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supporting principles of democratic government

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Alice in HOA Wonderland: recognizing HOA political governments

1. The status of our judicial system

America is no longer a country governed under the laws of the land, but by the laws of men and the predilections of judges. Americans are living in a society that has been reinvented by public interest firms, government officials and the courts, including the US and state supreme courts. A society where black is defined to look like white, and white is defined to look like black. Where what you see is not what you get – a modern version of the Wonderland of Alice, and Lewis Carroll. Where important and meaningful philosophies and political theories are made less and less distinguishable so that everything A is like everything B.

Where traditional legal meanings such as constitutional and private property rights have become whatever the current group in power says they are. Where "government intervention" really means "laissez faire" government at the turn of the 20th century, or that "anything favorable to business goes". Where the courts have upheld the common law of equitable servitudes superior to constitutional and state laws, and, therefore, as the true supreme law of the land.

As applied to homeowner associations, Americans are faced with the same changing legal landscape, where traditional laws and legal precedent are being treated as starting points of discussion rather than as the foundation of our system of jurisprudence. Randy H. Barnett wrote,

> When a writing can be contradicted by testimony of a differing understanding, the purposes for which the agreement was put into writing in the first place is undercut. . . . If we let writings be contradicted by extrinsic evidence, then . . . little or no purpose would be served by the original writing. (*Restoring the Lost Constitution*).

As an example, the Supreme Court's holding that "public use" is the same as "public purpose" for eminent domain takings of private property (Kelo decision) is a contradiction to the original meaning of the Constitution. However, attempting to arrive at a just application of privacy and confidentiality protections to the technological advance of the internet is a legitimate

interpretation and construction of the Constitution to new areas not existing at the time of the writing of the Constitution.

As an example in regard to the changing legal HOA landscape, the Constitution prohibits ex post facto laws that make an activity that was legal in the past now an illegal activity and a violation of law. Yet, HOAs are allowed to amend their CC&Rs to declare a prior activity not in violation of the CC&RS to be now a violation -- an "ex post facto amendment". The courts not only permit the retroactivity of these amendments, but require such application are necessary for the benefit of all homeowners – all homeowners new that there can only be one set of rules declared several state courts. The original CC&Rs have no legal status under equitable servitudes, but would remain binding under contract law. If the HOA were deemed a municipality then these ex post facto amendments would be prohibited, as they are for any other public government.

Further confusing the landscape, homeowner associations have been described as a business, as a government or quasi-government, and the compromise, but empty, description of a "sui generis" (unique, one of a kind), and are marketed as a community association with the implication of a government, and not a business. What are HOAs under law? What are HOAs in reality? These important questions must be answered before any workable and effective solutions to their continued problems can be given.

This writing relates to the nature and status of HOA governments n this changing landscape. What factors or functions define a government? More specifically, what distinguishes a municipality from the government of a business? Or, from a church? Or from a university? Or from an HOA Board of directors? What or who does a "government" govern? What does a "quasi-government" mean?

In order to answer these questions satisfactorily, the meanings of related terms need investigation: political government, sovereignty, state and board of directors. (See Exhibit A for Black's Law Dictionary, 7th ed., definitions of these and other concepts and terms).
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2. <u>The "public functions" test fails and needs to fade away into oblivion.</u>

The antiquated and poorly arrived at delineation of a town as to the public functions it performs is a grossly poor definition of a government (*Marsh v. Alabama*, 326 US 501 (1946)). The public functions test fails under scrutiny of the various state municipality laws setting forth the requirements for incorporating towns/villages and cities, the most obvious two requirements are state approval of the charter and a vote of the affected citizens. Not all towns, villages or cities provide the same set of functions, as the incorporation of these entities is based on population criteria. In other words, small towns are not created with the identical functions of a large city. In fact, as opposed to the Marsh opinion, state municipality laws do not require municipal entities to have a library or a park, or to permit businesses to operate, or to require public streets.

3. <u>The government of business, university or church</u>

Clearly and indisputably, the body responsible for the government of these entities is set forth in state laws and in the articles of incorporation and bylaws, and is given the designation of board of directors, or board of trustees, etc. "The who" and "the what" are delineated in state laws and

in the above-mentioned corporate documents. The NJ Supreme Court in its opinion on HOA constitutionality considers HOAs to have business-like legal properties:

> That is, a homeowners' association's governing body has "a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders."

(*Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association,*A-118-122-05, p.32, July 27, 2007).

