THE INVENTION OF THE MUNICIPAL CORPORATION: A CASE STUDY IN LEGAL CHANGE*

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INTRODUCTION

Although over seventy percent of the American population lives in cities,[1] and nearly forty-five percent of all funds spent on government in America are spent at the local level,[2] American cities have remarkably little inherent power. According to modern legal theory, cities are "mere subdivisions of the state"; their only powers are those given by state statutes, which courts construe strictly and state legislatures may modify at any time.[3]

The powerlessness of cities is particularly important today because of a series of recent Supreme Court decisions that have widened the scope of local government liability. The traditional lack of local government sovereignty has been fundamental, for example, to decisions holding cities liable under the antitrust laws[4] and under section 1983[5]—decisions that have compounded the limitations on cities' power to govern.[6]

The rise of cities' legal powerlessness is particularly intriguing because modern American local government law developed from the English law of corporate boroughs. Yet, although borough corpora-

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NATIONAL DATA BOOK AND GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES 19, 26 (1984).

2. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 6 (1982) (citing figures for FY 1977).

3. C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 50-51, 69-70 (1980).

4. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 49-50 (1982) (unlike states, cities not exempt from antitrust laws); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) (Brennan, J., concurring) (cities not sovereign and therefore not exempt from antitrust laws); L. ORLAND, *The Requirements for Antitrust Immunity*, in ANTITRUST AND LOCAL GOVERNMENT 73 (J. Siena ed. 1982) (cities do not receive antitrust exemptions of states).

5. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980) (municipalities have no qualified immunity in § 1983 suits); Monell v. Dep't of Soc. Serv., 436 U.S. 658, 690 (1978) (municipalities not immune from liability under § 1983).

6. R. FREILICH & R. CARLISLE, SWORD AND SHIELD 5-7 (1983); Freilich, *1979-1980 Annual Review of Local Government Law: Municipal Liability and Other Certain Uncertainties*, 12 URB. LAW. 577 (1980); Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government*, 13 URB. LAW. 1 (1981).

tions 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. The transition from borough to municipal corporation, which was completed in less than eighty years, provides the opportunity for a close study of legal change.[7]

A recent major study, Hendrik Hartog's *Public Property and Private Power*,[8] details the transformation of New York City from corporate borough to municipal corporation and portrays that city's transformation as central to the development of the legal framework of American cities' powerlessness.[9] Hartog contends that in the period from 1800 to 1830 confusion reigned over the status of American localities.[10] Hartog maintains that the confusion was cleared up during the period from 1835 to 1860 primarily in cases involving New York City.[11]

In Hartog's description of the law of city status during the first third of the nineteenth century, he cites cases from different states as if they were part of a unitary American approach to the legal sta-

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7. Steward Kyd published the definitive treatise on the law of corporate boroughs in two volumes in 1793-94. S. KYD, A TREATISE ON THE LAW OF CORPORATIONS (London 1793-94). John F. Dillon published the definitive American treatise stating the current framework of American local government law in 1872. J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

8. H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER (1983). Hartog's book has received uniformly favorable reviews in history journals. Appleby, *Defining the Public Realm: Property, Power, and Urban Politics in the New Nation* (Book Review), 12 REVIEWS IN AMERICAN HISTORY 198 (1984); Bussey, Book Review, HISTORY: REVIEW OF NEW BOOKS, March, 1984, at 101; Katz, Book Review, 1984 AMERICAN HISTORICAL REVIEW 1149. Such reviews are justified because they focus on what Hartog has done extremely well. As a close analysis of the development of New York City into a modern municipal corporation, Hartog's book is meticulously and extraordinarily rich. As a description of the development of American local government law, the study has major drawbacks. This Article explores those limitations.

9. H. HARTOG, *supra* note 8, at 13-20, 259-65. Hartog does not study in depth either the law or the "governmental culture" of any state other than New York. Presumably, Hartog's implication is that such study is unnecessary for an understanding of the development of the American law of municipal corporations. Hartog's explicit claims are more modest. He notes that "cases involving New York City were leading decisions in many areas of municipal corporation doctrine." *Id.* at 5.

This Article is the first in a series that will trace the development of important aspects of municipal corporation law and discuss their relationship to events outside of New York. The Article does not contend that New York law played an unimportant role in the formulation of American local government law. Rather, a goal of the series will be to trace the relationship between events in New York and contemporaneous developments elsewhere.

10. *Id.* at 7, 184-85.

11. *Id.* at 5. Philadelphia was the only major American city other than New York that was a borough corporation. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1096 (1980). Pennsylvania's state legislature abolished Philadelphia's incorporation shortly after the Revolution. *See* J. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 82-85 (1975). After the Revolution, therefore, New York City was the only major American corporate borough.

tus of American localities.[12] This article questions that assumption. It concludes that the transition from the English law of corporate boroughs to the American law of municipal corporations occurred quite differently in New York and Massachusetts.[13] Between 1800 and 1830, New York courts were convinced that English corporation law had continuing validity. Because the English law said that only boroughs were corporations, New York courts insisted that towns were *not* corporations.[14] By contrast, Massachusetts courts held as early as 1816 that English law was inapplicable in Massachusetts because New England towns were a new type of "municipal" corporation.[15] The invention of the municipal corporation in Massachusetts in 1816 calls into question Hartog's claim that the basic structure of American municipal corporation law was developed in New York cases in the period between 1835 and 1860.[16]

Because no adequate study of the English law exists, section I of this Article examines certain elements of English corporation law that proved crucial to its application in America. Section II describes the dramatically different reception of the English law in New York and Massachusetts.

I. ENGLISH CORPORATION LAW

In their efforts to formulate a legal status for towns and cities, courts in both New York and Massachusetts looked first to English corporation law. This section analyzes certain aspects of English law that became important once the law reached American shores. The section first describes what I call the "feudal logic" of English corporation law—an aspect of English law that explains why the law was extremely unstable (even in England) by the eighteenth century and why nineteenth century Massachusetts courts considered it "common sense" that the law was not relevant to their situation. The section then discusses the tension in the English law between

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12. H. HARTOG, *supra* note 8, at 179-204.

13. Obvious limitations accompany this Article's exclusive focus on cases from Massachusetts and New York. Without further study it is impossible to determine whether courts in states without the firm 17th century roots of New York and Massachusetts ever understood the difference between the use of the word "corporation" as it refers to the English borough, *see infra* notes 86-91 and accompanying text, and the 19th century American use of the word. *See infra* notes 178-82 and accompanying text (discussing New York); *infra* notes 267-92 and accompanying text (discussing Massachusetts). Courts in such states may simply have been unaware of the English usage.

14. *See infra* note 184 and accompanying text.

15. *See infra* notes 312-89 and accompanying text.

16. H. HARTOG, *supra* note 8, at 5. The invention of the municipal corporation in 1816 did not mean that the American law of municipal corporations had fully developed. Yet by 1816 Massachusetts had established two crucial changes to English corporation law that Hartog dates much later. *See infra* notes 312-89 and accompanying text.

the historical and theoretical definitions of "corporations." Courts in New York adhered to the traditional understanding that corporations were a historically defined closed set, while courts in Massachusetts seized upon the contradictory theoretical definition of "corporations" as the basis for their holding that Massachusetts towns were a new type of "municipal" corporation.

A. The Feudal Logic of English Corporation Law

English corporation law developed as a coherent doctrinal framework in the fifteenth and sixteenth centuries [17] and reached its mature form by 1659, when William Shepheard wrote the first treatise on the subject.[18] By the time Stewart Kyd published his influential two-volume corporation law treatise in 1793-94,[19] certain of the law's most basic elements—elements that were feudal in origin and rationale—had long been anachronistic. Yet two major aspects of the law's "feudal logic" persisted and ultimately proved particularly important to the development of local government law in America.[20]

The first anachronistic feature of corporation law was the definition of borough corporations' normal powers. The traditional set of borough powers dated from the late middle ages, before the modern notion of mutually exclusive public and private spheres predominated. Consequently, corporate boroughs exercised both public and private powers. By the eighteenth century, critics viewed the boroughs' traditional political powers as unduly oligarchical, and their traditional economic powers as excessively monopolistic.[21]

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17. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 469-90 (1923) (discussing development of the corporation).

18. W. SHEPHEARD, OF CORPORATIONS, FRATERNITIES AND GUILDS OR A DISCOURSE, WHEREIN THE LEARNING OF THE LAW TOUCHING BODIES-POLITIQUE IS UNFOLDED (London 1659) (there are many alternate spellings of the author's name, including Sheppard, Shepard and Shepherd.) Shepheard's treatise is basically a handbook on how to draft borough charters. As in modern practice manuals, it is long on practical advice and short on theory.

The second treatise on English corporation law was published anonymously in 1702. ANON., THE LAW OF CORPORATIONS (London 1702) [hereinafter cited as 1702 Treatise]. The 1702 Treatise notes that the only other treatise available was "a little Duodecimo by Mr. Shepheard." *Id.* at A3.

19. 1 S. KYD, *supra* note 7. Kyd's treatise was the most influential treatise on both sides of the Atlantic in the early 19th century. H. HARTOG, *supra* note 8, at 185.

20. By focusing on English corporation law's "feudal logic," this Article does not reassert Jon Teaford's claim that New York and other American boroughs in fact functioned as feudal boroughs. *See* J. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 16-34 (1965). Hartog has effectively refuted that claim. *See* H. HARTOG, *supra* note 8, at 33-43. This Article only asserts that English corporation law defined two of the categories that the law used to "carve up the world" in relation to feudal society because of the English borough's feudal origins.

21. *See* S. REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS 135 (1977) (noting traditional view that English towns moved from archaic democracy toward

Just as the powers granted to English boroughs were defined in relation to feudal society, so was the dividing line between what was and what was not a corporation. Groups that the law identified as aggregate corporations[22] seem unrelated to the modern eye: chartered boroughs, companies of merchants, including guilds,[23] and universities.[24] What did these groups share that caused them to be identified as corporations, while other groups, such as villages and towns, were not? The answer is that "incorporated" entities were corporations because they shared a special relationship to feudal society: each of the major English "corporations" developed from the late feudal practice of granting charters to groups that wanted to "opt out" of feudal obligations.[25] This division between groups that were corporations and groups that were not was the second anachronistic aspect of English corporation law.

1. The feudal logic of corporate boroughs' powers

a. The absence of a public/private distinction in feudal society

American legal historians have long been fascinated by the rise of the public/private distinction. Understandably, most studies focus on the development and decline of the distinction in America.[26] To understand why corporate boroughs exercised both public and private powers, however, one must return to feudal Europe.

Hartog links boroughs' mixture of public and private roles with eighteenth century civic humanism.[27] Hartog's claim that eight-

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oligarchy). Reynolds offers a critique both of this traditional view and of an alternative and more recent view. *Id.* at 135-39, 171-77. Reynolds provides an extremely sophisticated and measured reassessment of the relevant English medieval town history, and this Article relies heavily upon her work.

22. Common-law corporations were divided into corporations aggregate, composed of groups of people, and corporations sole. *See* 1 S. KYD, *supra* note 7, at 19-22. This Article deals with corporations aggregate only. Corporations sole had quite a different development. *See* 3 W. HOLDSWORTH, *supra* note 17, at 470-82.

23. 1 S. KYD, *supra* note 7, at 63. Kyd suggested that guilds probably were the first chartered corporations, and that the practice of expressly incorporating towns by charter probably was modeled upon the granting of charters to guilds. *Id.*

24. *Id.* at 328.

25. *Id.* at 42-43.

26. *See, e.g., The Public/Private Distinction,* 130 U. PA. L. REV. 1289-1602 (1982) (symposium). For critiques of the coherence of late 19th century public/private distinctions, see O. HANDLIN & M. HANDLIN, COMMONWEALTH 51-133 (1969) (discussing relationship of government and economy in Massachusetts from 1774 to 1861) [hereinafter cited as COMMONWEALTH]; H. HARTOG, *supra* note 8, *passim*; Hartog, *Because All the World Was Not New York City,* 28 BUFFALO L. REV. 91 (1979) (tracing changing definition of corporation in New York from 1730 to 1860); Horwitz, *The History of the Public/Private Distinction,* 130 U. PA. L. REV. 1423 (1982) (tracing development of public/private distinction through movements in political and legal thought).

27. *See* H. HARTOG, *supra* note 8, at 21-24; *see also infra* note 66 (critiquing Hartog's view on role of civic humanism).

eenth century New Yorkers understood New York City's borough structure in terms of civic humanism may well be justified. Yet the boroughs' mixture of public and private powers clashed with the growing tendency in the eighteenth century to think of the national government as purely public.[28] In fact, the boroughs' combination of public and private powers was a holdover from their feudal origin.

Historians agree that no sharp distinction between public and private powers existed in the middle ages.[29] Feudalism arose in the vacuum of power that resulted from the fall of the Roman Empire.[30] Feudal society substituted a complex system of personal relationships in place of government; these relationships provided a degree of protection in a violent age. In the fourth and fifth centuries A.D.,

> [n]either the State nor the family any longer provided adequate protection . . . . [A]t all levels of society, if one wished to protect oneself . . . one could do no better . . . than attach oneself to someone more highly placed. [Feudal society arose from the] increasing use of pacts of protection and obedience.[31]

Two types of relationships, initially quite different, composed the "protective network." At the top of the social scale, the protective relations originated in military alliances. Private fighting men chose their chiefs, and received gifts in return.[32] In the early period, the choice of both the lord and vassal was temporary, as was possession of the gifts, or "fiefs."[33]

At the lower end of the social scale, the feudal relationship between peasants and their lords did not have its origin in alliances of military chiefs, but was grafted onto a much older set of manorial relationships.[34] Like the relationship between lord and vassal, the

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28. Horwitz, *supra* note 26, at 1423.

29. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 230-31 (2d ed. 1898); J. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE 7, 13 (1970).

30. M. BLOCH, FEUDAL SOCIETY 148-49 (L.A. Manyon trans. 1964). Several eminent contemporary scholars of medieval history have explicitly adopted many of Bloch's basic conclusions. *See, e.g.*, D. HERLIHY, THE HISTORY OF FEUDALISM 1-6 (1970); J. Adams, Lecture Notes, History 50A, ch. 15, at 7-13 (unpublished manuscript available at The American University Law Review).

England was fully feudal after 1066. R. BROWN, ORIGINS OF ENGLISH FEUDALISM 21 (1973).

31. M. BLOCH, *supra* note 30, at 148-49; *see also* D. HERLIHY, *supra* note 30, at 3. Herlihy contends that

> [f]eudal institutions were not only spontaneous in development but were also in some sense 'domestic,' as they initially concerned not the king and the great men of the realm but the humbler freemen, who within the vacuum of governmental authority had to arrange for their own protection, security and support.

Id.

32. M. BLOCH, *supra* note 30, at 145-62.

33. *Id.* at 163-68.

34. *Id.* at 219-24. One innovative feature of Bloch's analysis is his rejection of the traditional distinction between feudalism and manorialism. J. Adams, *supra* note 30, at 7-8.

relationship between lord and tenant originated in personal tastes and needs.

> Nothing varied more from manor to manor according to locality, nothing exhibited more diversity, than the burdens of tenancy in . . . [early feudal times]. On certain days, the tenant brings the lord's steward perhaps a few small coins or, more often, sheaves of corn harvested on his fields, chickens from his farmyard, cakes of wax from his beehives or from the swarms of the neighbouring forest. At other times, he works on the arable or the meadows of the demesne. Or else we find him carting casks of wine or sacks of corn on behalf of the master to distant residences. His is the labour which repairs the walls or moats of the castle. If the master has guests the peasant strips his own bed to provide the necessary extra bed-clothes. When the hunting season comes round, he feeds the pack. If war breaks out he does duty as foot-soldier or orderly, under the leadership of the reeve of the village.[35]

Eventually both sets of relationships became standardized. At the upper end of the social scale, the link between lord and vassal became first permanent and then hereditary.[36] Feudal duties and benefits also stabilized. Moreover, the fief came to involve hereditary possession of land. Feudal services, or "incidents," were due in return. These incidents, originally military in nature, eventually evolved into a wide variety of cash or barter payments or, less frequently, into non-military services.[37] Thus, what began as a series of military alliances grew into a system of feudal relationships. The relationships at the lower end of the social scale also became standardized, as the relationship between lord and tenant came to be ruled by the "custom of the manor." In theory, both the lord and the tenants were bound to observe these ancestral rules.[38]

A lasting impact of feudal society's origins was its failure to view public and private powers as belonging to mutually exclusive spheres. Medieval chieftains busy subjugating their neighbors were not interested in exercising only "governmental" powers. Rather, they were interested in appropriating for themselves all the benefits it seemed feasible to appropriate.[39]

When feudal institutions were formalized, the lack of a pub-

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35. M. BLOCH, *supra* note 30, at 249-50.

36. *Id.* at 145-62.

37. *See id.* at 163-75, 194-210. Adams has noted that "English and German historians . . . tend to see feudalism as first of all a military management, characterized by the patterns of knights' fees." J. Adams, *supra* note 30, at 5; *see also* C. STEPHENSON, MEDIEVAL FEUDALISM 12-13 (1956) (discussing original military nature of feudalism).

38. M. BLOCH, *supra* note 30, at 248-49.

39. *See id.* at 219-24 (discussing feudal duties that lords received from vassals).

lic/private distinction persisted.[40] Consequently, feudal lords exercised some powers that modern law considers "private" (for example, lords' rights as their serfs' "landlord")[41] in addition to other clearly "public" powers (such as the right to judge their subjects in manorial courts).[42] This mixture of public and private rights characterized not only the powers of feudal lords, but also the powers of boroughs to which feudal lords began to grant a certain degree of autonomy in the late feudal period.[43]

b. The feudal logic of corporate boroughs' powers

Towns existed in medieval times, separate from the peasants and those in authority over them, as "isolated nuclei" of merchants and craftsmen.[44] Towns were dominated by "burgesses,"[45] who were similar in many ways to knights in rural areas, but crucially different in other respects, including their focus on commerce.[46]

A fairly large number of English towns were chartered as borough "corporations" in the late feudal era.[47] These corporations owed

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40. When feudal institutions were formalized, "statesmen, administrators and lawyers" attempted "to make sense of the confused traditions they had inherited [and] . . . to put them together into systems supporting an ordered society." D. HERLIHY, *supra* note 30, at 71. Historians have interpreted feudal society's lack of a public/private distinction at this later period in different ways. Some historians maintain that the protective relationship remained the central organizing principle. *E.g.*, J. Adams, *supra* note 30, at 11-23. Others shift their focus onto the property relationship between lord and vassal:

> [T]he property aspects of the feudal tie were coming to outweigh the personal aspects of vassalage. This process is what French scholars call the *realisation* of the feudal bond, growing dominance of 'real' property and 'real' rights in it over the considerations of sentiment and loyalty which had originally inspired the feudal relationship.

D. HERLIHY, *supra* note 30, at 77.

Maitland takes the argument a step further, and argues that government was property:

> Just in so far as the ideal of feudalism is perfectly realized, all that we call public law is merged in private law: jurisdiction is property, office is property, the kingship itself is property; and the same word *dominium* has to stand now for the *ownership* and now for *lordship*.

F. POLLOCK & F. MAITLAND, *supra* note 29, at 230-31. Maitland's analysis of feudalism as the linkage of government and property is strikingly similar to Hartog's analysis of 18th century New York City, and, in fact, Hartog quotes Maitland and notes that the linkage dates back to feudal times. H. HARTOG, *supra* note 8, at 23-25, 179-80.

41. *See* M. BLOCH, *supra* note 30, at 167.

42. *Id.* at 221-24.

43. *See* S. REYNOLDS, *supra* note 21, at 108-14.

44. *Id.* at 353.

45. According to Reynolds, the word "burgesses" appears to have acquired a relatively precise meaning, denoting those members of a borough corporation who have contributed their share of borough dues. S. REYNOLDS, *supra* note 21, at 97.

46. M. BLOCH, *supra* note 30, at 353.

47. *See* M. WEINBAUM, THE INCORPORATION OF BOROUGHS 48-125 (1937) (discussing evolution of incorporation from early period to classic age of incorporation). Those boroughs that were not founded in feudal times tended to receive "typical borough powers," and, therefore, (perhaps not consciously) were modeled after boroughs that were founded in feudal times.

their existence to the feudal practice of granting charters, which were formal documents describing the rights and obligations on each side of a feudal relationship.[48] Early municipal charters varied widely from place to place. Originally, charters represented specially tailored "deals" between seignorial lords (or the king) and burgesses. These charters served in part to formalize prior obligations or "customs," and in part to change old ways.[49] The core of borough powers that gradually arose was designed to eliminate the impediments burgesses faced in their pursuit of commerce:

> [A]s a speculator in real estate [the burgess] found feudal restrictions on landed property intolerable. Because his business had to be handled rapidly and, as it grew, continued to set new legal problems, the delays, the complications, the archaism of the traditional judicial procedures exasperated him. The multiplicity of authorities governing the town itself offended him as obstacles to the proper control of business transactions and as an insult to the solidarity of his class. The diverse immunities enjoyed by his ecclesiastical or knightly neighbours seemed to him so many hinderances to the free pursuit of profit. On the roads which he ceaselessly traversed, he regarded with equal abhorrence rapacious toll-collectors and the predatory nobles who swooped down from their castles on the merchant caravans. In short he was harassed or annoyed by almost everything in the institutions created by a society in which he as yet had only a very small place.[50]

By the twelfth century, borough charters began, fairly consistently, to grant powers that solved these problems. One borough power of major importance was the right to hold land in "burgage tenure." As early as 1100 the obligations of burgage tenure frequently excluded agricultural and other labor services, which were obviously undesirable to a town-dwelling craftsman or merchant, and consisted exclusively of money payments. In addition, burgage tenure entailed fewer restrictions on the sale of land than other forms of land tenure.[51] The burgesses also began with some consistency to gain the right to hold borough courts[52] and the right not to have to appear in any outside court.[53] One example of the concessions gained by charter amply illustrates the problems outside

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48. M. BLOCH, *supra* note 30, at 275-78.

