. In fact, this idea of HOAs as state actors forms the basis for a First Amendment argument in Monique Leahy, *Proof of Homeowner Association Acting as Quasi Governmental Entity Whose Conduct Constitutes State Action Requiring Declaration of Rights Under Homeowner Association Restriction Prohibiting Political Signs*, 76 AM. JUR. 3D *Proof of Facts* § 89 (2004). The argument works in this context because the First Amendment confers an automatic right. Identifying some right which a government may not abridge presents a challenge in and of itself in the context of solar energy exploitation.

37. *Id.* at 503.

38. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

39. *Id.* at 535, 549.

40. *Id.* at 520.

41. *See, e.g., Chevron v. NRDC*, 467 U.S. 837 (1984), ironically authored by Justice Stevens. The issues of standing and deference that plague environmental regulations could be avoided through congressional action on the subject. This is yet another argument in favor of legislative action. *See infra* Part IV.

order to understand the more abstract principles underlying this real-world conundrum. Residential solar energy use involves two interconnected legal issues. Way back in 1982, Melvin Eisenstadt pointed out a distinction crucial to creating efficient and enforceable solar rights laws: "It is important to distinguish between protecting solar access for potential collector sites and for protecting access for collectors that have already been installed."⁴² We can label these separate issues "siting problems" (the former) and "access-to-light problems" (the latter). The history of solar rights laws, commentary, and scholarship shows a misguided approach to these interlaced problems: legislatures, courts, and advocates of solar energy have put the cart before the horse in working to guarantee access-to-light while devoting less attention, or even outright ignoring, the precedent problem of solar system siting. An easement guaranteeing access-to-light may be ineffective without a guarantee of solar installation siting. This article addresses how to guarantee solar installation siting.

Like most environment-related regulation, solar rights law peaked in the late 1970s in response to the "Energy Crisis" of that decade. In 1977 President Jimmy Carter put solar panels on the roof of the White House; they came down as soon as President Ronald Reagan moved in.⁴³ In 1979 a new publication called the *Solar Law Reporter*⁴⁴ began reporting on solar issues nationwide. That publication lasted only until 1982, when the Energy Crisis had ended and the sun had set for the first time on solar energy.

A survey of scholarship and legal decisions during this heyday of solar energy shows that siting issues were relatively low on the totem pole. Alan Miller's article "Legal Obstacles to Decentralized Solar Energy Technology: Part II" devoted only two out of 22 pages to the problem of restrictive covenants prohibiting solar installations, despite claiming that "the most frequent impediment to solar installations may well be regulations governing the exterior appearance of buildings."⁴⁵ Similarly, 1982's "Access to Solar Energy: The Problem and Its Current Status" devoted only two out of 41 pages to restrictive covenants, even while claiming

42. Melvin Eisenstadt, *Access to Solar Energy: The Problem and Its Current Status*, 22 NAT. RESOURCES J. 21, 23 (1982).

43. Tawny L. Alvarez, Comment, *Don't Take My Sunshine Away: Right-to-Light and Solar Energy in the 21st Century*, 28 PACE L. REV. 535, 535 (2007-2008).

44. The full archives of this publication and its publication dates can be accessed through various journal provision services, such as <http://www.heinonline.org/HOL/Index?index=journals/solar>.

45. Alan Miller, *Legal Obstacles to Decentralized Solar Energy Technology: Part II*, 1 SOLAR L. REP. 761, 762 (1979-80).

that restrictive covenants are the most common private land-use controls.⁴⁶

Judicial decisions from the late 1970s and 1980s showed a far greater solicitude to solar rights, but few decisions specifically addressed the problem of restrictive covenants and siting problems. The seminal Wisconsin case *Prah v. Maretti*⁴⁷ held that blocking a neighbor's access-to-light could constitute a nuisance.⁴⁸ But to put it into the terminology above, that case rested on access-to-light guarantees, *not* siting guarantees. The 1979 New York case *Katz v. Bodkin* guaranteed siting for solar installations, but did so against local zoning ordinances.⁴⁹

Not all judicial decisions from this era were so friendly to solar rights. In one such case, homeowners in Country Club Heights in Mesa, Arizona, wanted to install solar collectors on their roof.⁵⁰ Country Club Heights prohibited a "structure of any kind" from unreasonably obstructing the view of other lots in the subdivision.⁵¹ The Maricopa County Court, while not explicitly ruling against the homeowners, required them to gain approval from the subdivision before installing the system.⁵² In 1979, perhaps in response to controversies like this, the Arizona Legislature considered, but did not pass, a law that would have invalidated such restrictive covenants.⁵³ Because of its geographic origin, this case shows the early barriers to solar energy particularly well. The most prevalent image of Arizona is endless sunshine. That a state with such abundant sunlight and huge solar energy potential would discourage solar development is nothing less than political tragedy.

Hope for solar siting guarantees finally came from California in the late 1970s, both judicially and legislatively. In 1978 Howard and Saundra Krave of Valencia wanted to install a solar water heater incorporating rooftop collector plates.⁵⁴ They sought approval from the Architectural Committee of Old Orchard Association, which denied permission for the heating system.⁵⁵ In 1979 the Superior Court of Los

46. Eisenstadt, *supra* note 42, at 25.

47. *Prah v. Maretti*, 108 Wis. 2d. 223 (1982).

48. *Id.* at 240.

49. Robert C. Barrett, *Overcoming the Solar Zoning Barrier: Katz v. Bodkin*, 1 SOLAR L. REP. 925, 925 (1979-80); *Katz v. Bodkin*, 75 A.D.2d. 871 (N.Y. App. Div. 1980).

50. *Arizona Court Requires Collector Approval*, 1 SOLAR L. REP. 251, 252 (1979-80).

51. *Id.*

52. *Id.* at 251.

53. *Id.* at 252.

54. *Kravez v. Old Orchard Association*, Superior Court, Los Angeles County, No. C 209-453 (Feb. 28, 1979) *printed in Recent Decisions*, 1 SOLAR L. REP. 503, 504 (1979-80) (original opinion unpublished).

55. *Id.* at 504.

Angeles County found in favor of the Krayes,⁵⁶ relying on the “public policy” doctrine to void the restrictive covenant. The court stated, “there exists a public policy in the State of California to promote and encourage the use of solar energy systems and to remove obstacles thereto”⁵⁷ and explained that restrictive covenants that prohibit rooftop solar installations “are contrary to and in violation of the said public policy of the State of California.”⁵⁸ In 1978 California enacted into law the Solar Rights Act,⁵⁹ which rendered “void and unenforceable” “any covenant, restriction, or condition . . . that effectively prohibits or restricts the installation or use of a solar energy system.” California amended this statute in 2005.⁶⁰

The solar forecast at the end of the 1970s still showed many clouds. While no state went as far as California in exploring and protecting alternate energy, by 1982 17 states had passed legislation declaring easements for solar access valid.⁶¹ Of course, declaring solar easements valid does not translate into a guarantee of solar easements—validity of a negotiated easement is not the same thing as obtaining pre-approval for solar access without the mess of negotiation with a neighbor. But those 17 states, while showing admirable dedication to renewable energy, failed to see what California had seen: without a legislative guarantee of solar siting and without a judicial determination that public policy includes solar energy encouragement, solar easements do not go far enough. Solar easement laws fail to completely protect use of renewable energy for two reasons: (1) they focus exclusively on access-to-light guarantees and completely ignore the equally pressing concern of siting guarantees, and (2) they leave siting issues to judicial remedy. And as one commentator put it as the sun set on the 1970s, “although some relief for solar consumers is found to be theoretically possible through adjustment of the means by which courts enforce covenants, a solution giving due regard to the importance of solar development requires legislative action. Consideration of a modified version of the California statute is advocated for other states.”⁶²

As this article will illustrate, these statements are almost prophetic—other states have realized the need for legislative action, but they have not quite followed California’s example. And while lawmakers and academics in the 1970s had only a short window of op-

56. *Id.* at 506.

57. *Id.* at 505.

58. *Id.* at 505.

59. CAL. CIV. CODE § 714.

60. See below for full explanation of the statutory provisions.

61. Eisenstadt, *supra* note 42, at 24.

62. Wiley, *supra* note 14, at 286.

portunity to address residential solar energy use, lawmakers and academics today face a potentially longer future of small-scale renewable energy exploitation.