The court stopped short of declaring that HOAs as bona fide businesses, knowing all too well that a "nonprofit business" is an oxymoron (self-contradictory), and that the distinguishing characteristic of a business is to make a profit. Blink your eyes Alice, because the Community Associations Institute (CAI) continues to argue that HOAs are a business to further advance its own personal agenda. However, the CC&Rs are binding not by virtue of business law, but by virtue of property laws and equitable servitudes. Yet, CAI, and other special interests, continues to speak of, advertise, and promote HOAs as community associations (CAs) and not business residential associations (BRAs).

It must be noted that each of these entities usually regulates and control the activities of the people within a territory, such as the campus or dormitories. These organizations may even issue monetary fines against people within and subject to their territory for violations of rules of conduct. Further criteria are needed to distinguish municipal governments from these governments.

4. Municipal government

A quick blink of the eye, Alice, now shows CAI now proclaiming that HOAs, as community associations, are a form of community government, a government created by and for the benefit of the homeowners and not by and for the developers and hired hand members of CAI. CAI argues that they are the expression of the people, local democracy at work.

It is safe to define and to distinguish a municipal government from the entities responsible for the governing of a nonprofit board of directors or university board of trustees simply by the laws that permit and govern their existence, namely, the municipality laws.

While municipal governments perform, or contract for, the same services that the business would provide or perform does not make the municipal government a business, even though the municipality may charge for the service or product as it's purpose was similar to that of a business, except for one very important point. Municipal governments are not allowed to make a profit. Any surpluses go back into state funds for the benefit of the inhabitants or the territory so government by the municipality. Therefore, it can be argued that the municipality is just like any other nonprofit organization.

However, the mission as specified in the town charter differs markedly from that of the nonprofit, or a business. As seen below, a municipality neither is not a business or a nonprofit, nor is a business or nonprofit a municipal government.

The Scottsdale, AZ city charter reads (emphasis added),

> Sec. 1. Incorporation.
>
> The inhabitants of the City of Scottsdale, within the corporate limits as now established or as hereafter established in the manner provided by law, shall continue to be a municipal body politic and corporate in perpetuity, under the name of the "City of Scottsdale".
>
> Sec. 2. Form of government.
>
> The municipal government provided by this charter shall be known as the council manager form of government. Pursuant to its provisions and subject only to the limitations imposed by the state constitution and by this charter, all powers of the city shall be vested in an elective council, hereinafter referred to as "the council," which shall enact local legislation, adopt budgets, determine policies and appoint the city manager and such other officers deemed necessary and proper for the orderly government and administration of the affairs of the city, as prescribed by the constitution and applicable laws, and ordinances hereafter adopted by the city. All powers of the city shall be exercised in the manner prescribed by this charter, or if the manner be not prescribed, then in such manner as may be prescribed by ordinance.
>
> Sec. 3. Powers of city.
>
> The city shall have all the powers granted to municipal corporations and to cities by the constitution and laws of this state and by this charter, together with all the implied powers necessary to carry into execution all the powers granted, and these further rights and powers . . .

The Austin, TX charter reads (emphasis added),

> § 1. INCORPORATION.
>
> The inhabitants of the City of Austin, Travis County, Texas, within its corporate limits, as established by Chapter 90, page 634, Special Laws of Texas, 1909, 31st Legislature, and as extended by ordinances of the City of Austin enacted subsequent thereto, shall continue to be and are hereby constituted a body politic and corporate, in perpetuity, under the name the "City of Austin," hereinafter referred to as the "city," with such powers, privileges, rights, duties, and immunities as are herein provided . . .
>
> § 2. FORM OF GOVERNMENT.
>
> The municipal government provided by this Charter shall be, and shall be known as, "council-manager government." Pursuant to the provisions of, and subject only to the limitations imposed by, the state constitution, the state laws, and this Charter . . .
>
> § 3. GENERAL POWERS.
>
> The city shall have all the powers granted to cities by the Constitution and laws of the State of Texas, together with all the implied powers necessary to carry into execution such granted powers.

As can be plainly seen, these charters explicitly mandate that municipal governments be subject to the state constitution and municipality laws, and as such, are subject to the Fourteenth Amendment to the US Constitution. Consequently, it is quite clear that a nonprofit corporation

like an HOA (which actually refers to the entity that governs a subdivision, or territory, and not the subdivision itself) cannot be a municipal government. Neither can boards of directors of universities or other nonprofits be considered a municipal government. In the Twin Rivers opinion, the NJ Supreme Court held that (emphasis added),

> We find that the minor restrictions on plaintiffs' expressional activities are not unreasonable or oppressive, and the Association is not acting as a municipality. (p. 31).
>
> We briefly outline the development of our law expanding the application of free speech or similar constitutional rights against nongovernmental entities. (p. 14-15).