49. *Id.* at 275. The notion of a "borough custom" first appeared in the 12th century. Reynolds notes that "[t]he customs in force in any town were often more eclectic than the charters suggest." Some customs dated from Anglo-Saxon times. S. REYNOLDS, *supra* note 21, at 95-99.

50. M. BLOCH, *supra* note 30, at 353-54.

51. S. REYNOLDS, *supra* note 21, at 93.

52. *Id.* at 102, 119-20.

53. *Id.* at 101.

courts presented for the merchant burgesses: burgesses won the right to defend themselves against criminal charges by oath rather than by battle.[54] The charters also established rules governing the collection of debts and limiting money penalties.[55] Finally, by 1200 many boroughs won freedom from the complex and sometimes heavy tolls that limited merchants' ability to transport their goods.[56]

By 1500 the process of bargaining among the towns, the lords, and the king made additional borough rights commonplace. Charters now normally included the right to elect members to Parliament,[57] a certain degree of town self-government,[58] including the right to elect a mayor and an alderman,[59] and quite extensive rights to control the economic life of the town.[60] Economic control included the right to establish monopolies for town merchants as well as rigorous measures regulating industry and commerce within the town.

The standard borough charter granted both "public" and "private" rights. As Hartog states, "the [borough] charter provided a continuum of governmental powers running from the almost purely governmental to the purely private."[61] At one extreme, the charter established a court structure and granted general regulatory authority to the town officers. At the other extreme, boroughs performed roles that the law today considers "private." A borough's right to control entry to trades, which unions exercise today, is but one example of borough rights over elements of economic life that today are traditionally left in the "private" sphere.[62] Moreover, a borough's "public" rights of sovereignty were linked with its "private" proprietary rights.[63] Maitland, as usual, says it best:

> A municipal corporation owns a few, but only a few, of the houses in the town. Over the whole town it exercises a certain governmental power. We have here two different ideas: they can be sharply contrasted. For one thing, we are accustomed to think

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54. *Id.*
55. *Id.*
56. *Id.* at 102, 127.
57. *Id.* at 111-12.
58. *Id.* at 108-14.
59. *Id.* at 108-09, 120-22.
60. *Id.* at 127-28. Pirenne termed towns' control over economic life "le socialisme municipale." 1 H. PIRENNE, *supra*, at 197.
61. H. HARTOG, *supra* note 8, at 19.
62. *See* S. REYNOLDS, *supra* note 21, at 127-28 (discussing borough control over apprentices, craftsmen, and merchants). Feudal society also failed to distinguish between public and private outside of the borough. Farmers, for example, even when they owned land, were not at liberty to cultivate it as they pleased. The jury of the manor court determined the system of cultivation. J.L. HAMMOND & B. HAMMOND, THE VILLAGE LABOURER 1760-1832, at 6 (1936).
63. F. MAITLAND, TOWNSHIP AND BOROUGH 30 (1898).

> that the governmental power is delegated by the state. The delegation will grow faint as we go backwards. There will be a sort of lordship over the whole town, and of a few houses there will be landlordship . . . [In feudal times all] political power exhibits proprietary traits, and every ownership of land is actually or potentially a right of governing and doing justice . . . .[64]

The struggle to separate ownership from rulership was a major feature of the early modern period. In the seventeenth century, the development of the nation-state promoted the notion of a "public" sphere; in the eighteenth century, John Locke and others defined private rights.[65] In the late middle ages, however, when the traditional set of borough powers was defined, no sharp distinction between public and private as yet existed. Boroughs, therefore, exhibited a characteristically feudal mixture of public and private roles. This is the first anachronistic aspect of English corporation law's feudal logic.[66]

2. *The feudal logic of which groups were corporations*

The second anachronistic aspect of English corporation law was the dividing line between the groups that were corporations and the groups that were not. This division, too, made sense only in relation to feudal society. The major types of common-law corporations in England were boroughs, guilds, and universities.[67] To modern (or even eighteenth century) eyes, these groups have little in common. From the standpoint of feudal society, however, they shared a

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64. *Id.*

65. *See* Horwitz, *supra* note 22, at 1423-24.

66. Hartog identifies the boroughs' mixture of public and private powers as the mixture of property and governance and explains it as a function of 18th century civic humanism. H. HARTOG, *supra* note 8, at 23-24. Hartog may be correct that 18th century New Yorkers would have explained their city's structure in terms of civic humanism. He skirts, however, a crucial question by claiming that "[i]n the eighteenth-century context . . . public action could not be separated from private action." *Id.* at 62. Hartog's statement conflicts with Horwitz's assertion that by the 18th century considerable progress had been made towards formulation of the public/private distinction in certain contexts. *See* Horwitz, *supra* note 26, at 1423. Specifically, Horwitz's material shows that the national government was viewed as public. Why, then, did New Yorkers continue to perceive the mix of public and private powers of the *city* government as legitimate? *See infra* note 398 and accompanying text (New York did not accept public/private dichotomy until 1857).

In order to trace the process of shift from the older view of authority as exercising both public and private power to the new view in which public and private were viewed as mutually exclusive spheres, one must identify the "mentality" in which each viewpoint originated. The mixture of public and private functions in boroughs, as Hartog admits, derived from the feudal mentality. *See* H. HARTOG, *supra* note 8, at 179-80 (citing F. MAITLAND, *supra* note 63) (discussion of feudal boroughs' mix of "lordship" and "landlordship").

67. *See supra* note 23 (citing Kyd's assertion that guilds were the first corporations). Boroughs were by far the most important. Shepheard, Kyd and the anonymous 1702 Treatise discuss borough corporations almost exclusively.

crucial similarity: all had "opted out" of feudal obligations by means of their charters.

The process through which chartered groups came to be defined as corporations is obscure. The borough charter that historians traditionally consider the first "charter of incorporation" dates to 1440.[68] Gradually, English law came to view charter grants as grants of corporate status,[69] which gave the "corporation" the so-called "five points": the right to have perpetual succession, to have a common seal, to sue and be sued, to hold lands, and to issue by-laws.[70] But the distinction between the old charter grant and the new "incorporation" remained unclear. By about 1470 a simple rule of thumb developed: any borough that paid the "fee farm" was a corporation.[71]

The "fee farm" was the traditional payment that boroughs owed to the king.[72] Kyd noted that formal incorporation required payment both of the rent to the local lord and the fee farm to the king.[73] Kyd reported that during Queen Elizabeth's reign "the rent and the farm was the cause of their [the boroughs'] ability to be a corporation."[74] Therefore, if the rent ceased, the corporations

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68. M. WEINBAUM, *supra* note 47, at 65.

69. *See generally id.* Lawyers and historians traditionally have oversimplified what "incorporation" meant at different periods. Weinbaum is to some extent guilty of this tendency. Reynolds warns against treating as preclusive and definitional words that were in the middle ages used "to describe, not to define." S. REYNOLDS, *supra* note 21, at 97.

70. S. REYNOLDS, *supra* note 21, at 113. Reynolds provides a useful discussion of the development and significance of incorporation:

> By the later fifteenth century a charter which would now be considered a charter of incorporation made a town a fictitious person in the eyes of the law by bestowing on it the so-called five points . . . . In practice many towns had exercised some or all of these rights long before and it was only gradually that developing legal theory made their formal expression useful . . . . By the later fifteenth century the standard form of incorporation charter gave a town a mayor and aldermen, made the mayor and others justices of the peace, and laid down rules for election. Clearly the most important features of incorporation were not the 'five points' of perpetual succession etc., whose significance is largely the creation of later lawyers and historians, but the grants of new jurisdiction like the commission of the peace and, even more, the giving of royal authority to a particular constitution within the town government . . . . Here it may be noted that, little as incorporation as such might mean at first, it gradually became common form, so that by the sixteenth and seventeenth centuries even the smallest towns with any pretensions to local independence were becoming incorporated, thus giving another gloss to the word borough, as a legally corporate town.

Id. at 113-14; *see also id.* at 116-17 (contending that greater attention to social structures rather than on academic definitions would yield better understanding of boroughs, communes, and guilds).

71. M. WEINBAUM, *supra* note 47, at 58, 88-91. Although Weinbaum reports that any borough that paid a fee farm was a corporation, he does not comment on the implication that every feudal charter would automatically be translated into a corporate charter through rigorous application of the rule. Only further research can determine exactly how the rule applied.

72. *Id.*; S. REYNOLDS, *supra* note 21, at 50, 102-03.

73. 1 S. KYD, *supra* note 7, at 4-5.

74. *Id.* at 4. By the late 18th century, Kyd considered this requirement anachronistic, as

ceased.[75] A rule that any borough that paid the fee farm was a corporation meant that any borough with a typical feudal charter became a "corporation."

As feudalism waned, the practice of granting charters to boroughs ended, and at some point before the eighteenth century the universe of borough corporations became a closed set. Consequently, in the eighteenth century many major local government units, including the newer urban population centers, were not chartered and were not incorporated. Only the approximately two hundred "ancient boroughs" were corporations.[76] Thus, London and Norwich were corporations, but Manchester and Birmingham were not. In addition, few counties and no parishes were corporations.[77]

Thus, the logic defining what groups were corporations, which had made perfect sense in the 1400's, made little sense by 1800.[78] As of 1800 political and social theorists had little use for a category that lumped together universities, guilds, and some towns, while it excluded other towns and all parishes and counties. As early as 1726, English commentators noted the irrationality of the distinction between corporations and unincorporated units.[79]

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indeed it was. *Id.* at 4-6. Yet a New York lawyer argued in favor of applying the rule as late as 1828. Town of North Hempstead v. Town of Hempstead, 2 Wend. 109, 117-18 (N.Y. 1828).

75. 1 S. KYD, *supra* note 7, at 5.

76. B. KEITH-LUCAS, THE UNREFORMED LOCAL GOVERNMENT SYSTEM 15 (1980).

77. S. REYNOLDS, *supra* note 21, at 113-14. Some counties were incorporated because some chartered boroughs had become counties. *Id.* In general, however, counties were not corporations.

78. I have limited my discussion to aggregate corporations. Corporations, however, included both aggregate and sole corporations. Aggregate corporations included universities, guilds, and boroughs. Sole corporations included the king, archbishops, bishops, and certain other clerics. Thus, when we consider both aggregate and sole corporations, the dividing line between corporations and unincorporated units, (a category that included some towns that could be very similar to incorporated boroughs) made even less sense in relation to early modern society. *See* 1 S. KYD, *supra* note 7, at 20 (discussing various kinds of corporations). The importance of the corporate status of sole corporations was that they, like aggregate corporations, could hold land in perpetual succession. The ability of anyone to hold land in perpetual succession in feudal society presented a severe threat because feudal incidents were due at the death of each tenant. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 15 (1966).

79. *See* T. MADOX, FIRMA BURGI (London 1726) (comparing incorporated towns with unincorporated towns). Professor Teaford suggests that the law's feudal logic was nonetheless preserved because English courts identified the rights of boroughs with the rights of Englishmen and sought to protect borough powers from the "onslaughts" of the Stuart "tyranny." J. TEAFORD, *supra* note 11, at 3-15. For rhetoric against the Stuarts, see J.W. WILLCOCK, THE LAW OF MUNICIPAL CORPORATIONS 9 (London 1827) (characterizing Stuart reign as "licentious, tyrannical, and devoid of moral and political virtue").

B. The Tension in English Corporation Law Between the Theoretical and the Historical Definitions of a Corporation

1. The preclusive claims of English corporation law

English corporation law encompasses two definitions of what was a "corporation." The predominant definition was historical: the only local government units that were corporations were the closed set of approximately 200 chartered "ancient boroughs."[80] A completely independent, theoretical definition of the "corporation," however, existed simultaneously in English law. This theoretical approach viewed corporation law as a framework that enabled a group to act in concert.[81]

A corporation could act as a group because it was a fictional personality, a "person in the eye of the law."[82] In the fifteenth century, legal scholars attempted to define the "nature" of a corporation in the scholastic manner. They noted that the corporation was invisible, of no substance, a mere name, and yet a person.[83] They discussed whether a corporate person could be outlawed or excommunicated; could be assaulted or imprisoned; could do homage or commit treason or a felony.[84]

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80. *See supra* note 76 and accompanying text.

81. *See, e.g.*, 1 S. KYD, *supra* note 7, at 3-4. The alternative theoretical basis in English law that allowed a group to act in concert was trust law, which allowed unincorporated groups to act through a trustee. 9 W. HOLDSWORTH, *supra* note 17, at 47-48.

82. 1 S. KYD, *supra* note 7, at 16. The idea of defining a group of people as a fictional personality probably entered England from Continental sources. Though some historians have said that Pope Innocent IV had made the first known mention of the idea of a fictional personality in 1263, in fact the idea dates back to Roman times. 3 W. HOLDSWORTH, *supra* note 17, at 363-64. In England its early development was in the ecclesiastical sphere to solve the legal question of who owned church property. *Id.* at 364. Bracton, an eminent medieval jurist of the 13th century, noted that a gift to a church was made in the first place to God and the saints. *Id.* By the 15th century, such gifts were to "corporations aggregate" (chapters and monasteries), or "corporations sole" (archbishops, deans, or rectors). These concepts solved the problem of creating a fictional entity with eternal life capable of holding land. *Id.* at 362-65.

83. 3 W. HOLDSWORTH, *supra* note 17, at 369.

84. 1 S. KYD, *supra* note 7, at 70-72; 1702 TREATISE, *supra* note 18, at 6-7. Blackstone attributed the statement that corporations have no souls to Sir Edward Coke (1549-1634), the famous English lawyer. 1 W. BLACKSTONE, COMMENTARIES *477. Early eighteenth century treatises on corporation law reflect this highly reified approach. The following is from the second corporations treatise in English, published in 1702:

> A Corporation or Incorporation is a body framed by Policy or Fiction of Law, and it's therefore called a Body Politick; and it's called an Incorporation or a Body incorporated, because the Persons are made into a Body which endureth in perpetual Succession; and are of Capacity to grant, sue or be sued, and the like. The Opinion of Chief Baron *Manwood* is odly [sic] express'd. Corporations are invisible, and immortal, and have no Soul; and therefore no *Subpoena* lies against them, because they have no Conscience nor Soul. None can create Souls but God . . . .

1702 TREATISE, *supra* note 18, at 2.

Kyd subjected such quasi-scholastic speculations to typical Enlightenment ridicule. 1 S.

The early modern scholars defined the corporation in theoretical terms.[85] At first this probably presented few problems. In theory, corporation analysis could have extended to any group that fit the reified definition of a corporation. English lawyers, however, eventually came to analyze only the closed set of historically defined entities as corporations.[86] This approach created a dilemma when later theoreticians changed the term "corporation" from a descriptive term into a preclusive one. Moreover, the general principle that corporations could hold land and sue and be sued as a group *because* they were persons in the eye of the law, became an assertion that *only* groups that were "persons in the eye of the law" could hold land and sue and be sued as a group.[87] As a result, English corporation law by the seventeenth century appeared to hold that a very broad range of groups in England, from unchartered towns to counties and parishes, could not exercise corporate powers.

Legal commentators noted the incongruity of the corporation law's preclusive claims as soon as they started examining the rules of corporations as a cohesive body of law. Thomas Madox's *Firma Burgi,* published in 1726,[88] discussed the preclusive claims of corporation law at length, and attempted to discredit them. Madox stressed the similarities between corporate and noncorporate towns: both were characterized by perpetual succession, holding at farm, paying common duties, manner of answering, and denomination.[89]

Stewart Kyd, in 1793, relied heavily on Madox, but Kyd altered Madox's analysis in a crucial way. Kyd stressed the preclusive claims of corporation law by stating that unincorporated towns *used* to exercise corporate powers, implying that they did (or should) no

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KYD, *supra* note 7, at 71. He reported a long list of corporate characteristics but then noted that the corporation was explicable "without having recourse to the quaint observations frequent in the old books, that [a corporation] exists merely in idea, and that it has neither soul nor body." *Id.* at 71. Kyd agreed with the 1702 author's recognition that the corporation "rests only in the intendment and consideration of law," 1702 TREATISE, *supra* note 18, at 6, but Kyd followed through the implications of that opinion and argued that it makes little sense to act as if the nature of a corporation entails a mere matter of logical deduction from first principles if the corporation is a creature of policy. 1 S. KYD, *supra* note 7, at 71.

85. For examples, see 9 W. HOLDSWORTH, *supra* note 17, at 49-53.

86. Incorporation became less and less common during the course of the 17th century. M. WEINBAUM, *supra* note 47, at 99. For lists of English boroughs and their dates of incorporation, see *id.* at 127-37.

87. The ability to hold land as a group and to sue and be sued as a group became the two most important corporate privileges because unincorporated groups (as well as corporations) could pass by-laws in certain circumstances. *See infra* notes 96-126 and accompanying text (discussing alternate bases of local government power).

88. T. MADOX, *supra* note 79.

89. *Id.* at 37. "Farm" refers to the fee farm. *See supra* text accompanying note 72. "Manner of answering" refers to the ability to sue and be sued as a group.

longer do so.[90]

Similarly, Kyd pointed out that "in ancient times" unincorporated groups could hold land and transmit it to their successors, but that this was no longer the case.[91] In formalizing a distinction between incorporated and unincorporated groups, Kyd formalized English corporation law's preclusive claims:

> There seems, indeed, no reason in the nature of things, why such grants should not have been allowed; there is certainly no *metaphysical* difficulty attending the transmission of landed property through a series of individuals in their collective capacity, without the support of a positive institution: It has, however, been long an established maxim of the English law, that land, granted to a community or aggregate body of men, not incorporated, cannot, by virtue of the original grant alone, be transmitted to their successors.[92]

2. *Alternative bases of local government powers in England*

By the end of the seventeenth century, the importance of English boroughs was waning.[93] The county and the parish, much more important local government units than boroughs in the seventeenth and eighteenth centuries, were unincorporated.[94] But only corporations could exercise corporate powers, which included not only the ability to hold lands and other property and to sue and be sued, but also the ability to pass by-laws, as local ordinances were called. The existence of a series of alternative legal concepts gave parishes, counties, and unincorporated towns authority to act in their assigned regulatory and service-provision roles even though they were not corporations.[95] These concepts also moderated the dissonance

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90. 1 S. KYD, *supra* note 7, at 3-4, 10. Kyd stated that

> It is another characteristic of the corporation, that it is capable in its collective capacity of processing property, and transmitting it in perpetual succession; but this, *in ancient times,* was not peculiar to a corporation: Madox, in his *Firma Burgi* . . ., gives a variety of instances, of towns not corporate, holding their town at ferm in the same manner as towns corporate . . . . Another characteristic of a corporation is, that it may sue and be sued in its collective capacity; but *in ancient times* there are many instances of other collective bodies suing and being sued in the same manner.

Id. (emphasis added).

91. *Id.* at 5-6 (quoting Lord Coke).

92. *Id.* (emphasis in original).

93. 2 B. & S. WEBB, THE MANOR AND THE BOROUGH, 7-8 (1963).

94. 1 B. & S. WEBB, THE PARISH AND THE COUNTY *passim* (1963).

95. Although scholars such as Maitland and Holdsworth devote substantial attention to the history of English corporation law, *see supra* notes 17, 40, & 66, no similar literature exists on the alternative basis of local government powers in England. Some legal doctrines that developed in the context of towns, however, played important roles in America. An example is the development in New York of the doctrine of corporations for a particular purpose. *See infra* text accompanying notes 110-17 & 183-240.

between the preclusive claims of English corporation law and the necessities of local governance.

One alternative basis for governmental authority was the right to act pursuant to custom. Many corporate boroughs possessed important rights by custom.[96] But the right to act pursuant to custom was not limited to incorporated groups. According to the 1628 edition of *Coke on Littleton,* "an upland Towne [an unincorporated group] may allege a custome to have a way to their church, or to make By-lawes for the reparations of the Church, the well ordering of the Commons and such like things."[97]

Borough customs involved both political and economic rights. Medieval towns and villages had existed in a fundamentally agricultural society. Their customs, therefore, tended to involve agricultural rights, such as the right to make by-laws for "the well ordering of the Commons and such like Things," as, for example, a by-law that "none shall put his beasts to the common field before such a day. . . ."[98] Other rights included town powers to pass by-laws concerning matters of the forest and customs concerning fishing. An English town, for example, adopted a by-law that provided "that none shall kill salmons at certain seasons of the year, and so of other fishes."[99]

Thus towns and villages had by custom the authority to take the basic actions necessary for the maintenance of village life—"the sowing of crops, the maintenance of local bridges and footpaths, and the care of straying animals."[100] Yet these customary powers had limited utility because they were backward looking: they could not provide the basis for new duties thrust on local government units in the early modern age.

A second, but apparently little-used basis of local government power was a town's or parish's power to act "pro bono publico" without any custom to support its by-law. Commentators occasionally described this power in broad terms. According to Kyd:

> [t]he inhabitants of a town not incorporated may, without any custom to authorize them, make a by-law for the repair of a church, or of a highway, or concerning any thing which the public good requires to be regulated; and in such a case the majority shall bind

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96. *See supra* note 49 and accompanying text (discussing custom as authority).

97. E. COKE, COKE ON LITTLETON 110b (London 1628). These unincorporated "upland" towns, however, could not devise lands by custom. *Id.*

98. 13 By-law, 1 Gould 79, 75 Eng. Rep. 1007 (1588); *see also* Lord Crumwell's Case, 3 Dyer 321b, 73 Eng. Rep. 727 (K.B. 1573) (upholding by-law limitations on cattle pasturing).

