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June 12, 2015

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Supreme Court says corporate entities cannot be used to evade Constitution

The recent non-HOA decision by the US Supreme Court in *DOT v. Assn American Railroads*[1] has a direct bearing on the constitutionality of the HOA legal scheme. This case dealt with the legal status of AMTRAK — is it or is it not a government entity — and was there an unconstitutional delegation of legislative authority. While I have argued that HOAs are de facto private governments based on their powers, authority and functions, I make the argument that as a de jure (according to the law) private corporation, HOAs have been unconstitutionally delegated legislative powers.

At issue were opposing arguments that AMTRAK violated

> *"the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity*" (p. 3) and that "*its charter's disclaimer of agency status prevent[ed] it from being considered a Government entity*" (p. 6); "*Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. The Government even 'specif[ies] many of its day-to-day operations' and 'for all practical purposes'"* (p. 7).

Two very critical points relating to the HOA legal scheme are made. First,

> *"'It is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.' **To hold otherwise would allow the Government 'to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form'"** (p. 6).* [As argued like with HOAs].
>
> *The constitutional issues . . . all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded* (p. 12).

Second,

> *[T]his statutory label cannot control for constitutional purposes. . . . One way the Government can regulate without accountability is by passing off a Government operation as an independent private*

concern. Given this incentive to regulate without saying so, ***everyone should pay close attention when Congress "sponsor[s] corporations that it specifically designate[s] not to be agencies or establishments of the United States Government"*** *(p. 7).*

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints (p. 9).

In short, the court decides the legal status of an entity and not the creation of laws by the legislature (Congress in this case), otherwise legislatures can bypass constitutional protections by explicitly creating private corporations. As the Supreme Court said above, state laws do not determine the constitutional status of HOAs, and neither do statements by other sources such as in the *Restatement of Servitudes*[2] that is used to guide the courts. CC&Rs do not override the Constitution.

Delegation of legislative authority to HOAs

The question now turns on whether or not the contents of the CC&Rs establish HOAs as state actors, and if not, then whether or not the delegation of legislative powers to private government HOAs is constitutional. The result of either analysis forces the conclusion that HOAs must of necessity be constitutionally legitimate governing entities and be held accountable to the state.

First, I have maintained that the CC&Rs create state actors subjecting HOAs to the 14th Amendment and thereby invalidating many of the oppressive covenants contained in the CC&Rs.

"*The policy makers fail to understand that the terms and conditions of the HOA CC&Rs cross over the line between purely property restrictions to establishing unregulated and authoritarian private governments.*"[3] Long ago in his 1994 book, *Privatopia*, Professor McKenzie wrote, *"HOAs currently engage in many activities that would be prohibited if they were viewed by the courts as the equivalent of local governments."*

Second, I also maintain that implicit unconstitutional delegation to private HOAs exists as there is no accountability to the state.

[I]t can be argued that even though there may not be explicit delegation there is an implied delegation of legislative powers, based on the nature and intent of the state's HOA acts and statutes.[4]

There are no enabling acts granting HOAs such legislative powers. That makes CC&Rs and HOAs an unconstitutional usurpation of legislative authority. If municipal corporations, agencies and private entities must have delegated authority to act, no matter how broad or detrimental to individual rights, then how can HOAs not be outside our constitutional system of government?[5]

"*'Rulemaking' is a term that deals with the grant of legislative powers to state agencies and, in a more restrictive mode, to private entities. It is the authority to adopt rules that have the effect of law. The point is that the term "rulemaking" is a state agency process and is not found in the nonprofit corporation or HOA law."*[6]

[R]ecognizing that the power to fashion legally binding rules is legislative.[7]

Implicit delegation of legislative powers are described in *The Restatement Servitudes*,[8]

> *"[the HOA has] the duty to 'act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers."* (§ 6.13(b). *"[The HOA] has an implied power to adopt reasonable rules"* (§ 6.7(1). *"Even in the absence of an express grant of authority, an association enjoys an implied power to make rules in furtherance of its power over the common property."* (§ 6.7, comment b).

Numerous state statutes carry implicit delegations of legislative powers.[9]

With respect to violations of the Constitution, the Supreme Court decision in *DOT* held 1) that private parties cannot draft agreements to circumvent the Constitution by declaring that an entity, specifically a corporation, is a private organization, 2) that such a determination is made by the courts based on the corporation's functions, powers and authority, and 3) that in order for a private entity's delegation of legislative authority to be constitutional, there must be control, supervision and accountability to the state.

I have presented my case that, in the absence of explicit enabling acts, there is implicit unconstitutional delegation of legislative power to private HOAs, particularly in regard to legally binding rules, without accountability.

References

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[1] *Dept. of Transportation v. Assn American Railroads*, 135 S.Ct. 1225 (2015)
[2] "[T]hat we are willing to pay for private government because we believe it is more efficient than [public] government . . . . Therefore this Restatement is enabling toward private government, so long as there is full disclosure", *Restatement Third, Property (Servitudes)*, Susan F. French, Reporter, p. ix (American Law Institute 2000).
[3] See CC&Rs are a devise for de facto HOA governments to escape constitutional government.
[4] *Supra* 3.
[5] See Unconstitutional delegation of power to HOAs.
[6] SeeThe unconstitutional delegation of implied rulemaking powers to HOAs.
[7] *Supra* 1, p. 17.
[8] *Supra* 2,
[9] For a sample of implied rulemaking statutes by state, see: Arizona: ARS 33-1803(A) and (B) for HOAs; 33-1242(A)(1) for condos. California: Civil Code §§ 4340-4370 (Part 5, Chapter 3, Article 5, Operating Rules). Florida HOAs: Title XL, § 720 et seq. do not explicitly address rules per se, but speak to enforceable "guidelines" and "standards"; Florida Condos: Title XL, § 718 et seq. (in particular, § 718.1035, the general statement on "association rules"). Nevada: "*NRS 116.31065 Rules. The rules adopted by an association*" (with 5 "musts" imposed on the HOA).