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The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups

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**THE ONE AND THE MANY: INDIVIDUAL RIGHTS,
CORPORATE RIGHTS AND THE DIVERSITY OF
GROUPS**

*Bruce P. Frohnen**

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I. INTRODUCTION

This Article examines the relationship between the person and the group in the context of contemporary discussions of rights among lawyers, historians, and political scientists. It takes issue with liberal interpretations of human rights, as well as those views put forward by liberalism’s prominent critics. This Article argues that where liberal rights are excessively individualistic and therefore both self-contradictory and unstable, liberalism’s critics concentrate excessively on the political dimension of human interaction, thereby shortchanging the social origins and purposes of rights. In order to correct this a-social view of rights and the persons who bear them, this Article seeks to buttress the argument that important rights, whether understood as natural or historically

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rooted and contingent, inhere in both the person and the group, provided the group is understood not as an entire nation, culture or subculture, nor as a mere aggregation of individual interests, but rather as one of the mediating institutions of local life possessed of its own identity and common good. To defend rights in contemporary discourse, this Article argues, it is necessary to reconnect our language and thought with the communalist understanding of rights themselves, regnant in their medieval origins and in legal practice well into the nineteenth century.

This Article begins with a discussion of current debates regarding the nature and role of rights; debates in which the social nature and roots of these rights receive scant attention. The Article next proceeds to a historical analysis of the development of rights in medieval canon law and the development of chartered rights in English localities, up through early American practices regarding business corporations and municipalities. The argument, that rights accorded these corporate groups actually enhanced important rights of the person, will be developed in discussion of the loss of corporate rights through the destruction of municipalities as independent legal entities and the institution of generalized corporate charters. Finally, this Article argues that the loss of definite corporate groups, endowed with group personality and common purpose, has undermined the rights of persons to participate meaningfully in common activities that enrich their lives and promote institutions capable of buffering social life against interference from the political institutions and actors of the central government. This Article seeks to provide no program of reform. Its aim is the more limited and realistic one of arguing for a reorientation of thinking about rights, individuals, and groups such that greater appreciation and respect for their interrelations may be possible.

II. INDIVIDUALISM IN CONTEMPORARY RIGHTS DISCOURSE

The liberal, individualistic interpretation of human rights dominates contemporary American legal thought¹ and practice.² For several decades important scholars of the American constitutional founding have been arguing that the influence of philosophical liberalism, and of John Locke in particular, has

¹ A segment search of TITLE ("rights") in the Combined U.S. and Canadian Law Review Database on LexisNexis® over the last 5 years returns over 3,000 hits (which is the maximum). Further, a search of the same database over the last two years on the phrase "individual rights" returns in excess of 3,000 hits.

² See, e.g., Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 732 (1998) ("The technical rules of American standing doctrine require that plaintiffs suffer direct, individuated, and redressable harms before they can invoke the power of federal courts to vindicate claims of constitutional rights.... This...emphasis on plaintiffs as vindicating their own interests, not generalized grievances, perhaps makes it natural to conclude that rights serve principally to protect atomistic, individual self-interests.").

been overstated.³ But the Lockean individualist reading of the founding as the triumph of individual rights,⁴ along with the more generalized Whig reading of history as the unfolding of individual rights,⁵ continues to dominate contemporary discourse. Moreover, contemporary liberal theorists have insisted on the continuing, paramount importance of individual rights as the grounding for any just order.⁶

Contemporary liberal rights discourse demands that rights be universal, that is, that they be fully individual, resting on no qualifications, such as membership in a particular political, social or racial group; indeed, such is the (liberal) definition of a “natural” right.⁷ According to contemporary liberals, be-

³ See generally Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (reviewing the extensive literature dealing with the civic republican influence on the American founding).

⁴ See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 48-49 (Prometheus Books 1986) (1690) (arguing that human beings are “born . . . with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty, and estate against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves”); see also THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 2 (1988) (asserting that “it is in Locke’s works that one finds the true integration into one edifice, and hence the full exploration of the meaning, of the three most important pillars supporting the Founders’ moral vision: Nature or ‘Nature’s God’; property, or the ‘pursuit of happiness’; and the dignity of the individual as rational human being, parent and citizen”). But see BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM* 4 (1994) (stating that “late 18th-century Americans (like some of their rural descendants) really did defend a reformed-Protestant, communal theory of good, and were not individualist”); see also THEODORE J. LOWI, *THE END OF THE REPUBLICAN ERA* 11 (1995) (“[T]he single defining attribute of liberalism is individualism. Liberalism embraces the individual as the purpose of society and the state. Liberalism defines the individual *in opposition to the collectivity*.”).

⁵ See Renata Salecl, *Rights in Psychoanalytic and Feminist Perspective*, 16 CARDOZO L. REV. 1121, 1132 (1994) (tracing modern human rights to the development of the Kantian subject, by which the rights of one individual came to be defined in opposition to the rights of other individuals); see generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (G. Bell and Sons, Ltd. 1950) (1931) (arguing that our understanding of history has been undermined by a persistent concern among historians to see it as the story of the constant progress of freedom and enlightenment over superstition and tyranny).

⁶ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 193 (1977) (“[T]he general benefit cannot be good ground for abridging rights, even when the benefit in question is a heightened respect for law.”); see also John Rawls, *Distributive Justice*, in *PHILOSOPHY, POLITICS AND SOCIETY*, 3rd series 58 (Peter Laslett and WG Runcimann, eds.) (1967) (“[W]e believe that as a matter of principle each member of society has an inviolability founded on justice which even the welfare of everyone else cannot override, and that a loss of freedom for some is not made right by a sum of greater satisfactions enjoyed by many.”).

⁷ See R.H. Helms, *Natural Human Rights: The Perspective of the Ius Commune*, 52 CATH. U. L. REV. 301, 301-302 (2003) (Natural rights are held “not simply because the government of the day concedes them to us. We hold them because we are human.”). But see Edward Taylor, *A Primer on Critical Race Theory*, 19 J. BLACKS IN HIGHER EDUC. 122, 123 (1998) (Critical race

cause only individuals are capable of pain and joy, only individuals can be treated justly or unjustly; thus, only individuals can have rights.⁸ Richard Epstein has argued that group rights, by which he means distribution by the government of different levels of goods and protections according to membership in racial or other categories, threaten to harden into a system of formal classifications dangerous to liberty.⁹ Katharine Inglis Butler decries advocates of race-based distribution of voting rights for being “disturbingly oblivious to the potential for group rights to undercut our philosophical base and ultimately threaten the nation’s existence.”¹⁰ Thus, distribution of rights according to membership in any classification seems contradictory in contemporary terms. Even critics of modern liberalism like Morton Horwitz see rights as inherently individualistic.¹¹

This is not to say that, according to liberals, no group should receive protection from the state. Voluntary associations, for example, may be accorded rights, in Epstein’s view, but these rights are merely additive, aggregating the rights of their individual members.¹² Association itself is merely one individual right, to be valued in accordance with its advancement of individual autonomy and interests.¹³ The group *qua* group—the collective entity in which individuals

theory, or “CRT”, “is deeply dissatisfied with traditional civil rights litigation and liberal reforms. Having seen many of the gains of the civil rights movement rendered irrelevant by an increasingly conservative judiciary, CRT scholars have lost faith in traditional legal remedies. They have seen restrictive definitions of merit, fault, and causation render much of current antidiscrimination law impotent CRT notes that color blindness makes no sense in a society in which people, on the basis of group membership alone, have historically been, and continue to be, treated differently.... By insisting on a rhetoric that disallows reference to race, blacks can no longer name their reality or point out racism.”).

⁸ See Robert Paul Wolff, *The Concept of Social Justice*, in FROM CONTRACT TO COMMUNITY: POLITICAL THEORY AT THE CROSSROADS 65, 68 (Fred R. Dallmayr ed., 1978) (“Manifestly, all suffering is *someone’s* suffering, all joy *someone’s* joy—and only an individual agent can have a right or a duty.”).

⁹ See Richard A. Epstein, *Tuskegee Modern, Or Group Rights Under the Constitution*, 80 KY. L.J. 869, 880-81 (1992) (“No system of government can claim the allegiance of all its citizens if it extends its protections to only those that are fortunate enough to fall within a protected class. For all the concerns about caste, and about subordinate status that might be created by unequal social conditions, there is almost no awareness of the far greater dangers that a social order runs of building formal and explicit classifications into the fabric of the law.”).

¹⁰ Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 622 (1995); see also *id.* at 623 (Group rights exist on a spectrum from “apportionment of social benefits along group lines, as in Belgium, to peaceful partitioning into new countries, as between the Czechs and the Slovaks, to violent splintering, as in Lebanon and Yugoslavia, to genocide, as in Rwanda.”).

¹¹ See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399-400 (1988) (stating that rights are “conceived in radical individualism and continue to express an individualistic perspective”).

¹² See Epstein, *supra* note 9, at 878-79.

¹³ See *id.* at 877-78 (“First Amendment cases like *NAACP v. Alabama* are best understood not

join on the basis of some common goal, interest or characteristic—is not a proper subject of rights in contemporary discourse.

Thus, in part, rights conflicts may be seen as the inevitable result of diverse individuals pursuing the inevitably diverse goods of liberal society.¹⁴ Such a vision has produced an ironic situation in which much criticism of individual rights has been rooted self-consciously in the language of individualism. With the group seen as merely a means by which individuals pursue their own interests, with no real, common good of its own, the very definition of rights becomes a conflict among interests. A number of traditional liberal rights have been attacked on the ground that they undermine other more important rights. For example, the “old liberal” attachment to the right of all individuals to the free and full use of their property has been challenged in favor of the right of all individuals to shelter.¹⁵ Another example is the challenge leveled at the right of

as a special gloss on First Amendment theory, but as an observation that freedom of association is part of all forms of individual freedom, as applicable in the area of the First Amendment as anywhere else.”). Cited in *NAACP v. State of Ala. ex. rel. Patterson*, 357 U.S. 449 (1958), in which the court sided with the NAACP in refusing to disclose its membership lists on the grounds that this would interfere with freedom of association.; see also *id.* at 879-80 (noting a potential problem of coercion in the formation of all associations); see also *id.* at 882 (arguing the persistent danger of self interested action, including on the part of various groups, means groups must be kept in check so as to prevent their commandeering “the legal and moral power of the state” for their own ends).

¹⁴ ISAIAH BERLIN, *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 214 (Henry Hardy ed.) (2002) (commenting on the futility of making individual rights paramount in societies without a diversity of goods). Berlin stated:

the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realized is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never wholly be eliminated from human life, either personal or social.

¹⁵ See Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 345 (1994) (“[T]he right to exclude has traditionally been broader and more absolute than justified by the particular benefits that right secures. Property owners ordinarily have the right to exclude others from their property even when the exclusion would serve no demonstrable social or private benefit and even when the balance of interests tips in favor of allowing access.”); see also *Mihans v. The Municipal Court for the Berkeley-Albany Judicial District of Alameda County*, 7 Cal. App. 3d 479, 489 (1970) (“[I]f the tenant is insolvent or does not have property subject to execution he must immediately surrender the premises; if he is solvent he cannot be compelled to do so . . . his is an ‘invidious discrimination.’”); see also John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL’Y 555, 564 (2000) (discussing *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.S. 1983)). Payne stated:

[t]he actual constitutional basis of *Mount Laurel II* is that the New Jersey Constitution embodies an implicit constitutional right to shelter. If so, explaining *Mount Laurel II* becomes simple (although hardly uncontroversial). Armed with such a right, *Mount Laurel* plaintiffs would have a straightforward case to make, which in its most dramatic form would be that the government must either provide shelter directly to those needing it, or that it must

employers to contract freely with employees by those espousing the right of workers to receive a just or "living" wage.¹⁶ Historically, arguments concerning economic rights have produced calls to replace owner friendly rights with worker friendly rights.¹⁷

It is important at this point to recognize the integral role of economic rights in liberal theory. Liberalism fundamentally is about human freedom, defined as individual autonomy and secured through individual rights.¹⁸ Whether in the sphere of economics or of matters implicated by more social issues, proponents of rights today justify those rights through appeals to, as they seek through them to foster, individual choice.¹⁹ In this context economic rights such as the right to government payments covering the cost of physical necessities, are intended to provide the means necessary to enable meaningful individual

insure that other housing providers do so, at costs affordable to people of all incomes.

¹⁶ See J.M. Spectar, *Pay Me Fairly, Kathie Lee! The WTO, The Right to a Living Wage and a Proposed Protocol*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 61, 69 (2000) ("Notwithstanding the many approaches to the concept of human rights, (including natural rights, moral theories and positivism), the living wage appears to qualify as a fundamental human right.").

¹⁷ KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 485 (Tucker, ed. 1978)). Marx stated:

[t]he average price of wage labor is the minimum wage, i.e., that quantum of the means of subsistence which is absolutely requisite to keep the laborer in bare existence as a laborer. What, therefore, the wage laborer appropriates by means of his labor merely suffices to prolong and reproduce a bare existence. We by no means intend to abolish this personal appropriation of the products of labor, an appropriation that is made for the maintenance and reproduction of human life, and that leaves no surplus wherewith to command the labor of others. All that we want to do away with is the miserable character of this appropriation, under which the laborer lives merely to increase capital, and is allowed to live only in so far as the interest of the ruling class requires it.

¹⁸ See Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409, 410 (1999) ("Liberals conceive of rights as critical elements in the constitution of individual freedom. And, insofar as freedom is a necessary condition for, and an instrument of, human self-realization, according rights to individuals expresses respect for basic human dignity."); see also David Abraham, *Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America's Problems* (review of MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*), 25 CONN. L. REV. 947, 948 (arguing that in both economic and social issues rights proponents today look for justification and goals to the fostering of individual choice).

¹⁹ See Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561 (1989) ("The liberal argument for the respondent's [*Bowers v. Hardwick*, 478 U.S. 186 (1986)] position was that, whether such a right is fundamental depends not on its historical roots, but on its importance for the fulfillment of basic human needs. Homosexual intimacy can be classed alongside other intimate activities as part of the sphere of autonomy necessary for the flourishing of the human personality.").

choice.²⁰ And this emphasis on rights as promoters of individual autonomy extends beyond liberalism. For example, the Marxist critique of liberal rights has been reinterpreted in recent years as a rejection of economic exploitation and promotion of a set of individual rights—of transcendence over “bourgeois” rights in favor of each individual’s equal right to develop his or her own “capacities, desires, and personalities.”²¹

Other radical critiques of liberal individualism have severely questioned the utility of both groups and rights in constructing a just society. Critical race theory argues that the current structure of rights is the product of unjust state practices encouraged by dominant racial groups aiming to define race in a manner conducive to their own rank and privileges, and in the process establishing an oppressive legal structure.²² Angela P. Harris asserts “that racial groups are not ‘natural’ groups but social creations, and law has played an important role in this creation.”²³ Yet, while racial groups are not “natural,” according to Harris, they must be taken into account; exclusive focus on defeating discrimination will produce supposedly neutral standards that in fact buttress racial subordination.²⁴ On this view both the definition of groups and legal rights themselves are products of oppressive ideology.²⁵ Critical race theorists seek transcendence over maintenance of human rights, which for them have no inherent status; the proper goal concerns “racial justice,” which requires achievement of substantive equality among racial groups.²⁶

²⁰ See BRUCE FROHEN, *THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM* 20-22 (1996) (arguing that liberalism aims to eliminate poverty as one of many ills preventing individuals from leading full and satisfying lives).

²¹ See Arthur DiQuattro, *Liberal Theory and the Idea of Communist Justice*, 92 AM. POL. SCI. REV. 1, 93 (1998).

²² See, e.g., Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico* 49 UCLA L. REV. 1395, 1395-1397 (discussing MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 60 (2d ed. 1994)).

²³ See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1927 (2000) (“The equation of race law with equality law tends to obscure the law’s participation in creating and maintaining racial distinctions, and thus subtly perpetuates the notion that races just naturally are and that equality law simply provides a neutral forum for conflict among them.”).

²⁴ See *id.* at 2006-2007 (criticizing emphasis on formal discrimination in the courts for undermining affirmative action and other policies aimed at redistributing power along racial lines).

²⁵ See *id.* at 1952 (discussing the role of race in “determining the scope of legal rights” wrongly because it “was untouched by the norm of racial equality”).

²⁶ See *id.* at 1935 (“[T]he preservation of ‘the social’ as a sphere beyond equality allowed for the continued creation and maintenance of racial inequality outside the official reach of the state.” Meanwhile, “the most important legacy of Reconstruction for the new century would be the idea of ‘equality,’ a principle that nonwhite legal activists and their white allies would use as both a sword and a shield against racial hierarchy.”).

Feminists also have questioned the proper status of individual rights, arguing that “human rights are actually men’s rights” used by the state to control sexuality and conceal institutional domination and oppression.²⁷ Renata Salecl takes this critique in an individualist direction, praising the liberal project for its role in providing individual women with a neutral standpoint from which to criticize society’s political, economic and social structures.²⁸ But the mainstream of feminist thought generally is seen as hostile to abstract human rights on account of their “male” nature.²⁹ Rights, on the feminist view, assume a male character inimical to meaningful association; they rest on and further male reason and a male separation of persons one from another such that they actually impede the development of women’s full, interconnected humanity.³⁰ The state, then, must establish a just order in society; rights themselves must be made subservient to the needs or interests of the oppressed female group.

