THE CITY AS A LEGAL CONCEPT

Gerald E. Frug

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THE CITY AS A LEGAL CONCEPT

*Gerald E. Frug**

Under current law, American cities are generally considered mere "creatures of the state," with their powers strictly construed and limited to those granted by the state. In this Article, Professor Frug examines city powerlessness and the arguments that support it. He finds that the law governing cities is properly explained as a political choice, one derived from the hostility of liberal political thought to the exercise of power by entities intermediate between, and thus threatening the interests of, the state and the individual. To demonstrate this, Professor Frug traces the legal history of the city, from the liberal attack on the powerful medieval city to the nineteenth century distinction between municipal corporations, seen as "public" entities requiring legal restraint, and private corporations, considered "private" entities deserving legal protection. Yet city powerlessness, Professor Frug argues, prevents the realization of "public freedom": the ability of persons to participate actively in the basic societal decisions that structure their lives. Moreover, the public/private distinction no longer justifies protecting corporate but not city power; our choice is a preference for hierarchical over democratic organization. Professor Frug concludes that granting cities real power, including the legal rights now enjoyed by private corporations, can best achieve "public freedom."

THIS Article explores how the law has contributed to the current powerlessness of American cities.[1] I argue that our highly urbanized country has chosen to have powerless cities, and that this choice has largely been made through legal

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[1] The principal sources on which I relied for this Article include Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) [hereinafter cited as *The Structure of Blackstone's Commentaries*]; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); D. Kennedy, The Rise and Fall of Classical Legal Thought (Oct. 1975) (unpublished manuscript on file at the Harvard Law School Library) [hereinafter cited as Rise and Fall]; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977); R. UNGER, KNOWLEDGE AND POLITICS (1975); R. UNGER, LAW IN MODERN SOCIETY (1976); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–1978); Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 24 (R. Tucker ed. 1972); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (G. Simpson trans. 1933); M. WEBER, THE CITY (D. Martindale & G. Neuwirth trans. 1958); O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (F.W. Maitland trans. 1958); O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500–1800 (E. Barker trans. 1934); O. GIERKE, ASSOCIA-

doctrine. The development of the law governing cities cannot be explained as a deduction from neutral principles, although it has traditionally been expressed as if it were. Nor has it been the necessary reflection of the development of modern society, although this, too, is the common perception. Rather, the logical form of legal decisions concerning city power and the perceived necessity of their outcomes have hidden from observers, and sometimes from decisionmakers, the ideological grounding of those decisions in liberal social theory and the element of choice that has always existed in the development of that theory. More important, this false consciousness has concealed the fundamental effect of these legal decisions upon the structure of power and the possibilities for human association in America.[2] I hope, in this Article, to reopen our eyes to the process that has led to the current powerlessness of American cities and thus to reveal the potential for change. I emphasize throughout, however, that the powerlessness of cities has become so basic to our current way of understanding American society that no modest effort to "revitalize" the cities by decentralizing power can succeed. Real decentralization requires rethinking and, ultimately, restructuring American society itself.

The Article is in five parts. Part I provides a brief introduction demonstrating that cities lack power and suggesting the consequences of that powerlessness. Part II is a methodological statement; it explains what I mean by liberalism, what role I claim for law in the development within liberal theory of the current status of cities, and what role I claim for lib-

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TIONS AND LAW (G. Heiman trans. 1977); F. MAITLAND, TOWNSHIP AND BOROUGH (1898); F. BRAUDEL, *Towns*, in CAPITALISM AND MATERIAL LIFE 1400–1800, at 373 (M. Kochan trans. 1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969); L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776–1860 (1948); O. HANDLIN & M. HANDLIN, COMMONWEALTH (1947); A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans. 1969); K. MANNHEIM, IDEOLOGY AND UTOPIA (L. Wirth & E. Shils trans. 1936); H. ARENDT, ON REVOLUTION (1962); J. DEWEY, THE PUBLIC AND ITS PROBLEMS (1972); W. KÖHLER, GESTALT PSYCHOLOGY (1947).

In addition, unpublished works by and conversations with Duncan Kennedy, Morton Horwitz, Roberto Unger, Richard Parker, Lloyd Weinreb, Charles Donahue, Henry Steiner, Lewis Sargentich, and Frank Michelman have been especially helpful. Errors are mine alone.

[2] As John Dewey noted:

> Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era.

Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

eralism itself in the development of cities. Part III is an historical exploration of the legal status of cities. I seek to reveal the origins of our modern legal conception that cities are governmental bodies with delegated powers created and limited by the authority of state governments, thereby showing that this conception is neither a necessary part of the definition of a city nor a neutral decision about the appropriate role for cities in modern society. Rather, I argue that our modern conception may be traced to the early liberal effort to undermine the alternative possibility for city power embodied in the medieval town. The liberal effort to reallocate the powers of the medieval town to the individual and to the state[3] is in turn related to the nineteenth century distinction between public and private corporations that created the radically different modern status for cities and for private corporations.

Part IV connects the historical development of city powerlessness to the general problem of decentralizing power in modern society. It argues that the public/private distinction no longer justifies preferring corporations to cities as vehicles for decentralized power. Finally, it suggests a new basis for city power, building upon the justifications currently advanced for corporate power in response to the undermining of the public/private distinction in the twentieth century. Part V is a conclusion.

One final preliminary comment is necessary. In this Article, I use the word "city" to include the concepts of neighborhood and regional government.[4] For some,[5] city power is unappealing because cities are too large; what they seek is neigh-

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[3] The word "state" has two meanings. It is the traditional term for the liberal concept of the sovereign, the person(s) or institution(s) that wield governmental power over individuals in "civil society." *See, e.g.*, R. UNGER, LAW IN MODERN SOCIETY 58–61 (1976). Machiavelli is generally considered the originator of this sense of the word ("*lo stato*"). *See* H. PITKIN, WITTGENSTEIN AND JUSTICE 310–13 (1972). In America, however, the term also refers to each of the fifty states within the federal system. This duality of meaning is troublesome, but it cannot be helped. Since the city has become subordinate to the state in both senses of the word, I usually do not attempt to distinguish them in this Article. When a distinction is important, I will use the term "American state" to refer to the second meaning. For the effect of liberalism on American states themselves, see notes 188, 301 *infra*.

[4] Except in contexts that require a narrower definition, I also use the word to refer to any other institution that exercises general governmental authority in an area smaller than, yet within, an American state. Thus, I generally make no distinction between cities and towns, or between them and any other local government entity.

[5] *E.g.*, M. KOTLER, NEIGHBORHOOD GOVERNMENT (1969). *See also* A. ALTSCHULER, COMMUNITY CONTROL (1970); D. MORRIS & K. HESS, NEIGHBORHOOD POWER (1975).

borhood or community power. For others,[6] city power is unappealing because cities are too small; what they seek is regional power. No one denies that neighborhoods and regions currently lack power; their proponents simply seek to change the existing unit of local government from the city to one of these other geographic areas. But the basic problem in doing that is the same as the problem of creating powerful cities as they now exist — the difficulty of decentralizing power to substate geographic areas. Since as a matter of history, that problem has been one of creating city power, it seems easiest to speak of the problem in those terms, sweeping within the discussion the ideas of neighborhood and regional power. Thus, I invite those who favor decentralization but who consider city power an anathema to substitute their own preferences for the geographic boundaries that will circumscribe local authority and then to pursue with me the reasons for, and the possibility of changing, city powerlessness.

I. CITY POWERLESSNESS

A. The Current Status of Cities

American cities today do not have the power to solve their current problems or to control their future development. Their impotence is expressed in their legal status. Under current law, cities have no "natural" or "inherent" power to do anything simply because they decide to do it. Cities have only those powers delegated to them by state government,[7] and traditionally those delegated powers have been rigorously limited by judicial interpretation.[8] Moreover, city authority exercised pursuant to unquestionably delegated powers is itself subject to absolute state control.[9] In an attempt to curb this unrestrained power, most state constitutions have been

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[6] *E.g.*, T. LOWI, THE END OF LIBERALISM (1969). *See generally* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL DECISIONMAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS (1973).

[7] *See* 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 2.00 (1979).

[8] *See id.* § 5.04.

[9] *See id.* § 2.00. The extent of state control over city powers and city property has been the subject of extravagant judicial emphasis, as in the leading case of Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907):

> The State . . . at its pleasure may modify or withdraw all [city] powers, may take without compensation [city] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state

amended to grant cities "home rule,"[10] but local self-determination free of state control is still limited even in those jurisdictions to matters "purely local" in nature.[11] These days, little if anything is sufficiently "local" to fall within such a definition of autonomy.[12] State law, in short, treats cities as mere "creatures of the state."

Firm state control of city decisionmaking is supplemented by federal restrictions on city power. The Federal Constitution, through the fourteenth amendment and the commerce clause, has been construed to limit city power.[13] In addition, the federal government is today taking an increasing part in determining city policy, sometimes by mandating city action[14] but, more often, by attaching strings to the federal grants-in-aid on which the cities have become dependent.[15]

> constitution, may do as it will, unrestrained by any provision of the Constitution of the United States . . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

The *Hunter* Court suggested, however, that the rule might be different for property held in a city's "proprietary" rather than its "governmental" capacity. *Id.* at 179–80. On this distinction in local government law, see generally p. 1104 *infra*; note 359 *infra*.

The contract, just compensation, due process, and equal protection clauses have all been held not to limit state control of municipal corporations. *See* Case Comment, *Municipal Corporation Standing to Sue the State:* Rogers v. Brockette, 93 HARV. L. REV. 586, 588 n.21 (1980).

[10] *See* 1 C. ANTIEAU, *supra* note 7, § 3.00.

[11] *See id.* §§ 3.20–.22. *See also* Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 650–52 (1964).

[12] *See, e.g.*, Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963). *Contra*, State *ex rel.* Heinig v. City of Milwaukie, 231 Or. 473, 373 P.2d 680 (1962). *See generally* F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 349–53 (1970).

[13] *E.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (14th amendment); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (commerce clause). For a rare example of constitutional protection for city authority, see National League of Cities v. Usery, 426 U.S. 833 (1976).

[14] *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, § 301(b)(1), 33 U.S.C. § 1311(b)(1)(B) (1976). The constitutionality of some of these mandates is an open question. *Compare* State Water Control Bd. v. Train, 559 F.2d 921 (4th Cir. 1977) (upholding the mandate of state action under the Federal Water Pollution Control Act), *with* EPA v. Brown, 431 U.S. 99, 102 (1977) (per curiam) (vacating as moot four federal appeals court decisions striking down federal air pollution regulations imposed on states). While these cases specifically concerned federal mandates imposed upon state governments, the constitutional issue is the same with respect to local governments. *See* National League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976).

[15] *See also* Downs, *Urban Policy*, in SETTING NATIONAL PRIORITIES: THE 1979 BUDGET 183 (J. Pechman ed. 1978) ("The idea that central cities can soon — or ever — become economically self-sufficient is absurd."). For a discussion of federal grants-

The growing importance of grants-in-aid illustrates another source of city powerlessness, a declining ability to generate income. City income is largely dependent on something cities cannot control: the willingness of taxpayers to locate or do business within city boundaries. The problem of the increasing exodus of wealthier taxpayers, including businesses, from the nation's major cities is notorious.[16] Even if cities could ensure that taxpayers remained within their borders, however, current law does not allow cities to tax them. Generally, every city decision to increase taxes must be expressly approved by the state,[17] and some states even have a constitutional limitation on the amount of taxes permitted.[18] The Federal Constitution, particularly through the commerce clause, also restricts the kinds of taxes cities can impose.[19]

Even more stringent restraints curb the cities' ability to borrow money. State law imposes upon cities detailed restrictions that supplement the normal market restraints applicable to other borrowers.[20] Thus, the city's borrowing authority is generally limited to a fixed percentage of its property base, and even borrowing within that amount often requires a popular referendum to authorize the debt.[21] Moreover, the use of borrowed money is restricted to "capital" as opposed to "op-

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in-aid to localities, see J. MAXWELL & J. ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 56–64 (3d rev. ed. 1977). For statistics regarding federal aid to states and localities, see U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1976–77, at 55–57 (1977).

On the legality of conditions attached to federal grants-in-aid, see Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 142–44 (1947) (upholding application of Hatch Act to state officials paid with federal grants-in-aid); Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977) (denial of injunctive relief to state and local governments protesting conditions attached to unemployment insurance grants).

[16] Moreover, even cities whose overall population has remained constant have lost people from older, inner-core neighborhoods and have faced a decrease in the average income of city residents. *See* Downs, *supra* note 15, at 163–64. *See also* N.Y. Times, Dec. 7, 1978, at 20, col. 4.

[17] *See* 16 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 44.05 (3d rev. ed. 1979).

[18] CAL. CONST. art. XIIIA. In addition, some courts have held that, in light of the widely varying extent of local wealth, reliance on local taxation to provide revenue for some functions, such as education, is in itself a denial of the equal protection of the laws. *Compare* Serrano v. Priest, 557 P.2d 929 (1977) (holding local property tax-based financing of public schools violative of the state constitution), *with* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting a federal constitutional attack).

[19] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6–14 to –20 (1978).

[20] *See* F. MICHELMAN & T. SANDALOW, *supra* note 12, at 428–36.

[21] *See generally* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS ON LOCAL GOVERNMENT DEBT 27–30 (1961).

erating" expenses.[22] Given these limits on cities' taxing and borrowing ability, city dependence on state and federal financial aid is not surprising.

City power is limited in other ways as well. Cities, unlike states, are not general lawmaking bodies. Because of their dependence on a legitimate delegation of state power, their ability to regulate private activity is more like that of an administrative agency than that of the state itself.[23] Moreover, state constitutions have generally been interpreted to authorize cities to perform only a "welfare-improving regulatory service," denying them "a general authority to define rights or alter the basic legal structure of civil society . . . [by making] 'private' or 'civil' law."[24]

Not only are cities unable to exercise general governmental power, but they also cannot exercise the economic power of private corporations. Municipalities may not engage in any "business" activity unless it "falls properly under the heading of a 'public utility'" and is not for profit.[25] Thus, both "public" and "private" city functions are largely reduced to the provision of certain municipal services. Yet today, even many of these services, such as education, transportation, and health care, are provided not by cities but by special districts or public authorities that are organized to cut across city boundaries and over which cities have no control.[26]

The limits on city power described above usually seem natural and uncontroversial. They appear simply to follow from the status of cities as junior members of the governmental hierarchy. This sense of naturalness keeps us from questioning these limits or trying to think of ways to change them. Indeed it is difficult even to imagine what another legal status for cities would look like.

Sharply different legal power is of course imaginable for private corporations. The restriction of city powers to those delegated by the state is clearly inapplicable; private corporate power can be exercised for any legal purpose merely by filing papers in whatever state the incorporators choose.[27] The lim-

[22] *See, e.g.*, Hurd v. City of Buffalo, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973), *aff'd*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974).

[23] *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1170 n.21 (1977).

[24] *Id.*

[25] F. MICHELMAN & T. SANDALOW, *supra* note 12, at 103.

[26] *See generally* Comment, *An Analysis of Authorities: Traditional and Multi-County*, 71 MICH. L. REV. 1376 (1973).

[27] *See* D. VAGTS, BASIC CORPORATION LAW 73–75 (2d ed. 1979). These general incorporation laws for private corporations are the product of the 19th century. *See* pp. 1100–01 *infra*.

itations imposed on cities by the fourteenth amendment or the commerce clause do not apply to private corporations; indeed while cities are restrained by these provisions of the Constitution, corporations are protected by them.[28] Similarly, the absolute limits on city taxing and borrowing power and on city business opportunities have no analog for private corporations, whose revenue-raising capacities are instead governed by the market.

Federal and state governments, of course, have extensive constitutional authority to regulate private corporations, and in fact, they have exercised this power to a considerable degree.[29] Yet our conception that private corporations ought to remain independent of state power substantially restrains the actual exercise of that power. Moreover, corporate property rights, unlike city "rights," are not fully subject to state control; rather, their protection from governmental control is the cornerstone of the "free enterprise" system.

The point of this comparison between the law for cities — municipal corporations — and the law for private corporations is that we never even think to make it.[30] The differences between the two types of entities are simply too obvious: one is public, the other private; one governed by politics, the other by the market; one a subdivision of the state, the other a part of civil society. In the modern development of the law for the cities, the historical connection between public and private corporations[31] has been forgotten in favor of an automatic incantation of the distinction between them: city discretion is the application of coercive power to liberty and must be restrained, while corporate discretion is the exercise of that liberty and must be protected. Thus, our conceptual framework, based on the public/private distinction, helps confirm the current powerlessness of cities.

City powerlessness, moreover, appears to be both an inevitable and desirable feature of modern life. It seems a necessary result of a national economy and the increasing cen-

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[28] *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (contract clause); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (commerce clause). Of course, to the extent that private corporations are considered to be performing "state action," they, too, would be restrained by the Constitution. *See generally* L. TRIBE, *supra* note 19, §§ 18-1 to -7.

[29] *See generally* L. TRIBE, *supra* note 19, §§ 5-4 to -9 (congressional power); *id.* §§ 6-1 to -13 (state power). The extent of these powers has led to expressions of concern over corporate powerlessness. *See* note 286 *infra*.

[30] This is not to say that the best scholars in the local government field have failed to make such comparisons. *See, e.g.*, F. MICHELMAN & T. SANDALOW, *supra* note 12, at 1-196.

[31] This connection is traced at pp. 1080–120 *infra*.

tralization and bureaucratization of all aspects of American society. The idea of real local power conveys a picture of the strangulation of nationwide businesses by a maze of conflicting local regulations and the frustration of national political objectives by local selfishness and protectionism. Far from seeming a political choice, the rejection of local power seems implied by the needs of modern large-scale organizations, both public and private.

In addition, there is a widespread belief that although cities are supposed to protect the public interest, they cannot really be trusted to do so. This distrust engenders support for state and federal control of cities to prevent local abuse of power, curb local selfishness, or correct the inefficiencies resulting from "balkanized" local decisionmaking. City discretion of any kind evokes images of corruption, patronage, and even foolishness. This sense of necessity and desirability has made local powerlessness part of our definition of modern society, so that decentralization of power appears to be a nostalgic memory of an era gone forever or a dream of romantics who fail to understand the world as it really is.

B. Why City Powerlessness Matters

Our ideas about the powerlessness of cities are so well settled that it is difficult for us to see why city powerlessness matters. It is tempting to relate the cities' lack of power to the so-called "crisis of the cities." But exactly what this crisis is, or why we should care about it, is uncertain. It may be the need to improve the quality of life for those — often poor, often black or Hispanic — who live in the nation's major cities, or the need to encourage greater concentrations of people because of the energy shortage and the environmental damage caused by the suburbanization of the countryside, or the need to preserve city institutions important to the nation as a whole, such as trade or cultural centers.

Yet if the "crisis of the cities" means no more than these kinds of problems, an increase in city power does not seem necessary for their solution. Indeed, many of these problems might be solved more quickly if local autonomy were prohibited altogether, and cities were administered by federal officials authorized to implement a national urban policy. The need for city power does not rest on the view that local autonomy is the only, or even the most efficient, way to solve local problems.

In fact, if we focus on cities as they are presently organized and managed, we will not see the argument for city power.

Cities as they currently exist should not simply be made more powerful. Rather, the argument for city power rests on what cities have been and what they could become. Cities have served — and might again serve — as vehicles to achieve purposes which have been frustrated in modern American life. They could respond to what Hannah Arendt has called the need for "public freedom"[32] — the ability to participate actively in the basic societal decisions that affect one's life. This conception of freedom — a positive activity designed to create one's way of life — differs markedly from the currently popular idea of freedom as merely "an inner realm into which men might escape at will from the pressures of the world," of a "*liberum arbitrium* which makes the will choose between alternatives."[33]

The basic critique of the development of Western society that has emerged since the beginning of the nineteenth century has emphasized the limited ability of individuals to control their own lives.[34] This development is sometimes attributed to the growth of bureaucracy; an individual's work is increasingly controlled by a distant, hierarchic chain of command, and an individual's political destiny is determined by distant government officials.[35] Others attribute the development to the evolution of the capitalist system to a stage in which the few individuals who control the bulk of productive property directly make the economic decisions, and indirectly make the political decisions, that shape society's future.[36] Still others emphasize the organization of society to conform to the utilitarian view of the individual as merely a consumer of satis-

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[32] H. ARENDT, *supra* note 1, at 114–15, 119–20.

[33] *Id.* The concept of public freedom was the definition of freedom in the Greek polis. It rests on the ideal of "isonomy," the notion that equality of political decisionmaking will eliminate the division between government and society, between ruler and ruled. *Id.* at 30–31. This idea is explored in the work of Aristotle. *See* E. BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE 61–207 (1959).

For a contemporary analysis of the liberal attack on this classical conception of freedom, see J. HABERMAS, THEORY AND PRACTICE 41–81 (J. Viertel trans. 1973).

[34] Sources espousing this critique include not only those cited in the next three footnotes but also the reactionary attack on the development of liberalism. *See, e.g.*, T. CARLYLE, *Sign of the Times*, in 7 COLLECTED WORKS 314 (1869); J. RUSKIN, *The Nature of Gothic*, in 2 THE STONES OF VENICE 152 (1881). *See generally* R. NISBET, THE SOCIOLOGICAL TRADITION 264–312 (1966).

[35] The classic work on bureaucracy is by Max Weber. *See* M. WEBER, FROM MAX WEBER 196–244 (H. Gerth & C.W. Mills eds. 1956). The literature on the subject itself is immense. *See, e.g.*, A. GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1954); R. MICHELS, POLITICAL PARTIES (E. Paul & C. Paul trans. 1962); READER IN BUREAUCRACY (R. Merton, A. Gray, B. Hockey & H. Selvin eds. 1952).

[36] Marx's own critique, which procedes along these lines, is found throughout his work. For a good summary, see J. MCMURTRY, THE STRUCTURE OF MARX'S WORLD-VIEW (1978). For a modern Marxist statement of this theme, see P. BARAN & P.

factions so that economic freedom is defined as the ability to choose from an array of products and jobs, political freedom as the ability to choose among political candidates, and intellectual freedom as the ability to choose opinions from the "marketplace of ideas." There is little opportunity, in each case, for the individual to create his own material life, determine his own political future, or form his own ideas from personal experience.[37] For our purposes, the important point is that all of these critiques stress the need for the individual to gain control over those portions of his life now determined by others.

Since absolute individual self-determination is pure fantasy, these critiques have focused on a more limited objective: reorganizing society to increase the degree of individual involvement in societal decisions. One step towards meeting that objective is the reduction of the scale of decisionmaking, since limited size appears to be a prerequisite to individual participation in political life or at the workplace. Reestablishing the definition of political democracy as popular involvement in the decisionmaking process,[38] rather than as merely providing a choice of candidates at an election,[39] is possible only at the local level. Similarly, some Marxists have argued that socialist control of economic life requires decentralized decisionmaking to avoid substituting the power of a centralized status hierarchy for the power of those who control the means of production.[40] As the tradition from Aristotle to Rousseau emphasizes,[41] individual involvement in decisionmaking is impossible except on a small scale.

More than a reduction in the size of decisionmaking units

SWEEZY, MONOPOLY CAPITAL (1966); for a sociological statement, see C. MILLS, THE POWER ELITE (1956); for a statement by a liberal economist, see C. LINDBLOM, POLITICS AND MARKETS (1977).

[37] For an articulation of this viewpoint, with references to the works on which it is based, see C.B. MACPHERSON, DEMOCRATIC THEORY 3–76 (1973).

[38] *See, e.g.*, C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1–44 (1970).

[39] *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). For an exploration of the different meanings of democracy, see C.B. MACPHERSON, THE REAL WORLD OF DEMOCRACY (1965).

[40] This is the Marxist critique of the Soviet state-socialist system. *See, e.g.*, R. LUXEMBOURG, THE RUSSIAN REVOLUTION (1967); J. MCMURTRY, *supra* note 36, at 174–87; H. MARCUSE, SOVIET MARXISM (1961).

[41] *See, e.g.*, ARISTOTLE, POLITICS bk. 7, 255–98 (T. Sinclair trans. 1962); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. 8, ch. 16, at 176–77 (D. Carrithers ed. 1977); J. ROUSSEAU, THE SOCIAL CONTRACT bk. 2, §§ 9–10, bk. 3, §§ 1, 3, 4, at 40–44, 48–53, 55–58 (L. Bair trans. 1974). Plato in his *Laws* calculated the optimal number of citizens at 5,040. 1 PLATO, LAWS 457 (R.G. Bury & L. Heinemann trans. 1926). For a critique of this position, albeit based on a representative rather than a participatory theory of democracy, see R. DAHL & E. TUFTE, SIZE AND DEMOCRACY 2–16 (1973).

is necessary, however, before popular participation in societal decisionmaking can be realized. There must also be a genuine transfer of power to the decentralized units. No one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life. Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.

