Municipalism's Escape from the Colonizing Imperatives of Empire in the U.S.

Submitted for the TRISE 2021 Conference, Libertarian Municipalism, Session 1, by Ben G. Price & Simon Davis-Cohen

ABSTRACT

Efforts to expand municipal activism in the U.S. are fettered by a constitutional framework at the national level that ignores the role of local, community governance, and by state constitutions that methodically elevate administrative state law above local governance and the protection of basic rights. But revolutionary municipal organizing by CELDF, for nearly two decades, has challenged legal dogmas like *Dillon's Rule*, which subordinates local institutions utterly to the authority of the state, and the legal fiction of corporate "personhood." By drafting and enacting community bills of rights that recognize peoples' right of local community self-government — and to reject the legal status of municipalities as mere tools of convenience for the state's exercise of power at the local level — activist organizers have assisted communities to separate municipal jurisdictions from hegemonic control. The authors suggest that future research into such strategies for expanding the principles of social ecology in the U.S. will find CELDF's lessons learned and perspectives of interest, and that there exists a natural alignment between CELDF's organizing efforts and TRISE's international network with front-line communities implementing the vision set out by Murray Bookchin. Using local law-making to engage in democratic, peaceful collective civil disobedience, residents of municipalities in the U.S., who are engaged in the CELDF-initiated "Community Rights Movement," go so far as to legislate the supremacy of human and civil rights over the synthetic rights attached to corporate property and, on that basis, to govern corporate behavior, whether that mean banning fossil fuel extraction and water privatization, or pursuing constitutional and worker rights in the workplace, or new enforceable civil rights for the houseless defensible against government and corporate private actors. Through these law-making efforts, transformative rights, not based in property law, and where legal standing is not tied to property ownership, get advanced. These have included rights to water, a Right to Survive, a right to a livable wage, the right to be free from toxic trespass, the right to a climate capable of sustaining human societies, as well as the rights of local ecosystems and the Rights of Nature. Bookchin recognized that social ecology will advance the cause of social and environmental justice by activating communities on many fronts. Uniting parallel efforts can actualize social ecology's goals.

INTRODUCTION

In this paper, we report on Ben Price's (author) efforts and those by our colleagues at the Community Environmental Legal Defense Fund (CELDF) in the United States of America to advance and implement local community self-government to fight back against corporate hegemony. In Ben's recent book *How Wealth Rules the World: Saving Our Communities and Freedoms from the Dictatorship of Property*,[1] he focused on deconstructing the role of property law and the anti-democratic systems of U.S. federal and state governments. It exposed the intricate web of deceit woven to appease voters while utterly denying local community self-government to any but the well-heeled. Official gaslighting and cultural myth-making have sustained the ruse of *government by the people*. However, a growing[2] opposition to systemic denial of community self-governing authority[3], including its racist roots and impacts[4][5][6], has brought new coalitions[7] together and is amplified by community organizing elsewhere and throughout the world. Parallel to the ongoing Community Rights strategies challenging core legal doctrines to strengthen protections for workers, renters, the environment and the houseless — which break through limiting discourses of centralism v. Libertarianism — is the Global Municipalist Movement, informed by the work of Murray Bookchin.

Background

Ben first became acquainted with the work of Murray Bookchin and what Bookchin then called "Libertarian Municipalism" in the mid-1990s, while reprinting a few of Bookchin's articles during the four-year run of the publication, *Groundswell*, a monthly

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[1] Price, Ben G., Berrett-Koehler Publishers, 2019

[2] https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf

[3] As demonstrated in the United States by the increased awareness and scrutiny of arbitrary forms of "state preemption" whereby state governments unilaterally rescind and restrict the legal scope of municipal activism that strengthens protections for workers, renters, the environment and the houseless.

[4] https://www.supportdemocracy.org/racial-justice

[5] https://scalawagmagazine.org/2019/11/virginia-property-discrimination/

[6] https://www.epi.org/publication/preemption-in-the-midwest/

[7] https://inthesetimes.com/article/local-politics-states-emergency-management-reconstruction-right-wing-alec

journal of anti-authoritarian views. Since then, Bookchin's concepts on Municipalism and local community self-determination have continued to influence Ben's work, beginning in 2004, when Ben joined CELDF.