Communitarianism offers another seemingly radical critique of liberal individualism. Mary Ann Glendon argues that liberalism’s focus on individual rights breaks down community, separating individual from individual to the detriment of all.³¹ But the communitarian focus is on the need to balance rights and responsibilities.³² Thus the communitarian critique of individual rights is not radical; rights are good, on this view, but ought not to be the sole focus of

²⁷ See Salecl, *supra* note 5, at 1126-27.

²⁸ See *id.* at 1129. (arguing that patriarchy is discernible only because of the abstract, unconnected nature of the self posited by Descartes and Kant).

²⁹ See *id.* at 1127 (quoting Catherine MacKinnon: “Abstract rights will authorize the male experience of the world”).

³⁰ See *id.* at 1127 (arguing that, for feminists, human rights are patriarchal on account of their basis in liberal premises, most particularly that the distinction between each individual and all others is essential to the definition of the human person).

³¹ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 143 (1991) (“Our overblown rights rhetoric and our vision of the rights-bearer as an autonomous individual channel our thoughts away from what we have in common and focus them on what separates us.”); see also CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 98 (1995) (“The replacement of informal types of association by formal systems of socialization and control weakens social trust, undermines the willingness both to assume responsibility for oneself and to hold others accountable for their actions, destroys respect for authority, and thus turns out to be self-defeating.”).

³² See Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650 (“Communitarians believe that even (or perhaps especially) in a rights-conscious society, rights have limits, and involve concomitant responsibilities. For example, one has a right to trial by jury, but one also has the responsibility to serve on a jury when called upon. Citizens have the right to be secure from unwarranted governmental intrusion, but air traffic controllers and railroad engineers must submit to periodic drug testing in deference to the legitimate interests of the community.”).

public life; as Amitai Etzioni argues, “a good society requires a carefully maintained equilibrium of order and autonomy.”³³

In overemphasizing the importance of individual rights, according to communitarians, liberals miss the importance of social groups in forming good lives.³⁴ Glendon points to associational life as crucial to “systems of self-government” on account of its nurturing of habits of mutual assistance, political skills and efficient provision of social services.³⁵ Nonetheless, communitarians accept the fundamental individualism of liberalism, subjecting social groups to the logic as well as to the power of the state. Etzioni argues that a moral society should respect individual autonomy, as that individual ought to commit reciprocally to social institutions supporting autonomy.³⁶ Glendon notes fears raised by civil society and the nature of small groups, including discord that impedes national cohesion and threatens the state, possible backwardness and narrow-mindedness, oppression of groups’ own members combined with intolerance of outsiders and possible fostering of militant nationalism and fundamentalism.³⁷ Such fears led William Galston to recommend using the state-run education system to teach authenticity, toleration and non-discrimination—overtly liberal values emphasizing the primacy of individual autonomy and choice.³⁸

Communitarians share with liberals an emphasis on individuals as largely autonomous, self-interested actors properly most concerned with their own flourishing.³⁹ Communitarians also focus on the state as a form of national

³³ AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 4 (1996).

³⁴ See Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385, 394 (1993) (“[T]he vocabulary and conceptual apparatus of modern law and politics is primarily geared to the relations among individuals, the state, and the market. Legal theory lacks adequate terms and concepts for grappling with the ‘thousand different types’ of social groups that provide the immediate context for most people’s lives and that flourish within and among the megastructures of the state and the market.”).

³⁵ See *id.* at 390-91.

³⁶ See Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391, 393 (1998) (discussing AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* xviii (1996)).

³⁷ See Glendon, *supra* note 34, at 391-92.

³⁸ See WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 255 (1991) (discussing the need to provide children with “critical distance” from the values of their families so as to foster individual flourishing and toleration, lest “parental brainwashing” interfere with development of the proper, liberal values).

³⁹ See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 3, 15, 26 (1991) (arguing that each individual requires one of a number of possible “backgrounds” against which to develop his or her identity, but that these “things that matter” cannot be allowed to prevent individuals from being fundamentally true to themselves rather than any particular social attachment because only independent moral choice promotes true, full humanity).

community providing proper values and inculcating these values in the people.⁴⁰ Communitarians focus on the state as the guarantor of appropriate individual rights and duties, thus extending the liberal opposition to ceding substantive autonomy or power to the groups that stand between the person and the state.⁴¹ Like their sometime classical republican allies, communitarians see mediating institutions as potentially oppressive and as enhancing a regrettable distance from public life – the form of life that is, on this view, properly central to our existence.⁴² As a result, communitarianism also shares with republicanism a hostility toward mediating institutions—the local groups that mediate between individual persons, society and the state; and it is these institutions which establish the empathy and fellow feeling necessary for enlightened politics or the common pursuit of reasoned dialogue rooted in mutual respect.⁴³

In contrast, multiculturalism promotes groups, in part through an apparently thoroughgoing critique of liberal rights. Anthony Anghie, for example, argues that international law, with its emphasis on rights, was created by European colonialists as a means to denigrate indigenous cultures in order to justify conquest and colonization.⁴⁴ Will Kymlicka charges that providing minority cultures with mere access to equal rights and opportunities within the majority culture, rather than a separate, autonomous sphere of action, amounts to oppression because it denies minority cultures their own freedom and equality.⁴⁵ Kymlicka's criticism focuses attention on the apparent tension between individual rights and group autonomy. Put succinctly, groups may wish to oppose or even deny the validity of liberal, individual rights.⁴⁶

⁴⁰ See *id.* at 46-48 (arguing that partial groupings such as those based on ethnicity are potentially dangerous as they breed atomism and keep individuals from forging common political purposes by identifying "with their political society as a community").

⁴¹ See Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69, 74-75 (1996).

⁴² See Fort, *supra* note 36, at 405; see also *id.* at 397-98 (arguing that republicanism is a response against interest group liberalism, seeing groups as factions that take away from the common good defined as the product of reasoned, trusting political deliberation).

⁴³ See *id.* at 400-402 (criticizing republican theorists in particular for discounting the role of religious thought and mediating institutions in providing the emotional and theoretical grounds for reasoned civil dialogue).

⁴⁴ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L. L.J. 1, 7 (1999).

⁴⁵ See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 11 (1995) (criticizing liberal calls for assimilation).

⁴⁶ See Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 J. CONTEMP. LEGAL ISSUES 661, 661-62 (2002) (setting forth two obvious reasons why the phenomenon of illiberal groups constitutes the most powerful litmus test for any viable multicultural liberalism. The first is the liberal worry that the price of group rights may be the violation or erosion of basic individual rights and liberties. The second is the liberal worry that strengthening people's loyalty to an ethnic, national, racial or religious group,

The compromising “multicultural liberal” response to the problem of illiberal minorities is to allow such groups to exist, in principle, but subject them to a liberal rights regime, utilizing criteria derived from liberal ideals to determine which cultures to protect and what transformations to demand in exchange for such protection.⁴⁷ Other multiculturalists, like Kymlicka, would provide exemptions from some liberal, individual rights to certain groups,⁴⁸ while still others, like Charles Taylor, would insist that all groups be respected only to the extent that they abide by basic universal rights.⁴⁹

Multiculturalists have not rejected rights talk. Indeed, a whole set of multicultural rights currently exist, including rights to use minority languages and to maintain sectarian schools.⁵⁰ Moreover, multiculturalism’s assertion of the “right” to freedom from prevalent government directives regarding which language to use and the potential refusal to allow maintenance of sectarian schools shows the essential identification of even multiculturalism with the contemporary liberal mind-set. Multiculturalism assumes that the state has both the power and the legitimate authority to determine which languages people will speak in various venues and what forms of instruction will be allowed. Multiculturalism’s claim to respect the rights of groups rests on its assertion that minority cultures require a specific and limited exemption from the exercise of state power in certain cultural arenas, such as those regulating public language.

In some ways the multiculturalist critique can be seen as merely another version of liberalism, recognizing group rights as a necessary means of providing individuals with an equal, substantive opportunity to achieve personal autonomy.⁵¹ More generally, for multiculturalists:

and the particularistic identity it may foster, can threaten the wider moral and political identity among citizens required both by a stable democracy and respect for human dignity).

⁴⁷ See *id.* at 672 (arguing that group rights must serve liberal moral purposes).

⁴⁸ See KYMLICKA, *supra* note 45, at 168 (advocating exempting some groups from federal bills of rights and judicial review).

⁴⁹ See Doppelt, *supra* note 46, at 673 (discussing Taylor and the tension between group autonomy and individual rights).

⁵⁰ See Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L. J. 1, 6 (2000) (citing *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, at art 18, UN Doc. A/810 (1948), available at <http://www.hri.com/Uninfo/treaties/1.shtml> (last modified Sept. 29, 1999) and arguing that multicultural rights protect activities and institutions necessary for participation in certain minority cultures); see also Gerald Doppelt, *supra* note 46, at 664 (arguing that multicultural rights such as that of Francophone Canadians to use French in Canadian courts and the rights of indigenous peoples to self-rule and territorial integrity lack any basis in universal rights of citizenship, instead being “based on cultural membership in particular national and ethnic groups with claims to self-protection.”).

⁵¹ See Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 631 (1992) (arguing that group rights may be a temporary necessity in order to make up for past discrimination); see also *id.* at 640 (presenting affirmative action policies as a needed corrective to past discrimination).

the basic building blocks of a just society continue to be founded on the protection of basic citizenship rights and the nurturing of the capacities of individuals. However, in certain cases, justice also requires the recognition of traditions and specific ways of life that are unique to members of non-dominant cultural minorities.⁵²

Multiculturalists seek, not the elimination of liberal rights or even the recognition of groups as themselves the proper subjects of rights, but rather recognition that respect for the individual requires “respect for the intrinsic value of the different cultural forms in and through which individuals actualize their humanity and express their unique personalities.”⁵³

There is a deep affinity between “strong” multiculturalists like Kymlicka and the “multicultural liberalism” analyzed by Gerald Doppelt; both see groups as potentially dangerous to individual autonomy.⁵⁴ “Multicultural liberalism” seeks, not to integrate, but rather to balance individuals with groups, in part by balancing minority with majority cultures on the grounds that liberal ends rooted in individual autonomy require respect for derivative and instrumental group rights.⁵⁵

This is not to say that multiculturalists do not seek to protect and foster groups; clearly they do. And in this pursuit they are willing to give up some of contemporary liberalism’s attachment to equality as a ground for individual autonomy and dignity.⁵⁶ But not even multiculturalists seek to protect just any group; rather they seek to protect “cultures” they value. The essential concern of multiculturalism is the protection of national minorities and, to a lesser extent, ethnic minorities—groups with their own distinctive customs and modes of life that are outnumbered by a majority, and therefore, are not likely to be protected by the democratic process.⁵⁷

⁵² Ayelet Shachar, *Two Critiques of Multiculturalism*, 23 CARDOZO L. REV. 253, 254 (2001).

⁵³ Steven C. Rockefeller, *Comment*, in CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 87 (Amy Gutmann, ed., 1992).

⁵⁴ Doppelt, *supra* note 46, at 661 (defining multicultural liberalism as “a revisionist liberalism which appeals to liberal ideals in order to defend special group rights for national, ethnic, and religious minorities, independently of the individual rights their members possess.”).

⁵⁵ *Id.* at 669 (arguing that minority cultures require group rights in order to further individual autonomy and freedom to make life choices); *see also id.* at 666 (arguing that meaningful choices and life options require “that individuals have access to a societal culture with which they identify as an expression of who they are.”).

⁵⁶ *Id.* at 673 (“[I]n seeking to protect established cultural identity, Kymlicka and Taylor unfortunately end up protecting illiberal minority cultures distorted by inequalities of gender, race, religion, and ethnicity and incompatible with liberal-democratic ideals and norms of equal recognition.”).

⁵⁷ *Id.* at 665; *see also id.* at 661 (stating that multicultural liberalism seeks to protect minority cultures while making the majority culture or nation more just in the process).

Thus, multiculturalists look to groups only at the “macro” level of full cultures or ethnic identities. And it is through this emphasis that multiculturalists may exacerbate the danger of political and cultural balkanization by splitting the people’s loyalties and potentially setting one culture against another within a particular nation.⁵⁸ Emphasis on such metastructures undermines opportunities for individual persons to identify with and grow through interaction in groups because these groups are simply too large for the kind of intimate relations necessary.⁵⁹ Moreover, especially if racial classifications are socially or ideologically constructed, as critical race theorists claim,⁶⁰ it seems highly likely that continuing focus on the state’s use of such categories in the distribution of rights and goods would lead to increased tension and conflict among such groups in pursuit of power. What is more, such conflict empowers the state, or the elites running it, to create, modify or even destroy rights in the name of a more just order.⁶¹ Society increasingly will become a mere set of antagonistic cultural groups jockeying for political favors.⁶²

III. REDISCOVERING THE GROUP

Radical critiques of liberal rights feed into political and cultural tensions, exacerbating the group-based conflict and intolerance they are designed to combat. Yet liberal, individual rights pit person against person, burying the very idea of a common good beneath layers of individual self-interest. And the resultant, atomistic individual is insecure, even in his or her enjoyment of liberal rights. Those rights conflict, and the individual becomes increasingly isolated and weak in the face of various interest-based majorities-of-the-moment. Thus, the most all-encompassing group, the people as a whole, in whose name the state acts, may end up suffocating the individual. As Alexis de Tocqueville observed already in nineteenth century America, formal rights cannot protect against majority tyranny; the democratic majority can control public opinion, the legislature, the executive, the police, juries, and even judges so as to enforce

⁵⁸ See Butler, *supra* note 10, at 622.

⁵⁹ Fort, *supra* note 36, at 411 (summarizing contemporary psychological and anthropological arguments to the effect that individuals can develop genuine relationships with only a limited number of other persons).

⁶⁰ See Harris, *supra* note 23, at 2006-2007.

⁶¹ See generally THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* (2004) (examining the results of race-based governmental policies in five nations and finding that in every case those policies lead to further social and economic stratification along with increased racial tension and state interference, including state-made classification systems).

⁶² ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 81-96 (Stuart Gilbert trans., Doubleday Anchor Books 1955) (1856) (arguing that the old regime in France had reduced its upper classes to a set of bickering elites incapable of serving or even recognizing the common good by taking away from them the responsibility and practice of interacting with and caring for members of lower classes connected with them).

its will and make freedom of thought almost impossible; using its political and moral authority, the majority can banish dissenters from society, leaving them with their formal rights but cutting them off from the only social and political life available.⁶³ Moreover, a form of "soft despotism," in Tocqueville's view, comes to dominate in democratic societies that have answered the call of individualism. Each individual, separated from his or her fellows, sees himself or herself as a small, powerless creature facing a massive majority and the state that serves it, and surrenders control over his or her own life in order to avoid the ire of the majority and further isolation.⁶⁴

Rights, then, are not self-sustaining. On their own, rights can not protect the individual from the mass. Rather, rights require an atmosphere of mutual forbearance and respect in order to flourish, and aid individual persons in flourishing. Thus, Tocqueville emphasized the importance of widespread ownership of property for the safety of property rights in America; everyone owning property, everyone had reason to respect property rights.⁶⁵

None of this is to deny the essential insight that rights constitute important spheres of autonomy. But this insight does not belong to modern liberalism; rather, its roots go back at least as far as 12th century England.⁶⁶ Moreover, rights are not the product of liberal or proto-liberal individualism, but of the communalist interactions of medieval Europe.⁶⁷ A more nuanced and accurate vision of rights would take account of the necessary structure of freedom, including social structures protecting social freedoms and a vision of the common good channeling individual action in ways consistent with the rights of all.⁶⁸ Such a vision would respect cultures, but through their constitutive elements

⁶³ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 252-57 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1969) (1848).

⁶⁴ See *id.* at 258.

⁶⁵ *Id.* at 262-63.

⁶⁶ BRIAN TIERNEY, *Origins of Natural Rights Language: Texts and Contexts*, in, *RIGHTS, LAWS AND INFALLIBILITY IN MEDIEVAL THOUGHT* 636 (Variorum 1997) ("[T]he clearest use of such language to specify 'a zone of human autonomy', 'a neutral sphere of personal choice', is found in a group of English glossators of the 1180's.").

⁶⁷ *Id.* at 626 ("[I]n the vigorous, fluid, expanding society of the twelfth century, old rights were persistently asserted and new ones insistently demanded . . . Cathedral canons asserted their rights against bishops. Bishops and barons defended their rights against kings. Newly-founded communes sometimes bought their rights and sometimes fought for them.").

⁶⁸ See, e.g., JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE W. WORLD* 324 (J.J. Doherty, trans., B. Herder Book Co. rev. ed. 1965) ("[Social freedom] implies religious, civil, political, economic and social liberty. Social liberty consists in man's self-determination in regard to his existential ends, without hindrance from individuals or society. From these ends spring man's original rights to freedom. Hence, freedom is based on rights, not rights on freedom. It is not to be forgotten that within the framework of the common good exists the wide sphere of freedom of the members of society for the pursuit of their various interests, since in the free development of man and his personality consists one of the existential ends.").