III. THE SITUATION AT THE DAWN OF THE 2010'S: IS THIS STILL A PROBLEM?

The world has changed greatly since the 1970s, but as this part will demonstrate, the position of many HOAs in regard to renewable energy has not changed, and individual homeowners pursuing any kind of environmentally responsible home improvements must run a formidable gauntlet thrown down by their neighbors and neighborhood. This part will also attempt to explain particular ironies resulting from the positions of many HOAs.

In 2007 former vice-president and current global climate change crusader Al Gore wanted to install a roof-mounted solar heating system.⁶³ The exclusive town where Gore lived, Belle Meade, Tennessee, denied a permit for the system.⁶⁴ Although Gore eventually got his panels, the nation's fifth-richest town still expressed concern for the delicate aesthetic balance of the neighborhood; the new ordinance reads, "Solar panels may be installed upon the roof of a building so long as they are not visible from the street or from any adjoining property."⁶⁵

Gore's experience "exemplifies the tension between on-site solar systems and traditional views of aesthetics and can be found in the ordinances or architectural review guidelines of many communities."⁶⁶ Gore's case also illustrates the lack of awareness that renewable energy still must overcome—a lack of awareness echoed in the academic literature. Current commentary still shows that siting guarantees and siting issues lag behind access-to-light guarantees. The 2008 article "Don't Take My Sunshine Away: Right-to-Light and Solar Energy in the 21st Century" mentions restrictive covenants and HOAs on only one page out of 25.⁶⁷ While residential solar siting issues have not received adequate attention in the academic literature, the popular press and trade publica-

63. *Gore's Solar Plans Thwarted by Upscale Neighborhood's Rules*, U.S.A. TODAY, Mar. 22, 2007, available at http://www.usatoday.com/weather/climate/globalwarming/2007-03-20-gore-solar_N.htm. Gore's case involved Belle Meade's zoning rules. The town, however, is a tiny enclave surrounded by Nashville and closely resembles an exclusive neighborhood governed by an HOA.

64. *Id.*

65. *Id.*

66. Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 30 (2008).

67. Alvarez, *supra* note 43.

tions have tried to shed some light on the issue.⁶⁸ One such press article details how even HOAs in Colorado's normally eco-friendly mountain communities have resisted solar panels.⁶⁹

The tension between energy and aesthetics with which Gore dealt pervades the entire mission and operation of HOAs. The "overall objective [of most HOAs] is to guarantee uniformity in order to preserve stability, and ultimately, property value."⁷⁰ While some CCRs can be reasonable, such as hiding a trash receptacle from view, others have created "institutionalized impediments for homeowners who wish to make energy efficient changes to their property."⁷¹ Many HOAs have even gone so far as to prohibit outdoor clothes drying,⁷² perhaps judging clotheslines too low-class for an upwardly mobile American lifestyle. CCRs can also impact environmentally friendly living in more subtle ways; the most common CCRs not only ban outdoor clothes drying and forbid or restrict solar panels but also set out lawn requirements and minimum square footage.⁷³ The City of Albuquerque recently ruled that, even in the arid New Mexico desert, neighborhood associations can require lawns!⁷⁴

"Property Cops: Homeowner Associations Ban Eco-Friendly Practices"⁷⁵ includes some egregious examples of CCRs from around the nation. Westerley subdivision in Sterling, VA: "Solar panels and solar collectors are prohibited."⁷⁶ Camelot in Cottleville, MO: "Exterior solar collection systems, wind generator systems or other similar appliances are prohibited."⁷⁷ Peach Creek in Lisle, IL: "Compost piles may *not* be created on any properties . . . A window fan is never allowed to be placed in the front windows of a home."⁷⁸ Quail Cove in Tucson, AZ: "Outdoor clotheslines are not permitted."⁷⁹ Crest Mountain in Asheville, NC: "The following are precluded: Outside clotheslines or clothes dry-

68. See generally BRINGING SOLAR ENERGY, *supra* note 17, and Stan Cox, *The Property Cops: Homeowner Associations Ban Eco-Friendly Practices*, ALTERNET, Apr. 26, 2007, available at <http://www.alternet.org/envirohealth/51001>.

69. Condon, *supra* note 2.

70. Pike, *supra* note 8, at 932.

71. *Id.* at 925.

72. *Id.* at 932.

73. Cox, *supra* note 68.

74. Dan McKay, *Lawns Can Be Required, City Council Votes*, ALBUQUERQUE J., Aug. 3, 2010, at C1.

75. Cox, *supra* note 68. All examples within this paragraph derive from Cox's *Property Cops* report.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

ing . . . window air conditioning units . . . vegetable gardens. . . .”⁸⁰ Tavistock Farms in Leesburg, VA: “Vegetable gardens must not exceed 64 square feet.”⁸¹ Sun Valley in Waldorf, MD: “No awnings in the front of the house will be allowed.”⁸² Of course, one of the biggest ironies in this situation is the names of most planned communities—the name may include the imagery and vocabulary of nature, but the community may have a decidedly un-nature-friendly attitude.

CCRs can even go one step further on the subtlety scale by appealing to vague notions of “aesthetics.” HOAs and CCRs can not only restrict the placement of and type of solar power generation, but they can require approval from an architectural review board for any home modification and set height restrictions, setback requirements, screening requirements, specifications of building materials, architectural style requirements, or secondary structure restrictions.⁸³ A public-interest publication⁸⁴ includes all of the following in its list of residential solar energy obstacles: prior approval of an architectural committee; explicit restrictions on the placement of solar equipment; setback requirements; height restrictions; restrictions on secondary buildings; restrictions concerning vegetation; requirements that utilities be screened; restrictions on the placement of improvements; specifications regarding roofing materials; regulations affecting piping; restrictions pertaining to architectural style. These types of regulations may also interfere with passive solar utilization or may preclude the use of energy-efficient building materials. The old saying “a man’s home is his castle” seems to have lost some of its proverbial validity.

Most HOAs include an architectural review committee (ARC) which must approve additions or renovations to existing residences. The members of an ARC do not need any actual architectural or design experience or education.⁸⁵ “Architectural control schemes” come in a variety of forms. Some require strict aesthetic conformity, while others require only that residents submit their plans to an ARC for prior approval.⁸⁶ The prior-approval process may not have clear standards and may or may not require approval from immediate neighbors.⁸⁷ Besides the actual

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 31.

84. BRINGING SOLAR ENERGY, *supra* note 17, at 16–17.

85. *Id.* at 23.

86. *Id.* at 16. The phrase “prior approval” brings to mind First Amendment guarantees of free speech. Would a court ever consider home improvements or residential architecture expression worthy of First Amendment protection?

87. *Id.* at 16.

CCRs in the rule book, more insidious forces can influence the approval process. "ARCs often undertake the enforcement of the CCRs with more attention and vigor than the developer. They may be interested in how the solar system will affect their own property values, their aesthetic tastes, or their vested authority."⁸⁸

HOAs and CCRs play a particularly ironic role in the struggle for residential solar energy development. People who have the means to live in expensive, manicured neighborhoods, those likely to have HOAs and CCRs, presumably have high education levels as well as a genteel appreciation for aesthetic concerns.⁸⁹ John Wiley has pointed out that restrictive covenants "may well be most common in expensive new subdivisions where the growth of residential active and passive solar heating and cooling applications is expected to be most rapid."⁹⁰ While the cost of solar energy installations and systems has fallen dramatically in the last decade,⁹¹ the price can still be prohibitive for many Americans. Those people who can likely afford to buy and install solar panels are the same people likely to live in communities that prohibit those devices. And those people who can afford the cost are also the same people who likely have the education and public engagement to realize and appreciate the need for renewable energy exploitation. Thus, "covenants . . . have a perverse tendency to appear just where they are likely to do the most harm to the public solar development policy."⁹² If "residential solar commercialization is to go forward at a faster pace, it is critical that consumers with high income, willingness to take risks, and preference for solar energy on noneconomic grounds adopt solar energy early."⁹³

All of this information suggests that renewable energy use at a residential scale faces impediments not only in the form of specific re-

88. *Id.* at 23.

89. Cox, *supra* note 68. Wiley also makes this point, noting the irony that "affluent consumers are, unfortunately, the ones most apt to be restrained by the covenants at issue, for restrictive covenants are most common in expensive, planned developments where an integrated overall appearance is considered one of the neighborhood's most desirable features." Wiley, *supra* note 14, at 285.

