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Privatization of Municipal Services: A Contagion in the Body Politic

Shirley L. Mays*

The City was once a shining star; an example of prosperity, innovation, and creativity. But it had long since fallen into decay and its streets were cluttered and unswept. Malefactors left the innocent to their own devices, and preyed upon one another.

But all is not lost. The elderly gentleman has an idea; he knows how to save the City. He wants the mayor to allow his company, a private corporation called Omni Consumer Products (OCP) to take over operation of the City.

"City hall is the decaying symbol of mismanagement and corruption," the elderly gentleman asserts. "Sometimes we just have to start over, from scratch, to make things right and that's exactly what we're going to do." The elderly man patiently explains to the mayor of the City, "we're going to build a brand new City where [this one] now stands. An exemplar to the world!"

The elderly gentleman presses a button to reveal the prototype of his model City—a conglomeration of skyscrapers; their walls sparkling and reflecting his satisfied face. The elderly gentleman points to the design. "Welcome to our City as it should be, and as it will be in the hands of responsible private enterprise!"

The mayor is nonplussed. "You've got to tear down a lot of people's houses before you can make that thing," he sputters, "and take away their homes!"

"We're going to raise towers of glass and steel," the elderly gentleman replies. "Every citizen will have a living unit; safe, secure and clean."

The mayor is still visibly upset. "Won't be much room for neighborhoods, huh? Like the kind that we all grew up in?"

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The elderly gentleman remains calm. "These days neighborhoods are just the places where bad things seem to happen. Don't be nostalgic!"

"What about democracy?" the mayor sputters. "Nobody elected you!"

"Anyone can buy OCP stock, and own a piece of our city." The elderly gentleman adds cryptically, "What could be more democratic than that?"

The mayor remains firm. "There are a lot of people in this town that can't afford to buy your stock. And they're not going to let you get away with this!"

The elderly gentleman loses his patience. "You haven't been following the polls," he says. "Sit down."¹

INTRODUCTION

Our cities are suffering from severe financial and sociological complications. Last year, more cities than ever finished the year with a deficit. Tax bases are eroding as both private individuals and local businesses flee cities to the comforting arms of the suburbs and foreign markets. As the urban population is becoming more and more needy, those residents remaining within city boundaries are loathe to pass tax increases to pay for the increased costs of providing social services. The sense of community that has been the backbone of city life has all but disappeared; suburbanites fear the nation's cities and city dwellers cower behind locked doors and shuttered windows. Neighbors attempt to reclaim their neighborhoods as the gangster lifestyle forces its way into the minds and hearts of the young.

As cities become increasingly desperate to tap new revenue sources and revitalize community pride, many administrations are beginning to consider the privatization of "public services" as an alternative to ruin.

The provision of public services by government is a relatively new phenomena in this country. In the not too distant past, the care of the sick, the elderly, and the poor was left to individual devices. Very few social programs sponsored by federal, state or local government existed before the Roosevelt New Deal in 1932.² For instance, the debate over federal aid to education still raged in the 1950's, and in the early 1960's federal housing

1. ROBOCOP II (Orion Pictures 1990).

2. BARRY CARROLL, *Introduction to PRIVATE MEANS* (Barry Carroll et al. eds., Praeger Pub. 1987).

and hospital programs were in their infancy.³ Not until 1966 did this country see the birth of the Medicare and Medicaid programs and Legal Aid emerged as a result of President Lyndon Johnson's war on poverty.⁴

The idea that government should provide public services arose from the fact that many people's needs were not being met. Many of the destitute and unfortunate were not cared for. They were forced to rely upon the kindness and generosity of the community. Consequently, many had inadequate housing and food and starved to death or died from exposure and disease.

Now, the tables seem to be turning once again toward the provision of public services by individuals. I maintain that the private entrepreneur is not the appropriate entity to provide certain public services. Indeed, governments cannot turn over the operation of essential governmental services to private companies without abusing the trust of its citizens and putting them at risk.

This article first discusses the provision of essential governmental services and how local governments came to produce and provide these public services. Next, it examines the many faces of privatization; how these concepts of privatization interface with public service delivery and the concerns regarding constitutional restraints on private entities. Finally, the article views the privatization debate from a sociological perspective and discusses the "essence of government" argument. This theory maintains that wholesale privatization would destroy the sense of community that has been fostered in the local governmental setting.

PRIVATIZATION OF PUBLIC SERVICES

What do we mean when we talk about privatization? The most common form of privatization is often referred to as "contracting out."⁵ In its simplest form, contracting out occurs when governments contract with a private vendor to provide a service. For example, a city's Parks and Recreation Department may enter into a contract with a lawn care company to maintain the grassy knolls of the city parks for the summer. The city has retained ownership of the parks but has privatized the production of the city parks' lawn care service for the term of the con-

3. CARROLL, *supra* note 2.

4. *Id.*

5. See, e.g., Ronald Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988) (discussing the various kinds of privatization).

tract.⁶

Contracting out was challenged in many jurisdictions as violative of the civil service provisions of state constitutions.⁷ It is now well-settled that cities are free to contract with private entities for the performance of governmental services.⁸

The truest form of privatization is known as "load shedding."⁹ Load shedding results when a city sells a government-owned facility or equipment to a private entity and the former public facility becomes a totally private facility. For instance, if a city decided to get out of the transportation business, it could sell its bus fleet to a private company while continuing to regulate and monitor the service. The private company would then own the buses and assume the responsibility to maintain and operate them without financial assistance from the city.

The most controversial form of load shedding in the privatization debate occurs when the provision of public services is completely privatized. The essential functions of government, that is the decision-making, policy-making and regulatory functions, are no longer in the hands of government officials. In order to pri-

6. Cities are both a provider and a producer of public services. These functions have been described as follows: "One distinct activity of government is to provide for its people. In other words: policy making, deciding, buying, requiring, regulating, franchising, financing, subsidizing." Ted Kolderie, *The Two Different Concepts of Privatization*, CURRENTS AND SOUNDINGS, July/Aug., 1986, at 285. Kolderie continues: "A second and distinctly separate activity of government may be to produce the services it decides should be provided. In other words: operating, delivering, running, doing, selling, administering." *Id.* at 286.

7. See *Corwin v. Farrell*, 100 N.E.2d 135 (N.Y. 1951) (illustrative of cases challenging the ability of a governmental unit to contract with a private company for the production of public services). In *Corwin*, the New York Housing Authority dismissed several tenured civil service employees after it contracted with a private firm to provide the same services the civil service employees had been performing. *Corwin*, 100 N.E.2d at 137. In addressing the legality of the contract that the Housing Authority entered into with the private corporation, the court held that "neither constitutional mandate nor statutory enactment requires that all service furnished or all labor performed for a governmental agency must be supplied by persons directly employed." *Id.* at 138. See also *Conlin v. Aiello*, 64 A.2d 921 (N.Y. App. Div. 1978); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 456 F. Supp. 85 (E.D.N.Y. 1978).

8. Contracting out is not devoid of detractors. Negative aspects of contracting out include: a detrimental impact on career public employees; erosion of bitterly fought merit systems; potential decline in service quality; interruption of services due to work stoppages; "creaming" practices; loss of tax revenues owing to private sector delivery incentives; potential for bankruptcies; and fraud and corruption. See CARL VALENTE & LYDIA MANCHESTER, *RETHINKING LOCAL SERVICES: EXAMINING ALTERNATIVE DELIVERY APPROACHES* 1 (1984); Ira Sharkansky, *Policy Making and Service Delivery on the Margins of Government: The Case of Contractors*, PUBLIC ADMIN. REV. 116-123 (1980); JOHN HANRAHAN, *GOVERNMENT FOR SALE: CONTRACTING OUT THE NEW PATRONAGE* (1977).