U.S. Constitutional Hostility Toward Community Self-Government

"*In carrying out the original intent of the Constitution with reference to property the courts have developed and applied the doctrine of vested rights—a doctrine which has been used with telling effect for the purpose of defeating democratic reforms. This doctrine briefly stated is that property rights once granted are sacred and inviolable. A rigid adherence to this policy . . . would disregard the fact that vested rights are often vested wrongs, and that . . . government without authority to interfere with vested rights would have little power to promote the general welfare through legislation.*[8]*"*

J. Allen Smith

When considering how we might practically apply the principles of Murray Bookchin's brand of municipalism within the United States, we must dispense with false legends of so-called American democracy. Experience shows that what's stopping municipal communities from protecting the health, dignity, and rights of their residents and the survivability of local ecosystems is not a lack of need, will or desire. It is the systemic limitations placed on political engagement. In the United States, local self-government through community legislation that impedes corporate property's "personhood rights" is made indirectly illegal or narrowly confined.

From Bookchin we learn a simple definition of democracy, which we paraphrase as: the people affected by governing decisions are the ones who make those decisions. Similarly, Harvard's Gerald Frug, an expert on U.S. municipal government, wrote that "public freedom [is] the ability to participate actively in the basic societal decisions that affect one's life."[9] It is these versions of democracy and freedom that are limited by U.S. law on the local level for anyone challenging corporate hegemony. Municipal activists who test these boundaries quickly learn how the game is rigged, and that to establish true democracy and public freedom requires challenging or dismantling the fixed system. In the U.S., municipal activists are routinely[10] repressed by courts that protect corporate property from municipal law making.

Bookchin understood that passionately working to mitigate the symptoms of injustice, while leaving the causes unchallenged, is the role of the reformer, while the radical activist must strive to discover, challenge and cure the root causes of injustice.

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[8] *Growth and Decadence of Constitutional Government* Chapter XI: Individual Liberty and the Constitution - The doctrine of vested rights p.299

[9] Frug, Gerald E., "The City As A Legal Concept," Harvard Law Review, Volume 93, Number 6, April 1980, p. 1069 (Thanks to Richard Grossman for bringing this article to my attention)

[10] https://celdf.org/2020/06/celdf-report-corporations-are-suing-cities-across-the-usa/

Taking this distinction seriously, CELDF community organizers have worked to encourage neighbors and municipal governments to act on the premise that true democracy and freedom are achievable not by begging state and federal governments to acquiesce to community needs and aspirations, but by rejecting administrative systems of regulatory law offered as salves for exploitation.

Through "Community Rights" organizing, CELDF took up the work of deconstructing the oppressive foundations of the government of the United States around demands for community self-determination. In 2003 we launched an educational seminar dubbed "Democracy Schools." Beginning in 2004, we operationalized this analysis by using what nominal municipal lawmaking authority exists to legislate locally while asserting local governance in protection of fundamental rights as a collective right of community inhabitants. This meant posing direct challenges to the oppressive structure. Though a bruising task, communities who had been abandoned and treated as sacrifice zones were willing to engage in this strategy, and their efforts have not only led to tangible gains but helped expand the political imagination, as seen by a rising chorus calling for paradigm-shifting recognition of ecosystem rights, principled self-determination and the abolition of certain corporate property privileges.

Legal Basis for Federal Denial of Local Democracy in the U.S.

The U.S. federal constitution does not mention municipal governments, but that hasn't stopped the judicial branch from hobbling cities' power to be a source of political clout for the poor. The U.S. Supreme Court laid the groundwork for today's suppression of redistributive and bold local governance in 1819. That year, Chief Justice John Marshall and Associate Justice Joseph Story invented a legal distinction between "private" and "public" corporations, as a side-note to the infamous *Dartmouth v. Woodward* decision. With no precedent to rely upon, the court redefined public — "municipal corporations" — as extensions of state government having no incorporators and no legal agency independent of state authority. This maneuver was accomplished while simultaneously redefining charters of incorporation for newly-minted "private" business corporations as contracts between their incorporators and the incorporating state, under the auspices of the Constitution's Contracts Clause. It was determined that so-called "public" municipal corporations enjoyed no such contractual relationship with the state. As a result, public municipal corporations were subordinated while private corporations were elevated to the status of contractual equals to the states that chartered them. Unlike the status of corporate management and investors, the residents of municipalities were deemed to be *mere tenants* living within the jurisdiction of a state-controlled municipal corporation.

