

## The Corporate State Ascends: Municipal Corporations Become Its Colonies

### Ben Price

#### *Formal Colonization of Municipalities*

The sleight of hand that slipped the *rights of property* into a superior relationship to the *sovereignty of the people where they live* was almost imperceptible. While the local charter could supply the privileges of the *rights of property*, the State kept its distance. But when an enlarging majority of propertiless white men presumed to use that same charter to expand self-governing authority in matters of local concern, the State deemed the charter meaningless.

Over the next half century, the *rights of property* would be expanded exponentially, and the self-governing authority of the people would be preserved symbolically in the ritual act of voting. "Universal suffrage" would not be tolerated if it forced the privileged to share power. And so it was resisted until the conventions of power were made subtler than electoral choice could encroach upon. And it was all achieved under color of law and in the elongating shadow of a central government that was overseeing the expansion of a continental empire.

When the post-civil war railroad lawyers sitting on the Supreme Court suddenly "found" corporations in the Constitution during the 1880s, and pronounced corporations to be "persons" under the equal protection and due process provisions of the 14<sup>th</sup> amendment, the *rights of property* were elevated securely above the rights of people. The Court amended the amendment that was intended to guarantee the rights of freed slaves, and gave it to corporations.<sup>1</sup> For Madison's *minority of the opulent* the constitutional ascendancy of private corporations would be their *coup de grace*.

And so, at the same time that *public municipal corporations* were contracting around the supposed "sovereign people," confining them in powerless political subdivisions subordinated to state legislatures, which themselves were firmly in the grip of the propertied elite, *private corporations* were becoming the bastions of post-revolutionary privilege, immune from state "interference," and increasingly made able by the Courts to compete with the People for political power.

The public corporation that eventually formed the basis on which local governments were built was seen as both a necessary tool and a potential threat to the *rights of property*. While tethered to the federal hierarchy, municipal

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<sup>1</sup> Thomas Alan Linzey, Esq. and Richard L. Grossman, *Model Brief to Eliminate Corporate Rights*, Community Environmental Legal Defense Fund, [www.CELDF.org](http://www.CELDF.org)

corporations could be tolerated. But in the hands of the People, wielded as community governing bodies, municipal corporations were inimical to the demands of privilege. Professor Burns explains:

“The fact of incorporation was crucial for potential entrepreneurs and was a circumstance not generally present before the 1800s. The corporate form was necessary for even mundane functions like uncontested ownership of property. In 1811, for example, the court declared a gift of land to the people of unincorporated Cooperstown, New York, as a site for a courthouse and jail invalid; the court stated that the people of the county did not have the power to own land.”<sup>2</sup>

Later in the century, the American Slavocracy was replaced by the rising Corporate State. Burns tells us:

“By granting home rule and abolishing special legislation, cities became more stable entities than they had been previously. At almost the same time, however, considerable debate arose concerning the sources of these entities’ power. On the one hand, Judge Thomas Cooley (one of the era’s leading scholars of constitutional law) argued that cities received power directly from the people and thus they had a kind of limited autonomy:

“The sovereign people had delegated only part of their sovereignty to the states. They preserved the remainder for themselves in written and unwritten constitutional limitations on governmental actions. One important limitation was the people’s right to local self-government.

“On the other hand, John Dillon (the foremost bond lawyer of his day) argued that cities were creatures of the state – nothing more than administrative divisions. As creatures of the states, these governments had no autonomy. Interestingly, Dillon’s argument survived (displacing the very widely read and subscribed-to work of Cooley). Entrepreneurial incentives for creating new cities were now quite high.”<sup>3</sup>

Even more interestingly, John Dillon made his fortune working for the railroad corporations, which angled in every way to tap into local funds to finance new lines. State lawmakers regularly passed “special legislation” when municipalities defaulted on oversubscribed bonds, dissolving cities and towns and reconstituting them with new boundaries, all to escape repaying the public for subsidies to the

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<sup>2</sup> Burns, Nancy *The Formation of American Local Governments: Private Values in Public Institutions*, Oxford University Press, 1994. p. 52

<sup>3</sup> Burns, pp. 52-53

corporations.<sup>4</sup> The record of private wealth manipulating public governance in fundamental ways is extensive.

We have no better example than the Supreme Court decision of 1819, in *Board of Trustees of Dartmouth College v. Woodward*. The Legislature of New Hampshire passed a law changing the corporate charter of Dartmouth College, which had been issued to its trustees by the King of England before the Revolution, in 1769. Under the king's charter, Dartmouth was a private, proprietary corporation. Under the new legislation, New Hampshire changed the charter to create a *public* corporation that would serve the interests of public education. The trustees challenged that law in court, and the New Hampshire Supreme Court upheld the law. But on appeal to the U.S. Supreme Court, under John Marshall, the law was found unconstitutionally violate the Contracts Clause of the U.S. Constitution.

Never mind that American suspicion of corporate power had led the new self-governing states to vest the authority to issue and revoke charters within their (supposed) representative legislatures.<sup>5</sup> The Marshall Court seemed not to notice that the private and proprietary colonial corporations of Massachusetts Bay, Pennsylvania, Rhode Island, Connecticut and Maryland had been, by virtue of the Revolution and adoption of the Constitution, converted directly from private property into public institutions for popular self-governance.

