



Scottsdale, AZ  
602-228-2891 / 480 907-2196 (fax)  
info@pvtgov.org <http://pvtgov.org>

March 25, 2011

By: George K. Staropoli

## **HOAs in America: the illusion of democracy in a dysfunctional republic**

In order to understand the public policy toward homeowner associations with its manufactured appearance of bona fide homeowner consent, we need to examine the political climate and belief-value system within American society.

### **1. The empty value system – anything goes**

The great American experiment in creating a democratic republic has been showing increased signs of stress and decline over the past few decades. The principles, values and political and economic philosophies, derived from the greatest generation of political philosophies of the 18<sup>th</sup> century, have fallen into disuse. They have been replaced by what author Jim Wallis described as, “*We have . . . substituted ‘market value’ for ‘moral value’.* *The cultural messages over the last several decades have clearly been: greed is good; it's all about me; and I want it all, and I want it now.*”<sup>1</sup> These are not the values that created America and allowed it to become the symbol for democracy throughout the world.

It is well understood that adolescents and adults too, need a value system to serve as the basis for the choices and decisions that they will be making throughout their lifetime. Without such a value system, especially an ethical and moral code of behavior, to bring order and consistency to their lives, the people will flounder aimlessly. They will react to events and incidents without any direction or purpose to their actions. Previously, the ethical and moral code had been primarily provided by religious beliefs and secular codes of ethics, also primarily based on religious beliefs.

The “God is dead” attitude, encouraged by a misguided interpretation of a separation of church and state doctrine, has removed this generally accepted source of higher authority. Religion provided the value system necessary for a society to function with order, harmony, productivity, and meeting the needs of its members with just and fair laws. The Declaration of Independence provided the fundamental basis for the unalienable rights that no government may take away from the people. Unfortunately, contemporary political and judicial leadership has failed to retain and uphold our unalienable rights in a replacement value system of ethics and morality. Thus creating the current vacuum in our value system that is required for the establishment of an orderly and just society.

## **2. The decline in the caliber of elected officials and the rise of political party ideology**

Ron Brownstein addressed this dramatic decline of ethical behavior in our elected officials and political parties, writing in *The Second Civil War*,<sup>ii</sup>

*The political system has evolved to a point where the vast majority of elected officials in each party feel comfortable only in advancing ideas acceptable to their core supporters. The political system now rewards ideology over pragmatism. . . . What's unusual now is that the political system is more polarized than the country. Rather than reducing the level of conflict the ideology increases it.*

One President announced his firm belief in laissez-faire government, which brought about the Great Depression, as this country plunged into the current financial disaster also created by a laissez-faire attitude that business will guide us through this disaster. He is a prime example of George Santayana's maxim, "*Those who have forgotten history are condemned to repeat it.*" Another President, in answering a court inquiry responds with, "*It depends on what the meaning of 'is', is.*" A third had to tell the people, "*I am not a crook,*" before resigning in disgrace.

In Nevada, a senator writes seven HOA bills but does not disclose her relationship with a Del Webb HOA. In California, the California Law Revision Commission, CLRC, backed off from including a "Members Bill of Rights" in its 2009 rewrite of the entire Davis-Stirling Act.

An Arizona President of the Senate pursued his challenge to federal power and immigration policies by providing and defending a single, angry, hate filled letter from a substitute teacher stating that his Hispanic students are against America. The President gave the letter to one of his loyal followers, defending his action with, "*We have an obligation to our citizens to keep them informed on what is happening in our schools.*" The Senator then read the letter aloud before the Senate, and defended her actions with, "*What's wrong with presenting another side to an issue that's really important?*" (The letter was released one day after the Senator's bills on immigration were defeated in the Arizona Senate).

In another incident the Speaker Pro Tem announced to an Arizona legislative committee that he had a meeting with all the "stakeholders," and that they were in agreement with his bill. The problem was that his meeting only included the vendor "interlopers" and he had excluded the most important "stakeholder," the property owners who vehemently objected to the bill. Unfazed, he repeated his false statement, after being publicly refuted by advocacy groups, when addressing a second legislative committee a few weeks later.

## **3. Legitimate government and the illusion of justice**

The above acts by our elected officials brings to mind the principles of one of the most celebrated politicians of all time, Niccolo Machiavelli, and his infamous book, *The Prince*.<sup>iii</sup> In his commentary on *The Prince*, William B. Allen wrote that Machiavelli "*teaches the means justify the ends,*" that "*the*

*role of morals in politics is mainly to cultivate illusions,” and that “politics is merely appearance and morality is merely pretense.” And speaking of justice, the necessary ingredient for the claim to the legitimacy of government and to be obeyed in conscience, Allen offers Machiavelli's advice, “Because the [right] to rule is rather the appearance of justice rather than justice itself, the appearance of injustice defeats every [right] to rule.”<sup>iv</sup>*