9. See *Cass*, *supra* note 5.

vate the provision of public services, the government need only decide not to provide a particular service. In theory, private providers would then step in to deliver the service, assuming sufficient demand exists for it. Returning to the transportation example, the city can simply decide to no longer provide bus transportation to its residents. The residents and potential entrepreneurs would then be left to their own devices regarding the ability to travel in the city. This article discusses wholesale privatization. It is by far the most far-reaching form of privatization.

THE CONSTITUTIONAL ARGUMENTS

City governments may contract out services with little or no negative effect upon their residents. City workers may lose their jobs, but from a public policy standpoint, privatization of production is not particularly problematic. However, once the local government decides to privatize the provision of public services, negative consequences will flow to the citizenry. Placing the decision-making, policy-making, and other discretionary functions of local government in private hands will seriously affect city residents who are consumers of the privatized facility.

The constitutional restrictions governing the relationship between private service providers and their clients are not the same as those governing the relationship between public service providers and their clients. For that reason, the privatization debate cannot be limited to concerns of cost and efficiency or to concerns regarding the proper size and scope of government. Private institutions generally are not subject to constitutional restraints. Therefore, the debate over the merits of proposals for privatizing provisions of public services must be informed by a real understanding of the different legal positions of the public and private sectors.

Rights secured by the United States Constitution are protected from infringement by the government. The Fourteenth Amendment proscribes state actions that will "deprive any person of life, liberty or property, without due process of law."¹⁰ It also requires that all similarly situated individuals be treated equally.¹¹ When governmental actions directly impact citizens,

10. U.S. CONST. amend. XIV, § 1.

11. *Id.* Of course, these restrictions only apply when the government is the actor. As the U.S. Supreme Court ruled in the Civil Rights Cases of 1883: "[I]t is State action of a particular character that is prohibited. . . . Individual invasion of individual rights is not the subject matter of the Amendment." The Civil Rights Cases, 109 U.S. 3, 11 (1883). The state action doctrine which emerged from these

it is without question that the government is bound by constitutional constraints.¹² On the other hand, when private actors, rather than governmental agencies, perform the same functions as the government, they are not necessarily subject to the same constitutional restraints.¹³ Therefore, transferring governmental services to private corporations will diminish the constitutional protections afforded individuals.

In state action cases, courts must determine when an action by a private institution "may be fairly treated as that of the state itself."¹⁴ In making that determination, courts evaluate a variety of factors. Those factors include the similarities between the functions of the private and public actor and the nature of their interrelationship.¹⁵ Although it initially interpreted these constitutional safeguards broadly in *Marsh v. Alabama*,¹⁶ during the last fifty years, the United States Supreme Court has continued to retreat from its original position. *Marsh* provides the framework for evaluating interactions between public and private decision makers and the applicability of constitutional safeguards.

Private Property Assuming Municipal Characteristics

Marsh is the seminal case dealing with the constitutional right of freedom of expression and its relationship to a privately-owned entity. Chickasaw, Alabama, a "company town", was owned by the Gulf Shipbuilding Corporation.¹⁷ Ms. Marsh at-

cases permits constitutional protections to be invoked only against "state laws . . . [or] acts done under State authority." *The Civil Rights Cases*, 109 U.S. at 11.

12. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (citing *The Civil Rights Cases*).

13. *Jackson*, 419 U.S. at 350-51.

14. *Id.* at 351.

15. *Id.*

16. 326 U.S. 501 (1946).

17. *Marsh*, 326 U.S. at 502. In his dissent, Justice Reed described a "company town" as follows:

[A]n area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Id. at 513 (Reed, J., dissenting).

The majority opinion describes the company town somewhat more expansively:

Except for that [the fact that Chickasaw is owned by a corporation] it has all

tempted to distribute religious literature on the company-owned sidewalk in the Chickasaw business district even though signs posted in the Chickasaw stores warned: "This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."¹⁸ Ms. Marsh was told to stop distributing the literature and was asked to leave the sidewalk.¹⁹ She refused and was arrested.²⁰ The Alabama Court of Appeals upheld her criminal conviction based upon the fact that the sidewalk on which she distributed her religious literature was private property, owned by the Gulf Shipbuilding Company.²¹

In a 5-3 decision, the United States Supreme Court reversed Ms. Marsh's conviction.²² The Court acknowledged that a city could not have proscribed the distribution of the literature in question.²³ However, it rejected the contention that private

the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf Shipbuilding Corporation's property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Id. at 502-03.

18. *Id.* at 503.

19. *Id.*

20. *Id.* Ms. Marsh was charged with a violation of Title 14, Sec. 426 of the 1940 Alabama Code wherein it was a crime "to enter or remain on the premises of another after having been warned not to do so." *Id.* at 503-04.

21. *Id.* at 504.

22. *Marsh*, 326 U.S. at 510.

23. *Id.* at 506.

ownership of the sidewalk settled the constitutional question.²⁴ As the Court explained:

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.²⁵

Relying on the similarities between Chickasaw and a "public" city, the Court emphasized that the "public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."²⁶ Mere private ownership of property should not be determinative of the exercise of constitutional freedoms, particularly when Chickasaw operated like any other city.²⁷ The Court concluded that the simple fact that the property was not public property would not justify Gulf Shipbuilding Company's restrictions on the rights of Chickasaw residents.²⁸ Moreover, the state should play no part in enforcing those restrictions.²⁹

In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*,³⁰ the Court extended the *Marsh* analysis to the "functional equivalent" of the company town, a privately-owned shopping center.³¹ In many areas, shopping centers have taken on the attributes of company towns. They have replaced downtown business districts as places where residents gather to receive and exchange information. Educational and recreational programs are often performed in the mall. Citizens can attend holiday programs, meet movie and television stars, participate in tractor pulls, and greet their neighbors.

In *Amalgamated Food, Logan Valley Plaza, Inc.* ("Logan") owned a shopping center known as Logan Valley Mall.³² One of the mall's tenants, Weis Markets, posted a sign that prevented anyone but its employees from trespassing or soliciting on the covered porch in front of the market, or in the parking lot surrounding the market.³³ Members of the Amalgamated Food Employees Union, none of whom were Weis employees, picketed

24. *Id.*

25. *Id.*

26. *Id.* at 507.

27. *Marsh*, 326 U.S. at 505-06.

28. *Id.* at 509.

29. *Id.*

30. 391 U.S. 308 (1968), *questioned*, 424 U.S. 507 (1976).

31. *Logan Valley*, 391 U.S. at 318.

32. *Id.* at 310.

33. *Id.* at 310, 311.

Weis to protest its non-union status.³⁴ The Court established that "the picketing was peaceful at all times and unaccompanied by either threats or violence."³⁵

Weis and Logan asked the court of common pleas to enjoin the picketing on the porch and parking lot immediately surrounding Weis Markets.³⁶ These areas were within the section of the mall that was privately-owned by Logan.³⁷ Weis and Logan wanted to require the union members to picket only in the public areas outside the shopping center.³⁸ The court granted their request.³⁹ The Pennsylvania Supreme Court upheld the issuance of the injunction under the rationale that the protesters were trespassing on Logan's private property.⁴⁰

In reversing the Pennsylvania Supreme Court, Justice Marshall acknowledged that if the area in question was a public business district, rather than a privately-owned mall, the union unquestionably would be permitted to picket.⁴¹ As Justice Marshall pointed out:

[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.⁴²

Justice Marshall referred to the holding in *Marsh*, wherein the Court determined that "under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held."⁴³

The majority held that the mall in *Logan Valley* and the business district in *Marsh* were indistinguishable.⁴⁴ It reiterated and expanded its rationale in *Marsh* regarding the constitutional treatment of the equivalent of the company town.⁴⁵ According to the Court, the mall with its surrounding sidewalks and streets operated in the same manner as the downtown of any city.⁴⁶ They served the same function of providing easy and open in-

34. *Id.* at 311.