99. Chamberlain of London's Case, 5 Co. Rep. 626, 77 Eng. Rep. 150 (K.B. 1591).

100. K.B. SMELLIE, A HISTORY OF LOCAL GOVERNMENT 11 (1968).

> the whole.[101]

It appears, however, that this doctrine in fact applied only when sustaining town and parish powers to repair churches and highways.[102]

The most important local government unit in seventeenth century England was not the town but the parish. The parish, a traditional institution with deep medieval roots, gained new importance in early modern times as monarchs from the Tudors onward imposed new duties on English parishes, ranging from the repair of roads and bridges to oversight of the poor.[103]

The most important parish officers were the churchwardens, whose obligations included repair and maintenance of the church and provision of the materials necessary for church services.[104] The most far-reaching duty of churchwardens was their customary responsibility to act "as a sort of inspector of the morals of the people."[105] In addition, although Parliament created officers to take primary responsibility for care of the poor and the highways, both the "Overseers of the Poor" and the local "Surveyor" were generally affiliated with the parish.[106]

A second important parish institution was the vestry meeting. In many ways analogous to the New England town meetings (for which they served as a model), vestry meetings allowed parishioners to exercise a very broad range of regulatory and taxing powers.

> Within the scope and jurisdiction of the inhabitants in Vestry assembled there lay the provision of practically any service, and the enactment of practically any regulation that the majority of the parishioners might think desirable, whether in the management of the church or of the secular institutions of the parish; whether in education, sanitation, or recreation; whether in the relief of the poor, the prevention of crime, or the provision of additional churches and clergy. To carry out any of their objects, the parishioners could not only hold property in trust and receive gifts but could also levy on all householders a series of rates unlimited in amount, and varied in incidence so as to include personalty as well as real estate.[107]

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101. 1 S. KYD, *supra* note 7, at 96.

102. *See, e.g.*, Rogers v. Davenant, 1 Mod. Rep. 236, 236, 86 Eng. Rep. 852, 853 (K.B. 1678); By-laws, 3 Salk. 76, 91 Eng. Rep. 701-02 (1795).

103. K.B. SMELLIE, *supra* note 100, at 12; 1 B. & S. WEBB, *supra* note 94, at 10-11.

104. 1 B. & S. WEBB, *supra* note 94, at 20.

105. *Id.* at 21 n.1 (quoting E.T. VAUGHAN, SOME ACCOUNT OF THE REV. THOMAS ROBINSON 110 (1815)).

106. 1 B. & S. WEBB, *supra* note 94, at 29. Parliament added these officers to the parish as assistants to the constables and churchwardens. *Id.*

107. *Id.* at 146-47. Although the vestry was unincorporated, the meeting could hold property by means of the trust, a practice that New York adopted. *See infra* notes 185-88 and accompanying text (discussing use of trusteeship).

English parishes themselves were not corporations. Neither were churchwardens, Overseers of the Poor, Surveyors, nor the vestry meeting itself, because none of these groups had ever been chartered. Their legal ability to act in concert, to hold land and other property, to sue and be sued, and to pass by-laws, therefore, presented theoretical difficulties by the seventeenth century in the face of the preclusive claims of English corporation law. Several grounds emerged to support the powers they exercised.

One basis for the powers of parish officers was the direct authority that statutes conferred on them to perform specific duties. Between 1530 and 1562 Parliament passed statutes making parishes responsible for bridges and highways.[108] In 1601 Parliament gave parish overseers responsibility for the administration of the poor laws.[109]

A potentially broader legal basis for parish powers derived from the common-law doctrine that churchwardens were "corporations for a particular purpose." This doctrine provided that although churchwardens were not full corporations they could exercise a limited number of corporate powers in connection with their duties to hold the parish's personal property. Because churchwardens could hold personal property "as a corporation," the "corporate" property passed automatically to the successor churchwardens rather than to the personal heirs of the prior occupant of the office. Churchwardens also could bring lawsuits in connection with the church property. In 1724 a court explained that "the churchwardens were a corporation, and might sell the church bells or silence them, and make a reasonable agreement beneficial for the parish, and thereby bind the parishioners and their successors as also the succeeding churchwardens."[110]

Kyd considered churchwardens a special kind of corporation. With respect to churchwardens, Kyd wrote that "[t]here are also some corporations which have a corporate capacity to some particular purpose."[111] Kyd stressed that churchwardens did not exercise general corporate powers; for example, they could not hold land as a corporation.[112] He added, however, that although the corporate capacity of a churchwarden was limited, a statute could grant a

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108. K.B. SMELLIE, *supra* note 100, at 12.

109. *Id.* The Webbs give the year that Parliament established the overseers of the poor as 1597. 1 B. & S. WEBB, *supra* note 94, at 30. Other statutes imposed on the parish the responsibility to repress drunkenness and unlicensed ale-houses. *Id.* at 21 n.2.

110. Martin v. Nutkin, 24 Eng. Rep. 724 (1724).

111. 1 S. KYD, *supra* note 7, at 29.

112. *Id.* at 31; *see also* Fawkners Case, 124 Eng. Rep. 354 (C.P. 1627) (invalidating grant of land to churchwarden because he lacked corporate power to hold land).

churchwarden "a more enlarged capacity."[113]

The concept that churchwardens were "corporations for a particular purpose," as the doctrine came to be known, was but one instance of a tendency in English law to hold that, if a group exercised a power supposedly limited to corporations, "to this purpose they are a corporation."[114] This doctrine served to mute the contradictions between the preclusive claims of English corporation law and the exercise by many unincorporated groups of "corporate" powers which, according to legal theory, only corporations could exercise.

The corporation-for-a-particular-purpose analysis also appears to have been used to explain the broad powers of vestry meetings. In the seventeenth century, challenges arose to the meetings' legal authority:

> The duly summoned town "meetings" or Vestry meeting had an undefined right to make by-laws on matters of parish concern, which were binding all parishioners, whether they consented or not, or whether or not they were present. . . . This by-law making power was warranted only by immemorial custom, recognized by the law courts from earliest times, but beginning, in 1689, in the rare cases in which it was questioned, to be supported with some hesitation and dubiety.[115]

One way in which the courts re-explained vestry meetings' powers was to assert that the meetings had the power to make by-laws because they were corporations. One court, for example, asserted in 1675 that although only Parliament could impose a tax, "the greater part of the parish can make a by-law; and to this purpose they are a corporation."[116]

The argument that vestry meetings and churchwardens could exercise certain powers *because* they were in some sense "corporations" raised the obvious question of whether other groups were the kind of "corporations" that should be able to exercise other "corporate" powers.[117] In 1788 a court addressed this issue in *Russell v. The Men Dwelling in the County of Devon.*[118] The case involved a suit by

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113. 1 S. KYD, *supra* note 7, at 31.

114. Rogers v. Davenant, 1 Mod. Rep. 194, 194, 86 Eng. Rep. 823, 823 (K.B. 1675).

115. 1 B. & S. WEBB, *supra* note 94, at 39.

116. Rogers v. Davenant, 1 Mod. Rep. 194, 194, 86 Eng. Rep. 823, 823 (K.B. 1675). The churchwarden was, however, not allowed to levy a tax.

117. The statement that a parish could undertake certain actions *because* it was a corporation for the purpose is, of course, not really an explanation: the statement is circular. *See* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-14 (1935) (discussing tautological characteristics of corporation definitions).

118. 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788) [hereinafter cited as Russell v. Men of Devon]. Historians have commonly asserted that *Men of Devon* was of major importance in England. *E.g.*, H. HARTOG, *supra* note 8, at 189. In fact, *Men of Devon* never played the important role in England that it played in America. In America, Massachusetts courts cited it for

a plaintiff whose wagon suffered injury "in consequence of a bridge being out of repair."[119] The county clearly had the duty to keep the bridge in repair, but its attorney argued that the county was not liable because it could not sue or be sued:

> Consider, first who are the necessary parties to all civil suits; they must either be brought against individuals who are to be particularly named or against corporations, or against persons who are rendered liable by the provisions of particular Acts of Parliament: if it be brought against individuals, all of them must be brought before the Court and they must appear before the Court or be outlawed. This mode of bringing actions against large bodies of men would render nugatory the privileges of the Crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity.[120]

Plaintiff's counsel based his argument in favor of county liability on various statutes that made unincorporated hundreds liable for damages in certain circumstances.[121] By analogy, he claimed that the county, although admittedly not a corporation, should be held liable.[122] In effect, plaintiff's counsel asked the court to give to counties the corporate power that Parliament had given to other entities by statute.

Chief Judge Kenyon abruptly refused to accede to this innovation. He wrote that

> [i]f this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent plaintiff's recovering, if by

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the proposition that unincorporated towns were a special type of "quasi corporation." *See infra* note 322 and accompanying text. New York courts cited *Men of Devon* for the proposition that even unincorporated towns could exercise certain corporate powers. *E.g.*, Todd v. Birdsall, 1 Cow. 260, 261 n.c. (N.Y. Sup. Ct. 1823). In England *Men of Devon* merely prevented plaintiffs from naming unincorporated groups as defendants: plaintiffs had to sue the members of the group individually if at all. *See, e.g.*, 1 H. GWILLIM, BACON'S ABRIDGEMENT, 50 (6th ed. London 1807) (inhabitants of district not liable to suit as a group unless Act of Parliament renders them liable) (citing Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788)).

119. Russell v. Men of Devon, 2 T.R. 667, 667, 100 Eng. Rep. 359, 359 (K.B. 1788).

120. *Id.* at 668, 100 Eng. Rep. at 359.

121. Hundreds were units of Anglo-Saxon origin. H. JEWELL, ENGLISH LOCAL ADMINISTRATION IN THE MIDDLE AGES 47 (1972). Jewell notes that

> [h]istorians have debated whether these units actually sprang from an ancient, convenient assessment of land into areas of approximately a hundred hides, or from an early association of a hundred heads of families in a police group, or from the tenth-century necessity for units on which defence burdens could be imposed.

Id. That hundreds remained unchartered shows how the preclusive claims of corporation law "cut across the older rules which allowed many powers to unincorporate groups." 4 W. HOLDSWORTH, *supra* note 17, at 477-78.

122. Russell v. Men of Devon, 2 T.R. 667, 670, 100 Eng. Rep. 359, 361 (K.B. 1788). The plaintiff's attorney asserted that the county was seeking merely "to shelter themselves under forms of law." *Id.*

> law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted . . . [T]he question here is, whether this body of men, who are sued in the present action, are a corporation, or *quasi* a corporation against whom such an action can be maintained.[123]

Having made it clear that he refused to accept the plaintiff's invitation to abandon traditional corporation law, Kenyon stated that he would not exercise "a legislative discretion in this case," making what was basically a separation of powers argument:

> [I]t has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes [giving hundreds the right to sue and be sued] . . . but I think that those statutes prove the very reverse . . . [I]t was never imagined that the hundred could have been compelled to make satisfaction . . . till the statute gave that remedy.[124]

Men of Devon presented an opportunity to resolve the tension between English corporation law's preclusive claims and the fact that most important local government units were unincorporated by the eighteenth century.[125] The court declined the invitation and reaffirmed the preclusive claims of English corporation law.[126]

Parliament, not the courts, finally resolved the tension between the corporation law and the local government institutions.[127] Any discussion of doctrinal change in English law must begin with the observation that English judges have not traditionally felt as free as their American counterparts to effect doctrinal change.[128] Of course, English judges have sometimes changed their law, despite protestations to the contrary. Yet the English courts' refusal to broaden the definition of the corporation is hardly surprising considering the political implications of such a decision in England. One attribute of borough status since the fifteenth century had been the right to representation in Parliament.[129] By the turn of the nineteenth century, the resulting system gave parliamentary representation to boroughs, but completely denied representation to major

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123. *Id.* at 671-72, 100 Eng. Rep. at 361-62. The report indicates that the court actually interrupted the lawyer's argument and refused to let him go on. *Id.* at 671, 100 Eng. Rep. at 362.

124. *Id.* at 672, 100 Eng. Rep. at 362.

125. *See supra* note 94 and accompanying text (noting primacy of county as local political authority).

126. Russell v. Men of Devon, 2 T.R. 667, 673, 100 Eng. Rep. 359, 362 (K.B. 1788).

127. *See* K.B. SMELLIE, *supra* note 100, at 31-33 (discussing passage of the Municipal Corporations Act of 1835).

128. The House of Lords decided only in 1966 that English judges were not always bound by precedent. J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 175 (1979).

129. S. REYNOLDS, *supra* note 21, at 111-12.

cities such as Birmingham and Manchester. Courts understandably avoided involvement in this increasingly controversial issue. Ultimately Parliament resolved the controversy by passing the Municipal Corporations Act of 1835, which restructured the distribution of political power on a national scale. Thus, Parliament and not the judiciary made the shift from borough to municipal corporation in England.[130]

II. ENGLISH CORPORATION LAW IN AMERICA

The problems that the preclusive claims of English corporation law created were potentially greater in America than in England. In England the dissonance between the law's preclusive claims and political reality was moderated; first, by the existence of a substantial number of boroughs to which corporation law granted substantial powers, but more importantly, by the alternative legal bases that justified the power of unincorporated local government units. America faced English law's preclusive claims without these buffers. After the Revolution, New York City was the only major chartered borough in the United States.[131] Moreover, many American courts were generally hostile to claims of authority based on "custom."[132] American courts thus confronted the full force of English corporation law's preclusive claims.

Unlike English judges, however, American judges in the post-Revolutionary period generally felt quite free to change the law to suit American needs.[133] Courts in both Massachusetts and New York ultimately changed English corporation law by 1850, but the process occurred quite differently in the two states. In New York the English law did not strike lawyers as obsolete. On the contrary, New Yorkers accepted New York City's mixture of public and private roles, and continued to view the dividing line between the Corporation of the City of New York and unincorporated towns as an obvious and commonsense distinction.[134] Thus New York courts in the period between 1800 and 1830 refused to hold that unincorporated

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130. Parliament passed the Municipal Corporations Act of 1835 as part of a wave of reform in the first part of the 19th century, K.B. SMELLIE, *supra* note 100, at 22-34, 41-46.

131. *See supra* note 11 (discussing New York's legal position after Revolution).

132. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1-30 (1977) (discussing American judges' use of English precedent).

133. *Id.*

134. Hartog shows how during the course of the 19th century, as the modern public/private distinction gained acceptance, New Yorkers reconceptualized the city as "a schizophrenic personality" that was a partly private corporation and a partly public authority. H. HARTOG, *supra* note 8, at 79-80. The continuing perception of New York judges that New York City was both public and private, however, stands in sharp contrast to the Massachusetts courts' perception that Massachusetts towns were purely public. *See infra* notes 372-82 and

New York towns were "corporations." Because New York courts preserved the "preclusive" historical definition of corporations as chartered boroughs, they continued to struggle with the question of whether New York's towns and villages were corporations.

In sharp contrast, courts in Massachusetts found the traditional dividing line between corporations and unincorporated units unconvincing. This perception enabled them to mobilize the theoretical definition of "incorporation" and conclude that Massachusetts towns were a new type of "municipal corporation."

A. English Corporation Law in New York

At the beginning of the nineteenth century, New York City's legal status was that of a corporate borough,[135] and courts applied English corporation law virtually unchanged in cases involving New York City.[136] New York courts also adhered closely to English precedent in cases involving the status of other local government entities, notably towns and villages. The courts were under considerable pressure to hold that towns and other local government entities were corporations because, if they were not, the preclusive claims of English corporation law would have raised serious questions about their ability to hold land and to sue and be sued. The only way to establish a firm basis for town powers was to hold that towns were corporations. New York courts, however, were reluctant to do so.

The New York courts' obstinancy stemmed from the substantial differences between towns and corporations (i.e. boroughs) such as New York City. Towns and villages differed from the Corporation of the City of New York in two major ways. First, towns and villages did not have the peculiar mixture of public and private powers char-

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accompanying text (discussing Massachusetts' characterization of municipal corporations as public entities).

135. *See* H. HARTOG, *supra* note 8, at 13-32.

136. *See, e.g.*, Hart v. Mayor of Albany, 9 Wend. 571, 588-90 (N.Y. 1832) (city ordinance upheld by court as within the scope of corporations' traditionally broad incidental powers); *In re* DeWint, 1 Cow. 595, 595 (N.Y. 1828) (using corporation as preclusive description of New York City); Furman v. Knapp, 19 Johns. 248, 258 (N.Y. 1821) (applying traditional liberal construction to corporation's charter); Mayor of New York v. Ordrenan, 12 Johns. 122, 124 (N.Y. Sup. Ct. 1815) (recognizing corporations' broad incidental powers); Cortelyou v. Van Brundt, 1 Johns. 313, 314 (N.Y. Sup. Ct. 1806) (citizens and those "made free of the city" are exempted from jury duty); LeRoy v. Mayor of New York, 4 Johns. Ch. 352, 354-55 (N.Y. Ch. 1820) (court cited English precedent to determine the breadth of New York City's equity jurisdiction over sewer assessment). For discussion of the English corporation doctrines applied in these cases, see 1 S. KYD, *supra* note 7, at 69-70 (discussing corporations' incidental powers); W. SHEPHEARD, *supra* note 18, at 44 (discussing advantages of charter corporations); J.W. WILLCOCK, *supra* note 79, at 159 (discussing ordinance-making power incident to municipal incorporation); 1702 TREATISE, *supra* note 18, at 209 (discussing incidence of incorporation).

acteristic of corporate boroughs. Second, and perhaps more significantly, towns and villages had a very different relationship to the state than corporate boroughs. In the early nineteenth century, charter inviolability provisions in the New York State Constitution kept New York City's charter rights immune from state intrusions.[137] If courts had held that towns and villages were corporations, their traditional rights might also have been protected from state intrusion. This conclusion would have conflicted with the traditional concept of the limited powers of New York localities.

Thus New York courts were adamant that towns were *not* corporations. They were much less certain what towns *were.* New York courts remained mired in confusion about the legal status of New York towns for decades after Massachusetts courts had concluded that Massachusetts towns were municipal corporations.

This section first provides background information necessary for an understanding of the New York courts' refusal to hold that towns were corporations. A discussion of the state constitutional provision that protected New York City's charter rights is followed by a description of the traditional legal status of towns and villages. The section then outlines the New York courts' struggle from 1810 until after 1830 to resolve the corporate status of towns and villages.

1. Charter inviolability in New York

The principle that the sovereign could not alter or rescind a borough's charter without the corporation's consent grew out of the struggles between English boroughs and Stuart kings in seventeenth century England.[138] The principle persisted in New York even after the 1819 dictum of the *Dartmouth College* case[139] that the state had broad powers over the charters of "public corporations."[140] Although the charter inviolability principle did not effectively protect New York City's traditional privileges,[141] the doctrine did play a central role in New York law throughout the first half of the nineteenth century. Its importance was primarily reflected in New York lawyers' arguments over whether towns were corporations.[142]

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137. N.Y. CONST. of 1777, art. XXVI; N.Y. CONST. of 1821, art. VII, § IX.; *see infra* note 143 & 155 and accompanying text (discussing charter provisions).

138. *See* J. LEVIN, THE CHARTER CONTROVERSY AND THE CITY OF LONDON (1969) (analyzing the legal consequences of Charles II's attack on the violability of London's charter).

139. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

140. *Id.* at 629-30; *see infra* notes 146-54 and accompanying text (discussing impact of *Dartmouth College* on New York law).

141. *See infra* note 158 and accompanying text (discussing New York City's reliance on state statutes, not charter, for legislative and regulatory authority).

142. Because Hartog does not provide a full discussion of charter inviolability, this section

After the Declaration of Independence, the Corporation of the City of New York lost no time in ensuring that its charter rights, which were originally granted by the English king, would continue to be protected from intrusions by its new sovereign. A provision in the New York State Constitution of 1777 stated that "nothing herein contained shall be construed to *annul* any charters politic granted by the king of *Great Britain.*"[143] In the years immediately after the Revolution, the legislature changed New York City's charter without its consent only once, to broaden the franchise in the city.[144] An 1815 case involving New York City referred to "the almost invariable course of proceeding of the legislature not to interfere in the internal concerns of a corporation, without its consent."[145]

Four years later, the United States Supreme Court decided the *Dartmouth College* case.[146] At issue was the New Hampshire legislature's attempt to change Dartmouth College's charter without its consent. The Court held that the legislature could not change the charter because the charter of a private corporation was a contract and, therefore, a vested property right.[147] From the viewpoint of local government law, however, the crucial feature of *Dartmouth College* was dicta in both the majority opinion[148] and in Justice Story's concurrence that distinguished between *private* corporations, which were protected by the doctrine of charter inviolability, and *public* corporations, the charters of which could perhaps be changed by the legislature.[149]

In New York, Story's dictum raised questions concerning whether New York City's charter rights were still inviolable. An 1821 case, *Furman v. Knapp,*[150] illustrated the considerable confusion that *Dartmouth College* engendered. The case involved a grocery store owner who had sold liquor under a New York City license but without a license from the state.[151] The city argued that its charter gave

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discusses the relevant constitutional provisions as well as the decisions of New York courts and their relationship to *Dartmouth College.*

143. N.Y. CONST. of 1777, art. XXVI.

144. *See* J. TEAFORD, *supra* note 11, at 74, 85-89 (discussing politics surrounding New York City's franchise expansion). For an argument citing this change in New York City's charter as precedent for a further change, see Jackson v. Nestles, 3 Johns. 115, 129 (N.Y. Sup. Ct. 1808).

145. Mayor of New York v. Ordrenan, 12 Johns. 122, 125 (N.Y. Sup. Ct. 1815).

146. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

147. *Id.* at 650. Article I, § 10 of the U.S. Constitution declares that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. 1, § 10.

148. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629-30 (1819).

149. *Id.* at 668-69, 675-76 (Story, J., concurring).

150. 19 Johns. 248 (N.Y. Sup. Ct. 1821).