90. Wiley, *supra* note 14, at 281.

91. See *Steep Price Drops for Solar Photovoltaics*, FUTURE PUNDIT, Aug. 15, 2009, available at <http://www.futurepundit.com/archives/006453.html> (claiming that costs dropped 40 percent in the previous 15 months alone). The current price (updated daily at http://www.ecobusinesslinks.com/solar_panels/htm) ranges from \$2 to \$4 per watt. While this price may become cost-competitive with the price per watt of coal or natural gas generated power, solar requires an up-front monetary outlay, and payback on investment may take years.

92. Wiley, *supra* note 14, at 284.

93. *Id.* at 285.

strictive covenants, but also in the form of an entire mindset and worldview that prevents individuals from taking control of their individual environmental responsibility. For some individuals improving the energy efficiency of their dwelling plays a vital role in shouldering that responsibility. As a cap-and-trade regime premised on greater use of renewable energy falters at the national level,⁹⁴ local, grassroots use of small-scale renewable energy appears like a shining beacon of hope. But just as national legislation faces national opposition, individual or neighborhood action faces individual and neighborhood resistance.

IV. JUDICIAL OR LEGISLATIVE: HOW BEST TO SOLVE THE PROBLEM

We now know that covenants, conditions, and restrictions are an insidious influence holding back the U.S. transition to greater renewable energy use. As with any problem, there are multiple solutions to removing HOAs' barriers to solar exploitation. The 2007 Zogby poll⁹⁵ asked residents of CIDs, "Would you like to see more government control of community associations?" Eighty percent said no. The poll also asked, "Who should determine how community associations prioritize and address environmental issues?"⁹⁶ Sixty-six percent, or two-thirds of respondents, gave that job to the community associations themselves through elected boards. Twenty percent would entrust responsibility to local governments, 5 percent to state governments, and 3 percent to the federal government.⁹⁷ These numbers, to put it bluntly, are alarming. They reflect an extremely misguided and complacent public. Government control of community associations is both necessary and proper.

A. Mr. Madison's Neighborhood

The idea of letting community associations control environmental issues within CIDs exemplifies James Madison's warning against majority tyranny.⁹⁸ In the tenth *Federalist* paper, Madison complained that even in democracies "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."⁹⁹ Here, the minor party

94. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). Otherwise known as the Waxman-Markey Bill, it has passed the House but not the Senate. You can follow it at <http://www.opencongress.org/bill/111-h2454/show>.

95. FOUNDATION SURVEY, *supra* note 3.

96. *Id.*

97. *Id.*

98. THE FEDERALIST NO. 10 (James Madison).

99. *Id.*

would be the individual homeowner who desires to put a solar panel on his roof and the “overbearing” majority would be the governing board of his neighborhood. As the “overbearing” majority, HOA leadership may give completely inadequate protection to the interest of the minor party. Madison then introduced his all important “factions” concept: a faction being a “number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁰⁰

Homeowners’ associations, their governing boards, and their architectural review committees represent classic examples of Mr. Madison’s definition of a faction. Depending on the structure of the HOA, all homeowners may or may not have any say in its positions, and depending on individual behavior, some or many homeowners may not even pay attention to the goings-on of the board. This could lead the HOA’s driving forces to amount to either a majority or minority of neighborhood inhabitants. The previous part of this article illustrated that HOAs do have a common impulse and passion: ensuring conformity and protecting property values.¹⁰¹ And as the previous part additionally showed, those interests run contrary to the permanent interest of the community—communities both local and global, small and large—in a clean, healthy world.¹⁰²

Madison proposed “two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”¹⁰³ Madison quickly dismissed option one,¹⁰⁴ and likewise so can we. Removing HOAs from the picture would be nigh impossible and maybe even undesirable. The question then becomes how to control the effects of the HOA faction given that factions cannot be relied upon to control themselves. In Mr. Madison’s situation, controlling the effects of factions meant carefully structuring the U.S. Congress. For solar energy controlling the effects of factions means putting control in the hands of more responsible governmental bodies. Governmental control could come either in the form of judicial action or legislative action.

100. *Id.*

101. *See supra* Part I.B.

102. This article assumes that using renewable, clean energy is in the best interest of every community in the United States.

103. THE FEDERALIST No. 10 (James Madison).

104. *Id.*

B. The Judicial Option

Putting the responsibility in the hands of judges, while not presenting any policy problems, presents many practical problems. Although the late 1970s saw court-mediated disputes between neighbors over solar system siting, the judicial process is too unwieldy to create widespread change. *Bringing Solar Energy to the Planned Community* sets out a roadmap to guide individual homeowners through the steps leading to ARC approval.¹⁰⁵ It then outlines legal options when compromise with an HOA fails.¹⁰⁶ Any homeowner reading this paper would likely recoil in horror at the variety of possible legal tortures. And pro-solar energy litigators would turn their backs when confronted with so many common law barriers to lawsuit victory.

For every legal thrust that individual pro-solar homeowners could make, legal precedent and practice can make an equal parry. Common law legal policies tend to favor enforcement of private agreements, so they tend to support the enforcement of restrictive covenants.¹⁰⁷ Restrictive covenants at their core are contractual, and “the argument that restrictive covenants in CIDs are non-enforceable will likely find great resistance in court because of the contractual agreements between private parties.”¹⁰⁸ Of course, the individual homeowner can attack restrictive covenants on grounds that he neither bargained for nor negotiated the terms.¹⁰⁹ An HOA may counter with the fact that the homeowner knew of the existence of the CCRs and made an informed decision to proceed with the purchase of the property. One commentator has come to the unfortunate conclusion that “more than likely, community associations will win in court if the family agreed to rules when joining a community.”¹¹⁰ And the Zogby poll revealed that 86 percent of home purchasers were told that a CID or HOA covered their prospective home.¹¹¹ Individual residents may also challenge the scope of the CCRs and argue that the creators of the CCRs could not have envisioned, intended, or included solar installations in their lists of regulated items.¹¹² This argument may have worked in the early 1970s, but will not work now; solar panels have now existed for several decades, and as earlier

105. BRINGING SOLAR ENERGY, *supra* note 17, at 19–29.

106. *Id.* at 30–35.

107. Wiley, *supra* note 14, at 281.

108. Pike, *supra* note 8, at 938.

109. Wiley, *supra* note 14, at 290.

110. Pike, *supra* note 8, at 935.

111. FOUNDATION SURVEY, *supra* note 3.

112. Wiley, *supra* note 14, at 290.

parts illustrated, many HOAs and CIDs explicitly included solar technology in the list of prohibited home additions.

An individual resident may then bring out the “public policy doctrine” and argue that the public policy in encouraging renewable energy use overrides the private agreement.¹¹³ However, this argument presupposes that encouraging renewable energy use is a *recognized* public policy. In some corners of the United States this recognition may lose the war before even getting to the battle. Furthermore, it “is more difficult for courts to overturn a private arrangement on the basis of a socioeconomic policy, particularly one of recent origin, such as the promotion of solar energy use,” than an arrangement that offends morals or fairness.¹¹⁴ Of course, one may argue, successfully or not, that encouraging residential solar energy use is not simply a socioeconomic policy, but in fact crosses over into national security policy, environmental policy, and public health policy. Courts and judges may be loath to intrude on “policy” issues usually delegated to legislatures. A judicial ruling involving public policy may require the precedent step of state legislatures declaring residential solar energy use a public policy.¹¹⁵

Alongside separation of powers issues and the conservatism of common law doctrines, the actual systemic organization of the U.S. judicial system would present a severe barrier to noticeable change in this area. Judicial processes have “functional limitations”¹¹⁶—lawsuits involve only two parties; issues must concentrate inwards to ever smaller dimensions; relief favors money over action; lawsuits may settle out-of-court, subject to confidentiality agreements that ensure the dispute never gets a public airing. A “bipolar adjudicatory framework” simply cannot accommodate the “multifaceted and broad-gauged policy decisions” that the renewable energy debate entails.¹¹⁷

C. The Legislative Option

The possibilities of faction abuse and tyranny of the majority eliminate the option of HOAs addressing the problem of solar siting guarantees themselves. Functional limitations eliminate the option of the judicial branch remedying the problem. This leaves the legislature to make law to solve the problem and the executive branch to enforce the legislature’s mandate. As the next part will show, the legislatures of various states have taken it upon themselves to address the issue of solar

113. *Id.* at 294.

114. *Id.* at 294–95.

115. *Id.* at 297.

116. *Id.* at 295.

117. *Id.* at 295.

siting guarantees. However, these legislatures have done so in an incomplete, imperfect way.