The idea of communal decisionmaking will appear utopian to some. Indeed it is, if we define utopia, as did Karl Mannheim, as a vision of the world derived from unrealized and unfulfilled tendencies in current society that threaten to break through the existing order and cause its transformation.[42] The idea of freedom as popular participation in the exercise of power has been a persistent and persistently revolutionary idea in Western social thought. It was, according to some scholars, the purpose of the American revolution until the reaction against mass democracy in the 1780's;[43] it was also, according to others, the central core of Marxism prior to the Leninist addition of the priority of organization.[44]

What makes the concept of popular participation so unrealistic to us is not only its frightening unfamiliarity, but also our conviction that all decisionmaking requires specialization, expertise, and a chain of command. For us, small units are organized just as large ones — as hierarchic bureaucracies. Cities are just another version of bureaucratic government managed by elected politicians, and small businesses tend to be structured as if they were larger ones. We find it difficult to conceive how communal decisionmaking might work, how people could be induced to participate, and how knowledge could be sufficiently widespread and decisionmaking sufficiently orderly to be possible. Popular participation seems to us to be chaos; it challenges not only our idea of property rights and sovereign power, but also our idea of the possible ways of organizing human activity. Yet even Lenin and Max Weber, both of whom believed in the necessity of bureaucracy in the modern world, recognized that democracy presents an alternative to bureaucracy as a method of decisionmaking.[45] Moreover, descriptions of the governing of Athens by forty

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[42] K. MANNHEIM, *supra* note 1, at 192–204.

[43] H. ARENDT, *supra* note 1, at 140–78. *See also* G. WOOD, *supra* note 1, at 3–124.

[44] *See* sources cited note 40 *supra*.

[45] As Lenin argued:

> Bureaucracy *versus* democracy is the same thing as centralism *versus* [local] autonomism. . . . The latter want[s] to proceed from the bottom upward

thousand citizens,[46] the control of industry by Yugoslavian workers,[47] and the management of Israeli kibbutzim by their members[48] suggest the viability of this alternative vision of the possibilities for organizing human behavior.

Another objection to communal decisionmaking, an objection as old as Plato's,[49] is that it appeals to the worst instincts of individuals and leads to a despotism of ignorance and prejudice. But the proponents of popular participation, themselves relying on Greek theory,[50] suggest that involvement in power itself changes the individuals who participate, giving them a practical notion of the needs of social life and an interest in the welfare of their community. In the 1830's, de Tocqueville saw the then-widespread participation in local government as the essential strength of American democracy.[51] John Dewey, almost a century later, viewed the demise of participatory local government as the central evil of the modern era. Popular participation seemed to him the only method of replacing reliance on mass propaganda with personally acquired information, and of creating the sense of a common venture necessary for any meaningful definition of the "public interest."[52] Hannah Arendt argued that no one can be truly free or happy without recapturing the meaning of freedom as active participation in public decisionmaking and the meaning of happiness as public happiness, the sharing of public power. Freedom is cheapened, she argued, by defining it merely as a source of protection for our private lives, rather than as a creative form of control over our lives.[53] For these critics, popular partici-

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> . . . . The former proceed[s] from the top, and advocate[s] the extensions of the rights and powers of the centre in respect of the parts. . . .
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> . . . My idea . . . is "bureaucratic" in the sense that the Party is built from the top downwards . . . .

2 V.I. LENIN, SELECTED WORKS 447–48, 456 n.1 (1935). *See generally* S. WOLIN, POLITICS AND VISION 407–29 (1960).

Weber saw two possible results of democracy: the first, that of replacing bureaucracy with popular decisionmaking, and the second, that of making bureaucratic positions accessible on a formally equal basis to all applicants. *See, e.g.*, M. WEBER, *supra* note 35, at 77–128, 196–244.

[46] *See, e.g.*, G. GLOTZ, THE GREEK CITY AND ITS INSTITUTIONS 117–294 (1929).

[47] *See, e.g.*, C. LINDBLOM, *supra* note 36, at 330–43; C. PATEMAN, *supra* note 38, at 85–102.

[48] *See, e.g.*, J. BLASI, THE COMMUNAL FUTURE: THE KIBBUTZ AND THE UTOPIAN DILEMMA (1978); R. COHEN, THE KIBBUTZ SETTLEMENT 68–92, 288–315 (H. Statman trans. 1972).

[49] For a summary of Plato's philosophy, see E. BARKER, *supra* note 33, at 61–207.

[50] *See id.* at 231–37, 276–92 (on Aristotle).

[51] 1 A. DE TOCQUEVILLE, *supra* note 1, at 62–63, 68–70, 87–98, 189–95, 231–45.

[52] J. DEWEY, *supra* note 1, at 143–84.

[53] H. ARENDT, *supra* note 1, at 215–81.

pation is the source of values, the creation of morality, not its elimination.

It should be emphasized that participatory democracy on the local level need not mean the tyranny of the majority over the minority. Cities are units within the state, not the state itself; cities, like all individuals and entities within the state, could be subject to state-created legal restraints that protect individual rights. Nor does participatory democracy necessitate the frustration of national political objectives by local protectionism; participatory institutions, like others in society, could still remain subject to general regulation to achieve national goals. The liberal image of law as mediating between the need to protect the individual from communal coercion and the need to achieve communal goals[54] could thus be retained even in the model of participatory democracy.[55]

We need not decide here whether this alternative vision of society would improve the human condition. Certainly Rousseau's[56] model of popular participation can be characterized as both the full expression and full suppression of individualism. Yet any denial of the possibility of such a vision of democracy in a country which professes democratic ideals must be explained, and the creation of powerless cities is just such a denial. Participatory democracy exists today only as a faint echo, discernible in the remnants of the New England town meetings and in the sense that, somehow, the bureaucratic governments of most localities are still more accessible, controllable, and amenable to popular direction than is the federal bureaucracy. The question becomes, then, one of establishing how the powerlessness of cities is a factor in preventing the emergence of participatory democracy.

It is not that cities are the only form in which participatory democracy is possible in American society. The Populist movement can be viewed as an experiment in popular participation.[57] In addition, some writers have suggested that private corporations are vehicles for creating new forms of human association based upon the communal tie created by the pursuit of common goals.[58] Such an idea has many possible meanings, ranging from socialism on the one hand to business management based on the infusion of communal values on the

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[54] *See The Structure of Blackstone's Commentaries, supra* note 1, at 258–61.

[55] Indeed, this was Rousseau's view of the role of law in a society governed by the general will. *See* J. ROUSSEAU, *supra* note 41, bk. 2, ch. 6.

[56] *See* J. ROUSSEAU, *supra* note 41.

[57] *See* L. GOODWYN, THE POPULIST MOVEMENT (1978).

[58] *See, e.g.*, E. DURKHEIM, *supra* note 1, at 1–31.

other.[59] But surely a more likely source of participatory democracy has always been the cities, in part because of the tradition of local participatory democracy from the colonial era to as recently as de Tocqueville's time.[60]

Why are cities today governed as bureaucracies, rather than as experiments in participatory democracy? The answer cannot simply be that they are too large, because when city powerlessness first became a legal principle,[61] there were only two cities in the United States with over one hundred thousand people.[62] Moreover, many cities — even without our special definition of the word — remain as small today as Athens was in classical times.[63]

Instead, the answer must be sought in the development of our liberal ideology which makes the idea of participatory democracy seem so bizarre, so dangerous, and so unworkable that most state constitutions prohibit its emergence.[64] Complementing this is the relationship depicted above between participation and powerlessness. Since significant powers have been withheld from cities, the idea of cities' becoming experiments in popular democracy is unattractive. Individual participation in powerless institutions fails to provide individuals with the opportunity to shape their lives in a meaningful manner. Thus, state control has prevented cities from becoming experiments in participatory democracy while simultaneously making them unlikely targets for attempts at popular control.

City powerlessness, then, diminishes the possibility of developing a form of human association based on participation in public power. City power would not ensure the success of such a form of association, but it could be an important ingredient of it. Indeed, a powerful city is desirable only if it becomes transformed, modifying its functions and organization and, perhaps, its boundaries, to engender greater participation in its decisionmaking.

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[59] On the infusion of communal values in business management, see E. MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1933); E. MAYO, DEMOCRACY AND FREEDOM (1919); P. SELZNICK, LEADERSHIP IN ADMINISTRATION (1957); Selznick, *Foundations of the Theory of Organization*, 12 AM. SOC. REV. 23 (1948). *See generally* S. WOLIN, *supra* note 45, at 407–14. Discussion of the possibility of participatory democracy within American corporations is pursued in Part IV *infra*.

[60] *See* 1 A. DE TOCQUEVILLE, *supra* note 1.

[61] *See* pp. 1102–05 *infra*.

[62] *See* C. ADRIAN & E. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS 1775–1870, at 20–21 (1976).

[63] *See* note 46 *supra*.

[64] State constitutions contain a wide variety of restrictions on local government activity and organization which, cumulatively, would make a system based on mass participation impossible. *See, e.g.*, PA. CONST. art. 9.

II. The Role of Law in City Powerlessness

Even if the powerlessness of cities and its consequences are recognized, the question remains how the law has contributed to that status for cities. In this Part, two aspects of this question are discussed. First, what does it mean to say that law has had an effect on city power, rather than merely saying that law as a deduction from, or a reflection of, the development of liberalism has done so? Second, how can law, liberalism itself, or any other system of ideas be said to have altered the structure of social life, rather than simply to have been themselves shaped by that structure? In other words, what role am I claiming for law in the development within liberal theory of the status of cities, and what role am I claiming for liberalism itself in the development of the city?

A. Liberalism, Law, and City Powerlessness

Liberalism is a term of many definitions, but it is sufficient here to say that liberalism is the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life. Liberalism, as I use the term, should not be distinguished from conservatism, as it is in modern American political jargon, but should be interpreted to include, and be broader than, both these strands of American political thought. Rather, liberalism describes in the most fundamental way how most of us understand any political system, because it also describes the way we understand ourselves and society as a whole. Liberalism is our world view, one that emerged from such theorists as Hobbes and Locke, was developed by both Bentham and Rousseau, and was forcefully expressed in the mid-nineteenth century in the work of John Stuart Mill. It so pervades our thinking that it can be contrasted only with radically different ways of understanding the world, such as that based on medieval thought[65] or that derived from modern critiques of liberalism itself.[66]

For some, liberalism is characterized by its emphasis on the belief that the passions can be subordinated to reason, that the world can be rationalized both in terms of thought and by organization of social life, and that the way to do so is by a scientific dissection of all aspects of life, thereby rendering

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[65] *See* pp. 1083–87 *infra*.

[66] *E.g.*, R. Unger, Knowledge and Politics (1975). Liberalism can also be contrasted with non-Western thought, *see, e.g.*, M. Weber, *supra* note 35, at 267–442 (on India and China), or the thought of Ancient Greece, *see, e.g.*, N. Fustel de Coulanges, Ancient City (W. Small trans. 1874); note 33 *supra*.

them orderly and controllable.[67] For our purposes, it is sufficient to point out that such a definition, as well as others like it,[68] is based on the more fundamental proposition that the world is divided into spheres of reason and of desire, of fact and of subjective values, of freedom and of necessity, of the development of the self and of the need for communal relationships, of the free interaction of civil society and of the demands of the state, of the controlling importance of empirical fact and the controlling importance of ideas. Liberalism is not a single formula for interpreting the world; it is, instead, a view based on seeing the world as a series of complex dualities.[69]

Liberalism, however, provides no method for deciding how any particular feature of life should be allocated between its dualities. There was nothing, for example, in the early development of liberal thought that determined the place of cities within liberal society. Over time, liberals have adopted changing, often contradictory, solutions to this persistent problem. Cities have sometimes been seen as the essence of freedom ("The air of the city makes free," says a German proverb)[70] and sometimes as a danger to freedom;[71] cities have been touted as the source of individual development and fulfillment[72] and as the source of atrophy of individualism[73] and of the blasé attitude;[74] cities have been characterized as the expression of bourgeois rationalism[75] and as the threat of the passions, or politics, to that rationalism;[76] cities have been classified as part of society[77] and as part of the

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[67] K. MANNHEIM, *supra* note 1, at 122–23.

[68] *See, e.g.*, T. LOWI, *supra* note 6, at 71–72.

[69] *See generally* K. MANNHEIM, *supra* note 1, at 3–33, 122–23, 164–91; R. UNGER, *supra* note 66; *The Structure of Blackstone's Commentaries*, *supra* note 1, at 258–61, 294–300, 354–62.

[70] H. PIRENNE, MEDIEVAL CITIES 193 (F. Halsey trans. 1925).

[71] *Cf.* THE FEDERALIST No. 10 at 69 (J. Madison) (E. Bourne ed. 1901) (on the dangers to individual freedom when small groups exercise power).

[72] *See* pp. 1071–72 *supra*.

[73] *See, e.g.*, G. SIMMEL, *The Metropolis and Mental Life*, in THE SOCIOLOGY OF GEORGE SIMMEL 422 (K. Wolff ed. 1950) (attributing this view to Nietzsche).

[74] *Id.* at 409–24 (Simmel himself).

[75] Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *quoted in* H. ARENDT, *supra* note 1, at 250.

[76] 4 WORKS OF THOMAS JEFFERSON 86 (P.L. Ford ed. 1904) (Notes on Virginia of 1782).

[77] F. MAITLAND, *supra* note 1; H. PIRENNE, *supra* note 70. For some purposes, we still understand cities as part of society and not part of the state. For example, while an American state is immune from a suit for damages in federal court under the 11th amendment, cities are not; they are not "states" for this purpose. *See* Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 756 (1978). Cities are also

state;[78] cities have been analyzed as purely empirical phenomena[79] and as pure creations of the mind.[80]

The principal puzzle confronted by liberal theorists concerning city status was that cities seemed entities intermediate between the state and the individual. On the one hand, cities could be understood as vehicles useful for the exercise of the coercive power of the state, but, on the other hand, they could also be understood, like voluntary associations, as groups of individuals that sought to control their own lives free of state domination.[81] Cities were partly creations of the state, yet they were also partly creations of the individuals who lived within them. Thus, cities failed to fit neatly into liberal theory which sought to allocate all aspects of social life to one of the poles of its dualities, in this case either to the sphere of the state or to that of the free interaction of individuals within civil society.

But gradually, there has developed a process of slowly working out a solution to the status of cities within liberal theory, a process still ongoing despite our settled feeling that we have arrived at a "natural" status for cities. My claim is that this process has, to a large extent, been carried on by the development of legal doctrine. The results of this process are our current perceptions that cities represent state rather than individual interests and that city powerlessness is necessary and desirable.

This process of defining a status for cities within liberal theory is simply an example of the general development of liberal ideas. Liberalism, like any general theory, is useful only to the extent it can help people understand their lives and

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sometimes considered to be like private individuals and not like either American states or the federal government for antitrust purposes. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408–13 (1978) (plurality opinion); *id.* at 418–26 (Burger, C.J., concurring in part and in the judgment).

[78] 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 9-12, at 24–30 (4th ed. 1890). For purposes of the 14th amendment and the commerce clause, for example, *see* note 13 *supra*, as well as for purposes of the 10th amendment, *see* National League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976), and, sometimes, for antitrust purposes, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 428–30 (1978) (Stewart, J., dissenting); *id.* at 418–26 (Burger, C.J., concurring in part and in the judgment), we still understand cities, like American states, as part of the state.

[79] Park, *The City: Suggestions for the Investigation of Human Behavior in the Urban Environment*, in R. PARK, E. BURGESS & R. MCKENZIE, THE CITY 1–46 (1967).

[80] *See* O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (F.W. Maitland trans. 1958).

[81] For an interesting discussion of the similar tension between the value of association and the problem of coercion in religious associations, see L. TRIBE, *supra* note 19, § 14-13.

the world around them. Thus, liberal thinkers have tried to explain all the puzzles of human nature and social life by making concrete the meaning of the liberal dualities. The development of legal doctrine has generally been one form this effort has taken. Thus law has been part of the definition of liberal thought.[82] It has sometimes been influenced by ideas arising elsewhere in liberal theory while at times influencing those areas by its own development. But it cannot properly be understood apart from its role within the development of liberal theory.

Moreover, law has been a special way of articulating the meaning of liberal theory. The legal system serves an important legitimating function, providing a moral force so that attempts to go outside it come to be viewed as attacks against "the entire legal system and therefore the consensual framework of the body pclitic."[83] Whenever the legal process is adopted as a mode of analysis, it fuels the notion that the results of application are natural, apolitical, and deductive.[84] In addition, the law has its internal demands, such as for consistency and generality,[85] and these demands themselves have influenced the development of liberal theory.

Thus, in working out a legal status for cities, courts have for centuries wrestled with the question, which has perplexed liberal theorists, whether to classify cities as an exercise of freedom by individuals or as a threat to freedom analogous to that posed by the state. English courts, for example, were asked to decide whether city charters once awarded could be revoked by the King, by Parliament, or not at all. To resolve this question, the courts in effect had to decide whether cities, like the state, were a threat to freedom, thus justifying central control of their charters or whether cities protected individual rights and thus needed protection from the state.

The city was considered like the state in that context,[86] and, as we have seen, the answer that has generally been developed by the legal system in such situations has been to identify the city with the state and to conceive of the city as

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[82] *See The Structure of Blackstone's Commentaries*, *supra* note 1, at 261–64, 354–62.

[83] E. GENOVESE, ROLL, JORDAN, ROLL 28 (1974). *See also* Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE 17–63 (1975).

[84] *But see* Dewey, *supra* note 2.

[85] These ideas are associated with the work of Max Weber. *See* M. WEBER, LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1954); Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720. *See also* E. THOMPSON, WHIGS AND HUNTERS 258–69 (1972).

[86] This was the original answer, although not the only one that has been given. *See* pp. 1092–95 *infra*.

a threat to freedom. Yet legal theory is still working out the exact relationship of the city on the one hand and the state and the individual on the other within the liberal idea of society. In 1978, for example, the Supreme Court considered whether the federal antitrust laws should be applied to cities as they are to individuals and private corporations or whether cities should be exempt from these laws, as are state governments.[87] In deciding the case, four Justices associated the city with the state,[88] four associated it with individuals,[89] and the final, deciding Justice[90] said that sometimes the city acts like an individual and sometimes like the state. As this case demonstrates, in every case involving city power, courts must classify the city within liberal theory.

B. Liberalism and the Changing Status of Cities

Having tried to place the law of cities within the context of the development of liberal theory, I turn to the second question posed earlier: in what way has liberalism, as a system of ideas, affected the actual structure of social life? On this issue, I am not espousing a form of pure idealism.[91] While this Article discusses only the development of liberal ideas, I am not suggesting that liberal theory by itself has caused or controlled the changing status of Western cities. I do not deny the role of economic, social, or political factors or even other ideas in the development of cities. Instead, I am simply bringing to the surface an aspect of our social life that has too often gone unnoticed.

The specific purpose of this Article is to discuss why cities can exercise only certain powers and how this powerlessness has affected their role in society. I am not trying to explain the process of urbanization in the Western world in general. By narrowing the focus to what cities as institutions can or cannot do, it becomes clear that our decision on this issue is influenced by our ideas. In the capacity discussed here, the "city" is an abstraction, despite our attempts to reify it. My

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[87] City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

[88] *Id.* at 426–41 (Stewart, J., dissenting, joined by White, Blackmun & Rehnquist, JJ.).

[89] *Id.* at 391–417 (opinion of Brennan, J., joined by Marshall, Powell & Stevens, JJ.).

[90] *Id.* at 418–26 (Burger, C.J., concurring in part and in the judgment).

[91] Thus I am not espousing a form of determinism that would parallel the religious determinism of Fustel de Coulanges, N. FUSTEL DE COULANGES, *supra* note 66, or the economic determinism of Sombart, W. SOMBART, DER MODERNE KAPITALISMUS (1902). *See generally* M. Finley, *The Ancient City: From Fustel de Coulanges to Max Weber and Beyond*, 19 COMP. STUD. SOC. & HIST. 305 (1977).

task, therefore, is limited to investigating how liberalism and the legal system have shaped our ideas about the institutional role of cities, not how they have affected the overall growth or decline of cities.

In this limited endeavor, I suggest that people perceive the world by selecting out those things which seem important to them and that their actions are tailored to those selected perceptions.[92] Thus, the empirical world — the economic, demographic, and political activities that affect city life — has been the source of people's understanding of cities, and has affected their ideas of and actions regarding city power. But their frames of reference, their liberal ideology, have organized the mass of empirical data and experience in a way that has channeled their perceptions and actions, and therefore has influenced the development of the cities. To put it another way, there has been a continual process of accommodation of people's ideas about cities to the empirical world as they saw it and at the same time what was seen has been affected by selecting out, or assimilating, possible perceptions of the world and of the city to conform to preexisting ideas.[93] The combined process of accommodation of ideas to experience and assimilation of experience to ideas means that, to some extent, the world is made to conform to our ideas and, to some extent, our ideas are made to conform to the world.

Such a process should not be totally unfamiliar to lawyers, who understand the world as presenting problems that demand legal solutions (a role for experience) and the enactment of laws as changing that world by affecting human behavior (a

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[92] This is the claim of Gestalt psychology. *See* W. KÖHLER, *supra* note 1. *See also* K. KOFFKA, PRINCIPLES OF GESTALT PSYCHOLOGY (1935). Gestalt psychology is but one of the possible sources for the methodology I have adopted in this Article, but it has been the most important one for me. Others may find its roots in phenomenology, *see, e.g.*, E. HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY (D. Carr trans. 1970); M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (C. Smith trans. 1962); A. SCHUTZ, THE PHENOMENOLOGY OF THE SOCIAL WORLD (G. Walsh & F. Lehnert trans. 1967), Marxism, *see, e.g.*, J. GABEL, FALSE CONSCIOUSNESS (M.K. Thompson trans. 1975); G. LUKACS, HISTORY AND CLASS CONSCIOUSNESS (R. Livingstone trans. 1971), structuralism, *see, e.g.*, C. LEVI-STRAUSS, THE SAVAGE MIND (1966); J. PIAGET, STRUCTURALISM (C. Maschler trans. 1971), or the later Wittgenstein, *see, e.g.*, L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 1968); H. PITKIN, WITTGENSTEIN AND JUSTICE (1972). Of course, I need not accept all of Gestalt psychology any more than their followers have accepted all of Husserl, Marx, Levi-Strauss, or Wittgenstein.

[93] This terminology is that of Jean Piaget. *See, e.g.*, J. PIAGET, PLAY, DREAMS AND IMITATION IN CHILDHOOD (C. Gattegno & F. Hodgson trans. 1962); J. PIAGET, SIX PSYCHOLOGICAL STUDIES (A. Tenzer trans. 1967). For Piaget's comments on Gestalt psychology, see J. PIAGET, *supra* note 92, at 54–60.

role for ideas). The methodology applied here merely broadens that view. It is not only the passage of laws that affects how cities develop. Our ideology, that is, our way of understanding the world, affects our selection of the laws we pass, and that understanding itself, in addition to the laws it generates, affects people's actions and thus the development of social life.[94]

III. THE DEVELOPMENT OF THE LEGAL STATUS OF CITIES

To understand the relationship between the development of legal theory and the declining power of cities, one must examine the history of cities since their reemergence in the West beginning in the eleventh century.[95] In this Part, however, only the most cursory treatment is possible. The reader must, therefore, be prepared for a breathtaking dash through an enormous and densely crowded area, allowing, at such a speed, only a brief glance at certain landmarks along the way.

Three basic reasons underlie the need for this historical examination. First, it is impossible to demonstrate the role of law as a part of liberal theory and of liberal theory as a factor in the creation of powerless cities without an historical survey. Moreover, as we shall see in this Part (and build upon in Part IV), the liberal attack on city power is but an example of the more general liberal hostility towards all entities intermediate between the state and the individual, and thus all forms of decentralized power. Yet there remains a powerful

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[94] As Max Weber put it, ideas created "world images," which "like switchmen, determined the tracks along which action has been pushed by the dynamic of interest." M. WEBER, *supra* note 35, at 280. Gierke stated that liberalism

> served as a pioneer in preparing the transformation of human life; it forged the intellectual arms for the struggle of new social forces; it disseminated ideas which, long before they even approached realisation, found admittance into the thought of influential circles, and became, in that way, the objects of practical effort.

1 O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 1500–1800, at 35 (E. Barker trans. 1935). For a brilliant discussion of the influence of ideas, focusing on the role of reification in liberal consciousness, see G. LUKACS, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS 83 (R. Livingstone trans. 1971).

[95] It might be legitimate to start the history even earlier — for example, with the history of Greek and Roman cities. Greek cities, however, while contributing to our notion of "public freedom" discussed earlier, *see* pp. 1071–73 *supra*; note 33 *supra*, did not seek to achieve autonomy within a powerful nation-state. *See, e.g.*, sources cited note 297 *infra*. Roman cities, although important, also never achieved autonomy from the central government. Indeed, the similarity between their legal status and the modern legal status of the American city is remarkable. *See* O. GIERKE, ASSOCIATIONS AND LAW 95–142 (G. Heiman trans. 1977).

sense that some form of decentralized power is necessary; a world composed solely of a centralized state and individuals appears to threaten us with state domination.

Second, an historical perspective can help undermine the naturalness of our current understanding of the status of cities by contrasting it with different understandings of that status, indeed, with those that have had a role in the formation of our own conception. Thereby, possibilities for change will emerge, and these possibilities will underlie the proposals outlined in Part IV.