151. *Id.* at 249.

the city exclusive jurisdiction over the sale of liquor within its limits;[152] the state's attorney cited *Dartmouth College* to support his contention that the state could rescind New York City's charter power at will.[153]

The court in *Furman* clearly wanted to avoid the charter inviolability issue. It upheld the state's regulatory power without expressly rejecting the doctrine of charter inviolability. Instead, the court employed a legal fiction:

> If the charter of the city of *New-York,* authorizing the Mayor to grant licenses, was not altered by the statute, as I think it was not; . . . . Then it follows that there was a concurrent jurisdiction . . . . It seems to me that we give full effect to the charter, by saying, that the power and authority of the Mayor yet exists in full force; and we are bound to say, that the statutory provision remains unaffected by the charter, because *we are bound to presume* that the statute was passed with the assent of the corporation. It then turns out, that the charter requires a license from the Mayor, and the statute requires a license from the [state] Commission also; and the only inconvenience that retailer is subject to, is the necessity of obtaining both.[154]

New York's constitutional convention of 1821 adopted a new inviolability provision that required the assent of two-thirds of each house of the legislature to pass any bill that altered the rights of "any body politic or corporate."[155] Although the provision sought to slow "the too rapid multiplication of bank charters, and the legislative corruption which their creation induced,"[156] by its terms it covered all corporations, and evidence exists that the legislature intended the provision to include chartered cities and villages.[157]

As a practical matter, New York City's power over its internal affairs was eroded by the city's tendency to turn to the state for specific regulatory authority.[158] Yet the doctrine of charter inviolability

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152. *Id.* at 257.

153. *Id.* at 249. The state's attorney was apparently not completely comfortable citing the *Dartmouth College* dictum of Justice Story's concurrence, *see supra* notes 148-49 and accompanying text, to support his claim concerning the rescindability of a city charter. The attorney, instead, primarily relied on the more traditional argument that New York City had acquiesced to a change in its charter and had therefore given up its charter power to license liquor sales. Furman v. Knapp, 19 Johns. 248, 250 (N.Y. Sup. Ct. 1821). The grocer's counsel, however, felt equally uncomfortable challenging the dictum from *Dartmouth College;* he too sidestepped the issue of charter inviolability. *Id.* at 252-53. Instead, the attorney argued that the court could decide the case without reaching the charter inviolability rule by asserting that the legislature had made no explicit attempt to amend the charter. *Id.*

154. *Id.* at 258-59 (emphasis added).

155. N.Y. CONST. of 1821, art. VII, § IX.

156. Purdy v. People, 4 Hill 384, 398 (N.Y. 1842).

157. *Id.* at 397.

158. *See* H. HARTOG, *supra* note 8, at 126-42 (discussing city's reliance on state authority

continued to protect the city's traditional charter rights in its 1821 form. As discussed in a subsequent section, the doctrine played a central role in cases involving the question of whether New York towns were corporations.[159] New York courts' steadfast refusal to hold that towns were corporations was due in part to the recognition that, if towns and villages were corporations, they would be protected from state authority by the 1821 charter inviolability provision.

2. *The traditional status of New York's towns and villages*

At the beginning of the nineteenth century, the major local government units in New York were counties, towns, and villages.[160] The county played a predominant role in New York's local government. During the colonial period, New Yorkers focused their desire to manage their own local affairs on attempts to institute and preserve the county structure.[161] One of the first laws that the New York General Assembly passed divided New York into twelve counties.[162] Counties exercised very substantial governmental powers[163] and were the units of representation in the New York Assembly.[164] New York counties gradually assumed a predominance that English counties had exercised in theory but not in practice.[165]

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for political and legislative action). Coates v. Mayor of New York, 7 Cow. 585 (N.Y. Sup. Ct. 1827), demonstrates the legal doctrines at work. The case involved New York City's authority to regulate cemeteries. The city initially had had a charter right to regulate cemeteries, but a subsequent state act had expanded its charter authority. *Id.* at 585. Although the city first argued that it had the requisite regulatory power under its charter, it quickly conceded that its dependence on the charter was inapposite, agreeing "that we cannot go back to the charter; but must rely for our power on the statute." *Id.* at 588 (citing Furman v. Knapp, 19 Johns. 248 (N.Y. Sup. Ct. 1821)). The city added that "[t]hat part of our declaration referring to our charter may be striken out as surplusage." Coates v. Mayor of New York, 7 Cow. at 593. The city was caught in a dilemma: the more it turned to the state for specific grants of regulatory power, the more vulnerable it became to state control.

159. *See infra* notes 183-247 and accompanying text.

160. There were a very limited number of corporate boroughs as well.

161. Varga, *The Development and Structure of Local Government in Colonial New York*, in TOWN AND COUNTY 194 (B. Daniels ed. 1978). In 1683 New Yorkers were demanding not only the rights of Englishmen but also adherence to English governmental structure. New Yorkers did not want gradual dispersion of governmental powers by means of town charters because the state could use such grants to bolster the influence of the central administration; instead, New Yorkers wanted the immediate establishment of county autonomy. *Id.*

162. Act of Oct. 1, 1691, ch. 17, 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 267 (1894); *see also* Varga, *supra* note 161, at 197 (discussing New York's affinity for county authority).

163. *See* Varga, *supra* note 161, at 197-206 (discussing county power to choose officials). The county court was a major county institution. In addition, a variety of officials were appointed at the county level, such as county clerk, coroner, and surrogates who dealt with testamentary matters. The highest elective county officers, the board of supervisors, exercised substantial ordinance-making and administrative functions. *Id.*

164. *Id.* at 197-203.

165. *Id.* at 203. Varga stresses New York counties' powers. *Id.* Although counties were thought of as the major unit of local government in England, parishes exercised substantial

New York subdivided its counties into townships.[166] These townships were by no means identical to New England towns. A board of six to twelve "trustees,"[167] elected by the "inhabitants and freeholders" at a single annual meeting, governed the township.[168] As the town supervisors' title implies, New York towns turned to the "trust" rather than the corporation to provide the legal basis for their actions.[169] The "trust" concept made sense for towns in New York because lawyers there, like lawyers in England, had a very concrete notion of what was a corporation, and they knew that their towns were not corporations.[170] Thus, when New York passed a statute to create new townships and counties on a regular basis in 1788, the statute did not "incorporate" towns.[171] In contrast to the Massachusetts statutes that "incorporated" towns in the late eighteenth century,[172] the 1788 New York act carefully avoided "corporate" language. It was merely "[a]n Act for dividing the counties of this State into towns."[173]

The 1788 statute formally "erected" a long list of towns and authorized the towns to choose various officials at town meetings.[174]

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authority in practice. 1 B. & S. WEBB, *supra* note 94, at 279-80. During the colonial period, New York counties took on tasks that counties had not performed in England. *See* Varga, *supra* note 161, at 197-206 (discussing substantial authority of New York towns).

166. Bonomi, *Local Government in Colonial New York: A Base for Republicanism*, in EARLY NEW YORK SOCIETY & POLITICS 29, 32 (1974). In rural areas, counties were sometimes divided into "precincts" rather than townships. *Id.*

167. *Id.* at 32. Bonomi's article is a case study of the Township of Kingston, New York in the early 18th century. Bonomi claims that trustees governed Kingston, meeting formally seven to nine times a year. The trustees' largest single responsibility was to grant land, but they also addressed a wide variety of other issues, including supervising construction, levying fines, paying bills, and adopting certain ordinances. *Id.* at 42-43.

168. *Id.* at 32. Bonomi suggests that although additional "special" town meetings took place, there is no evidence that they were very frequent or that the meetings at Kingston played as important a civic role as did the town meetings of New England. *Id.* at 43.

169. *Id.* at 32.

170. *See supra* notes 135-37 and accompanying text (discussing application of English corporation law to New York towns).

171. Act of Mar. 7, 1788, ch. 64, 2 Laws of the State of New York (1785-88), at 748 (Weed Parsons & Co. 1888).

172. Act of Nov. 30, 1785, ch. 22, 1785 Mass. Laws 339.

173. Act of Mar. 7, 1788, ch. 64, 2 Laws of the State of New York (1785-88), at 744, 747 (Weed Parsons & Co. 1888). The Act's only mention of corporations was in its charter inviolability savings clause, which asserted

> [t]hat none of the bounds or lines by this act assigned for the limits of any or either of the said towns, shall be deemed to take away, abridge, destroy or affect, the right or title of any person or persons, bodies politics or corporate, in any manner or by any means whatsoever.

Id. at 762. Nonetheless, modern commentaries refer to this act and those for which it served as a model as statutes of incorporation. *See, e.g.*, McGovern, *Creation, Control and Supervision of Cities and Villages by the State*, 20 BROOKLYN L. REV. 158, 158-65 (1954) (discussing evolution of municipal corporations in New York State).

174. Act of Mar. 7, 1788, ch. 64, 2 Laws of the State of New York (1785-88), at 748, 762-63 (Weed Parsons & Co. 1888).

The statute authorized "the freeholders and inhabitants" at their town meetings "to make . . . such prudential rules, orders and regulations, as the majority of the freeholders and inhabitants . . . judge necessary and convenient."[175] In contrast to the broad powers traditionally given to borough corporations,[176] however, the act sharply limited town powers to the building of fences and other actions "for the better improving of their common lands" and "for ascertaining and directing the use and management and the times and manner of using their common lands."[177]

Subsequent statutes confirmed the New Yorkers' perception that towns were not corporations.[178] Yet, although *towns* were not corporations, many villages began to be "incorporated" by statute after 1800.[179] Indeed, by 1815 incorporation of villages had become standard practice.[180]

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175. *Id.* at 766.

176. *See* 1 S. KYD, *supra* note 7, at 69 (discussing incidental powers tacitly annexed by incorporated entity); W. SHEPHEARD, *supra* note 18, at 109-29 (discussing nature of corporation and inherent powers); 1702 TREATISE, *supra* note 18, at 209 (discussing incidents of municipal corporation).

177. Act of Mar. 7, 1788, ch. 64, 2 Laws of the State of New York (1785-88), at 748, 766 (Weed Parsons & Co. 1888).

178. *See, e.g.*, Act of Apr. 8, 1796, ch. 52, 3 Laws of the State of New York (1789-96), at 705, 706 (Weed Parsons & Co. 1887) (authorizing election of trustees); *see also supra* notes 167-70 and accompanying text (discussing role of town officials as trustees). Typically, acts creating towns around the turn of the 19th century were called acts "to appoint trustees and hold certain lands therein mentioned and for other purposes." *See, e.g.*, Act of Mar. 25, 1794, ch. 36, 3 Laws of the State of New York (1789-96), at 510, 510-11 (Weed Parsons & Co. 1887) (appointing trustees for villages of Waterford and Troy); Act of Apr. 5, 1790, ch. 49, 3 Laws of the State of New York (1789-96), at 178 (Weed Parsons & Co. 1887) (appointing trustees for Village of Lansingburgh); *see also* Act of Apr. 8, 1796, ch. 52, 3 Laws of the State of New York (1789-96), at 705, 706 (Weed Parsons & Co. 1887) (empowering proprietors of County of Suffolk to elect three trustees to manage lands). These early acts were very explicit about the trustee relationship they established. The 1790 Act creating the Town of Lansingburgh provided that "the said trustees hereby appointed, and their successors, are hereby enabled to take a grant or grants . . . in trust to and for the common use and benefit of the freeholders and inhabitants aforesaid." Act of Apr. 5, 1790, ch. 49, 3 Laws of the State of New York (1789-96), at 178 (Weed Parsons & Co. 1887).

179. *See, e.g.*, Act of Mar. 27, 1799, ch. 52, 4 Laws of the State of New York (1797-1800), at 365 (Weed Parsons & Co. 1887) (incorporating Village of Poughkeepsie). The Poughkeepsie statute demonstrates a trend towards villages that were incorporated. Although the statute created a corporation, it was still entitled "An Act to vest certain Powers in the Freeholders and Inhabitants of the Village of Poughkeepsie," a formulation that the legislature had traditionally used to create unincorporated villages holding lands in trust. *Id.; see also* Act of Mar. 28, 1805, ch. 58, 1805 N.Y. Laws 200 (incorporating Waterford: "An Act to amend an act, entitled 'An Act vesting certain powers in the freeholders and inhabitants of the Village of Waterford' ").

180. *See, e.g.*, Act of Mar. 1, 1817, ch. 96, 1817 N.Y. Laws 84, 84 (incorporating Village of Rochesterville). Unlike Massachusetts' "statutes of incorporation," Act of Feb. 9, 1785, ch. 83, 1785 Mass. Special Laws 83-84, the New York acts incorporating villages formally created corporations. *See, e.g.*, Act of Mar. 27, 1799, ch. 52, 4 Laws of the State of New York (1797-1800), at 365, 366 (Weed Parsons & Co. 1887) ("And be it further enacted, that all the freeholders residing within the aforesaid [village] limits be and they are hereby ordained, constituted and declared . . . one body politic and corporate . . . .").

One explanation why villages were corporations whereas towns were not was that towns

Although New York law referred to these village statutes as "statutes of incorporation,"[181] New York courts did not blur the distinction between "real" chartered corporations and villages incorporated by statute. New York lawyers continued to recognize a clear distinction between incorporation by statute and incorporation by charter. As late as 1821, courts were carefully preserving the distinction between the two approaches. In reference to the cities of New York, Albany, Hudson, and Schenectady, a circuit judge noted that "it is well known that, technically speaking, no charters had been granted incorporating *Hudson,* and *Schenectady.* Those cities were incorporated by statute."[182] Thus even after the legislature began "incorporating" villages by statute, New York lawyers continued to distinguish between towns and villages, whether "incorporated" or not, and New York City, which was a charter corporation.

3. New York towns as corporations for a particular purpose

Historians have traditionally asserted that American towns were considered "quasi corporations" in contrast to real borough corporations such as New York City.[183] In fact, New York courts did not accept the analysis that towns were a special type of "quasi corporation;" New York courts refused to accept the conclusion that towns and villages were corporations at all.[184] This refusal led them into a direct confrontation with the preclusive claims of English corporation law, which provided that if towns were not corporations, they were precluded from holding land and from suing and being sued as a group.

During the colonial era, New York towns had the capacity to hold land through their trustees.[185] In 1807 Circuit Judge (later Chancellor) James Kent reaffirmed this traditional analysis in *Jackson v. Schoonmaker.*[186] *Jackson* raised the question of whether the town trustees of Rochester had held the capacity to grant lands in 1714, three years before they formally became trustees. The lawyers argu-

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could exercise certain traditional town powers pursuant to the 1788 statute. Because villages received no authority from the 1788 act, they were dependent on corporation law to provide them with the legal authority to act as a group.

181. *See, e.g.,* Act of Mar. 21, 1817, ch. 96, 1817 N.Y. Laws 84, 84 (incorporating Village of Rochesterville). The title of this statute, "An act to incorporate the Village of Rochesterville . . .," is typical of post-1815 statutes.

182. Furman v. Knapp, 19 Johns. 248, 258 (N.Y. Sup. Ct. 1821).

183. *See* H. HARTOG, *supra* note 8, at 186-92.

184. *See infra* note 208 and accompanying text (discussing New York court's rejection of town as corporation).

185. *See supra* notes 167-69 and accompanying text.

186. 2 Johns. 230, 233 (N.Y. Sup. Ct. 1807).

ing in favor of the validity of the trustees' grant argued that the trustees were in effect a corporation:

> A patent was produced, dated the 25th of *June,* 1703, to certain persons therein named, as trustees for all the freeholders and inhabitants of the town of *Rochester.* It was proved by the town clerk, and by the records of the annual election of trustees, from the date of the charter to that day; that the freeholders and inhabitants of *Rochester,* had annually chosen three trustees, and used to keep and use a common seal, and recorded all conveyances by the trustees of the common lands, and that the town-records had been always deemed conclusive evidence of the acts of the trustees. It was proved by these records . . . who were the trustees in 1729; and a deed from them, under their corporate seal . . . was read in evidence.[187]

Kent rejected out of hand the inference that the Rochester trustees were a corporation. His explanation reflected New York law's traditional solution of allowing towns to hold land through their trustees *without* analyzing the town as corporations. Accordingly, Kent held that "[t]here is no colour for the suggestion that the freeholders and inhabitants of *Rochester* were *incorporated* as a body politic, by the patent of 1703. . . . The patent is in the usual form of a grant [to the three trustees] as joint tenants."[188]

A series of cases decided in 1811 and 1812 called this traditional solution into question. The first, *Jackson v. Cory,*[189] determined whether the county supervisors of Otsego County could sell the county courthouse pursuant to a state statute.[190] The challenge to the sale was that the county, not being a corporation, had no authority to own land.[191] "It will hardly be pretended that the counties are corporations," argued the plaintiff's attorney, citing Kyd, "and not being incorporated, they could not take as a corporation."[192]

The statement that counties were not corporations had a firm basis in English precedent. Most counties had never had charters and were not considered corporations under English law.[193] But the plaintiff's correct use of English precedent ended there. English

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187. *Id.* at 231-32.

188. *Id.* at 233.

189. 8 Johns. 385 (N.Y. Sup. Ct. 1811); *see* R. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 21-23 (1982) (discussing *Jackson v. Cory*).

190. Jackson v. Cory, 8 Johns. 385, 387 (N.Y. Sup. Ct. 1811). In 1791 a land speculator had donated a lot in Cooperstown to the people of the County of Otsego as a site for a courthouse and jail. *Id.* at 386. The county supervisors erected the buildings, and, in 1806, an act of the state legislature authorized the supervisors to sell the land and buildings. *Id.*

191. *Id.; see also* R. SEAVOY, *supra* note 189, at 22.

192. Jackson v. Cory, 8 Johns. 385, 386 (N.Y. Sup. Ct. 1811).

193. *See supra* note 77 and accompanying text (discussing historical developments that precluded counties from corporate status).

courts had required incorporation for an unincorporated body such as a county to exercise corporate powers only in the absence of a specific enabling statute; lack of incorporation had never precluded a county from holding land pursuant to specific statutory authorization to do so.[194]

The New York court, however, accepted the plaintiff's argument and asserted that "[i]t is the settled rule of the common law, that a community, not incorporated, cannot purchase and take in succession."[195] The court discounted the importance of the statute, stating that "[i]t is not to be presumed that the legislature intended to authorize the supervisors to convey any thing more than the right and title which they might have had in the lot."[196] The court made no secret of the classic Federalist motivation behind its innovative decision not only to deprive counties of important powers but seemingly to deprive the legislature of the power to grant counties such powers in the future.[197] The court stated that, "[t]o take away private property by public authority, even for public uses, without making a just compensation, is against the fundamental principles of free government."[198]

In the same month, the New York Supreme Court decided another case involving county authority to grant land, *Jackson v. Hartwell.*[199] This time the supervisors of Oneida County held the land involved in trust for the Town of Rome.[200] The supervisors were to use the land in part for a jail and courthouse and in part for a schoolhouse and church.[201] The court once again considered the central issue the corporate status of the county. But whereas the court in *Jackson v. Cory* held that the 1806 statute authorizing Otsego to sell the courthouse failed to give the county the authority it sought, the court in *Jackson v. Hartwell* accepted the proposition that a state statute could authorize a community to act as a group even if the group was not a corporation.[202]

In *Hartwell* the court looked to the 1788 statute that established

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194. *See, e.g.,* Statute of Westminster, 3 Ed. 1 c. 9 (1628) (*cited in* Russell v. Men of Devon, 2 T.R. 667, 668, 100 Eng. Rep. 359, 360 (K.B. 1788), which provided that a hundred could sue and be sued).

195. Jackson v. Cory, 8 Johns. 385, 388 (N.Y. Sup. Ct. 1811).

196. *Id.*

197. For a discussion of the Federalist concern with protecting private property, see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 403-13, 503-06 (1969).

198. Jackson v. Cory, 8 Johns. 385, 385 (N.Y. Sup. Ct. 1811). The court also suggested that allowing the county to sell the property would be unconstitutional. *Id.*

199. 8 Johns. 422 (N.Y. Sup. Ct. 1811). The same benefactor who granted the land in *Jackson v. Hartwell,* granted the land in *Jackson v. Cory.* R. SEAVOY, *supra* note 189, at 22.

200. Jackson v. Hartwell, 8 Johns. 422, 422 (N.Y. Sup. Ct. 1811).

201. *Id.*

202. *Id.* at 426.

the basic structure of counties and towns. It held that the statute made Oneida County "a corporation for special purposes and with special powers."[203] The court abandoned the strong presumption of *Jackson v. Cory* that the legislature had not intended to give corporate powers to an unincorporated group. Instead, it adopted the logic of those English courts that had held that if a community could exercise a given corporate power, it was a corporation in that regard.[204] The New York court then did what English courts, in cases like *Russell v. Men of Devon,* had not been willing to do and applied the "corporation for a particular purpose" language outside the traditional English context of churchwardens.[205]

The court in *Jackson v. Hartwell* ultimately struck down the grant of land in question: it held that the 1788 statute did not give counties the capacity to hold land.[206] The decision was influential despite its holding because of its analysis of the county as a corporation for a particular purpose. Courts soon applied this analysis to New York towns, replacing the traditional view that New York towns were trusts with legal authority to act through their trustees. The courts did not fully accept this solution, however, for another six years.[207] Meanwhile, confusion reigned. Several months after the court's decision in *Jackson v. Hartwell,* the New York Supreme Court held that the Town of Rochester could not hold an interest in land because it was not a corporation.[208] This holding appeared to confirm that New York courts would no longer analyze towns as trusts; however, their actual legal status remained unclear.[209]

In 1817 Chancellor Kent attempted to dispel the confusion and establish a clearcut basis for a town's capacity to hold real estate. His opinion in *Denton v. Jackson*[210] would be cited widely as support

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203. *Id.* at 425. The court actually said that the county was a corporation with "special powers *only.*" *Id.* (emphasis added).