V. THE CURRENT LEGISLATIVE PICTURE: THE PROBLEM WITH “REASONABLE”

Legislation involving solar energy splits into two groups: the legislation that provides incentives and the legislation that removes barriers (or removes disincentives). Protecting individual homeowners from pseudo-militant CIDs and HOAs would belong to the latter category. Legislatures all around the country have produced a flood of incentives (the former category), but the latter approach has received less attention.¹¹⁸ This difference continues the trend of disparate treatment of solar siting guarantees from academic and legal perspectives.

Currently, 21 states and the Virgin Islands have laws that address the conflict between solar energy and restrictive covenants.¹¹⁹ The following section will include in-depth examination of certain statutes that have particularly interesting components, either for good or ill.¹²⁰ These components could influence the structure of a “model statute.”¹²¹ This section will also give one example of how the application of a statute has not worked and what the state did to work out the kinks.

A. The Statutes

Arizona’s solar siting guarantee¹²² says that “any covenant, restriction or condition . . . affecting the transfer or sale of, or any interest in, real property which effectively prohibits the installation or use of a solar energy device . . . is void and unenforceable.” The main point of interest in Arizona’s statute is the language “effectively prohibits.” This language suggests that Arizona may still permit *restrictions* on solar energy devices, because of course an HOA may have guidelines governing placement and size that restrict but do not entirely prohibit. The adverb “effectively” provides something of a safe harbor for individual homeowners. A homeowner wishing to use a solar energy device may argue

118. A very helpful resource for looking at these statutes and comparing the solar energy situation across the country is the U.S. Department of Energy’s website “Database of State Incentives for Renewables and Efficiency” at <http://www.dsireusa.org>.

119. Solar and Wind Access Laws for Renewable Energy, <http://www.dsireusa.org/incentives/index.cfm?SearchType=access&&EE=0&RE=1> (last visited Dec. 27, 2010). Although this website uses the term “solar access” to refer to solar siting guarantees, I have continued my terminology to avoid confusion with solar easements or right-to-light.

120. Simply for organizational ease, the approach is alphabetical by state name.

121. This model statute will appear at the end of this article.

122. ARIZ. REV. STAT. ANN § 33-439 (1979).

that the HOA's guidelines affect the solar device to such an extent as to qualify as a prohibition.

The "effectively prohibits" language could also prove a nightmare for a homeowner. One can easily imagine the back-and-forth. The homeowner, armed with the statute above, begins to install solar energy devices. A neighbor notices and informs the architectural review board. The ARC comes to inspect and informs the homeowner that the community's aesthetics require the solar panels to be placed in such-and-such a position. The homeowner points to the statute as his legal authority. The ARC or HOA board says, "This is not a prohibition, only a regulation." The homeowner responds, "But your proposed placement will make my system less efficient." The HOA shoots back, "Well, a less efficient system still does not amount to a prohibition." The individual homeowner would then have to show that the aesthetic considerations do, in fact, amount to an effective prohibition. And in fact, one such homeowner pursued that exact argument; I will pursue that story below. The legal challenges to Arizona's statute actually resulted in its amendment in 2007. The full story, plus discussion of the amended statute, is below.

California's statute has a much better design than Arizona's.¹²³ Section 714(a) starts out by saying that "any covenant, restriction, or condition . . . affecting the transfer or sale of, or any interest in, real property, and any provision of a governing document . . . that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable." This section has two very important and excellent additions to the Arizona model: it voids "restrictions" and it also subjects "any provision of a governing document" to the rule, thus leaving absolutely no doubt that this statute applies to HOAs, CIDs, and their CCRs, given that CCRs are expressed within governing documents.¹²⁴

Whereas the bare-bones Arizona statute may leave open the question of application to development-wide covenants, conditions, and restrictions, the California code telegraphs to the reader the breadth of the law's application. HOAs often have former lawyers working as board members¹²⁵ and may come up with very clever arguments to preserve

123. Solar Rights Act, CAL. CIV. CODE § 714 (1978).

124. This article mentioned above that restrictive covenants really come in two sub-species: the agreements between two private parties regarding the transfer of property (for example, the racial qualification at issue in *Shelley v. Kramer*) and the governing documents set forth by HOAs and CIDs. The statutory language "affecting the transfer or sale" would seem to reach the former, while "governing documents" would seem to reach the latter.

125. For example, on the High Desert Board of Directors in Albuquerque, New Mexico, two out of seven members are attorneys. While this may not seem overly high, a one-third attorney rate does not reflect general population demographics.

their precious aesthetic constitution. Although Arizona does include covenants affecting “any interest” in land, that language may prove ambiguous. Does it refer to an ownership interest of the kind that first-year law students agonize over in Property class? Or does it include the interest that every homeowner has in his or her community’s self-governance? California’s version answers those questions conclusively—it applies to any “governing document,” which surely includes the covenants, conditions, and restrictions set forth by HOAs and CIDs.

The best parts of California’s code are sections 714(b) and 714(d), which further define the restrictions that come under the statute. Section 714(b) concedes that section 714(a)¹²⁶

does not apply to provisions that impose reasonable restrictions on solar energy systems. *However*, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, *reasonable restrictions* on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.¹²⁷

Section 714(d) then puts an actual numerical value on “significantly”: for solar hot water heaters, a “significant” restriction means anything that increases the cost more than 20 percent or decreases the efficiency more than 20 percent.¹²⁸ For photovoltaic systems, a “significant” restriction would increase the cost by more than \$2,000 or decrease efficiency by more than 20 percent.¹²⁹

While California does use possibly the most dangerous word in the entire legal world—“reasonable”—it saves itself by further defining “significantly.” And despite the legal silver bullet “reasonable,” section 714(b) also demonstrates responsible legislative drafting by explicitly stating the public policy of the state. Not only does the statute give concrete figures by which to resolve disputes, it provides big-picture guidance in the attempt to decipher public policy aims. California’s code accomplishes a very important goal of providing consumers, HOA board members, judges, and local governments all the elements they need to resolve conflicts involving solar energy systems.

126. See discussion *supra* note 125.

127. CAL. CIV. CODE § 714(b) (1978) (emphasis added).

128. CAL. CIV. CODE § 714(d) (1978).

129. *Id.*

Colorado's "Solar Access Law"¹³⁰ falls somewhere between Arizona's bare-bones statute and California's exemplary version. Like California, Colorado outlaws both prohibition and restriction, but unlike California, it does not include "governing documents."¹³¹ And more importantly, Colorado allows "aesthetic provisions [to] impose reasonable restrictions on the dimensions, placement, or external appearance" of the energy device that do not "significantly" increase cost or decrease efficiency.¹³² However, this provision does not put any numerical value on "significant" or "reasonable."¹³³ When California declares a public policy in favor of solar development, Colorado's protection of "aesthetic provisions" seems both shallow and spineless. It elevates appearance above energy efficiency and of course begs the question, "Whose aesthetic preferences will we follow?"

Colorado's version does have one very major advantage: it uses the language "renewable energy device," which section 38-30-168(1)(b) defines to include *both* solar and wind. Addressing both solar and wind in the same statute kills two birds with one stone and puts different renewable energy technologies on equal footing. Colorado's emphasis on wind may reflect the state's considerable large-scale wind interests.¹³⁴ Colorado legislators were very prescient in their prediction of nuisance actions against wind turbines, excluding from coverage "reasonable restrictions" on wind generators that "reduce interference with the use and enjoyment by residents of property situated near wind-electric generators as a result of the sound associated with the wind-electric generators."¹³⁵ This same section, 38-30-168(2)(c), outlines who and what will determine whether such restriction is "reasonable": "the architectural review process as required by the governing documents of the common interest community."¹³⁶

This last section, 38-30-168(2)(c), presents two interesting points. First, although Colorado did not include "governing documents" alongside any "instrument affecting" an interest in real property in section 38-30-168(1), it recognizes those documents in section 38-30-168(2)(c). Why recognize the existence and importance of "governing documents" in one section but not the other? Perhaps this is an example of poor proofreading or part of the acknowledgment by Colorado that it must provide

130. COLO. REV. STAT. § 38-30-168 (1979).

131. COLO. REV. STAT. § 38-30-168(1) (1979).

132. COLO. REV. STAT. § 38-30-168(2) (1979).

133. COLO. REV. STAT. § 38-30-168(2) (1979).

134. Colorado Wind Facts, http://www.nationalwind.com/colorado_wind_facts (last visited Dec. 27, 2010).

135. COLO. REV. STAT. § 38-30-168(2)(c) (1979).

136. *Id.*

guidance for future nuisance actions. More disturbing is Colorado's second deferment to the aesthetic judgment of those people with the greatest interest in restricting wind generators. This section lets a small group of people who may or may not have vested interests in maintaining their board positions, not to mention the status quo, determine what qualifies as "reasonable." This suggests that Colorado does not yet have a public policy which favors development of renewable energy.

