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by George K. Staropoli

## **The HOA experiment of privatized government is alive and well, and growing**

Goldwater Institute's Policy Report of 100 ideas for 2009<sup>1</sup> contains some disturbing ideas that directly affect local government, homeowners associations and the future of American society. In particular, the following two "ideas" (emphasis added) are most disturbing for constitutional local government, because they carry the thought of expanded, privately "contracted" local governments not subject to the Constitution with its protections of individual rights.

22. Afford citizens enhanced protection against local government overreaches by enacting local constitutions.

41. Give cities and counties the power to replace centralized and bureaucratic zoning and land use regulation with decentralized and privately-enforced restrictive covenants.

I cannot help but notice the choice of the word "constitutions" in Idea 22 above, rather than "charter". Cities and towns have charters, not constitutions, subject to votes of the citizens and approvals according to Arizona's statutes. Homeowners associations have governing documents quite often referred to as constitutions. Absent from these constitutions are any obedience or compliance with the their state constitutions, thereby placing them on a more or less equal footing. Where is the Institute going with the image of a "constitution" rather than a state approved charter?

It appears that Idea 22 above is also suggesting the continued segmenting, not uniting of, communities, which also creates another level of government. When is government interference not government interference. At the home? At the block level? At the neighborhood? The municipality? And, if these new constitutions are private constitutions, like the HOA governing documents, then serious constitutional issues are raised: can private contracts be used to avoid

compliance with the supreme law of the land, the US Constitution? Can state legislatures create such delegated governments and not violate the Constitution?

My views in the above two paragraphs are supported by the Institute's Idea 41, as given above. The power to create private governments is being promoted, and, apparently, by using the HOA legal scheme as their model. It seems that the Institute recognizes some problems with existing planning boards that require HOA governance of new developments in order to obtain subdivision approvals, and seeks to legitimize it. Nothing is said about compliance with state constitutions with their Declarations of Rights. (While this may appear far fetched, please note that the California Law Review Commission had submitted a rewrite of California's common interest ownership laws with a blank "Members Bill of Rights").

Consequently, one can ask, Is the Institute's Center for Constitutional Government, whose director is responsible for these "ideas", supporting secession from local government? If so, then what becomes of public government? What is left for municipalities to do? Robert Nelson advanced this New America in which HOAs will secede from local municipal government since they will be performing all municipal functions.<sup>2</sup>

Creating a private neighborhood association [HOA] is an act of local secession by an altogether different route [as compared to incorporation under state municipality laws] (p.431). . . . The rise of the private neighborhood association . . . amounts to a powerful new movement of local secession in American life (p. 433). . . . In the future, more complete forms of secession may become possible (p.432).

Furthermore, the use of "privately-enforced restrictive covenants" in idea 41 can only be a reference to homeowners associations, which the Constitutional Center has maintained in not a constitutional issue. Its Director, wrote in response to this writer's question,

*"Doesn't this [constitutionality issues] apply to HOAs as well? You know, those binding constructive notice contracts that implicitly surrender due process and equal protection rights to private governments."*

If it's a genuinely contractual HOA, with CC&Rs that impose mutual and definite obligations, the bottom line is it's a private association to which the constitution does not apply.

And if it's an HOA based on an illusory contract, with CC&Rs that impose no obligation on HOAs and grant no benefit to homeowners, then any effort by the HOA to enforce the CC&Rs is a species of malicious prosecution (i.e. a frivolous lawsuit). But again, this would be private misconduct to which the constitution does not apply.

(Dranius email of November 19, 2008).

This should leave the reader quite perplexed as to just what The Goldwater Institute stands for. Is it for contract / government interference only if it is in favor of HOAs, as proposed in the above two mentioned "ideas"? (Why did the Institute violate its mission statement<sup>3</sup> of not taking

positions on specific legislation when it openly opposed this year's HOA reform bill, SB1162?) How can this claim that contract interference is not a constitutional issue when Art I, sec. 10 of the Constitution specifically refers to the impairment of contracts? That's like saying improper police interrogation procedures is a matter of criminal law and not of constitutional law, and Miranda is all wrong.

Our Founding Fathers, although not perfect beings, well knew that a lasting democracy must be founded upon the respect for and the protection of the rights of the minorities, those rights that no government can take away. Yet, we are seeing a new wave of political aristocrats offering a supposed better form of government, when, in fact, they are only pursuing a single-minded ideology.<sup>4</sup>

Is The Center for Constitutional Government at Goldwater advocating HOA independence from constitutional restraints, and the establishment of a New America of independent principalities? Is The Goldwater Institute moving in the direction of HOA secession from local government? If the thought of secession continues to spread, what will become of America?

#### references

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<sup>1</sup> "100 Ideas for 100 Days", [http://goldwaterinstitute.org/Common/Img/100%20Ideas%20\(2\)%20with%20links.pdf](http://goldwaterinstitute.org/Common/Img/100%20Ideas%20(2)%20with%20links.pdf).

<sup>2</sup> *Private Neighborhoods and the Transformation of Local Government*, Robert H. Nelson, Urban Institute Press, 2005. (See comments at "HOA Secession from Local Government: The future of Planned Communities?", George K. Staropoli, <http://pvtgov.wordpress.com/2005/09/08/hoa-secession-from-local-government-the-future-of-planned-communities/>).

<sup>3</sup> Supra note 1, *"The Goldwater Institute does not retain lobbyists, engage in partisan political activity, or support or oppose specific legislation, but adheres to its educational mission to help policymakers and citizens better understand the consequences of government policies."*, p.2.

<sup>4</sup> See "The impact of ideology on the HOA legal scheme", George K. Staropoli, <http://pvtgov.wordpress.com/2008/11/23/the-impact-of-ideology-on-the-hoa-legal-scheme/>.