(e.g. families, townships, and local voluntary associations) rather than their metastructures; it would reflect the fact that groups need not oppress their individual members. Mediating groups, townships and voluntary associations in particular, in many ways enhance rights by making their exercise more active and meaningful. Thus, the loss of group rights means the loss of rights for individual persons. For example, Richard Epstein notes how the state of Alabama capitalized on the reduction of municipalities to mere administrative units of the state, subject to their every political whim, in order to disenfranchise African-Americans in the city of Tuskegee, with court approval.⁶⁹ A majority African-American town with real, corporate rights, would have had the legal means and standing to defend itself against, or at least, resist the state's attempts to disenfranchise its people.

Rights are important; as Tocqueville pointed out, without them only force will rule.⁷⁰ Moreover, one of democracy's greatest achievements is its making "the idea of political rights penetrate right down to the least of citizens, just as the division of property puts the general idea of property rights within reach of all," thus assuring their widespread application and respectability.⁷¹ But excessive individualism endangers the attitudes, traditions and corporate groups that uphold ordered liberty and rights. Tocqueville saw hope for liberty and for the rights he loved, not in increased individualism, but rather through recognition of the important role played by mediating groups in fostering ordered liberty. The administrative decentralization provided by America's federal structure and strong tradition of township government meant that there were a number of political authorities that could block or at least soften the effects of centralized actions that might prove oppressive.⁷² In addition, through local group participation individuals gained the social connections necessary to bind people together to form self-sufficient communities capable of opposing infringements on their rights.⁷³

A later French political thinker, Bertrand de Jouvenel, elaborated on the necessity of associations mediating between individual persons and the state. According to Jouvenel, the French revolutionary state had become totalitarian "[b]y destroying in the name of *the mass*, which it claimed to represent, though

⁶⁹ Epstein, *supra* note 9, at 870-71 (discussing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which upheld Alabama state redistricting eliminating black voting influence, on the grounds that the state had the power to create, destroy, or administer its municipalities as it saw fit).

⁷⁰ See TOCQUEVILLE, *supra* note 63, at 238.

⁷¹ *Id.* at 239.

⁷² *Id.* at 262-63.

⁷³ See *id.* at 189 (arguing that American children learn from an early age to rely on themselves to set rules for their own games and, later, to look to their neighbors rather than the government to make local improvements).

its existence was only a fiction, the various *groups*, whose life was a reality.”⁷⁴ Jouvenel emphasized the importance of “makeweights”—interests representing sections of the nation, be they based in class, region, or profession—in limiting the potentially absolute power of the state.⁷⁵ In the name of “the mass,” the French revolutionary regime swept away these makeweights, leaving individuals isolated, causing them to lose “the instinct of association and the tendency to form societies within society, which had in other days been the precious bulwarks of liberty.”⁷⁶

An important strain of political and legal thought emphasizes the necessity of strong mediating groups for the protection of individual rights and liberty. The multiplicity of authorities provided by these groups – the multiplication of centers of power and legitimation to which individual persons may recur in time of need – increases the person’s ability to carve out a sphere of personal freedom of action. Sociologist Robert Nisbet argued that “[i]ndividual liberty . . . is only possible within the context of a plurality of social authorities, moral codes, and historical traditions, all of which, in organic articulation, serve at one and the same time as ‘the inns and resting places’ of the human spirit and intermediary barriers to the power of the state over the individual.”⁷⁷ Medieval Europe provided the seedbed for rights because it was pervaded by competition among vigorous secular authorities and a separate, institutionalized Catholic Church. “Since neither the spiritual nor temporal power could wholly dominate the other, medieval government never congealed into a rigid theocratic absolutism in which rights theories could never have taken root.”⁷⁸

The medieval European multiplicity of authorities extended beyond king and pope and took on institutionalized, juridical form. Harold Berman has shown the importance of the existence of multiple types of law in the early middle ages for the growth of rights and liberty. According to Berman, the overlapping of courts, forms of law and jurisdictions meant that “the same person might be subject to the ecclesiastical courts in one type of case, the king’s courts in another, his lord’s courts in a third, the manorial court in a fourth, a town court in a fifth, a merchants’ court in a sixth.”⁷⁹ The result was the growth of a legal tradition in which the person was recognized as the center of a nexus of relations, able to exercise meaningful choices and having individual dignity, rights and an appropriate sphere of autonomy.

⁷⁴ BERTRAND DE JOUVENEL, ON POWER 326 (J. F. Huntington, trans., Liberty Fund 1993).

⁷⁵ *Id.* at 317-18.

⁷⁶ *Id.* at 320-21.

⁷⁷ Robert Nisbet, *Uneasy Cousins*, in FREEDOM AND VIRTUE: THE CONSERVATIVE/LIBERTARIAN DEBATE, 38-39 (George W. Carey ed., Harvard Univ. Press 1998).

⁷⁸ TIERNEY, *supra* note 66, at 626.

⁷⁹ HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 10 (1983).

In addition to protecting individual persons from the state (and, in contemporary circumstances, the multinational corporation),⁸⁰ groups themselves embody individual purposes; they provide their members with the means by which to exercise individual autonomy in forging common ends.⁸¹ Liberalism's hostility toward groups mediating between the individual person and the centralized state has resulted in the stripping of important rights from those groups.⁸² And with the loss of these corporate rights has come the loss of important rights traditionally attaching to individuals acting within mediating groups. The rights of towns, for example, once provided an important vehicle for public freedom, consisting of active participation by local citizens in basic decisions affecting their lives; decisions that made one's individual autonomy actually matter, in concrete practice, to one's life. As a result, at least since 1800, people in America have had a decreasing ability to control their own lives as they have ceded participatory control to bureaucracies, capitalist managerial elites, and the trends of utilitarian consumerism.⁸³

In part, as a result of our loss of understanding of group rights, we have lost critical legal rights that historically protected people, both as individual persons and in their social relationships. We have lost both protections against potentially oppressive metastructures (freedom from, in Isaiah Berlin's phrase)⁸⁴ and aids to substantive participatory rights within groups (freedom to, in Berlin's phrase).⁸⁵ And this loss of socially-based rights and rights discourse has left modern society without the means to ground individuals and their rights in institutions and practices harmonizing diverse interests while protecting individual human beings from political oppression.⁸⁶

As to the danger of intolerant groups quashing individual autonomy, Kathryn Abrams has pointed out that "[t]he plurality of local communities and the possibility of exit diminish the [sic] both the likelihood and the impact of

⁸⁰ See Fort, *supra* note 36, at 395 (arguing that mediating institutions stand between the individual and social metastructures, including the multinational corporation).

⁸¹ See MESSNER, *supra* note 68, at 472 (arguing that "[t]he particular right of the free association to autonomy consists in the full right to frame its purpose and statute as long as the public interest or the rights of others are not affected").

⁸² Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1081 (1980).

⁸³ *Id.* at 1086 n.340-47.

⁸⁴ BERLIN, *supra* note 14, at 169 (describing negative liberties as follows: "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others.").

⁸⁵ *Id.* at 178 ("The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master...I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realise that it is not.").

⁸⁶ Nisbet, *supra* note 77, at 50 ("It is not liberty but chaos and license which...come to dominate when moral and social authorities—those of family, neighborhood, local community, job, and religion have lost their appeal to human beings.").

coercive politics.”⁸⁷ Because local politics “control questions of citizenship and inclusion over only a limited domain,”⁸⁸ citizens who find any particular local polity oppressive, or even uncongenial, have a real opportunity to exit which, while often involving hardship, nonetheless is more real and effective than that provided by larger political units such as the nation state.⁸⁹

Key, then, to the safe and beneficial nature of mediating structures is their small size. They are smaller, more diverse and less all-encompassing than social metastructures, including the minority cultures espoused by multiculturalism, and so are both less likely to cause harmful exclusions and more likely to spawn meaningful participation.⁹⁰ Thus, rather than according differing and conflicting rights to various politicized groups, we can instead recognize the rights inherent in more local, organic corporate groups within the local lives of individual persons. Instead of stripping persons of any social relations with rights and dignity, we can recognize that social lives are built through local attachments, and that the groups formed by these attachments have their own integrity and inherent rights, without which individual persons themselves lose positive rights as well as protections from the state. This would be consistent with the historical groundings of the rights we seek to defend, with the practical needs of individual persons as they face the erosion of autonomy by the state, and with the rich, social nature of rights themselves.

IV. THE MEDIEVAL ROOTS OF INDIVIDUAL AND GROUP RIGHTS

To understand the inherent connection between individual and group rights it is necessary to review the development of rights in the interaction of individual and communal concerns central to medieval thought and practice. Brian Tierney has pointed out the historical inaccuracy of the common claim that philosophers created rights during the modern era.⁹¹ He points out that rights, understood as persons’ rational, moral power to discern a sphere of autonomy within which they could licitly act as they wished, can be found developed in the works of medieval Decretists whose views had been widely diffused in the law schools of Europe by the end of the twelfth century.⁹² Such rights grew, not out of the pristine minds of philosophers, but out of the analysis

⁸⁷ Kathryn Abrams, *Law’s Republicanism*, 97 YALE L.J. 1591, 1606 (1988).

⁸⁸ *Id.* at 1605.

⁸⁹ *Id.*

⁹⁰ See generally Fort, *supra* note 36, at 395.

⁹¹ TIERNEY, *supra* note 66, 615-16 (1989) (arguing that contemporary theorists, who generally place the origins of natural rights language somewhere in the seventeenth century, in large measure wrongly assume that any concept not present in the writings of Thomas Aquinas must not have been extant during the medieval era).

⁹² *Id.* at 625.

of texts, and especially of existing practices, conducted by canon lawyers and commentators.

Some may reject the “purportedly objective assessment of the teachings of natural law and the Christian religion” central to medieval juridical thought.⁹³ But medieval jurists forged a fertile theory and practice of human rights through the integration of Roman and canon law within the confines of the communalist society of medieval Europe.⁹⁴ At the center of this integrative process was the corporate group, itself an integrative institution which, as its name suggests, incorporated various individuals into itself. As the groundbreaking historian of medieval corporatism, Otto von Gierke, observed, the medieval view, the town, for example, was seen as real in itself, unifying individuals with the group; this is in contrast to the modern view, in which the corporation is seen as a fictional person separate from the members.⁹⁵

Legal practice reflected the medieval, integrationist view. Rather than bestowing limited liability on a corporation seen as utterly separate from a more or less passive group of shareholders, the town, for example, was seen as being possessed of a kind of joint and several liability. Each member of the corporation was liable for its acts, and this included citizen liability for the taxes of the town.⁹⁶ Yet, by the later fifteenth century, a charter which would now be considered a charter of incorporation did not bestow limited liability, yet still bestowed on the town the so-called five points of incorporation: the right to have perpetual succession and a common seal; the right to sue and be sued; the right to own property; and the right to issue bylaws—to have its own will, though one for which corporate members were fully responsible.⁹⁷

Corporate entities, including municipalities, trade guilds and burial societies, were known in Roman law from the earliest times. But the Romans had no theory of collective personality.⁹⁸ Moreover, Roman secular corporations

⁹³ Helmholtz, *supra* note 7, at 324. (contrasting the medieval, “objective” view of rights with modern conceptions of rights as “grounded in conceptions of individual autonomy and human worth”).

⁹⁴ *Id.* at 301-302 (supporting in general terms “a strand of revisionist scholarship” holding that the origins of natural rights are to be found in “the amalgam of Roman and canon law that governed European legal education up to the time of codification and controlled much of the legal practice in the courts of church and state from the twelfth century to the eighteenth”); see also Kenneth Pennington, *The History of Rights in Western Thought*, 47 *EMORY L.J.* 237, 252 (1998) (arguing that rights “have been a part of our discourse for eight centuries”).

⁹⁵ Frug, *supra* note 82, at 1089.

⁹⁶ H. Ke Chin Wang, *The Corporate Entity Concept (Or Fiction Theory) in the Year Book Period*, 58 *LAW Q. REV.* 498, 507-08 (1942).

⁹⁷ SUSAN REYNOLDS, *AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS* 113 (Clarendon Press 1977); see also FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 487 (Cambridge University Press 1968) (1899) (pointing out that the non-liability of members was not essential to incorporation).

⁹⁸ *Corporations in 3* *DICTIONARY OF THE MIDDLE AGES* 606 (Joseph R. Strayer ed., 1982).

survived the fall of the empire only in scattered and fragmentary form. Meanwhile the Christian church, suffering less interruption in its institutional continuity, developed within itself a rich variety of corporate communities.⁹⁹ Thus, the earliest true corporations were those of the Church and the constitutive groups within it.¹⁰⁰

Charles Reid has pointed out that “the twelfth and thirteenth-century Church was defined juristically as consisting at least in part of a network of corporate entities.”¹⁰¹ These entities, including dioceses, cathedral chapters, monasteries and religious orders, were defined as corporations, governed through members’ consent and combining a web of individual rights with corporate existence.¹⁰²

The rights of corporate groups and of their members were set forth, not as part of the early modern rise of individualism, but in the laws of the Church of which they were a part.¹⁰³ Canon law established a structure of rights governing individual persons and groups and controlling a wide variety of issues, including: clerical exemptions from civil duties, taxes, prosecutions and forced testimony; the ability of ecclesiastical organizations such as parishes, monasteries and charities to form and disband, accept and reject members and acquire and alienate property; and the ability of religious conformists to worship, evangelize, maintain religious symbols, participate in the sacraments and educate their children.¹⁰⁴

While a significant portion of medieval canon law was put forth, substantively and procedurally, in the form of rights attaching to individuals, many of these rights did not attach to individuals merely on account of their humanity; they were not “natural” in the sense of being universally applicable.¹⁰⁵ Only the

⁹⁹ JOHN P. DAVIS, 1 CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE 36-37 (1905); see also 3 DICTIONARY OF THE MIDDLE AGES 606 (arguing that the development of the theory of the corporation as a distinct institution began with Justinian’s *Corpus iuris civilis*, culminating in the *Commentarius super libros quinque decretalium* of Pope Innocent IV. However, the development of an identifiable concept of the corporation is more clearly attributable to the commentators on the canons, the decretists and the decretalists.).

¹⁰⁰ *Id.* at 236.

¹⁰¹ Charles Reid, Rights in Thirteenth-Century Canon Law: A Historical Investigation, 6, (1995) (unpublished Ph.D. thesis, Cornell University)(on file with author).

¹⁰² *Id.* at 310-12 (arguing that medieval corporate structures had juridic personality, perpetuity, a corporate seal and a common chest).

¹⁰³ John Witte, Jr., *Law, Religion and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 18 (1996) (“Many of the common formulations of rights and liberties in vogue today were first forged not by a John Locke or a James Madison, but by twelfth and thirteenth century canonists and theologians.”).

¹⁰⁴ *Id.* at 17.

¹⁰⁵ Helmholtz, *supra* note 7, at 301 (discussing natural rights)(“We hold some rights not simply

Catholic faithful, specifically excluding Jews, Muslims and heretics, were accorded many rights and protections, and even these rights were to be exercised only within appropriate ecclesiastical limitations.¹⁰⁶ This is not to say, however, that only Christians were accorded rights in Europe during the middle ages. The Catholic Church in particular recognized a series of universal—natural—rights accruing to individuals independent of their stature within that Church.¹⁰⁷ Canon law “defined the rights of the poor, widows, and the needy to seek solace, succor, and sanctuary within the church.”¹⁰⁸ Also defined were the rights of spouses to claim sexual relations with their partners, and to protect this relationship from outsiders.¹⁰⁹

Moreover, Christian religious thought emphasized the importance of the individual person, focusing on individual intention in assessing guilt, individual consent in marriage, and individual scrutiny of conscience.¹¹⁰ The medieval view emphasized both corporatism and individualism, in part because it rested on the assumption that people become fully human through social interaction, rather than in isolation.¹¹¹ Rights provided a neutral sphere of personal choice, but the choice was to be exercised in the context of a requirement that individuals exert themselves to achieve moral improvement, which would benefit the community as a whole.¹¹²

The individual/group dynamic was at the heart of medieval corporate life. The corporation was conceived, neither as the mere extension of a ruler nor as a mere temporary association of discrete individuals, “but as an organic union of a head and members.”¹¹³ For example, under canon law, all Christians were incorporated into the one Body of Christ (the Church). In the corporation of the Church, the Pope’s status as temporal head meant that he had more power than each individual, but did not confer on him greater power than that of the whole

because the government of the day concedes them to us. We hold them because we are human.”).

¹⁰⁶ Witte, *supra* note 103, at 18.

¹⁰⁷ Reid, *supra* note 101, at 72 (“It is simply not true that the medieval canonists lacked a concept of universal rights.”).

¹⁰⁸ Witte, *supra* note 103, at 17-18; *but see* Helmholz, *supra* note 7, at 305-07 (arguing that commentators disagreed over the nature and extent of the right to sustenance, with few holding it actionable).

¹⁰⁹ Reid, *supra* note 101, at 27. Another arguably universal right was that of lepers to marry in the Church, should they be able to find a willing spouse. *See id.* at 61.