Florida's statute leaves no question about its target: "A property owner may not be denied permission to install solar collectors or other energy devices by any entity granted the power or right in any deed restriction, covenant, declaration, or similar binding agreement to approve, forbid, control, or direct alteration of property."¹³⁷ This sweeping definition would seem to guarantee inclusion of HOAs and CIDs and their bylaws and governing documents. Florida's version is also admirably clear about its temporal effect. Whether the property owner has owned the house since time immemorial or just yesterday, and whether the covenant has existed since 1970 or five minutes ago, the provision goes into effect *whenever* the individual property owner seeks to install an energy device.

Florida also has a very interesting list of devices covered by its statute: "solar collectors, clotheslines, or other energy devices."¹³⁸ Clotheslines make their first appearance in this survey, and for good reason. A clothesline costs practically nothing compared to a solar collector, yet may provide an equal amount of energy savings. Florida has very intelligently realized that abatement of existing energy use goes hand-in-hand with developing renewable energy resources. And of course, "other energy devices" leaves the door open to wind-powered devices.

Hawaii gets a gold star for directly addressing HOAs. Its statute declares that "no person shall be prevented by any covenant, declaration, bylaw, restriction, deed, lease, term, provision, condition, codicil, contract, or similar binding agreement, however worded, from installing a solar energy device."¹³⁹ Hawaii then goes on to actually require affirmative action that encourages solar development:

Every private entity shall adopt rules by December 31, 2006, that provide for the placement of solar energy devices. The rules shall facilitate the placement of solar energy devices and shall not unduly or unreasonably restrict that placement so as to render the device more than twenty-five per cent less efficient or to increase the cost of the device by more than fifteen

137. Energy devices based on renewable resources, FLA. STAT. § 163.04(2) (1980).

138. *Id.* at § 163.04(1).

139. HAW. REV. STAT. § 196-7(a) (1992).

per cent. No private entity shall assess or charge any homeowner any fees for the placement of any solar energy device.¹⁴⁰

Not only does Hawaii require affirmative solar encouragement from private entities, but it provides an actual numerical figure for guidance. Section 196-7(f) defines “private entity” as “any association of homeowners, community association, condominium association, cooperative, or any other non-governmental entity with covenants, bylaws, and administrative provisions with which the homeowner’s compliance is required.” Hawaii takes the unprecedented step of explicitly mentioning the word “contract” in its list of binding agreements,¹⁴¹ thus directly implicating the U.S. Constitution’s Contract Clause.

New Jersey’s version¹⁴² actually defines what type of “reasonable” restrictions an HOA may employ: the qualifications, certifications, and insurance coverage of installation providers; location; concealment of supportive structures or piping; “color harmonization” with the surrounding building material; aggregate size.¹⁴³ However, these restrictions must not increase the cost of a solar collector system by more than 10 percent and must not interfere with the solar collectors functioning at “maximum efficiency.”¹⁴⁴

New Mexico’s law is among the barest version out there. It merely states that “a covenant, restriction, or condition contained in a deed, contract, security agreement or other instrument . . . affecting the transfer, sale or use of, or any interest in, real property that effectively prohibits the installation or use of a solar collector is void and unenforceable.”¹⁴⁵ This suffers from the same problems as neighboring Arizona’s original version did. It only covers prohibitions and not restrictions. While it contemplates HOAs, it does not expressly mention them. And it offers no guidelines for how to manage and resolve controversies.

Vermont in 2009 adopted a law regarding solar siting restrictions.¹⁴⁶ While most states have some variation in their respective statutes, Vermont chose to follow Florida’s example—the Vermont language tracks the Florida version word-for-word. Vermont had the opportunity to assess the relative successes or failures of other state statutes and evidently decided that Florida set out the clearest, most comprehensive example. Conversely, the State of Delaware in 2009 chose to follow

140. Placement of Solar Energy Devices, HAW. REV. STAT. § 196-7(b) (1992, 2005).

141. HAW. REV. STAT. § 196-7(a) (1992).

142. N.J. STAT. ANN § 45:22A-48.2 (2009).

143. *Id.* at § 45:22A-48.2(b).

144. *Id.* at § 45:22A-48.2(c).

145. N.M. STAT. § 3-18-32(b) (2007).

146. VT. STAT. ANN. tit. 27, § 544 (2009).

California's example, following the language of "deed, contract, or other legal instrument which affects" an interest in real property.¹⁴⁷

Statutes do not exist in a vacuum, of course. At some point they must interact with the real world and apply to actual factual situations. Cracks and imperfections inevitably appear and highlight the advantages and disadvantages of the original drafting. Other states can learn from the example below.

B. Application and Amendment

The experiences of Arizona homeowners show the need for well-drafted legislation. In 1997 two different homeowners living in the bizarrely named "Garden Lakes" community-association-governed neighborhood in Maricopa County installed solar water heaters for their swimming pools.¹⁴⁸ The community association demanded changes to the solar heating systems; its proposed plan would have involved entirely re-roofing the house or building an entirely new roof for the patio!¹⁴⁹ Both the individual homeowners and the association brought in experts on solar installation, but even that could not prevent the community association from bringing suit. The association sued both pairs of homeowners, alleging failure to comply with the guidelines and breach of the declared covenants of the community.¹⁵⁰ The association sought permanent injunctions, monetary penalties, and attorneys' fees.¹⁵¹ In response the Arizona homeowners pointed to section 33-439 of the Arizona statute, which invalidated any covenant that "effectively prohibited" their solar energy devices.¹⁵²

The case went to trial, and the trial court found that the association's guidelines *and* its conduct did "effectively prohibit" the solar energy devices.¹⁵³ In addition, the trial court awarded attorneys' fees to the individual homeowners.¹⁵⁴ The association appealed, and the Arizona Court of Appeals affirmed the trial court's decision.¹⁵⁵ The association

147. Restrictive Covenants, DEL. CODE ANN. § 318(b) (2009).

148. *Garden Lakes v. Community Association*, 204 Ariz. 238, 62 P.3d 983 (Ct. App. 2003). William and Joan Madigan and Henry and Lavonne Speak were the named defendants. Although the Association sued the two couples separately, the actions were consolidated. They initially did so without permission of their Architectural Review Committee, even though the governing guidelines did require prior approval.

149. BRINGING SOLAR ENERGY, *supra* note 17, at 35.

150. *Garden Lakes*, 62 P.3d at 985.

151. *Id.* at 985.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Garden Lakes*, 62 P. 3d at 984.

argued that the state statute required an “inevitable preclusion” of the installation of the solar energy device.¹⁵⁶ The homeowners countered with evidence showing that the association’s requirements either could not be met (according to expert testimony in the trial court below) or added so much cost that any homeowner would forgo installation entirely.¹⁵⁷ The Arizona Court of Appeals declined to accept the association’s “inevitable preclusion” definition and instead decided that determining whether an effective prohibition exists “is a question of fact to be decided on a case-by-case basis.”¹⁵⁸

On those facts the court did find an effective prohibition. It considered the feasibility of the two “alternative” designs offered by the association.¹⁵⁹ One of those solutions would have added \$5,000 to the cost of installation; the other involved the building of an “aesthetic screen.”¹⁶⁰ Expert testimony from both a contractor and a distributor of solar heaters confirmed that both options presented enormous difficulties.¹⁶¹ The court also affirmed the award of attorneys’ fees to the homeowners.¹⁶²

In 2007 Arizona amended its solar siting statute to incorporate the lessons learned from the protracted *Garden Lakes* litigation.¹⁶³ Section 33-1816(A) now says, “Notwithstanding any provision in the community documents, an association shall not prohibit the installation or use of a solar energy device.” Although the association may still “adopt reasonable rules regarding the placement of a solar energy device,” those rules must not “prevent the installation, impair the functioning of the device or restrict its use or adversely affect the cost or efficiency of the device.”¹⁶⁴ Subsection C awards attorneys fees to the prevailing party in the event of litigation, perhaps echoing the judicial decision above. While Arizona once had a statute that subjected homeowners to association abuse, it now has a workable law that discourages frivolous litigation through the provision for fee shifting.

Arizona’s process of amending its solar siting statute shows the breadth necessary in these laws. These laws must protect the individual homeowner, but they also must balance the interests of the association. Litigation over ambiguous statutory language costs time, money, energy, and most ironically, destroys the feeling of neighborly good will and

156. *Id.* at 986.