Ruling that a charter is not a conveyance of *privilege* from a sovereign (which now meant the People and not the king) to the incorporators, but rather a *contract* between the state and the incorporators, the Court argued that the state had acted beyond its authority in unilaterally changing the *contract*. Ironically, had the Revolution not occurred and the king remained sovereign, it is doubtful the trustees of Dartmouth College could have prevailed. But the Court had surreptitiously amended the definition of "sovereign" into the bargain. Henceforth, private corporations would have an increasing share in American sovereignty.

We can easily see that private corporations gained legal independence from state legislatures as a result of the *Dartmouth College* case. But how does this ruling play-out in terms of *public corporations*, like municipalities? Professor Hartog explains and then quotes the Marshall Court:

"For public entities, the existence of a corporate charter was beside the point in analyzing their relations with the state. Corporate status gave some local governments a surface similarity to private corporations. Like charitable

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<sup>4</sup> Burns, p. 49

<sup>5</sup> Richard L. Grossman and Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation*. Charter Ink, 1993

corporations or private franchises, a city might have the power to hold property, to sue and be sued as an individual, to make internal bylaws, and so forth. But that did not make the city into a private entity:

“The character of civil institutions does not grow out of their incorporations, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being instruments of government, created for its own purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control.”

Hartog explains Justice Bushrod Washington’s opinion in the case, saying:

“What made local governments public institutions was that the state created them on its own initiative, and that there was ‘no other founder or visitor than the king or government.’ If the charters of such institutions were amended by the unilateral acts of the legislature, ‘such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it,’ and that was the state.”<sup>6</sup>

That such local government could be established *where people live*, and that it could be altered or dissolved, but without the consent of the governed, seemed not to trouble the Court. The judges did not consider the People to be a party to the *contract* if that is what an incorporating charter was henceforth to be.

Again, Hartog writes:

“Local governments --- including most chartered city corporations --- might be separated from the autonomy of corporate existence by the absence of an identifiable membership of incorporators. No one could be a ‘citizen’ of an ordinary town, for in republican America the only compulsory political communities to which the individual belonged were the state and the federal government.”<sup>7</sup>

Roger W. Cooley (not to be confused with Judge Thomas Cooley) seems at first to agree with this analysis. In 1913 he wrote:

“The purpose in making all corporations, is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for unless the public are to be benefited, it is

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<sup>6</sup> Hartog, pp. 194-195

<sup>7</sup> Hartog, p. 195

no more lawful to confer 'exclusive rights and privileges' upon an artificial body, than upon a private citizen. The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned.

"Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract.

"So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract. The division of the state into counties is an instance of the former. There is no contract, no second party; but the sovereign, for the better government and management of the whole, chooses to make the division in the same way a farmer divides his plantation off into fields and makes cross fences where he chooses. The sovereign has the same right to change the limits of counties and to make them smaller or larger by putting two into one, as the farmer has to change his fields; because it is an affair of his own, and there is no second party, having a direct interest.

"There is no contract, for no consideration moves from any one, and without a consideration, there cannot be a contract. The discharge of certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county: In legal parlance the 'consideration is past' – the thing is done, before their appointment."<sup>8</sup>

On the topic of counties, Cooley is unequivocal. But, using the 1857 Ohio Supreme Court decision in *Board of Commissioners of Hamilton County v. Mighels*, he makes a clear distinction, between counties and municipal corporations, which calls this one-sided contract notion into question. The court ruled:

"Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority."<sup>9</sup>

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<sup>8</sup> Cooley, Roger W., *Illustrative Cases on Municipal Corporations*, West Publishing CO., 1913, pp. 2-3

<sup>9</sup> Cooley, *Illustrative Cases...* p. 4

In his companion volume, Roger Cooley went on to write, "What constitutes municipal membership? The persons residing within the corporate limits are members of the municipal corporation."<sup>10</sup> And yet he was compelled to follow up these basic understandings of local self-governance with citations of one court ruling after another that contracted and restricted and finally destroyed any semblance of community-based democracy, starting at the dawn of the great Corporate Revolution (historically referred to as the American Civil War) and completing the coup by the beginning of the 20<sup>th</sup> century.

In 1856, the New Hampshire Supreme Court, in *Berlin v. Gorham*, rebuked the idea that "the rule which applies in the case of private corporations, that the act [of incorporation] is ineffectual, until it is accepted by the incorporators, governs also the case of public corporations like towns." The judge argued, "there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by removal from the town."<sup>11</sup> Public incorporation of communities was to be made non-consensual, non-rights conveying, and inferior to the incorporation of private property, government at the consent of the governed be-damned.

What accounts for the judicial demotion of municipal corporations into colonies of the states? How is it that the implied "contract" between the state and the people at the creation of a municipal corporation has been turned in every case into a state fiat, and the people living within the boundaries of those public corporations mere tenants of the state, and not its sovereigns?

The "contractual" nature of charters that *Dartmouth* invented has since played out in the courts to strip the People of their sovereignty and right to government by their consent in the communities where they live. As each segment of society struggled and fought to win the franchise, a *minority of the opulent* simultaneously engineered the federal system into a private Corporate State that made popular participation through voting irrelevant to what governing decisions would be made. By 1907 John Dillon's Rule, rather than Thomas Cooley's Doctrine, was the law of the land and communities were permanently ostracized from the federal structure of political power.

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<sup>10</sup> Cooley, Roger W., *Cooley on Municipal Corporations*, West Publishing CO., 1914, p. 62

<sup>11</sup> Cooley, *Illustrative Cases...* p. 15