In his commentary on *The Prince* Hadley Arkes characterized Machiavelli's view of politics as “*advancing the interests of the state without regard to moral . . . strictures.*” In contrast he reminds his readers that, “*The founders understood that the principal mission of government was to secure people in their natural rights — to protect them against the lawless private thugs as well as of ill-intentioned legislators.*” He quotes US Justice Wilson's (1798) warning that, “*the people in sovereign office might well perform unjustified and therefore lawless acts,*” and that “*such acts, though vested with 'legal' authority, could not fully claim nor elicit from the people an obligation to obey.*”<sup>v</sup>

And that champion of the people, Thomas Jefferson in his 1801 inaugural address, stated, “*That though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possesses their equal rights, which equal law is to protect, and to violate would be oppression.*”

Without an ethical and moral compass this nation will continue its descent into mediocrity and disorder. Our elected officials are no longer concerned about the appearance of impropriety or wrong-doing, or of an illusion of morality and ethical conduct. They openly exhibit a “winning is everything” agenda as described in *The Second Civil War*. Their actions exclude consideration of the views of other parties whose supporters are seen without merit or given any credence. “The rule of the day” by the majority party has become the flaunting its authority by “*unjustified and therefore lawless acts.*”

Some argue that this has always been the case since time immemorial. Maybe so, but the extent to which “civilized” behavior with its decorum and customs has been replaced by a complete disregard even for the appearance of impropriety can only bring the deterioration of our society. Such lawless behavior, as described earlier, can only result in the alienation of society that increasingly views government as no longer legitimate and no longer deserving of obedience in conscience. Even our judicial system cannot escape charges of political activism when its public statements about “justice for all”, and other similar wordings, serve only to create an appearance of justice. The failure of our judicial system to provide justice has produced an appearance of injustice. The result is a further alienation of society, and the courts being no longer seen as legitimate and no longer deserving of obedience in conscience.

#### **4. The rise of authoritarian private HOA governments**

The America of the Founding Fathers is rapidly becoming a myth, replaced by a government that caters to business interests and where the people are here only to serve as consumers of numerous and often unneeded products and services. Where, as in business, winning is not everything, it's the only thing. And where the functions of government are seen primarily in monetary terms, permitting the privatization of many public services, even including the privatization of authoritarian governments in the form of homeowners associations, HOAs.

Over the years the supreme laws of the land have been ignore, revised and interpreted in favor of the widespread acceptance and adoption of HOAs across the land. The massive rewrite of the restatement of servitudes in 2000 states in the Forward, *“Therefore this Restatement is enabling toward private governance,”* adding a caveat that has been ignored, *“so long as there is full disclosure to prospective and current participants and so long as decisions are made according to established and fair procedure.”* We are all aware of the failure across the board to fully disclose the consequences of life in an HOA, leading to the valid assertion that there is an unspoken alliance of No Negatives about HOAs.

Comment “h” to section 3.1, “Validity of Servitudes” [servitudes are covenants binding on all subsequent owners], contains several statements that imply that homeowner rights are protected by the Restatement. Yet, a contradictory overriding comment is made, *“The question of whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law [meaning these servitudes], not constitutional law.”* And we've witnessed the Texas Supreme Court upholding servitudes law over the very explicit Texas Constitution on homestead protection (Inwood v. Harris, 1987). And the NJ Supreme Court mollifying the people that homeowners still have the protection of the business judgment rule promoted in the 2000 version of the Restatement, and need not worry about loss of free speech protections of the First Amendment (CBTR v. Twin Rivers HOA, 2007).

We have forgotten what distinguishes government from a business, or a nonprofit corporation. It goes well beyond monetary, or the beautification of the landscape of the HOA concerns, or the HOA's strict enforcement of the governing documents as a means of coercion and intimidation. We have forgotten that the purpose of our American system of government is set forth in the Preamble to the Constitution, which speaks of: *“to establish justice, insure domestic tranquility . . . promote the general welfare, and securing the blessings of liberty.”*

We have replaced it with the value system described by Wallis above, *“We have . . . substituted market value for moral value”* and have substituted the maintenance of property values in place of the noble goals and purposes set forth in the Preamble. Wallis quite accurately describes this “fall from grace”, this repudiation of the Declaration and Constitution: *“What has been deliberately and carefully made 'socially acceptable' was, not too long ago, thought to be irresponsible — both financially and morally.”*

## **5. The transformation of society and the acceptance of the New America of HOA-Lands.**

How can we explain this loss of democratic institutions, this deterioration and degradation of our attitudes, beliefs, principles and ethical and moral values? How can we explain this narrow a view of government and society that holds “better landscaping makes a better America” as the objectives of local government? How can we explain this transformation to “greed is good” and “what's in it for me?” values now pervading our elected officials and the people in general? A good part of the answer can be found in a study of the attitudes and beliefs of average Germans ten years after the end of the National Socialist Party (Nazis) and Hitler with the end of WW II.