Finally, I am convinced that the best way of understanding a legal concept is to analyze it the way a geologist looks at the landscape. For a geologist, any portion of land at any given time is "the condensed history of the ages of the Earth and . . . a nexus of relationships."[96] Our current legal conception of cities is similarly the remnant of an historical process, so that its meaning cannot be grasped until the elements of that process, and their relationships, are understood. Thus, this Part should be understood as an effort to describe how liberal thinkers at different points in history have interpreted the question of city power — the proper relationship of the city, the individual, and the state. Each attempt to resolve the question has had a cumulative effect on our current understanding of how to think about the issue; each stage in the process should be understood as adding to, and not replacing, its predecessor.

We turn to a brief summary of the historical section that follows. Section A examines the medieval town, not only because it is the ancestor of the modern city but also because it presents a conception of a status for cities that has been the persistent focus of liberal attack. That conception is one of the city as a corporation, an intermediate entity which is neither the state nor the individual, neither political nor economic, neither public nor private, yet which has autonomy protected against the power of the central state. In medieval thought, the question of city power thus appeared as one concerning the role of group activity, rather than individual or state activity, in social life. Section A also articulates the initial liberal attack on this intermediate entity, one which sought to allocate its role to either that of the state or that of the individual. Section B discusses the city corporations' ability to resist this liberal attack because of their economic power

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[96] O. PAZ, CLAUDE LEVI-STRAUSS: AN INTRODUCTION 6 (J. Bernstein & M. Bernstein trans. 1970).

and their status as entities with rights protected against the King. The nature of these rights was the subject of major controversy between the King and the cities, a controversy that led, after the Glorious Revolution of 1688, to the further protection of city rights against the King. Thus the question of city power became the problem of defining the relationship of those who wielded economic power to the King.

In Section C, I discuss the relevance of the history of the English city corporations to the status of cities in colonial America, demonstrating that in America as in England the rights of cities were resolved as part of the question of the relationship between all corporations and the central state. It must be understood that before the nineteenth century, there was no distinction in England or in America between public and private corporations, between businesses and cities. As a legal matter, all these corporations had the same rights. But while the rights of corporations against the King were resolved, their relationship to the legislature remained unsettled; the problem of city power in early America therefore lay in defining that relationship. This issue was complicated by the fact that all corporations remained, like the medieval town, entities intermediate between the state and the individual.

Section D discusses the adoption in the nineteenth century of the public/private distinction for corporations to determine the relationship between corporations and the legislature. As a result, the city, but not the private corporation, came to be dominated by state legislative power. The public/private distinction thus was an attempt to resolve the puzzle within liberal theory of the intermediate nature of corporations by placing cities in the sphere of the state and private corporations in the sphere of the individual in civil society. During this period, the city first appeared as a sharply defined public, political entity. The question of city power came to concern the role of decentralized political activity within a unified nation with a "private" economy.

Finally, Section E discusses the late nineteenth century articulation of this public/private distinction for corporations in the important treatise on municipal corporations by John Dillon, and the unsuccessful attack on that articulation both by other writers and by political activists. Despite the criticisms, Dillon's position remained largely intact, and it is the basis of the current legal status of cities in American society. For Dillon, the issue of city power was reformulated as one dealing with the role of local political power in light of the need for a rational, bureaucratic government of experts wielding power in the public interest.

A. The Medieval Town[97]

1. Its Status as an Association. — Our own ideas about the promise and the dangers of local autonomy derive from those that emerged, after the decline of Roman cities, with the revival of European towns in the eleventh century. These medieval towns established a degree of autonomy within their society which has been the goal of advocates of local power and the target of its critics ever since. But the autonomy of the medieval town was not the autonomy of a political organization in the sense which we attribute to the modern city. Rather, the medieval town was a complex economic, political, and communal association.

The medieval town was not an artificial entity separate from its inhabitants; it was a group of people seeking protection against outsiders for the interests of the group as a whole. The town was an economic association of merchants who created the town as a means of seeking relief from the multiplicity of jurisdictional claims to which they, and their land, were subject. These merchants gained their autonomy by using their growing economic power to make political settlements with others in the society, specifically the King and the nobility. They achieved a freedom from outside control that was made possible by, and that allowed to be enforced, a strong sense of community within the town.[98] This autonomy for the merchants and their ability to establish their own communal rules were recognized in the legal status of the town.

Thus city autonomy meant the autonomy of the merchant class as a group with distinct privileges within society.[99] Yet,

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[97] The principal sources for this Section include F. BRAUDEL, *supra* note 1; O. GIERKE, *supra* note 95; O. GIERKE, *supra* note 94; O. GIERKE, *supra* note 80 (the three foregoing books being the only sections translated to date of Gierke's DAS DEUTSCHE GENOSSENSCHAFTSRECHT); O. GIERKE, THE DEVELOPMENT OF POLITICAL THEORY (B. Freyd trans. 1966); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 39–54 (1909); F. MAITLAND, *supra* note 1; H. PIRENNE, ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE (I.E. Clegg trans. 1936); H. PIRENNE, *supra* note 70; C. PLATT, THE ENGLISH MEDIEVAL TOWN (1976); M. WEBER, *supra* note 1. Also useful were E. FREUND, THE LEGAL NATURE OF CORPORATIONS (1897); E. KANTOROWICZ, THE KING'S TWO BODIES (1957); L. MUMFORD, THE CITY IN HISTORY 243–343 (1961); S. REYNOLDS, AN INTRODUCTION TO THE HISTORY OF THE ENGLISH MEDIEVAL TOWNS (1977); C. STEPHENSON, BOROUGH AND TOWN (1933); J. TAIT, THE MEDIEVAL ENGLISH BOROUGH (1936).

[98] "More than anything else the fully developed ancient and medieval city was formed and interpreted as a fraternal association." M. WEBER, *supra* note 1, at 96.

[99] It was the protection afforded "the nest of the medieval town," as Lewis Mumford put it, that enabled "the egg of the capitalist cuckoo" to grow. L. MUMFORD, *supra* note 97, at 411.

it should be emphasized that the medieval town established the rights of a group that could not be distinguished from the rights of the individuals within the group. The status of the individual merchant was defined by the rights of the group to which he belonged, namely the medieval town. As a result, the medieval town had some features that for us are unrecognizable: a strict identity established between individual interests and the town's interest as a whole, a lack of separation of individual property rights and town sovereignty rights, and a mixed political and economic character.

The interests of the merchants were not only the goal of town autonomy, but they also provided the basis for the functions of the medieval town. The town association controlled individual commercial conduct with a thoroughness unmatched in history. It protected the worker from competition and exploitation, regulated labor conditions, wages, prices, and apprenticeships, punished fraud, and asserted the town's interests against neighboring competitors.[100] It is, therefore, important to understand the aspect of "freedom" that was achieved by the autonomy of the medieval town.

It was, in essence, the ability of a group of people to be governed at least to some extent by their own rules, free of outside interference. As Fernard Braudel described it, with some exaggeration:

> The medieval city was the classic type of the closed town, a self-sufficient unit, an exclusive Lilliputian native land. Crossing its ramparts was like crossing one of the still serious frontiers in the world today. You were free to thumb your nose at your neighbour from the other side of the barrier. He could not touch you. The peasant who uprooted himself from his land and arrived in the town was immediately another man. He was free — or rather he had abandoned a known and hated servitude for another, not always guessing the extent of it beforehand. But this mattered little. If the town had adopted him, he could snap his fingers when his lord called for him.[101]

In some areas, particularly Italy, Flanders, and Germany, this autonomy allowed the towns to lead a fully separate life for a long time. But even where such a separate life was not achieved, as in England, the structure of the towns provided its inhabitants shelter to pursue, largely on terms defined within the town, their own economic interests.

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[100] H. PIRENNE, *supra* note 70, at 208–09.

[101] F. BRAUDEL, *supra* note 1, at 402–03.

This autonomy by no means created the medieval town as an idyllic oasis of freedom in a world of feudal bondage. Internally, often from the outset, the towns were not democratic but hierarchical; they operated under the strict control of an oligarchic elite. Far from achieving communal bliss within the towns, the exercise of hierarchic power "quickly set in motion their class struggles. Because if the towns were 'communities' as has been said, they were also 'societies' in the modern sense of the word, with their pressures and civil wars: nobles against bourgeois, poor against rich ('thin people,' *popolo magro*, against 'fat people,' *popolo grasso*)."[102]

If we could look today at a medieval town, the idea of the town as a community would appear to us largely as a cover for the advancement of particular interests, and the value of town autonomy, although apparent, would be overshadowed by real and potential internal conflicts. But, although the conflicts within the town surely were apparent to its inhabitants, they could see an importance and value in the communal association that we do not. We must try to understand how even those subjected to the power of others within the town could look at their town, describe it as a community and defend the importance of its autonomy.

The identification of the individual with the town as a whole was, first of all, based on the place of the town in the life of its inhabitants. The town defined their place in society, defended them from outsiders, and enabled them to pursue their livelihood. Protection of town autonomy was necessary for the protection of their way of life. Patriotism and loyalty to the town resulted; thus some have characterized medieval towns as "the West's first 'fatherlands.'"[103]

In addition, the idea of community was maintained by the complex idea of "city peace":

> [C]ity peace was a law of exception, more severe, more harsh, than that of the country districts. It was prodigal of corporal punishments: hangings, decapitation, castration, amputation of limbs. It applied in all its rigor the *lex talionis*: an eye for an eye, a tooth for a tooth. Its evident purpose was to repress derelictions, through terror. All who entered the gates of the city, whether nobles, freemen or burghers, were equally subject to it. Under it the city was, so to speak, in a permanent state of siege. But in it the city found a potent instrument of

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[102] *Id.* at 399.

[103] *Id.* Braudel emphasizes that the patriotism of the townspeople "was for a long time to be more coherent and much more conscious than territorial patriotism, which was slow to appear in the first states." *Id.*

> unification, because it was superimposed upon the jurisdictions and seigniories which shared the soil; it forced its pitiless regulation on all. More than community of interests and residence, it contributed to make uniform the status of all the inhabitants located within the city walls and to create the middle class. . . . [T]he peace created, among all its members, a permanent solidarity.[104]

Most important, the hierarchic organization of the town did not undermine the value of the association but was itself legitimated by the medieval concept of society. The legitimacy of the autonomy of the town or any other group did not depend on the protection of individuals from the group. To comprehend how an individual could think that he benefited simply by the freedom of the town as a whole requires an understanding of the medieval conception of the role of the individual in society. Indeed, to understand the medieval idea of city autonomy itself — the relationship of the town to the rest of society — one must see it, like the relationship among those who lived within the town, as an aspect of the overall organization of the medieval world.

A classic description of the medieval conception of society is contained in the work of Otto Gierke.[105] According to Gierke, in medieval political thought the relationship within each association was an example, in microcosm, of the relationship between the association and all others in society, and this in turn was understood as a harmony whose individual parts complemented each other as do the parts of the human body. Indeed, each form of association, like social life and like man himself, was understood as a diminished copy of the divinely instituted harmony of the universe. This harmony was not seen as noncoercive collective action, nor as individual coordination. No part of society represented the product of individual agreement; hierarchy was everywhere. God ruled the world, so, naturally, the King ruled his realm, the lord ruled his manor, the elite of the town ruled the town, and the father ruled his family. Each organization allowed its members, and the group as a whole, to contribute something to the working of society, and to be a constituent part of the harmony of the whole. But no organization required equality of its members any more than the working of the human body or of the universe itself requires equality of its parts.

Thus, medieval political thought did not seek to distinguish the separate interests within the town or between the town

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[104] H. PIRENNE, *supra* note 70, at 199–201.

[105] *See* sources cited note 97 *supra*. Gierke's subtlety and sophistication cannot, regrettably, be captured in this attempt to summarize his views.

and the rest of society, but rather sought to analyze their harmonious unity. Neither the idea of an individual identity separate from the town nor that of town autonomy separate from others in society implied a notion of opposition between the parts and the whole. The individual contributed to town functions and the town contributed to society's functioning.

Since preserving the integrity of the parts was necessary to preserve the whole, preservation of town autonomy was necessary to preserve the ability of town inhabitants to contribute their part to the operation of society. Thus, the autonomy of the medieval town cannot be understood from our modern perspective of separating the individual interests from the town interests and, then, town interests from the "state" interests. The idea of the autonomy of the town and of its citizens merged; as Maitland saw in the English medieval borough, there were absent the distinctions that we recognize as fundamental: between personal property rights and town sovereignty rights, between the town as a collection of individuals and the town as a collective whole.[106]

2. The Liberal Attack on Group Identity. — Slowly, however, an entity separate from its membership — the town with a capital "T"[107] — "struggles into life."[108] This emergence of the town as an entity with rights and duties independent of, even opposed to, its inhabitants, this creation of the town as "a person," occurred long before the first corporate charter was granted by King Henry VI in 1439.[109] It grew with the idea that "[t]he 'all' that is unity will not coincide with, may stand apart from, the 'all' of inhabitants."[110] Only once this was established could the effect of the King's actions with respect to the towns become distinguishable from its effect on the towns' citizens. Only then was it possible to conceive of the King's attempt to control the towns as liberating, and not restricting, the individual. Thus, the separation of the individual's interest from the town unity, and the increase of the King's power over the town, were part of the same process.

The dissolution of the medieval town as an organic association and the accompanying increase in the power of the King over the town were part of the general liberal undermin-

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[106] "[T]he 'belongs' . . . of private law begins to blend with the 'belongs' of public law; ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*, and the vague medieval *communitas* seems to swallow up both the corporation and the group of co-owners." F. MAITLAND, *supra* note 1, at 11–12.

[107] *Id.* at 85.

[108] *Id.* at 80.

[109] *Id.* at 18.

[110] *Id.* at 85.

ing of medieval society itself. A similar process has been traced within medieval rural society.[111] Indeed, the progress of liberalism can be understood, as Gierke saw it,[112] as a progressive dissolution of all unified structures within medieval society — the feudal manor, the medieval town, and even the King himself. Instead of seeking to understand the harmonious working of the whole, liberalism separated out from each aspect of life an individual interest as contrasted with a group interest and, at the same time, consolidated all elements of social cohesion into the idea of the nation-state. With the development of liberalism, "[the] Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy."[113]

The evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state. The unity of the church, the feudal manor and the medieval town dissolved into entities separate from, and opposed to, the interests of their members, and each of them established separate relationships with the emerging nation-state. Even the King himself became divided into his "individual" and "State" parts, a division "between his private property and the State's property which was under his care."[114]

Much of Gierke's analysis of the development of liberalism is stated in terms of legal doctrine, particularly the development of the legal status of corporations. It should be remembered that the King, the church, the university and the medieval town were the principal examples of medieval corporations[115] and that many of these institutions were, together with the feudal manor, the principal objects of liberal attack. For Gierke, the changing of the conception of the corporation was the vehicle by which liberalism undermined the status of those groups.

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[111] *See generally* F. BRAUDEL, *supra* note 1; B. MOORE, SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 3–110, 413–508 (1966). On feudal society outside the towns, see generally M. BLOCH, FEUDAL SOCIETY (C.A. Manyon trans. 1961).

[112] Gierke refers to liberalism as the "theory of natural law." *See* O. GIERKE, *supra* note 94.

[113] O. GIERKE, *supra* note 80, at 87.

[114] *Id.* at 63. *See generally* E. KANTOROWICZ, *supra* note 97.

[115] *See* 1 W. BLACKSTONE, COMMENTARIES *467–71.

To show how this was done, Gierke contrasts two conceptions of the corporation, the Germanic and the "antique-modern."[116] In the Germanic conception, the corporation is an organic unity that is not reducible to a collection of individuals or to an artificial creation of the state. Rather, its existence is seen as "real in itself." The "antique-modern" conception, however, views the corporation as merely the sum of its individual members and, simultaneously, a "fictional person" created by, and therefore subject to, the state. This contrast is hard for us to grasp unless we recall the powerful conception of unity in medieval thought and the fracturing of that unity by liberal thought, which came to focus instead on the individual and the state. The movement from the Germanic to the antique-modern conception of the corporation facilitated the undermining of the corporate entity by the development of individual freedom from corporate unity and of state power over corporate unity. Entities like the medieval town, "formed and interpreted as a fraternal association,"[117] with autonomous power for the unity as a whole, could gradually become mere locations for individual effort and mere "creatures of the state."

For early liberal thinkers,[118] the attack on the autonomy of medieval corporations, including the medieval town, was necessary to protect what they considered the vital interests of individual liberty and of the emerging nation-state. Their perspective, then, was the predecessor of our own; they sought to eliminate the domination of individuals within the town by the town oligarchy and establish the rule of law over all centers of power. So important was the need to restrict the towns' control of individual activity and their irresponsible local protectionism that the increase in the power of the nation-state necessary to achieve these objectives seemed benign. In other contexts, liberal thinkers viewed increasing the power of the state as necessarily a threat to individuals — one interest advances only at the expense of the other. But increasing the power of the state over the towns was understood as simultaneously advancing both state and individual interests. This viewpoint encouraged early liberal thinkers, as it encourages us, to see the eradication of the power of the towns as a step forward in the progress of freedom.

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[116] 1 O. GIERKE, *supra* note 94, at 162–65, 180–95.

[117] *See* note 98 *supra*.

[118] A list of the works of early liberal thinkers, including those of Suarez, Grotius, Bodin, and Hobbes, can be found in 1 O. GIERKE, *supra* note 94, at 36–37; 2 *id.* at 229–32.

Yet the defense of the power of the town was itself based on the notion of freedom. In fact, as we have seen, it was the idea of freedom from feudal restrictions that was the basis for the creation of the town. Elimination of the town as an entity intermediate between the state and the individual could, therefore, threaten the way of life — the freedom — of those protected by town autonomy. Thus, both the liberal efforts to destroy the town and the efforts to preserve it, were made in the interest of freedom.

B. The Early Modern Town[119]

1. Its Relationship to the King. — In spite of the liberal attack, the towns retained much of their autonomy and power, at least until the beginning of the nineteenth century. The primary explanation for this fact in the case of English cities, the models for the American law of cities, was the retention of a major aspect of their medieval identity; the towns remained "economic corporations"[120] whose franchises provided protection against control by the King and fracturing by individuals. Commerce was the basic activity of municipal corporations,[121] and the power of the economic elite, who played an increasingly dominant role in the towns, was both the force behind, and the result of, the protection afforded by the corporate charters.[122] An understanding of the nature of city autonomy in England prior to the nineteenth century therefore requires an examination of the relationship between this economic elite and the King.

The King's relationship to the economic elite in the towns was one of mutual dependence as well as mutual suspicion. The assumption of control of the cities by this largely self-

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[119] The principal sources for this Section include P. ABRAMS & E. WRIGLEY, TOWNS IN SOCIETIES (1978); P. ANDERSON, LINEAGES OF THE ABSOLUTIST STATE 15–42, 113–42 (1974); F. BRAUDEL, *supra* note 1, at 373–440; P. CLARK & P. SLACK, CRISIS AND ORDER IN ENGLISH TOWNS 1500–1700 (1972); P. CLARK & P. SLACK, ENGLISH TOWNS IN TRANSITION 1500–1700 (1974); T. HOBBES, LEVIATHAN (Oxford ed. 1909); J. LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON 1660–1688, AND ITS CONSEQUENCES (1969); J. LOCKE, 2D TREATISE OF CIVIL GOVERNMENT (1924); M. WEBER, *supra* note 1. Also useful were 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 192–222 (1925); M. LANDON, THE TRIUMPH OF THE LAWYERS (1970); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962); J. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA (1975).

[120] M. WEBER, *supra* note 1, at 133.

[121] *See* J. TEAFORD, *supra* note 119, at 1–15.

[122] P. CLARK & P. SLACK, ENGLISH TOWNS IN TRANSITION 1500–1700, at 128 (1974).

perpetuating oligarchy[123] created a conflict with the craftsmen and the proletariat within the towns, a conflict which dominated the towns' political life. The elite was thus forced to seek outside support for their privileges, particularly from the King.[124] In addition, the elite increasingly looked to the King for social advantages and legal protection.[125] The King, for his part, favored control by a small group upon whom he could depend for financial and administrative support. This mutuality of interest became a centerpiece of mercantilism:

> Economic centralization, protectionism and overseas expansion aggrandized the late feudal State while they profited the early bourgeoisie. They increased the taxable revenues of the one by providing business opportunities for the other. The circular maxims of mercantilism, proclaimed by the Absolutist State, gave eloquent expression to this provisional coincidence of interests.[126]

Yet the King remained suspicious of the independent power wielded by the economic oligarchy and persistently sought to bring them under his control. They in turn resisted royal interference as an inroad on the basic rights of Englishmen, since the liberty of the towns and the protection of freehold interests, such as the corporators' freehold interest in the corporate franchise, had been established by the Magna Carta.[127]

The issue of royal power and of corporate freedom was entangled with another central issue of the time, the relationship of the King and the Parliament. From the fourteenth century, municipal corporations were represented in Parliament,[128] where they became a dominant influence. This parliamentary role provided an alternative forum for protecting city interests and obviated the need to seek the kind of political

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[123] *See* J. TEAFORD, *supra* note 119, at 4–6.

[124] P. CLARK & P. SLACK, *supra* note 122, at 134.

[125] M. WEBER, *supra* note 1, at 136.

[126] P. ANDERSON, *supra* note 119, at 41.

[127] *See* J. LEVIN, *supra* note 119, at 107; S. REYNOLDS, *supra* note 97, at 109. As Max Weber noted:

> When the concept of the corporation was finally admitted into English law, the cities became privileged corporations within the estates system. The executives of this corporation possessed individual rights derived from acquisition of a special legal title in somewhat the same way that individual rights were appropriated as privileges by individuals and commercial corporations. There was a fluid transition from the privileged "company" to a guild or corporation. The special position of the burghers as a legal estate consisted of a bundle of privileges which they secured within the national federation of estates which was of semi-feudal and semi-patrimonial character.

M. WEBER, *supra* note 1, at 135.

[128] P. ANDERSON, *supra* note 119, at 115.

autonomy asserted by cities elsewhere in Europe.[129] Moreover, since the rural upper classes were themselves developing commercial interests, they tended to align with city interests against the King rather than, as elsewhere, with the King against the cities.[130] Thus, the issue of the limitation of the King's power with respect to Parliament and with respect to the cities were two aspects of protecting the same interest: that of the commercial class.

2. The Attack on City Charters. — The uneasy alliance between the King and the commercial oligarchy broke down in the late seventeenth century, thereby precipitating royal conflicts with both the cities and the Parliament. The dispute with the cities took the form of an attack by the King on their corporate charters, since the charters defined both the power of the corporate elite over ordinary citizens and their relationship to the King.[131] As far back as the thirteenth century, the King had asserted the power to revoke these charters for wrongdoing.[132] The issue became increasingly sensitive, however, because city officials had begun to determine both the identity of city representatives in Parliament and the identity of the juries upon which the King depended to enforce the laws.

The question of the status of corporate charters became the focus of what has been called the "most important case in English history,"[133] the quo warranto[134] brought in 1682 by Charles II in which he challenged the legitimacy of the corporate status of the city of London. The arguments made in the case[135] are significant because they illustrate how liberal thinkers conceived of the issue of city autonomy near the close of the seventeenth century.

The King, believing the issue to be one of the necessity for central control to prevent societal conflict, asserted the right to revoke the charters of cities and other economic corporations later formed on the model of the cities, such as the East India Company, the Hudson Bay Company, and some of the Amer-

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[129] M. WEBER, *supra* note 1, at 137, 182, 185.

[130] B. MOORE, *supra* note 111, at 7.

[131] P. CLARK & P. SLACK, *supra* note 122, at 126.

[132] The efforts date from the time of Henry III and Edward I. *See* J. LEVIN, *supra* note 119, at 1; S. REYNOLDS, *supra* note 97, at 109–11.

[133] J. LEVIN, *supra* note 119, at 80.

[134] For a definition of quo warranto, see 1 W. BLACKSTONE, *supra* note 115, at *485.

[135] J. LEVIN, *supra* note 119, at 29–49. The issues in the case were the city's imposition of allegedly unlawful tolls and its alleged publication of "malicious and seditious libel." *Id.* at 46–49.

ican colonies.[136] If their charters could not be forfeited for wrongdoing, they would become "so many commonwealths by themselves, independent of the Crown and in defiance of it."[137] This view of the need for royal power echoed Hobbes:

> Another infirmity of a Common-wealth, is the immoderate greatnesse of a Town, when it is able to furnish out of its own Circuit, the number, and expence of a great Army: As also the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man. To which may be added, the Liberty of Disputing against absolute Power, by pretenders to Politicall Prudence; which though bred for the most part in the Lees of the people; yet animated by False Doctrines, are perpetually medling with the Fundamentall Lawes, to the molestation of the Common-wealth . . . .[138]

For the cities, however, corporate power was liberty itself, the corporate charter being evidence of rights vested in the corporation by the King. If the wrongdoing of an individual could be treated as if it were that of the corporation and thus result in the forfeiture of the corporate charter, the vested rights on which the members of the corporation relied would be rendered valueless. In short, the vested rights acquired by the corporate franchise were rights of property and must be protected to ensure the liberty of all Englishmen. This argument anticipated Locke:

> [T]he supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own. Men, therefore, in society having property, they have such a right to the goods, which by the law of the community are theirs, that nobody hath a right to take them, or any part of them, from them without their own consent; without this they have no property at all.[139]

Thus the conflict over whether the city charter was a revocable franchise or a vested right represented, in microcosm, the fundamental split in liberal political theory between posi-

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[136] *See* 8 W. HOLDSWORTH, *supra* note 119, at 192–222.