157. *Id.*

158. *Id.* at 987.

159. *Id.*

160. *Garden Lakes*, 62 P. 3d at 988.

161. *Id.*

162. *Id.* at 989.

163. ARIZ. REV. STAT. § 33-1816 (2007).

164. *Id.* at § 33-1816 (B).

friendship that community associations specifically try to cultivate. A statute that clearly delineates the rights and responsibilities of each party is preferable. The model statute that concludes this article takes into account several components that will allow states to avoid the hassle and conflict that overtook Arizona. Because New Mexico's current version copies Arizona's first attempt, New Mexico should pay particular attention to necessary legislative language.

C. The National Version

Lawmakers at the national level had a similar idea. In 2007 Representative Cardoza of California and Representative Ferguson of New Jersey introduced H.R. 2848 into the House of Representatives. Senator Menendez of New Jersey came out with S. 1016.¹⁶⁵ The title of the bill was the "Solar Opportunity and Local Access Rights Act" (SOLAR Act).¹⁶⁶ The bill directed the Secretary of Housing and Urban Development together with the Secretary of Energy

to prohibit any private covenant, contract provision, lease provision, homeowners' association rule or bylaw, or similar restriction, that impairs the ability of the owner or lessee of any residential structure . . . to install, construct, maintain, or use a solar energy system on such residential property.¹⁶⁷

The bill also requires approval for such systems to proceed "in the same manner as an application for approval of an architectural modification to the property" and requires that approval "shall not be willfully avoided or delayed."¹⁶⁸ It goes on to define impairment as "unreasonably" delaying the project or increasing costs.¹⁶⁹

The proposed federal version had some advantages of its own. It included covenants, contracts, *and* HOA rules, leaving no room for mistakes about coverage. It also acknowledges the existence of ARCs and the fact that homeowners must still go through the ARC approval process. But even while acknowledging this unpleasant reality, the bill provides relief from it, cautioning HOAs and ARCs that foot-dragging and logrolling will not be tolerated. HOAs and ARCs cannot single out solar energy for any special treatment. This sends the powerful message that

165. The two bills were equivalent. Their texts, histories, and outcomes may be found through <http://www.thomas.gov>.

166. H.R. 2848, S. 1016, 110th Cong. (2007).

167. SOLAR Act, H.R. 2848, 110th Cong. § 6 (a)(1) (2007), available at <http://www.thomas.gov/cgi-bin/query/F?c110:38:/temp/~mdbsieAdr4:e28160>.

168. *Id.* § 6(a)(2).

169. *Id.* § 6(b)(1).

residential solar systems are here to stay. Despite these advantages, the bill fails to put a number value on “unreasonably.”

2007’s SOLAR Act died on its journey through the 110th Congress. On the Senate side, it swept immediately into the Committee on Energy and Natural Resources, which did nothing with it.¹⁷⁰ The House version was assigned to no fewer than four committees: Energy and Commerce, Oversight and Government Reform, Financial Services, and Science and Technology.¹⁷¹ It never again saw the light of day. No committee in either chamber produced any kind of document related to the bills.

Representative Cardoza tried again in 2009 with the exact same text,¹⁷² and again it failed to even reach the floor. This time it traveled to the Committees on Energy and Commerce, Oversight and Government Reform, Financial Services, and Transportation and Infrastructure. In Transportation and Infrastructure it went to the sub-committee on Economic Development, Public Buildings, and Emergency Management.¹⁷³

VI. THE CONTRACT CLAUSE

While the solar siting guarantees play a crucial role in residential solar growth, they face legal challenge from nothing less than the U.S. Constitution. At least one scholar has pointed out that outlawing CCRs may interfere with the right of private owners to freely contract.¹⁷⁴ The common law emphasis on the freedom of contract may provide vague grounds for a legal protest. The U.S. Constitution, however, makes the objection much more specific. Article 1, Section 10, states that “No State shall enter into any . . . Law impairing the Obligation of Contracts.” Analyzing the legality and constitutionality of solar siting guarantees involves multiple questions: (1) Are restrictive covenants truly contractual obligations?, (2) What has the Supreme Court said in the past regarding the Contract Clause?, and (3) Do these state laws invalidating CCRs fit within the Supreme Court’s analysis?

State laws that invalidate restrictive covenants as related to solar technology do not come into conflict with the U.S. Constitution’s Con-

170. LIBRARY OF CONGRESS, Bill Summary and Status, All Congressional Actions, <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1.:/temp/~bdLsHq:@@X—/home/LegislativeData.php?n=BSS;c=110—>.

171. *Id.*

172. SOLAR Act, H.R. 2895, 111th Cong. (2009).

173. LIBRARY OF CONGRESS, Bill Summary and Status, All Congressional Actions, <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:1.:/temp/~bdM6PH:@@X—/home/LegislativeData.php?n=BSS;c=111—>.

174. Pike, *supra* note 8, at 944.

tract Clause. The two leading cases suggest that this kind of state statute fits squarely within the exception afforded to the state's power to protect the health and welfare of its citizens.

A. The Contractual Nature of Restrictive Covenants

"Covenant" has a variety of definitions, but most hew closely to the idea of a contractual agreement. *Black's Law Dictionary* defines "covenant" as "a formal agreement or promise, usually in a contract."¹⁷⁵ *American Jurist* makes no quibbles in its definition:

"covenant" is a contract, an agreement, a promise, or a species of express contract. The word "covenant" means to enter into a formal agreement, to bind oneself in contract, and to make a stipulation. As covenants are contractual in nature, they bind the parties in the same manner as any other contract.¹⁷⁶

A survey of caselaw reveals that most courts agree that restrictive covenants, and specifically CCRs, are contracts. One Arizona appellate court declared that a "recorded declaration that contains restrictive covenants common to all properties in a development forms a contract between the [development's] property owners as a whole and the individual lot owners."¹⁷⁷ Academic literature says that in the "case of CIDs, the covenants are created through a private party contracting directly with the HOA."¹⁷⁸ When an individual homeowner buys his home or joins his community, he agrees to bind himself to the community's rules and obliges himself to act in accordance with those rules.

B. The Contract Clause and Solar Siting Guarantees—an Ideological Misfit

From various pieces of Contract Clause jurisprudence we can glean a kind of ideological thrust—a mindset regarding how and why courts should enforce the Clause. The solar siting guarantees at issue in this article do not fit within that mindset. The seminal Contract Clause case is 1934's *Home Building and Loan Association v. Blaisdell*; in this case the Court went into a lengthy recounting of the Contract Clause's history.¹⁷⁹

175. BLACK'S LAW DICTIONARY 311 (8th ed. 2004).

176. 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 1 (2009).

177. *Nolan v. Starlight Pines Homeowners Association*, 216 Ariz. 482, 488, 167 P.3d 1277, 1283 (App. Div. 2007).

178. Pike, *supra* note 8, at 939.

179. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

The Court's discussion of the history of the Contract Clause shows its inapplicability to the statutes at issue in this article. The Framers from the beginning had in mind one particular contractual relationship—that which exists between debtor and creditor—and particular legislative actions which let debtors off the hook: “the widespread distress following the revolutionary period and the plight of debtors had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations.”¹⁸⁰

In the early nineteenth century, Chief Justice John Marshall, who was of course present during the time of the constitutional drafting, recounted that “the power of changing the relative situation of debtor and creditor, of interfering with contracts . . . had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man.”¹⁸¹ As Marshall put it, “This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.”¹⁸²

An analysis using the constitutional theory of “originalism” and the historical background of the Contract Clause shows that state statutes guaranteeing solar siting do not run afoul of the Contract Clause because these statutes have nothing to do with the original intention of the Framers and nothing to do with the economic climate of 1789. The solar statutes do not affect credit flows at all, and they do not release homeowners from any monetary obligations. A homeowner wishing to install a solar heating system still must pay for that system. And the statutes do not prohibit HOAs from charging dues or fees to its members. Furthermore, since our statutes do not concern commercial enterprises, Chief Justice Marshall's fear for the credit market has no bearing here. Letting homeowners place solar panels on an individual home simply does not approach the graveness of letting individual debtors walk away from their monetary responsibilities in droves. Marshall also places his caution within the context of interpersonal relationships: confidences between “man and man” and the “sanctity of private faith.”¹⁸³ The state laws at issue here do not fit into this deeply personal context. HOAs and CIDs represent contracts between an individual and a faceless collective entity, not between individuals themselves. Marshall recognized the danger of changing the power structure between debtor and creditor,

180. *Id.* at 427.