¹¹⁰ TIERNEY, *supra* note 66, at 27.

¹¹¹ *Id.* at 169-70.

¹¹² Charles J. Reid, Jr., *The Medieval Origins of the Western Natural Rights Tradition: The Achievement of Brian Tierney*, 83 CORNELL L. REV. 437, 462 (1998).

¹¹³ TIERNEY, *supra* note 66, at 171.

of the people.¹¹⁴ As Tierney has argued: "Christian individualism was balanced by this vision of the church as one body, united to Christ as head, a body in which the members could help and sustain one another, spiritually through their prayers, and corporally through works of charity."¹¹⁵

The Pope had rights on account of his position as head of the corporate Church, including the right of holding the property of the Holy See (although in a feudal context, so that he did not necessarily hold it in exclusive possession)¹¹⁶ and the right to general supervision in case of necessity.¹¹⁷ And the Pope had the power to intervene in any local contentious process at any stage.¹¹⁸ But the Pope's rights were limited by the rights of others. Specifically, litigants had the right to receive justice in the face of papal power; causes of action might be deferred, but could not be denied.¹¹⁹ The Pope also was limited by the corporate relationship, including by due process protections afforded those below him in the hierarchy. The Pope could not intervene where cardinals or bishops were exercising their rights without satisfying strict procedural safeguards.¹²⁰ Moreover, while the Pope could remove a cardinal from office, this required consent of the entire assembly.¹²¹ A cardinal could not be convicted of a crime without the testimony of several witnesses.¹²²

As a college, the cardinals had the right to elect the Pope, through means governed by procedural rules protecting individual cardinals' rights of participation.¹²³ The cardinals had substantial say in the governance of the Church; as bishops were required to get the consent of the cathedral chapter (the body of clergy in their bishoprics, assigned as a group to help them govern)¹²⁴

¹¹⁴ See BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT* 90-95 (1982) (arguing that the Great Schism spawned much writing to the effect that ultimate authority in the church resided in the whole community, which could meet in a general council which might have the power to depose even a pope).

¹¹⁵ Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J. L. & RELIGION 163, 170 (1987).

¹¹⁶ Reid, *supra* note 101, at 322.

¹¹⁷ *Id.* at 321.

¹¹⁸ *Id.* at 351.

¹¹⁹ *Id.* at 366.

¹²⁰ *Id.* at 215-16, 356.

¹²¹ *Id.* at 377.

¹²² *Id.* at 378.

¹²³ *Id.* at 395. The Cardinals constituted a group, drawing on a common, corporate treasurer's chest. *Id.* at 401-02.

¹²⁴ William H.W. Fanning, *Chapter*, in THE CATHOLIC ENCYCLOPEDIA (1908) (indicating the cathedral chapter had its own rules and interests, forming a separate body from the bishop that at times opposed his will), available at <http://www.newadvent.org/cathen/03582b.htm> (last visited

for certain functions, and the Pope was required to get the consent of the cardinals for certain actions. In instances in which consent was required, failure to receive it could lead to invalidation of the papal act.¹²⁵ The unanimous consent of the college was required for alienation of property that pertained to the Church.¹²⁶ Further, cardinal-legates were empowered to exercise voluntary jurisdiction over non-contentious cases, and to exercise jurisdiction over contentious cases with local consent.¹²⁷

There were numerous other rights accruing to individuals as members of corporate groups. The members of individual religious corporations possessed a series of identifiable rights.¹²⁸ These rights depended, in nature and form, on each person's status within the salient group. For example, the bishop had a right to his *cathedraticum*, a fixed sum to be paid to him by the churches of his diocese.¹²⁹ The cathedral canon held some rights in common with the other members of the cathedral chapter, but also held individual rights, defensible at law, such as that to his own *prebend*, or claim to receive revenue.¹³⁰ Bishops had a right to visit, inquire, and impose punishment or correction upon monasteries as a whole or upon their individual members.¹³¹ The abbot of a monastery was accorded monarchical powers over his monks, who were deemed "dead to the law" of the secular realm, but who still enjoyed canonical protections and whose interests were looked after by the monastery as a whole.¹³²

Another example is provided by the cathedral chapter, members of which had the right to vote for chapter officers, including the bishop.¹³³ Members also had the right to receive notice of elections.¹³⁴ Due process protections were significant; an election might be voided where the rights of a single elector were infringed. Where a member of a cathedral chapter had not been notified of an election or otherwise was excluded from participation, he could not be compelled to ratify the chapter's choice and was empowered to bring an action to

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¹²⁵ Reid, *supra* note 101, at 393-94.

¹²⁶ *Id.* at 387.

¹²⁷ *Id.*

¹²⁸ *Id.* at 109.

¹²⁹ *Id.* at 165-66.

¹³⁰ Tierney, *supra* note 115, at 171.

¹³¹ Reid, *supra* note 101, at 197.

¹³² POLLOCK & MAITLAND, *supra* note 97, at 507; *see id.* at 504-07 (detailing rights and responsibilities of medieval abbots).

¹³³ Reid, *supra* note 101, at 310-12.

¹³⁴ *Id.* at 170-71.

invalidate it.¹³⁵ However, where an elector did not wish to participate, the college was free to proceed without him, and the right of election could be lost through misconduct or lack of use.¹³⁶

Although the right of election has been seen as a precursor of the more modern notion of a generalized right to vote, it was, in its origins, a link between individuals and the groups of which they were members.¹³⁷ Tierney has shown, however, that this era produced generalized arguments concerning the right of the people to consent to their government.¹³⁸ It also is important to note that the corporate character of the Catholic Church's organization was reproduced in other groups, spawning a plethora of rights accruing to individuals on account of their corporate membership.¹³⁹ One important such group was the municipality or, more specifically in England, the borough.

V. BOROUGHES, CORPORATIONS AND THE ENGLISH CHARTER TRADITION

Two related areas on which the canon law had a significant impact were municipal rights and the charter tradition.¹⁴⁰ English common law was suffused with canonist, corporatist assumptions, and forms.¹⁴¹ Thus, it is not surprising that one may find secular bodies analogous to ecclesiastical corporate bodies; such was the English borough. Boroughs are difficult to define in medieval usage and difficult to differentiate from other population centers.¹⁴² We know, however, that boroughs had certain characteristics that enhanced their importance and communal character; with their roots in earlier royal military en-

¹³⁵ *Id.* at 272.

¹³⁶ *Id.* at 276.

¹³⁷ Helmholtz, *supra* note 7, at 311-12 ("[T]he modern law of elections can be traced back to the system the medieval canonists developed for choosing bishops, abbots, and many humbler offices within the church." However, Hostiensis "one of the most prominent of the thirteenth century canonists," argued that the true purpose of the voting right was the production of correct choices—picking the right person to serve the group, rather than fostering individual autonomy).

¹³⁸ TIERNEY, *supra* note 114, at 22.

¹³⁹ DAVIS, *supra* note 99, at 237.

¹⁴⁰ See generally R. H. Helmholtz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999) (tracing the key elements and generalized form of the Magna Carta to the continental incorporation of canon and civil law).

¹⁴¹ See generally William W. Bassett, *Canon Law and the Common Law*, 29 HASTINGS L. J. 1383 (1978) (summarizing the varied influences of canon law on the development of English common law).

¹⁴² POLLOCK & MAITLAND, *supra* note 97, at 642 (arguing that "in the thirteenth [century] no strict definition of a borough was possible").

campments, boroughs enjoyed greater self-government, representation and corporate existence than other localities in medieval England.¹⁴³

By the thirteenth century, the English borough could be likened to a religious order because it had "a permanent purpose that keeps it together[;] just as a religious house is kept together by the purpose of glorifying God[;]" a freeman of Norwich, for example, would take as his civil purpose to protect the franchises and liberties of that borough.¹⁴⁴ Medieval English boroughs developed corporate personality; their lands and affairs belonged to the group, rather than simply to individuals.¹⁴⁵ "In the second place, the administrators for the time being are a legally organized body, a body which perdures while its members come and go.¹⁴⁶ [Finally] this body transacts business as a body by means of meetings and votings and resolutions; the motive power is not ... the will of a single man."¹⁴⁷

England itself was conceived as a corporation with the king as head, limited in his rights by the corporate, law-bound nature of his relationship with his subjects and the doctrine of *ultra vires*.¹⁴⁸ Indeed, Pollock and Maitland note that the same interaction of individual and communal rights as that shown in canon law was prevalent in English law: "Every right, every duty, however communal its character, spontaneously becomes the right, the duty, of an individual by attaching itself to the land that he holds."¹⁴⁹

As bishops were not mere creatures of the Pope, secular corporations in the medieval era were not mere creatures of the king. Charters, or "formal documents describing the rights and obligations on each side of a feudal rela-

¹⁴³ *Id.* at 634-38 (by the time of the Conquest, the borough was "a unit," it already had corporate personality and so had to be dealt with as a unit rather than as a collection of vassals). See also J.C. HOLT, *MAGNA CARTA* 73 (1992) (arguing that "[a] borough was a distinct and easily comprehended entity; there was no difficulty in accepting that it held corporate privilege. A shire was not so easy to imagine in this role. ").

¹⁴⁴ POLLOCK & MAITLAND, *supra* note 97, at 686. Norwich here is referred to as a "city" but Pollock and Maitland point out that this is merely another term for a borough, one usually but not uniformly applied to a borough with its own cathedral. See *id.* at 634. Pollock and Maitland draw most directly the parallel between church and borough, placing both in the category "corporations." *Id.* at 635.

¹⁴⁵ *Id.* at 507-08; see also *id.* at 502 (in the canonist era both theory and practice held that corporations could commit crimes and/or torts).

¹⁴⁶ *Id.* at 508 (citations omitted).

¹⁴⁷ *Id.*

¹⁴⁸ Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, WASH. U. J.L. & POL'Y 1, 7-8 (2001). See also *id.* at 8 ("[The] corporate law doctrine of *ultra vires*, at least theoretically, prevented the king's personal acts from becoming an act of his corporate or political capacity when they violated the laws which created his office."); see *id.* at 6 (stating that both Blackstone and Henry VIII argued that England was a corporation with head and members, and its laws could be changed only by the combination of the two).

¹⁴⁹ POLLOCK & MAITLAND, *supra* note 97, at 688.

tionship”¹⁵⁰ were common means by which both kings and lesser lords granted privileges (for a price) to burgesses or local borough leaders.¹⁵¹ Charters from the crown played an important role in establishing corporations and their laws; during the medieval era, “[g]radually English law came to view charter grants as grants of corporate status.”¹⁵² By 1200 boroughs were receiving seals with their charters, which their heads used to commit the whole in conducting business.¹⁵³ But, as Pollock and Maitland note, the idea that a corporation must be created by the sovereign was a fourteenth century innovation driven by “political expedience and financial needs.”¹⁵⁴ Medieval corporations could be formed by act of Parliament, prescription, or common law.¹⁵⁵ Thus charters were not the sole source of borough rights, but rather a particularly clear and enforceable statement of corporate rights, providing specific terms rather than usage or custom to interpret.

That the Magna Carta is central to any discussion of chartered rights is self-evident.¹⁵⁶ But important to note is that the Great Charter was not unique. Other monarchs at this time and even earlier were granting charters of liberties to their realms, in whole or in part.¹⁵⁷ Moreover, Magna Carta was part of a long practice by which kings and nobles granted privileges and liberties of widely differing degree and kind to particular groups and individuals within

¹⁵⁰ Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 378 (1985) (citing M. BLOCH, *FEUDAL SOCIETY*, at 148-49 (L.A. Manyon trans., 1964)).

¹⁵¹ REYNOLDS, *supra* note 97, at 135 (Burgesses were those wealthy enough to have paid borough dues).

¹⁵² Williams, *supra* note 150, at 381.

¹⁵³ POLLOCK AND MAITLAND, *supra* note 97, at 683.

¹⁵⁴ *Id.* at 669-670 (“[Guilds] may give trouble; Besides, here lies a not disreputable source of income.”).

¹⁵⁵ JOSEPH S. DAVIS, 1 *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 2-3 (1917).

¹⁵⁶ Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948 (stating that the “ancestry of the due process clause is universally traced to chapter 39 of Magna Carta”). One potential complication arises from the fact that charters of liberties or privileges—even those drafted as late as were American colonial charters—seldom used the term “rights.” James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 AM. J. JURIS. 185, 187-88 (1994). But this article follows a well-worn line of argument (*see id.* at 188 and citations therein) to the effect that these charters did in fact confer “rights” — rights which developed from the fact of increased autonomy granted by charter and developed through procedural safeguards within corporate groups. As Holt argues, charters of liberties were but one step in the “long tortuous and often bloody journey” “to a settled constitution.” HOLT, *supra* note 143 at 23.

¹⁵⁷ HOLT, *supra* note 143, at 25-26 (listing monarchs on the continent during this era who had granted charters of liberties to all or parts of their realms); *see also id.* at 36-38 (noting similarities and distinctions between Magna Carta and Henry I’s Charter of Liberties (promulgated in 1100)).

their demesnes: The English monarchs' reliance on sales of charters, increasing quickly in the reigns soon after the conquest of 1066, produced demands for more liberties, and for more generalized rights, eventually culminating in the rebellion that produced Magna Carta.¹⁵⁸ That document declared a number of rights attaching to individual barons and others that are credited with a crucial role in the development of individual rights, and due process rights in particular.¹⁵⁹ In addition, however, it was the product of a communalist society that took the rights of groups, including boroughs, very seriously. Indeed, "Magna Carta owed much to the precedent of municipal privilege."¹⁶⁰ As Pollock and Maitland point out, Magna Carta was a grant of "certain liberties" by King John to the men of England "as he had granted them to the men of Cornwall and the men of London," that is, as a corporate charter for a borough.¹⁶¹

The Magna Carta expanded upon common elements of borough charters including freedom to trade, free access to markets, individuals' marriage rights and limitations on taxes and feudal rights of lordship.¹⁶² During the twelfth and thirteenth centuries, London in particular had won pledges from a succession of monarchs to support municipal liberties.¹⁶³ By the thirteenth century more rural areas also had begun negotiating for charter rights, including the right to develop royal lands and to control the office of sheriff.¹⁶⁴ Control over one's sheriff could entail many specific charter rights, including the right to have a specific person in that office, procedural limits on the sheriff's activities, and the right of dismissal for misbehavior.¹⁶⁵

Borough rights were sought for the sake of both the borough itself and of the boroughs' citizens. Medieval boroughs sought corporate freedom from external interference, including the freedom of individual citizens from servitude to external lords.¹⁶⁶ Many rights accruing to borough members were de-

¹⁵⁸ *Id.* at 50-51.

¹⁵⁹ See, e.g., Tierney, *supra* note 115, at 174 (stating that, because of Magna Carta, "the whole existing political order was now being defined as a structure of rights," which would expand to include all people, including through adaptation of notions of "law of the land" to current rights of due process).

¹⁶⁰ HOLT, *supra* note 143, at 55.

¹⁶¹ POLLOCK AND MAITLAND, *supra* note 97, at 674.

¹⁶² HOLT, *supra* note 143, at 57-59.

¹⁶³ *Id.* at 56-57; see also REYNOLDS, *supra* note 97, at 109 (arguing "Magna Carta not only confirmed the liberties and free customs of cities, boroughs, towns (ville) and ports (portas), but, by its reference to the aids (auxilia) of London, implied that London—though not the other towns—was exempt from tallage").

¹⁶⁴ HOLT, *supra* note 143, at 60-62.

¹⁶⁵ *Id.* at 62.

¹⁶⁶ REYNOLDS, *supra* note 97, at 100.

pendent on their status. For example, burgesses gained important rights such as that of being tried by a jury of local persons, in the borough court rather than in the court of the local lord.¹⁶⁷ Burgesses also gained some of the rights normally accruing to the local sheriffs, such as that to tolls, rents and court profits.¹⁶⁸ Other rights accrued to all within the borough, such as freedom from attachment of one's chattels by another borough.¹⁶⁹

Important rights were held by the borough as a corporation, such as freedom from personal service¹⁷⁰ as well as rights of self government. While boroughs could not officially pass new legislation unless such right was specifically granted by the king, such powers did evolve; among the earliest local laws was a building code for the city of London, the grounds for which developed from the recognized right to declare and follow local custom.¹⁷¹ Boroughs also held numerous economic rights rooted in local control. These economic rights included that of maintaining borough monopolies on various goods,¹⁷² as well as freedom from certain taxes and feudal incidences.¹⁷³ These rights spurred development of further corporate groups and rights rooted in the medieval guilds, which were separate from the boroughs and maintained their own courts.¹⁷⁴ Indeed, part of the reason boroughs came to need charters, rather than relying on prescription for their rights, was the plethora of other associations gaining chartered liberties during this period.¹⁷⁵

Key to boroughs' liberty—both positive and negative—was their securing the right to appoint their own officials and thereby control their own internal affairs. Grants of the “farm of the borough” made citizens corporately responsible for the annual royal dues, and transferred to them the right to appoint the reeve who accounted to the crown for payment.¹⁷⁶ Over the medieval era, boroughs also purchased rights to appoint their own bailiffs or tax collectors, coroners to oversee the bailiffs, and local judges and mayors.¹⁷⁷ With these rights, a

¹⁶⁷ POLLOCK & MAITLAND *supra* note 97, at 643-44. The King's jurisdiction was not, however, eliminated. *Id.*

¹⁶⁸ *Id.* at 650-51. Certain responsibilities came with burgesses' corporate leadership – chiefly joint and several liability for the borough's debts. *Id.* at 655.