35. *Id.* at 312.

36. *Logan Valley*, 391 U.S. at 312.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 313.

41. *Logan Valley*, 391 U.S. at 319-20.

42. *Id.* at 315.

43. *Id.* at 316 (citing *Marsh*, 326 U.S. at 507).

44. *Id.* at 319.

45. *Id.*

46. *Logan Valley*, 391 U.S. at 319.

gress and egress to the business center for members of the general public.⁴⁷ Therefore, the Court determined that the only difference in public use by the two entities would be "that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing."⁴⁸

Even though *Logan Valley* extended the *Marsh* constitutional protections to the functional equivalent of a public business district, the picketing in *Logan Valley* was directed at the employment standards of one of the mall's tenants, Weis Market.⁴⁹ The *Logan Valley* Court did not consider whether a privately-owned shopping center could prohibit the distribution of leaflets when those leaflets were totally unrelated to the operations of the shopping center.⁵⁰ *Lloyd Corp. v. Tanner*⁵¹ addressed this issue and seriously eroded the *Logan Valley* holding.⁵²

Delivering the majority opinion for the Court in a 5-4 decision, Justice Powell focussed on the purpose of the mall, the Lloyd Center (the "Center"), owned by Lloyd Corp., Ltd. ("Lloyd").⁵³ The Center was a large, comprehensive facility.⁵⁴ Its sixty retail and commercial establishments covered fifty acres, including parking facilities for over 1,000 cars.⁵⁵ The Center was an expansive complex containing "buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, escalators, bridges, and gardens, and contain[ed] a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable."⁵⁶

On November 14, 1968, Mr. Donald Tanner, Ms. Betsy Wheeler, and Ms. Susan Roberts (the "Activists") were among five people who began distributing invitations to a meeting to protest the draft and the Vietnam War.⁵⁷ The Activists distributed the invitations inside the Center and were at all times orderly and quiet.⁵⁸ The private security guards who were hired by Lloyd to maintain order in the Center told the Activists that they would

47. *Id.*

48. *Id.*

49. *Id.* at 312.

50. *Id.* at 320 n.9.

51. 407 U.S. 551 (1972).

52. *Lloyd*, 407 U.S. at 552.

53. *Id.* at 552, 564-65.

54. *Id.* at 553.

55. *Id.*

56. *Id.* at 571-72 (Marshall, J., dissenting) (quoting *Tanner v. Lloyd Corp.*, 308

F. Supp. 128, 129 (D. Or. 1970)).

57. *Lloyd*, 407 U.S. at 556.

58. *Id.*

be arrested if they continued to pass out the invitations.⁵⁹ The Activists left the Center and began distributing their literature on the public streets outside the Center and subsequently brought suit seeking declaratory and injunctive relief.⁶⁰

The district court, unable to distinguish this fact situation from the Supreme Court holding in *Logan Valley* held, as the Supreme Court had in *Logan Valley*, that the Center was the functional equivalent of a publicly-owned business district and thus applied the constitutional protections of free speech.⁶¹ The U.S. Supreme Court, however, limited its decision in *Logan Valley*.⁶²

Justice Powell emphasized the differences between the Center and the prototype of the company-owned town, particularly as they each applied to a publicly-owned town.⁶³ The company town, according to Justice Powell, possessed all of the attributes of a city, including residential buildings, streets, churches, postal facilities and sewers.⁶⁴ However, the analogy between a privately-owned facility and a publicly-owned facility need only be carried so far, and, in fact, was not the gravamen of the Court's decision in *Logan Valley*.⁶⁵ Rather, the *Logan Valley* decision applied strictly to protests directed at a store confined within a mall.⁶⁶ If such protesting was not made available, protesters would have "no other reasonable opportunities" to inform the public of their complaints.⁶⁷

In *Lloyd*, the invitations that were distributed in the Center bore no relationship to the purpose and use of the Center itself.⁶⁸ Moreover, those who wished to promote ideas totally unrelated to the purposes of the Center had alternative means to do so.⁶⁹ The invitations to attend a rally against the Vietnam War were directed toward the general public, not to the patrons of the Center, and could have been distributed "on any public street, on any public sidewalk, in any public park, or in any public building

59. *Id.*

60. *Id.*

61. *Id.*

62. *Lloyd*, 407 U.S. at 563.

63. *Id.* at 556-70.

64. *Id.* at 557, 562.

65. *Id.* at 563.

66. *Id.* at 564.

67. *Lloyd*, 407 U.S. at 563.

68. *Id.* at 564.

69. *Id.* The Court stated that the availability of other means distinguished *Lloyd* from *Logan Valley*. *Id.* at 566. In *Logan Valley*, the picketers "would have been deprived of all reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center." *Id.*

in the City of Portland."⁷⁰

The Center was a business establishment and it invited the public to come within its walls in order to do business with its tenants.⁷¹ The Center did not solicit the public to come and do whatever it desired.⁷² "There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve."⁷³ Therefore, Justice Powell concluded that the Activists' constitutional rights could be restricted.⁷⁴

The final eradication of the *Marsh/Logan Valley* doctrine occurred with the decision in the case of *Hudgens v. NLRB*.⁷⁵ *Hudgens* also concerned picketing in an enclosed mall surrounded by a large parking lot.⁷⁶ Sixty stores were located within the mall and most of them, including the Butler Shoe Co. could only be entered from inside the mall.⁷⁷ During a strike against Butler Shoe Co., the strikers, who were employees of the shoe store, picketed inside the mall while carrying signs that stated "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315."⁷⁸ They were told they could not picket in the mall or the parking lot.⁷⁹ The lower courts found this to be an unfair labor practice, based in part on the analysis in *Logan Valley* and *Marsh*.⁸⁰

After acknowledging once again that "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state,"⁸¹ the Court quoted extensively from the portion of the dissent in *Logan Valley* which maintained that *Marsh* was only intended to apply to situations where private property had:

[T]aken on *all* the attributes of a town, i.e., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."⁸²

The Court, in expressly overruling *Logan Valley*, determined that neither the shopping center in *Logan Valley* nor the one in

70. *Id.* at 564.

71. *Id.*

72. *Lloyd*, 407 U.S. at 565.

73. *Id.*

74. *Id.* at 570.

75. 424 U.S. 507 (1976).

76. *Hudgens*, 424 U.S. at 508.

77. *Id.* at 509.

78. *Id.*

79. *Id.*

80. *Id.* at 509-12.

81. *Hudgens*, 424 U.S. at 513.

82. *Id.* at 516 (quoting *Marsh*, 326 U.S. at 502) (Black, J., dissenting).

Lloyd were analogous to the company town in *Marsh*.⁸³ The Court reasoned that the pickets of the Butler Shoe Co. did not have the power to exercise their First Amendment rights because the protesters in *Logan Valley* and *Lloyd* did not have such power.⁸⁴ If the Court's analysis in *Hudgens* actually was applied as written, only complete private ownership of a town will trigger the *Marsh* protections. Every aspect of providing governmental services would need to be in private hands. It is not enough that many downtown business districts of municipalities are dead or dying and have been displaced by suburban shopping malls. If those shopping malls are owned by private individuals, i.e. the provision of the "community gathering" function of community has been privatized, constitutional freedoms can and will be abridged.

In his dissent in *Lloyd* over twenty years ago, Justice Marshall wrote these prescient words:

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh v. Alabama* and continue to hold that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."⁸⁵

Privatization of Governmental Services

When the provision of a traditional governmental service is privatized, *Marsh's* constitutional analysis does not apply. The Court shifts its attention to the action, rather than the actor, to determine if the service is one that can be characterized as essentially governmental. *Jackson v. Metropolitan Edison Co.*⁸⁶ illustrates this point.