204. *Id.* at 425; *see supra* notes 110-26 and accompanying text (discussing corporations for a particular purpose at English common law).

205. Jackson v. Hartwell, 8 Johns. 422, 424-25 (N.Y. Sup. Ct. 1811). The New York courts also grouped into one doctrine references made by Kyd to disparate situations in which unincorporated entities could exercise certain corporate powers, because the groups were "like corporations" in specific ways or "for special purposes." *See id.* (citing 1 S. KYD, *supra* note 7, at 9, 10, 12, 29, 31). The New York courts transformed scattered references into a formal doctrine that these groups were all "corporations for special purposes."

206. Jackson v. Hartwell, 8 Johns. 422, 424-25 (N.Y. Sup. Ct. 1811).

207. *See infra* notes 210-18 and accompanying text (discussing *Denton v. Jackson*).

208. Hornbeck v. Westbrook, 9 Johns. 73, 75 (N.Y. Sup. Ct. 1812). The issue involved was actually whether Rochester had had the capacity to hold interests in land when it acquired the property in 1730. *Id.* at 74-75.

209. *See id.* at 75 (citing Jackson v. Schoonmaker, 2 Johns. 230 (N.Y. Sup. Ct. 1807)) (holding that town could not take grant of land but citizens might gain some personal privilege from grant).

210. 2 Johns. Ch. 320 (N.Y. Ch. 1817).

for the theory that towns and other local units could be corporations for particular purposes. *Denton v. Jackson* was a town partition case of a type extremely common in New England.[211] When North Hempstead split off from the original Town of Hempstead, the inhabitants of the original town claimed rights as tenants in common to Hempstead's common lands. The new town of North Hempstead claimed exclusive title to a portion of the lands, arguing that the property that Hempstead originally owned had been conveyed to North Hempstead pursuant to the town partition.[212]

Chancellor Kent held for North Hempstead and offered two different rationales. First, Kent cited *Jackson v. Hartwell* to support his decision that Hempstead was a corporation for a particular purpose and, as such, was given the capacity to hold land.[213] Kent referred to towns as "persons [who] may have corporate powers, *sub modo,* and, for certain specified purposes only."[214]

This part of Kent's analysis was merely an extension of the doctrine elaborated in *Jackson v. Hartwell.* Kent, however, intertwined it with a very different approach by asserting that towns were *actually corporations*:

> The grant was to the association and their *successors,* as well as heirs, for public purposes of a municipal nature. The professed objects of the grant were consistent with the design of bodies politic. There is no particular form of words requisite to create a corporation. A grant of a rent to a chaplain and his successors, and a grant to a body of men to hold mercantile meetings, (*Gildam mercatoriam*), has been held to confer a corporate capacity. . . . There are many instances of grants to the inhabitants of a town, that they should be a free borough, and enjoy various privileges which have been considered as making them a corporate body.[215]

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211. For a discussion of town partition cases, see *infra* notes 310-11 and accompanying text. Town partition cases appear not to have been very common in New York, even though the New York legislature often divided one town into two or more new towns. *See, e.g.,* Act of Apr. 10, 1805, ch. 128, 1805 N.Y. Laws 586; Act of Apr. 17, 1815, ch. 210, 1815 N.Y. Laws 210; Act of Mar. 21, 1817, ch. 45, 1817 N.Y. Laws 84. North and South Hempstead were created in 1788. Act of Mar. 7, 1788, ch. 64, 2 Laws of the State of New York (1785-88), at 748-49 (Weed Parsons & Co. 1888).

212. Denton v. Jackson, 2 Johns. Ch. 320, 322 (N.Y. Ch. 1817).

213. *Id.* at 325. Kent stated:

> Several towns in this state may be considered as legal communities, or bodies politic, for certain purposes. They are authorized, at their town meetings, to make rules and regulations for the better improving of "their common lands in tillage, pasturage, or any other reasonable way," and for making and maintaining pounds, and for imposing penalties, and to raise money for prosecuting or defending the common rights of the town; and all such rules or by-laws are to be recorded by the town clerk.

Id.

214. *Id.*

215. *Id.* at 324-25.

This language suggests that the court should construe the grant creating Hempstead as creating a corporation. Yet most of the language in Kent's opinion indicated that he did not mean to alter the "corporation for a particular purpose" analysis by implying that towns were *actually* corporations. Even if he did, subsequent New York courts rejected that innovation, which courts in New England had already accepted.[216] The New York courts adhered to the understanding that towns were "endowed with a corporate capacity in some particulars expressed, but [they] have, in no other respect, the capacities incident to a corporation."[217]

A series of cases decided between 1820 and 1826 involving the issue of whether towns had the power to sue and be sued further developed the proposition that towns were like corporations in certain respects, but were not actually corporations. The courts framed the issue as whether town officers were "quasi corporations."[218]

In 1820 *Rouse v. Moore*[219] first raised the question in New York of whether town officers could sue or be sued. Specifically, the case presented the issue of which of two towns was responsible for the upkeep of a pauper.[220] The plaintiff's lawyer defined the issue as whether the officers were "quasi corporations."[221] It will be recalled that in England, the court in *Men of Devon* used the term in describing an attorney's argument that unincorporated local units should be given corporate powers because they were "quasi corporations."[222] Although the English court had rejected the argument,[223] the plaintiff's lawyer in *Rouse* reasserted it and cited Kyd for support.[224] Unlike lawyers in Massachusetts, who used the term

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216. *See supra* notes 321-74 and accompanying text (discussing treatment in New England of towns as "quasi corporations" in the early 19th century).

217. Jackson v. Hartwell, 8 Johns. 422, 425 (N.Y. Sup. Ct. 1811). The court repeated this statement virtually verbatim in 1820. Rouse v. Moore, 18 Johns. 407, 418 (N.Y. Sup. Ct. 1820) (citing *Jackson v. Hartwell*).

218. The "quasi corporation" language no doubt occurred to the courts because *Russell v. Men of Devon* had used the language in a case involving an unincorporated county's liability to suit. *Compare infra* notes 313-18 and accompanying text (discussing adoption in Massachusetts of municipal corporation language) *with infra* notes 219-49 and accompanying text (discussing New York's difficulty with corporation language). But, although New York courts used quasi corporation language, they did not use the doctrine as Massachusetts courts did, to define what kind of corporation towns were. Instead, New York courts used the term to explain why towns could sue and be sued as a group even though they were *not* corporations. The New York courts' correct citation of *Men of Devon,* see *infra* notes 227-28 and accompanying text, was but one aspect of their greater respect for correct use of English corporation law.

219. 18 Johns. 407 (N.Y. Sup. Ct. 1820).

220. Rouse v. Moore, 18 Johns. 407, 407 (N.Y. Sup. Ct. 1820). For a discussion of Massachusetts pauper cases, see *infra* note 311 and accompanying text.

221. Rouse v. Moore, 18 Johns. 407, 411 (N.Y. Sup. Ct. 1820).

222. Russell v. Men of Devon, 2 T.R. 667, 671-72, 100 Eng. Rep. 359, 361-62 (K.B. 1788).

223. *See supra* notes 121-26 and accompanying text (discussing *Men of Devon*).

224. Rouse v. Moore, 18 Johns. 407, 411 (N.Y. Sup. Ct. 1820).

"quasi corporation" to hold that towns were in fact corporations,[225] the plaintiff's lawyer in *Rouse* used the term to explain why the overseers had the specific corporate powers despite the fact that they were not corporations: "Though not strictly a corporation, having a corporate name and seal; yet they are *quasi* corporations, having a succession, and a capacity to sue and be sued, as to all matters appertaining to their official duties."[226] Moreover, the question posed was whether the overseers, rather than the town itself, were "quasi corporations."[227]

Neither the opposing counsel nor the court adopted the novel "quasi corporation" terminology. The opposing counsel used Chancellor Kent's term for a corporation for a particular purpose, "a corporation *sub modo.*"[228] The court compared the town officers to churchwardens, the classic English example of a corporation for a particular purpose, and held that the overseers did have the corporate capacity to sue and be sued.

Three years later, in 1823, the New York Supreme Court in *Todd v. Birdsall*[229] affirmed the *Rouse* holding.[230] Three aspects of the court's opinion are notable. First, like the court in *Rouse,* the court in *Birdsall* did not adopt the quasi corporation language which the counsel again suggested.[231] Second, the court made very clear that it was in effect holding that the overseers—not the town itself—were a corporation for one particular purpose, to sue and be sued.[232] Finally, the court made it clear that it viewed its earlier holding that unincorporated towns could exercise a corporate power as novel and of limited scope.[233] The court signaled that it had based its holding on practical considerations and had not meant to suggest that local officials had a broad range of corporate powers by implication:

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225. *See infra* notes 321-25, 344-45 & 370-71 and accompanying text (discussing the quasi corporation argument in Massachusetts).

226. Rouse v. Moore, 18 Johns. 407, 411 (N.Y. Sup. Ct. 1820).

227. *See id.* Thus, the issue was not whether the town was a corporation aggregate, but whether the overseers were sole corporations. The quasi corporation argument may have been a translation into corporate language of another court's holding that town officers could sue and be sued as agents of the town. *See* Olney v. Wickes, 18 Johns. 122, 125-26 (N.Y. Sup. Ct. 1820).

228. Rouse v. Moore, 18 Johns. 407, 413 (N.Y. Sup. Ct. 1820). For a discussion of corporations *sub modo,* see *supra* notes 213-14 and accompanying text.

229. 1 Cow. 260 (N.Y. Sup. Ct. 1823).

230. *Id.* at 260.

231. *Id.* The attorney for Todd not only used the term "quasi corporations" but cited to *Men of Devon* and to Rumford v. Wood, 14 Mass. 193 (1816), an important Massachusetts case involving the quasi corporation argument. 1 Cow. at 262. For a discussion of *Rumford v. Wood,* see *infra* notes 330-45 and accompanying text.

232. Todd v. Birdsall, 1 Cow. 260 (N.Y. Sup. Ct. 1823).

233. *Id.* at 260-61.

> Overseers of the Poor are not a corporation, according to the technical meaning of the term . . . In *Johnson v. Hartwell* . . . this Court held, that the Supervisors of a county were a corporation for special purposes, and with special powers only . . . who have, in no other respect, the capacities incident to a corporation . . . . It seems highly expedient, that legal liabilities, incurred by their predecessors in office [of the current Supervisors], for the support of the poor, ought, upon a sound construction of their duties and powers, to devolve upon them. It is incident to their office, which, in this respect, may be viewed in the nature of a corporation . . . .[234]

Traditional New York courts were wary of expanding their holdings that gave towns the power to hold land and to sue and be sued into a general rule that towns could exercise all the powers of corporations. Nonetheless, this principle was finally advanced in 1823 in *Janson v. Ostrander*,[235] a case questioning whether a town supervisor could sue and be sued.[236] Justice Woodworth, who wrote for the majority, took New York's typically conservative approach. Although he held that the supervisors, not the town itself, could sue and be sued, Woodworth not only stated that town supervisors did not exercise full corporate powers; he also asserted that the town officers' capacity to sue and be sued differed from the equivalent capacity of an actual corporation.[237] In a concurring opinion,[238] Chief Justice Savage took a less conservative approach. He suggested that towns could exercise full corporate rights because they were quasi corporations, and that town officers had all the powers that officers traditionally held or had need of to enable them to perform their duties.[239] Savage stated that

> [f]rom an examination of the act relative to towns, it would be seen that there are a variety of persons, in each of the towns, . . . clothed with corporate powers and capacities, so far as is necessary to the execution of the trust confined to them . . . . It would seem, therefore, that the Supervisor possesses certain corporate

234. *Id.*
235. 1 Cow. 670 (N.Y. Sup. Ct. 1823).
236. *Id.* at 677. This was a separate issue from whether overseers of the poor were sole corporations with the power to sue and be sued.
237. *Id.* at 681.
238. *Id.* at 683 (Savage, C.J., concurring).
239. *Id.* Savage also suggested that the officers were, in fact, corporations "by custom." *Id.* This is a much more anachronistic argument than Massachusetts lawyers ever would have used at this time. Massachusetts lawyers instead tended to argue that towns were aggregate corporations of a kind different from common-law corporations. *See infra* notes 351-52 and accompanying text (discussing novel argument by Massachusetts lawyer against powers by custom). Justice Savage's argument was similar to the Massachusetts courts' use of the quasi corporation argument. *See infra* notes 339-52 and accompanying text (discussing quasi corporations in Massachusetts law).

> powers and capacities, at least so far as to enable him to perform his official duties . . . .[240]

The majority of the court rejected Savage's analysis.[241] In 1826, however, when another set of parties litigated for yet a third time the issue of whether overseers of the poor could sue and be sued,[242] the majority cited *Rouse* but broadened its holding considerably to conform with language in Chief Justice Savage's concurring opinion in *Ostrander.* The majority stated that "the town officers are considered as *quasi corporations,* so far as is necessary for each to perform their several trusts imposed upon them by their several offices."[243] Moreover, the court at last abandoned the notion that the town officers, rather than the towns themselves, were corporations for particular purposes. The court explained that in these cases, "strictly speaking, it is not the officers of the town, but the town itself, which is the corporation."[244]

Thus, in considering whether towns could sue and be sued, by 1826 New York courts had begun tentatively to suggest that towns were corporations. But the issue was by no means clearly settled. In 1828 the legislature attempted to resolve the matter by passing an act that proclaimed towns and counties to be "bodies corporate," with the power to sue and be sued, to purchase and hold lands, to contract, and "to make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants."[245] Despite this statute, New York courts continued to dispute whether towns were corporations for another thirty years. Shortly after passage of the statute, in a second case involving a dispute between Hempstead and North Hempstead, North Hempstead's attorneys asserted that Hempstead had never owned the commons because "towns are not corporations."[246] The court's opinion demonstrated its confusion. Although Chief Justice Savage stated that "I *consider* the town of Hempstead a corporation"; his opinion did not actually *hold* that towns were corporations.[247]

The sense in which New York towns were corporations remained

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240. Jansen v. Ostrander, 1 Cow. 670, 684 (N.Y. Sup. Ct. 1823) (Savage, C.J., concurring).

241. *Id.* at 681.

242. Grant v. Fancher, 5 Cow. 309 (N.Y. Sup. Ct. 1826). Unlike previous cases in which litigants questioned the overseer's liability to suit, *Grant* brought to issue the overseers' ability to sue a corporation. *Id.*

243. *Id.* at 311. The court asserted that the overseers must have a capacity to sue commensurate with their public trust to discharge the duties of their office. *Id.* at 312.

244. *Id.*

245. 9 N.Y. REV. STAT. ch. XI, tit. 1, § 1 (1828) (towns); *id.* ch. XII, tit. 1, § 1 (counties).

246. Hempstead v. North Hempstead, 2 Wend. 109, 116-17 (N.Y. Sup. Ct. 1828).

247. *Id.* at 135 (emphasis added).

unclear, and New York lawyers seemed at a loss for a solution. They could not hold that New York's towns and villages were corporations without reinterpreting the status of New York City. The two prerequisites that eventually motivated such a reinterpretation did not yet exist by 1830.

To reinterpret New York City's borough status, New York courts had first to be willing to face an enormous political battle with the city and its supporters. The time was not yet ripe for such a battle in 1830; not until 1850 were the political conditions suitable for such a struggle.[248] The second prerequisite was the subtle and gradual shift in New Yorkers' mentality that made the identification of the city as a "corporation" seem less and less convincing.[249] Hartog has linked this shift to changes in what he terms the "governmental culture" of the city.[250] Not until long after New York City had ceased to function as a traditional corporation did lawyers and judges abandon the old rubric and invent new doctrines better suited to the institution that nineteenth century New York City had become.

Either the courts or the legislature had to reinterpret New York City's legal status before they could resolve the legal status of New York towns and villages. New York City's status, however, would not be reinterpreted until its governmental culture changed. For these reasons New York courts moved slowly in their efforts to adapt English corporation law to American circumstances. Massachusetts courts faced no such political or conceptual problems in their efforts to define a new legal status for New England towns. In fact, as the following section shows, the governmental culture of New England actually made it easier for Massachusetts courts to abandon English corporation law.

B. English Corporation Law in Massachusetts: The Invention of the Municipal Corporation

In Massachusetts the New England town heavily influenced the outlook of judges and played a central role in the political self-image of New England. The traditional prestige of the New England town

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248. Chief Justice Nelson was ready to do battle by 1835. In People v. Morris, 13 Wend. 325 (N.Y. Sup. Ct. 1835), the court accepted his dichotomy between private and public corporations, a dichotomy that lumped together all towns and cities, including New York City, as potentially vulnerable to state intervention. Caution, however, gained the upper hand. *See* Purdy v. People, 4 Hill 384, 395 (N.Y. 1842) (reversing *People v. Morris*). The battle against New York City did not come to a head until after 1850. *See* H. HARTOG, *supra* note 8, at 209-39 (discussing rise of public/private distinction and its effect on New York City).

249. *See generally* H. HARTOG, *supra* note 8 (detailing gradual movement from borough to municipality and consequent reassessment of New York City's status).

250. *Id.* at 129-57.

caused judges to take for granted that towns had legitimate status and substantial powers. These convictions made English corporation law's preclusive claims seem absurd. In the eyes of Massachusetts judges, the claim that only an historically defined set of boroughs could exercise governmental powers was viewed as a reflection of the law's inadequacy, rather than a valid conclusion about the powers of Massachusetts towns. Moreover, the towns themselves were adamant in their rejection of borough status. Massachusetts judges responded by rejecting English corporation law in the early nineteenth century. As early as 1816, Massachusetts courts held that Massachusetts towns were not boroughs but instead were "municipal" corporations.

This section analyzes how Massachusetts courts reached this conclusion, which clearly contradicted English law, within a short period of time and within a legal system based on precedent. The following two sections examine how the governmental culture of New England enabled Massachusetts courts to adopt the theoretical definition of incorporation as the legal concept that enabled a group to act in concert. The final two sections discuss the cases in which Massachusetts courts concluded that towns were municipal corporations.

1. The New England town

"We already know, as Edmund Morgan long ago remarked, more than any sane man would want to know about colonial New England."[251] The New England town has received particular attention. Current issues of debate include the relative power of, and the relationship between, the central colonial government and New England towns, and the extent to which New England settlers imported English local law and custom to the New World. For the purposes of this Article, a few basic characteristics of Massachusetts towns need to be noted.

First, New England towns clearly were an institution of central political importance in a way that New York towns never were. Historians disagree on *when* towns played a predominant role in New England,[252] not on *whether* towns ever functioned as a major political

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251. Zuckerman, *Reply to D. Allen, The Zuckerman Thesis and the Process of Legal Rationalization in Provincial Massachusetts*, 29 WM. & MARY Q. 461, 466 (1972).

252. Historians' traditional interpretation was that power in Massachusetts grew increasingly centralized during most of the provincial period. *See* Allen, *The Zuckerman Thesis and the Process of Legal Rationalization in Provincial Massachusetts*, 29 WM. & MARY Q. 443, 443 (1972) (reexamining Zuckerman's thesis and suggesting that centralization of power in Massachusetts applied only to *some* towns for *part* of provincial period); Murrin, Review Essay, 11 HIST. & THEORY 226 (1972) (reviewing five books that investigate development of early New Eng-

institution.[253]

Second, it is important to note that the issue of the legal status of Massachusetts towns is quite independent of the question on which recent New England historians have focused most of their attention, namely whether there was a shift in *actual* authority from the town to the central colonial government or the reverse in the eighteenth century.[254] The formal *legal* relationship of New England towns to central authority became established in the early seventeenth century and did not change substantially thereafter.

At first, settlements in New England had no legal status, little governmental authority, and they were called "plantations."[255] Gradually, the town meeting became a central political institution common to most New England towns.[256] The town meeting "paralleled to a very large degree" the vestry meetings of English parishes.[257] By the

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land towns). Michael Zuckerman challenged this view in his book *Peaceable Kingdoms,* published in 1970. Professor Zuckerman's thesis was that the central government at Boston exercised very substantial secular and ecclesiastical powers over Massachusetts towns in the 17th century, but that, after 1691, power shifted "from hierarchical 'coercive' to local 'accommodative' consensus." M. ZUCKERMAN, PEACEABLE KINGDOMS 444-45 (1970). In the 18th century, according to Zuckerman, towns were virtually autonomous from the central government. *Id.* at 51. For a different approach that also focuses on the central importance of towns, see Breen, *Persistent Localism,* 32 WM. & MARY Q. 3 (1975) (asserting relationship between preimmigration institutional experience of colonists and their determination to maintain local authority); Breen, *Transfer of Culture: Chance and Design in Shaping Massachusetts Bay,* 132 NEW ENG. HIST. & GENEOLOGICAL REG. 3 (1978) (comparing foundations of 17th century localism in New England to preimmigration practices in England).

Zuckerman's view has been controversial since he first articulated it. *See, e.g.,* Murrin, *supra,* at 245-76 (questioning Zuckerman's thesis); Wroth, *Possible Kingdoms: The New England Town From the Perspective of Legal History,* 15 AM. J. LEG. HIS. 318, 318-19 (posing three counterpropositions that would significantly modify Zuckerman's thesis); *see also* Konig, *English Legal Change and the Origins of Local Government in Northern Massachusetts,* in TOWN AND COUNTRY 12-43 (B. Daniels ed. 1978) (citing examples to suggest that towns had little power in relation to county courts). David Grayson Allen has forwarded a recent challenge. D.G. ALLEN, IN ENGLISH WAYS (1981). To simplify Professor Allen's position, he generally agrees with the traditional analysis, but gives even greater stress to the local autonomy in the 17th century, which he believes was followed by a precipitous shift of authority to the provincial government in the eighteenth century. Allen ties this movement to the waning influence of English custom and law. *But see* Reid, Book Review, 56 N.Y.U. L. REV. 850, 850-66 (local autonomy explicable by lack of central authority), 865-66 (Allen fails to account for precipitousness of decrease in influence). *Compare* Zuckerman, *supra* note 251, 461-68 (claiming "Allen samples my thesis with unbecoming ineptitude") *with* Murrin, *supra,* at 245 (calling *Peaceable Kingdoms* "a sharply disappointing book which adds little to what [Zuckerman] has already said").