[137] J. LEVIN, *supra* note 119, at 48 (footnote omitted).

[138] T. HOBBES, *supra* note 119, at 256–57.

[139] J. LOCKE, *supra* note 119, at 187–88.

tivism, the Hobbesian view that individual interests are subordinate to the command of the state, and natural rights theory, the Lockean view that the state reaffirmed, and was limited by, the natural rights of man.[140]

The King's victory in the London case represented a victory for the positivist position, and established the legal principle of royal control of the cities for a time. Many other city charters, as well as the charters of some American colonies, were surrendered to Charles II and James II under the threat of further quo warranto proceedings. Yet the royal conflict with the commercial class merely shifted its location to Parliament. Finally, in 1688, the Glorious Revolution ended the Stuart reign. As a result, the London case was reversed, the surrender of other city charters was undone, and the immunity of corporate charters from royal abrogation was reestablished.[141]

The Glorious Revolution, however, did not lead to the adoption of a Lockean protection for corporate rights as we would understand it today. Although the Revolution protected corporate charters from the only source then thought to threaten them — the King — it did not resolve the extent of Parliament's power over those charters. The Revolution was a victory for both Parliament and the cities; increasing the power of one secured the interests of the other. Hence, one could support the victory for both Parliament and the cities without conceiving of Parliament as the "state" which could invade corporate "rights." Even almost a century later, Blackstone shared the same view. He did not see the Parliament as a threat to corporate freedom even though it had absolute power to dissolve corporations, since Parliament itself considered corporate charters inviolate.[142]

At the time of the American Revolution, then, corporate liberty was protected against royal attack, but the extent of its vulnerability if Parliament became hostile remained unresolved. The resolution of this issue — the confrontation of legislative power and corporate rights — produced for the first time a legal distinction between public and private corporations. Until the early nineteenth century, no such distinction between cities and other mercantile entities chartered by the King existed either in America or in England, since all such corporations possessed similar legal powers and protections.

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[140] *See The Structure of Blackstone's Commentaries*, *supra* note 1, at 261–64.

[141] *See* 1 W. BLACKSTONE, *supra* note 115, at *485.

[142] *Id.*; 2 W. BLACKSTONE, *supra* note 115, at *37. *See generally The Structure of Blackstone's Commentaries*, *supra* note 1.

Indeed, neither Blackstone nor Stuart Kyd, who authored the first treatise on corporations in 1793, even mentioned the concepts of public and private corporations.[143] We must therefore turn to the question of how in America the public/private distinction became decisive in resolving the issue of legislative control over corporations, a resolution that left public corporations in the Hobbesian sphere of command and private corporations in the Lockean sphere of rights. Before this question may be answered, however, a preliminary issue must be explored: why were American cities even viewed as corporations for purposes of determining the scope of their rights against the state?

C. *The Early American City*[144]

1. Its Corporate Status. — Since the important English cities were corporations indistinguishable as a legal matter from any other commercial corporation, English law naturally treated the question of the power of cities as being synonymous with that of the power of corporations.[145] In colonial America, however, most cities were not corporations at all. Nevertheless, the issue of city power was resolved in America as in England in the form of the question of corporate power. Why American cities were treated as corporations is a puzzle that deserves further scrutiny.[146]

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[143] 1 W. BLACKSTONE, *supra* note 115, at *470–71; S. KYD, LAW OF CORPORATIONS (1793–1794).

[144] The principal sources for this Section include the works of O. GIERKE, *supra* note 97; E. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD (1938); TOWN AND COUNTRY (B. Daniels ed. 1978); M. ZUCKERMAN, PEACEABLE KINGDOMS (1970); McBain, *The Legal Status of the American Colonial City*, 40 POL. SCI. Q. 177 (1925); Rise and Fall, *supra* note 1. Also useful were E. ALLINSON & B. PENROSE, THE CITY GOVERNMENT OF PHILADELPHIA 10–33 (1886); C. BRIDENBAUGH, CITIES IN THE WILDERNESS (1960); C. BRIDENBAUGH, CITIES IN REVOLT (1955); R. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776–1790 (1942); G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1968); K. LOCKRIDGE, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS (1970); S. WARNER, THE PRIVATE CITY 3–45 (1968).

[145] This is not to say that corporations were the only entities in England that performed what we would call local government functions; counties, parishes, and specially organized single purpose commissions, among others, supplemented city activities. *See, e.g.*, P. CLARK & P. SLACK, CRISIS AND ORDER IN ENGLISH TOWNS 1500–1700 (1972). But the identity in England of the city and the corporate form was close enough to make these other units relatively insignificant.

[146] Indeed, the fact that city power was resolved in this way may be highly significant. *See* p. 1108 *infra*. In any event, given the diversity of forms that cities adopted in colonial America, the classification of cities as corporations is an impressive example of the ability of concepts to reduce a vastly complicated world into a narrow doctrinal framework. *See* C. LEVI-STRAUSS, *supra* note 92, at 131.

Prior to the Revolution, there were only about twenty incorporated cities in America.[147] In New England, where local autonomy was most fully established, no city possessed a corporate franchise; instead, the power of the New England towns was based on their role as the vital organizing unit in social life. Although originally subordinate to the colonial government, the towns increasingly established their power on the basis of the direct popular sovereignty exercised in town meetings. By the late eighteenth century, colonial legislatures were far from being considered a threat to town liberty — a role assigned to the English King and his colonial representatives — since these legislatures were composed of representatives of the towns who were under explicit instructions to represent the towns' interests. Moreover, proposals to turn New England towns into corporations were denounced as attempts to weaken the towns by substituting elitist English boroughs for direct democracy.[148]

In the South, Charles Town, South Carolina, was the only major city. Although it had "many of the characteristics of a city-state,"[149] it too was not a corporation. Its power was based not on town meetings as in New England but on the influence of its merchants. These merchants dominated both the colonial legislature and the complex of organizations that ran the town. In 1723, Charles Town successfully resisted attempts to transform the city into a corporation.[150]

Even in the mid-Atlantic region, in which incorporated cities were most numerous, the corporation was not always the basis of a town's governance. For example, in Philadelphia, one of the two major corporate cities in colonial America, special purpose commissions and voluntary associations progressively assumed duties previously entrusted to the corporation, which was considered archaic and aristocratic. By the late eighteenth century, the Philadelphia corporation was "a club of wealthy merchants, without much purse, power or popularity."[151]

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[147] McBain, *supra* note 144, at 186.

[148] For a fuller discussion of the development of the New England towns, see G. HASKINS, *supra* note 144; Daniels, *The Political Structure of Local Government in Colonial Connecticut*, in TOWN AND COUNTRY, *supra* note 144, at 44; Konig, *English Legal Change and the Origins of Local Government in Massachusetts*, in TOWN AND COUNTRY, *supra* note 144, at 12.

[149] Waterhouse, *The Responsible Gentry of Colonial South Carolina: A Study in Local Government 1670–1770*, in TOWN AND COUNTRY, *supra* note 144, at 160.

[150] *See id.*; E. GRIFFITH, *supra* note 144, at 73.

[151] S. WARNER, *supra* note 144, at 9. Other sources on the development of Philadelphia local government include E. ALLINSON & B. PENROSE, *supra* note 144; R. BRUNHOUSE, *supra* note 144; J. Diamondstone, *The Government of Eighteenth Century Philadelphia*, in TOWN AND COUNTRY, *supra* note 144, at 238.

In general, then, colonial towns did not have the formal corporate structure of the English cities. Instead, they could be viewed as bearing a resemblance to the kind of associations that created the medieval towns,[152] and thus their power could have been perceived as based on the freedom of association rather than on corporate rights. Both medieval and colonial towns were established by people who broke away from existing social restraints and who formed relatively closed societies with new social structures. Moreover, the relationship in colonial America between the aspects of association represented by the town and the aspects of association represented by the family and by religion was often quite close.[153] Conceiving of colonial towns as associations was, therefore, by no means impossible.

As in the case of medieval towns, however, we must be careful not to confuse the concept of association with that of democracy or equality. Hierarchical relationships existed in colonial towns just as in the family and the church. Yet that did not prevent them from being associations. It is the relationship of the people to one another as a unit and not the rules under which the unit operates that creates an association. Even under a more rigorous definition of an association, however, there were towns that operated on the basis of popular participation, at least for those then considered eligible.[154] Nevertheless, despite the evidence that the towns were associations, they were treated by the courts as if they were corporations.

We can only speculate why towns were viewed in this manner. One possible explanation is that, at the time, many people saw no radical distinction between a corporation and an association. Even colonial religious bodies often considered themselves corporations, their corporate nature seen as affirming and strengthening their associational ties.[155] While from a lawyer's point of view a corporation could be formed only by a grant of a corporate charter from the Crown, an alternative conception was that a corporation existed whenever a group possessed and exercised power.[156] It was thus not dis-

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[152] F. BRAUDEL, *supra* note 1, at 406–07. *See also* L. MUMFORD, *supra* note 97, at 328, 356.

[153] *See, e.g.*, M. ZUCKERMAN, *supra* note 144.

[154] The relationship between the Mayflower Compact and the town made real at least in some cases what has generally existed only in political theory. *See* H. ARENDT, *supra* note 1, at 165–78.

[155] *See* Goebel, *Editor's Introduction* to S. LIVERMORE, EARLY AMERICAN LAND COMPANIES at x–xix (1939).

[156] For an analysis of this concept, see O. GIERKE, *supra* note 94, at 162–95. For a case struggling with the difficulties in classifying towns for legal purposes, see School Dist. v. Wood, 13 Mass. 192, 198–99 (1816).

positive to say that the towns had no charters, since medieval cities had also been considered corporations long before they had in fact received corporate charters. Indeed, many medieval cities — London being the most prominent — became corporations by prescription rather than by grant because they had existed as corporations "time whereof the memory of man runneth not to the contrary."[157]

The important point about colonial towns and cities was that they exercised power as a group; as a group they had rights, as a group they had powers. Such an association would be a corporation, or "quasi-corporation," since the corporation was the dominant way of asserting group authority and protecting group rights. The towns were "bodies politic," and all bodies politic — English cities, colonial towns, churches, the states themselves — seemed to be corporations.

If this hypothesis about the creation of the corporate status of colonial American cities is true, it would explain how historians such as the Handlins[158] and Ernest Griffith[159] could describe eighteenth century New England towns as corporations long before the first charter was granted. Whatever the explanation,[160] the rejection of corporate charters by most early American towns prevented their transformation into the kind of closed corporation that governed English cities or Philadelphia, but it did not prevent them from being conceived of as corporations. And it was as corporations that the extent of their power was decided.

2. The City's Relationship to the Legislature. — The question of the appropriate extent of legislative power over the cities was therefore decided as part of the larger issue of the desired extent of legislative power over all corporations, whether cities or other mercantile bodies. In late eighteenth century America, the larger issue was deeply troubling. On the one hand, corporate rights had been protected from the King by the Glorious Revolution; these rights, once recognized, seemed to deserve protection from legislative infringement as well. America had rejected the English notion of legislative supremacy in favor of the Lockean concept of a legislative power limited by natural rights. Legislative denial of these rights could be tolerated no more than could executive denial. On the other hand, corporations exercised power in society that seemed to limit the rights of individuals to earn their livelihood, and this power, wielded by an aristocratic

[157] 1 W. BLACKSTONE, *supra* note 115, at *473.

[158] O. HANDLIN & M. HANDLIN, *supra* note 1, at 100.

[159] E. GRIFFITH, *supra* note 144, at 71.

[160] For another possible explanation, see p. 1108 *infra*.

elite to protect their monopolistic privileges, needed to be controlled by popular — that is, legislative — action. Thus, while the exercise of legislative power was perceived as a threat to corporate rights, the exercise of corporate rights risked the curtailment of legislative power thought necessary to protect the welfare of the people.

On a deeper level, the corporation represented an anomaly to liberal thinkers who envisioned the world as sharply divided between individual rightholders and state power, the ruled in conflict with the ruler.[161] The corporation exhibited traits of both poles: it was part ruled and part ruler, both an association of individuals and an entity with state-granted power. The continued existence of the corporation demonstrated that the liberal effort to destroy the intermediate forms of medieval social life — to recreate the world as one populated solely by the individual and the State — had not yet succeeded. The corporation was thus a feudal remnant, a vestige of the medieval town.

Even more troublesome was that the corporation was in some aspects a protector of, while in other ways a threat to, both individual rights and state power. In one capacity, the corporation not only protected individual property rights but also served as a useful vehicle for the exercise of state powers. Yet, at the same time, the corporation, like the medieval town, restricted the freedom of individual enterprise and operated as a miniature republic, impervious to state power. The dilemma created by the corporation, then, could be solved neither by retention of its present form nor by abolition in favor of individual rights as urged by Adam Smith,[162] or in favor of the state, as advocated by Hobbes.[163]

D. The Adoption of the Public/Private Distinction

1. The Development of the Distinction. — To solve the problem created by the intermediate status of the corporation, early nineteenth century legal doctrine divided the corporation into two different entities, one assimilated to the role of an individual in society and the other assimilated to the role of the state.[164] The corporation as an entity that was simulta-

[161] For a description of this dominant image in late 18th century America, see G. WOOD, *supra* note 1, at 3–45, 159.

[162] 1 A. SMITH, WEALTH OF NATIONS 133–46 (E. Cannon ed. 1965).

[163] *See* p. 1093 *supra*.

[164] This process is described in J. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS (1917); E. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954); O. HANDLIN & M. HANDLIN, *supra* note 1; L. HARTZ, *supra* note 1; M. HORWITZ, *supra* note 1; J. HURST, THE LEGITIMACY OF THE BUSINESS

neously a rightholder and a power wielder thus disappeared. In its place emerged the private corporation, which was an individual rightholder,[165] and the public corporation, an entity that was identified with the state. The very purpose of the distinction was to ensure that some corporations, called "private," would be protected against domination by the state and that others, called "public," would be subject to such domination.[166] In this way, the corporate anomaly was resolved so that corporations, like the rest of society, were divided into individuals and the state.

This public/private distinction for corporations was not purely a legal invention. The distinction had been generally emerging since the American Revolution, and both the newly created public and private identities were the product of a pervasive liberal attack on the exclusive privileges and oligarchic power wielded by corporations.

The attack which established the "private" character of business corporations developed as their number expanded, rising from only eight in 1780 to several hundred by the time of the critical *Dartmouth College* opinion in 1819.[167] Even though these business corporations were public service enterprises, such as canals, bridges, water supply companies, and banking enterprises, their creation raised troubling questions concerning the amount of protection afforded their investors and participants. As the courts gradually developed protections for the investors' property, pressure mounted on the

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CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970 (1970); J. TEAFORD, *supra* note 119; Handlin & Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945); Hartog, Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of the Corporation, 1730–1860 (1980) (forthcoming in the *Buffalo Law Review*); Rise and Fall, *supra* note 1. *See generally* Marx, *supra* note 1.

[165] This culminated in the recognition of the corporation as a person for purposes of the 14th amendment. *See* Santa Clara Co. v. Southern Pac. R.R., 118 U.S. 394 (1886).

[166] Of course, corporations not only had the rights of "private" property, but they wielded power as owners of private property, at least in the sense that all individual property owners exercise power. Although the relationship between the power derivable from property and that derviable from sovereignty is clear to us, *see* p. 1132 *infra*, the public/private distinction sought to deny this relationship by classifying sovereignty as public power and property as private right. This distinction was made despite the close historical connection between the development of the idea of property rights and that of corporate (city) power. *See* H. Hartog, Property and Governance in Prerevolutionary New York (n.d.) (unpublished manuscript on file at the Harvard Law School Library).

[167] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); *see* M. HORWITZ, *supra* note 1, at 111–14.

legislature to expand the opportunities for incorporation from a favored few to the more general population.

Yet, as the legislature yielded to this drive for more incorporations, the demand for protection of property rights for those involved itself increased. As one commentary noted, "The process which multiplied the institution [of the corporation] and the unfoldment of its private character reacted upon each other in a reciprocal, accumulative fashion. Every new grant strengthened the grounds for considering it private; every new affirmation of privateness strengthened the hands of those who demanded new grants."[168] This process gathered momentum, culminating in the middle of the nineteenth century in the Jacksonian effort to pass general incorporation laws, thus allowing the "privilege" of incorporation to be exercised by all.

The attack on the exclusiveness of city corporations worked in another direction. Although the number of city corporations could not be expanded, participation in their operation could be enlarged. With the sovereignty of the people as the emerging basis of republican politics, and with the need created by population growth to add new functions to city corporations, the pressure for state legislation to end aristocratic corporate governance mounted. The most important closed corporation in America, that of Philadelphia, was abolished by radical republican legislators in 1776, and it was replaced several years later with a modified, more broadly based, corporation.[169]

This attack on the privileged control of city corporations and the concomitant expansion of participation in corporate governance made it increasingly difficult to separate the city corporation from the people as a whole, that is, to view city corporate rights as distinct from the rights of the public at large. The movement toward what was then considered universal suffrage, in the 1820's and 1830's, helped confirm the emerging public character of city corporations, thus setting them in contrast to the "private" business corporations.

2. The Protection of Property. — Despite these developments, American courts in the early nineteenth century had great difficulty in establishing the public/private distinction for corporations. All corporations continued to have similar characteristics. Corporations, whether cities or mercantile entities, were chartered only to further public purposes, and many of

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[168] O. HANDLIN & M. HANDLIN, *supra* note 1, at 173.

[169] *See* R. BRUNHOUSE, *supra* note 144.

their functions overlapped.[170] All corporations were in one sense created by individuals and, in another sense, created by the state through the award of the franchise. Many mercantile corporations wielded the same powers as cities, such as eminent domain,[171] while many cities received their income from the same sources as mercantile corporations, primarily commerce and trade.[172] Both cities and mercantile corporations served to protect the private investments of individual founders and allowed those active in their governance a large degree of self-determination. Many cities and mercantile corporations were controlled by an elite, and consequently both were subject to popular attack. Finally, cities and mercantile corporations alike could be viewed as associations of individuals organized to achieve commercial ends.[173] In short, all corporations wielded power and all corporations protected rights. The concepts of power and rights, so fully merged in the medieval town, had not yet been segregated into their public and private identities.

In determining where to draw the public/private distinction for corporations, the courts first decided what was important to protect against state power. In *Trustees of Dartmouth College v. Woodward*,[174] decided in 1819, the United States Supreme Court gave its response to this question, an answer that came straight from Locke: what needed protection was property. The scope of property rights thus divided private from public corporations, private corporations being those founded by individual contributions of property, and public corpora-

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[170] *See* Handlin & Handlin, *supra* note 164, at 29–41.

[171] E. DODD, *supra* note 164, at 159.

[172] L. HARTZ, *supra* note 1, at 87–93.

[173] From the earliest times, cities were considered associations organized for certain purposes, and not entities with fixed territorial boundaries. H. MAINE, ANCIENT LAW 103–09 (1861).

[174] 17 U.S. (4 Wheat.) 518 (1819). The public/private distinction for corporations was not invented in the *Dartmouth College* case. Justice Story had drawn the distinction previously in Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 51–52 (1815). It can also be found in the opinion of Chief Justice Holt in Philips v. Bury, 91 Eng. Rep. 900 (1694), a case on which Justices Washington and Story relied in *Dartmouth College*, 17 U.S. at 659, 669–73. Each of these cases, however, devoted only a few words to the distinction; the first attempt to develop the distinction fully was in *Dartmouth College*. On the narrowness of the use of the distinction in Philips v. Bury, see Garfield, *The Dartmouth College Case*, 8 AM. L. REV. 189, 219–29 (1874).

Although the literature on the *Dartmouth College* case is enormous, most of it addresses the effect of the decision on private corporations, rather than its effect on public corporations. *See, e.g.*, C. HARRIS, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 379–419 (1973).

tions being those founded by the government without such individual contributions.

Having decided the importance of property rights, the Court then sought to determine the status of cities under the public/private distinction. While three major opinions were delivered in the case, Justice Story, who had four years earlier first made the public/private distinction for corporations in a Supreme Court opinion,[175] presented the most complete discussion of the issue:

> Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government.[176]

This passage, however, is ambiguous. Justice Story may have been arguing that the critical distinction between private and public corporations was whether they were founded by individuals or "founded *by the government* for public purposes, where the *whole interests* belong to the government."[177] This seems close to the positions taken by both Chief Justice Marshall and Justice Washington.[178] Only if the corporation were completely a state creation, Justice Washington argued, would there be a diminished need to protect property rights from state domination; protection of contract rights would be unnecessary if there were but one party, the state, involved in the foundation of the corporation.[179] Yet, if that were the definition of public corporations, most cities could not be public corporations: most were not founded by the government, nor did they belong wholly to the government. Alternatively, Justice Story may have accepted what was "generally esteemed" at the time if not "strictly speaking" true: that all cities were public corporations. In fact, he twice referred to "towns, cities, and counties" as examples of public corporations.[180] Which of these positions Justice Story held with

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[175] Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 51–52 (1815).

[176] 17 U.S. (4 Wheat.) at 668–69 (Story, J., concurring).

[177] *Id.* (emphasis added).

[178] *Id.* at 629–30, 638–39 (Marshall, C.J.); *id.* at 659–64 (Washington, J., concurring).

[179] *Id.* at 660–61 (Washington, J., concurring).

[180] *Id.* at 668 (Story, J., concurring).

regard to the place of cities within the public/private distinction is unclear.

Moreover, the emphasis on property did not in itself provide a division between cities and other mercantile corporations. Many cities possessed property contributed by individual founders,[181] and mercantile corporations could readily be created by governments for their own purposes. Indeed, Justice Story noted in *Dartmouth College* that even cities possessed certain property rights, although he did not indicate what, if any, additional legal protection from legislative interference cities should receive.[182]

Seventeen years later in his *Commentaries on American Law*,[183] Chancellor Kent offered his own view of the status of cities within the public/private distinction:

> Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state. They may also be empowered to take or hold private property for municipal uses, and such property is invested with the security of other private rights.[184]

In this passage, Chancellor Kent apparently rejected the notion that, in order for an entity to constitute a public corporation, the "whole interest" must belong to the government. He simply asserted that cities were "created by the government," thus denying their actual history both in England and in America. Having taken that step, Kent then divided city authority into two parts: legislation for the public good, and the possession of property for municipal uses. Of these, only city property received protection from state control. Just as public and private corporations are distinguished by the need to protect private property, cities themselves became bifurcated by the same need — self-determination was retained only for the protection of their private property.[185] It is this view that

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[181] For an example of the difficulties these contributions created for the public/private distinction, see Philadelphia v. Fox, 64 Pa. 169 (1870), *discussed in* F. MICHELMAN & T. SANDALOW, *supra* note 12, at 167–73.

[182] 17 U.S. (4 Wheat.) at 694–95 (Story, J., concurring).

[183] 2 J. KENT, COMMENTARIES ON AMERICAN LAW (3d ed. 1836).

[184] *Id.* at 275. Interestingly enough, Kent's first edition more closely follows Story's original language. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 222 (1st ed. 1827).

[185] Thus, the public/private distinction between types of corporations created the public/private distinction within municipal corporation law. *See* p. 1111 *infra*; note 359 *infra*.

became, and remains, the law concerning the status of cities in the United States.

3. The Subordination of the City to the State. — It is by no means self-explanatory why, once corporate property rights were protected, early nineteenth century writers like Chancellor Kent seemed to think it obvious that the other functions of cities would be subordinate to state power.[186] Cities, like other corporations, had never based their resistance to state control simply on the protection of property.[187] Freedom of association and the exercise of self-government had always been values sought to be protected by the defense of the corporation. It did not, therefore, follow from the need to protect property that property alone needed protection and that these other values could be sacrificed to state domination. Indeed, even at the time, these other values were seen as part of the definition of liberty, their defense being most clearly articulated in the defense of state power against federal control encapsulated in the doctrine of federalism.[188]

In addition, such a notion of subordination would turn the political world as it then existed upside down. New England towns had controlled state legislatures since prior to the Revolution,[189] and the move in other sections of the country to end aristocratic city governance in favor of democracy was not made with the intention of establishing state control over cities. Nor could subservience to the state be considered an inevitable product of liberal thought. The proper relationship

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[186] *See also* J. ANGELL & S. AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 14 (1833).

[187] *See* pp. 1084, 1096–97 *supra*.

[188] *See, e.g.*, THE FEDERALIST No. 51 (J. Madison). To the modern reader, American states seem to be, like cities, entities that are intermediate between the central (federal) government and the individual. It therefore seems odd that the city's subordination to an American state could be understood as limiting the power of intermediate entities rather than merely as a transfer from one intermediate entity to another. To the 19th century thinker, however, an American state was sovereign; it wielded ultimate governmental power and not just the power of an intermediate entity. While the federal government was absolute in its sphere, that sphere at the time was limited. *See generally* Rise and Fall, *supra* note 1. Of course, the dividing line between federal and state power was often in dispute, as demonstrated by the advocacy of states' rights in opposition to Jacksonian programs in the 1820's and 1830's, and in support of slavery in the Nullification controversy. *See, e.g.*, M. PETERSON, THE JEFFERSONIAN IMAGE IN THE AMERICAN MIND 36–66 (1960). It was not until the 20th century, however, that an American state could be understood as an intermediate entity superior to the individual but subordinate to federal power. Once this occurred, of course, the liberal undermining of this new intermediate entity has proceeded apace. *See* note 301 *infra*. For a recent example of such an attack on state power, see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[189] *See* p. 1096 *supra*.

of city to state was instead a hotly contested political issue. Some argued that the sovereignty of the people required control at the local level,[190] but others feared the power of democratic cities over the allocation of property in America.[191] Aristotle, Montesquieu, and Rousseau could be invoked in favor of power at the local level,[192] while Madison and Hume could be cited to show the danger of local self-government.[193] Thus, it is necessary to explain how legal theorists could classify cities as public corporations and thereby subject them to state control.