Note that the court is not saying that the HOA is a municipality, which is obvious that it is not, but that it is "not acting as a municipality." Now, this pronouncement can be seen as begging the question – since the HOA is not a municipality it cannot act like a municipality. How does a municipality act as distinguishable from the actions of an HOA? In the instance before us, both entities set rules and regulations (ordinances), regulate a person's conduct, and are permitted to impose monetary fines against noncompliance. How is the HOA not acting like a municipality when it restricts free speech? Or regulates usage of property or services?

If the court had found Twin Rivers to be acting like a municipality, then the HOA would be a state actor subject to the 14th amendment restrictions.

5. What's a "quasi-government"?

What is meant by the term, "quasi-government"? Everyone involved in this HOA controversy, including the courts, have referred to HOAs as quasi-governments at one time or another. A search of Black's results in no such definition! However, the word "quasi," alone, is defined using a Corpus Juris Secundum (legal encyclopedia) citation in terms of "resembling", but "sufficiently similar for one to be classified as the equal of the other" (see Exhibit A).

In an effort to clear the smoke and escape from plunging further into this legal Wonderland, Black's offers a definition of a "quasi-autonomous nongovernmental organization" that is a semi-public organization supported by government, but not answerable to it, such as a tourist authority or university-grants commission. Perhaps a better characterization of an HOA is that it's such an animal. The status of this "animal" as a state actor remains unanswered.

6. Can there exist a "government" that is not a municipality?

Does the US Constitution permit or prohibit the existence of non-municipal governments to regulate and control the people in a territory within the United States? Do private contracts that establish governments over a community, yet are thereby excluded from the prohibitions of the 14th Amendment, violate the Constitution or good public policy? The Constitution simply states that, "New States may be admitted by the Congress into this Union . . . (art.4, sec.3), and "The United States shall guarantee to every state in this Union a republican form of government . . . (art.4, sec. 4).

A test of these provisions occurred in 1870 with a dispute concerning the transfer of jurisdiction of two counties from Virginia to West Virginia. Under the Constitution, the US Supreme Court ruled that such a transferred required Congressional consent, the consent of both states, and the majority vote of the affected population. (*VA v. WV*, 78 US 39; see Exhibit B for a summary).

Both federal and state constitutions are silent on the establishment of governments not formed under their respective municipality laws. But states generally prohibit the formation of any municipal corporation except by the legislature: "Municipal corporations shall not be created by special laws, but the legislature, by general laws" (Ariz. Const., art.13, sec. 1). However, some states allow for a grant of self-government powers within which the municipality functions as the sovereign.

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Ohio const., art xviii).

Specifically regarding municipalities, records pertaining to the creation/modification of state counties are hard to come by. In Arizona, however, La Paz County is the only county in Arizona to have been formed after statehood (1983), and via county initiative. Northern residents of Yuma County proposed and won an initiative to split the northern portion into a new county, which became La Paz.

HOAs seem to have the powers of local self-government, but without being established under the municipality laws of the state or without a plebiscite. What is the legal status of an HOA government? In particular for our analysis, considering all the evidence, are HOA governments state actors? Should they be formed under and subject to the municipality laws?

Does the prohibition against interference with contractual obligations allow private parties to contract for such entities, governments that are not subject to municipality laws? Does the government possess a right to restrict contractual agreements? It is a well-entrenched legal doctrine that government has the police powers to restrict constitutional freedoms and liberties under certain conditions, that being concern for the general welfare of the public. Another way of looking at "promoting the general welfare" is to look at the pronouncements of public policy by our government, including the legislature and the courts.

Can there exist a form of government that is not a municipality, but a legitimate government under law, or a de jure government? The answer is simply, yes. Under the various definitions by Black's Law Dictionary in Exhibit A, HOAs are governments over a people within a territory, and are essentially sovereign since state laws do not hold them accountable and the courts defer to the judgment of the HOA board. HOAs are de jure governments since state law does not prohibit their existence, but recognizes and regulates them, and only in very limited ways prohibits their activities. HOAs exist according to and under the laws of the state and are, by definition, de jure governments. HOAs are also de facto governments -- they exist in fact.

7. Why are HOA governments not recognized as legitimate de jure governments and subject to the US Constitution as are municipal governments?

HOAs are not created as a result of a vote of the people or approved by any state agency or legislature, and are based not on municipality laws but on the property laws of servitudes. They are primarily constructed to protect the financial interests of private developers, while adding physical features that may add to the attractiveness of the landscape, employ an "enforcement agency, the HOA board. However, HOAs deny homeowner rights and freedoms to which homeowners are otherwise entitled to if they did not live in an HOA. Especially in regard to restraints on HOA government actions as restraints on any government were deemed essential under our American system of government.