¹⁶⁹ *Id.* at 675.

¹⁷⁰ *Id.* at 664-65.

¹⁷¹ *Id.* at 660-61.

¹⁷² *Id.* at 664-65.

¹⁷³ HOLT, *supra* note 143, at 57-59.

¹⁷⁴ POLLOCK & MAITLAND, *supra* note 97, at 667.

¹⁷⁵ *Id.* at 669-70.

¹⁷⁶ REYNOLDS, *supra* note 97, at 102-03.

¹⁷⁷ POLLOCK & MAITLAND, *supra* note 97, at 656-57.

majority of the borough corporation members could act for the whole, with each individual member exercising rights of control through the group.¹⁷⁸

Most important among local officials was the mayor. Unlike reeves and bailiffs who, while appointed by the citizens, still had financial and administrative responsibilities to the king, mayors were purely urban officials and as such symbolized the borough's unity.¹⁷⁹ The mayor filled in the borough a role analogous to that of the Pope in the Church and heads of other ecclesiastical bodies.¹⁸⁰ As the head of the corporate group of the borough, the mayor was the nexus of individual and group rights. Individual burgesses had the right to choose their mayor; the mayor as an individual had the right to exercise the powers of his office; and the borough as a corporate body had the right to act through the mayor, to be free from interference from lords and even from the king in areas protected by the charter, and to control their common destiny in terms of legal proceedings, economic activity and everyday, customary relations.

VI. DUE PROCESS AND THE BOROUGH

There are deep connections between corporate rights developed in borough charters and the rights of individuals, including such "natural" rights as that to due process. Magna Carta gave rights to trial according to "the law of the land."¹⁸¹ Local borough citizens had the right to appeal to the king on the grounds that local laws and procedures were unfair.¹⁸² Moreover, the enforceable, legal status of charters brought the king under the law and established norms according to which every person had a right to the enforcement of his or her rights—to a process by which they might enforce rights gained through charter or usage.

It was the English ability to keep their monarch within the confines of corporate office that allowed them to prevent establishment of the personal absolutism of other monarchs, such as France's Louis XIV.¹⁸³ As Tocqueville observed, the French kings took it upon themselves to curtail, sell, resell and

¹⁷⁸ Wang, *supra* note 96, at 507.

¹⁷⁹ REYNOLDS, *supra* note 97, at 109.

¹⁸⁰ JAMES TAIT, *THE MEDIEVAL ENGLISH BOROUGH* 255 (1936).

¹⁸¹ See *MAGNA CARTA*, ch. 39 (1215), reprinted in HOLT, *supra* note 143, at 461 ("No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful [judgment] of his peers or by the law of the land.").

¹⁸² POLLOCK & MAITLAND, *supra* note 97, at 661.

¹⁸³ Enlow, *supra* note 148, at 6 (stating that the French monarch managed to establish rights as a personal sovereign that absorbed his corporate office, thus establishing himself as an absolute ruler).

finally abolish towns' charter rights in pursuit of personal power and money.¹⁸⁴ The English king's power in this area was limited in that rights granted in perpetuity could be revoked only for lack of exercise or cause.¹⁸⁵ Guarantees to all persons were inviolable in England; every person had the rights accorded him or her in any relevant charter or usage, and these rights were vindicated, most dramatically in the exit from power of King James II in 1688. When James attempted to abuse the power to revoke charters through *quo warranto* proceedings he was forced to abandon the attempt even before losing his throne.¹⁸⁶

Quo warranto is a common law writ used to inquire into the authority by which a public office is held or a franchise claimed.¹⁸⁷ It had been used early on by the King as a tool of arbitrary revocation. However, it soon became an instrument of due process. Its development in important ways was the development of the rights of both groups and individual persons. By establishing due process as a norm in charter proceedings it reinforced the developing right to proceedings according to usage or the law of the land as well.

Perhaps the most significant development of the writ of *quo warranto* took place during the reign of Edward I (1272-1307). Edward carried out a general inquiry into local franchises and governmental conduct.¹⁸⁸ "Claimants were to appear before them [itinerant judges riding in circuit], and if it was found that they actually held any franchise, a writ of *Quo Warranto* would be served on them, requiring them to show by what warrant they claimed to have the liberty of wreck, or gallows, or view of frankpledge, or return of writs, or whatever it might be."¹⁸⁹ The use of the writ was nothing new. In fact, Edward's father, Henry III, used *quo warranto*, and there are records indicating it was used as far back as the reign of Richard I (1189-1199).¹⁹⁰

What set Edward's use of *quo warranto* apart from his predecessors' was his widespread, general exercise of the writ. Previously kings had, either by unilateral action or writ of *quo warranto*, revoked charters or warrants known to

¹⁸⁴ TOCQUEVILLE, *supra* note 62, at 42. This is not to say that all grants of charter rights were permanent, many required repeated confirmation; see HOLT, *supra* note 143, at 71-72.

¹⁸⁵ POLLOCK & MAITLAND, *supra* note 97, at 667-668.

¹⁸⁶ LOIS SCHWOERER, *THE DECLARATION OF RIGHTS, 1689 9-18* (1981) (stating that James' attack on borough charters, part of his attempt to pack Parliament with supporters, sparked intense opposition, not assuaged by his rescinding of relevant orders, and was an important grievance leading to his downfall, and to constitutional reforms in England); see also Frug, *supra* note 82, at 1092-1094 (pointing out that Charles II's *quo warranto* proceeding against London, the most important of cities, actually succeeded, but that the court decision affirming the king's right to revoke the charter was reversed after the Glorious Revolution of 1688).

¹⁸⁷ BLACK'S LAW DICTIONARY 1264 (7th ed. 1999).

¹⁸⁸ HELEN M. CAM, *LIBERTIES AND COMMUNITIES IN MEDIEVAL ENGLAND*, 173 (1963).

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.* at 174.

them to exist; under Edward, the inquiry was a general one into all exercises of franchises.¹⁹¹ If the party answered the writ successfully the franchise was maintained. If not, the putative franchise was confiscated by the crown.

Edward rarely abolished anyone's franchise; such was not the goal.¹⁹² The usual result of an adverse ruling for the subject in *quo warranto* was the imposition of a substantial fine that was followed by the granting of a royal charter.¹⁹³ Besides revenue, then, what did Edward seek? Not franchises' revocation, but rather their proper definition, along with recognition of their revocability for misuse.

If the abbot of St. Albans had the right to appoint his own coroner for the liberty of St. Albans, he took on himself the responsibility for seeing that the coroner's rolls were duly kept, and that the coroner was available when required; when these conditions were not fulfilled the king took back the privilege and appointed a coroner himself.¹⁹⁴

One crucial, though perhaps unintentional, by-product of Edward's aggressive program was a partial fulfillment of Magna Carta: establishment of due process rights in the guarantee of "each man's own liberty, warranted by a charter, upheld in the courts."¹⁹⁵ This due process went so far as to show that the king, as a person, was not above the law. When Earl Warenne was called to defend his Stamford charter in Lincolnshire, he claimed that Edward himself had granted his charter. Edward's attorneys asserted the defense that, prior to becoming king, Edward had himself usurped the liberties in question and, therefore, had no power to grant them.¹⁹⁶ Further, the charters themselves, and thus the king's powers, by the sixteenth century at the latest were deemed incapable of either changing the common law or altering the rights and duties of private

¹⁹¹ *Id.* at 175 ("[F]rom 1254 onwards the justices in eyre, as part of their ordinary routine work, were charged to inquire into the assumption of liberties without warrant.").

¹⁹² *Id.* at 180-181 (observing that Edward "was far from wishing to do away with private jurisdictions and have all the work of local government done by royal officials alone").

¹⁹³ *Id.* at 180.

¹⁹⁴ *Id.* at 207. They continue: "All through the reign the juries of the countryside were being invited to tell the king's justices in eyre what they knew of persons who had had liberties granted to them and had used them otherwise than the grant prescribed". *Id.*; see also *id.* at 181 (stating that what Edward "wanted was to get down in black and white what rights his subjects might lawfully claim, and to assert in an unmistakable manner the principle that they held these rights from him and only so long as they exercised them to the good of the realm").

¹⁹⁵ *Id.* at 183.

¹⁹⁶ *Id.* at 176 ("In Lincolnshire (1281) he claims return of writs and other liberties in Stamford, under a charter given him by Edward himself in 1263. The king's counsel points out that the liberties in question had been unlawfully usurped by Edward himself when he was lord of Stamford, and that he, being, as he was then, a private person, had no power to grant usurped liberties; as he has no other warrant, the earl loses these franchises.").

persons as fixed by that law.¹⁹⁷ Charters were part of, rather than in some sense trumps against, the common law. Indeed, during the earlier parts of the medieval era, towns without charters were treated little differently from those with such charters.¹⁹⁸ Thus, municipal rights even outside the borough were real and respected as part of the “law of the land” insisted upon in Magna Carta. Custom or usage, the basis of the common law, was not mere tradition, but right; it established what process was due, and even what actions, what sphere of autonomy, was to be protected by that process.

But charters served a crucial role in fixing the bounds of rights and process. Those who exercised their rights in ways inconsistent with the terms of grant or usage would have those rights abolished—but not without proper definition and inquiry. It is significant, here, that the finders of fact were countryside juries working with itinerant justices and not the king’s own household.¹⁹⁹ The result was increasingly objective enforcement of rights, along with their objective limits.²⁰⁰

Rights, then, were real, though they could be revoked for abuse. A right increasingly was defensible at law, liable to abolition only for cause and through proper procedures.²⁰¹ Thus, it seems clear that even the more obviously “acquired” rights of persons with a given status (such as a borough’s mayor) also was “inalienable” in the sense that it could be revoked only for cause and brought with it the guarantee of procedural safeguards. The right was no absolute trump, but rather a provider of a sphere of licit activities, of power and autonomy within the confines of the common good.²⁰² It is no wonder, then, that the charter of incorporation has been called “the nucleus of British self-government.”²⁰³ Boroughs and, later, American townships, were key centers of right-holding, of licit autonomy.

¹⁹⁷ W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 392 (1922).

¹⁹⁸ Wang, *supra* note 96, at 499; see also *id.* at 500 (noting that during the yearbook period members of corporate groups could be held jointly and severally liable for debts of the group even without a formal charter of incorporation).

¹⁹⁹ CAM, *supra* note 188, at 207.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Philip Hamburger *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908 (1993) (stating that “natural rights were circumscribed by their very character as natural rights” and by natural law).

²⁰³ MARTIN WEINBAUM, *BRITISH BOROUGH CHARTERS* xxvii-iii (1943) (discussing the ways in which the charter of incorporation’s elasticity allowed town oligarchies to take on more responsibilities as they learned the ways of self-government, and also allowed self-government to spread out from these oligarchies); see also TIERNEY, *supra* note 66, at 171-72. (Arguing the vast extension of civil liberties that occurred in the twelfth century came through the grant of charters of rights to corporate communities, churches, boroughs and cities for instance; but often the rights

VII. EARLY MODERN DEVELOPMENTS

Boroughs and ecclesiastical organizations were not the only corporate right-holders in medieval England. Business corporations were unusual, but the guilds formed out of the boroughs asserted economic rights to autonomy that would grow through the early modern era. Guilds were identified closely with the borough. Charters might “enforce guild regulations and monopolies . . . and could give the town a trading monopoly in its county.”²⁰⁴ Guilds enjoyed substantial rights of the borough, including freedom from toll, because they often were seen as themselves representing their local municipal corporation.²⁰⁵

Business corporations seen as separate entities from the geographically based borough/merchant guilds were slow to develop. The first large business corporations in England were the quasi-governmental foreign trading companies, which were granted the privilege to explore, colonize, and trade in particular geographic areas.²⁰⁶ These corporations were created either by royal charter or by special act of Parliament.²⁰⁷ An example of these trading companies is the still viable Hudson Bay Company which was granted a royal charter in 1670.²⁰⁸ Companies chartered for such commercial activities nonetheless mixed economic with colonizing and governmental functions; the Jamestown (Virginia) and Massachusetts Bay Companies, for example, ran colonial governments, enforcing laws and providing local administration, as well as conducting trade.²⁰⁹

Thus, trading companies resembled boroughs in their mixed political/social/economic nature, though trading companies’ activities and sphere of autonomy were significantly larger. Trading companies’ growth came about at

were of a kind that could actually be exercised only by individuals, e.g. the right of a merchant to come and go freely. Earlier medieval society had certainly recognized individual rights, especially feudal rights, but there was nothing liberal or egalitarian about them. A baron’s right was typically an exemption from royal jurisdiction, a right to dominate others. One of the most cherished of feudal rights was the right to have a gallows. But when rights or liberties, exemptions from official meddling in certain areas of life, began to be granted to corporate communities, they took on a new tone and quality and became diffused through much broader classes of the population. From the twelfth century onward thousands of urban communities acquired such rights through purchase or negotiation or sometimes outright rebellion—rights like freedom from arbitrary taxation and arbitrary arrest, freedom from servile dues, the right to be tried by one’s own townfolk in a local town court, and the right to elect a mayor and other city officials. This was rich soil where later more generalized theories of civil rights would take root and grow.).

²⁰⁴ REYNOLDS, *supra* note 97, at 102.

²⁰⁵ *Id.* at 102.

²⁰⁶ JAMES D. COX ET AL., *CORPORATIONS* § 2.2.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.*

the time of, and perhaps reinforced, growing suspicion of corporate groups among those at the center of English power. By the sixteenth century it was assumed that the creation of a corporation required the sanction of the state, though such was not openly stated until 1682, in a suit against the London charter.²¹⁰ Over the sixteenth and seventeenth centuries there developed a theory of corporate purpose according to which each corporation was limited in its licit actions to those taken in furtherance of the purpose for which it was created.²¹¹ This *ultra vires* doctrine, which was applied to boroughs as well as business corporations, was justified as a means by which the sovereign could limit the assumed rights of corporations—those which corporate groups did not enjoy on account of their charter, but which were deemed necessary for carrying out their purpose.²¹² Also during this period outside controls over corporate groups increased through regularization of the role of the visitor in ecclesiastical corporations and those, such as charitable hospitals, formed to carry out the will of a founding grantor.²¹³ Such measures merely added to Parliamentary actions beginning in the fifteenth century, which gave justices of the peace oversight of ordinances instituted by guilds and similar bodies such as crafts and fraternities.²¹⁴

During the early modern era there grew significant limits on the rights of corporate groups. Moreover, the spread of municipal rights was eliminated sometime before the eighteenth century, when new borough incorporation ceased.²¹⁵ With shifts in population came the problem of “rotten” or under populated boroughs, which local lords might control along with Parliamentary elections, even as great cities grew up in areas not possessed of charters, and hence corporate rights and Parliamentary representation.²¹⁶ Nonetheless, the corporate form was too well established to be abolished, and customary, substantial rights of self-government continued. In addition, the early modern era saw a great expansion of corporate rights rooted in the common law; rights intimately connected with economic life, but deeply impacting social and political life as well through their incorporation in guilds, business companies and the companies responsible for settling the new world.

²¹⁰ Holdsworth, *supra* note 197, at 383.

²¹¹ *Id.* at 386.

²¹² *See id.* at 396-97.

²¹³ *See id.* at 394-95.

²¹⁴ *See id.* at 395.

²¹⁵ Williams, *supra* note 150, at 392.

²¹⁶ Timothy P. Brennan, *Cleaning out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean up this Messy Process*, 13 WIDENER J. PUB. L. 235, 250 (2003) (discussing the manipulation of elections by royalty and the wealthy through use of “rotten boroughs”).

VIII. MUNICIPAL RIGHTS IN AMERICA

The American colonies were settled by people with deep respect for and attachment to corporate groups.²¹⁷ This allowed for both local diversity and certain overarching similarities. Virginia and Massachusetts, both chartered, corporated colonies, were very different in important ways. First, Massachusetts settlers considered it important to form themselves, through the Mayflower Compact, into a “civil body politick,” a society dedicated to living a Godly life.²¹⁸ Both, however, began and were for decades treated as corporations, with wide latitude for self-government.²¹⁹ The colonies took full advantage of this latitude,²²⁰ and of their isolated state, in exercising their local autonomy, governing themselves and making their own laws not inconsistent with the laws of England.²²¹

The law of corporations developed in England was brought directly to America and applied here. Thus, prior to the American Revolution the corporate charters of cities such as New York City were regarded as “inviolable grants of privilege and property not subject to the whim of legislative or royal author-

²¹⁷ See generally Liam Seamus O'Melinn, *The Sanctity of Association: The Corporation and Individualism in American Law*, 37 SAN DIEGO L. REV. 101, 116-21 (2000) (discussing early Americans' reverence for the group).