The *Dartmouth* decision languished until the Civil War, when politics shifted. At this time, the ruling was reinvigorated as part of a multi-pronged legal movement that resulted in the protection of overwhelmingly white-controlled corporate property from redistribution during and after the Reconstruction Era. During this period

Dartmouth was applied to materially protect railroad and mining corporations. In 1868, a railroad lawyer appointed to the Iowa Supreme Court, John Forest Dillon, spelled out what *Dartmouth* had tentatively accomplished for the propertied class. In *City of Clinton v. Cedar Rapids and Missouri River Rail Road Company*, he revived *Dartmouth* with a ruling that protected a railroad corporation from having to comply with local law-making. He summarized his opinion years later in a legal treatise, writing: "the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, of any inherent right of local self-government which is beyond [state] legislative control."[11] This ***Dillon's Rule*** has been cited by courts, state governments and proponents of state emergency management to justify the nullification of local labor contracts, minimum wage increases, worker benefits, environmental protections and tenant protections throughout the 20th and 21st century. It was spun as a mechanism to protect against local corruption, which played directly into racist tropes of local Black electoral activism following emancipation.

Federal constitutionalism further restricts community self-determination by way of the U.S. Constitution's Commerce Clause. In short, local lawmaking that challenges profiteering is extremely vulnerable to being overturned by courts for "interfering" in commerce[12]. This same Commerce Clause was instrumental to establishing a legal foundation for the continent-spanning empire coveted by the U.S. "Founding Fathers."

In 1886, a time defined by backlash to emancipation of enslaved people and popular demands for radical redistribution following the Civil War, Chief Justice Morrison Waite's Court decision in *Santa Clara County v. Southern Pacific Railroad* reaffirmed legal protections for corporate (predominately white-controlled) property by extending legal personhood status, with Bill of Rights protections, to corporate property. After suffrage was expanded for previously enslaved African American men, the court jumped to the defense of corporate property, further insulating it from democratic activism.

Such legal doctrines continue to obstruct forms of liberatory activism envisioned by the global municipalist movement. The judicially-engineered ascendency of corporate power, coupled with the subordination of so-called municipal corporations, continues[13] to constrain modern fights for environmental and racial justice.

Centralized Control Over Municipal Activism in the U.S.

"*. . . restrictions upon the powers of cities indicate a fear that too much local self-government might jeopardize the interests of the propertied classes. This attitude on the part of those who*

[11] John Forrest Dillon, LL. D, *Commentaries on the Law of Municipal Corporations*, 5th ed, Boston, Little, Brown, and Company, Fifth Edition, Vol. 1, 1911, pp. 1:154–-156.
[12] Ben G. Price, *How Wealth Rules the World: Saving Our Communities and Freedoms from the Dictatorship of Property,* Berrett-Koehler Publishers, 2019
[13] https://celdf.org/2020/06/celdf-report-corporations-are-suing-cities-across-the-usa/

have framed and interpreted our state constitutions is merely an expression of that distrust of majority rule which is . . . the distinguishing feature of the American system of government. It is in the cities that the non-possessing classes are numerically strongest and the inequality in the distribution of wealth most pronounced. This largely explains the reluctance of the state to allow cities a free hand in the management of local affairs. . .. Every attempt to reform this system must encounter the opposition of the property-owning class, which is one of the chief reasons why all efforts to establish municipal self-government have thus far largely failed.[14]" -J. Allen Smith

Any minimally democratic system would contain space for local activism. Many people in the United States think there are some inherent powers for communities to raise state's minimum standards. Instead, the opposite is true. Rather than setting minimum standards of social and environmental justice, states throughout the U.S. have adopted maximum standards of protection, accompanied by "ceiling preemption" law, meaning that statutory limits are imposed on local law-making that exceeds standards set by the state, for example on issues like[15] the minimum wage, protections for water from fossil fuel extraction, tenant protections and worker benefits. Today, local laws offering greater than state-defined minimal protections are routinely[16] preempted and prohibited. This institutionalized form of repression is racist[17] and threatens the collective political imagination as local attempts to raise standards and otherwise creatively govern corporate property are frequently quashed before they can spread to other municipalities.

This ceiling preemption is justified by reference to John Forest Dillon's Iowa court dicta from 1868. Today, it is applied nationally to municipalities in all fifty states and referred to as *Dillon's Rule.* The ***Rule*** was fully adopted for nationwide application to local governments by the U.S. Supreme Court, by reference to Dillon's book, in *Hunter v. Pittsburgh*, in 1907. Under this regime, state power over municipal governments is absolute. We see manifestations all around us. For instance, in Flint, Michigan an *Emergency Manager* was interposed between the people and their city government by the state, ostensibly to repair the city's financial crisis. The imposition of that local

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[14] *The Spirit of American Government*, Chapter X: "Municipal Government" The Macmillan Company 1907 p. 277

[15] https://www.supportdemocracy.org/preemption

[16] https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf

[17] https://www.epi.org/publication/preemption-in-the-midwest/

dictatorship resulted in the notorious racist lead poisoning of the population because the governor's unelected *proconsul* switched water systems to reap economic savings.

