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THE STATUS OF THE MUNICIPAL CORPORATION IN AMERICAN LAW

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THE American municipal corporation is a body politic created by the incorporation of the people of a prescribed locality and invested with subordinate powers of legislation to assist in the civil government of the state and to regulate and administer local and internal affairs of the community.¹ In many respects besides that of its juristic personality it partakes of the nature of a private corporation, and its rights and obligations are determined by the same or analogous principles of law. This is especially true when it deals with property or engages in business enterprises, similar to those which may be carried on by private corporations, at least so far as its relations to private parties are concerned. But it is nevertheless strictly a public corporation created by the state for public purposes, dependent for the continuance of its life upon the legislative power. Whether or not in fact its organization has been requested or consented to by the residents of the territory it covers, in the eyes of the law it is an involuntary creation and its charter is not from any point of view to be considered as a contract. A fortiori, all its rights are held subject to the will of the state and may be modified or transferred to other public agencies as the public interest may require.²

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¹Coyle v. McIntire, (1884) 7 Houston (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109. 1 Dillon, Mun. Corp., 5th ed., sec. 31. 1 McQuillin, Mun. Corp., 2nd ed., sec. 126.

²United States v. Baltimore & Ohio R. R., (1872) 17 Wall. (U.S.) 322, 329, 21 L. Ed. 597; Chicago v. Town of Cicero, (1904) 210 Ill. 290, 71 N. E. 356; Codman v. Crocker, (1909) 203 Mass. 146, 89 N. E. 177; Trenton v. New Jersey, (1923) 262 U. S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937.

As an administrative body, it bears a close resemblance to the corporate or unincorporate local agencies into which each American state divides all its territory for governmental purposes. Having been called into existence to meet the peculiar needs of the more populous localities, it is generally superimposed upon the county and town, but may in many instances be charged with the same administrative duties, either concurrently with or to the exclusion of these other subordinate state agencies. It differs from them primarily in that the state has delegated to it the power to legislate, to enact ordinances which have the force of law upon all who come within the territorial limits which prescribe the extent of its jurisdiction. Thus, while subject to the same control as other public corporations and holding its franchises at the will of the state, it is a unit of local self-government with extensive powers of regulation over the conduct of life within its borders.

It is a striking fact of our American political system that thus superimposed upon the common administrative agencies of the state are thousands of such public corporations with more or less extensive powers of local self-government and that to these corporations have been committed in large part the rapidly expanding governmental functions made necessary by the conditions of modern society. In the aggregate, from the point of view either of the extent of services rendered or of the cost of such services, the municipal corporation has come to occupy a position in many respects more important than that of the state government itself. The legal problems that concern its status under the changing policies of the state and its relation to the rights of private persons are among the most serious with which the courts have to deal. Its vitality under the social, economic and political vicissitudes of American life is one of the most notable phenomena of history. For it will be admitted by anyone who has studied municipal government from its constitutional and legal aspects that the American municipal corporation stands out as a peculiarly persistent institution, which by a process of legislative adjustment has proved itself adaptable to almost revolutionary changes in our social, economic and political life. At the present time we may see it, as in California, being extended to meet the common needs of the people in all the administrative units of the state. Not only has it survived and expanded the scope of its activities,

but with the urbanization of rural life it bids fair to extend itself over the entire territory of some of our states, the underlying system of counties and townships either being raised in the scale of governmental units to the status formerly accorded to cities and boroughs or villages or supplanted in individual instances by the overlapping municipality.³

To appreciate properly the development of an institution so unique and of such vitality, it is necessary to know its historical foundations, and to weigh the social, economic and political influences which have affected its progress. But none the less important is a thorough knowledge of the current constitutional and legal principles to which from time to time the courts have had to conform their concept of the municipal corporation. Examination of the historical basis of the legal theories which lie at the foundation of this institution, especially those antedating the formation of our state governments, is a preliminary requisite to an elementary understanding of the institution itself and of the legal problems that have arisen in connection with its development. We shall therefore endeavor to give a brief summary of the historical setting of local public corporations as they existed in England and the American colonies prior to the Revolution and to consider how these earlier governmental forms have influenced the legal conception of the municipal corporation as we know it today.

The idea of the municipal corporation as a legal entity can be traced back to the political organization of the Roman Empire. Rome recognized certain large towns as *municipia*, communities in which the freemen were citizens of Rome, possessing the same rights and subject to the same duties, but retaining the administration of local law and government in matters which did not concern the state at large.⁴ The Roman law first developed the corporation concept in connection with the *municipia*, which were given a corporate status that ensured them a continuing existence,

³As in the cases of Baltimore, St. Louis, San Francisco and Denver, one corporation now discharges the duties formerly allotted to both the city and the county. See Studensky, *Government of Metropolitan Areas* 173-180.

⁴Abbott & Johnson, *Municipal Administration in the Roman Empire* 1-9. As to the nature of the privileges of a *municipium* in the later days of the Roman Republic, see for example Abbott & Johnson, *Municipal Administration in the Roman Empire* 43-45 which recites the provisions of the *Lex Antonia de Termessibus* (71 B.C.) defining the privileges given to the people of Termessus by decree of the Senate. See, also, Sherman, *Roman Law in the Modern World*, secs. 908-912.

independent of changes in their population or in the extent of their territory.⁵ This attribute of juristic personality enabled them to acquire large property rights and to maintain local customs and institutions, which from many points of view were separate and distinct from those of the Roman State as a whole. As the imperial administrative system was gradually extended, the municipia lost what remained of their political independence. They came under the control of a small oligarchic class which administered the local government in its own interests, but they continued to function as corporate entities down to the time of the fall of the empire.