²¹⁸ See Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 25 (1990) (“We can note several foundation elements contained within [the Mayflower Compact (1620)]. First, God is called in as a witness to the agreement: ‘In the Name of our Lord Jesus Christ . . .’ Second, it explains why the agreement is necessary: to create a church in the wilderness to support their living together in a manner ‘as becometh all those whom He hath Redeemed, & Sanctified to Himself . . .’ Third, it creates a people: ‘We whose names are hereunder written . . .’ Fourth, it creates a church. Fifth, it defines the kind of people they wish to become -- a people who walk in the ways of the Gospels, God's ordinances, and in mutual love.”); see also *id.* at 26 (noting that the Pilgrim Code of Law (1636) re-stated the Mayflower Compact).

²¹⁹ *Id.* at 30 (describing elements of colonial charters) (“More often than not, the sixth element took the form of establishing an oversight council in England, but empowering the colonists to handle all collective decisions on their own, including civil and criminal matters.”).

²²⁰ *Id.* at 32-33 (noting that in Connecticut, this latitude was so broad that political leaders needed only to delete references to the King to transform the Fundamental Orders of Connecticut (1639) into the Connecticut Constitution); see also *id.* (noting that the Fundamental Orders of Connecticut, drafted by the colonists, was adopted by the King after the restoration of Charles II in 1660 as the Connecticut Charter of 1662). Likewise, Massachusetts and Rhode Island used their pre-revolution charters as their state constitutions. The other ten states wrote new constitutions, but these “largely brought forward their colonial institutions and political principles.” *Id.* at 22, 35.

²²¹ See *id.* at 23 (During the early colonial period settlers were “usually under the nominal control of a board of directors in London, the grant of local control, the impossibility of running any colony from London given the distance involved, and the preoccupation in England with the English Civil War gave the settlers considerable latitude in running their own affairs.”).

ity.”²²² But these charters had been granted by the crown; the vast majority of American municipalities lacked charters. This did not, however, keep unchartered municipalities from acting and being treated as important corporate groups, with rights analogous to those of English boroughs.²²³

Moreover, soon after colonization began, so did broad grants of power from colonial governments to their municipalities. The first “Town Act” was passed in 1636, granting powers far broader than those granted to lesser municipalities in England.²²⁴ These acts “were broad, open-ended mandates for the town meeting to manage local business.”²²⁵ Local popular sovereignty was so widespread and valued in colonial America that townspeople resisted chartered incorporation for fear they would thereby lose control of the town.²²⁶ Towns exercised significant authority in America, and townspeople held significant rights; particularly in New England, where the town meeting enabled them to vote directly on matters of economics, taxation, health, education and morals; and where early constitutional documents defined the powers of local elected officials as essentially executive functions designed to carry out the will of the town meeting.²²⁷ Before the revolution, New England towns already had established a pattern of government in which delegates were sent to the colonial legislature to represent their towns’ interests; rather than the towns deriving their legitimacy from grants by the colony, the colonial government derived its legitimacy from local assemblies.²²⁸ The reality of local rights spawned the view that, as Tocqueville put it, whereas the state and nation are creations of man, “townships seem to spring directly from the hand of God.”²²⁹

Not all Americans were fond of townships and their rights, especially after the revolution had separated America from England. James Madison, for

²²² Jon C. Teaford, *The Birth of a Public Corporation*, 83 MICH. L. REV. 690, 690 (1985).

²²³ See Williams, *supra* note 150, at 370-71; see also WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* 21 (4th ed. 1926) (“[The] American system of municipal government did not originate in America; it was borrowed from England”).

²²⁴ Williams, *supra* note 150, at 412.

²²⁵ *Id.* at 413 (quoting Lockridge & Krieder, *The Evolution of Massachusetts Town Government, 1640 to 1740*, 23 WM. & MARY Q 549, 550-51 (1966)).

²²⁶ See *id.*; see also Frug, *supra* note 82, at 1096 (noting that Charles Town, South Carolina successfully resisted incorporation, while the corporation of Philadelphia became over time a mere club with its powers superseded by special commissions and associations).

²²⁷ Dorchester Agreement 1633, reprinted in *Dorchester Town Records: Fourth Report of the Record Commissioners* 3 (Rockwell and Churchill, City Printers, 1880) (setting up a local representative body to carry out the will of the local town meeting, which predated it).

²²⁸ Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, 23 FORDHAM URB. L.J. 1, 7-9 (1995).

²²⁹ TOCQUEVILLE, *supra* note 62, at 62.

example, articulated in *Federalist* 10 his view of the negative impact on society to which majority rule could lead to, stating:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority . . . the more easily will they concert and execute their plans of oppression.²³⁰

Others during this period expressed mistrust for “municipal charters as perpetuating special privileges in derogation of the recently established republican form of government.”²³¹ Nonetheless, the Massachusetts Constitution of 1780 not only recognized towns’ claims to self-government, but also went further, “tacitly likening Massachusetts itself to the smaller corporations within it.”²³²

Madison’s view would win out as municipal rights came to be seen as rooted in an individualistic notion of self-government, according to which government itself “was nothing more than ‘a voluntary association of individuals: . . . a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.’”²³³ Thus, both the corporation and the state increasingly came to be seen as mere aggregations of individuals.²³⁴ Within a few decades of the revolution the “self” in “self government” increasingly came to mean the individual to the exclusion of the township or other corporate group.²³⁵

There seems an unbridgeable gulf between early practice, including early American practice, in regard to municipal rights and the current situation. Where once towns had rights granting them wide latitude in local governance and important immunities from state and federal action, today municipalities are considered mere administrative units of their states. They are allowed to exercise only those powers delegated to them by the state, taxing only as allowed by both state and federal limits; are forbidden from economic activities beyond operation of local, nonprofit public utilities; and are subject to all but absolute

²³⁰ Charles W. Goldner, Jr., *Home Rule School Districts: An Opportunity for Meaningful Reform or Simple Window Dressing?*, 21 S. ILL. U. L.J. 255, 268 (1997) (quoting *The Federalist* No. 10 (James Madison)).

²³¹ Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 300 (1990).

²³² O’Melinn, *supra* note 217, at 126.

²³³ *Id.* (quoting THE MASS. CONST. OF 1780, reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 441 (Oscar Handlin & Mary Handlin eds., 1966)).

²³⁴ *Id.*

²³⁵ See *id.*

state control.²³⁶ Even formerly local activities related to health and education are carried out or thoroughly regulated by larger governmental units.²³⁷ As Joan C. Williams notes, “although borough corporations exercised a broad range of both public and private powers and were substantially immune from state sovereignty, their modern American counterparts, municipal corporations, are purely public entities subject to the will of the sovereign states.”²³⁸

But while the gap between current and former practice may be unbridgeable, that to understanding is not. The very individualism regnant in talk of “popular sovereignty” soon undid the nexus of rights constructed over many centuries as it spawned hostility toward mediating groups thought to infringe individual choice. Key to this development was a distinction key to modern liberal ideology: that between public and private spheres of action.²³⁹

American municipalities lost their rights in large measure because judges and legislators during the early republican period could not or would not understand and accept their mixing of economic, social and political functions. Early on, there was a demand that municipal corporations be defined as either public or private. In the end, the public classification won out, and municipalities were subordinated utterly to the states.²⁴⁰

Thus the loss of municipal rights had its origins in the very body of thought often looked to as the source of individual rights. Social contract and other individualist thinkers in the early modern era, including Hobbes and Grotius, opposed medieval corporate groups as obstacles in the way of individual freedom and state efficiency.²⁴¹ Gerald Frug characterizes James II’s late-seventeenth century suit seeking to subordinate the city of London to his rule as a struggle between the Hobbesian view that a municipal charter was a state interest and the Lockean view that it was an individual right; the King’s (Hobbesian) view won out, but neither side any longer grasped the older reality of a municipal charter as recognition of a group incorporating its members rather

²³⁶ Frug, *supra* note 82, at 1062-65.

²³⁷ *Id.* at 1065.

²³⁸ Williams, *supra* note 150, at 370-71; *see also* Frug, *supra* note 82, at 1119-20 (“[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 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 them to play an important part in the development of Western society.”).

²³⁹ Frug, *supra* note 82, at 1065-67; *see also id.* at 1080 (arguing that city powerlessness is merely one aspect of liberal hostility to all intermediate groups between the state and the individual).

²⁴⁰ *See id.* at 1076.

²⁴¹ *Id.* at 1088-89.

than standing utterly outside of them.²⁴² As Frug notes, the London case was reversed by the Revolution of 1688 and its opposing interests mollified by the political victory of a locally-based Parliament.²⁴³ Nonetheless, a crucial set of beliefs and practices was being lost: that of charters as particular grants within a common law tradition rooting rights in custom and usage, and in a tradition, wherein corporate groups like the township exercised significant autonomy.

Soon after the revolution, American courts began distinguishing between “private” corporations, set up for some self-interested end, and “municipal” or “quasi” corporations serving the public.²⁴⁴ During the same era, courts began defining municipal rights according to statutory standards rather than usage and common law procedures.²⁴⁵ In *Stetson v. Kempton*,²⁴⁶ it was specifically held that Massachusetts towns were municipal corporations, and that they held only those powers given by the relevant statute.²⁴⁷

As Williams points out, *Stetson* is particularly important because it is the first case that makes apparent the public/private distinction in corporation law.²⁴⁸ Massachusetts was not the only state to begin distinguishing corporations as either public or private around this time. In 1818, in *Eustis v. Parker*,²⁴⁹ “New Hampshire courts also viewed their towns as public and employed the terminology of public and private corporations.”²⁵⁰

In New York the issue of municipal corporations was more complicated than in New England because of the existence and power of two cities with royal charters: New York City and Albany. After the break with England, New

²⁴² *Id.* at 1093-94.

²⁴³ *Id.* at 1094.

²⁴⁴ See Williams, *supra* note 150, at 421-22 (noting that the term “municipal corporation” was first applied to towns in *Dillingham v. Snow*, 5 Mass. (5 Tyng) 547 (1809), in which Chief Justice Parsons contrasted the very limited powers of parishes with the broad powers of municipal corporations “‘to assess and collect money for the maintenance of schools and of the poor, and for the making and repairing roads, and for some other purposes’” (quoting *Dillingham*, 5 Mass. (5 Tyng) 554)).

²⁴⁵ *Id.* at 422. (In *Mower v. Inhabitants of Liecester*, 9 Mass. (8 Tyng) 247 (1812), “[t]he court’s opinion once again set up an opposition between ‘corporations created for their own benefit’ and ‘quasi corporations,’ and linked Massachusetts town powers with state statutory authority.” (quoting *Mower*, 9 Mass. (8 Tyng) at 250)).

²⁴⁶ 13 Mass. (12 Tyng) 272 (1816).

²⁴⁷ *Id.*

²⁴⁸ Williams, *supra* note 150, at 429 (stating that the “assumption that municipal corporations were purely public suggests that Massachusetts courts had gone a substantial distance towards assimilating the public/private distinction into corporation law by 1816”).

²⁴⁹ 1 N.H. 273 (1818).

²⁵⁰ Joan C. Williams, *The Development of the Public/Private Distinction in American Law*, 64 Tex. L. Rev. 225, 234 (1985).

York reaffirmed pre-existing charters while also granting its legislature the constitutional power to grant new and modify old charters. For several decades the legislature refrained from aggressive use of its power over charters.²⁵¹ Moreover, between 1800 and 1830 New York courts went so far as to refuse to treat the towns as corporations at all.²⁵² This position was dictated by the power of New York City. Should the courts hold that towns were corporations, they would have to either cede all control over them by recognizing that the state constitution's provision on charter inviolability applied to all public corporations or assert the legislature's power to change any corporate charter at will.²⁵³ The first option was unacceptable to the state, the second to New York City.

Early on, New York City and the state struck a bargain according to which the City's Common Council repeatedly petitioned the state legislature for approval of its actions and approval was almost always granted. "[B]y 1815 the New York Supreme Court had made it a legal presumption that state legislation touching on municipal government reflected the stated preferences of that government."²⁵⁴ In other words, the court took it for granted that the state legislature consistently abided by the desires of the city in legislating for it. The city sought the approval of the legislature because it wanted to align itself with the state.²⁵⁵ The city also wanted the legislature's approval because some people mistrusted the city's republican character because it had been founded by royal charter.²⁵⁶ By going to the state legislature for approval of its actions, the city undercut its authority, but it was still exercising local autonomy by preparing legislation and submitting it to the legislature with the foreknowledge that the legislature would approve it.

The key turning point in the history of American local government came with *Trustees of Dartmouth v. Woodward*.²⁵⁷ Here, the United States Supreme Court had to determine whether the state of New Hampshire could intervene in the affairs of the private corporation of Dartmouth College; it was in this case that the Court established the legal distinction between municipal corporations and corporations set up for business or charitable purposes.²⁵⁸ In holding

²⁵¹ See HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 4 (1916) (ascribing state restraint to the small size of towns during this period).

²⁵² Williams, *supra* note 150, at 400.

²⁵³ See *id.* at 393-94.

²⁵⁴ HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* 98 (1983).

²⁵⁵ See *id.* at 126.

²⁵⁶ Teaford, *supra* note 222, at 692-93.

²⁵⁷ 17 U.S. (4 Wheat.) 518 (1819).

²⁵⁸ David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 498 (1999).

that the legislature could not alter the college charter, the Court emphasized the private, contractual nature of the charter, defining it as a vested property right of the original grantor.²⁵⁹ Chief Justice Marshall went further, stating that the legislature did have the right to alter "public" corporations like municipalities because such corporations are mere instruments of government created and properly ruled by the state.²⁶⁰

The differences between New England and New York can be seen in how *Dartmouth* affected the course of municipal law in each. Because prior to *Dartmouth* New England already had accepted the public/private distinction, *Dartmouth* merely confirmed the ongoing trend of treating cities and towns as public corporations.²⁶¹ In contrast, in New York confusion regarding the status of local governments reigned for forty years after *Dartmouth*.

Beginning in the 1820s, New York courts worked out the public/private distinction in a manner significantly different from that in New England. New England courts separated public from private corporations; New York courts separated public from private functions within municipalities.²⁶² In the third edition of his *Commentaries*, Chancellor Kent developed this governmental/proprietary distinction.²⁶³ According to Kent, municipal authority consisted of legislation for the public good and possession of property for municipal use; Kent asserted that, because towns were founded by governmental entities, only their proprietary possession was due protection from state control; such remains the law today regarding cities.²⁶⁴

Between 1831 and 1842 the New York Supreme Court developed this distinction in a series of cases dominated by Justice Samuel Nelson. In *People v. the Corporation of Albany*,²⁶⁵ Nelson held that a city had only those powers specifically granted in its charter. In this case, there being no provision in Albany's charter authorizing it to cut down the bulkhead of the Erie Canal, the fact that doing so was necessary for the public health did not alter the need for specific authorization from the legislature for such action.²⁶⁶ In *People v. Mor-*

²⁵⁹ Williams, *supra* note 150, at 395.

²⁶⁰ Barron, *supra* note 258, at 501-02 (quoting *Dartmouth*, 17 U.S. (4 Wheat.) 518).

²⁶¹ Williams, *supra* note 150, at 240 ("Although most New England lawyers by 1820 accepted the existence of two mutually exclusive categories of public and private corporations, they had yet to agree on how to define the 'publicness' of municipal corporations or the 'privateness' of business corporations.").

²⁶² See *Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826) (upholding city bylaw repealing its covenant with the church for quiet enjoyment).

²⁶³ Griffith, *supra* note 231, at 302.

²⁶⁴ Frug, *supra* note 82, at 1104-05.

²⁶⁵ 11 Wend. 539 (N.Y. Sup. Ct. 1834).

²⁶⁶ HARTOG, *supra* note 254, at 208. Cutting down the bulkhead was necessary to remove garbage rotting in the Erie Canal.

ris,²⁶⁷ Nelson emphasized the distinction between private corporations, which were “the private property of corporations” and so proper subjects for protection from legislative action, and municipalities, which were mere “political institutions” incorporated “for the good government of the people.” In the latter case there was no contract; the state owed no duty in regard to “their creation, continuance, alteration, or renewal” save to the public, and thus incorporation was indistinguishable from other public acts.²⁶⁸

Finally, in *Bailey v. the Mayor of New York*,²⁶⁹ Nelson defined the public and private spheres of municipal corporations.²⁷⁰ The Croton waterworks were constructed to supply the city of New York with water; *Bailey* concerned the city’s liability when the dam built for these waterworks broke and damaged a dam downstream.²⁷¹ In denying municipal liability in this case, Nelson held that operation of the waterworks was a private activity because the city owned the company, as property.²⁷² This holding flew in the face of assumptions by both city leaders and the state legislature that the waterworks project was a municipal activity for the public good.²⁷³ Thereafter, judges took it upon themselves to determine, independent of legislative intent, the public or private nature of municipal activities.²⁷⁴

By 1846, in the state of New York even the cities’ right to select their own local officials was being undermined—despite a state constitutional provision that guaranteed that very right. The cities were denied the right to select their local officials in three main ways. First, the legislature would create a special commission and appoint its officers; the courts found that the constitution did not prohibit the appointment of officers who performed “temporary” functions, even if those commissions lasted for years.²⁷⁵ Second, the legislature would “abolish an existing ‘city office’ as such, create a geographical district larger than the city, provide for the central appointment of the officers of this district, and empower them to carry on the functions formerly performed by city officers.”²⁷⁶ Third, the legislature, with judicial sanction, took upon itself the power to appoint “any officer in any city provided the functions of that officer

²⁶⁷ 13 Wend. 325 (N.Y. Sup. Ct. 1835).