CELDF's work directly challenges this doctrine and advances new theories for balanced self-determination, including through advancement of state constitutional change[18] as well as on the local level, including the recent cases of Lincoln County, Oregon[19], in defense of a rights of ecosystems ordinance banning corporate aerial pesticide spraying, and Grant Township (Indiana County), Pennsylvania, where the community continues a seven-year battle to protect drinking water from a fracking waste injection well.

Progressive reformers of the late nineteenth and early twentieth centuries championed municipal "home rule" as a remedy for the democracy-nullifying effect of *Dillon's Rule.* But "home rule," where it exists, has not[20] fundamentally altered this power relation. For instance, Michigan is a "home rule" state, but this did nothing to protect Flint or Detroit from the state's regressive emergency manager law. In fact, Dillon's Rule was evoked[21] to justify the emergency management, despite the presence of "home rule."

The Community Rights Movement in the U.S. and the Promise of Social Ecology

"*At their best, genuine political movements bring to consciousness the subterranean aspirations of discontented people and eventually turn this consciousness into political cultures that give coherence to inchoate and formless public desires.[22]" -*Murray Bookchin

People in the U.S. are faced with social, political, and environmental problems that resist resolution because law empowers a wealthy minority at odds with the general welfare to govern. The U.S. Constitution — and its interpretation by the courts — amounts to an arsenal of weaponized law able to deliver special privileges to a

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18 https://celdf.org/2019/10/media-statement-constitutional-amendment-introduced-in-pennsylvania/

19 https://celdf.org/2020/06/corporate-actors-challenged-in-lincoln-county-or-ecosystem-petitioners-defend-ordinance/

20 https://www.pennlive.com/opinion/2019/08/the-limits-of-home-rule-opinion.html

21 https://truthout.org/articles/challenging-bedrock-law-dillon-s-rule-in-detroit-and-beyond/

22 https://www.social-ecology.org/wp/wp-content/uploads/2009/12/Libertarian-Municipalism-The-New-Municipal-Agenda.pdf

propertied class. Certain legal mechanisms let those seeking profit to block policies that compete with their interests. These legal doctrines remove democratic rights from the public sphere and deposit them in concentrated accumulations of property. The oddity of attaching legal rights to property itself rather than to people roared into public consciousness with the Supreme Court's 2010 *Citizens United v. Federal Election Commission* ruling that affirmed corporate property's "personhood" rights to finance election campaigns. Although the ruling shocked the conscience of average Americans, it was, as we have seen, not the first time the Court had vested civil rights within inert property.

When civil and human rights are deposited in property, that property is placed beyond the authority of people seeking to govern. For good reason, municipalities are prohibited from violating the civil rights of persons, but because corporations have won access to "personhood," this system of checks constricts municipal activism from infringing on corporate property. Another result is that contracts, which frequently enter people into exploitative private relationships, are constitutionally shielded from public intervention. This nullifies activist lawmaking seeking to intervene on behalf of workers and consumers. In sum, privileges secured by law for an opulent minority outweigh the right of communities to fashion society. Communities are left institutionally disadvantaged when it comes to taking meaningful action on issues like:

- Houselessness
- Non-citizen political rights
- Workers' rights on the job
- Living wages
- Extractive industries
- Environmental protection, including Rights of Nature
- Corporate development
- Privatization of education, water, health care, retirement, transportation
- Corporate control of elections
- Corporatization of food production

As we have seen in books like *Fearless Cities,*[23] and as colleagues at this conference have expressed, the Global Municipalist Movement is truly a *movement.* It involves communities *acting* in their collective capacity and taking it upon themselves to not just theorize and talk about the oppressive challenges they face. They have begun to do what must be done, and this includes linking local movements and advancing systemic alternatives that encourage a pluralistic community of communities mutually

[23] Barcelona en Comú (BeC), Debbie Bookchin and Ada Colau, *Fearless Cities: A Guide to the Global Municipalist Movement*, New Internationalist, 2019

bound together by standards of protection and simultaneously free to test new ideas and push the envelope for radical governance.