In *Jackson*, Catherine Jackson's electric service to her home in York, Pennsylvania was terminated because she had not paid on her account for several months.⁸⁷ Ms. Jackson was not notified

83. *Id.* at 519 (quoting *Lloyd*, 407 U.S. at 567-70).

84. *Id.* at 520-21.

85. *Lloyd*, 407 U.S. 551, 586 (Marshall, J., dissenting) (quoting *Marsh*, 326 U.S. at 506).

86. 419 U.S. 345 (1974).

87. *Jackson*, 419 U.S. at 347.

that her electric service would be discontinued; nor was she given an opportunity to respond to or challenge the decision to cut off her electricity.⁸⁸

Metropolitan Edison Co., a privately-owned and operated utility company that was extensively regulated by the State of Pennsylvania, provided service to Ms. Jackson's home.⁸⁹ Electric service was once provided by the state government.⁹⁰ Metropolitan Edison had petitioned and received permission from the state to provide electric service to the residents of York.⁹¹ Thus, the City of York had privatized the provision of electrical service to its residents.⁹²

Had York provided electric service, rather than privatizing the service, it is beyond dispute that Ms. Jackson would have had the right to receive prior notice and an opportunity to be heard prior to the termination of her electric service. It is also indisputable that purely private actions, engaged in by purely private actors, are immune from the provisions of the Fourteenth Amendment.⁹³

The Court ruled that a sufficient interrelationship between Metropolitan Edison Co., a private entity, and York, as a representative of the state, must exist in order to consider Metropolitan Edison's actions the same as the state's.⁹⁴ Justice Rehnquist, writing for the majority, held that neither extensive state regulation nor the mere existence of a monopoly were dispositive in determining whether state action was present.⁹⁵ Inquiry must determine whether a "sufficiently close nexus" exists between the private company and the state to find state action present in the private company's actions.⁹⁶

In *Jackson*, the Court held that extensive regulation of the utility by the state was not sufficient to establish the existence of state action.⁹⁷ A heavily-regulated, privately-owned utility was

88. *Id.*

89. *Id.* at 346.

90. *Id.*

91. *Id.*

92. *Jackson*, 419 U.S. at 346.

93. *Id.*

94. *Id.*

95. *Id.* at 350-51.

96. *Id.* at 351. The Court stated:

[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. . . . The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met.

Id. (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)).

97. *Jackson*, 419 U.S. at 350-51.

permitted to deny service under conditions that would not be constitutionally permissible for a publicly-owned institution. Therefore, state regulatory approval of the actions of privately-owned providers of services was clearly insufficient to trigger constitutional protections. The implications of this decision are clear and far-reaching. If the provision of a service that was traditionally provided by the government, such as electric, water or gas service, is privatized, constitutional safeguards need not apply. Cities can shift the responsibility of providing services to private actors, who in turn, can save themselves time and money because private entities are not required to provide due process protections to customers prior to terminating their services. As many of these providers are monopolies, citizens as customers are helpless to prevent their service from being terminated.

Of the three justices who dissented in *Jackson*, Justice Marshall challenged the majority's assertion that state action was not present in this case.⁹⁸ He reasoned that since the state had granted a monopoly to Metropolitan Edison, the company "assume[d] many of the obligations of the State."⁹⁹

Justice Marshall recognized the dangers of allowing private entities that perform public services to escape constitutional constraints. He declared:

Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized. . . . [I]t is hard to imagine any such interests that are furthered by protecting privately owned public utility companies from meeting the constitutional standards that would apply if the companies were state owned. The values of pluralism and diversity are simply not relevant when the private company is the only electric company in town.¹⁰⁰

Unfortunately, Justice Marshall's reasoning did not prevail. Private actors providing traditionally public services are not bound by constitutional protections. As a result, the customers of these private entities, the residents of the municipalities, suffer the consequences.

98. *Id.* at 365 (Marshall, J., dissenting).

99. *Id.* at 366.

100. *Id.* at 373.

Homeowner Associations

Further support for the contention that private entities performing public services escape constitutional constraints is provided by examining the treatment of homeowner associations, which have been called "residential private governments."¹⁰¹ In homeowner associations, an elected group governs the residents of the association. The growth of both condominiums and housing developments has spawned the proliferation of homeowner associations. Homeowner associations are the epitome of the privatization of the provision of governmental services. In homeowner associations, the government itself has been privatized.

Membership in a homeowner association usually coincides with the purchase of a home. Upon purchasing a home, the owner automatically becomes a member of the homeowner association. Homeowner associations and public governments have many common attributes. Both entities profess to serve the needs of their residents by managing common areas and establishing the parameters of acceptable conduct of their inhabitants.¹⁰² For

101. Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

102. Reichman, *supra* note 101, at 254-55. Reichman describes the similarities: When an individual takes up residence in a city, he automatically establishes a set of complex legal relations with the local municipal government: he is subjected to a comprehensive set of rules, granted a variety of rights, and is entitled to participate in the local political process. In the same way, by the simple act of acquiring title, a home buyer entering a community regulated by a residential private government automatically becomes the "subject" of the organization, owes various legal obligations, and is entitled to specific benefits.

Id.

Reichman continues:

The similarity between the residential private government and its public counterpart also extends to structural matters. The private government is organized on the basis of certain notions of democratic participation. The "government" is run by elected officials, each homeowner has the right to vote, and the majority has the power to change the community's norms. A division between "administrative" and "legislative" branches is often maintained. While certain matters are determined by the discretionary judgment of the organization's directors and agencies, the basic rules can be abolished or amended only by the homeowners' general assembly

Id.

Reichman concludes that:

Finally, there is resemblance between the regulatory provisions maintained by both the public and private systems. . . . Comprehensive services like those usually supplied by municipalities may be furnished by the private organization; parks, recreational and cultural facilities may be provided along with the more traditional services such as street maintenance, snow removal, and garbage collection.

Id.

example, a homeowner association may restrict an owner's ability to sell or lease his or her property¹⁰³ and prohibit consumption of alcohol in common areas.¹⁰⁴

Public governments may tax their residents. Homeowner associations raise revenue through the imposition of monthly "assessments" and/or dues. Municipal governments are elected by voters within a specified geographical area. Similarly, the governing body of the homeowner association is elected by the property owners within the association. Thus, many of the functions normally performed by a municipal government have been taken over by the homeowner association:

By their very nature, associations become mini-governments. They provide services that in many areas of the country have been provided by municipalities, including maintenance of common areas, roads, utility systems (water and sewer), lighting, refuse removal, and communications systems. Implementation and enforcement by Cas [community or homeowners associations] of these easements of access, architectural covenants, and use restrictions contained in land documents are analogous to police and public safety services provided by governmental bodies.¹⁰⁵

However, there is one acute difference between homeowner associations and municipal governments. Public governments are constrained by constitutional prohibitions regarding individual rights and freedoms. The homeowner association has no such restraints because it is not a state actor. Questions have been raised concerning the constitutionality of the homeowner associations. For example, most homeowner associations restrict voting to homeowners. As a consequence, residents who rent property are disenfranchised in violation of the Equal Protection clause of the Fourteenth Amendment.¹⁰⁶ Renters are prevented from voic-

103. See *Ritchey v. Villa Nueva Condominium Ass'n.*, 81 Cal. App. 3d 688 (Cal. Ct. App. 1978) (Bylaws of condominium association which restricted occupancy in project to persons 18 years of age or older was reasonable restriction upon owner's right to sell or lease his condominium unit to families with children.); *Worthinglen Condominium Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275 (Oh. Ct. App. 1989) (An amendment to a condominium declaration prohibiting leasing is not per se unenforceable against owners who acquired condominium units before adoption of amendment.).