181. *Id.* at 428 (quoting *Ogden v. Saunders*, 25 U.S. 213, 354–55 (1827)).

182. *Id.*

183. *Id.*

who necessarily have differing leverage in the relationship. The solar guarantees give the individual greater leverage against an organization, not against another individual.

Even without subscribing to “originalism,” we can find enough Supreme Court guidance to further safeguard these statutes under the heading of “police power.” After noting that the Minnesota law at issue in *Blaisdell* affected only the *remedy* of the contract and not its underlying obligation, the Court stated that “not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes,” but “the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect.”¹⁸⁴ The Court for once explicitly favored people over contracts: “the police power [] is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.”¹⁸⁵ And while recognizing the importance of ends, the Court also acknowledged the means which accomplish those ends. “The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.”¹⁸⁶

Promoting the use of solar energy is a legitimate end, and our statutes are reasonable and appropriate to accomplishing that end. Whether or not people agree on the science and policy of global climate change, they can agree that more solar energy will mean less pollution, which will enhance the health, comfort, and general welfare of a state’s people. Whether from an environmental, security, or human health standpoint, states have a legitimate interest in exploiting solar energy. Another possible justification along these lines is that U.S. independence from foreign petroleum will enhance the “general welfare” of all. Statutes guaranteeing solar siting address both economic and environmental ends. And these statutes ultimately do something very, very small. They remove one barrier to private solar development. They do not attempt to invalidate billion dollar contracts between multinational petroleum companies. They propose a solution matched in size to the size of the problem: individual homeowners face barriers to solar development. These

184. *Blaisdell*, 290 U.S. at 434–35.

185. *Id.* at 437.

186. *Id.* at 438.

statutes remove one of those barriers while leaving the majority of homeowners' obligations under their CCRs intact.¹⁸⁷

C. The *Blaisdell* and *Energy Reserves Group* Rules

1. *The Blaisdell Factors*

In addition to ideological guidance, *Blaisdell* provides legal, fact-driven rules. The Great Depression context of the case is readily apparent. In 1933 Minnesota passed a Mortgage Moratorium law which amended foreclosure laws to postpone foreclosure sales and extend the time period for redemptions. Chief Justice Hughes' majority opinion noted that the Minnesota statute had little substantive effect: "The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains . . . Aside from the extension of time, the other conditions of redemption are unaltered."¹⁸⁸ The Court also cautioned that while the emergency of the Great Depression had prompted the legislation, emergencies do not create power; they only provide opportunities for the exercise of power.¹⁸⁹

The Court ultimately ruled Minnesota's law constitutional and in doing so set out five factors it considered in its decision: (1) the existence of an emergency, (2) the legislation did not give special treatment to anyone, (3) the relief was of a character appropriate to the emergency, (4) the conditions were reasonable, i.e., the integrity of the mortgage remained, the interest continued to run, etc., and (5) the legislation had only temporary effect.¹⁹⁰

Although the solar rights statutes do not have all five factors, the Court did not *require* all of them, and in any case, the statutes do have several of these characteristics. The solar rights statutes fulfill factor 2's requirements. The great majority of the statutes include multiple targets; they do not pick out HOAs and CIDs specifically for regulation but instead apply to many different instrumentalities.¹⁹¹ As to factor 3, the solar statutes do not so much give relief as they protect an individual homeowner from having to take legal action. Whether or not we characterize this technically as "relief," preventing unnecessary lawsuits is usually an "appropriate" measure, at least for judicial efficiency interests (for the "emergency" component of factor 3, see below). And just as factor 4

187. Similarly, the Minnesota law in *Blaisdell* gave a few months more to homeowners under threat of foreclosure while leaving the majority of the homeowners' obligations under their mortgage contracts intact.

188. *Id.* at 425.

189. *Id.*

190. *Id.* at 444.

191. This factor could influence a model statute. See *infra* Part VII.

recommends, the solar rights statutes leave intact the majority of HOA and CID restrictive covenants. Although homeowners may now install solar panels, they still may not leave garbage out or may not blast their stereo systems or some of the hundreds of other restrictions. Most HOAs and CIDs have pages and pages of CCRs, and the solar statutes leave most of those conditions alone—a very “reasonable” choice.

Whether factor 1 exists could very well depend on whom you ask. The emergency in question in *Blaisdell* was none other than the Great Depression. Can U.S. overdependence on fossil fuels qualify as an emergency? The providers of carbon-based energy would conversely argue that the United States has plenty of energy to last for many years without danger of emergency. And even if politicians conceded that fossil fuel usage presents a problem, would they ever go so far as to call it an emergency? In the 1970s an Organization of the Petroleum Exporting Countries’ (OPEC) oil embargo resulted in the “Energy Crisis,” but must we wait until the price of oil rises dramatically to haul out the word “emergency?”

The solar rights statutes do not meet the Court’s factor 5 of temporariness. However, to state yet again, the Court identified these five characteristics as only *influences* upon the Court’s decision, not dispositive requirements.

2. *The Energy Reserves Group Inquiry*

The Court revisited and clarified its analysis in 1983’s *Energy Reserves Group v. Kansas Power and Light*.¹⁹² The context of that case bears more resemblance to the energy background of this article. The Energy Reserves Group (ERG) had entered into contracts to purchase natural gas. These contracts contained “governmental price escalator clauses.”¹⁹³ A Kansas law invalidated this kind of escalator clause.¹⁹⁴

The Court’s statement of the Kansas law’s constitutionality could apply almost verbatim to the statutes at issue here: “To the extent, if any, the Kansas Act impairs ERG’s contractual interests, the Kansas Act rests on, and is prompted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of . . . gas prices.”¹⁹⁵ Replace “Kansas” with any relevant state and “ERG” with “HOA” to get an effective justification of solar guarantee statutes. This statement also provides an example of a state interest that the Court can accept. Translated to our setting, the state can say that

192. *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400 (1983).

193. *Id.* at 403.

194. *Id.* at 407.

195. *Id.* at 416–17.

allowing homeowners to install solar energy systems on their homes protects the homeowners from rising energy prices.

Besides this valuable statement of purpose, the case also produced a method of analysis for Contract Clause issues. First, a court must inquire whether the state law has “operated as a substantial impairment of a contractual obligation.”¹⁹⁶ If a court finds such a substantial impairment, the state “in justification, must have a significant and legitimate public purpose behind the regulation.”¹⁹⁷ Finally, once a state has identified its public purpose, the court should inquire “whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.”¹⁹⁸ The Court also resolved any doubts about the continued relevance of some of the *Blaisdell* factors: “Since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation.”¹⁹⁹

a. “Substantial Impairment”

Solar siting statutes do not operate as a substantial impairment of a contractual obligation. In parsing the language, “substantial” is the determiner. We have already decided that CCRs qualify as “contractual.”²⁰⁰ We can concede “obligation.” By joining the planned community, the individual homeowners have obliged themselves to follow the rules,²⁰¹ and if the state allows them to, in essence, break the rules, it will have impaired the obligation. “Substantial” remains, but it is not an absolute characteristic. In *Energy Reserves Group* the Court tied the degree of impairment to the context of the contract. In discussing “substantial” in *Energy Reserves Group*, the Court noted that the parties operated in the already heavily governmentally regulated natural gas industry, and so ERG should have expected some interference with its contracts.²⁰² “Price regulation existed and was foreseeable as the type of law that would alter contractual obligations.”²⁰³

The linkage between the substance of an impairment and the context of the regulation could apply to the solar statutes in two ways: (1)

196. *Id.* at 411.

197. *Id.*

198. *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400, 412 (1983).

199. *Id.*

200. In *General Motors v. Romein*, 503 U.S. 181 (1992), the Supreme Court did not even reach the “substantial” inquiry because it found no contractual relationship.

201. Specifically, the homeowner in accepting the covenants and restrictions made a contractual agreement not to install solar panels.

202. *Energy Reserves Group*, 459 U.S. at 413.

203. *Id.* at 416.

the government traditionally regulates energy production and use, and so it can continue to regulate the placement and use of solar energy systems, and (2) local and state governments traditionally regulate land-use planning and zoning, and so state governments can continue to set guidelines for land-use planning. Although residential solar panels and state regulatory power over utilities have a somewhat attenuated relationship, they do still have a relationship: more residential solar energy use will mean less public utility use. Because the state already regulates energy use, a law that fits within that duty does not impair contractual obligations, but merely extends the government's regulatory footprint further.