In seeking to understand why cities became subordinate to state power, I will not seek to isolate some factor as the "cause" of this change in city status. Instead, I will simply suggest how an early nineteenth century thinker could have conceived of state control of cities as a defense of freedom and other values rather than as a restriction of freedom.[194]

Once the cities became synonymous with the people within them, one could acknowledge city rights only if one were willing to recognize the right of association and self-determination for any group of people, however large. Such a recognition would threaten many other important values. It would limit the nation's ability to establish a unified political system under the Federal Constitution, preventing the needed centralization of authority and perpetuating the idea that the nation was merely a loose federation of localities. Moreover, these groups, particularly small groups, could be seen as "factions" dangerous to the individuals within them, inhibiting the individual's free development and threatening his property rights.[195] In other words, recognizing the rights of the city as an exercise of the freedom of association would frustrate both the interests of the state and the individual and would defy the liberal attempt to dissolve the power of groups in favor of the state and the individual. Recognizing the rights of the city as an association would thus bring to the surface what was sought to be denied: that corporations were the continuation

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[190] *See, e.g.*, H. ARENDT, *supra* note 1, at 139–78.

[191] Chancellor Kent, for example, expressed this fear. *See* M. MEYERS, THE JACKSONIAN PERSUASION 239–40 (1957).

[192] *See* note 41 *supra*.

[193] *See* THE FEDERALIST No. 10 (J. Madison); D. HUME, *Idea of a Perfect Commonwealth*, in 1 ESSAYS, MORAL, POLITICAL, AND LITERARY 480, 480–81, 492 (1875). For Hume's influence on Madison, see Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIB. Q. 343 (1956).

[194] This approach is explained by my methodology outlined in Part II.

[195] Both these positions were standard parts of the federalist argument at the time. *See* G. WOOD, *supra* note 1, at 471–564.

of the group rights of the medieval town, protecting both the associational and property rights of its members.

Recognition of city rights would also bring to the surface the conflict between the values of association and of property rights themselves, a conflict that had been hidden by the fact that both values had traditionally been protected by the corporate form. Prior to the emergence of the public/private distinction, there was no difference between a corporation's property rights and its rights of group self-government. But now group self-government — or popular sovereignty — seemed a threat to property rights, and property rights seemed a necessary limit to popular sovereignty.[196] Thus, any recognition of the rights of the city would require the courts to choose between associational rights and property rights in particular cases, rather than simply protecting property rights against the power of "governmental" collective action. All these problems seemed to disappear, however, if recognition of the rights of cities were avoided.[197]

The amount of emphasis to put on the fear of democratic power in explaining the judicial decision to limit the power of cities is, of course, a matter of conjecture. Such fear plainly existed, however, even in the minds of such champions of local power as Jefferson and de Tocqueville. While Jefferson saw towns as the "elementary republics" of the nation that must be preserved so that "the voice of the whole people would be fairly, fully, and peaceably expressed . . . by the common reason" of all citizens,[198] he also saw them as objects to be feared: "The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body."[199] For de Tocqueville, "the strength of free peoples resides in the local community," giving them both the "spirit of liberty" and the ability to withstand the "tyranny of the majority";[200] but the size of American cities and the nature of their inhabitants were also so threatening to the future of the republic that they required "an armed force which, while remaining subject to the wishes of the national majority, is independent of the peoples of the towns and capable of suppressing their excesses."[201] Indeed, the vision of cities as being the home of "mobs," the working class, immigrants, and,

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[196] *See* Marx, *supra* note 1.

[197] *See generally The Structure of Blackstone's Commentaries*, *supra* note 1, at 211–21.

[198] *Quoted in* H. ARENDT, *supra* note 1, at 253.

[199] 4 THE WRITINGS OF THOMAS JEFFERSON 86 (P. Ford ed. 1904).

[200] 1 A. DE TOCQUEVILLE, *supra* note 1, at 62, 68–70, 262–63.

[201] *Id.* at 278 n.1.

finally, racial minorities, is a theme that runs throughout much of nineteenth and twentieth century thought. Chancellor Kent's own fears of the democratic cities were surely no secret.[202]

Yet one need not rely on the assertion that the subordination of cities was the product of the unwillingness to protect the cities' rights of association and the fear of democratic power. Since the issue of city power was decided as part of the issue of corporate power, the threatening ideas associated with the rights of association did not need to be brought to consciousness. It is for this reason that the classification of American cities as corporations mattered; it can be understood as helping to repress the notion that associational rights were being affected in defining the laws governing city rights. No rights of association needed to be articulated when discussing the rights of "private" corporations, since property rights were sufficient to protect them against state power, and there was nothing that required rights of association to be imagined in discussing the subordination of "public" corporations.[203] Yet, if no rights of association were recognized, cities, increasingly deprived of their economic character — the basis of their power for hundreds of years — had little defense against the reallocation of their power to the individual and to the state. There was nothing left that seemed to demand protection; therefore, nothing could prevent the control of the cities by the state.

The developments in legal doctrine that led to the public/private distinction for corporations did not immediately alter the allocation of power between American states and cities.[204] In fact, prior to the 1850's, local autonomy remained largely intact.[205] The impetus for the assertion of state political power to curb local autonomy finally came when the desire to restrict city activity in favor of private activity increased. In light of the new conception of public and private activities, the investment by cities in business enterprises no longer

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[202] *See* M. MEYERS, *supra* note 191, at 239–40.

[203] Moreover, nothing in the decision about corporate power would affect the notion of states' rights as embodied in the idea of federalism. That idea rested on the constitutional plan rather than on the recognition of a right of association.

[204] Although the alteration was not immediate, state dominance was now a legal principle that could be invoked when domination became desirable. Just as the structure that was in place during the *ancien regime* was used after the French Revolution to centralize political power, *see* A. DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION (S. Gilbert trans. 1955), the legal structure created by an *ancien regime* in America could be used after the Industrial Revolution to the same end.

[205] *See* H. MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 5–6 (1916).

seemed an appropriate "public" function, and local regulation of a city's business community seemed to invade the "private sphere." Hence, state control over these city activities was invoked.[206] State control of cities during this period, however, was by no means limited to the assurance of a "laissez-faire" policy designed to prevent both cities and states, as governments, from intervening in the private sector. Much state legislation compelled the cities to raise and spend money for state-supported causes, including the promotion of economic enterprise.[207] Other state legislation — so-called "ripper legislation" — simply sought to transfer control of the city government to state-appointed officials.[208] For a wide variety of purposes, then, state power to control cities could now be exercised — and was being exercised — as a matter of law.

E. The Modern Law of Municipal Corporations

1. Dillon's Treatise. — The legal doctrine that cities were subject to state authority was enthusiastically endorsed by John Dillon, who in 1872 wrote the first and most important American treatise on municipal corporations.[209] Dillon did not seek to disguise the values he thought important in framing the law for municipal corporations. In speeches,[210] law review articles,[211] and books,[212] Dillon eloquently defended the need to protect private property from attack and indicated his reservations about the kind of democracy then practiced in the cities.

It would be a mistake, however, to read Dillon's defense of strict state control of cities as simply a crude effort to advance the interests of the rich or of private corporations at the expense of the poor inhabitants of cities.[213] Instead, it is more plausible to interpret Dillon as a forerunner of the Pro-

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[206] *See* L. HARTZ, *supra* note 1.

[207] *See* H. MCBAIN, *supra* note 205, at 6–12.

[208] *Id.* at 9.

[209] J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed. 1872).

[210] After serving as a prominent state and federal judge, Dillon became a leading corporate lawyer and was elected President of the American Bar Association in 1892. For selections from his speeches, see A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW 28–29, 78–81 (1960).

[211] *E.g.*, Dillon, *Property — Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161 (1895).

[212] *E.g.*, J. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1894).

[213] It is, after all, to Mr. Justice Miller that Dillon dedicated his *Treatise* on Municipal Corporations. *But cf.* C. JACOBS, THE LAW WRITERS AND THE COURTS 98–127 (1954) (asserting that Dillon's *Treatise* was instrumental in supporting limitations on municipal taxing power, thus aiding corporations at the expense of the poor).

gressive tradition;[214] he sought to protect private property not only against abuse by democracy but also against abuse by private economic power. To do so, he advocated an objective, rational government, staffed by the nation's elite — a government strong enough to curb the excesses of corporate power and at the same time help those who deserved help. It is important to understand how Dillon could consider state control of cities as a major ingredient in accomplishing these objectives.

According to Dillon, a critical impediment to the development of a government dedicated to the public good was the intermingling of the public and the private sectors. Strict enforcement of a public/private distinction was essential both to protect government from the threat of domination by private interests and to protect the activities of the private economy from being unfairly influenced by government intervention. Moreover, to ensure its fully "public" nature, government had to be organized so that it could attract to power those in the community best able to govern. Class legislation in favor of either the rich or the poor had to be avoided — neither a government of private greed nor one of mass ignorance could be tolerated. Instead, it was the role of the best people to assume responsibility by recognizing and fulfilling their communal obligations: "It is a duty of perpetual obligation on the part of the strong to take care of the weak, of the rich to take care of the poor."[215]

This vision pervades Dillon's work on municipal corporations. From his perspective, cities presented problems that seemed almost "inherent" in their nature.[216] By merging the public and private spheres, cities had extravagantly invested in private businesses, performing functions "better left to private enterprise."[217] As both a state and federal judge, Dillon saw firsthand the problems engendered by municipal financing of railroads.[218] He therefore advocated constitutional limitations and restriction of the franchise to taxpayers whenever

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[214] On Progressivism, see generally L. HARTZ, THE LIBERAL TRADITION IN AMERICA 203–55 (1955); R. HOFSTADER, THE AGE OF REFORM (1955); R. WIEBE, THE SEARCH FOR ORDER 1877–1920 (1967). For an alternative interpretation, see G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963). *See also* pp. 1138–41 *infra*.

[215] Dillon, *supra* note 211, at 173.

[216] J. DILLON, *supra* note 209, ch. 1, § 9, at 21.

[217] *Id.* at 22.

[218] For a summary of Dillon's role in the municipal bond cases, see C. FAIRMAN, RECONSTRUCTION AND REUNION 1864–1888, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 834–36, 839, 970–72, 978, 981, 1051, 1074, 1080, 1096, 1102–04 (P. Freund ed. 1971).

any expenditure of money was at stake in order to prevent cities from engaging further in such transactions.[219]

At the same time, Dillon believed that all of the functions properly undertaken by cities should be considered "public." He therefore criticized the courts for contributing to the division of city activities into public and private spheres. For half a century, courts had distinguished the city's governmental functions, which were subject to absolute state power, from its proprietary functions, which received the constitutional protection afforded to rights of private property. While conceding that such a distinction was "highly important" in municipal corporation law,[220] Dillon found a city's retention of any private identity "difficult exactly to comprehend."[221] Since a city was by definition created by the state, "which breathed into it the breath of life,"[222] there seemed nothing private about them at all.

Most troubling of all to Dillon, cities were not managed by those "*best fitted* by their intelligence, business experience, capacity and moral character."[223] Their management was "too often both *unwise* and *extravagant.*"[224] A major change in city government was therefore needed to achieve a fully public city government dedicated to the common good.

But how could this be achieved? To Dillon, the answer seemed to lie in state control of cities and in judicial supervision of that control. State control, though political, was purely public, and the "best fitted" could more likely be attracted to its government. Moreover, enforcement of the rule of law could play a role, since law was "the beneficence of civil society acting by rule, in its nature . . . opposed to all that [was] fitful, capricious, unjust, partial or destructive."[225] The state and the law working together could thus curb municipal abuse by rigorously enforcing the public/private distinction.

In his treatise, Dillon could not have more broadly phrased the extent of state power over city functions. State power "is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to

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[219] J. DILLON, *supra* note 209, ch. 1, § 9, at 25.

[220] *Id.* at 82. For the origins of the distinction, see p. 1104 *supra*. For a discussion of the current law on the subject, see note 359 *infra*.

[221] J. DILLON, *supra* note 209, § 39, at 83 n.1.

[222] *Id.*

[223] *Id.* ch. 1, § 9,at 21 (emphasis in original).

[224] *Id.* at 22 (emphasis in original).

[225] J. DILLON, *supra* note 212, at 16. Dillon here is paraphrasing, although not citing, Burke: "[L]aw itself is only beneficence acting by a rule." E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 56 (1967).

require."[226] In addition to legislative control, he argued for a major role for the courts:

> The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise; to *lean against constructive powers*, and, with firm hands, to hold them and their officers within chartered limits.[227]

Once all these steps were taken, Dillon argued, the cities' governance could properly be left to democratic control.[228]

It is hard for us to comprehend fully Dillon's confidence in noblesse oblige and in the expectation that state and judicial control would help ensure the attainment by cities of an unselfish public good. For us, the late nineteenth century legislature was as unwise and extravagant as the late nineteenth century city,[229] and our definition of law would be somewhat more restrained than Dillon's. The important point, however, is that the legal doctrines emphasized by Dillon — state control of cities, restriction of cities to "public" functions and strict construction of city powers — are not necessarily tied to his vision of society. While for Dillon the law of cities and the goals of public policy formed a coherent whole, he stated the law so broadly and categorically that it could simply be extracted from its context and applied generally.

Indeed, although Dillon's vision of society may be gone forever, Dillon's statement of the law of municipal corporations, stripped of its ideological underpinnings, largely remains intact today. For example, in the current edition of his treatise, Professor Antieau's articulation of the subservience of cities to state power (absent specific state constitutional protection for cities) is no less emphatic than Dillon's in 1872.[230] His emphasis upon the strict construction required of grants of power is simply a paraphrase of the so-called Dillon's Rule.[231] He too criticizes the public/private distinction *within* municipal corporation law as "difficult to draw,"[232] although, like Dillon, he has no difficulty with the distinction between public and private corporations themselves. Only his state-

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[226] J. DILLON, *supra* note 209, § 30, at 72.

[227] *Id.* ch. 1, § 9, at 25–26 (emphasis in original). For the famous Dillon's Rule encapsulating this policy, see *id.* § 55, at 101–05.

[228] *Id.* ch. 1, § 9, at 26.

[229] According to Henry Demarest Lloyd, "Standard Oil did everything to the Pennsylvania legislature except refine it." R. WIEBE, *supra* note 214, at 28.

[230] 1 C. ANTIEAU, *supra* note 7, § 2.00.

[231] *Compare id.* § 5.04 *with* J. DILLON, *supra* note 209, § 55, at 101–05.

[232] 1 C. ANTIEAU, *supra* note 7, § 5.06.

ment of the law of what are now called public utilities seems more accepting than Dillon's version.[233]

2. Attempts to Establish a "Right to Local Self-Government." — Dillon's thesis, however, did not go unchallenged at the time. The major challenge was launched by Judge Thomas M. Cooley, only three years after publishing his celebrated *Treatise on Constitutional Limitations*.[234] In a concurring opinion in *People ex rel. Le Roy v. Hurlbut*,[235] Cooley denied the existence of absolute state supremacy over cities. Relying on American colonial history and on the importance of political liberty in the definition of freedom, he argued that local government was a matter of "absolute right,"[236] a right protected by an implied restriction on the powers of the legislature under the state constitution.[237] Amasa Eaton advanced the same thesis in a series of articles entitled *The Right to Local Self-Government*.[238] Eaton canvassed English and American history to demonstrate that this "right to local self-government" existed prior to state incorporations and could not be subjected to state restriction.

The most extensive rebuttal to Dillon was published in 1911 by Eugene McQuillin in his multivolume treatise, *The Law of Municipal Corporations*.[239] In an exhaustive survey, McQuillin traced the historical development of municipal corporations and found the essential theme to be a right to local self-government.[240] He rejected the suggestion that cities were created by the state, arguing that "[s]uch [a] position ignores well-established, historical facts easily ascertainable."[241] McQuillin strongly criticized courts that failed to uphold the right of local self-government:

> The judicial decisions denying the right of local self-government without express constitutional guaranty, reject the rule of construction that all grants of power are to be interpreted in the light of the maxims of Magna Carta, or rather the

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[233] *Id.* § 19.

[234] T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

[235] 24 Mich. 44, 93 (1871) (Cooley, J., concurring).

[236] *Id.* at 108.

[237] *Id.* at 97–98.

[238] Eaton, *The Right to Local Self-Government* (pts. 1–3), 13 HARV. L. REV. 441, 570, 638 (1900); (pts. 4–5), 14 HARV. L. REV. 20, 116 (1900).

[239] E. MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed. 1911).

[240] This is Chapter 1 of his second edition, entitled "Rise and Progress of Municipal Institutions." 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (2d ed. 1928).

[241] *Id.* § 268 (246), at 679.

> development of English rights and governmental powers prior to that time; that is, the common law transmuted into our constitutions and laws. They ignore in toto the fact that local self-government does not owe its origin to constitutions and laws. . . . They disregard the fact that it is a part of the liberty of a community, an expression of community freedom, the heart of our political institutions. They refuse to concede, therefore, that it is a right in any just sense beyond unlimited state control, but rather it is nothing more than a privilege, to be refused or granted in such measure as the legislative agents of the people for the time being determine.[242]

McQuillin also sought to buttress his argument by inventing a new rationale for the public/private distinction within municipal corporation law, the distinction that had so confused other writers. There was a general consensus, McQuillin noted, that absolute state power could only be exerted over a city's "public functions." Those functions, he argued, were those that in fact had been given the city by the state. Since the justification for state supremacy depends on the idea of state creation, state control must be limited to those things so created. Powers not derived from legislative action must therefore be "private" and subject to the same constitutional protection as other private rights. The power of the locality that historically was exercised prior to a state charter — the right to local self-government — is, then, a "private" right and cannot be subject to state supremacy.[243]

History has not been kind to the Cooley-Eaton-McQuillin thesis, although at first it was taken quite seriously. In a later edition of his treatise, Dillon himself specifically denied the theory's usefulness and noted its lack of judicial acceptance.[244] Howard Lee McBain, a noted municipal law authority of the time, argued that most courts had properly rejected the right of self-government.[245] In discounting the thesis, McBain seized upon the weak links in the way the proponents framed the right. He denounced the idea of an "implied limitation" on legislative power as dangerous and unworkable and argued that, even if the right to local self-government were a common law right, it would not therefore be beyond the legislative power to change the common law.[246] He also denied that there was in fact an historical right to self-government, at least

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[242] *Id.* at 680–81.

[243] *Id.* § 190 (169), at 514–16.

[244] 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 98, at 154–56 (5th ed. 1911).

[245] McBain, *The Doctrine of an Inherent Right of Local Self-Government* (pts. 1–2), 16 COLUM. L. REV. 190, 299 (1916).

[246] *Id.* (pt. 2) at 300–01.

if interpreted as the right to democratic, popular control of local officials.

McBain's arguments were cleverly aimed at the phrasing, and not the substance, of the Cooley-Eaton-McQuillin thesis. The proponents of the thesis could have responded that the power of public corporations was a "liberty" interest expressly protected by the due process clause in the same way that the "property" interests of private corporations were protected. They could also have explained that this liberty interest was not the democratic control of corporations as understood in the nineteenth century, but instead the kind of local autonomy all corporations had exercised before the ideas of property and sovereignty were separated in the late eighteenth and the nineteenth centuries. But they did not do so. Nor would it have mattered. By the time of McBain's attack, courts were not willing to eliminate the distinction between public and private corporations — even Cooley, Eaton and McQuillin did not challenge *that* distinction. That state power over cities was different from state power over corporations had become an automatically accepted part of legal thought.

In 1923, William Munro, in his classic work, *The Government of American Cities*, stated that Dillon's position on state control of cities was "so well recognized that it is not nowadays open to question."[247] McQuillin's thesis, on the other hand, has been substantially revised even in his own treatise by its current editor:

> [T]he municipal corporation is a creature of the legislature, from which, within constitutional limits, it derives all its rights and powers. Distinction should be made between the right of local self-government as inherent in the people, and the right as inherent in a municipal corporation; while as to the people, the right has quite commonly been assumed to exist, but as to the municipal corporation the right must be derived, either from the people through the constitution or from the legislature.[248]

No other serious academic challenge to the Dillon thesis has ever been made.

There was in the late nineteenth century, however, a political challenge to state control of cities launched under the rallying cry of "home rule."[249] Once state invasion of city

[247] W. MUNRO, THE GOVERNMENT OF AMERICAN CITIES 53 (1923).

[248] 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.82, at 137 (3d rev. ed. 1979) (footnotes omitted).

[249] *See* C. PATTON, THE BATTLE FOR MUNICIPAL REFORM 69 (1940). *See generally* C. BEARD, AMERICAN CITY GOVERNMENT 31–51 (1912); F. GOODNOW, MUNICIPAL HOME RULE (1895); H. MCBAIN, *supra* note 205.

authority became a common occurrence, it became apparent that cities were not faring well under the doctrine that purported to give private enterprises rights and public bodies power. Although by 1886 private corporations had fully become "persons" whose rights were constitutionally protected,[250] public corporations no longer had the sovereign power they once exercised. Moreover, their remaining power derived only from specific state authorizations which were strictly construed by the courts. The solution offered to correct the cities' absence of rights and loss of self-government was the amendment of state constitutions.

Late nineteenth and early twentieth century reformers in fact achieved the enactment of a bewildering variety of constitutional amendments designed to protect city autonomy. These constitutional amendments, however, failed to achieve their objective of local autonomy. The reason for their failure lies in the continuing liberal unwillingness to tolerate an intermediate entity that appears to threaten the interests of both the state and the individual.

One of the most common constitutional amendments was a restriction on state power that gave a state authority to pass only "general" and not "special" or local legislation.[251] This restriction was designed to curb state efforts to control detailed city decisionmaking by specific legislation. Yet if the state's ability to deal with substate, or local, problems were prohibited altogether, individuals would be subject to irresponsible local action or neglect. Accordingly, these constitutional restrictions have not been interpreted to prohibit "general" legislation aimed at a class of cities, even if the "class" is really only one city, for example, a class of cities with population of 29,946 to 29,975.[252] Restrictions on special legislation, then, have become merely weak equal protection clauses limiting the state legislature's ability to classify cities. They are ineffective because there is nothing "suspect" about state restrictions and nothing "fundamental" about the invasion of local autonomy.[253]

Another important state constitutional restriction was designed to grant cities "home rule," meaning both the ability to enact legislation without specific state permission and the ability to prevent certain state invasions of local autonomy.[254]

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[250] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

[251] *See* F. MICHELMAN & T. SANDALOW, *supra* note 12, at 334–39.

[252] *See* Ponder v. State, 141 Tenn. 481, 212 S.W. 417 (1919) (dealing with counties). *See also* 76 HARV. L. REV. 652 (1963).

[253] *See generally* L. TRIBE, *supra* note 19, §§ 16-6 to -29.

[254] *See* F. MICHELMAN & T. SANDALOW, *supra* note 12, at 302–04, 308–13, 349–53; Sandalow, *supra* note 11, at 644–52.

Where permitted, home rule has been useful in expanding the cities' ability to exercise their powers without seeking detailed state authorization.[255] However, it has not successfully created an area of local autonomy protected from state control.[256] Since some state control of city action is of course necessary to protect both state interests and individual liberties, the courts have grappled with determining what matters are of "state concern" and what matters are "purely local" in nature. Given the fact that any local action can be seen as frustrating state objectives and any governmental action restricts individual liberty, protection of cities under home rule is possible only if there is some strong sense that the values being protected "outweigh" the risks involved. Such a sense, however, has all but disappeared under the liberal attack on city autonomy. As a result, very little that is "purely local" can be found, and state control of cities has not been affected significantly by state constitutional protection for home rule.[257] Thus, in accord with the liberal view, the interests of the state and the individual have been upheld at the expense of city power, even in the face of supposedly restrictive constitutional amendments.

3. Cities Become Businesses Again. — A look at one final late nineteenth century development will bring this survey of the development of the current legal status of the cities to a close. Major changes in city organization at that time were the result of the attempt by reformers to eliminate the corruption symbolized by the role of the "boss" and the "machine" in city politics. In 1890, Dillon referred to the need to make city governments more businesslike:

> In many of its more important aspects a modern American city is not so much a miniature State as it is a business corporation, — its business being wisely to administer the

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[255] *See* Sandalow, *supra* note 11, at 658–85.

[256] *See id.* at 652, 658–85. Attempts to create such an area of local autonomy do exist. *See, e.g.*, State *ex rel.* Heinig v. City of Milwaukie, 231 Or. 473, 373 P.2d 680 (1962). But these attempts have the same weakness as the attempt to create states' rights impervious to federal control in National League of Cities v. Usery, 426 U.S. 833 (1976). *See, e.g.*, Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

[257] *See* Sandalow, *supra* note 11. This is not to suggest that the values of home rule do not continue to have an influence on modern society. Those values contributed to the legislative permissiveness that allowed the beginnings of suburbanization in America in the last half of the 19th century, *see* J. TEAFORD, CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970, at 5–31 (1979), and subsequently have sustained the fragmentation of metropolitan areas as a matter of policy, although not of right, to the present day. *Id.* at 184–86.