²⁶⁸ HARTOG, *supra* note 254, at 210.

²⁶⁹ 3 Hill 531 (N.Y. Sup. Ct. 1842).

²⁷⁰ HARTOG, *supra* note 254, at 226.

²⁷¹ *Id.* at 225.

²⁷² *Id.* at 226.

²⁷³ *Id.* at 227.

²⁷⁴ *Id.* at 228.

²⁷⁵ MCBAIN, *supra* note 251, at 35-36.

²⁷⁶ *Id.* at 36.

had not been performed in that particular city by some local officer prior to 1846.”²⁷⁷ Through these means the state legislature effectively controlled the governing of cities.²⁷⁸

In 1857 the New York state legislature asserted its utter dominance over municipal governance, proclaiming its freedom to intervene at will.²⁷⁹ The courts affirmed this power in *People ex rel. Wood v. Draper*,²⁸⁰ upholding the right of the state legislature, in opposition to a provision of the state constitution authorizing local governments to elect and appoint their own officers, to abolish the local police departments of New York City and Brooklyn and replace them with a state controlled Metropolitan Police District. The court’s reasoning? The state legislature possesses “the whole law-making power of the state.”²⁸¹

Thus, over time, New York’s distinction between public and private functions in municipal corporations lost its capacity to protect local autonomy. Even New York City’s ferry grant, previously seen as a property interest properly in the city’s “private” sphere, was now considered a proprietary interest which, like all other municipal interests and powers, was to be utilized in the interests of the state.²⁸² “New York courts ultimately combined their version of the public/private dichotomy with New England’s and held that municipalities were public corporations that nonetheless exercised both public and private powers.”²⁸³ This formulation was followed across the country.²⁸⁴

Once state supremacy had been established, all attempts to defend municipal rights were ineffective. In the doctrinal forefront of such attempts during the late nineteenth century was Thomas M. Cooley, who maintained that local self-government is a matter of right to be protected from state usurpation. According to Cooley, municipalities, not being mere creatures of the state, had no need for delegated authority.²⁸⁵ While the state had the authority to establish

²⁷⁷ *Id.* at 38.

²⁷⁸ *Id.* at 40 (citing floor debate during the Constitutional Convention of 1867-68 during which the statement was made that “of the entire amount raised for the annual support of the city of New York more than three-fourths . . . are disbursed by those who hold their appointments under state authorization and who are in no way responsible to the people of the city”).

²⁷⁹ HARTOG, *supra* note 254, at 237.

²⁸⁰ 15 N.Y. 532 (1857).

²⁸¹ Viteritti, *supra* note 228, at 13.

²⁸² HARTOG, *supra* note 254, at 257-58 (citing *People v. The Mayor of New York*, 32 Barb. 102 (1860)).

²⁸³ Williams, *supra* note 250, at 236.

²⁸⁴ *Id.*

²⁸⁵ Harold A. Olsen, *Procedural Barriers to Suits Against the State by Local Government*, 62 BROOK. L. REV. 431, 434 (1996).

municipalities, Cooley argued in *The People ex rel. LeRoy v. Hurlbut*,²⁸⁶ “[t]he right in the state is a right, not to run and operate the machinery of local government, but to provide for it and put it in motion.”²⁸⁷ Cooley based the legal doctrine of local sovereignty on English common law tradition and quoted Tocqueville frequently in defining the doctrine.²⁸⁸ He further noted that in America the towns preceded the states, and did not lose their autonomy on creation of the states. In *People v. Hurlbut*, he wrote that “the constitution [was] adopted in view of a system of local government well-understood and tolerably uniform in character, existing from the very earliest settlement of the country [and] the liberties of the people [were] generally... supposed to spring from and be dependent upon that system.”²⁸⁹

Cooley’s doctrinal arguments would have protected municipal rights from state usurpation, but by 1900 they had been rejected firmly in favor of the Dillon Rule.²⁹⁰ John F. Dillon actually formulated two influential doctrines limiting municipal power. The first barred municipalities from issuing bonds for railroads or other “private” purposes. The second subordinated cities to their states, making any autonomous activity difficult and a matter of leave rather than right.²⁹¹

Dillon sought to address corruption and other problems ascribed to municipal financing of railroads during the period following the Civil War.²⁹² His solution was strict enforcement by the state legislature of the public/private distinction regarding municipal activities, along with judicial oversight of the legislature.²⁹³ Key to this solution was Dillon’s insistence that all appropriate municipal activities were by nature “public.”²⁹⁴

In *Hanson v. Vernon*,²⁹⁵ Dillon applied the fourteenth amendment’s due process clause to limit the state legislature’s ability to impose a “tax” by way of a bond issue. The statute in question actually did not impose the “tax” directly, but rather authorized municipalities to issue bonds to aid the railroads. Dillon struck down the statute on the grounds that the tax lacked a permissible “public”

²⁸⁶ 24 Mich. 44 (Mich. 1871).

²⁸⁷ Williams, *supra* note 250, at 148.

²⁸⁸ Viteritti, *supra* note 228, at 699.

²⁸⁹ *Id.* at 11 (quoting *People v. Hurlbut*, 24 Mich. 44, at 98).

²⁹⁰ Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 89-90 (1986).

²⁹¹ *Id.* at 94.

²⁹² *Id.*

²⁹³ Frug, *supra* note 82, at 1110-11.

²⁹⁴ *Id.* at 1111.

²⁹⁵ 27 Iowa 28 (Iowa 1869).

purpose.²⁹⁶ According to Dillon, it was the responsibility of the court to enforce the public/private distinction against state as well as municipal action.²⁹⁷ As Williams remarks, Dillon's opinion was based on "an extremely innovative doctrinal argument . . . Use of the fourteenth amendment to protect property, rather than civil rights, is of course a hallmark of the constitutionalism of the *Lochner* Court."²⁹⁸

The second major doctrine Dillon formulated was that ascribing to the states plenary power over municipalities. Dillon's Rule was set forth in his 1872 treatise on municipal corporations:

It is a general and undisputed proposition of the law that a municipal corporation possesses and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the corporation, and the power is denied.²⁹⁹

Dillon stated the state-centered reasoning behind this rule in *City of Clinton v. Cedar Rapids & Mo. R.R.*³⁰⁰ "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control."³⁰¹ Thus Dillon, in the guise of transmitting the common law, overturned it, in the process destroying municipal autonomy and empowering the courts to determine the bounds of public and private activities. As Williams notes, both of Dillon's doctrines "served to translate a policy question about which there was little con-

²⁹⁶ Barron, *supra* note 258, at 508.

²⁹⁷ *Id.* at 526.

²⁹⁸ Williams, *supra* note 290, at 96.

²⁹⁹ ERNEST S. GRIFFITH & CHARLES R. ADRIAN, *A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS, 1775-1870* 39 (1983), (quoting JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 101-02 (5th ed. 1911)).

³⁰⁰ 24 Iowa 455 (Iowa 1868).

³⁰¹ Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL'Y & L. 683, 708 (1997), (quoting *City of Clinton v. Cedar Rapids & Missouri R.R.*, 24 Iowa 455, 475 (Iowa 1868)).

sensus—the proper scope of city power—from the realm of the legislature into a technical legal judgment suitable for a judge.”³⁰²

As an antidote to city powerlessness after the universal adoption of Dillon’s Rule, many states, beginning with Missouri in 1875, enacted home rule legislation or drafted constitutional provisions granting local government autonomy.³⁰³ Constitutional provisions in particular could be seen as establishing greater municipal autonomy by preventing legislatures from denying home rule authority.³⁰⁴ The purpose behind the home rule movement was to give local governments control over local matters. However, it was at a court’s discretion to interpret the constitutional provisions and legislative acts that created home rule, and “the courts have not found home rule to be a compelling reason to reallocate authority away from the state legislature.”³⁰⁵ In addition, courts were instrumental in defining which matters were strictly local in nature, generally siding with the legislature and against the cities.³⁰⁶ As a result of court interpretations, the home rule movement did not significantly affect state control over cities.

Another way cities attempted to restrict legislative interference in local affairs was by supporting constitutional provisions against special legislation, “that is, legislation applicable only to a particular local governmental unit.”³⁰⁷ The legislatures circumvented these provisions by defining a class of cities in such a way that the class only applied to one city.³⁰⁸ The courts upheld this legislative end-around.³⁰⁹

By 1907, the United States Supreme Court confirmed that local governments were completely subservient to the state. In *Hunter v. City of Pittsburgh*³¹⁰ the Court declared:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them The State . . . at its pleasure may modify or withdraw all such

³⁰² Williams, *supra* note 290, at 99.

³⁰³ R. Perry Sentell, *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 102-103 (1998).

³⁰⁴ Goldner, *supra* note 230, at 260.

³⁰⁵ Viteritti, *supra* note 228, at 14.

³⁰⁶ Viteritti & Russello, *supra* note 301, at 709-10.

³⁰⁷ Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames The Dilemma For State Constitutionalism*, 76 OR. L. REV. 909, 912 (1997).

³⁰⁸ MCBAIN, *supra* note 251, at 72-73.

³⁰⁹ Frug, *supra* note 82, at 1116.

³¹⁰ 207 U.S. 161, 178-79 (1907).

powers, . . . repeal the charter and destroy the corporation
In all these respects the State is supreme and its legislative
body, *conforming its action to the state constitution*, may do as
it will, unrestrained by any provision of the Constitution of the
United States.³¹¹

Today, then, municipalities stand to the states as boroughs stood to the English monarch prior to formalization of *quo warranto* proceedings. Charters provide no substantive rights to either the municipality as a corporate group or to the local citizens as members of that group. Altered or revoked at will, without cause or due process, the charters are nothing more than statements of current policy. This situation resulted from a decades-long campaign to strip municipalities and their citizens of rights of self-government in their localities. Mayors, town councils and other local leaders lost the right to exercise control over local administrations and even to set up and control their own police forces—rights even heavy-handed kings during the medieval era had ceded to the boroughs. And the citizenry, from having the right to control its own local affairs in a wide-range of areas including economic regulations, health, safety and morals, lost such direct control in the town meeting and even the right to meaningful voting rights in the locality as cities increasingly became mere administrative units doing the bidding of the state. As municipalities lost rights necessary for control of their own destinies, so did their citizens.

IX. RIGHTS IN THE AMERICAN BUSINESS CORPORATION

The public/private distinction might be seen as increasing the rights of business corporations. It established the sanctity of business corporation charters and agreements as contractual property rights. Individuals' investments in corporations have gained great protection. Corporations also may be seen as having acquired increased rights. More than a century ago, corporations in America even began being accorded a number of constitutional rights of individuals, such as that against unreasonable search and seizure.³¹² But the result has not, in fact, been a substantive increase in either the rights of groups or the rights of persons. The corporation has become less a person than a machine for the generation of income. Corporations today are defined as structures owning property, acting and in particular having legal existence and liability separate from that of their shareholders.³¹³ Though its roots lie in corporate groups

³¹¹ Goldner, *supra* note 230, at 259, (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (alteration in original)).

³¹² Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 183 (1985) (noting that it was the decline of the view that corporations were created by grant of the state that allowed them to be accorded rights as individuals).

³¹³ COX ET AL., *supra* note 206, § 7.1.

through which members exercised the right to control important aspects of their lives in common, the corporation today has reduced shareholders to mere passive investors, as it has reduced managers to mere income maximizers.

Real autonomy involves moral decisions beyond technical concerns related to profit maximization; it concerns substantive ends about the kind of life one wishes to pursue with one's fellows, the kind of person one wishes to be. The corporation is no longer considered to aim at such ends; it no longer has the right to be a moral actor. Moreover, the shareholders no longer have the right to act morally within the corporation. They no longer have the right to pursue moral conduct through their participation in the corporation. According to the court in the seminal *Santa Clara*³¹⁴ case, shareholders, at least since 1883, have "only a right during the continuance of the corporation to participate in its dividends, and, on its dissolution, to a proportionate share of its assets[.]"³¹⁵ Further, the grant of constitutional rights to corporations did not increase shareholder rights; instead it stripped them of standing to sue over corporate management decisions.³¹⁶ Thus it furthered two trends destructive of both individual and group rights: reduction of shareholder control, and reduction of corporate purpose—the appropriate end of the corporation—from common moral action to mere profit.

Through the end of the seventeenth century, there remained at least a memory of the business corporation as a combination of head and members, incorporating without standing utterly apart from them, as evidenced by corporate names like "The Governor and Company of the Bank of England," created by Parliament in 1694.³¹⁷ Moreover, these corporations had substantive purposes—for example trading companies were to conduct business and organize common life in particular geographic areas—affording purposive group autonomy. Such is no longer the case.

A business corporation may be seen as one formed to secure pecuniary gain for its members; much the same might have been said of a merchants' guild during the medieval era. But the form of the business corporation, despite its many differing ends, was not distinguished from those of municipal, ecclesiastical and charitable corporations early on. Indeed, at the end of the eighteenth century, there was not as yet a well-defined formal classification for business corporations.³¹⁸ The reason was simple: differing corporate groups were not all that different.

³¹⁴ *Santa Clara County v. Southern Pac. R.R. Co.*, 18 F. 385 (C.C.D. Cal. 1883).

³¹⁵ *Id.* at 402-03.

³¹⁶ Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 59 n.19 (1990).

³¹⁷ COX ET AL. *supra* note 206, § 2.2.

³¹⁸ DAVIS, *supra* note 155, at 3.

Like the municipalities, business corporations in America grew in large measure out of the trading companies responsible for colonization. Also like municipal corporations, early business corporations combined economic with more public ends. More specifically, economic corporations began to be formed during the late eighteenth century in England. But such corporations were formed (by royal charter or act of Parliament) generally only to accomplish acts of significant public utility such as railroad and canal construction (deemed necessary for industrialization). Ordinary commercial enterprises were generally organized as unincorporated joint stock companies, lacking corporate privileges.³¹⁹

Within the colonies, almost all corporations were established for religious and/or charitable, rather than business purposes.³²⁰ Indeed, Joseph S. Davis observes that incorporation solely for business purposes was so uncommon that the presumption must be that it did not take place during this era.³²¹ This is not to say that business corporations did not exist, only that the vast majority were local public service corporations.³²²

The mixed public/private character of business corporations continued after the revolution. American business corporations commonly were centered on provision of financial or municipal services: building and running turnpikes, bridges, wharfs and water supplies. Banks were the most important business corporations during the period immediately following the revolution.³²³ These corporations provided significant public benefits by creating credit and financial infrastructure.³²⁴ Despite their success in terms of both number and capital, however, banks' expansion slowed significantly after 1793. Banks had saturated their markets, reducing profits and, with them, pressure for additional charters.³²⁵ Municipal services corporations, on the other hand, continued to expand. These corporations provided public improvements without raising taxes. Thus, state governments often sought to encourage their formation by investing in the corporations themselves or guaranteeing corporate debt instruments, thereby mixing public with private capital.³²⁶

³¹⁹ COX ET AL., *supra* note 206, § 2.2, at 32.

³²⁰ James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 622-23 (1985).

³²¹ DAVIS, *supra* note 155, at 65-66.

³²² *Id.* at 5.

³²³ Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011, 1012 (2001).

³²⁴ George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 389 (1988).

³²⁵ DAVIS, *supra* note 155, at 295.

³²⁶ Carpinello, *supra* note 324.

In addition to supporting their capitalization, states aided business corporations by bestowing monopoly trade status and granting specific tax exemptions, the power of eminent domain, and/or exemptions from military service for corporate employees.³²⁷ State charters also often brought with them the power to assess local members for deficiencies or capital requirements.³²⁸ Some states even granted lottery privileges as a form of supplementary aid.³²⁹ In exchange, the state often received discounted corporate stock or substantial tax payments.³³⁰

There was substantial opposition to the spread of these specially privileged business corporations. One objection was that such corporations, as concentrations of power and wealth, were inconsistent with a democratic society.³³¹ Another objection concerned the standard process of incorporation by special statute, with its susceptibility to corruption.³³² Related to the second objection was a third, to the direct state involvement in private enterprise.³³³ Despite opposition, however, after the revolution, increased capital accumulation from the war, along with an increased supply of labor from former soldiers and relationships formed in wartime, spawned increased incorporation.³³⁴ Between 1789 and 1801 over 270 charters were granted for business corporations.³³⁵

Certain state supports for business corporations dwindled over time. By the 1840s many states began prohibiting further direct involvement in corporate business' operations. A brief resurgence of state—primarily local—corporate involvement during the 1870s was short lived. By the turn of the twentieth century, states generally refrained from direct financial interest in business corporations.³³⁶ Over the course of the nineteenth century, courts also began denying business corporations any automatic monopoly status and asserting limited liability for shareholders—a move that frustrated attempts at corporate assessments.³³⁷

³²⁷ *Id.*

³²⁸ COX ET AL., *supra* note 206, § 2.3, at 33.

