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June 30, 2013

By: George K. Staropoli

## **The HOA contribution to the decline in civic virtue**

Jeb Bush and Clint Bolick, VP of Litigation at the Goldwater Institute in Phoenix and nationally recognized constitutional law scholar, expressed their concern for the loss of “basic American values.” Although presenting their solution to the dysfunctional US immigration policy<sup>i</sup>, their concern is well suited to the impact that the defective HOA legal scheme has had on civic virtue.

But if there’s one field of study that is unquestionably a proper mater for national policy, it is civics education. Not just for newcomers, but we believe our entire population is in the need for improved civics education. . . . And without a truly informed citizenry, we cannot expect American ideals to continue to flourish.<sup>ii</sup>

The lack of adequate civics education means that many Americans have little idea how their government works . . . . [A report] found that less than one-third of fourth-, eighth- and twelfth-graders were not proficient in civics . . . [and] knowing what America stands for is not a genetic inheritance, but must be learned.<sup>iii</sup>

It is interesting to note that in the 2013 Arizona legislative session, two bills were put forth designed to educate high school students in civics: HB 2467, “*high school graduation; constitutional oath*”, and SB 1212, “*high school instruction; federal constitution.*” Neither was assigned a committee. I call these type bills “show and tell” bills, solely designed to make the Legislature look good, but not meant to go anywhere.

A good part of the failure to provide for education in civic awareness lies in the rapidly growing residential housing industry that requires a governmental body over developers’ subdivisions that contain common elements. Some entity, if not the local municipality, must govern these common elements and that has fallen to the homeowners association (HOA) legal scheme. The legal scheme is rooted in the CC&Rs, the equivalent to a private constitution, and to which the courts frequently refer to as such. They are created not by constitutional scholars or political

scientists, but by real estate lawyers knowledgeable in servitudes law. They are not approved by the state nor are oversight protections in place, as we find in all and every state subdivision including incorporated town and villages, and in even those with a fair amount of home rule.

If the CC&Rs had confined itself to simply setting up a nonprofit corporation to administer the business functions pertaining to the operation and maintenance of these common areas with amenities, we would not be seeing the encroachment upon our democratic system of government. What has developed has been the authority and powers, supported by almost identical state statutes, that amount to the control and regulation of people and their behavior in their homes. Authority and powers that deny homeowners those rights and freedoms still retained by homeowners not living in an HOA controlled property.

There is no civic virtue or civil servants in HOAs, because the HOA legal structure for governance is a corporation. The equivalent of civic or civil is HOA virtue, which amounts to two simple attitudes: pay your assessments on time and follow the rules. (See [High Noon in HOA-Land: members who permit lawless boards to function](#)). Some 23% of Americans reside in these HOA governed subdivisions or territories according to industry sources,<sup>iv</sup> more than either of the Black or Hispanic minorities.

Apparently the powers that be do not feel the need for developing civic virtue within HOA regimes because they readily bought into the misguided belief that HOAs are not governments. But they are governments -- private, de facto governments unrecognized by the authorities much like Cuba and others. They are governments much like independent principalities without allegiance to the Constitution or to those “*basic American values.*” To the supporters of these private regimes, the US Constitution is only about absolutely no interference with private contracts no matter what. The supporters also believe that “consent to agree” is a matter of still remaining under the HOA rule and not moving out, a doctrine used to legitimize obedience to public government.<sup>v</sup>

However, the homeowner has been told that he has signed and agreed to a binding contract, the CC&Rs, but “consent to agree” appears nowhere in the contract. The “agreement” is completely at odds with the requirements for a bona fide contractual agreement (Actually, wording exists and is buried in the CC&Rs that amounts to a surrender just by accepting the CC&Rs, a serious violation of judicial scrutiny criteria). In the public domain, there is no contractual agreement and a legal doctrine had to be developed to maintain law and order.

Organic law is the fundamental basis of a government. *The Homes Association Handbook* (1964, the HOA “bible”) and UCIOA (uniform common interest ownership act) constitute, in my view, the organic law for HOA governed planned communities. In contrast, the U.S. Code defines the organic laws of the United States to include the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the U.S. Constitution.<sup>vi</sup> The organic laws of HOA-Land are replacing the organic laws of the US as applied to local government.

If the organic law of America is to remain the ideal, the standard, the goal of American beliefs of and values in democratic government, we must so educate the people in civics and we must return these independent HOA-Land regimes back to the American fold. HOAs must be made subject to the Constitution as any other local municipality. Here's a proposed, yet very simple bill to accomplish this return:

The CC&Rs or Declaration for any planned community, condominium association or homeowners association shall state that, "The association hereby waives and surrenders any rights or claims it may have, and herewith unconditionally and irrevocably agrees to be bound by the US and State Constitutions and laws of the State as if it were a local public government entity."

If the above is unacceptable, then perhaps the following, which was suggested by a nationally recognized constitutional lawyer, will be found acceptable:

No provision of any contract or any declaration of covenants, conditions, and restrictions affecting lawful property uses of residences in a subdivision or condominium is enforceable in this state unless the party seeking to enforce the provision proves by clear and convincing evidence that 1) the provision being enforced was knowingly and voluntarily agreed to by all parties against whom it is being enforced; or 2) all parties against whom the provision is being enforced knowingly and voluntarily agreed to be bound by the provision without reading or understanding it.

But, will we see these reforms actually happen? The authors of *Immigration Wars*, Bush and Bolick, are somewhat angered at "*The ideological rancor, demagoguery, and political cowardice*" resulting in dysfunctional policy. Bolick is also angered at the lack of "*political courage – the courage to face down the demagogues.*" I, too, am angered and find myself in agreement with the authors in regard to the dysfunctional HOA state policies.

## Notes:

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<sup>i</sup> *Immigration Wars: Forging an American Solution*, Jeb Bush and Clint Bolick (Threshold Editions Div. of Simon & Schuster 2013).

<sup>ii</sup> *Id.*, p. 61.

<sup>iii</sup> *Id.*, p.60.

<sup>iv</sup> Industry Data, Community Associations Institute (<http://www.caionline.org/info/research/Pages/default.aspx>).

<sup>v</sup> A thorough discussion of the concept of "consent to agree" can be found in *Restoring the Lost Constitution: The Presumption of Liberty*, Randy E. Barnett (Princeton Univ. Press 2004).

<sup>vi</sup> ([US Statutes At Large](#), 1789 –1875, Vol. 18, Part I, Revised Statutes (43rd Congress, 1st session), p. v and vi).