> local affairs and economically to expend the revenues of the incorporated community. As we learn this lesson and apply business methods to the scheme of municipal government and to the conduct of municipal affairs, we are on the right road to better and more satisfactory results.[258]

McQuillin, however, resisted this reformulation of city status, insisting that cities should retain their identity as miniature states.[259] To understand this dispute, we must analyze the nature of the reformers' attack against city corruption.

In the popular American mythology, the history of cities in the late nineteenth century is aptly reflected by the chapter headings of Samuel Orth's book, *The Boss and the Machine*: "The Rise of the Machine," "Tammany Hall," "The Awakening," and "The Expert at Last."[260] Recent historians have sought to revise this image of history, substituting a more complex version of what was at stake in the movement to replace city machines with more "businesslike" forms of city government.[261] To the immigrant, the machines responded to vital needs for jobs and services in a manner that was corrupt but humane. For the "reformer-individualist-Anglo-Saxon," whose goals were "citizenship, responsibility, efficiency, good government, economy, and businesslike management,"[262] the machine represented an evil that had to be curbed.

Despite the reformers' rhetoric, it was city corruption and not its eradication that transformed the cities into businesses. What corruption meant was the mingling of the private sector's profit motive with the business of the state. As Max Weber's brilliant portrayal of the boss in his essay "Politics as a Vocation" suggests, the boss was much more a late nineteenth century businessman than was his successor in the reform city governments.[263] Although the nature of the invasion of the profit motive into the public sphere was undesirable, the reformers, in their "search for order"[264] in political chaos, dealt with corruption in a way that, while transforming city governments into a less political form, by no means transformed

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[258] 1 J. DILLON, *supra* note 78, § 15, at 34 (citing 1 J. BRYCE, AMERICAN COMMONWEALTH 625 (1888)).

[259] 1 E. MCQUILLIN, *supra* note 240, § 106, at 302–06.

[260] S. ORTH, THE BOSS AND THE MACHINE vii (1919).

[261] *See, e.g.*, R. HOFSTADER, *supra* note 214, at 173–84; J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900–18, at 92–116 (1968); R. WIEBE, BUSINESSMEN AND REFORM (1962). For a general review and critique of the literature, see J. BUENKER, URBAN LIBERALISM AND PROGRESSIVE REFORM 198–239 (1973).

[262] R. HOFSTADER, *supra* note 214, at 183.

[263] M. WEBER, *supra* note 35, at 77, 109–10.

[264] *See generally* R. WIEBE, *supra* note 214.

them into businesses. Instead, further controls over city operations were added, controls — such as civil service requirements for employees and the appointment of managers not removable by the chief executive officer — that would be unthinkable for any American business.[265]

By the steps they took to reinforce the public/private distinction, the reformers reinforced the powerlessness of cities. Their efforts to transform the cities helped to erode further the sense of the city as a center of political autonomy or of direct democracy. Today, almost half of American cities have "nonpartisan" elections, commission governments, or city managers.[266] In the place of democracy are the ideas of expertise, objective decisionmaking, and government by rational rules.

The reforms, however, did have one curious side effect: if cities were to be considered businesses, some argued, they should own and operate some vital city services, such as utilities. This concept of the city as a business is far from Judge Dillon's, but it was the centerpiece of the solutions to city corruption offered by other reformers (such as Frederick Howe).[267] Eliminate the corrupt businessman seeking city contracts, they argued, and you eliminate the principal source of corruption; with municipal ownership, no such corrupt contracts would exist. The reformers did achieve some, but only a limited amount of, municipal ownership as part of transforming the city into "a business."

4. Conclusion. — Reviewing the history of the city as an institution, we can see that a complex transformation of the city has occurred, a transformation that has increasingly narrowed the definition of its nature to that of an entity authorized by the state to solve purely local political problems. The city has changed from an association promoted by a powerful sense of community and an identification with the defense of property to a unit that threatens both the members of the community and their property. Ideas and experience have altered the city completely, and it is this alteration that I have sought to convey by referring to the increasing powerlessness of cities. It is not simply that cities have become totally subject to state control — although that itself demonstrates their powerlessness — but also that cities have lost the elements of association and economic strength that had formerly enabled

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[265] For a critique of the civil service system, see Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 990–1011 (1976).

[266] *See* J. WEINSTEIN, *supra* note 261, at 93.

[267] *See* F. HOWE, THE CITY: THE HOPE OF DEMOCRACY (1905). *See also* C. BEARD, *supra* note 249, at 218–41.

them to play an important part in the development of Western society.

It should not be overlooked that the form of social organization that cities represented became undermined just at the time that popular participation in city affairs had at last become generally possible. Moreover, there is some irony in the fact that this process reached completion during the last few decades of the nineteenth century, the period described in Arthur Schlesinger's seminal history of cities entitled *The Rise of the City*.[268] In this work, Schlesinger argued that urbanization caused the "rise" in city importance. Yet urbanization did not curb the declining role of the city as an institution; on the contrary, urbanization simply reinforced the controls exercised over cities. The fear of the changing nature of the city population led to additional political support for these controls, and that support could not be countered with any effective notion of a right of local self-determination.

The current status of cities is now an unstated assumption in most of the recent literature. Sociological work like that of the so-called Chicago school[269] and historical work by those who followed Schlesinger[270] have focused on the city as a place to live. Most political scientists who have written on the city as an institution have limited their inquiry to its internal governmental structure, accepting as a given the extent of its power and the amount of state control.[271] Thus, our current image of cities has become an established part of liberal social thought.

IV. THE POSSIBILITY OF CITY POWER

A. The Problem of Decentralizing Power

In Part III, I traced the development of the legal concept of the city, showing that the idea of the city as a powerless "creature of the state" derived from the liberal fracturing of all medieval corporate forms into spheres of the individual and of the state. The public/private distinction has perpetuated

[268] A. SCHLESINGER, THE RISE OF THE CITY 1878–1898 (1933). This was the pioneering work that led to the now burgeoning interest in urban history. *See* Warner, *If All the World Were Philadelphia: A Scaffolding for Urban History, 1774–1930*, 74 AM. HIST. REV. 26 (1968).

[269] The central work is R. PARK, E. BURGESS & R. MCKENZIE, *supra* note 79. *See also* CLASSIC ESSAYS ON THE CULTURE OF CITIES 13–19, 91–233 (R. Sennett ed. 1969).

[270] *See* works cited in Warner, *supra* note 268.

[271] *See, e.g.*, E. BANFIELD & G. WILSON, CITY POLITICS (1965); R. DAHL, WHO GOVERNS? (1961); N. POLSBY, COMMUNITY POWER AND POLITICAL THEORY (1963).

the liberal effort by assigning to private corporations the role of "persons" and to cities that of state subdivisions. In Part II, I emphasized the limited, although crucial, role I was claiming for the development of liberal thought: that these ideas have organized people's perception of the world and therefore their perception of which goals have been possible and desirable to achieve. In this way, they have influenced people's actions and, thereby, limited the institutional possibilities for the city.

Today, these ideas constrict our own actions, not only through our continued reliance on the legal status of the cities they helped create but through their influence on our ability to think about changing the city as an institution. Our ideas make the current status of the city seem such a natural and inevitable feature of modern society that any attempt to find, as a matter of law, a "local" function to be protected from state control,[272] or to find, as a political matter, a way to decentralize real power to cities, seems defeated from the start. Changing our way of thinking about cities has become a necessary, although by no means sufficient, ingredient in increasing the power of cities.

1. Decentralization as a Dilemma Within Liberalism. — Our ability to change the status of cities is not, however, simply a matter of allocating more power to certain minor political subdivisions. The issue involves, instead, the fundamental question whether any decentralization of power is possible in a liberal society. The liberal attack against the city, traced in Part III, can be understood as illustrating the precariousness of establishing within liberalism any form of group power intermediate between a centralized state and the individual. Every example of group power — whether political or economic, public or private — permits the power wielder to invade the spheres of both the individual and the state, and is thus subject to the same liberal attack as has been waged against the cities. This attack may help explain the diminishing position in our society of forms of decentralized power as diverse as the family[273] and the American states.[274]

At the same time, the need to decentralize power is not widely questioned. Indeed, the history of the city repeatedly illustrates the idea that protection of entities intermediate between the state and the individual can be regarded as a defense of freedom, not simply as a danger to it. The creation of the

[272] *See* pp. 1116–17 *supra*.

[273] *See, e.g.*, M. GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977).

[274] *See* note 188 *supra*; note 301 *infra*.

medieval town as a protection for the merchants' way of life,[275] the defense of the English corporation against the King in the name of rights of property,[276] the vitality of the colonial town as an association,[277] the defense of a "right of local self-government" against Dillon's support of state control of the cities,[278] and the effort to gain "home rule"[279] can all be seen as attempts to preserve intermediate entities in order to protect individuals from the power of a centralized state. Moreover, all these examples of the idea of group autonomy can contribute to the attempt to define the concept of "public freedom" discussed in Part I:[280] the ability of a group of people, working together, to control actively the basic societal decisions that affect their lives.

Indeed, it is a paradox that while liberalism can be understood as an attempt to eradicate group power in favor of that of the individual and the state, most liberal thinkers seem convinced that the creation of a world without any intermediate bodies — a world in which the state is the only power wielder other than individuals themselves[281] — would leave individuals powerless to prevent a centralized state from threatening their liberty. Liberal thinkers have sought to avoid this problem, principally by imagining that power can be allocated solely to individuals with the state all but withering away. An example is the pretense that a laissez-faire society could do away with a powerful state when, of course, such a state would be indispensable in creating, construing and enforcing "private rights." These days, however, the continued existence of a powerful state is too obvious for most liberal thinkers to ignore. They too, therefore, seek safety in the power of intermediate entities that can protect them from the power of the state.

Liberals, then, have been caught in a perilous contradiction: they have sought to destroy intermediate forms of power, but they also want to preserve them. Until recently, this contradiction had escaped the notice of many liberal think-

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[275] *See* pp. 1083–85 *supra*.

[276] *See* pp. 1092–94 *supra*.

[277] *See* pp. 1095–97 *supra*.

[278] *See* pp. 1113–15 *supra*.

[279] *See* pp. 1115–17 *supra*.

[280] *See* pp. 1068–72 *supra*.

[281] This is the liberal vision of society expressed by Rousseau. *See* J. ROUSSEAU, *supra* note 41. The critique of Rousseau's vision is a mainstay of the literature on political theory. For an interesting evaluation of Rousseau's theory, see A. LEVINE, THE POLITICS OF AUTONOMY (1976); for an attempt to place it in the context of democratic theory generally, see C. PATEMAN, *supra* note 38, at 1–44.

ers. This was possible because private corporations, the principal remaining source of decentralized power in America, were portrayed as individuals — as persons — rather than as bodies exercising group power intermediate between the individual and the state.

But the image of major American corporations as individuals has become increasingly less convincing. The threats such corporations pose to real individuals are now being curbed, for example, by labor laws[282] and civil rights legislation,[283] as are the threats they pose to the state, by regulation and planning.[284] Private corporations once again appear to be examples of the original meaning of "corporate" power — group power. As a result, they are now being subjected to the very attack already successfully waged against public corporations.[285] Indeed, it is in the defense of private corporate power that the need for entities intermediate between the state and the individual is now most often expressed.[286]

Those who now defend the need for some form of decentralized power do so, as did their predecessors, because of its connection with "freedom." As noted earlier,[287] "public freedom" can only be achieved by preserving the authority of a group small enough to allow active participation by group members. Other definitions of freedom, such as "freedom of choice" and the maintenance of civil liberties, have also been tied to some form of independent corporate life.[288] Yet immunizing, even to a limited extent, any definition of freedom is dangerous.

In supporting the need for decentralized power, one should not make the mistake of denying the force of the liberal attack against it. Independent corporate power of any kind does threaten individuals. We have seen examples of these threats in the history of the city outlined in Part III, and similar examples can be drawn from the more recent history of private

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[282] *E.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–169 (1976).

[283] *E.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

[284] *See* E. ROSTOW, PLANNING FOR FREEDOM (1959).

[285] *See, e.g.*, A. BERLE, POWER WITHOUT PROPERTY (1959); R. DAHL, AFTER THE REVOLUTION? 115–40 (1970); J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE (1973); J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967). For a Marxist critique, see P. BARAN AND P. SWEEZY, *supra* note 36.

[286] *See* pp. 1141–42, 1146–47 *infra*. *See also* THE ATTACK ON CORPORATE AMERICA (M. Johnson ed. 1978).

[287] *See* p. 1096 *supra*.

[288] *See* pp. 1142, 1146–47 *infra*.

corporations[289] or even from the history of the family[290] which in ancient times itself "was a Corporation."[291]

Our choice, then, whether or not to have strong intermediate bodies is not a choice between vulnerability and protection. The exercise of state power infringes individual rights protected by independent corporations, yet the exercise of corporate power infringes individual rights protected by the state. Every time we seek state help to protect us from a corporate invasion of our rights, we strengthen one threat to liberty at the expense of another; yet every time we prevent the state from protecting us against corporate power, we accomplish the same result. Our only option is to choose which danger to liberty seems more tolerable, more controllable, or more worth defending.

2. Decentralization as an Option Within Liberal Society. — We can, of course, decentralize power if we decide to do so. We are not prisoners of our liberal ideology, forced by a mechanistic idealism to deny the preservation of group power. We can create any powerful entity we want to create. But if we wish to create powerful intermediate bodies, we must find a way to enable them to retain their power when challenged by individuals or by the state.

Any kind of absolute corporate immunity from state control, such as nineteenth century thinkers might have imagined in terms of home rule for cities or property rights for corporations, is, of course, a fantasy, as would be ceding to corporations absolute power over individuals. Yet corporations, once subjected to state power to some extent, cannot be defended against that power by seeking, in classic liberal terms, protection of corporate "rights."[292] There will always be a good argument in favor of greater individual liberty from corporate power or greater state restriction of corporate power. And, if the state decides the conflict between these values and corporate rights (who else could?), the destruction of corporate power cannot be prevented. We know this not only because of the process of subordination that has already been completed in the case of cities but also from the history of the attempt to protect private corporate power through substantive

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[289] The growth of the labor movement may be viewed as a response to the threats to individual freedom created by private corporations.

[290] Similarly, the history of the movement for women's and children's rights reveals the threats posed by the family to individual freedom.

[291] H. MAINE, *supra* note 173, at 184.

[292] *See The Structure of Blackstone's Commentaries*, *supra* note 1, at 261–64, 354–62.

due process.[293] Independent group power is simply not an idea, whether clothed in the name of rights or sovereignty, that can be defended within a liberal legal system against liberal attack. The power of these intermediate entities must, therefore, be based on more than mere rights; it must rest on their actual ability to exercise power within society.

In fact, the power of intermediate groups, where it has occurred, has always been based on more than the protection of their legal rights. Two examples can illustrate this point. The current power of private corporations rests in part on their importance to the nation's economic system, so that any political or legal attempt to destroy their power would create what would seem to most people to be frightening instability. This degree of power can be self-protecting.[294] When cities possessed real economic power in this sense, their ability to resist state control was much greater than today (notwithstanding the fact that their current "political" power to tax is "the power to destroy").

Second, as we have seen, cities, when they did not base their power merely on economic strength, rested it on their role in the daily lives of their citizens. Medieval towns were powerful because they represented an economic-political-communal unit that allowed their citizens to achieve a new status within feudal society.[295] New England towns, at the height of their power, were religious and fraternal communities, and their ability to represent what seemed to be the fundamental interests of their citizens enabled the towns to control the state, rather than the other way around.[296] The role of the polis in Greek life was so central that Aristotle could describe man as a political animal.[297] Thus, the former power of cities depended, as the current power of corporations depends, on their actual place in social life. To protect any form of group power,

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[293] *See generally* L. TRIBE, *supra* note 19, §§ 8-1 to -7. Judicial scrutiny of economic legislation under the fourteenth amendment has become so lenient that the limited, recent protection of corporate "rights" has come from rather unlikely sources. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (contract clause).

[294] *See, e.g.*, C. LINDBLOM, *supra* note 36.

[295] *See* pp. 1083–85 *supra*.

[296] *See* pp. 1096–97 *supra*.

[297] ARISTOTLE, *supra* note 41, bk. 1, ch. 2, at 28. *See generally* E. BARKER, *supra* note 33, at 218–51. In Greek city states, "the citizen was a shareholder, not a taxpayer." *Id.* at 340–41 (quoting annotation in ARISTOTLE, ETHICS 212 (J. Burnet annot. 1900)). On the role of the polis in Greek life, see N. FUSTEL DE COULANGES, *supra* note 66; G. GLOTZ, *supra* note 46; L. MUMFORD, *supra* note 97, at 119–82; M. WEBER, *supra* note 1; A. ZIMMERN, THE GREEK COMMONWEALTH (1911).

therefore, such power must be based not simply on a legal status empty of an underlying rationale but on its importance — both as a matter of experience and as a matter of thought — to our lives.

3. Cities as Possibilities for Decentralized Power. — We seem, however, unable to conceive of a way in which cities could resume such importance. Our inability to imagine cities exercising real decentralized power stems in part from our tendency to reduce that possibility to the concept of political decentralization.[298] There is, however, no meaningful possibility of purely political decentralization. To begin with, there has never been a concept of purely political local autonomy in Western thought. As we have just noted,[299] all powerful local units, whether Greek cities, medieval towns or New England towns, combined their "political" identity with other forms of religious or fraternal cohesion or economic power.

Second, the liberal undermining of intermediate entities has nowhere been so effective as in presenting the danger involved in genuine decentralization of power to a purely political, purely governmental body. Decentralization of power to such an entity would make it, to the extent of its independence from state power, a sovereign political body. But to permit two sovereigns to function within the same state would create what is called *imperium in imperio*, "the greatest of all political solecisms."[300] No area of political power can be left to the uncontrolled discretion of local authorities; every local action affects other localities; there must be a body to resolve local political conflict. Thus, the need for a single unified sovereign has become a fundamental premise of Western political thought.[301]

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[298] Much of the current literature proposing decentralization of power to cities or neighborhoods assumes that what is meant is simply political decentralization. *See, e.g.*, W. FARR, L. LIEBMAN & J. WOOD, DECENTRALIZING CITY GOVERNMENT (1972); M. KOTLER, *supra* note 5. Political decentralization was also the goal of the federal government's efforts to achieve community control through the Office of Economic Opportunity program, 42 U.S.C. §§ 2701–2996 (1976), and the Model Cities program, *id.* §§ 3301–3313, in the 1960's and the State and Local Fiscal Assistance program (revenue sharing), 31 *id.* §§ 1221–1264, in the 1970's. For a broad, innovative look at the possibilities of decentralizing power, see P. GOODMAN & P. GOODMAN, COMMUNITAS (1947).

[299] *See* p. 1125 *supra*. The experience of American states is illuminating on this point. *See* note 188 *supra*; note 301 *infra*.

[300] B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 206 (1967) (quoting James Otis).

[301] The classic statement is that of Hobbes. *See* T. HOBBES, *supra* note 119, ch. 17, at 131–32. *See generally* B. BAILYN, *supra* note 300, at 198–229; G. WOOD, *supra* note 1, at 344–89. It might be thought that this premise has been rejected in the United States and replaced with the notion of federalism. But those who created the

Third, small units can be seen — as Madison saw them[302] — as the greatest governmental danger to individual liberty. Indeed, it may not be enough merely to apply the Constitution to restrain the political power exercised by cities or to reform city power by making it more "rational."[303] The mere delegation to cities of broad political power, even while leaving that power fully subject to state legislative control, can be considered an impermissible threat to individual liberties.[304]

Finally, even if cities could exercise the amount of political power for their own jurisdiction that state legislatures exercise for the state as a whole, their ability to control effectively the future of their communities would be sharply limited by the independent exercise of economic power by private corporations. Not only would city power continue to be limited by the constitutional protections afforded private corporations (such as the commerce clause), but, as a practical matter, cities would still have to depend for their survival on the goodwill of the private corporations that did business within their boundaries. The influence on national political decisionmaking of the need to protect the economy is well recognized in modern political analysis,[305] but that influence is vastly greater if the private sector decisionmaker can readily move his business across city boundaries to avoid political decisions he opposes.

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federal system envisioned retaining one absolute sovereign by placing sovereignty "in the people." *Id.* at 462, 530–32, 544–47, 590–91, 599–600. It is "the people" who retain final say on all political issues in the United States.

For two centuries, those who created constitutional law have struggled to determine the meaning of this idea. In the late 19th century, the courts seemed to settle on the view that the people, the federal government, and the states could all exercise political sovereignty without conflict, all exercising "absolute power within their sphere." Rise and Fall, *supra* note 1, ch. 5. It is that notion that underlay late 19th century efforts to create an area of home rule for cities, making the city absolute within its sphere as well. *See* pp. 1115–17 *supra*. In the 20th century, the idea that state and federal authority can coexist without one's having superior political power over the other has collapsed. For all practical purposes, the unified sovereign has become the federal government (absent a constitutional convention), exercising power by virtue of the commerce clause, § 5 of the 14th amendment, the spending power, or, if necessary, another source. The recent attempt in National League of Cities v. Usery, 426 U.S. 833 (1976), to assert the immunity of an aspect of state sovereignty from the federal commerce power is supremely unconvincing — on sovereignty grounds — to modern constitutional scholars. *See* Michelman, *supra* note 256; Tribe, *supra* note 256.

[302] THE FEDERALIST No. 10 (J. Madison).

[303] *See* pp. 1118–19 *supra*.

[304] Professor Sandalow has argued in an important article that cities must be subject not only to constitutional restraints, but also to additional judicial scrutiny to ensure protection of nonconstitutional but "deeply rooted," "fundamental," "basic" values. Sandalow, *supra* note 11, at 708–21.

[305] *See, e.g.*, C. LINDBLOM, *supra* note 36, at 164–233.

The very split between political and economic power, with political authorities dependent on their ability to tax economic entities in order to pay for government services, would thus determine much of the agenda of even a powerful local government.

Decentralization of power to cities need not, however, be limited to the transfer of purely political power. Cities could be given the kind of power that we are willing to decentralize in our society, the kind of power wielded by those entities that still exercise genuine decentralized power — private corporations. A start could be made, as some have suggested,[306] by transferring a portion of the banking and insurance industries to city control. In having cities perform these functions, we need neither accept the current structure of American cities nor recreate a modern version of a hierarchical medieval town. We could create any form of city organization that seemed worth having.

If we can decentralize power despite the liberal undermining of intermediate groups, why have we chosen to rely on private corporations rather than cities as our principal means of doing so? The answer must be attributed in part to the continuing power of our liberal ideas, which suggest that the kind of organizations that wield economic power in this country are radically different from cities — a difference summarized by their being "private" and cities "public" — and that this difference legitimates the status quo against any genuine transfer of power to cities. We traced the origin of this public/private distinction in Part III, but we have not yet analyzed its ability to justify the continuing subordination of the city to the state. The remainder of this Article is devoted to analyzing both the public/private distinction and the other reasons now being advanced to support the current preference for corporate rather than city power.

B. The Erosion of the Public/Private Distinction as a Justification for City Powerlessness and Corporate Power

The public/private distinction generally serves as the explanation for city powerlessness and the justification for corporate power.[307] To attempt to construct powerful cities, we

[306] *See, e.g.*, Case, Goldberg & Shearer, *State Business*, in WORKING PAPERS FOR A NEW SOCIETY, Spring 1976, at 67; *cf.* Cockburn & Ridgeway, *Ralph Nader Forecasts Big Change Coming in the 1980's*, Village Voice, Sept. 29, 1975, at 16, col. 1, 19, cols. 1–2 (ownership of banks by depositors advocated by Ralph Nader). *See also* pp. 1050–51 *infra*.

[307] Of course, we do seek some control over private corporations to curb the threats they pose to the state and to individuals. *See* p. 1123 *supra*. But we do not

must first examine the legitimacy of this way of distinguishing cities and corporations. Indeed, the public/private distinction so powerfully affects the city/corporation comparison that, until we can put it aside, we will not be able to analyze these entities in any other way.

This Section is designed to demonstrate how developments in the twentieth century have significantly undermined the "privateness" of major business corporations, with the result that the traditional bases for distinguishing them from public corporations have largely disappeared. As we shall see, a prominent feature of twentieth century thought has been the effort to break down the public/private distinction for all major centers of power. In response, new theories have been advanced to justify the continued independence of private corporate power from state control. Section C will analyze these new justifications to determine whether they in fact support power for cities as well as corporations. In this way, we can judge whether cities can serve — even better serve — the values that we seek to protect by preserving some kind of corporation not fully subservient to a unified state.