Constitutional law requires explicit legislative consent for a valid delegation of its authority to other government agencies or to private entities. The following citation is from *US v. Grimaud*, 220 US 506 (1911) concerning an unconstitutional delegation of legislative power to a cabinet secretary. Note the requirement for the legislature, Congress in this case, to delegate authority for administrative regulation, for the "determination of minor matters" and with "power to fill up the details". With respect to HOAs, there is no grant of any authority by state legislatures giving HOAs policy making discretionary powers that are the sole domain of the legislature as set forth under the US and state constitutions.

> Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances, and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes, nor fix penalties therefor.
>
> By whatever name they are called, they refer to matters of local management and local police. They are 'not of a legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature [authorities] the determination of minor matters.'
>
> From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,- not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

CAI seems to think that interference in these contractual obligations is a "sacred cow", untouchable, and one of the few undeclared unalienable rights in the US Constitution in contrast to free speech, due process protections and the equal application of the laws.

> We are pleased that the court has disallowed intrusive government interference in the rights of private homeowners . . . . With this decision, homeowners can continue to govern their own communities by mutual consent and continue to enjoy the self-determination and quality of life they have come to enjoy. (CAI VP communications, Rathbun).
>
> This is an important victory for homeowners and associations across the country. . . .and it supports the traditional concept that government (whether it be the executive, legislative or judicial branches) should not interfere with private contracts and associations freely entered into. (CAI CEO Skiba).

This is rather disingenuous of the long-time national lobbying organization for the HOA industry, CAI. The only evidence for any claim of a freely entered into contract or a mutual consent to be governed by the HOA is the purchase of a home in HOA-land. Furthermore, homebuyers are not buying with full and complete knowledge of the consequences of living in an HOA that is easily characterized as an authoritarian government operating outside the protections available to homeowners living outside HOAs. And, when the homebuyer has no choice for comparable homes without an HOA, as is increasingly happening in more and more communities, these claims become more unsupportable.

Blink your eyes Alice. It appears that CAI is once again looking at HOAs as municipal governments where all residents are bound to the laws of the area regardless of having read or understood the applicable laws, while, in the same breath, claiming interference with private contracts. Consent to be governed by the public governmental entities is presumed when a person moves into the area, and CAI is taking the same approach with HOAs. Why? Because the legality of CC&Rs is not based on bona fide contracts, but real property servitudes, and some other avenue of defense is necessary – the "now HOAs are a government" defense.

Blink your eyes Alice, and now see CAI imposing on local communities the top-down uniform common interest laws, known as UCIOA, for adoption in every state. This model is authoritarian and is essentially the model adopted from the seminal publication on the creation, development and operation of planned communities contained in the 1964 Urban Land Institute's *The Homes Association Handbook*. Note that the sponsor of the guide to HOAs is a real estate public interest organization formed from a split-off from the national Realtors organization in 1933, and not a political science or public interest organization seeking to establish better communities.

Those familiar with many HOA CC&Rs will see many similarities with this handbook, but with UCIOA as well. This should not be a surprise to anyone, since all parties share the same beliefs and belong to the same real estate interests club. Documents that do not contain any protections for homeowners, but many rights granted to the HOA to coerce payments of assessments, issuing of fines, inadequate election procedures to insure fair elections and removal of board members, and completely ineffective mechanisms whereby homeowners who differ with the actions of the board cannot obtain effective due process. Documents that either themselves are adhesion contracts -- take it or leave it – or support and legalize these unconscionable "contracts". This

imposition of an un-American state charter for HOAs, UCIOA, is a direct contradiction to the claims of community democracy in action

Why shouldn't HOAs be recognized as a public entity subject to municipality laws and the 14th Amendment? Because continued failure to do so serves to establish a legitimate America as a New America, whereby citizens who do not like their government can create their own political governments free of US Constitutional constraints, prohibitions and restrictions. Form an HOA with CC&Rs over your village or town. Let the people in St. George do so! Or these militant groups! Form a New America that rejects the US Constitution, the Bill of Rights, and the political philosophies and theories, beliefs and values that make America stand out as a nation for the people, of the people, by the people.

Truly, this New America is one of a growing balkanization of principalities not accountable or answerable to the government of this country. America must remain a government under law, and not under HOA governments inconsistent and conflicting with the Constitution, creating a multitude of laws applied to differing groups of citizens.