104. See *Hidden Harbour Estates v. Norman*, 309 So.2d 180 (Fla. Dist. Ct. App. 1975) (Homeowners association could enforce rule prohibiting alcoholic beverages in clubhouse.).

105. URBAN LAND INSTITUTE/COMMUNITY ASS'N INSTITUTE, *MANAGING A SUCCESSFUL COMMUNITY ASSOCIATION* 2 (1974).

106. HUGH MIELDS, JR., URBAN LAND INSTITUTE, *FEDERALLY ASSISTED NEW COMMUNITIES: NEW DIMENSION IN URBAN DEVELOPMENT* 2 (1974). Mr. Mields states: If they are based, as most of them are, on the home owner association concept, serious legal issues arise in terms of equal enfranchisement of all citizens, since most HOAS [homeowner associations] exclude lessees from member-

ing their opinions about issues that concern them and they have no effective means of accessing the decision-making process.¹⁰⁷

If the holdings of *Marsh* through *Hudgeons* were carried to their logical conclusions, a homeowner association would be the equivalent of a "company town" and thus be subject to constitutional safeguards. After all, this is an instance when all the attributes of a public government are being performed by private actors. Rather than treat homeowner associations as they would municipal governments, courts have employed a test of reasonableness when assessing the fairness of association rules and regulations. The courts have applied a standard of deferential treatment in reviewing association bylaws. Therefore, the restrictions in the bylaws are presumptively valid and must be uniformly enforced.¹⁰⁸ The "deference" given to the enactment of the private laws of homeowner associations gives wide latitude to homeowner associations to impose constraints upon their residents/members. The associations have enforced rules that prohibited the distribution of newspapers,¹⁰⁹ prevented homeowners from entering and leaving their condominium through the back door,¹¹⁰ and interfered with the marital relationship of a newlywed couple.¹¹¹

Other restrictions have been described as follows:

Even vegetable gardens are frowned upon—though some people do grow tiny ones out of their neighbors' view. Fences, hedges, or walls require

ship. Thus these "private governments" may violate the equal protection clause of the Fourteenth Amendment. In essence, they establish the new community as a municipal corporation without ensuring that those citizens who will be governed have a voice in the decision-making process.

Id.

107. MIELDS, *supra* note 106, at 2.

108. See *Hidden Harbour Estates v. Basso*, 393 So.2d 637 (Fla. Dist. Ct. App. 1981) (Restrictions found in a declaration of condominium are presumed valid and this presumption arises from the fact that the purchasers of the unit do so knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they are not invalid absent a showing that they are arbitrary in application, in violation of public policy, or that they abrogate some fundamental constitutional right.)

109. See *Laguna Publishing Co. v. Golden Rain Found. of Laguna Hills*, 182 Cal. Rptr. 813 (Cal. Ct. App. 1982).

110. *United Press International, Couple Sues to Lift Ban on Condo Door*, L.A. TIMES, October 8, 1989, part 8, at 21. The homeowner association claimed that by walking from their back door to the parking lot, the owners of the unit were making an unattractive path in the grass. *Id.*

111. *United Press International, Court Finds Wife Too Young for Retirement Condo*, SAN DIEGO DAILY TRANSCRIPT, December 11, 1987 (The homeowner association took the couple to court because the wife was three years younger than the minimum age for residency. The judge who heard the case ordered the sixty-year old husband to either sell his home, rent it out, or live there without his wife.)

approval, and may not be more than three feet tall. Signs, other than for-sale signs, are prohibited. Trees must be kept trimmed and may not grow above the level of the roof, which must be covered with red tiles. One village, designed more for seniors, prohibits grandchildren from using the recreation center, and home visitation by grandchildren is strictly limited. The owners of patio homes . . . must gain their neighbors' approval before altering the patio, planting a rosebush, or raising a canopy.¹¹²

When left in private hands, the decision-making and policy-setting functions of government are driven by considerations of property values. The decision as to what is best for the community exalts money over individual freedoms and, once again, the citizens of these communities are the losers.

THE ESSENCE OF GOVERNMENT ARGUMENTS

To posit that extensive differences exist between a public and private entity perhaps states the obvious. However, in the privatization debate, it is necessary to begin from this proposition in order to fully comprehend the effect privatization will have upon the citizens of the public corporation community, the municipality.

Although little distinction was made in colonial times between a public and a private corporation, over time the contrast between the two entities became profound.¹¹³ Courts recognized this differentiation at law and treated the two entities accordingly.¹¹⁴ Although both public and private corporations had constituents to whom they answered,¹¹⁵ each was designed to achieve significantly different objectives.

A private corporation must have the making of money as its primary goal.¹¹⁶ If it fails to thrive financially, the private corporation faces ruin. To acquire an interest in the corporation and a right to vote on corporate matters, one has to purchase corporate stock.¹¹⁷ The corporation is designed to regulate private in-

112. RICHARD LOUV, *AMERICA II* 92 (1983).

113. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1101-02 (1980). Cities and private corporations were treated similarly and even had similar characteristics. For example, the purpose of both public and private corporations was to further the public good. *Id.* at 1102-03. Numerous private corporations possessed the power of eminent domain, the authority to claim privately-owned property for a public purpose. *Id.* Many cities were financed by income from commerce and trade, the same sources of revenue relied upon by private corporations. *Id.*

114. See Frug, *supra* note 113, at 1101-03.

115. The private corporation must answer to its shareholders and the public corporation must answer to its electorate.

116. See generally the REVISED MODEL BUSINESS CORP. ACT (1995).

117. *Id.*

terests and exists mainly for private gain.¹¹⁸

Conversely, the duties of a public corporation go beyond the desire for monetary gain. Cities have responsibilities to their constituents that are essentially political.¹¹⁹ A city is not a business designed to make a profit. It exists to assist its inhabitants by supplying them with products and services that will inure to the benefit of the community as a whole.

The eventual division between public and private corporate entities developed from the desire to protect the exclusive rights and preserve the power of private corporations from the state:

The very purpose of the [public/private] distinction was to ensure that some corporations, called "private," would be protected against domination by the state and that others, called "public," would be subject to such domination. In this way the corporate anomaly was resolved so that corporations, like the rest of society, were divided into individuals and the state.¹²⁰

Any attempt to completely separate the functions of a public from a private corporation does not adequately comport with the functions of a city. When acting in its governmental capacity, a city sometimes operates more similarly to a private corporation. This occurs specifically when the city performs certain of its proprietary functions. A city can hold title to land, for instance, as long it does so for a public purpose.¹²¹ The dual nature of the city has led to the characterization of a city as both a corporate and political body.¹²²

118. *Id.*

119. *See, e.g.,* *Byrne v. Chicago G.R. Co.*, 48 N.E. 703, 705 (Ill. 1897). Other cases adopt this same perspective in discussing a municipality and its purpose and function. *See also* *Dunn v. Mayor and Council of City of Wilmington*, 212 A.2d 596 (Del. Super. Ct. 1965). The court in *Dunn* stated that:

The conception [of the city as a political and governmental organ differs widely from the view sometimes taken] that a city or town is not a governmental organ at all, but is simply a "business corporation," or organization designed to give service, and to be managed on what are termed "business principles" in somewhat the same manner as the private corporation is controlled by its board of directors, or as is often the case, by a select few for the sole purpose of pecuniary profit.

Dunn, 212 A.2d at 604 (quoting 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 11.106 (3d ed. 1964)).