³²⁹ DAVIS, *supra* note 155, at 327.

³³⁰ Carpinello, *supra* note 324.

³³¹ *Id.* at 390.

³³² Horwitz, *supra* note 312, at 181 (noting the roots of anti-corruption concerns in Jacksonian democracy).

³³³ See *infra* notes 244-52 and accompanying text.

³³⁴ DAVIS, *supra* note 155, at 6-7.

³³⁵ *Id.* at 8.

³³⁶ Carpinello, *supra* note 324, at 397-98.

³³⁷ COX ET AL., *supra* note 206, § 2.3.

Nonetheless, it would be a mistake to view the attempts at state involvement these developments blunted as somehow linked to an earlier view of the corporation as inherently public in nature. The mixing of public with private functions had changed radically in character by this time. The medieval view had treated corporate groups as having autonomy and purpose of their own—London's rights were linked to its flourishing as a city. Alternately, nineteenth century public concerns were linked to the use of business corporations for particular economic ends—treating corporations as tools for achieving industrialization rather than as independent sources of legitimate, autonomous common action. Any chance that the municipality-based guilds of the medieval era might become the model for business corporations was eliminated by hostile statutory actions against guild associations during the eighteenth century—guilds were treated as illegal restraints of trade and dealt with accordingly.³³⁸

Modes of incorporation also reflected the changing perception of corporate groups, with corporate purpose of decreasing significance over time. After initial grants from the English crown, the vast majority of colonial corporations were formed by grants from colonial proprietors, governors, or assemblies, despite there being no provision for such methods at common law.³³⁹ Incorporation by special statute followed. In 1811, New York began allowing persons to incorporate by compliance with a general statute, rendering the process much easier in the manufacturing sector in particular. Although the process became easier, the corporation's life would be limited to 20 years, with capitalization not in excess of \$100,000.³⁴⁰ Beginning in 1835 and again in 1888 there were spurts of activity in other states regarding numbers and liberality of general incorporation statutes. Then in 1896, New Jersey enacted what may be regarded as the first permissive modern incorporation act—that is, a statute that conferred broad powers on corporations, empowered promoters of corporations to set up almost any kind of corporate structure they desired, granted broad powers to corporate directors and managers, and provided great protection against liability for corporate directors and managers. Corporations also began legally holding stock in other corporations.³⁴¹ Other states followed suit.

The era of corporate trusts had begun. And trusts separated corporations from their members, making shareholders owners of something that owned

³³⁸ CHARLES E. RICE, *FREEDOM OF ASSOCIATION* 22 (1962).

³³⁹ DAVIS, *supra* note 155, at 3, 10 (noting that colonial authority to incorporate was presumed to be delegated from the crown). A discrepancy here arises, however, as, in English law, one corporation could not create another. Therefore, the incorporation of entities by the colonial authorities was theoretically impossible.

³⁴⁰ COX ET AL., *supra* note 206, § 2.2, at 31; *see also* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 457 (2d ed. 1985) (1973) (arguing that limits on capitalization declined over the course of the nineteenth century) (listing the "obsolete" Massachusetts capitalization limits during the late nineteenth century).

³⁴¹ COX ET AL., *supra* note 206, § 2.2, at 31.

something in its turn, thus distancing them from businesses of which they at one time would have been a part. At least as important, the demise of charters spelling out any particular corporate purpose beyond profit, the rise of the business judgment rule, and the commodification of corporate stock by the early twentieth century had succeeded in separating ownership from management. General charters meant there was no means by which members could become a cohesive moral group with common ends—and no means by which they could control management other than through the demand that management produce profits. The business judgment rule added to and expanded upon these elements by insulating management and directors from liability to shareholders so long as they act with reasonable care and within their scope of authority, without self-dealing.³⁴² Commodification reduced stocks from shares of ownership to security interests.

Morton Horwitz has dealt with the means by which commodification occurred, arguing that the late nineteenth century saw a switch from a theory by which incorporation was a grant from the state, through which certain businesses were granted exceptions from the common law, including limited liability, to an “entity” theory, according to which corporate businesses, with their privileges, began to be treated as normal ways of doing business, over which the state should have no particular power.³⁴³ In reality, what took place was a reduction of courts’ treatment of the corporation to a base form of utilitarianism lacking any focus on the corporation’s purpose, content or internal logic.

Contemporary theories of the corporation have little to do with the corporation; they are merely attempts to conceptualize the legal relations courts must sort out in particular cases. As long ago as 1938 a court could state:

[A] corporation has no need of defining it as a person or an entity, or even as an embodiment of functions, rights and duties, but may treat it as a name for a useful and usual collection of jur-
al relations, each one of which must be ascertained, analyzed
and assigned to its appropriate place according to the circum-
stances of the particular case, having due regard to the purposes
to be achieved.³⁴⁴

Because courts seldom look beyond the contract in front of them in their dealings with corporations, contemporary commentators can state that “[t]he ‘charter’ is properly regarded as the entire corporate constitution, arising from the incorporation papers and the applicable corporation laws. It constitutes a contract between the corporation and the individuals who become shareholders or members of the corporation.”³⁴⁵ The charter also can be viewed as a contract

³⁴² FRIEDMAN, *supra* note 340, at 450.

³⁴³ See generally Horwitz, *supra* note 312.

³⁴⁴ *In re Estate of Witkind*, 4 N.Y.S.2d 933 (1938) (quoting *Farmers’ Loan & Trust Co. v. Pierson*, 222 N.Y.S. 532 (1927)).

³⁴⁵ COX ET AL., *supra* note 206, § 3.11, at 56.

between the organizers and the state; the duties and rights flowing from the articles of incorporation, and the state incorporation laws can be viewed as forming a “nexus of contracts” that is all there is to the corporation. Indeed, the theory of the firm as a mere nexus of contracts stems from Ronald Coase’s view that firms exist solely on account of their status as less costly alternatives to market transactions. This analysis concludes that firms, with their hierarchical decision making structures, exist only to limit transaction costs associated with negotiating and enforcing contracts in the market. Accordingly, this has spawned significant literature examining business corporations as essentially collections of individual contracts.³⁴⁶ On this view, the corporation exists purely as a mechanism for transactions. It is an “entity” in the sense that it is an undefined being about which little is currently known.

The road from grant to entity took decades to traverse. There remained, even with the *Dartmouth* decision, some understanding of the corporation as having a substantive purpose, control over which was constitutive of the rights of the members. In *Dartmouth*, Justice Marshall referred to a corporation as the means by which “a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.”³⁴⁷ The object in *Dartmouth* was establishment and running of a particular kind of school; such was laid out in its charter.³⁴⁸ Marshall refused to allow New Hampshire to subvert that purpose. But what if the directors of the corporation themselves sought to subvert its purpose?

For decades courts attempted to enforce a purposeful vision of the corporation through use of the *ultra vires* doctrine. According to that doctrine, a corporation could only enter contracts and perform acts authorized by its charter or the law creating it and those not expressly prohibited which also were “fairly regarded as incidental to and consequential upon those things which are authorized by the charter.”³⁴⁹ The purpose of the doctrine was to make clear who was contracting for what; the stockholder was not to be held accountable for acts of which he or she was not informed and which he or she did not approve. Parties contracting with the corporation were deemed to have constructive knowledge of the proper scope of conduct of directors and agents.³⁵⁰ Notice was given

³⁴⁶ See, e.g., George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1103 n.1, 1105 n.10, 1162 (2004) (providing a general overview of the organizational literature spawned by Coase).

³⁴⁷ Trustees of Dartmouth, 17 U.S. (4 Wheat.) 518, 636 (1819).

³⁴⁸ *Id.* at 554.

³⁴⁹ REUBEN A. REESE, THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS § 47 at 69 (reprint Fred B. Rothman & Co. 1981) (1897).

³⁵⁰ *Id.* § 1, at 1.

specifically in the instrument creating the corporation, which would list its purpose, powers and members, as well as listing who could bind the corporation.³⁵¹

Such actions may be seen as intending to protect corporation members, seeing to it that their investments would be used to further the corporation's stated purpose. But one should keep in mind that courts also sought to protect the state's interest not only in the corporation's benefit to the public, but also in profit to investors.³⁵² And the first purpose, that of protecting stockholders, increasingly came to mean protecting investments rather than control. Over the course of the nineteenth century, courts put increasing restrictions on the power of corporations to make assessments on shareholders and developed a doctrine of limited liability that overruled existing practice. According to this doctrine, stockholders often were deemed liable for twice the par value of their stock until the corporation's liabilities were paid off, as well as being liable to corporate employees for wages.³⁵³

As the justification for the doctrine of *ultra vires*—that the corporation is a creature of the law, granted only those powers specifically stated in its charter—came under criticism, courts' application of that doctrine slackened. Between the era before the Civil War and 1930, courts went from strict to almost non-enforcement of *ultra vires*, with more and more peripheral activities being held to fall within the scope of the corporation's purpose and management's proper sphere. Moreover, general incorporation statutes undermined the logic and applicability of the doctrine because they allowed companies to incorporate for any lawful purpose, leaving no purpose to be enforced.³⁵⁴

The effect of a successful *ultra vires* claim was that the shareholders escaped the need to pay for the actions of the corporate managers. This aspect further emphasized the increasing separation of ownership from management. Neither partial performance nor the assent of every one of the shareholders could validate a contract not within the corporation's scope of powers.³⁵⁵ Thus, shareholders were held to be separate from the corporation.

In the end, shareholders' increased protection from liability came at the expense of their rights of control over the corporation. By 1900, corporate directors no longer were seen as mere agents of the shareholders, but rather as the corporation itself.³⁵⁶ One important factor contributing to this ascendancy of management was the demise of the Trust Fund doctrine. This doctrine held that the capital stock of a corporation was a trust fund held for the benefit of corpo-

³⁵¹ *Id.* at § 3, at 3-6.

³⁵² *Id.* at § 4, at 7-8.

³⁵³ FRIEDMAN, *supra* note 340, at 451.

³⁵⁴ Horwitz, *supra* note 312, at 186-87.

³⁵⁵ Oregon R. & Navigation Co. v. Oregonian R. Co., 130 U.S. 1, 22 (1889).

³⁵⁶ Horwitz, *supra* note 312, at 183.

rate creditors, for which corporate shareholders would be held personally liable. Thus, for example, if the stock had been watered (sold for less than its par value, often with fraudulent intent) the shareholders would be held liable for the difference on the grounds that they had left less than the full amount available to pay creditors.³⁵⁷ The growth of large, anonymous markets in stocks often left small, innocent shareholders paying for the frauds of others, undermining the doctrine's legitimacy and causing courts during the 1890s to erode its application. As the national market in stocks converted small, cohesive groups of shareholders sharing common substantive goals (e.g. founding a religious community in the new world or helping their city flourish by providing it with clean water) into impersonal investors with no common interest beyond profit, it rendered untenable the view that shareholders were members of a corporation, not fundamentally different from partners. Shareholders now were mere investors, they "came to be treated as completely separate from the corporate entity itself."³⁵⁸

The increasing size of American markets and corporations clearly was an important factor in the separation of ownership from management. As Horwitz relates, when American business enterprises were small, the partnership form was preferred, and even those businesses which incorporated tended to be owned by only a few stockholders, who did not buy or sell their shares on the open market.³⁵⁹ Thus, before increased size led to dependence on mass stock markets, corporate members were a small enough group to maintain a cohesive vision of what their corporation should do and how.

All this changed over the course of the nineteenth century. By the 1880s it was becoming clear that management, and not the shareholders, held the decision making power in large corporations. Shareholders were simply passive, atomized investors interested only in profit—itself not properly an end, but rather a means to other more substantive goals centering around the building of a good life lived in common with one's fellows.³⁶⁰ By 1919 a commentator would state that "[i]t cannot be too strongly emphasized that stockholders today are primarily investors and not proprietors."³⁶¹

This limited view of the role of shareholders spawned, as it was furthered by, changes in the means by which corporations might change their purpose and nature. Courts had imposed a requirement of shareholder unanimity for fundamental changes to the corporation. By the 1890s states were passing

³⁵⁷ *Id.* at 207.

³⁵⁸ *Id.* at 209.

³⁵⁹ *Id.* at 209-10.

³⁶⁰ See generally ARISTOTLE, 2 THE POLITICS OF ARISTOTLE BOOK 1 (B. Jowett, trans. 1885) (describing the purpose of acquisition and household management as the securing of sufficient means and leisure to lead a good life).

³⁶¹ Horwitz, *supra* note 312, at 206-207 (citing J. CARTER, THE NATURE OF THE CORPORATION AS A LEGAL ENTITY 160 (1919)).

legislation providing for majority rule in such instances.³⁶² Also, by the end of the nineteenth century, power was centralized in management through limitations on shareholder voting rights, in particular the provision of exclusive statutory powers in managers and the replacement of weighted voting with one-share-one vote.³⁶³

Corporate management had become the corporation, a legal entity wholly separate from the shareholders. It was the corporation that owned property, with shareholders holding only an indirect interest in the property and business, entitling them to a share of the profits and the distribution of assets upon liquidation.³⁶⁴ Moreover, the corporation itself had the right to sue officers over issues of control and financial mismanagement. Shareholders could defend their rights directly only through a class action lawsuit—a device foreshadowed as early as the 1830s. In addressing the question of what standard would be applied to management conduct in such lawsuits, Lawrence Friedman observes that courts “looked to the concept of fiduciary obligation. The officers and directors were trustees for the corporation. This meant that officers could not engage in self-dealing; they could not buy from or sell to the company; they were strictly accountable for any profits they made in transactions with the company.”³⁶⁵ Only self-dealing and gross negligence could bring personal liability of directors; otherwise, management’s “business judgment” would rule. Along with the death of the *ultra vires* doctrine and changes in voting rules, institution of the business judgment rule stripped from shareholders the right to control management and both determine and follow through on the corporations’ purposes.

Even as business corporations became more powerful, both they and their members lost crucial individual and group rights. Reduction of the business corporation to a machine for generating profits certainly contradicted the notion of organic unity behind the entity theory.³⁶⁶ But this development accurately reflects the subsequent demise of rights, whether inhering in shareholders, managers, or the corporation as a whole, to pursue substantive moral ends through business conduct.

Corporations no longer are allowed to mix public with private ends. They no longer include even substantive business purposes in their charters—no limits on business conduct that could allow for the development of moral interaction within a specific sector of a particular industry. Shareholders of given

³⁶² *Id.* Many of these statutes also enhanced the ability of directors to initiate actions making fundamental changes to the corporation.

³⁶³ Lynne L. Dallas, *The Control and Conflict of Interest Voting Systems*, 71 N.C. L. REV. 1, 6 (1992).

³⁶⁴ COX ET AL., *supra* note 206, § 7.2, at 108.

³⁶⁵ FRIEDMAN, *supra* note 340, at 449-50, 452.

³⁶⁶ Horwitz, *supra* note 312, at 183.

business corporations rarely form a cohesive group with a particular moral vision. There no longer exists a meaningful sphere of autonomy within which corporation members may control their common actions and pursue goods in common within the corporate form in the realm of economic activity.

Even the assumptions of current corporate theory dehumanize everyone involved. Daniel J.H. Greenwood notes that corporate managers today commonly are held to be trustees for fictional shareholders whose sole desire is the maximization of profits. Such a view causes corporations to act in ways that this fictional shareholder would desire, but not necessarily in a manner any actual, living shareholder would approve.³⁶⁷ The dignity of the person, and of the group, at the root of rights theories is thereby denied as the actual conduct of corporations is pushed, in the name of a theory, away from the actual preferences of living, breathing human beings.

X. RIGHTS, LIBERTY AND THE DIVERSITY OF GROUPS

Neither townships nor business corporations are any longer capable of serving as makeweights against the power of the state. Business corporations may be seen as influencing the central government—as Jouvenel saw all individuals seeking to influence the new, total state.³⁶⁸ But one thing they do not do is limit the state's power to control the lives of people in their constitutive groups. Where once society was composed of a multitude of diverse groups in which people sought to act with one another so as to pursue a variety of common goals, today the model is one of an overarching state protecting the rights of individuals from other individuals, from any group that might attempt to take actions they find offensive, and from the state itself.

But who guards the individual rights so valued in this political society? It is the state which stands alone as both guardian and guarded. A multitude of authorities, aiming at differing ends, engaging in a mixture of political, economic and purely social acts, allowed space for each person to carve out his or her own sphere of autonomous action while also pursuing substantive goods in common with his or her fellows. Before lauding too vociferously the accomplishments of the unitary state and its rights regime, we would do well to consider the rights it has destroyed through its hostility to corporate groups. It is all well and good to point to the undoubted injustices of the past, but to ignore the dangers of the current state, along with the loss of variety, social engagement and moral choice it has brought, is to reduce real diversity and choice to a matter of consumerism, which can be provided without effective rights.

³⁶⁷ Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1022-29 (1996).

³⁶⁸ JOUVENEL, *supra* note 74, at 395 (arguing that individuals in a democratic state in which the central government has done away with all makeweights have no choice but to seek control over the machinery of power in order to lead lives not enslaved to that power).