Before we turn to this analysis, however, I should make clear at the outset that, in my opinion, neither the public/private distinction nor any of the newer attempts to legitimate corporate power in fact justifies our refusal to grant genuine power to cities. Instead, our refusal is a political choice, a choice for organizing our social life by means of technical hierarchy rather than democratic control. Whether this choice is based on our fears of the unknown, of the potentially revolutionary nature of cities as vehicles for mass power, of the instability that any transfer of power can create, or of organizations not based on "rational expertise," we hide from ourselves this element of choice when we justify the subordination of cities by the rhetoric of fear of governmental power. Yet with the mounting attack on the legitimacy of private corporate power, we may have to find some form of legitimate decentralized power in order to preserve any possibility of decentralization. Viewed in this way, the creation of powerful cities may be more worthwhile than we are currently willing to believe.

1. The Bases of the Distinction Between Public and Private Corporations. — (a) The Need to Protect Private Property. —

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feel the need to turn private corporations into mere "creatures of the state" as we have done with "public" cities. State and individual interests require some state control of private corporate power, but to a considerable extent, they also require preservation of that power.

The original basis for the public/private distinction was the need to protect private property.[308] Yet, at least since the appearance in 1932 of Berle and Means' celebrated work, *The Modern Corporation and Private Property,*[309] the "private property" status of the assets of major American corporations has been seriously questioned. Berle and Means argued that the separation of ownership and control in the modern, "publicly held" corporation has placed control of corporate assets in the hands of a relatively small number of corporate managers, with shareholders so widely dispersed that they cannot exercise meaningful influence on corporate policy. Corporate assets can no longer be considered the private property of shareholders, not only because shareholders cannot effectively obtain their pro rata share of the assets or control their use, but because, as Berle's later studies showed, most corporate property is not derived from the shareholders' investment at all but rather from business savings and corporate borrowing.[310] In addition, individual shareholders have allowed much of what remains of their voting control to be exercised by institutional investors.[311]

The shareholders' property interest has thus been reduced to the market value of their stock and has thereby become detached from corporate assets themselves. Except for their ability to sell their corporate investment, shareholders who contribute part of a private corporation's assets have begun to resemble taxpayers who contribute part of a public corporation's assets. Neither controls the use of assets but each elects managers who do.[312]

But if corporate assets are not the shareholders' private property, they are certainly not the property of corporate executives or directors. Since no human owner can be found, the corporation itself seems the only possible candidate to be the owner of corporate property. And if that is true, all corporations, including "public" corporations, can be seen as owners of private property.

Corporate property has thus become separated from the concept of individual possession; it has become group, not private, property. This "dissolution of the atom of property,"

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[308] *See* pp. 1101–05 *supra*.

[309] A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[310] A. BERLE, *supra* note 285, at 27–41.

[311] *Id.* at 41–58.

[312] For an analysis of the role of shareholders in corporate management, reviewing the extensive relevant literature, see Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1 (1969).

Berle and Means argued, "destroys the very foundation on which the economic order of the past three centuries rested."[313] The message was well recognized by the conservative economist Joseph Schumpeter, who saw the "Evaporation of the Substance of Property" as facilitating the transition from capitalism to socialism.[314]

(b) "Public" and "Private" Managers. — It might also be said that corporate executives are private individuals and city executives are public individuals. We classify corporate and city executives in this way in order to impose obligations on public employees not required of private ones. As Marx suggested in his essay "On the Jewish Question,"[315] to label the individual in civil society (such as in a private corporation) "private" and a state employee "public" is to divide those who can lead an earthly life of economic gain from those who must regard themselves as communal beings and act in a heavenly fashion.[316] This vision still retains a powerful influence on our thinking. It delegitimates political activity since political behavior, of necessity, falls far short of a heavenly standard.

In the twentieth century, however, the dichotomy between public and private behavioral ideals has been greatly eroded. Increasingly we see the need for both public and private officials to meet a standard of communal behavior.[317] Modern corporate managers present themselves as having "public" obligations;[318] indeed, it is this "corporate conscience" that, for Berle, partly provided the continuing legitimacy of private corporate power.[319] Indicia of this growing ideal of public responsibility for private corporations include their expanding

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[313] A. BERLE & G. MEANS, *supra* note 309, at 8. *See also* A. BERLE, *supra* note 285, at 59–76.

[314] J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 156 (1942). Marx himself saw the separation of ownership and control as removing the owners from their role in production, making them "capitalists without function," and thereby facilitating the transition to socialism. 3 K. MARX, CAPITAL 387–88 (F. Engels ed. 1967). The fact that this has not occurred has led to new theories of class conflict in industrial society. *See, e.g.*, R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY (1959).

[315] Marx, *supra* note 1.

[316] *Id.* at 31–32.

[317] Such a standard has become common in the law governing commercial relations, as exemplified by the requirements of "good faith" in contract relations under the Uniform Commercial Code. *See generally* Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 666 (1963); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

[318] *See, e.g.*, Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 313–14 (1957).

[319] A. BERLE, *supra* note 285, at 77–116.

role in supporting artistic endeavors and recent proposals to add so-called "public members" to corporate boards of directors.[320] It is true that the demand for legislation restricting corporate activity demonstrates our skepticism that corporate officials will achieve a communal standard of behavior. But the same is true of public officials for whom our insistence on "heavenly" rather than "earthly" behavior has also become largely a matter of statutory obligation, with a maze of conflict of interest legislation, open meeting laws, competitive bidding requirements, and other restrictions all seeking to curb their expected earthly misconduct.[321]

(c) Coercive Power. — Another traditional distinction between public and private corporations is that only governmental corporations exercise power over private individuals. This distinction has been attacked in a variety of ways. An examination of the power that property rights afford those to whom they are allocated has led some, notably Morris Cohen, to identify the close relationship that still exists between property and sovereignty.[322] Economists, such as John Kenneth Galbraith,[323] have emphasized the power large corporations exercise in controlling market decisions. Others have analyzed the pervasive influence of corporate officials on the exercise of political power.[324]

The evidence of private corporate power is overwhelming enough for Professor Chayes to accept it as a premise:

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> Adm. Elmo R. Zumwalt Jr., the retired former Chief of Naval Operations and president of American Medical Buildings, has been nominated for a one-year term as a public representative on the board of governors of the American Stock Exchange. Ten incumbent governors, five representing the public and five representing the securities industry, were renominated for two-year terms.
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> Renominated as public governors were Arthur Fleischer Jr., a partner of the law firm of Fried, Frank, Harris, Shriver & Jacobson; Madeline H. McWhinney, president of Dale, Elliot & Company; Samuel Pierce, a partner in the law firm of Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel; Terry Sanford, president of Duke University, and Edmund A. Stanley Jr., chairman of Bowne & Company.
>
> The industry nominees are Michael A. Dritz, senior managing partner of Dritz Goldring Wohlreich & Company; Alan C. Greenberg, chief executive officer of Bear, Stearns & Company; George Reichhelm, an Amex floor specialist; Elliot J. Smith, executive vice president of Bache Halsey Stuart Shields, and Frederick B. Whittemore, a managing director of Morgan Stanley[.]

N.Y. Times, March 6, 1979, at D2, col. 1.

321 *See generally* S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 415–45, 477–95, 654–85 (2d ed. 1977).

322 Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). The closeness of that relationship is demonstrated by the history of the city outlined in Part III *supra*.

323 J. GALBRAITH, THE NEW INDUSTRIAL STATE 61–97 (2d rev. ed. 1971).

324 *See* C. LINDBLOM, *supra* note 36.

> Professor Adolph Berle, in a contemporary summary note, tells us: "Some of these corporations are units which can be thought of only in somewhat the way we have heretofore thought of nations." All the instruments agree: the modern corporation wields economic and social power of the highest consequence for the condition of our polity. Let us resist this conclusion, or belabor it, no further. Let us accept it as our first premise.[325]

In recognition of this power, two Supreme Court Justices have argued that corporations should no longer be recognized as "persons" protected by the fourteenth amendment from government control.[326] For the same reason, Berle has argued that corporate action should be considered "state action" to be restrained by the fourteenth amendment.[327]

(d) Voluntary Participation. — Another argument for distinguishing public from private corporations, one closely related to the issue of exercise of power, is that participation in a public corporation's activities is involuntary while participation in those of private corporations is voluntary.[328] There are two basic lines of rebuttal to this position. The first seeks to demonstrate the involuntary aspect of submission to economic power, thus suggesting that both political and economic power lie toward the involuntary end of the voluntary/involuntary spectrum; the second seeks to demonstrate the voluntary aspect of participation in city affairs, thus suggesting that both powers lie toward the voluntary end of the spectrum. For our purposes, it does not matter which of the two characterizations is more convincing. The point instead is

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[325] Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 28 (E. Mason ed. 1970) [hereinafter cited as THE CORPORATION IN MODERN SOCIETY].

[326] *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949) (Douglas, J., dissenting, joined by Black, J.).

[327] Berle, *Constitutional Limitations on Corporate Activity — Protection of Personal Rights from Invasion by Economic Power*, 100 U. PA. L. REV. 933 (1952).

[328] A forceful statement of that position has been made by Ayn Rand:

> No individual or private group or private organization has the legal power to initiate the use of physical force against other individuals or groups and to compel them to act against their own voluntary choice. Only a government holds that power. The nature of governmental action is: *coercive* action.
>
> . . . What is economic power? It is the power to produce and to trade what one has produced. In a free economy, where no man or group can use physical coercion against anyone, economic power can be achieved only by *voluntary* means: by the voluntary choice and agreement of all those who participate in the process of production and trade. . . . [E]conomic power is exercised by means of a *positive*, by offering men a reward, an incentive, a payment, a value; political power is exercised by means of a *negative*, by the threat of punishment, injury, imprisonment, destruction.

A. RAND, CAPITALISM: THE UNKNOWN IDEAL 39–41 (1966) (emphasis in original).

to demonstrate that the voluntary/involuntary distinction does not by itself neatly separate private from public corporations.[329]

The argument that seeks to demonstrate the involuntary aspects of economic power focuses on two related ingredients: first, that economic activity depends for its survival on political and legal coercion and second, that the exercise of economic power, when applied to people who need work and food to live, is itself coercive. The role of legal coercion in the maintenance of private power has been widely recognized.[330] Indeed, legal remedies are so important to the maintenance of economic power that "if a statute undertook to take from property owners all legal remedies against trespass and conversion, it would most likely be regarded as an act of force [against the owners] though the only affirmative force to which it subjects the owners is that exerted by private trespassers."[331] Such a statute illustrates the dependence of property owners on legal rights without which owners would be rendered defenseless against the will of others.

Second, the example also reminds us that state action may be coercive even if it does not involve a threat of imprisonment.[332] Yet the broad range of coercive state activity can also be performed by economic entities:

> [S]uppose a state, without imposing any duty on a person, and without imprisoning him or seizing his property in a sheriff's execution, simply destroys an opportunity he had to obtain

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[329] An even more basic criticism of the voluntary/involuntary distinction, but one that we cannot pursue here, would focus on the distinction itself, challenging its meaningfulness on the basis of modern developments in psychological theory. *See, e.g.*, S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS (J. Riviere trans. 1961) (psychoanalytic theory); A. FREUD, THE EGO AND THE MECHANISMS OF DEFENSE (C. Bains trans. 1966) (ego psychology); J. PIAGET, PLAY, DREAMS AND IMITATION IN CHILDHOOD (C. Gattegno & F. Hodgson trans. 1962) (developmental psychology); E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959) (social psychology).

[330] *See, e.g.*, Cohen, *supra* note 322; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Jaffe, *Law Making By Private Groups*, 51 HARV. L. REV. 201 (1937). Hale, for example, anticipated by more than a dozen years the Supreme Court's recognition that a property owner, when seeking judicial or police enforcement of his interests, exercised "state" power. *Compare* Hale, *supra*, at 197–201 *with* Shelley v. Kraemer, 334 U.S. 1 (1948).

[331] Hale, *supra* note 330, at 179. Hale cites Truax v. Corrigan, 257 U.S. 312 (1921), to demonstrate that such action would be subject to 14th amendment scrutiny. *Id.* at 180. Recent cases also support the proposition that application of common law rules is state action. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[332] On "state action" generally, see L. TRIBE, *supra* note 19, §§ 18-1 to -7.

> employment or to sell his property; and does it, not by imposing any duty on him, but by forbidding other persons to employ him or to buy from him. In such cases, he has no option in the matter. But the state is threatening him with no harm which private persons are not at liberty to inflict upon him. Yet he has been held to have constitutional rights which are infringed by such state action. The action must be regarded as an exertion of force, not merely on his potential employer or buyer, but on *him*; otherwise it would scarcely be held to invade his rights. But the only force that reaches him is the supposed non-action of private individuals.[333]

The actions described are coercive because any denial of money can be coercive, whether by an exaction of a tax, a penalty, a denial of a job, or an exclusion from the ability to buy the necessities of life.[334] Economic power allows its possessor to profit from the mutual dependence necessary in a modern, integrated economy and to enforce its will through state action; it is, in this sense, grounded on the element of coercion.[335]

The argument that city action, like economic activity, can be considered voluntary, proceeds in a very different fashion. It requires us to focus on the city itself rather than the abstract idea of "the state." Once we do, it becomes clear that no one is forced to live in a particular city any more than he is forced to work for, buy from, or invest in a particular corporation. Leaving a city once it is selected may be hard, but that difficulty must be attributed, in part, to the difficulty in finding a new job in another locality. The substantial shift of the American population over the last thirty years dramatizes the fact that moving out of a city without changing jobs is a genuine choice.[336] Of course, we must live in some "city" — some political society — but in modern society we must, in the same way, transact with *some* commercial entity. In both cases, we can select which entity we prefer, but neither an exit from the

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[333] Hale, *supra* note 330, at 176. Even Chief Justice (then Judge) Burger has recognized that a powerful buyer exercises force against a seller in refusing to deal with him (at least when the buyer is the government). *See* Gonzales v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1970).

[334] "[I]n modern economic life it must be clear that none could survive for long without the assurance, legal or otherwise, that affirmative action on the part of many others would be continued." Hale, *supra* note 330, at 180.

[335] The fact that those without property cannot produce their own livelihood because they have no land or goods with which to work, and thus must sell their labor to property owners to survive, is a cornerstone of Marxist analysis. *See generally* C.B. MACPHERSON, *supra* note 119, at 51–61 (comparing societies with and without this feature).

[336] *See* p. 1064 *supra*.

capitalist system nor one from a given political system can easily be made.

Moreover, city taxes need not be considered involuntary while payments to private corporations are considered voluntary. City taxes are imposed by elected officials and often by a vote of the people themselves. Indeed, it is their very susceptibility to change that makes local property taxes targets for mass action (such as California's Proposition 13).[337] At a more basic level, political activity can be understood, like economic activity, as the result of a consensual agreement made by competing groups.[338] Of course, no individual gets his own way in every political transaction; but he is understood to consent not to every particular result but to the rules of the process that determines the results.

The same can be said for economic activity. The individual in economic life cannot in every transaction reopen the nature of the contract and property rights on which the transaction is based, although changes in those rights would affect the results of the bargain. For economic transactions to be possible, each actor must impliedly consent to certain rules much as each political actor must impliedly consent to certain rules regulating political activity. Such a theory of consent does not undermine the voluntary nature of the process, for the rules can be changed by group decisions (which themselves will be based on certain rules).[339] Political activity, then, like economic activity, is grounded on the "morality of consent" expressed within the framework of existing rules;[340] indeed, consent is the justification for both the democratic process and the market economy.

(e) Functions and Controls. — A final distinction between public and private corporations is said to rest on the functions they now perform and on whether these functions are governed by "political" or "market" forces.[341] But even if this is true today, it is only because we have decided on political grounds

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[337] CAL. CONST. art. XIIIA.

[338] This is the predominant theme of modern liberal political theory, originating with A. BENTLEY, THE PROCESS OF GOVERNMENT (1908). *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). For critiques of this view, see T. LOWI, *supra* note 6; C. PATEMAN, *supra* note 38, at 1–44.

[339] *See generally* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

[340] *See* A. BICKEL, THE MORALITY OF CONSENT (1975).

[341] The attempt to design a system that assigns certain functions to the public sector and others to the private sector has been a mainstay of the application of economic theory to political science, an effort associated with the term "public choice." *See generally* Mueller, *Public Choice: A Survey*, 14 J. ECON. LITERATURE 395 (1976); Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 AM. J. POL. SCI. 511 (1976). This literature is explicitly limited to an analysis of public decisionmaking based upon the assumptions that underlie its economic theory;

to allocate to each type of corporation different functions and different controls. At the time of *Dartmouth College*, public and private corporations could not be differentiated by function.[342] The decision in the nineteenth century to transfer some functions (such as railroads)[343] from public to private control, like the twentieth century decision to transfer functions (railroads again)[344] the opposite way, cannot create their public or private nature, unless we mean no more than to label the entity now performing them.

Nor is the existence of market or political controls decisive. If we allowed cities to operate banks, cities could be subject to the market, just as railroad executives could be popularly elected. Allocating functions and types of controls is simply a matter of deciding who ought to perform a service and who ought to control it. There is no value-free way of making these decisions.

Even today, however, the functions of public and private corporations are largely indistinguishable. This can be made clear by playing the "game" of trying to identify a government activity without a private counterpart:

> The judiciary? Mediation and arbitration play a widespread and increasing role. Police? Pinkertons are famous in our history; today every large company and school has its own security force, and private eyes continue to be hired for peephole duty; many highly innovating industries have their own secret service working in the world of industrial espionage. Welfare? Any listing of private, highly bureaucratized and authoritative welfare systems would be as long as it is unnecessary.[345]

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it does not represent an attempt to choose in a neutral, apolitical fashion which services should be public and which private. *See, e.g.*, R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 46 (1959):

> The choice of technique will frequently be a matter of judgment, not subject to a clear-cut decision on grounds of efficiency. The decision then hinges on a choice between the principle that production management should be private, unless specific circumstances prevail under which public management is called for, and the principle that production management should be public, unless special circumstances prevail under which private management is called for. A choice between these principles, or various in-between views, transcends considerations of economic efficiency. Political, social, and cultural aspects enter, as does the interrelation between economic organization and the state of individual freedom. These matters will not be examined here. Rather, we shall proceed on the assumption that public production should be limited to situations where it is clearly superior in efficiency to private production under public control.

See also M. OLSON, THE LOGIC OF COLLECTIVE ACTION 16 (1965).

[342] *See* pp. 1101–02 *supra*. *See generally* L. HARTZ, *supra* note 1.

[343] *See* L. HARTZ, *supra* note 1, at 161–80.

[344] *See* United States Railway Association Amendments Act of 1978, 45 U.S.C.A. §§ 701–794 (West Supp. 1979).

[345] T. LOWI, *supra* note 6, at 44.

For local governments, the game could continue indefinitely: Sanitation? Health care? Parking? Utilities? Housing? The results of this game will reveal the virtual impossibility of a meaningful, nonpolitical distinction between functions "naturally" performed by public or by private corporations, between "public goods" and "private goods."[346] Only our judgment about the extent to which the state ought to control the exercise of the function determines who performs it.

2. The Modernist Attempt to Merge Public and Private. — The erosion of the private nature of corporate power as the basis for describing and justifying that power has not been simply an accident. It is the result of the increased growth and concentration of corporate power after the Civil War[347] and of the conscious effort of modernists — from the Progressives to Berle, Laski, and Galbraith — to emphasize the effect of these developments on the private status of corporate power.[348] The modernists have strenuously sought to undermine the public/private distinction both as the basis for corporate power and elsewhere in modern society.

The modernist effort can be viewed as an attack on the dominant position of major private corporations in late nineteenth and twentieth century America.[349] According to this view, the modernists sought to curb concentration of private power because they recognized its growing ability to control the lives of the public at large. They therefore denied that corporate power was truly private. But they did not seek to transfer private power to a purely public substitute. Instead, they sought to create entities that were neither public nor private or (amounting to the same thing) both public and private.

The creation of federal administrative agencies was the modernists' first major achievement in this regard. These agencies were designed not only to curb the abuse of private power but also to take some of the public or "political" element out of governmental decisions — to put them on a more rational, businesslike basis.[350] Decisions would not be based on private interests, but they would not be political either; they

[346] The "public choice" literature does not suggest otherwise. *See* note 341 *supra*.

[347] *See generally* A. CHANDLER, THE VISIBLE HAND (1977).

[348] For an analysis of the Progressives, see works cited note 214 *supra*; for recent modernist works, see, *e.g.*, A. BERLE & G. MEANS, *supra* note 309; A. BERLE, *supra* note 285; J. GALBRAITH, *supra* note 323; H. LASKI, LIBERTY IN THE MODERN STATE (1930).

[349] For a review of the literature, see R. WIEBE, *supra* note 214, at 303–24.

[350] *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 6–46 (1938). *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–88 (1975).

would be based instead on "the public interest." Administrative agencies thus represented the merging of the concepts of public and private into the idea of expertise.[351]

There are other ways to interpret the rise of administrative agencies — and of the Progressive movement itself — than as part of a search for neutral expertise. Revisionist historians[352] argue that the creation of these agencies can be interpreted as an attempt by major corporations to gain public power in order to advance their own private ends. According to this view, the merger of public and private has not meant an expansion of the public sector at the expense of the private but the reverse — an invasion of the public sector by private interests.[353]

We need not enter into the debate over the nature of the merger of public and private. By whatever definition one accepts, the growth of mixed public/private entities in modern times is enormous. Public/private entities of all kinds have been created on the state and local as well as the federal level. Public service corporations, special districts, and public authorities have been designed to take over major functions, including transportation, development, housing, health, and education, and manage them in a "nonpolitical" fashion.[354] Until recently all these innovations were clearly intended to be public, rather than private. But now corporations are openly being created as mixed public/private entities. The Communications Satellite Corporation,[355] the National Railroad Passenger Corporation,[356] and the Corporation for Public Broadcasting[357] are current examples, and President Carter's proposed Energy Security Corporation[358] would, if created,

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[351] An important example of this kind of thinking is the Federal Reserve Board. *See* 12 U.S.C. §§ 241, 243, 248 (1976). The Board is celebrated for its independence from politics — from the control of the Congress or the President. Yet, although staffed by individuals with important private experience, it does not purport to be a purely private entity.

[352] *See, e.g.*, G. KOLKO, *supra* note 214; J. WEINSTEIN, *supra* note 261.

[353] Private influence on administrative decisionmaking is widely recognized. *See, e.g.*, Stewart, *supra* note 350, at 1713.

[354] *See, e.g.*, New York City Health and Hospitals Corporation Act, 65 N.Y. UNCONSOL. LAWS § 7384 (McKinney Supp. 1979). *See generally* Comment, *supra* note 26.

[355] *See* 47 U.S.C. §§ 701-744 (1976). *See generally* Schwartz, *Governmentally Appointed Directors in a Private Corporation — The Communications Satellite Act of 1962*, 79 HARV. L. REV. 350 (1965).

[356] *See* 45 U.S.C. §§ 501–645 (1976). *See generally* Adams, *The National Railroad Passenger Corporation — A Modern Hybrid Corporation Neither Private nor Public*, 31 BUS. LAW. 601 (1976).

[357] *See* 47 U.S.C. § 396 (1976).

[358] N.Y. Times, July 22, 1979, § 6, at 1, col. 5.

become another. More and more functions are being absorbed into a model expressing the abolition of the public/private distinction.

Thus, the breakdown of the public/private distinction, far from expanding city power, has simply created new competitors for it.[359] But why did those who recognized the need to break down the public/private distinction rely on the creation of new kinds of "public" bodies to exercise power rather than on the city, which had historically bridged the public/private distinction? It is not that cities are fully and irreversibly public and political and therefore distinguishable from the public/private entities the modernists have created. Indeed, part of the modernist effort has been to create "businesslike" cities through the innovations of city commissions, city managers, and other attempts to ensure "rational" decisionmaking.[360] Perhaps the cities' image as areas filled with immigrants, the working class, the poor, and later, blacks and Hispanics, has made reformers suspect that they could never establish for long a reign of rational expertise (or of private power) on such a foundation.[361]

But to this idea must be added another: the reformers sought centralization as well as the creation of mixed public/private entities. It was primarily to the federal government that they turned for solutions. To the extent that local entities were created, they were regional, multicity entities (for example, the Port Authority of New York and New Jersey). If we accept the position that Progressivism was an attempt

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[359] In fact, the merger of public and private in the 20th century has invaded the law of municipal corporations in a tangential way. When courts have tried to apply the public/private distinction *within* municipal corporation law, they have been unable to do so. Ever since Dillon observed that the public/private distinction within municipal corporation law, although "highly important," was "difficult to trace," J. DILLON, *supra* note 209, § 39, at 85, the courts have denounced the distinction with a vehemence now almost unsurpassable. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 433 (1978) (Stewart, J., dissenting) ("The distinction between 'proprietary' and 'governmental' activities has aptly been described as a 'quagmire . . . [with] distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.'") (quoting Indian Towing Co. v. United States, 350 U.S. 61, 65, 68 (1955)). Justice Stewart was criticizing the opinion of Chief Justice Burger, who, in casting the decisive fifth vote in *Louisiana Power*, argued that the federal antitrust laws should apply to a city's proprietary but not to its governmental functions. Yet in that very case, Justice Stewart thought the question of the cities' antitrust status was answered by recognizing that cities were governmental and not private entities. 435 U.S. at 426–28. This ability to denounce the public/private distinction within municipal corporation law while insisting upon it when comparing cities to private corporations has become the foundation of modern local government jurisprudence. *See* p. 1104 *supra*.

[360] *See* pp. 1118–19 *supra*.