253. *But see* Konig, in TOWN AND COUNTRY, *supra* note 252, at 26-28 (suggesting that towns had little power compared to county magistrates). *See infra* note 260 (critiquing Konig's thesis).

254. *See supra* note 252 (setting out positions in the debate).

255. Konig, in TOWN AND COUNTRY, *supra* note 252, at 28.

256. The exact role of the town meeting in the town's power configurations is the subject of much discussion among historians. *See* Lockridge & Krieder, *The Evolution of Massachusetts Town Government, 1640 to 1740,* 23 WM. & MARY Q. 549, 549-74 (1966) (warning against overconcentration on the "continuity of external forms"). Those forms, however, are of major importance to this Article and to legal history. *See also* K. LOCKRIDGE, A NEW ENGLAND TOWN (1970) (studying inception and growth of single community to gain sense of local life).

257. Lockridge & Krieder, *supra* note 256, at 550.

seventeenth century, the legal authority of vestry meetings to pass by-laws began to be challenged.[258] The New England town meetings faced the same uncertainty with respect to their legal authority to act. The wariness in Massachusetts of rights based on custom compounded the problem.

Massachusetts responded to this uncertainty by giving town powers a statutory basis. The colonial government of Massachusetts passed the first "Town Act" in 1636.[259] This act and later acts were far broader than any of the specific parliamentary grants to English parishes.[260] To quote from a later Town Act adopted in 1647, towns were given the "power to make such laws and Constitutions as may concern the welfare of their Town. Provided they be not of a criminal but only of a prudential nature . . . and not repugnant to the publick Laws."[261]

These statutes were essentially an amplification of the English doctrine that towns could act "pro bono publico."[262] The authority of English towns to pass by-laws pursuant to their power to act pro bono publico appears to have extended only to the repair of bridges and highways.[263] The Massachusetts Town Acts, however, granted much broader powers:

> Beginning "whereas particular towns have many things which concern only themselves," the General Court provided that the town (or, its resident freemen acting collectively) should have the power to dispose of its own lands, make bylaws not repugnant to the laws established by the General Court, and "to choose their own particular officers [such] as constables, surveyors for the highways and the like." Hereafter it was clear who constituted the town meeting and what was its competence. And it was a very broad competence as it then stood, with its bylaws ". . . not re-

258. *See* 1 B. & S. WEBB, *supra* note 94, at 39; *see supra* notes 107-26 (discussing use and difficulties of vestry meeting power in England).

259. *See* Konig, in TOWN AND COUNTRY, *supra* note 252, at 29.

260. *Cf. id.* at 29-30. Konig argues that the Town Acts "constituted town governments [in Massachusetts] closely to resemble the weak and limited structure of English parochial or manorial administration." *Id.* at 29. His argument appears to be based on a misunderstanding of parish powers in England. Konig misquotes the Webbs to support his claim that English parishes had sharply constricted powers. *Id.* at 19-20 (quoting 1 B. & S. WEBB, *supra* note 94, at 40). Konig quotes the Webbs as claiming that the parish "was regarded by no one as an organ of autonomous self-government." Konig, in TOWN AND COUNTRY, *supra* note 252, at 19. The Webbs' position, however, was that the parish exercised substantial powers *despite* the fact that "any member of the governing class" in England would have viewed the county as the primary organ of local government. 1 B. & S. WEBB, *supra* note 94, at 279-80; *supra* notes 103-07 and accompanying text (discussing relationship between parish and county).

261. 1647 Mass. Town Act, THE LAWS AND LIBERTIES OF MASSACHUSETTS 50 (1648 & reprint 1929).

262. *See supra* notes 101-02 and accompanying text (discussing authority of English parishes to act pro bono publico).

263. *Id.*

> pugnant" and "own particular officers . . . and the like." Such clauses were broad, open-ended mandates for the town meeting to manage local business.[264]

The unique history of the New England town had a major influence on Massachusetts decisions defining town powers. The Supreme Judicial Court of Massachusetts in some sense invented the municipal corporation as a name for the difference between Massachusetts towns and borough corporations. Moreover, the court, in its first attempt to articulate the power of its towns, found it easy to accept the notion that towns derived their powers from statutes.

2. *Incorporation in New England*

"One important question remains," says Ernest Griffith in his study of incorporation of colonial cities, "why was the desire for borough incorporation so conspicuously lacking in the inhabitants of the New England colonies?"[265] Attitudes towards "incorporation" in New England highlight the manner in which tensions in English corporation law, which in England remained as ambiguities, were resolved in Massachusetts.

The reason why New England towns were not corporate boroughs is very clear: New Englanders did not want them to be.[266] New England settlers vigorously opposed incorporation of Boston throughout the seventeenth and early eighteenth centuries. A 1714 pamphlet argued that incorporation would give rise to great expense because citizens would be taxed to support the traditional pomp, circumstance, and officers of English boroughs. It would make necessary "a Town, Prison and Keeper, a Bridewell, and keeper of Two Great Silver Maces, to be carried before the Mayor, and Two Men to carry them; and a Sword Bearer, a Clerk of the Court; a Clerk of the Market; a Recorder; a Chamberlain . . . ."[267] Furthermore, incorporation would have required Boston to abandon its free trade policies and to adopt borough monopolies that would have required merchants to sell all goods in the city market and subject the merchants to the "dues and duties" of the corporation.[268] The 1714 pamphlet argued, "[t]hat which is worst [sic] than

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264. Lockridge & Krieder, *supra* note 256, at 550-51.

265. *See* 1 E. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT 71 (1938) (noting conspicuous lack of incorporation of New England towns).

266. *See* J. TEAFORD, *supra* note 11, at 35-44 (New Englanders sought greater economic freedom and greater local autonomy than European boroughs allowed).

267. Ford, *Communication of Two Documents Protesting against the Incorporation of Boston*, in 10 PUBLICATIONS OF THE COLONIAL SOC'Y OF MASS. 345, 345-56 (1906).

268. *Id.* at 346.

all, is to the Trading part [of Boston inhabitants] which is put under a possibility of being reduced to manage but one Trade, which will be great Confusion, if not Unsupportable in its difficulties, *viz.* The Shop-keepers which do many of them occupy more than Twelve Trades . . . ."[269] The final economic result of incorporation, warned another pamphleteer, would be to "driv[e] out the Trade of the Town, to its Neighbouring Towns, & so make them Rich and Happy, and this Poor, and Miserable."[270]

The pamphleteers also inveighed against the oligarchical nature of borough corporations, in which a special group of citizens controlled the city. Incorporation, Bostonians feared, would take away "the Ancient rights, and undoubted Property of our Voting at Town Meetings, which we now enjoy."[271] One pamphleteer added that

> I do not like the Rule of Regulating of [the proposed corporation], nor the Qualifications of Mayor & Alderman; for a Man may be worth 1000 pounds and yet have neither Grave nor good Manners, but be a Covetous Man, that may be like a Wolfe among Sheep; an honest man may not come into the Town without buying his Freedom . . . .[272]

There was no doubt in the pamphleteers' minds that their form of government differed fundamentally from that of borough corporations:

> *Boston* has now been Settled for near an Hundred years, and has from its Infant State, till now, been Governed by the same Methods it is at this day. Our Forefathers, the first Founders of this Town, esteemed by all that ever heard of them, to be Judicious, Understanding Men; chose and preferred this sort of Town Government, under which we now live, & under which they lived all their time, to all others whatsoever: And many of them lived to see this spot of Ground, from a Wilderness and Desert place, as it was, to become in their day, a town Considerable for Trade, Riches and Number of Inhabitants; thro' the Good Government of it; And their Descendants and those who have come after them may indeed, justly, now behold it as the most considerable Town; for the time it has stood, on the whole Earth. What an Instance then of Folly and Levity in a People must it needs appear, to all considering Persons, for them to Change a Government under which they have thus prospered, for One which may be their utter ruin, Confusion & Undoing. . . .[273]

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269. *Id.*
270. *Id.* at 349.
271. *Id.* at 346.
272. *Id.* at 347; *see also id.* at 351-52 (suggesting that actual charter might be less liberal than advertised charter).
273. *Id.* at 349.

The pamphlets also show how early New England residents recognized that the role of borough corporations in England—as sacred protectors of English basic rights against Stuart encroachment—was irrelevant in the New World. They argued that Boston already enjoyed the powers the incorporation afforded to English boroughs:

> But they who are for a Corporation, may make the following Objection, to what has been said, *Viz. If the being Incorporated brings Charges and Troubles only on a People, without Privileges and Advantages, how come it to pass, that almost every Town in Great Britain has sought to be, and is a Corporation? The Answers to this Objection . . .*
>
> 1. Then the Inhabitants of a Town in *Great Britain,* before they are Incorporated, have no Power at all to make any Orders, or By-Laws for their own Rule or Government, but are altogether Dependent on, and Governed by the General Laws of the Kingdom; and therefore are under a sort of necessity to seek for a Charter, and of being Incorporated, that so they may have a Power to make By-laws or Orders referring to some particular Affairs among themselves, which the General Laws of the Land don't take notice of, or sufficiently provide for. But *Boston* has already the Power of making By-Laws as we have here before shewn, and therefore needs not a Charter on this Account.[274]

These arguments evidently proved persuasive, for their proponents defeated ten separate attempts to incorporate Boston.[275] The result:

> There were thus some twenty-four municipal corporations of the more pretentious type [i.e. borough corporations] created in the American colonies. Nearly three-fourths of this number were located . . . in New York, New Jersey, and Pennsylvania. Except [for] the short-lived Acomenticus or Gorgeana [in Maine], none were to be found in New England.[276]

Although no borough corporations existed in New England, by the eighteenth century New England towns were "incorporated." English corporation law explains this apparent contradiction.

English corporation law defined "corporations" in two separate ways.[277] First, the term "corporation" described those "ancient boroughs" that were part of a closed set of chartered towns, all of

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274. *Id.* at 350. The second major power incorporation gave in England that Boston already had was the power to hold its own courts. *Id.*

275. *Id.* at 353-54. Attempts to incorporate Boston occurred in 1650, 1659, 1661, 1662, 1663, 1677, 1708-09, 1714, 1762, and 1784. *Id.*

276. 1 J.S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS 59-60 (1917).

277. *See supra* notes 80-81 and accompanying text (discussing historical and theoretical definitions of corporations in England).

which had or pretended to have medieval origins.[278] Second, the concept of incorporation provided the sole theoretical framework available in English law that allowed groups to act in concert.[279] In England and New York, the existence of an historically defined set of "corporations" precluded lawyers and courts from taking advantage of the theoretical definition of "incorporation." Lawyers in New England did not feel similarly constrained. Consequently, they developed a new definition of "incorporation" that exploited English corporation law's theoretical potential.

In the early eighteenth century, the term "corporation" was still used in New England as it was used in England. New England towns were viewed as corporations only in the sense that a group with limited corporate characteristics was sometimes referred to as a "corporation for particular purposes."[280] Governor Hutchinson of Massachusetts, for example, noted that "[n]ot only the town of Boston, but every town in the old colony, were *to many purposes* a corporate body."[281] In 1717 the trustees of Yale College referred to towns, saying that "[t]hese are not bodies corporate yet as ye common law allows one *as it were* incorporate to do some things . . . ."[282] Implicit in both these statements is a recognition of the difference between these "incorporated" towns and true common-law corporations.[283]

The question of whether New England towns were true corporations was never a pressing one.[284] The 1694 Act "enable[d] Towns, Villages and Proprietors in Common and Undivided lands, etc. to sue and be sued."[285] A separate statute gave towns authority to hold land[286] and the first Town Act gave them broad powers to pass by-laws.[287]

In the course of the eighteenth century, a shift took place in the

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278. *See supra* notes 80 & 86-87 and accompanying text (sketching how corporations in England were limited to an historically defined closed set).

279. *See supra* notes 81-84 (discussing scholastic attempts to define corporations theoretically).

280. *See supra* notes 111-26 and accompanying text (discussing English use of "corporation for a particular purpose").

281. *See* J.S. DAVIS, *supra* note 276, at 63 (quoting T. HUTCHINSON, HISTORY OF MASSACHUSETTS i, 175n (London 1765) (emphasis added by Davis)).

282. *Id.* at 63 (emphasis added).

283. *Id.*

284. B. DANIELS, THE CONNECTICUT TOWN 13 (1979). Daniels asserts that towns only worried about their legal status "[b]riefly, during the period of the Dominion of New England, when colonial governments were being challenged by England . . . ." *Id.* at n.13.

285. 1 Mass. Prov. Acts 182-83 (1694), *quoted in* J.S. DAVIS, *supra* note 276, at 62. Davis noted that such an act would have been unnecessary if the towns were full corporations. *Id.*

286. MASS. BAY PROVINCE—CHARTERS, ACTS AND LAWS 1691-1743, ch. V, at 59-60 (1694).

287. *See supra* note 259 and accompanying text (discussing original town acts).

use of the term "incorporation" in Massachusetts. Statutes began to raise New England settlements that had begun life as plantations to the status of "incorporated" townships with the accompanying privileges.[288] Exactly when these statutes became known as "statutes of incorporation" is unclear, but by 1785, a fairly typical statute used the "incorporation" language explicitly: "An act for incorporating the Plantation called *Pearsontown* into a town . . . ." [289] Unlike statutes incorporating New York villages, however, these statutes did not create formal corporations.[290] Instead, the New England statutes mobilized the theoretical definition of corporations from English corporation laws: "incorporation" simply meant the political act that allowed a group of settlers to act as a town.

Statements from English treatises, once divorced from the English political context, offered ample support for this theoretical interpretation of "incorporation." For example, the English authorities from Shepheard on had held that incorporation required "no set form of words."[291] Massachusetts adopted and applied this principle with vigor.[292]

Thus, New York and New England used the words "corporation" and "incorporate" very differently. The governmental culture of New York ensured that New York courts would preserve the English understanding of a corporation as a corporate borough. Courts in Massachusetts, however, functioned in a society in which "incorporation" meant simply the legal act that allowed a group of settlers to act as a town. This distinction proved crucial in the divergent development of local government law in the two states.

3. Massachusetts towns as corporations

Despite the statutes purporting to "incorporate" Massachusetts

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288. B. DANIELS, *supra* note 284, at 27.

289. Act of Nov. 30, 1785, ch. 22, 1785 Mass. Laws 339; *see also* J.S. DAVIS, *supra* note 276, at 62 (citing 1785 statute as first unmistakable grant of corporate powers to a town).

290. *See* J.S. DAVIS, *supra* note 276, at 62-63. Davis suggests that Massachusetts towns resembled quasi corporations more than actual corporations. *Id.* (citing Rumford v. Wood, 13 Mass. 193, 198 (1816)).

291. *See, e.g.*, W. SHEPHEARD, *supra* note 18, at 13; 2 J. KENT, COMMENTARIES ON AMERICAN LAW *276; 1 S. KYD, *supra* note 7, at 62.

292. J.S. Davis notes the difficulty in establishing with any precision when towns became corporations:

> The line between the true corporations and those which are improperly so designated is exceedingly difficult to draw. Suffice it to say at the outset that the terms "incorporate," "corporation," "body politic," and "charter" are used in this connection both by contemporaries and by later writers with the greatest looseness; and that it is not always safe to infer that a town in connection with which such terms have been used actually possessed the characteristics of a legal corporation.

J.S. DAVIS, *supra* note 276, at 62-63.

towns, the sense in which such towns were corporations remained unclear at the turn of the nineteenth century. Nonetheless, post-Revolutionary Massachusetts courts did refer to towns as corporations primarily in the context of three major types of cases.

The first class of cases focused on whether a town's common lands were owned by the town proprietors as tenants in common or by the town as "corporate" property. The common lands of many New England towns originally were conveyed to their settlers as tenants in common.[293] When the legislature incorporated a town into a separate political unit, its common lands became the "corporate property" of the town.[294] This use of the term "corporate" returned to the central notion that incorporation enabled incorporators to pass property to their *corporate successors* instead of to their personal heirs.[295] The court in *Proprietors of Monumoi Great Beach v. Rogers*[296] applied this concept. The litigants questioned "whether the acts of individuals claiming under the ancient proprietors . . . can be given in evidence so as to support this action of trespass [by defendant] upon the possession of the proprietors. . . ."[297] The proprietors could not prove they had acted as a corporation at any time after 1756 because they had lost their corporate books.[298] Three of the four judges voted to admit the oral evidence.[299] The one dissenting judge stated briefly the English view that unincorporated individuals had to sue in their own names and not as a group.[300] The majority rejected the English rule. One judge stated that

> [t]his is a species of corporation different from corporations in general—*this* is intended to *die*—*those* to *live* forever. I make these observations to show that common law rules as to corporations in general do not apply, in all instances, to this kind of corporation. These statutes take away no rights from the individuals composing such a corporation, which, as tenants in common, they had before they were incorporated—but on the contrary give them

293. *See* R. AKAGI, THE TOWN PROPRIETORS OF THE NEW ENGLAND COLONIES 9, 30-38 (1924) (discussing grants "to groups of individuals").

294. This is how post-Revolutionary courts described the situation. Seventeenth century courts probably conceptualized the situation differently and surely would not have identified the proprietors as a corporation.

295. *See* 3 W. HOLDSWORTH, *supra* note 17, at 483 (passing land to corporate successors was one of earliest corporate characteristics).

296. 1 Mass. 159 (1804).

297. *Id.* at 162.

298. *Id.* at 161-62.

299. *Id.* at 162-64.

300. *Id.* at 161-62 (Sewall, J., dissenting) (arguing that no corporation can claim benefits from acts of individuals unless it made the acts its own).

new powers.[301]

Cases involving the relationship of towns to parishes were more common. These cases involved a variety of issues, including that of whether an individual owed taxes to both the town and the parish. In New England, as in many places in England, towns and parishes originally were coterminous.[302] As one court stated, "[u]nder the colony charter no man could be a freeman, unless he was a church member, until the year 1662; and a majority of the church constituted a majority of the legal voters of the town."[303] Another court noted in 1796 that "[e]very town incorporated by law contains in it all the rights, powers and privileges of an ecclesiastical society, and are subject to all duties: and so long as they remain one entire body may manage their ecclesiastical concerns in town meetings. . . ."[304] With the Great Awakening and other pressures towards religious diversity, however, towns gradually lost their religious unanimity. Daniels describes new parish creation in the eighteenth century as reaching "epidemic proportions."[305] By 1807, according to the Massachusetts Supreme Judicial Court:

> [i]ndeed, a town may, and most commonly does, contain more or less inhabitants of a different religious denomination from that of the parish. They have no concern in the affairs of the parish, but they have all the rights of other inhabitants as to the affairs of the town. Accordingly, it is generally practiced to hold distinct meetings for the two objects.[306]

The town and the parish were often identified as distinct "incorporations."[307] Because the town and the parish were different corporations, the parish continued to exist even if a town was subsequently incorporated containing identical lands. Thus, the cases held, a subsequent incorporation of a new town or parish did not release the inhabitants of the new town or parish from duties already incurred[308] or abrogate the rights of the original town or

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301. Proprietors of Monumoi Great Beach v. Rogers, 1 Mass. 159, 163 (1804). Few town division cases appeared as late as the 19th century. But they must have been common a century earlier as town after town faced the issue of ownership of the commons. Although these cases require further research, they probably played an important role in the analysis of New England towns as corporations.

302. B. DANIELS, *supra* note 284, at 95; L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 48-50 (1957).

303. Avery v. Inhabitants of Tyringham, 3 Mass. 160, 180 (1809); *see also* B. DANIELS, *supra* note 284, at 95.

304. Selectmen of Cornwall v. Pierce, 2 Root 431, 433 (Conn. 1796).

305. B. DANIELS, *supra* note 284, at 35.

306. Dillingham v. Snow, 3 Mass. 276, 279 (1807).

307. The court in *Dillingham v. Snow* stated "[the] incompatibility of the two incorporations . . . seems to . . . require the continuance of each for the preservation of their distinct property and privileges, and to answer the several purposes of their creation." *Id.* at 282-83.

308. *See, e.g.*, Inhabitants of Harrison v. Inhabitants of Bridgeton, 16 Mass. 15, 17 (1819)

parish.[309]

A third major context in which courts analyzed towns as "corporations" involved town partition cases. Both in Connecticut and Massachusetts, many towns "hived off"[310] from existing towns in the 1770's and 1780's. The town partition cases often involved the question of which entity—the old town or the new—was responsible for maintenance of a pauper. New England's system of poor relief required the town of the pauper's "settlement" to support him. If the pauper had a settlement in a particular town which was later partitioned into two new towns, courts required the original town to support the pauper because, upon incorporation, support of paupers became a corporate responsibility. One court that adhered to this policy explained that "[t]his principle [was] . . . deduced from the nature of corporate rights and duties . . . ."[311]

4. Massachusetts towns as "quasi" or "municipal" corporations

Despite the courts' references to "corporations," the sense in which Massachusetts towns were corporations remained unclear in 1800. In the first two decades of the nineteenth century, courts clarified the relationship between Massachusetts towns and English corporation law.

In defining the relationship between their towns and "corpora-

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(new town not released from obligation to support ministry); Eager v. Inhabitants of Marlborough, 10 Mass. 430, 432-33 (1813) (pre-division decision to build meeting-house enforceable against first parish, although meeting-house located in second parish); Dillingham v. Snow, 3 Mass. 276, 282-83 (1807) (incorporation of new parish does not suspend or abolish obligation to support public worship).