Internationally, *Municipalism* contests neoliberal austerity imposed by undemocratic institutions. Domestically, it encounters the scale of the human and the ecological. The Community Rights Movement has taken-up municipal law-making in hundreds of direct challenges to state and corporate mechanisms that clamp down on municipal activism. This movement is a natural ally to the Global Municipalist Movement.

Through the organizing efforts of CELDF, Movement Rights, and other groups, hundreds of communities in the U.S. challenging state preemptions include small rural towns like Tamaqua, Pennsylvania, where the world's very first non-indigenous recognition of inherent legal rights for ecosystems was enacted in 2006, in the face of state plans to enter into a private-public venture to import industrial waste into the community for so-called *mine reclamation.* In Halifax, Virginia, the town ratified an ordinance in 2009 declaring a right of the community and their local environment to be free from toxic trespass — in response to a looming uranium mine proposal. In Pittsburgh, Pennsylvania, the City Council unanimously enacted a law banning fracking and recognizing the Rights of Nature, under withering pressure from an activated community. With this ordinance, the City openly thumbed its nose at the state's prohibition against local regulation of fossil fuel extraction. Successes like these expand political imaginations.

In 2019 the Denver, Colorado residents voted on a ballot initiative called *The Right to Survive* ordinance that would have ended the City's official policy of intolerance toward people without homes. It would establish a bill of rights for the propertyless, recognizing them as a class of people with civil rights. In this instance, the affluent hospitality industry, the chamber of commerce, real estate companies and pillars of the community mounted a well-funded campaign to defeat the measure. In Toledo, Ohio, a citizen-initiated ballot measure was passed by sixty-seven percent of voters to recognize legal rights for Lake Erie, only to be challenged by an agribusiness corporation whose attorneys successfully argued the measure violated the civil rights of corporate property.

The cyclical system of legal precedent, like a returning tide, may remove our sand castles and return the shoreline to the blandness of a political horizon on which we are not present. But there is something that is not wiped away when communities encounter the self-replicating status quo — success cannot be measured only by immediate victories. Instead, progress can be traced in step-by-step public awakenings to official injustices and forms of non-linear change. These awakenings

are initiated when communities dare to enact alternatives to injustice without seeking permission from the empire.

And these awakenings slowly begin to birth entirely new paradigms of governance that cherish the indispensable role of local activism. For instance, over two decades of organizing has resulted in coalition building and mobilization for state constitutional change in Pennsylvania and New Hampshire. (Most recently, constitutional change was re-introduced into the Pennsylvania Generally Assembly in fall 2021.)

This advancement of a macro vision that opens space for local self-determination in alignment with principles of social, racial and environmental justice is essential for our collective project. It also joins fertile efforts for such a macro vision, from around the globe. In Spain[24], we see calls for the creation of a plurinational structure. This follows the plurinational project advanced, with contradictions[25], in Bolivia, and Indigenous demands[26] for the Guatemalan government to establish a plurinational state. Constitutional demands in Chile[27] are also being raised for a similarly balanced and liberatory plurinationalism. Demands are rising around the globe for principled decentralizations of political power, including in Iraq[28] in response to centralized power structures.

To be sure, there are many instances in which U.S. cities have successfully resisted federal and state dictates. Sanctuary city policies have created forms of safety for people persecuted by official predation. A nascent campaign to defund police aggression against the communities that fund them is forming. Participants in the Community Rights Movement in the U.S. have benefited from Murray Bookchin's invaluable work and look to examples in the Global Municipalist Movement for next steps. These communities are eager to share with fearless cities around the globe what they have learned by daring to enact local legislation and envision structural change that embodies needed revolutionary change. They are keen to learn of other ways to create alternatives to entrenched injustice that can bring to reality peoples' aspirations for genuine democracy that protects people and the planet.

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[24] https://www.jacobinmag.com/2021/09/pablo-iglesias-vox-partido-popular-spain-psoe
[25] https://journals.sagepub.com/doi/abs/10.1177/0094582X18781347?journalCode=lapa
[26] https://www.democracynow.org/2021/7/30/guatemala_national_strike
[27] https://www.iwgia.org/en/news/4424-chile-%E2%80%9Cthe-constitution-must-recognize-indigenous-peoples-by-means-of-a-plurinational-state%E2%80%9D.html
[28] Kurdish, Sunni and secular groups are all advocating for a more federalist structure in Iraq. Zahra Ali, Cambridge University Press, 2018