There are parallels between the acceptance and establishment of the HOA as an institution, and the influence and acceptance of Nazi doctrine in Germany before and during WW II. Both offered benefits

and serious drawbacks, but only the pluses were seen and not the negatives. While the content of the two doctrines are widely distinct and separate, the social dynamics worked in a similar manner on the two societies and their people. The rationale of the defenders of Nazism follows a similar pattern to that of the defenders of the HOA authoritarian, private government.

Understand that the National Socialist Party, a fascist party, was supported and backed by the giant industrial firms of Germany. Understand that the driving force for the HOA scheme has been and remains the real estate interests — the developers, the realtors, the mortgage firms, and the “support” vendors groups of lawyers and managers — that created the Community Associations Institute (CAI) in 1973. As Milton Mayer pointed out in his book,<sup>vi</sup> there were the “true believers, the die-hard loyal Nazis, and there were the “joiners” who went along for one reason or another. In America today, HOAs have their true believers and faithful cliques running the HOA, and the “conscripted” volunteer members who go along or who mistakenly believe that one board member, alone, can change the flow of events.

CAI was an attempt to solve the growing problems with the HOA legal scheme. CAI became the “attack dog” and formed legislative action committees in all states to influence legislation, although they do not have HOAs as members and can only claim, at most, 10% of the HOA population as “volunteer” members. The HOA attorneys found it easy to dominate the HOA with its advice to the HOA boards that, “if you don't take the advice of an expert you may be held personally liable for your actions,” and “you can be sued if you do not enforce the CC&Rs.” They offered to defend the most frivolous of allegations by the HOA, often without credible evidence, and run up fees of \$10,000 to \$50,000 for “black letter” board violations of the CC&RS, and for homeowner weed, or color of the house, or some other minor construction violation.

Mayer also wrote about the beginnings of the new order in Germany,

What happened was the gradual habituation of the people, little by little . . . to believing that the situation was so complicated that their government had to act on information which the people could not understand. This separation of the government from people, this widening of the gap, took place so gradually and insensibly, each step disguised. [The government] provided an excuse not to think, for people who did not want to think anyway.

And as the new order took hold, there came the “us against them” mentality,

On the one hand your enemies, the law, the regime, the Party intimidate you. On the other hand, your colleagues pooh-pooh you as pessimistic, or even neurotic. Now you live in a world of hate and fear, and the people who hate and fear do not even know it themselves. . . . Now you live in a system which rules without responsibility even to God.

Mayer also addresses the reactions of the “good” people and those who could understand what was happening. They went along “*in the usual sincerity that required them only to abandon one principle after another, to throw away, little by little, all that was good.*” They further rationalized that “*when men who understand what is happening — the motion of history not the single events or developments — when such men do not object or protest, men who do not understand cannot be expected to.*”

Those who live in homeowners associations or who have followed its developments and history can easily see the parallels between the attitudes of the common German people and the average American of today. Today, the media focuses on those single developments and incidents and fails to present the larger “motion of history,” even though they have frequently occurred over the years. The public interest “think tanks” have also avoided any involved on the substantive issues of a second form of political government, the authoritarian, local HOA government — de facto, yet unrecognized governments. The legislature, the government, sees no evil and supports this privatization of government devoid of constitutional protections for the people.

The fears espoused in the Homes Handbook of 1964, the “bible” for creating and operating HOAs, of “running out of land.” The continued irrational fears of dangerous and blasphemous owners fixing cars in front of their \$200,000 homes, and ruining the community by daring to exercise their aesthetic values. The fears from the faithful followers that if constitutional protections are applied to HOA private governments, as if they were government entities, that would be the doom of the HOA. The fears of the widow, the retired person, and the single Mom among others that to object to the HOA would result in financial burdens and the loss of their home. So they pay the legalized extortion, if they can.

State legislatures played their important part in “enabling private governance,” in this transformation of the American landscape with the accompanying denial and repudiation of the Declaration of Independence and US Constitution. The state legislature, as a result of the caliber of their legislation, have either coerced homeowners, cooperated with HOAs, created symbiotic relationships whereby the HOA and the state mutually support each other, intermingled with the day-to-day operations of the HOA, and sanctioned acts by the HOA that he could not permit if the HOA were a government entity.

Since the “great push” of 1964 and the mass marketing of HOAs based on the Homes Handbook, the HOA legal scheme has been institutionalized into our society. As an institution, HOAs are taken for granted and no longer questioned. And those who attempt to shed some light on this transformation of American society and politics are pooh-poohed, to use Mayer's description.

## Notes

---

<sup>i</sup> *Rediscovering Values: On Wall Street, Main Street, and Your Street*, Jim Wallis (Howard Press 2010).

<sup>ii</sup> *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America*, Ronald Brownstein (Books 2011).

<sup>iii</sup> *The Prince*, Nicholas Machiavelli, translated by Angelo M. Codevilla (Yale University Press 1997).

<sup>iv</sup> *Id.*, W. E. Allen, “Machiavelli and Modernity.”

<sup>v</sup> *Id.*, Hadley Arkes, “Machiavelli and America.”

<sup>vi</sup> *They Thought They Were Free*, Milton Mayer (Univ. of Chicago Press, 1955).