309. *See, e.g.*, Inhabitants of the First Parish in Medford v. Pratt, 21 Mass. (4 Pick.) 221, 226 (1826) (original parish retained exclusive right to use meetinghouse for public worship following incorporation of second parish); Inhabitants of the First Parish in Shapleigh v. Gilman, 13 Mass. 189, 191 (1816) (original parish retains right to land designated for use as a parsonage).

310. B. DANIELS, *supra* note 284, at 35.

311. Inhabitants of Windham v. Inhabitants of Portland, 4 Mass. 384, 390 (1808). This is a statement of the law that many courts applied in the absence of relevant statutes. Statutes could, and sometimes did, change the obligations involved. In *Inhabitants of Windham,* for example, one of the statutes in question provided that

> upon division of towns or districts, every person having a legal settlement therein, but being removed therefrom at the time of the division, and not having gained a new settlement elsewhere, shall have his settlement in that town or district, wherein his former dwelling-place or home shall happen to fall upon such division.

Id. at 388 (citing Statute of 1793, ch. 34). This act did not apply in *Inhabitants of Windham,* however, because the division in question occurred prior to enactment of the statute. *Id.; see also* Inhabitants of Lancaster v. Inhabitants of Sutton, 16 Mass. 112, 113-14 (1819) (enforcing provision of partition statute that required original town to maintain pauper unless he terminated his settlement with that town according to specific statutory procedure); Inhabitants of Norton v. Inhabitants of Mansfield, 16 Mass. 48, 51 (1819) (enforcing provision in partition act that provided that new town should "bear their proportionate part of supporting the poor. . . .").

tions," Massachusetts courts turned to the long-established political discourse that had divorced the terms "incorporation" and "corporate" from the technical and preclusive meanings the terms had in England and New York.[312] Courts thus had a "commonsense" argument that "incorporation" meant something different in New England than it did at common law. Moreover, because New England used the term "incorporation" to refer to the *procedure* that authorized a group of settlers to act as a town, post-Revolutionary New England courts inherited what courts in England and New York so sorely lacked: a legal language tied into contemporary political practice.

Once Massachusetts courts faced the intellectual challenge of defining the relationship between their use of the words "corporate" and "corporation" and the traditional uses of these words in English law, the courts concluded that towns were a special type of "municipal" or "quasi" corporation. The Massachusetts Supreme Judicial Court first held that towns were municipal corporations in two 1816 cases, *Rumford v. Wood*[313] and *Stetson v. Kempton.*[314]

The conclusion of the Massachusetts courts that towns were municipal corporations represented an important shift in the use of the word "municipal." In the eighteenth century, the term "municipal" existed in the political vocabulary but was not used to refer to local government units. Hartog explains that "[i]n Blackstone's *Commentaries*, 'municipal laws' represented the English equivalent of the *jus civil* of continental law, a rule of civil conduct prescribed by the Supreme power of the state, commanding what is right and prohibiting what is wrong."[315] American law adopted this usage. Kent's *Commentaries* used the term "municipal law" to refer to the law regulating the internal affairs of a nation or state.[316]

In Massachusetts at the turn of the nineteenth century, Chief Justice Parsons[317] of the Massachusetts Supreme Judicial Court began consistently to use the word "municipal" in cases in which he compared the narrow powers of parishes with the broader "municipal"

312. Most lawyers and educated people would have known what a true corporation was. For example, Thomas Jefferson owned two books in his private collection that discussed the history of English boroughs: Robert Brady's *An Historical Treatise of Cities and Burghs or Boroughs* (London 1704), and Thomas Madox, *Firma Burgi* (London 1726). Catalogue of the Thomas Jefferson Collection, Library of Congress.

313. 13 Mass. 193 (1816).

314. 13 Mass. 271 (1816).

315. H. HARTOG, *supra* note 8, at 190 (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 44-53 (London 1765-69)).

316. *Id.* at 190 (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW *419-508).

317. Theophilus Parsons (1750-1813) was Chief Justice of Massachusetts from 1806 to 1813.

powers of Massachusetts towns. As early as 1804, Massachusetts courts had developed the principle that parishes had only statutorily granted powers.[318] A Massachusetts court refused to hear an attorney who argued otherwise: "[t]he court[s] were so clear that parishes had no powers except those given by statutes . . . they would not permit the counsel to proceed in his argument—saying it was like arguing against a first principle, and respecting which there had never been any doubt."[319] Chief Justice Parsons applied the term "municipal corporation" as early as 1809 when he reasserted the broad nature of town powers as opposed to parish powers: "Parishes are incorporated with a very few powers and duties . . . Towns are municipal corporations, with power 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."[320]

The term "quasi corporation," which Massachusetts courts eventually came to use interchangeably with "municipal corporation," developed independently. The term had appeared in *Men of Devon,*[321] which Massachusetts courts read as holding that unincorporated local units were quasi corporations.[322] In an early post-Revolutionary case involving private corporations, Chief Justice Parsons applied the quasi corporation language: "We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties, and hundreds in *England;* and counties, towns, & c. in this state."[323]

Two years later, in 1812, an attorney cited to *Men of Devon* in a case involving a town's tort liability.[324] The 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.[325]

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318. Bangs v. Snow, 1 Mass. 181, 189 (1804).

319. *Id.*

320. Dillingham v. Snow, 5 Mass. 547, 553-54 (1809).

321. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788); *see supra* notes 118-26 and accompanying text (discussing *Men of Devon*).

322. *See, e.g.,* Riddle v. Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169, 187 (1810) (asserting that English courts had held towns to be quasi corporations). In fact, of course, American courts miscited *Men of Devon,* which had used the term "quasi corporation" in rejecting an attorney's argument that unincorporated local units were quasi corporations. *See supra* notes 121-24 and accompanying text (discussing *Men of Devon*).

323. Riddle v. Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169, 186-87 (1810).

324. Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

325. *Id.* at 250.

Chief Justice Parsons' successor, Issac Parker,[326] redefined the terms "municipal" and "quasi" corporations and introduced the principle that towns as well as parishes had only those powers granted by statute. In doing so, Parker (who was not shy about changing law to suit the needs of the new republic)[327] miscited Parsons' decisions as precedent for his novel holdings in *Rumford v. Wood*[328] and *Stetson v. Kempton,*[329] both decided in 1816.

In *Rumford v. Wood*[330] the central issue was whether a school district had sufficient corporate powers to sign a lease on its own behalf and to sue on a contract to build a schoolhouse.[331] The argument of the school district's attorney contained one of the few cites to Kyd that appears in the local government context in the Massachusetts Reports.[332] Because school districts did not exist at common law, and because Massachusetts had decided few cases involving school districts, the school district's attorney naturally returned to corporation law, which was still the only general rubric available in the Anglo-American system for conceptualizing local government units. An attorney arguing a case involving a town might simply have cited town powers cases and avoided making an explicit assumption that towns were corporations because of pervasive uncertainty about the sense in which towns were corporations. In *Rumford,* however, the attorney had no choice but to assert explicitly that English law continued to be relevant because the school district was a corporation.

The attorney began by quoting the principle that "no certain prescribed form of words is necessary to create a corporation."[333] He asserted that the words of the statute of 1799 establishing school districts contained sufficient words of incorporation.[334] Moreover, "when a corporation is duly created, all other incidents are tacitly annexed to it."[335] School districts, therefore, were corporations ca-

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326. Issac Parker was Chief Justice of the Massachusetts Supreme Judicial Court from 1814 to 1830.

327. *See* M. HORWITZ, *supra* note 132, at 26, 49, 57-58, 72-74 (recounting frequent examples of Parker ignoring precedent in favor of "instrumentalist" arguments).

328. 13 Mass. 193 (1816).

329. 13 Mass. 272 (1816).

330. 13 Mass. 193 (1816).

331. *Id.* at 193.

332. *Id.* at 194 (citing Kyd for proposition that no prescribed form of words necessary to create corporation).

333. *Id.*

334. *See id.* at 195. The attorney pointed to various sections of the statute of 1799 that empowered the majority of the school district's inhabitants to bind the minority in voting on matters affecting the school district. *Id.* He then asserted that a majority's power to bind the minority is "of the very nature and essence of a corporation." *Id.*

335. *Id.* at 194-95.

pable both of holding lands and of instituting lawsuits incident to their land holdings.

The response of opposing counsel shows that, although the school district's attorney probably had no choice but to base his argument on English corporation law, that strategy had entailed substantial risks:

> The cases cited for the plaintiffs from the *English* books, as they respect the manner in which a corporation can be created by the king, can have little or no application in this country. They are all grants by the king to the subject of parts of the royal prerogative: chiefly of commercial privileges, which, in favour of the subject, have received a liberal exposition. Our statutes respecting schools are not to be considered as favours, sparingly imparted by the sovereign to his subject: but rather as declarations, by the legislature, of the manner in which a public duty is to be discharged. The intention of the legislature, therefore, is the only object of inquiry.[336]

The lawyer opposing the school district then refuted the argument that the statute establishing school districts conveyed corporate powers. He argued that such a broad definition of corporations would mean that "the tenants of prison limits are corporations: for the same language, in substance, is adopted in authorizing the Courts of Sessions to fix and determine the limits of jail yards."[337]

Chief Justice Parker's opinion leaves no doubt that *Rumford* was a difficult case. He reported that "[t]his cause has been some time before us; there having been, at the several consultations we have had upon it, doubts upon the mind of some or other of the court, as to the effect of the arguments submitted in writing."[338] After complementing counsel on both sides for having "ingeniously applied the legal principles and reasoning belonging to the subject,"[339] Parker concluded that the school district was not a common-law corporation.[340] Instead, he categorized both towns and school districts as "quasi corporations."[341] School districts and towns, he asserted, are not "bodies politic and corporate, with the general powers of

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336. *Id.* at 196.

337. *Id.* As a final argument, the attorney opposing the school district argued that the school districts are not corporations because they are set up and controlled by *towns*, not by the state legislature: "It is among the inseparable incidents of a corporation, that it can be erected and controlled by the sovereign authority only." *Id.* (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 500 (London 1765-69)). This is an early instance of the cross-over of this doctrine from private corporation cases to cases involving local government units.

338. Rumford v. Wood, 13 Mass. 193, 196 (1816).

339. *Id.* at 198.

340. *Id.* at 197.

341. *Id.*

corporations. . . [Both] are yet deficient in many of the powers incident to the general character of corporations."[342] Pointing out the specific differences between "those corporations which exist at common law" and "our municipal corporations," Parker warned that "it will not do, therefore, to apply the strict principles of law respecting corporations, in all cases, to these aggregate bodies, which are created by statute in this commonwealth."[343]

In *Rumford* Parker used Parsons' terminology very differently from the way Parsons had used it. Although Parsons used the terms "municipal corporations" and "municipal powers" to refer to Massachusetts *towns,* Parker used the terms as generic categories that included both towns and school districts in contradistinction to corporations at common law,[344] by which he meant borough corporations. Parker also began to give more substance to the concept of "municipal" or "quasi corporation," terms he used interchangeably. He looked to existing statutes to define the powers of municipal corporations, although he also asserted that such corporations could have powers by "usage." Municipal corporations "may be considered under our institutions as *quasi* corporations; with limited powers coextensive with the duties imposed upon them by statute or usage: but restrained from the general use of the authority, which belongs to these metaphysical persons by the common law . . ."[345]

Many of the important statements in *Rumford* were dicta, but it was not long before Chief Justice Parker had a second opportunity to define the nature and powers of municipal corporations. In *Stetson v. Kempton,*[346] which the court handed down two months after *Rumford,*[347] Parker held that Massachusetts towns were municipal corporations with only those powers given by statute.

Stetson involved a challenge to a war tax that the Town of Fairhaven had levied during the War of 1812.[348] The attorney for the plaintiff taxpayer adopted Parker's suggestion that towns were municipal corporations and asserted that "the powers of our municipal corporations are wholly derived from our statutes."[349] This claim directly conflicted with Parker's statement in *Rumford* that

342. *Id.* at 198.
343. *Id.* at 199.
344. *Id.*
345. *Id.* at 198-99. Parker's assertion that towns had certain powers by usage may well have been related to the English vestry meeting's right to legislate by custom. *See* 1 B. & S. WEBB, *supra* note 94, at 39 (discussing rights of vestry meetings).
346. 13 Mass. 272 (1816).
347. *Rumford* was decided in the May term of 1816, Rumford v. Wood, 13 Mass. 193 (1816); *Stetson* was decided the following July, Stetson v. Kempton, 13 Mass. 272 (1816).
348. Stetson v. Kempton, 13 Mass. 272, 273 (1816).
349. *Id.* at 273.

towns had limited powers "coextensive with the duties imposed upon them by statutes *or* usage."[350] Massachusetts lawyers and courts had, of course, looked to town acts and other statutes to determine questions of town authority for decades, if not centuries.[351] Yet the lawyer's argument was novel in its assertion that towns had *only* powers derived from statutes. The lawyer clearly was aware that his claim was tenuous. In an attempt to meet and disarm an assertion that the towns had powers by usage, the attorney argued that

> The practice of towns during the revolutionary war may perhaps be cited in support of the act of the town [in passing the war tax] . . . [b]ut that was a period of confusion and anarchy, from which precedents cannot be drawn in times of settled order and government. Towns then, at one time or another, exercised almost all the powers of sovereignty. By the Constitution of the *United States,* the power of raising and supporting armies, and all necessary concomitant powers, are vested exclusively in Congress. The common defence is committed to that body, and all necessary means for that object. It can, then, make no portion of the necessary expenses of our towns.[352]

The taxpayer's attorney also felt compelled to address the traditional approach of New England courts before *Rumford* to cases involving challenges to town actions. An apt example of this earlier approach appears in *Hitchcock v. Town of Litchfield,*[353] a 1790 Connecticut case involving a challenge to a tax the town levied to pay Revolutionary War soldiers.[354] The most interesting feature of the decision in *Hitchcock* is its failure to discuss the town's power to vote the tax. The court upheld the tax by asserting that a "legal town meeting" had assessed it.[355] This was the traditional inquiry in cases involving a challenge to an exercise of town powers.[356] The taxpayer's attorney in *Stetson,* however, assured the court that this approach was no longer viable:

> [N]othing can be inferred from the fact agreed in the case, that this money was voted at a legal meeting of the town . . . . An unauthorized vote of a town can confer no powers on the assessors of such town, nor can it screen them from the regular conse-

350. Rumford v. Wood, 13 Mass. 193, 198 (1816).

351. 1636 Mass. Town Act, THE LAWS AND LIBERTIES OF MASSACHUSETTS 50-51 (1648 & reprint 1929).

352. Stetson v. Kempton, 13 Mass. 272, 274 (1816).

353. 1 Root 206 (Conn. 1790).

354. *Id.*

355. *Id.*

356. *See, e.g.,* Craigie v. Mellen, 6 Mass. 7, 17-18 (1809) (eminent domain proceeding authorized by legitimate town meeting).

quences of an illegal act.[357]

The final argument of the taxpayer's attorney was that "parishes are as much corporations, and have as high and comprehensive an authority over the parishioners, as towns' bylaws have over their inhabitants."[358] Because the parishes could not vote a tax such as the one at issue here, neither could the town.[359] The plaintiff's attorney miscited cases in which Parsons had contrasted parish powers with "municipal power."[360] Parsons had compared town and parish powers to stress how much broader were town than parish powers, but the attorney in *Stetson* cited the limited powers of *parishes* as authority for his assertion that *towns*, as another species of municipal corporation, also had limited powers.[361]

Chief Justice Parker agreed with the plaintiff taxpayer's assertion that the central issue of the case was whether the town had the legal authority to tax its inhabitants to support a militia. Parker wrote that "[t]he principal question, which arises out of these facts is whether the inhabitants of the town of Fairhaven had lawful right and authority, in their corporate capacity, to raise money. . . to give additional wages to the militia, and for other purposes of defense."[362] Parker then proceeded to modify in a highly significant respect the formulation he had developed only two months earlier in *Rumford* concerning the scope of town powers. Although in *Rumford* Parker had asserted that Massachusetts towns had both powers given by statute *and* powers given by usage, in *Stetson* Parker accepted the suggestion of the taxpayer's attorney that towns had *only* powers given by statute: "the powers of towns, as well as parishes, are either entirely derived from some legislative act, or defined and limited by the general statutes, prescribing the powers and duties of both classes of corporations."[363] Parker continued, "Whether it would be wise to extend and multiply the objects, for which towns may be authorized to raise money, is a question for the legislature, and not for us, to decide . . . towns now being creatures of legislation, and enjoying only the powers which are expressly granted to them."[364]

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357. Stetson v. Kempton, 13 Mass. 272, 275, 277 (1816).
358. *Id.* at 277.
359. The plaintiff's attorney cited to the court's earlier holding in Bangs v. Snow, 1 Mass. 181 (1804). There the court held that parishes could only raise funds for purposes necessarily connected to objectives sanctioned by statute. *Id.* at 190-91.
360. Stetson v. Kempton, 13 Mass. 272, 274 (1816). For a discussion of the earlier cases decided by Parsons, see *supra* notes 317-23 and accompanying text.
361. *Id.* at 277-78.
362. *Id.* at 278.
363. *Id.* at 281.
364. *Id.* at 284.

Parker thus took the principle, established by Parsons, that parishes have only statutorily conferred powers and generalized it by inventing a generic category of municipal corporations that included both towns and parishes.[365] Parsons, in turn, had derived the principle that parishes "have no authority to grant moneys, except for the objects specifically expressed in [their enabling act] and for the *purposes necessarily connected with those objects*" from cases involving private corporations.[366] Commentators normally cite the principle that corporations were "creatures of legislation" with only statutory powers to United States Supreme Court Chief Justice Marshall's 1804 opinion in *Head v. Providence Insurance Company.*[367] In that case, Marshall stated of the private corporation involved:

> [T]his body . . . in its corporate capacity, is the mere creature of the act to which it owes its existence . . . . [I]t may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.[368]

Thus, when Parsons cited this principle in the parish cases, he was proceeding on the assumption that parishes were the same type of corporations as the flood of private corporations that state legislatures were then creating.[369]

In both *Rumford* and *Stetson* Parker stressed the similarity between private and municipal corporations. The point comes through most clearly in *Rumford.* Directly after Parker stressed the dissimilarity between quasi corporations and "these metaphysical persons by the common law,"[370] he focused on the *similarities* between municipal and private corporations. One important similarity was that both were created by statutes.

> [A]ll the numerous corporations, which have been from time to time created by various acts of the legislature . . . [enjoy] the power, which is expressly bestowed upon them; and perhaps, in all instances where the act is silent, possessing by necessary implication the authority which is requisite to execute the purposes of their creation.[371]

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365. *Id.* at 283. As did the attorney for the taxpayer, Parker miscited Parson's cases to support his holding. *Id.*

366. *Id.* at 278-79 (citing Bangs v. Snow, 1 Mass. 187 (1804)).

367. 6 U.S. (2 Cranch) 127 (1804).

368. *Id.* at 167.

369. *See* COMMONWEALTH, *supra* note 26, at 106-33 (describing rapid creation of busines corporations in late 18th and early 19th century Massachusetts). *See also* R. SEAVOY, *supra* not 189, at 65-67 (describing rapid creation of diversified incorporations in New York followin enactment of 1811 general incorporation statute).

370. Rumford v. Wood, 13 Mass. 193, 198-99 (1816).

371. *Id.* at 199. In *Stetson,* Parker again miscited the parish cases to support the propo

Although at one level Parker stressed the similarity between private corporations and towns, at another level he assumed a dichotomy between public and private corporations. Indeed, Parker's assumption that municipal corporations were *public* entities was probably the most important principle underlying *Stetson v. Kempton.* Towns had power under the Town Act, Parker said, to "raise such sums as should be necessary to meet the ordinary expenses of the year."[372] Parker's attempt to define "ordinary" town expenses plunged him directly into an effort to define public—and, therefore, authorized—as opposed to private—and, therefore, unauthorized—activities.[373] In contrast to borough corporations with their mix of public and private rights and duties, Parker clearly considered the activities of municipal corporations to be confined to the public sphere:

> The erection of the public buildings for the accommodation of the inhabitants, such as town houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the word *necessary*: for these may be essential to the comfort and convenience of the citizens. But it cannot be supposed that the building of a theater, a circus, or any other place of mere amusement, at the expense of the town, could be justified under the term *necessary town charges.* Nor the inhabitants be lawfully taxed for the purpose of raising a statute, or monument; these being matters of taste and not necessity: unless in populous and wealthy towns, they should be thought suitable ornaments to buildings or squares, the raising and maintenance of which are within the duty and care of the governors or officers of the town.[374]

Parker's 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. In fact, the bifurcation of corporations into public and private had begun in Massachusetts in the first decade of the nineteenth century.[375] Two important early opinions considered whether the charter inviolability doctrine protected Massachusetts corporations. Chief Justice Parsons held that charter inviolability protected *private* corporations in *Wales v. Stetson* in

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tion that towns had only those powers granted by statute. Stetson v. Kempton, 13 Mass. 272, 281 (1816).

372. Stetson v. Kempton, 13 Mass. 272, 278-79 (1816).

373. *Id.* at 278-79.

374. *Id.* at 279.

375. Thus, the bifurcation of corporations into public and private began in Massachusetts substantially before the Supreme Court decided *Dartmouth College* in 1819. *See infra* note 399 and accompanying text (arguing that bifurcation of public and private corporations began in Massachusetts before *Dartmouth College*).