If we instead view these solar guarantees as a kind of zoning or land-use law, the analysis has a similar result. All the way back to *Village of Euclid v. Ambler Realty*,²⁰⁴ state and local governments have told property owners what they can and cannot do and where they can or cannot do it. HOAs essentially have taken over that responsibility from government. Individual homeowners and their CIDs exist in a sphere in which government traditionally has played a role. We can view these state statutes not as substantially impairing a contractual relationship, but as taking *back* responsibility for a traditional governmental function.

b. Gains

In its inquiry into substantial impairment, the Court also focused on a kind of sub-category of "substantial impairment:" the gains that ERG expected to receive and actually received. The original price escalator clause "was designed to guarantee price increases consistent with *anticipated* increases in the value of ERG's gas."²⁰⁵ The Kansas law prevented those "anticipated increases," leaving ERG with "gains it reasonably *expected* from the contract."²⁰⁶ Although the difference between "anticipated" and "expected" is a very slim one, the two words do have different connotations. "Expected" suggests a much higher degree of certainty than "anticipation." If a gain is "expected," then the party relies upon it. In contrast, an "anticipated" gain suggests hope rather than reliance. Application of this principle to the solar siting guarantees provokes the question of what HOAs seek to gain through their CCRs. Aesthetic uniformity? Peace and quiet? A safe neighborhood? Certainly they do not seek monetary gains. The solar siting guarantees do not restrict HOAs from realizing their sought gains: the HOAs still get safe neigh-

204. *Energy Reserves Group v. Kansas Power and Light*, 272 U.S. 365 (1926).

205. *Energy Reserves Group*, 459 U.S. at 415 (emphasis in original).

206. *Id.* at 411 (emphasis added).

borhoods full of peace and quiet, and they probably will still maintain a high degree of aesthetic uniformity.

c. Public Policy

The residential solar statutes do not substantially impair contractual obligations, but even if they did, they would satisfy the second and third prongs of the *Energy Reserves Group* test: public policy and reasonableness.²⁰⁷ Now we know why California and other states decided to explicitly include in their versions a statement of public purpose or policy. A state can choose from a myriad of public purposes to justify its guidelines: to encourage use of renewable energy; to reduce pollution and promote the public health; to gain energy independence at a state or national level; to force public utilities to consider renewable energy. A state can think up diverse arguments to justify any one of these as a “public policy.” Although the *ERG* rule does not require the state to provide a justification within the statute, California may have made a smart decision to explicitly state the public purpose and legislative intent within the law itself.

d. Reasonable

The third prong of the *Energy Reserves Group* test shows why California and other states included the word “reasonable” in their statutes. The statutes definitely do adjust the rights and responsibilities of the individual and the HOA, but they do so in a reasonable way—and some of the better drafted laws even define “reasonable.” The state statutes match the narrowness of the solution—homeowners can install their preferred renewable energy devices—to the narrowness of the problem—homeowners living in CIDs face obstacles to renewable energy use. *Merriam-Webster* lists two of the definitions of “reasonable” as “not extreme or excessive” and “moderate, fair.”²⁰⁸ Giving homeowners greater options in energy use does not represent “extreme” action—“extreme” would be *requiring* every homeowner to install solar panels. And in the interest of fairness and moderation, the state statutes at issue in this article still leave intact the majority of restrictive covenants.

207. Note that the *ERG* test, as expressed *supra* at Part VI.C.2.a, requires inquiry into public policy only IF the court finds a substantial impairment. Because this is a hypothetical argument, it will consider all components of the test.

208. Merriam-Webster.com, Reasonable, <http://www.merriam-webster.com/dictionary/reasonable> (last visited Dec. 27, 2010).

D. Circumventing the Contract Clause

The leading case finding a substantial impairment, *Allied Structural Steel v. Spannaus*,²⁰⁹ suggests a method for conceptually evading the Contract Clause altogether. In doing so, it actually provides more support for the solar siting statutes. Due to a change in Minnesota's regulation of private pension funds, Allied Structural Steel had to pay \$185,000 more in pension funding than it had previously expected.²¹⁰ Although the majority considered this an *impairment*, Justice Brennan wrote a dissent that attempted to distinguish between laws that *imposed* new obligations and those that *negated* old obligations.²¹¹ In Justice Brennan's calculus, only the latter would be unconstitutional; the former would simply be called "government legislation."²¹² Brennan's dissent suggests two completely different ways to look at the solar rights laws at issue here. In the first view, the laws negate the old obligation of individual homeowners to comply with the rules of their CID. But in the second view, the laws impose a new obligation on the CIDs and HOAs to allow renewable energy devices. Which is the more correct connotation of "obligation:" to not do something, or to allow something to happen? Certainly Hawaii's version takes the latter view and creates a new obligation for community associations to develop a renewable energy plan. Although Justice Brennan's view is a dissent, it provides a provocative new perspective on contractual relationships that could lead to a conceptual leap out of the Contract Clause's way.

Of course, one possible solution evades the Contract Clause entirely: national legislation. The Contract Clause only applies to states, not the federal government.²¹³ Congress would not have the constraint of the Contract Clause if it decided to attempt solar siting legislation once again. The avoidance of a possible constitutional challenge is a distinct advantage to the idea of a national version of the state statutes this article has examined.

The constitutional analysis can proceed in a number of manners: appeal to the general spirit, consider means versus ends, apply the various factors and rules and tests, and argue that the tests do not even apply. No matter which approach we apply to the solar siting guarantees, the outcome remains the same: they are a valid expression of state legislative authority.

209. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

210. *Id.* at 234.

211. *Id.* at 254.

212. *Id.*

213. The Constitution itself says, "No State . . .".

VII. CONCLUSION: A MODEL STATUTE

The perusal of various state statutes and the Contract Clause analysis has highlighted the positives, negatives, attractions, and dangers of various legislative drafting choices. I am proposing a statute that represents a hypothetical version incorporating the best features of the state and federal versions and the lessons learned from the Contract Clause. It derives most of its text from the proposed federal version while incorporating California's declaration of public policy, allowance for "reasonable restrictions," and numerical valuation of "significantly." It also incorporates three components of Florida's version: the list of targeted entities, the inclusion of clotheslines, and the approach of centering the statute on the actual action of using or installing solar energy systems. It avoids using the word "contract" so as not to directly antagonize the U.S. Constitution.

(1) Any entity granted the power or right in any deed restriction, covenant, declaration, lease provision, homeowner's association rule or bylaw, or similar binding agreement to approve, forbid, control, or direct alteration of property shall not impair the ability of the owner or lessee of any residential structure to install, construct, maintain, or use a solar energy system, clothesline, or other energy device on such residential property; and

(2) Whenever any such covenant, provision, rule or bylaw, or restriction requires approval for the installation or use of a solar energy system, the application for approval shall be processed and approved by the appropriate approving entity in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed.

(3) This section does not apply to provisions that impose reasonable restrictions on solar energy systems. However, it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto. Accordingly, reasonable restrictions on a solar energy system are those restrictions that do not significantly increase the cost of the system or significantly decrease its efficiency or specified performance, or that allow for an alternative system of comparable cost, efficiency, and energy conservation benefits.

(3)(a) "Significantly" means an amount exceeding 20 percent of the cost of the system or decreasing the efficiency of the solar energy system by an amount exceeding 20 percent, as originally specified and proposed.

There is one other possibility for policy change in the area of solar energy and property rights. HOAs can take it upon themselves to review and change their policies. In an effort to proactively address possible controversies and alleviate tension, the High Desert neighborhood in Albuquerque, New Mexico, has discussed adopting a policy akin to California's statute into their internal governing documents.²¹⁴ Even though New Mexico has a protective statute, clarification by the association itself could prevent confusion and neighborhood conflicts. HOAs around the country can review their states' position and the position in other states and decide for themselves which approach works more effectively.

The recent discussions in the High Desert neighborhood—whether or not they result in adoption of California's policy—show that neighbors can still talk to neighbors and that perhaps the best way of solving this problem is at the neighborhood level. While the United States may never return to the days of popping in next door to borrow a cup of sugar, we should not descend into a state of civic hostility that prevents neighbors from resolving their disputes in a friendly and peaceful way. And with energy reform pushed out of the picture in Washington, D.C., the war against climate change may end up being fought on residential streets across America.

214. Personal discussion with John Caffrey, member, High Desert Board of Directors. In full disclosure, Mr. Caffrey is the author's father.