[361] *See* pp. 1107–08 *supra*.

by major corporations to exercise public power, such an effort to achieve centralization would not be surprising. And even if the reformers were truly looking for expertise and rationality, they would be likely to seek it in centralized federal agencies, since centralization would be thought necessary to check the power of those giant entities that needed to be brought under control.

C. The Choice Between City and Corporate Power

As we have seen,[362] the public/private distinction allowed nineteenth century thinkers to deal with the anomaly that corporations protected individual rights and facilitated state power while simultaneously threatening those rights and frustrating that power. The public/private distinction seemed to make the problem go away by splitting corporations into their harmless, right-bearing private identities and their threatening and therefore limited public identities. However, the undermining of the private nature of business corporations and the growth of new forms of public/private power has caused the reappearance of the problem of the combined right-threatening and right-protecting nature of all corporations, but this time without a convincing public/private escape hatch.

As a result, liberal thinkers have had to articulate new defenses for business corporations, which once again appear as troubling entities intermediate between the state and the individual. But these new defenses, unlike the public/private distinction, can be viewed as possible justifications for city power as well. In this way, the undermining of the public/private distinction allows us at last to compare directly the desirability of the city and the business corporation as forms of decentralized power.

1. False Distinctions. — (a) Decentralization. — The principal modern defense of corporate power has rested on the value of decentralization of power. An explicit defense of business corporations on just these grounds has been made by Kingman Brewster.[363] Accepting the image of the corporation as "private government,"[364] Brewster argues that "the lessons of federalism" support corporate power:

> The virtue of leaving considerable economic power in private hands is not too dissimilar from the virtue of leaving considerable political power in the several states of a federation. In

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[362] *See* pp. 1099–1100 *supra*.

[363] Brewster, *The Corporation and Economic Federalism*, in THE CORPORATION IN MODERN SOCIETY, *supra* note 325, at 72.

[364] *Id.*

> the negative sense both reject centralism because of the bureaucratic overload at best, the political and moral overload at worst, which total accountability to central authority portends. More important, both the exponents of states' rights and those who would leave economic power in private hands are affirming that more socially constructive energies will be released in the long run if problems can be attacked by and left to the final decision of those living closest to them. Even if they are problems which the subsovereigns have in common, the more experimentation the better. There may be more error through independent trial. But in the long run, more success whose lesson is available to all will be generated by leaving play for diverse solutions to comparable problems.[365]

Brewster's defense of decentralization emphasizes pragmatic advantages, while Arthur Okun's defense emphasizes the protection of rights:

> A market economy helps to safeguard political rights against encroachment by the state. Private ownership and decision-making circumscribe the power of the government — or, more accurately, of those who run the government — and hence its ability to infringe on the domain of rights.
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> In the polar case of a fully collectivized economy, political rights would be seriously jeopardized. If the government commanded all the productive resources of the society, it could suppress dissent, enforce conformity, and snuff out democracy. . . . That ardent exponent of laissez-faire, Friedrich Hayek, quotes approvingly a brief passage from the disillusioned communist Leon Trotsky: "In a country where the sole employer is the State, opposition means death by slow starvation. The old principle, who does not work shall not eat, has been replaced by a new one: who does not obey shall not eat."[366]

Both Brewster's and Okun's arguments for decentralization are familiar; they remind us of the defense of London in the quo warranto proceedings of 1682.[367] They focus on the need there expressed for aggregates of power to defend against the tyranny of a centralized state.

It is clear that the defense of the business corporation as a means of decentralizing power does not in itself justify the preference of corporate power to city power. Indeed, it is ironic to defend the currently hierarchical, massively centralized corporate structure on the basis of decentralization of power. If by corporate independence we seek economic in-

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[365] *Id.* at 75–76.

[366] A. OKUN, EQUALITY AND EFFICIENCY 38–39 (1975) (footnote omitted).

[367] *See* pp. 1092–94 *supra*.

dependence from a centralized state, diversity of entrepreneurial enterprises, or a choice of employers, cities could perform these tasks as well as corporations now do. For the vast majority of people who deal with corporations only as consumers, workers, or neighbors, corporations serve no purpose that any other form of decentralization could not also serve. Rather than focus on the virtues of decentralization, we must compare cities and corporations as vehicles for decentralized power.

(b) Efficiency. — The choice between cities and corporations should not be framed in terms of how efficiently current city or corporate affairs are being run. After all, we need not accept as given the current form of either entity. The bureaucratic controls that envelop city operations, such as civil service and competitive bidding requirements,[368] could be eliminated to make cities more efficient, or they could be imposed upon corporations if in fact they prevent abuse. The efficiency of the two entities cannot now be directly compared because they operate under such different rules. Also for that reason, the choice between cities and corporations is not one between reliance on planning and reliance on the market. Either kind of independent corporate power could exist in a market society and either kind could be subject to decisions by centralized planners.[369]

(c) Politics and Economics. — Most important, it would be a mistake to consider the choice between cities and corporations as one between political and economic decentralization. Such an approach simply reintroduces the public/private distinction into the discourse by renaming it the political/economic distinction. As shown above, it is impossible to label functions "public" or "private" in any principled way.[370] Any effort to categorize functions as "political" or "economic" in an attempt to preserve the public/private distinction is thus doomed to fail.

For some, however, any further breakdown of the distinction between political and economic corporations would mean socialism. Perhaps so. Indeed, Marx argued against the division of both the individual and society into political and economic spheres on the ground that the division prevented human emancipation by fracturing the human personality and reducing political activity to the protection of economic interests.[371] But Marx sought total abolition of the distinction

[368] *See* pp. 1118–19 *supra*.

[369] *See* J. SCHUMPETER, *supra* note 314.

[370] *See* pp. 1136–38 *supra*.

[371] *See* Marx, *supra* note 1.

between the political and the economic; only the elimination of both the state and private economic power would accomplish his objectives.[372]

A reallocation of functions between cities and corporations, as discussed here, however, would leave both corporate forms subject to the laws of a fully political, liberal state. Such a reallocation would lead neither to the absorption of all economic functions by a centralized state nor to the abolition of the state itself. Rather, adding decentralized political participation to "economic" corporations could help legitimate their economic independence from state control; adding economic power to "political" corporations could help protect them from state control and simultaneously transform the nature of economic power. This process would merely accelerate the merger of political and economic functions already apparent in the case of modern cities and corporations.[373]

(d) Geographic Versus Property Ties. — It might be tempting — but it would also be a mistake — to say that the choice between cities and corporations as forms of decentralized power is one between organizations defined geographically and those whose membership is formed by property contribution. Such a dichotomy is based on two false assumptions: that city associations must necessarily be limited to people within a fixed territory and that corporate associations are in fact based on property rights. As Henry Sumner Maine has pointed out, geographic restrictions on city membership are of relatively recent origin.[374] It is no more necessary to exclude all outsiders from city decisionmaking than it has been necessary historically to include all insiders.

Even if we accept the proposition that territoriality is to some extent the basis of city organization, it is difficult to isolate the distinguishing characteristic of corporate organization. The basis for preferring corporate to city power cannot be the protection of property. As the history outlined in Part III shows, both the city and the corporation can be organized to defend property rights.

Moreover, with the exception of the small, shareholder-controlled corporation, neither corporations nor cities in their current form are truly organized to protect property rights. As noted earlier, Berle and Means and their followers have made untenable the defense of the modern, publicly held business corporation based upon private property rights.[375] It is not

[372] *See* sources cited note 36 *supra*.

[373] *See* pp. 1136–38 *supra*.

[374] H. MAINE, *supra* note 173, at 103–09.

[375] *See* pp. 1129–31 *supra*.

the rights of shareholders, of individual property holders in their property, that major corporations defend, since those rights have been separated from corporate assets. Indeed, shareholders' property rights are now protected by the state against the power of corporate management.

The issue here is not the seizure of shareholders' stock nor the denial of their ability to buy or sell their corporate investment, but the relative advantages of decentralizing power to a unit that these property owners no longer control or to the city. To quote Galbraith:

> The case for private ownership through equity capital disappears whenever the stockholder ceases to have power — when he or she or it becomes a purely passive recipient of income. The management is a self-governing, self-perpetuating bureaucracy. It can make no claim to the traditional immunity associated with property ownership. The logical course is for the state to replace the helpless stockholder as a supervisory and policy-setting body; the forthright way to accomplish this is to have a public holding company take over the common stock.[376]

Perhaps, however, the desirability of a territorially based association can itself be examined. A territorial association does appear to have certain features. It can readily include every individual in the geographic area, thereby presenting the greatest opportunity for widespread participation in its decisions. Because of this inclusiveness, it can further a broad range of possibilities for human association. It can also further stable expectations, since once formed, it cannot simply pack up its economic assets and leave town. On the other hand, a territorial association seems to present a visible threat to its participating members. Once a decision is made, members must choose to accept the decision, leave the association, or face the consequences of being dissenters. Being tied to a geographic area is in this sense a restriction of freedom.

But every corporate form entails both opportunities for protecting freedom and limitations on its exercise. This element of contradiction, as we have seen, has consistently been characteristic of all intermediate entities. Surely the modern business corporation has not escaped this dilemma. It allows investors the freedom of limiting their risk of participation to economic loss and permits easy transfer of their interest. But it also restricts participation in its decisionmaking to a small

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[376] Galbraith, *What Comes After General Motors*, NEW REPUBLIC, Nov. 2, 1974, at 13, 16, *quoted in* R. HESSEN, IN THE DEFENSE OF THE CORPORATION xii (1979) (quoted disapprovingly).

number of individuals while enabling those few to affect the lives of most members of society whether as workers, consumers, neighbors, or investors.[377] Moreover, there seems little potential for allowing these "outsiders" to participate meaningfully in corporate decisionmaking in order to protect themselves from the power of largely self-perpetuating corporate managers.[378] Thus, there is no basis for deciding that any nonterritorial corporation promotes freedom with less danger than any kind of territorial city and so should be preferred as the vehicle for decentralized power.

Attempting, then, to compare cities and business corporations on the basis of territorial versus nonterritorial organization is not particularly enlightening. Exactly what form of participation a city allows and what protection it affords either its members or those who are affected by its decisions cannot be deduced from the concept of territoriality. These dimensions of city power have varied widely in history, and they are subject to similarly diverse solutions in the future. Moreover, if little can be deduced from the concept of territoriality, even less can be learned from simply imagining its absence. The freedom that nonterritorial associations will allow and the dangers to freedom that they will permit will also vary with the kind of association created. Thus, without more concrete examples, a comparison of opportunities for decentralization in terms of territoriality or nonterritoriality is impossible. Surely there can be no presumption of favoring nonterritorial units as such over their territorial counterparts.

(e) Rights of Association. — Another current defense of corporate power relies on the desirability of protecting the rights of those who seek to form corporations or any other form of association. In a recently published book,[379] Robert Hessen emphasizes this point of view. He seeks to disprove the "concession theory" of private corporate power which derives corporate power from a concession granted the corporation by the state. Instead, Hessen finds the basis of corporate power in the freedom of association of its stockholders:

> A proper defense of corporations must stress that they are created and sustained by freedom of association and contract, that the source of freedom is not governmental permission but individual rights, and that these rights are not suddenly forfeited when a business grows beyond some arbitrarily defined size, either in terms of assets, sales, and profits or the number of investors, employees, and customers.[380]

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[377] *See* pp. 1132–36 *supra*.

[378] *See* Eisenberg, *supra* note 312, at 15–27.

[379] R. HESSEN, *supra* note 376.

[380] *Id.* at 115.

Since, Hessen argues, "[*e*]*very* organization, regardless of its legal form or features, consists only of individuals,"[381] the corporation is merely a "mental construct"[382] that must be defended on the basis of the rights of individuals who compose it.

Of course, both cities and business corporations have traditionally involved the rights of association. The close connection throughout history between the idea of association and that of corporations was described in Part III, a connection linking both the medieval and the colonial town to the image of partnership conveyed by early business corporations. Hessen quite rightly seeks to find the exercise of such a right in the modern business corporation as well. But the divorce between shareholders and the corporate entity undermines his effort to ground corporate legitimacy on the shareholders' rights of association. Hessen recognizes this problem, and seeks to overcome it by suggesting that the shareholders association has given its consent to management control.[383] But such a theory of consent requires us to believe that corporate management can continue to be controlled by the shareholders at least to the extent that shareholders can effectively withdraw their consent. But it is just such shareholder control that modern commentators deny.[384] Indeed, the ability of city voters routinely to change city officers is one feature that distinguishes even current city democracy from private corporate democracy.

Moreover, the idea of an association of stockholders — of strangers[385] — is an odd one. It means no more than the ability of property owners to invest their property in the same venture as others. To begin with, this ability to invest can surely be limited by legal restraints on what qualifies for investment, or else we would be forced to deny the constitutionality of the federal securities laws. Moreover, to defend rights of association, one needs to tie them to some real relationship among the members of the association or to some function they perform together; association requires an "organic life as a center of communal perceptions and common activities."[386] Yet when we consider the slight degree of association which common investment entails and the legal restrictions on investment opportunities, as well as the ease of shareholder disinvestment and the limits on shareholder participation, the

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[381] *Id.* at 41 (emphasis in original).

[382] *Id.*

[383] *Id.* at 49–59.

[384] *See, e.g.*, Manning, Book Review, 67 YALE L.J. 1477, 1482–83 (1958).

[385] R. HESSEN, *supra* note 376, at 58.

[386] L. TRIBE, *supra* note 19, § 15–18, at 979.

substantive right of association involved in the modern business corporation becomes very weak.

Indeed, the weakness of the idea that current corporations are the results of the exercise of shareholders' rights of association, like the weakness of the image of current cities as the expression of the community's rights of association,[387] merely highlights the possibility of alternative bases for corporate associations. A corporation could actually be an association of contributors, workers, customers, or members chosen on a variety of other bases, with or without a geographic connection. But until such a change occurs, neither the modern city nor the modern business corporation can persuasively be defended in terms of the associational rights of its members.

2. The Nature of the Protected Association. — While neither entity can presently be viewed as an exercise of rights of association, the current preference for the corporate over the city form can be understood as being a choice for a certain model of organizing human activity, for a specific model of human association. Ever since the emergence of the city as a "public" entity, the city has been linked to the idea of democracy while the business corporation has increasingly become connected with the concepts of rationality, expertise, and technical hierarchy. This is not to say that there is any necessary connection between these forms of organization and these different bases for human association. A greater degree of democracy can be envisioned for business corporations,[388] and more businesslike, hierarchical management has already been designed for cities.[389]

However, while the socialist and syndicalist traditions suggest the possibility of democratic business corporations,[390] the likelihood of transforming the modern business corporation into a vehicle for mass participation seems frustrated by size, geographic dispersion, and the variety of groups — contributors, workers, and customers — who would compete for rights to participate.[391] At the same time, while professional man-

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[387] Professor Tribe, discussing the conceivable associational rights of town residents, has noted that such rights are limited by the possibility that towns today are no more examples of communal associations than "the commuters on the 6:45 returning from offices in New York." *Id.*

[388] *See, e.g.*, Chayes, *supra* note 325, at 38–45; for a critique, see Eisenberg, *supra* note 312, at 15–27.

[389] *See* pp. 1118–19 *supra*.

[390] *See generally* 2 J. PLAMENATZ, MAN AND SOCIETY 37–128 (1963). For a modern analysis of the importance of work in social life, see M.J. Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 94–103 (1979).

[391] *See* Eisenberg, *supra* note 312.

agement, commission government, and nonpartisan elections have been at the heart of the modernist attempt to transform cities into businesses,[392] there seems to be an ineradicable element of democracy in city affairs. It is hard for us to imagine a geographic association without *some* degree of participation by its members or a business corporation without *some* kind of hierarchical chain of command. Thus, while continued reliance on business corporations could lead to more democracy, and while a shift of power to cities could lead to more technical hierarchy, it seems more likely that a shift of power to cities would mean a shift of emphasis from hierarchical associations to more democratic ones.

Indeed, as argued above,[393] a restructuring of city power to promote a greater degree of "public freedom" is the rationale for an increase in city power. If so, the continued preference for the modern business corporation, as well as the modernist attempts to legitimate the corporation by adding "public" rather than "private" individuals to its boards of directors, by advocating federal rather than state chartering,[394] and by creating centralized public/private entities based on the corporate model, must be understood as preferences for technical hierarchy over democratic control.

Paradoxically, however, as this process has unfolded, there has been increasing disillusionment with the hierarchical form of association, whether public or private, and increasing suspicion that government by neutral expertise is a chimera. Simultaneously, there has been a growing awareness that the fact that city power might lead to more participatory democracy cannot justify a preference for business corporations over cities in a country in which the notion of legitimacy is so closely tied to the democratic ideal.[395] Thus, on the question of a choice between models of human association, there seems at least as much justification for preferring cities to the business corporation as the other way around.

V. CONCLUSION

We can transform society as much or as little as we want in order to begin the process of making the city an alternative form of decentralized power in our society. We can

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[392] *See* pp. 1118–19 *supra*.

[393] *See* pp. 1067–73 *supra*.

[394] *See, e.g.*, R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976).

[395] *See* Kristol, *On Corporate Capitalism in America*, 41 PUB. INTEREST 124 (1975).

accept all, part, or none of the market system and the welfare state. But real power must be given to cities.

I suggested above[396] that a start could be made by creating city banks and city insurance companies. These examples are not wholly arbitrary. First, believe it or not, a "public" bank (the Bank of North Dakota) and a "public" insurance company (the Wisconsin State Life Fund) already exist.[397] Second, the extensive public regulation of both these services demonstrates their vital effect upon the welfare of the public at large. Third, both entities are currently supported in good part by government action, including government bank deposits and state laws requiring automobile insurance.

Fourth, both kinds of businesses now have counterparts, such as credit unions and mutual insurance companies, that are not organized as stereotypical private entities. Fifth, both city banks and insurance companies, as major lenders, could significantly affect the growth and nature of the city economy by changing the criteria for the selection of eligible borrowers. A different kind of lender might make different judgments about the relative value it places on its profit margin, the kinds of loans that it deems socially useful, and the kinds of consumer protection it seeks to provide. Sixth, and most important, these are profitmaking ventures, clearly shattering the image of the city as a receptacle solely for industries that lose money (mass transit, hospital emergency rooms) rather than those that could make money to serve community ends. This would not be a new idea; as late as the nineteenth century, local governments relied on profitmaking ventures to curb their dependence on taxation.[398] But it would be a striking change from the general practice today.

Simply allowing cities legally to undertake banking or insurance activities will not make them powerful, independent bodies, intermediate between state and individual. Nor would such legal changes be sufficient to achieve the "public freedom" spoken of in Part I. To attain these goals a far more thorough transformation both of our present legal system and of the organization of our economic life would be necessary. The possibility of city banks and insurance companies merely suggests the path along which we might travel. Moreover, the actual creation of such entities might provide a start toward achieving the goal of making cities viable intermediate bodies. The extent of the power currently wielded in our society

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[396] *See* p. 1128 *supra*.

[397] Case, Goldberg & Shearer, *supra* note 306, at 67.

[398] *See* p. 1102 *supra*.

by major banks and insurance companies is surely plain enough.[399]

The important point is not to decide exactly which new powers the city should exercise, but how the exercise of those powers should be organized. A new type of entity needs to be invented: one that is organized not just as another bureaucracy, but as a vehicle for new forms of association and popular participation. There is little experience that can guide such a venture.[400] We need to determine how different forms of organization will change the way power is exercised over the organization's members and over others with whom it deals. There is no need for the pretense that such an organization will eliminate all threats to freedom. What is required is a search for some improvement in the ways we accommodate the varied interests of those whose lives are affected by organized social life.

How any particular scheme would work I cannot say. I can only emphasize, with Kingman Brewster and other proponents of decentralization, that one advantage of decentralization is the possibility of experimentation, of "local laboratories."[401] The fact that some projects might fail can no more serve as an argument against these experiments than the fact that some projects might succeed, although both arguments are commonly made when such city ventures are proposed.[402] Nonetheless, if some successes are achieved, changes in the

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[399] The exercise of power by these entities in the resolution of the financial crises of New York City and Cleveland is an indication of their current importance in the cities' future. Even more significant, however, is the central role banking and insurance executives play as members of the network of interlocking directorates that control the nation's major corporations. According to a congressional report, "The boardrooms of four of the largest banking companies (CitiCorp, Chase Manhattan, Manufacturer's Hanover, and J.P. Morgan), two of the largest insurance companies (Prudential and Metropolitan Life), and three of the largest nonfinancial companies (ATT, Exxon, and General Motors) look like virtual summits for American business." SUBCOMM. ON REPORTS, ACCOUNTING, AND MANAGEMENT OF THE SENATE COMM. ON GOVERNMENT AFFAIRS, REPORT ON INTERLOCKING DIRECTORATES AMONG THE MAJOR U.S. CORPORATIONS, S. DOC. NO. 107, 95th Cong., 2d Sess. 280 (1978). It should not be overlooked that banks are often limited to fixed geographic territories.

[400] But there is some. *See, e.g.*, sources cited notes 46–48 *supra*.

[401] *See* Brewster, *supra* note 363, at 75–76.

[402] Those who argue that city enterprises will fail usually point to the municipal bankruptcies that followed city investment in railroads in the 19th century. *See, e.g.*, Fairman, *supra* note 218, at 918–1116. The argument that they will succeed has most frequently been expressed as part of an argument that if cities take over certain services, cities — being governmental bodies — will have an unfair competitive advantage over "private" interests who also provide those services. *See, e.g.*, City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 376 (1974) (rejecting such an argument).

city entity could spread in other directions. The city might, for example, become a vehicle for the consumer movement, seeking, like "private" cooperatives, to lower costs by combined purchasing. There is no lack of possibilities for new forms of city power.

At this stage, the reader may think that the possibility of achieving power for cities on the basis described above is farfetched — at least I hope he or she does. I have not only sought to reverse the direction of nineteenth century liberal thought by abandoning the public/private distinction but, indeed, have now gone further, seeking to recreate in modern dress legitimate, powerful corporate units intermediate between the individual and the state. Liberalism has taught us that such attempts are dangerous. Yet, as suggested earlier, the feeling that something was lost in the dissolution of powerful intermediate entities prevents even liberals from abandoning such an effort completely.

As Hannah Arendt has shown,[403] at moments of revolutionary instability, whether in America, France, or Russia, there has been a recurrent attempt to reassert power at a community level. The ideal of "all power to the Soviets," like Jefferson's "divide the counties into wards," arises everywhere, only to disappear again in a centralized state. Even today, when faced with the prospect of abandoning powerful community units, leaving only the federal government and individuals, modern liberals seek local power. Moreover, their desire for decentralization is not quite satisfied by the continued existence of the *Fortune* 500, or even the preservation of the small businessman. Consequently, liberals attempt to decentralize political power alone, leaving untouched the public/private distinction and the liberal attack on the medieval town. But in their attempts to do so, they are stymied by their inability, described above,[404] to conceive of real, local, political power. They do not want to abandon community power but there seems no way to achieve it.

What explains the unwillingness to give up the idea of local autonomy and the inability to achieve it? In my view, the idea of local autonomy recreates in political terms the subject/object dichotomy in social life. A good description of the subject/object dichotomy — the relationship of self to others — is by Duncan Kennedy:

> Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all — they

[403] H. ARENDT, *supra* note 1, at 255–81.

[404] *See* p. 1126 *supra*.

> provide us the stuff of our selves and protect us in crucial ways against destruction. Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition and feeling that are, simply as a matter of biology, collective aspects of our individuality. Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.
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> But at the same time that it forms and protects us, the universe of others (family, friendships, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.[405]

This "fundamental contradiction — that relations with others are both necessary to and incompatible with our freedom"[406] appears in two forms in the attempt to create city autonomy. First, at times we identify ourselves with our local community, recognizing that joint action with others is essential for us to achieve our own objectives, that alone we can do nothing. The community becomes a form of "the self" and outsiders and the central government take on the role of "others." These others then appear as threats to our capacity for self-determination, and we seek against them a "right of local self-government" or "home rule." But these others are not only threats; they are also necessary to our community's survival. Our local life depends on and cannot be disentangled from them. While we do not want to sacrifice ourselves to outsiders, we cannot separate ourselves from them. Thus, while the absence of local autonomy implies our submission to the domination of others, the actual achievement of local autonomy seems impossible.

Second, we sometimes see our local community as itself the embodiment of the threat of others to our individual lives. This threat seems so intense that we are willing to seek the help of outsiders who are themselves threatening — the state — to protect us from local domination. Yet if the state's

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[405] *The Structure of Blackstone's Commentaries, supra* note 1, at 211–12.

[406] *Id.* at 213.

attempt to save us is too pervasive, we immediately switch to the first mode of understanding the local community, in which we identify it with ourselves, and then seek to prevent further outside domination in the name of local autonomy.

In the search for local autonomy, then, we move relentlessly from one of these visions to the other. We cannot tolerate the absence of local autonomy because of our first vision, and we cannot tolerate genuine autonomy because of our second. As we oscillate between the poles of this contradiction, we seek one or the other as the stable basis for understanding the role of the city in our lives. But both visions are true.

We need not, however, overcome this version of the subject/object dichotomy to create a basis for local autonomy. We need only establish a *modus vivendi* that accepts with all its dangers a form of city power. But to do this we need a basic rethinking of liberalism and then a restructuring of our society itself.