This state of affairs, this New America, is glowingly told in Chapter 20 of *Private Neighborhoods and the Transformation of Local Government* (Robert H. Nelson, Urban Institute Press, 2005), titled, "Neighborhood Secession".

> Hence it may be desirable to review systematically the institutional mechanisms that can provide an exit from local government. . . . That is, the area could secede from the local government . . . The best hope might be a constitutional revolution that involved 'dramatic devolution" of governing authority.

8. <u>Restoring the America of our Founding Fathers and returning order across the American landscape.</u>

The solution to over 43 years of planned community discord and continued problems, incapable of solution under these 43 years of "patching", is the simply declaration that HOAs are public entities. Then, all citizens are subject to the same laws and constitutional protections while permitting individual variations from local ordinances and amenities restricted to the "HOA taxing district", which are the two basic claims to any valid argument to the right to local expression.

This can be accomplished quite easily and painlessly, if it were not for the national lobbying organization's pursuit of its personal agenda for "laissez-faire" private governments, and its insistence on complete independence of HOAs from the judicial application of the supreme laws of the land. Completely independent of course, except under the centralized, national dominance of UCIOA, and its derivative state laws and CC&Rs, that establish authoritarian regimes contrary to the American system of government.

EXHIBIT A. Black's Law Dictionary, 7th Ed. (emphasis added)

Government	2. The sovereign power in a nation or state. 3. **An organization through which a body of people exercise political authority;**
State	1. The political system of a body of people who are politically organized; annotation: A state or political society is an association of human beings established for the attainment of certain ends by certain means. **Modern states are territorial; their governments exercise control over persons and things within their frontiers** . . .
De facto government	2. An independent government established and exercised by a group of a country's inhabitants who have separated themselves from the parent state.
De jure	Existing by right or according to law.
Sovereign state	**A political community whose members are bound together by the tie of common subjugation to some central authority.**
Sovereign	The ruler of an independent state.
Politics	The science of the organization and administration of the state; the activity or profession of engaging in political affairs.
Political	Of or relating to the conduct of government
Business	A commercial enterprise carried on for profit; a particular occupation or business habitually engaged in for livelihood or profit
Quasi-government	No definition provided. Under "quasi" we find, Quasi, citing 74 C.J.S at Quasi, 2: A Latin word [that] marks the resemblances, and supposes a little difference . . . . [I]t negatives [sic] the idea of identity, but . . . [concepts] are sufficiently similar for one to be classified as the equal of the other.
Quasi-autonomous nongovernmental organization	A semi-public administrative body having some members appointed and financed by, but not answerable to, the government, such as a tourist authority, a university-grants commission . . .
Sovereign power	**Power that is absolute and uncontrolled within its own sphere.** **Within its designated limits, its exercise and effective operation do not depend on, and are not subject to, the power of any other person** and cannot be prevented or annulled by any other power recognized within the constitutional system [of the state or territory].

EXHIBIT B. Transferring state jurisdiction over counties
Virginia v. West Virginia, 78 US 39 (1870)

The following summary provides guidance as to the requirements for the alteration of municipal boundaries.

Essentially, with the allegiance of Virginia to the Confederate States, the northwest part of Virginia, on the other side of the Shenandoah Mountains, sought to remain with the United States. Several counties were given the option to transfer to the new state of West Virginia, but a majority vote would first be necessary to make that happen. It eventually took place, but the agreement between the two states, ratified as required by Congress, called for the Governor of Virginia to certify the elections in his own discretion. The vote to transfer of these two counties was challenged in the case before the Supreme Court.

Our interest is in the approval of all governmental entities affected by the transfer, and in the requirement for a vote the people, and not simple the acceptance of a deed recorded in the new state of West Virginia. The Court found the certification of the vote valid. Some highlights:

> As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became a State, to receive these counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.
>
> 1. Did the State of Virginia ever give a consent to this [*32] proposition which became obligatory on her?
>
> 2. Did the Congress given such consent as rendered the agreement valid?
>
> 3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent, and justify us in setting aside the contract, and restoring the two counties to that State.
>
> The State of Virginia, in expressing her satisfaction with the new State and its constitution, and her consent to its formation, by a special section, refers again to the counties of Berkeley, Jefferson, and Frederick, and enacts that whenever they shall, by a majority vote, assent to the constitution of the new State, they may become part thereof;
>
> These statutes provide very minutely for the taking of this vote under the authority of the State of Virginia; and, among other things, it is enacted that the governor shall ascertain the result, and, if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify that result under the seal of the State to the governor of West Virginia; and if a majority of the votes given at the polls were in favor of the proposition, then the counties became part of said State.