1806.[376] Although Parsons did not explicitly state that charter inviolability did not apply to towns, this conclusion evidently was obvious to his contemporaries.[377] An 1802 Opinion of the Massachusetts Attorney General (1802 Opinion) suggests the reason. The opinion stated explicitly that charter inviolability did not apply to towns because towns were not corporations like private corporations.[378]

The 1802 Opinion did not designate what kind of corporations towns were: Chief Justice Parker did not invent the municipal corporation until 1816. Yet *Wales v. Stetson* and the 1802 Attorney General's Opinion appear to reflect a growing consensus in early nineteenth century Massachusetts that towns were different from business corporations. Although neither *Wales* nor the 1802 Opinion articulated the modern public/private distinction, Justice Parker came close to doing so in *Ellis v. Marshall*[379] in 1807. *Ellis* involved a corporation formed to construct a street and considered whether such a corporation could compel an owner of adjacent land to contribute funds for street construction. Parker defined the issue as whether the corporation could compel the landowner to become a member of the corporation and consequently become liable for the assessment levied on members.[380] Parker noted that the issue in *Ellis* "requires that we should ascertain the true nature and character [of the act setting up the corporation]. If it were a *public* act, predicated upon a view to the general good, the question would be more difficult."[381] But, Parker held, the legislature clearly could not compel membership in a corporation "for the promotion of a *private* enterprise."[382]

A comparison of *Wales v. Stetson,* the 1802 Attorney General's Opinion, and *Ellis v. Marshall,* with *Rumford v. Wood* and *Stetson v. Kempton,* suggests that by 1816 Massachusetts courts had taken substantial steps toward formulating the modern public/private distinction.[383]

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376. 2 Mass. 143, 146 (1806).

377. *Cf. id.* at n.*a*. Parsons warned that every legislative grant reserved an implied right to take the grant for a public use. *Id.* Parsons' assertion might have carried the implication that towns, which derived their authority from the state, were subject to changes in their charters by the state. In any event, this author found no cases in which Massachusetts towns claimed that charter inviolability protected their town charters.

378. *Opinion of the Attorney General on the Life of the Corporation* (1802), *reprinted in* COMMONWEALTH, *supra* note 26, at 54-61, app. D.

379. 2 Mass. 269 (1807).

380. *Id.* at 275.

381. *Id.* at 276 (emphasis added).

382. *Id.* at 277 (emphasis added).

383. I am grateful to Hendrik Hartog, who with characteristic generosity focused my attention on the implications of *Ellis v. Marshall, Wales v. Stetson* and the 1802 Attorney General's

Nonetheless, Parker's holdings in *Rumford v. Wood* and *Stetson v. Kempton* does not mean that in 1816 he offered a fully developed version of late nineteenth century municipal corporation law. Yet the cases stated three important conclusions. Most basic was *Rumford v. Wood*'s use of the term "municipal corporations" to hold that towns were part of a generic group of entities, in contrast to the earlier view that only by specific charters could towns gain corporate powers.[384] Second was the holding that municipal corporations were purely public entities, in contrast to traditional corporate boroughs that combined public and private roles.[385] Both these changes, which Hartog links with the institutional transformation of New York City,[386] in fact took place much earlier in Massachusetts. *Stetson*'s final holding, that municipal corporations had only those powers granted by state statute, was an early articulation of Dillon's Rule,[387] which many consider the core doctrine of city powerlessness. Although the modern version of Dillon's Rule goes beyond *Stetson*'s holding to add that courts must strictly construe statutes granting cities powers,[388] *Stetson* is one of the earliest cases that John F. Dillon cited in support of his Rule in the first American treatise on municipal corporation law in 1872.[389]

CONCLUSION

A close reading of the case law suggests that lawyers from New York and Massachusetts saw the major legal issues surrounding town and city status very differently in the period from 1800 to 1830. *Denton v. Jackson*,[390] a New York case that Chancellor Kent decided one year after *Rumford* and *Stetson* (in 1817), sharply demon-

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Opinion, when juxtaposed with *Stetson v. Kempton*. For a more detailed discussion of the role of *Ellis v. Marshall*, *Wales v. Stetson* and related cases in the development of the law of business corporations, see COMMONWEALTH, *supra* note 26, at 134-60, and M. HORWITZ, *supra* note 132, at 111-14.

384. Rumford v. Wood, 13 Mass. 193, 199 (1816). Local lawyers quickly adopted the term "municipal corporation." *See, e.g.*, Stetson v. Kempton, 13 Mass. 272, 273 (1816).

385. *See supra* notes 374-75 and accompanying text.

386. H. HARTOG, *supra* note 8, at 180-81 (discussing development of generic category of municipal corporations after 1856); *id.* at 259-64 (discussing traditional mix of public and private roles as late as 1860's in New York). For a discussion of how the 1807 commissioner's map for New York assisted in furthering the public-private distinction, see *id.* at 67-75.

387. *See* J. DILLON, *supra* note 7, at 101-02. For a statement of Dillon's Rule, see *infra* text accompanying note 401. *See* H. HARTOG, *supra* note 8, at 223 (suggesting Dillon's Rule is the "symbolic center" of the modern law of city powerlessness).

388. Stetson v. Kempton, 13 Mass. 271, 278 (1816).

389. The only earlier case Dillon cited is Bangs v. Snow, 1 Mass. 187 (1804), the parish case that Parker miscited. *See supra* notes 358 & 365 and accompanying text (asserting that Parker miscited *Bangs v. Snow*). Dillon consistently miscited *Bangs v. Snow*. *See* J. DILLON, *supra* note 7, at 103 (citing *Bangs v. Snow*).

390. 2 Johns. Ch. 320 (N.Y. Ch. 1817).

strates this divergence. In *Denton* Kent made an argument very similar to Parker's assertion that towns were in fact corporations.[391] Yet, whereas Parker's assertion that towns were "municipal" corporations was brilliant in Massachusetts—which is to say it was an extension of accepted law that was immediately convincing—Kent's argument in *Denton* was considered unconvincing: subsequent New York courts never mentioned it.[392]

The difference between the two states' law was pervasive. In New England the description of town status from English corporation law seemed clearly wrong and the description of borough status seemed irrelevant.[393] Consequently, Massachusetts courts did not view the English law as a single logical system the integrity of which could not be disturbed.

Instead, Massachusetts courts felt free to pick and choose from English corporation law those elements they would preserve and those they would ignore. Massachusetts cases consistently reflect this lack of concern for the rigors of English corporation law. Cites to Kyd and other English treatise writers were rare, and, although learned judges such as Chief Justices Parsons and Parker were aware of English doctrines, Massachusetts lawyers and courts did not have the kind of technical mastery of English corporation law that was commonplace in New York. The attitudes of Massachusetts lawyers toward English law allowed Massachusetts judges to ignore that law's predominant tendency to limit corporations to the historically defined closed set of boroughs, and to mobilize instead the alternative but traditionally secondary theoretical definition of incorporation (as the political act that allowed a group to act in concert).

The uncritical attitude of New York courts towards English law contrasts sharply with the approach of the Massachusetts courts.

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391. *Id.* at 324. Chancellor Kent developed his argument very differently from Parker for he was a shrewd enough lawyer to sense that an assertion that towns were in fact corporations was not going to be perceived as a strong argument in New York. Therefore, he used the "towns are corporations" argument only to bolster a different argument that although towns were not *actually* corporations, they had the rights to exercise certain corporate powers. *Id.; see supra* notes 192-98 and accompanying text (discussing New York's rejection of Kent's assertion).

392. New Yorkers developed Kent's alternative suggestion that towns were not in fact corporations with full corporate powers; instead they were unincorporated groups that had been given limited corporate powers as "corporations *sub modo*." Denton v. Jackson, 2 Johns. Ch. 320, 324 (N.Y. Sup. Ct. 1817); *see supra* notes 210-14 and accompanying text (discussing *Denton v. Jackson*).

393. English corporation law's preclusive claims implied that towns could not hold land, sue and be sued, or exercise other corporate powers such as the ability to pass by-laws, *see supra* notes 80-92 and accompanying text. These claims seemed clearly wrong in Massachusetts, where towns had long exercised these powers. The English law's definition of borough powers seemed irrelevant in Massachusetts because boroughs had never existed there. *See supra* note 265.

Reference to Kyd's treatise was frequent in New York, and courts were attentive to highly technical distinctions and to the traditional rules defining corporate powers.[394] Underlying the New York courts' rigid adherence to English corporation law was the explosive political issue of whether the charter inviolability provision applied to New York City.[395]

New York courts could have defused this political issue by preserving the English law's claims with respect to the status of *boroughs,* while rejecting its claims with respect to the status of *towns.* Instead, the courts preserved English corporation law virtually intact. The persistence of New York City as a borough meant that New Yorkers continued to view the entire system of English corporation law—built around the paradigm of the borough—as a viable doctrine with continuing validity.[396]

The difference between New York and Massachusetts courts' assertions that towns were quasi corporations is illustrative of the difference between the approaches of each state. Massachusetts courts rejected the preclusive claims of English law and used the term "quasi corporation" to define the kind of corporation that towns *were.* New York courts used the term to explain why towns could exercise certain limited corporate powers even though they were *not* corporations. New Yorkers did not challenge the English law's preclusive claims directly but, instead, treated towns as a counterexample to the general rule that only boroughs were corporations.

The sharp differences between New York and Massachusetts law

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394. For cites to Kyd's treatise, see *e.g.,* Jansen v. Ostrander, 1 Cow. 670, 674 (N.Y. Sup. Ct. 1820) (attorney for the defendant) (discussing succession of public office); *id.* at 680 (Woodworth, J., majority) (discussing succession of public office); *id.* at 684 (Savage, C.J., concurring) (discussing succession of public office); Rouse v. Moore, 18 Johns. 407, 411, 417 (N.Y. Sup. Ct. 1820) (holding that when legislature creates public office, officer has implied authority to bring suits incident to office); Jackson v. Hartwell, 8 Johns. 422, 425 (N.Y. Sup. Ct. 1811) (holding that county supervisors are *pro tonto* endowed with corporate capacity); Jackson v. Plumbe, 8 Johns. 378, 378 (N.Y. Sup. Ct. 1811) (directing nonsuit when corporation sues and did not prove that it is a corporation). For an example of the New York court's preservation of a highly technical distinction from the English common law, see *supra* note 227 (courts insisting that if overseers were in any sense corporations, they were *sole* corporations). For New York cases applying traditional English rules of borough powers, see Hart v. Mayor of Albany, 9 Wend. 571, 601-04 (N.Y. Sup. Ct. 1832) (looking to English common law to discern powers of borough); Furman v. Knapp, 19 Johns. 248, 258 (N.Y. Sup. Ct. 1821) (depending on English common law to prevent state from preempting city regulation); Mayor of New York City v. Ordrenan, 12 Johns. 122, 124 (N.Y. Sup. Ct. 1815) (citing to opinion of Lord Mansfield as authority); Cortelyou v. VanBrundt, 1 Johns. 313, 313-14 (N.Y. Sup. Ct. 1806) (using English common-law definition for "rights of Freemen").

395. *See infra* notes 138-59 and accompanying text (discussing treatment of New York City's charter inviolability provision).

396. The analysis of the borough as a paradigm draws from the work of Thomas Kuhn. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1973). For sophisticated critiques and commentary upon Kuhn, see G. GUTTING, PARADIGMS AND REVOLUTIONS (1980).

raise interesting questions about the development of the public/private distinction in American law. The traditional view is that the distinction between public and private corporations was a brilliant insight of the Supreme Court in the *Dartmouth College* case in 1819.[397] Hartog challenges this view, and focuses instead on the process by which the purely public municipal corporation in New York law between 1830 and 1860 replaced the borough, which had mixed public and private roles.[398] This Article suggests that Massachusetts law assimilated the public/private distinction before both *Dartmouth College* and the developments in New York law that Hartog describes. Its tentative conclusion, that the public/private distinction developed very early in Massachusetts, has implications not only for the history of the city but also for American political history in general.[399]

This study is part of a larger effort to trace the startling transformation of English corporation law into American municipal corporation law during the eighty years between 1790 and 1870. By 1872 John F. Dillon, in the first treatise on American municipal corporation law, sought to portray a coherent body of doctrine the validity of which stretched back to English common law.[400] This Article confirms Hartog's conclusion that English corporation law changed substantially once it reached America. Yet a comparison of cases from New York and Massachusetts suggests that Hartog considerably oversimplified the process of legal change. Whereas Hartog appears to have assumed that regional differences were unimportant in the development of the American law, in fact quite different bodies of doctrine developed in New York and Massachusetts at the begin-

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397. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517 (1819).

398. *See* H. HARTOG, *supra* note 8, at 205-39. Hartog shows that New York courts first formally bifurcated corporations into public and private in 1835 in a case that was promptly overruled. *Id.* (citing People v. Morris, 13 Wend. 325 (N.Y. Sup. Ct. 1835), *rev'd,* Purdy v. People, 4 Hill 384, 395 (N.Y. Sup. Ct. 1842)). New York law did not finally accept the notion that all towns and cities—including New York City—were public corporations until 1857. *See* H. HARTOG, *supra* note 8, at 209-39 (citing People *ex rel.* Wood v. Draper, 15 N.Y. 532, 543 (1857)).

399. The suggestion that Massachusetts law began to assimilate the public/private distinction in the first decades of the 19th century may also suggest the need for a rethinking of the Handlins' famous analysis of Massachusetts between the Revolution and the Civil War. The Handlins sought to show that business corporations were viewed in Massachusetts not as private but as public entities. *See, e.g.,* COMMONWEALTH, *supra* note 26, at 138, 180 (references to corporations as "organs of the state" and as "government agencies"). The Handlins' position appears to contradict the assertion made here that business corporations were viewed as private, in contrast to public municipal corporations, in the first decade of the 19th century. One historian who has focused on the private nature of early 19th century Massachusetts business corporations is Professor Morton J. Horwitz. *See* M. HORWITZ, *supra* note 132, at 111-14. Note that the Handlins were aware of the case law on which both Horwitz and this author base their arguments. *See* COMMONWEALTH, *supra* note 26, at 134-60.

400. J. DILLON, *supra* note 7, at 18.

ning of the nineteenth century. The central question for further research is whether different state traditions continued to play an important role in the law defining cities' legal status. Preliminary research suggests that they did.

Dillon's original formulation of his rule in 1872 shows the influence of the Massachusetts case law on town powers. Dillon formulated his rule as follows:

> It is a general and undisputed proposition of 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 declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[401]

Although commentators today usually interpret Dillon's Rule as imposing a sharp limit on municipal powers, Dillon's original formulation was ambiguous. The first sentence in fact suggests a *broad* construction of statutes granting cities power. Not only do cities have powers expressly granted; they also have all powers fairly implied, as well as those essential to their municipal purposes. The second sentence—the rule of strict construction—suggests a narrower construction of city powers than does the first.

No one has yet fully documented the origin and development of these two opposing trends. Yet Dillon's cites are suggestive. One of the earliest cases that Dillon cited in support of the broad formulation of city powers is *Stetson v. Kempton.*[402] This cite reflects the fact that, by 1830, Massachusetts law had reconciled *Stetson* and *Rumford* in a series of decisions that upheld the authority of New England towns to exercise their broad traditional powers by "usage."[403] By contrast, the authority that Dillon cited for the rule of strict construction suggests the continuing influence of New York

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401. *Id.* at 101-02.

402. *Id.* at 103; *see supra* notes 387-89 and accompanying text (discussing Dillon's use of *Stetson v. Kempton*).

403. *See, e.g.,* Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 485, 489 (1837) (authority to fix fire-engine is obvious); Willard v. Inhabitants of Newburyport, 29 Mass. (12 Pick.) 227, 232 (1831) (authority to fix town clock is a common necessity). In 1861 Chief Justice Bigelow, in what appears to be the first town powers case heard after Bigelow succeeded Shaw as Chief Justice, held that Massachusetts towns did not have powers by usage: "abuse of power and violations of right derive no sanction from time or custom." Hood v. Lynn, 83 Mass. (1 Allen) 103 (1861). It appears, however, that Massachusetts lawyers continued to argue that towns had certain powers by usage as late as 1907. *See* Attorney Gen. v. Stratton, 194 Mass. 51, 52, 79 N.E. 1073, 1073 (1907).

law.[404] Thus the different case law traditions in New York and Massachusetts appear to have had continuing importance in shaping American law.

Different state traditions appear to have had a second lasting impact on the law. As Hartog documents, New York City's mix of public and private powers eventually gave rise to the modern governmental/proprietary distinction.[405] Indeed, the governmental/proprietary distinction may well be a holdover from the lasting conviction of New Yorkers that cities play both public and private roles. This vision of the city appears to contradict the view of Massachusetts courts that towns were purely public. Although modern local government law downplays the contradiction between the New York courts' vision of cities as both private and public, and the Massachusetts courts' vision of towns as purely public, the two traditions persist in local government law today in uneasy combination.

This Article also contains some very preliminary suggestions concerning why the law of city powerlessness developed as it did. It suggests that the American law of city powerlessness was not an inevitable result of the rejection of the corporate borough and of English corporation law. In fact, when the Massachusetts Supreme Judicial Court first replaced the analysis of the borough with that of the municipal corporation, the municipal corporation was still an empty vessel.[406] "A rethinking of the legal nature of the city may have been inevitable, but what determined the content of the new judicial doctrine?"[407] Hartog focuses his explanation upon "the nineteenth-century middle-class movement to control and remake the American city."[408]

This Article suggests that the initial stirrings of the law of city powerlessness may not have arisen in cases involving major American cities. In fact, the appearance in *Stetson v. Kempton* of an early form of Dillon's Rule suggests that the impulse of American courts to constrict the local governments' powers arose in cases involving small New England towns long before the desire to control the pro-

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404. Dillon cites to a Supreme Court opinion written by Justice Samuel Nelson. *See* J. DILLON, *supra* note 7, at 102 (citing Minturn v. Larue, 23 How. 435, 64 U.S. 638 (1859)). Nelson was, before joining the United States Supreme Court, a very influential state court judge in New York. For background on Nelson's role in the development of the municipal law of New York, see H. HARTOG, *supra* note 8, at 207-16.

405. H. HARTOG, *supra* note 8, at 181-82.

406. In fact, *Stetson* and *Rumford* expressed very different views of the municipal corporations' powers. *Compare supra* notes 346-65 and accompanying text (discussing *Stetson*) *with supra* notes 330-45 and accompanying text (discussing *Rumford*).

407. H. HARTOG, *supra* note 8, at 262.

408. *Id.* (citing P. BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920 (1978)).

cess of urbanization began to play a major role on the American scene.[409]

The court's decision in *Stetson* stems not from the court's concerns about the threats that cities might pose. Instead, the court's attention seems focused upon the proper scope of government in general. Parker's constriction of town powers in *Stetson* appears to be part of a larger national debate about the proper scope of governmental power when the exercise of such power threatened private property interests.

Dillon demonstrated similar concern with the threat that town governments posed to private property. Dillon's focus, like Parker's, was not on the government of major cities. Dillon's interest in local government law arose from cases in which towns large and small voted to issue bonds to help finance railroads during the period from 1830 to 1870.[410] Preliminary evidence suggests that Dillon's Rule became an established tenet in cases involving the authority of towns to impose taxes on private individuals to finance railroads and other improvements.[411]

Thus, *Stetson v. Kempton* and Dillon's Rule suggest that the national debate on the limits of governmental power in derogation of property rights may well have played a persistent role in the development of city powerlessness. If nightmares about city power proved influential in defining the nature of the municipal corporation, however, so too did Jeffersonian dreams of the glories of self-government exercised at the local level.[412] It is still unclear how

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409. *Stetson v. Kempton* involved the town of Fairhaven, which had a population of 2,733 in 1820. U.S. DEP'T OF COMMERCE, FOURTH DECENNIAL CENSUS: 1820.

410. Dillon's desire to protect private property from governmental power is well established. *E.g.*, A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW 27-29, 78-81 (1960) (referring to Dillon as a laissez-faire extremist); Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161 (1895); Frug, *supra* note 11, at 1109-11. Dillon was the foremost bonding lawyer of his day. A. PAUL, *supra*, at 78.

411. *Stetson v. Kempton* was, of course, an early case involving towns' ability to impose taxes on private individuals. *See supra* notes 346-69 and accompanying text (discussing *Stetson*). Cases involving towns' authority to impose a tax to buy stock or otherwise help finance railroads were the most common type of mid-19th century case involving the issue of a town's authority to impose taxes. For a listing of mid-19th century bonding cases, see J. DILLON, *supra* note 7, at 144-50. For examples of bonding cases debating the construction of Dillon's Rule, see *e.g.*, Nichols v. Mayor of Nashville, 9 Hum. 171, 177-79, 28 Tenn. 252, 262-63 (1848) (debating whether a statute that authorized Nashville to own stock in a railroad should be strictly construed); City of Bridgeport v. Housatonac, 15 Conn. 475, 489 (1843) (debating whether Bridgeport's charter allowed issuance of bonds to finance a railroad); Bank v. Chillicothe, 7 Ohio (Part II) 31 (1836) (attorneys for both sides arguing conflicting clauses of Dillon's Rule).

412. The Jeffersonian romance with government at the local level was fully developed in the mid-19th century work of Thomas Cooley, who presented the principal alternative to Dillon's version of municipal corporation law. *See* T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 201 (1871). For background on Cooley's theory of the inherent right to local government, see Eaton, *The Right to Local Government*, 13 HARV. L. REV. 20 (1900). For the

these national debates interacted with each other and with local traditions, and how both interacted with private corporation law.

It is too early to say what "caused" the law of city powerlessness to predominate in America. An attempt to provide such an explanation must pay close attention to these influences and others. One goal of legal history must be to recapture both the sense of contingency that existed at different historical periods and the range of doctrinal choices that seemed available. Many historical events, as do many current events, result from a complex interaction of influences and conterinfluences, such that the end result may look more like chemistry among conflicting "causes" than simple but/for causation. Even after the rejection of the paradigm of the English borough, American lawyers appear to have retained a sense of choice concerning the scope of city powers. The task that remains is to examine how and why that sense of choice gradually narrowed into a unitary law of city powerlessness.

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links between Cooley and Jeffersonian thought, see Jones, *Thomas Cooley and "Laissez Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967).