See also *Mayor & City Council of Nashville v. Ray*, 86 U.S. 468 (1874). Early on, the Supreme Court took the position that the city is a public institution, created for public purposes only and hence has "none of the peculiar qualities and characteristics of a trading company instituted for purposes of private gain, except that of acting in a corporate capacity." *Ray*, 86 U.S. at 475. With emphasis the Court in *Ray* stated: "Its [municipal corporation] objects, its responsibilities and its powers are different." *Id.*

120. *See* *Frug*, *supra* note 113, at 1100.

121. *See, e.g.,* *Hoskins v. City of Orlando*, 51 F.2d 901 (5th Cir. 1931).

122. MCQUILLIN, *supra* note 119, § 1.16, which provides:

A city is called a body politic because it provides for the needs of its citizens and has an indefinite life.¹²³ Because the city has the capacity to sue and be sued and to exercise eminent domain powers, a city is called a body corporate.¹²⁴ Since a city is comprised of both political and business elements, its government has "standing in politics and law."¹²⁵

The government began providing services in reaction to the neglect suffered by the socially and economically distressed in this country. This neglect became particularly evident right after the Great Depression. Reaction to the social and economic inequities suffered by Americans at the hands of the private sector provided the impetus behind much of President Roosevelt's New Deal legislation.¹²⁶ The next spate of social legislation came about with the attempt by the government to address racial inequalities during the 1960's.¹²⁷ The government responded to demands by African-Americans that they be included in the substance of American life.¹²⁸ During these time periods, governments discerned an imbalance in access to public services left unmet by private enterprise. The city, as the body corporate and

[The city was] an association of individuals joined together to accomplish some lawful purpose. It had perpetual succession, and therefore it is called . . . a body politic, and also a corporation or body incorporate, because the persons are made into a body and are of capacity to take, grant, etc., by a particular name; to sue and be sued; and to have a common seal. These essential elements completed the corporate entity and gave the municipal government a standing in politics and law.

Id.

The term "body corporate and politic" was originally used to describe the municipal corporation when it acted in its traditional role as the provider of governmental services. For instance, the preamble to the 1786 Constitution of the Commonwealth of Massachusetts read as follows:

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

MASS. CONST. of 1786 pmbl.

In 1786 when the Legislature of the Commonwealth of Massachusetts formally established the geographic boundaries of each town, it proclaimed: "the inhabitants of every town within this Government are hereby declared to be a body politic and corporate." See MCQUILLIN, *supra* note 119, § 1.15. This conjunctive language stuck, and courts and legislative bodies oftentimes use the phrase to refer to a legal entity that is created to perform essential public functions. *Id.*

123. MCQUILLIN, *supra* note 119, § 1.16.

124. *Id.*

125. *Id.*

126. See HARVEY BROOKS, *SEEKING EQUITY AND EFFICIENCY: PUBLIC AND PRIVATE ROLES, PUBLIC-PRIVATE PARTNERSHIPS; NEW OPPORTUNITIES FOR MEETING SOCIAL NEEDS* (1984).

127. See BROOKS, *supra* note 126.

128. See *id.*

politic, evolved to perform tasks that came to be known as essential governmental services.

The growth of populations centered in the municipal geographic area caused residents in those areas to look to the municipal governments to provide what the residents considered to be essential services.¹²⁹ Due to residents' demands, cities began to provide certain services to those residing within its boundaries. These services, such as constructing parks,¹³⁰ furnishing water,¹³¹ maintaining streets,¹³² and supporting fire protection¹³³ assumed a "public" persona because they were provided by the municipal government. Thus, they came to be known as public or governmental services.

The purpose of a public corporation is not to make a profit, nor does it exist merely to provide and produce services for its inhabitants. Although a municipal corporation does provide services, its objective is much broader. A municipal corporation exists to advance the prosperity of the whole community.¹³⁴ The municipal corporation ensures the health and safety of its inhabitants, regulates to the extent necessary to achieve those goals, and protects those within its boundaries who are unable to protect themselves.¹³⁵ It functions as the body politic of the municipal community and exercises a portion of the political power of the state.¹³⁶

The Court in *Nashville v. Ray*¹³⁷ distinguished between a pri-

129. MCQUILLIN, *supra* note 119, § 1.08.

130. See *Fahey v. Jersey City*, 244 A.2d 97, 100 (N.J. 1968) ("Public parks, open spaces, playgrounds and places for public resort, rest and recreation are facilities anciently provided by local government . . . public parks are operated as a governmental service.") (quoting *Coleman v. Township of Edison*, 232 A.2d 187, 189 (N.J. Super. Ct. App. Div. 1967)).

131. See *Eastern Ill. State Normal Sch. v. City of Charleston*, 111 N.E. 573, 575 (Ill. 1916) ("In the creation of a system of waterworks and the operation of the same for the purpose of protection against fire, flushing sewers, or other uses pertaining to the public health and safety, the city is in the exercise of the police power and is therefore exercising a governmental function.")

132. See *City of Benwood v. Interstate Bridge Co.*, 30 F. Supp. 952, 959 (N.D. W.Va. 1940) ("The construction and maintenance of streets and alleys within the territorial limits of a city would seem to be a governmental function. . . .")

133. See *Delaware Liquor Store, Inc. v. Mayor & City Council of Wilmington*, 75 A.2d 272, 275 (Del. Super. Ct. 1950) ("Municipal enterprises relating to the preservation of peace, the care of the poor, the public health, and the prevention of the destruction of property by fire are among those enterprises generally classified in the category of governmental functions.")

134. See *Byrne v. Chicago*, 48 N.E. 703 (Ill. 1897).

135. *Id.*; see also *Maccabee Investments, Inc. v. Markham*, 311 So.2d 718 (Fla. Dist. Ct. App. 1975).

136. *Kennelly v. Kent County Water Auth.*, 89 A.2d 188, 190-91 (R.I. 1952).

137. 86 U.S. 468 (1874).

vate and public corporation as follows:

A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished.¹³⁸

In order to ensure that local residents retain the sense of community and quality of life to which they are entitled, certain governmental activities must be designated as "essential." Such services are essential because the recipients of these services have acquired a "right" to receive them. For example, in the *Jackson* case, Ms. Jackson claimed that she had "an entitlement to reasonably continuous electrical service in her home."¹³⁹ She based her argument upon a state statute that required public utilities to "furnish and maintain"¹⁴⁰ appropriate utility service in a manner that was "reasonably continuous and without unreasonable interruptions or delay."¹⁴¹ The Court declined to address whether the provision of electrical service to Ms. Jackson was an "entitlement." Rather, the Court directed its attention to the issue of whether Metropolitan Edison was providing an "essential public service" to determine if state action was present.¹⁴²

In his analysis, Justice Rehnquist first lists several cases that demonstrate the type of powers that are traditionally reserved to

138. *Ray*, 86 U.S. at 475. See also *Mayor & Alderman of Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611 (1879). The court in *Wetumpka* stated:

Municipal corporations are strictly of political institution; they are but parts of the internal government of the State. All their purposes and objects are public, and the power they exercise, if not delegated to them, would reside in the General Assembly, or in some other department of the government. There is not a power the city could exercise through the agency of the mayor and aldermen, under the original act of incorporation, that is not governmental; and these powers are confined in the sphere of operation to the territorial limits of the city. . . . Private gain, trading speculation, or the derivation of pecuniary profit, are not purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage, or advance such purposes, further than the incidental encouragement and advancement, which may follow a prudent exercise of the powers of local government.

Wetumpka, 63 Ala. at 624-25.

139. *Jackson*, 419 U.S. at 347-48. See *supra* notes 86-100 and accompanying text for a discussion of *Jackson*.

140. *Jackson*, 419 U.S. at 348 n.2.

141. *Id.*

142. *Id.* at 352.

states: conducting elections, operating a company town such as the one in *Marsh*, and maintaining a municipal park.¹⁴³ He also mentioned the power of eminent domain as an example of authority that has been "traditionally associated with sovereignty."¹⁴⁴ While he conceded that electric service must be provided, Justice Rehnquist found no requirement that the state be the entity that provides that service.¹⁴⁵ The provision of electric service has not been "traditionally the exclusive prerogative of the State."¹⁴⁶

Justice Marshall, however, disagreed, and argued that Metropolitan Edison did provide an essential public service.¹⁴⁷ In asserting that state action was, in fact, present, Justice Marshall relied heavily upon the fact that Metropolitan Edison provided an "essential public service that is in many communities supplied by the government."¹⁴⁸ He recognized that Metropolitan Edison was the only entity, public or private, to provide the service, and,

143. *Id.* In *Evans v. Newton*, 382 U.S. 296 (1966), the U.S. Supreme Court determined that operating a park was an example of a function that was exclusively reserved to states. *Evans*, 382 U.S. at 302. In *Evans*, a United States Senator from Georgia executed a will that left a one hundred acre parcel of land to the City of Macon. According to the terms of the Senator's will, the land was to be operated as a park reserved for use by whites. *Id.* at 297. The City of Macon adhered to the terms of the will for some time, but eventually sought to be removed as trustee, asserting that it could not legally enforce racial segregation in the park. *Id.* Although a private entity would serve as the new trustee for the park, Macon would continue the maintenance and upkeep of the park. *Id.* at 297-98. In effect, the city sought to privatize the provision of the park, while keeping its production under governmental control.

In a 4-3 decision, Justice Douglas, writing for the majority, held that because the park was an "integral part of the City of Macon's activities," the change from public to private oversight was not enough to withdraw Fourteenth Amendment constitutional protections:

[I]t was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption. . . . The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of "private" trustees. . . . If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment.

Id. at 301.

The majority was quick to point out, however, that if the provision (rather than just the production) of a service previously furnished by the government was privatized, constitutional protections might not apply. *Id.* at 300. In *Flagg Bros., Inc., v. Brooks*, 436 U.S. 149 (1978), the U.S. Supreme Court rejected the claim that *Evans* determined that the operation of a park for recreational purposes was an exclusive public function. *Flagg Bros.*, 436 U.S. at 159 n.8. See *infra* notes 151-66 and accompanying text for a discussion of *Flagg Brothers*.

144. *Jackson*, 419 U.S. at 353.

145. *Id.*

146. *Id.*

147. *Id.* at 366 (Marshall, J., dissenting).

148. *Id.* at 371.

coupled with the state's extensive regulations, found no obstacles to classifying the provision of the electric service as an essential public service.¹⁴⁹ He explained:

The fact that Metropolitan Edison Co. supplies an essential public service that is in many communities supplied by the government weighs more heavily for me than for the majority. The Court concedes that state action might be present if the activity in question were "traditionally associated with sovereignty," but it then undercuts that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the "public function" argument too narrowly. The whole point of the "public function" cases is to look behind the State's decision to provide public services through private parties.¹⁵⁰

Justice Marshall's view of what constitutes an essential public service was not embraced by a majority of the Supreme Court. Four years later, Justice Rehnquist, in *Flagg Brothers, Inc. v. Brooks*,¹⁵¹ had the opportunity to clarify his position respecting which governmental powers had been traditionally reserved exclusively to states.¹⁵²

Flagg Brothers, Inc. was a storage company that stored furniture belonging to Ms. Shirley Herriott Brooks following Ms. Brooks' eviction from her apartment.¹⁵³ After Ms. Brooks received notice, pursuant to New York's Commercial Code, that her furniture would be sold unless she paid her account, she brought an action under 42 U.S.C. § 1983 claiming a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁵⁴ Ms. Brooks claimed that the resolution of a private dispute was a traditional function of government, and that by delegating this function to Flagg Brothers, state action was present.¹⁵⁵

Writing for the majority, Justice Rehnquist emphasized that although many functions had traditionally been performed by the government, very few had been "exclusively reserved to the State."¹⁵⁶ He elucidated the claim he made in *Jackson*; that elections and a company town fall within the definition of exclusive state functions.¹⁵⁷ According to Justice Rehnquist, since the

149. *Jackson*, 419 U.S. at 366-70.

150. *Id.* at 371 (citations omitted).

151. 436 U.S. 149 (1978).

152. *Flagg Brothers*, 436 U.S. at 155.

153. *Id.* at 153.

154. *Id.*

155. *Id.* at 157.

156. *Id.* at 158.

157. *Flagg Brothers*, 436 U.S. at 158, 159. The Court retreated from its earlier

election process is the only one in which public officials are selected, "the conduct of the elections themselves is an exclusively public function."¹⁵⁸ Furthermore, under his constricted interpretation of *Marsh*, when a private entity performs all the "necessary municipal functions" of a town, the private entity is performing activities that have been exclusively reserved to states.¹⁵⁹ Thus, in that circumstance, private property can be treated as though it were public.¹⁶⁰ Stressing the "exclusivity" present in the scenarios previously described, Justice Rehnquist distinguished the fact situation in *Flagg Brothers*.¹⁶¹ The dispute between Ms. Brooks and Flagg Brothers was purely private.¹⁶² Moreover, Ms. Brooks had other remedies available to settle her dispute.¹⁶³ Flagg Brothers' actions were not transformed into some type of exclusive state action simply because it chose to sell Ms. Brook's furniture pursuant to a state statute.¹⁶⁴

The Court admitted that there were other state and municipal functions that could be considered exclusively reserved to states that did not fall within either the conduct of elections or the *Marsh* analysis.¹⁶⁵ Without explanation, Justice Rehnquist placed fire and police protection, education, and tax collection in this category.¹⁶⁶

In both *Flagg Brothers* and *Jackson*, the Court unnecessarily

position in *Evans* that seemed to include the operation of a park as a function that was exclusively reserved to states.

158. *Id.* at 158.

159. *Id.* at 158-59.

160. *Id.* at 159.

161. *Id.* at 160. The Court stated:

[T]he proposed sale by Flagg Brothers . . . is not the only means of resolving this purely private dispute. Presumably, . . . she [one of the plaintiffs] . . . could have sought to replevy her goods at any time under state law. The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.

Id. (citations omitted).

162. *Flagg Brothers*, 436 U.S. at 160.

163. *Id.*

164. *Id.*

165. *Id.* at 163.

166. *Id.* The Court concluded:

We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.

Id. at 163-64.

and unreasonably limited its definition of what constitutes an "essential public service." Election contests and fire and police protection are not the only municipal services that should be characterized as essential. Particularly in the context of privatization, an expansive view of what is essential is imperative in order to protect the citizens of the municipality.¹⁶⁷

Traditionally, certain public services have been designated as "essential." As Justice Rehnquist acknowledged in *Flagg Brothers*, such services have included fire and police protection,¹⁶⁸ and public school education.¹⁶⁹ The willingness to denote police and fire services as essential stems from the appreciation for the need for the government to provide those services, coupled with the fact that the government has historically provided those services.¹⁷⁰

167. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). This article discusses this concept of expansive interpretation of essential services in terms of an ever changing and expanding "government largess." *Id.* at 734. Reich explains that an individual's personhood has evolved over time to consist of "rights or status rather than of tangible goods." *Id.* at 738. These forms of government largess, such as the individual's practice of his or her occupation, the ability to receive benefits, and the capability to be licensed, are an integral part of the life of that individual. *Id.* They are inexorably intertwined with the status of the individual and must be viewed as a right of the individual, rather than a privilege bestowed by the government: "The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be vested." *Id.* at 785.

168. See, e.g., *Hillsdale PBA Local 27 v. Borough of Hillsdale*, 644 A.2d 564, 567 (N.J. 1994). The court in *Hillsdale* stated:

The Borough contends that police and fire department salary increases have exceeded increases for other public and private employees and have outstripped the cost of living. From its perspective, police and fire fighters have received disproportionately high wage increases. From another perspective, police and fire fighters perform essential public services, often at great risk and with little recognition.

Hillsdale, 644 A.2d at 567.

See also *Masloff v. Port Auth. of Allegheny County*, 613 A.2d. 1186, 1191 (Pa. 1992) ("To the extent that Local 85's argument suggests that the adverse effect on the threat to essential public services such as fire and police protection . . . are the ordinary and unanticipated consequences of a transit strike, we are unpersuaded.")

169. See *Lenox Educ. Ass'n v. Labor Relations Comm'n*, 471 N.E.2d 81 (Mass. 1984) (holding that public education is an essential public service).

170. See, e.g., *Rector v. Eastchester*, 99 N.Y.S.2d 991 (N.Y. Sup. Ct. 1950). Cities emerged as financial and social focal points of any given geographic area. Clusters of previously independently-minded citizens attempted to maximize their ability to provide for themselves and their families by pooling their resources. Business enterprises were located in close proximity to private homes in order to more easily serve as many individuals as possible. Individuals took comfort in being close to their neighbors for safety, economic and social reasons. Smaller parcels of land cost less money, and groups could more easily fight undesirables than could individuals.

As the colonists banded together to form their cities/communities, they began to rely upon one another to provide certain services. MCQUILLIN, *supra* note 119, § 1.15. For instance, the colonists' community spirit spawned the development of privatized police protection systems. *Id.* Initially, citizens either volunteered to patrol

Essential public services should be characterized as rights of the individual that cannot be taken away without due process or just compensation. Essential public services are a right that has vested with the individual, and must be provided by the government, not the private sector.

Moreover, since the purposes of a public and private corporation are vastly different, the consequences of permitting private entities to perform public functions will be perverse:

Once the line between "public" and "private" becomes meaningless and is erased, the various units of the Corporate State no longer appear to be parts of a diverse and pluralistic system in which one kind of power limits another kind of power; the various centers of power do not limit each other, they all weigh in on the same side of the scale, with only the individual on the other side. With public and private merged, we can discern the real monolith of power and realize there is nothing at all within the system to impose checks and balances, to offer competition, to raise even a voice of caution or doubt. We are all involuntary members, and there is no zone of the private to offer a retreat.¹⁷¹

The private corporation cannot be entrusted with the responsibility of maintaining and nurturing the rights of the individual. Part of the basis for the separation between the public and private enterprise is to protect the citizenry from the tyranny of both entities. When decision-making, planning and programming that were under the auspices of the public government are transferred to the control of a private corporation, the city residents lose whatever recourse they previously possessed to provide redress for their grievances.

Since the corporation must make a profit, the administrators of the corporate entity become tied to their roles as administrators. Without the primary goal of working for the public good, the private administrator must embark upon a specific course of action:

[H]e is incapable of thinking of *general* values, or of assuming responsibility for society. He can do that only in the diminishing area outside his role. Consider an automobile company executive. He can propose public housing as a solution to the urban crisis. But he cannot propose that

the city or were assigned the task by the local governmental unit. *Id.* If an individual failed to serve his turn as the night watchman, he was fined by the city. *Id.* Eventually, those who had money and who did not want to perform their night watch duty paid others to function in their stead. *Id.* After a time this "arrangement" no longer served the interests of the general populace. *Id.* Residents began to think of police protection as a necessary service, albeit one that should be provided for by the government. *Id.* Therefore, the local governing councils started to provide police protection, and paid for it from revenues received by taxing the citizenry. *Id.*

171. CHARLES REICH, GREENING OF AMERICA 100 (1971).

fewer cars be produced, or that models be kept the same, to save money for public housing. Thus his role prevents him from acting for the community in the one area where he has power to act, and it prevents him from even realizing that his cars are one of the things draining money that should be used for cities. As long as he is in his role, he cannot act or think responsibly within the community. Outside his role, if there is any outside, he is virtually powerless, for his power lies in the role.¹⁷²

Consigning the provision of municipal functions to private organizations is akin to asking the wolf to guard the henhouse. The private administrator will make decisions based upon what is best for the company, not what is best for the public at large. Of course, those who own stock in the company may vote to change the management or institute new policies and procedures. But what happens to those who are not stockholders? They will be eliminated, in effect, disenfranchised, from the decision-making process. Such persons will not have the ability to impact decisions that affect the operation of their community.

Returning to the example of the homeowner association, the association has as its main concern the preservation of the property values of its assets and the protection of the physical well-being of its residents.¹⁷³ The homeowner association accomplishes its goals through the use of various restrictions on the behavior of its residents and their guests.¹⁷⁴ In the hands of the private sector, individual freedoms give way to the need to conform for the sake of monetary gain.

A public government is concerned about property values, but it also serves to address the social, political, and economic needs of its residents. Consideration about the well-being of the greater community is absent in the private company. The private market rests fundamentally on self-interest. Altruistic instincts and the potential for cooperation fall by the wayside as the need to acquire material goods takes precedence. The very attributes that private enterprise fosters works well in the private sector. However, these attributes can serve to destroy the public corporation.

The market atomizes society, emphasizes society, emphasizes material acquisition, and caters to immediate gratification. Consequently, there is a risk that the use of the market for welfare ends may loosen the bonds of community . . . and citizens may no longer harbor social concerns.¹⁷⁵

172. REICH, *supra* note 171, at 125-26.

173. See generally EVAN MCKENZIE, IN PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994) (providing a detailed history of the homeowner association and its rise to prominence as a means to preserve homogeneity in housing developments).

174. See *supra* notes 101-12 and accompanying text.

175. Clarence Stone, *Whither the Welfare State? Professionalization, Bureaucracy,*

In sum, the market works well for certain social purposes but not so well for others. A preoccupation with privatization and its emphasis on efficiency, competition, and market forces may overlook other interests and issues that are vital to the public's social and economic well-being.

CONCLUSION

The elderly gentleman from OMNI has been consumed by greed and the need for power. The perfect city that he planned, that was to be operated by OMNI, has blown up in his face. The privatized police force, which consisted of a legion of one, was beset by inefficiency and rife with malfunction. The elderly gentleman has been defeated, and the city has been returned to its citizens, complete with all of its bumps, bruises, and warts.

Perhaps, in a perfect world, there would be no need for the public sector to be involved in the delivery of any type of goods or services. Private entrepreneurs would ascertain and fulfill identified needs of community residents. All residents would receive the same level of service at a price that they could afford to pay. No need would go unmet and the necessity for government to be the producer and provider of goods and services would be nonexistent.

However, we do not live in a perfect world. The days that are fondly recalled as the "good old days" before governmental intervention and intrusion into the lives of the everyday citizen were a glorious time only for a select few. Although selected forms of privatization, i.e. "contracting out," may cause little harm to the residents of cities, wholesale privatization of the provision of public services should be viewed skeptically. Privatization is not a panacea for the ills of the city, and will, in fact, cause much greater harm than good.

and the Market Alternative, 93 ETHICS 588, 594 (1983). Similar concerns are expressed in Mimi Abramovitz, *The Privatization of the Welfare State: A Review*, SOCIAL WORK 257 (1986). Ms. Abramovitz states:

Purchased services and vouchers drain public programs of those who can absorb the economic risks of the market, the less fortunate—the poor, the sick, the less educated, and the unskilled—become increasingly segregated and thus more vulnerable politically. Not only is social justice thwarted, such an arrangement reverses the fundamental social welfare principle that services should be available on the basis of need and not limited to those who can pay.

Id. at 259.