It is not to be inferred, however, that local government in the modern sense ever prevailed in any of the conquered cities. The imperial system, based upon the concentration of power in Rome and the extermination of every vestige of local independence, never recognized the principle of representation and maintained the corporate status of the provincial cities mainly for convenience of administration. Local government as a political institution owes its origin to Teutonic influences and as we know it especially to their development in England. Following the Norman Conquest, this institution began to take on fixed forms with clearly recognized grades, each with a defined political and legal status, varying from the administrative unit of the county down to the ultimate division of the parish and hundred.⁶ But intermediate between these territorial extremes appears the borough, the remote historical predecessor of the modern municipal corporation.

The early English municipal organization as it existed at the time of Edward the First was essentially democratic. At that period we find in England numerous towns and cities organized as boroughs with a local judicial and administrative body called the court-leet. This body was made up of the freeman householders who "paid scot and bore lot." Some of the boroughs had existed before the Conquest, and their privileges were later recognized by the Crown. Some had been created by the Norman kings, and others owed their origin to the acts of the feudal lords.⁷ The political position of the boroughs was recognized by Edward when in 1295 he summoned two representatives from

⁵Savigny, *Jural Relations*, Translation by Rattigan, secs. 86, 87.
Sherman, *Roman Law in the Modern World*, secs. 537, 547.

⁶For a succinct statement of the development of local administration in England, see Jennings, *Principles of Local Government Law* 44-100.

⁷Tait, *The Study of Early Municipal History in England* 11.

each of them with two knights from each shire to meet with the Great Council and thus erected the institution afterwards known as the English Parliament. The customary rights of the boroughs from the time of the Conquest had been generally recognized by the Norman kings.⁸ From the earliest times the city of London was able to preserve its local customs and a large degree of local governmental autonomy, rights which were confirmed to it by numerous so-called charters of the Crown.⁹ As other towns increased in wealth and population, the Crown assured to them or to a portion of their inhabitants certain franchises and privileges under the solemn form of charters, by virtue of which they were permitted to collect their own taxes and enjoy the revenue arising from the franchises thus granted and from the administration of their local government. As consideration for these privileges, the borough assumed the obligation of making fixed periodical payments in money or in services. These payments thus reserved went under the name of *firma burgi*, the chartered towns being known as boroughs and accorded the right of choosing their officers and enacting local by-laws.¹⁰ The borough community collectively was recognized as a continuing body and subject to penalties for the non-performance of the duties it owed the Crown, just as were the local administrative units, the county, the hundred and the rural township.¹¹

The holding body in the early days was not incorporated, the grant usually being made to a select group of persons and their heirs. But beginning with the charter of Kingston on Hull in 1439¹² some of the boroughs became corporations in the modern sense; and by the beginning of the 16th century the borough corporation was recognized by the law as a "Body Politick that indureth in perpetuall succession" similar to abbeys, priories, deaneries and the governing authorities of certain colleges, hospitals

⁸Magna Charta, ch. 13; Merewether & Stephens, History of Boroughs and Municipal Corporations in England 60 et seq.

⁹Firth, Municipal London, ch. 1; Round, The Commune of London, ch. XI. For a list of such charters and extracts from many of them, see Carpenter, Liber Albus, Translation by Riley, pp. 114-153. For the Charter of William the Conqueror, see Stubbs, Select Charters 82.

¹⁰Madox, *Firma Burgi* 232-297. See, also, Stubbs, Select Charters 41; Beverly Town Documents, 14 Selden Society, which gives a complete résumé of the organization, customs and by-laws of a borough of the 16th Century.

¹¹Pollock & Maitland, History of English Law 663.

¹²Merewether & Stephens, History of Boroughs and Municipalities in England xxxiii.

and almshouses.¹³ Similar to all other corporations whose charters were grants by virtue of the royal prerogative, and unlike those created by act of Parliament, the consent of the incorporators was essential to their creation, and their charters were subject to forfeiture for misuser or nonuser of their franchises. Corporations created by Parliament were called into existence solely by the will of the legislature and could not be dissolved except by an act of the sovereign legislative body which gave them birth.¹⁴ While incorporation may have brought about no substantial change in the rights formerly exercised by the borough communities, it served not only to insure the recognition of those rights throughout the kingdom but as a means by which the state could exercise over them a larger control.¹⁵ The result of incorporation was to enable the borough to hold property, and to sue and be sued as an individual or as the private corporation of a later day.¹⁶

The most marked characteristic of the charters of the English boroughs was the lack of any uniformity in the rights and privileges granted by the Crown, in the nature and amount of their fermes and in the public duties imposed upon them. The notable exception, however, besides the common fact of their corporate status, was that they all possessed in some measure a power of local legislation. This power to enact by-laws was extremely limited, and in the majority of the boroughs only went so far as to enable them to make rules and regulations looking to the preservation of their ancient customs, the maintenance of the commercial privileges of their inhabitants and the administration of such property as they might hold. No general power to enact what we call police ordinances existed, although in the great city of London and a few of the more important centers such power

¹³ Shepherd, *Corporations, Fraternities and Guilds* 1.

¹⁴ Parliament exercised its power in 1789 (2 Wm. & M. Sess. 1, ch. 8, 9 Stat. at L. 79) to nullify the judgment of forfeiture which had been decreed by the Kings Bench in the famous quo warranto proceedings in 1683 (*Rex v. City of London*, (1683) 8 How. St. Tr. 1039), an action fully justified if the ancient liberties of the city rested upon prescription which presupposed a sovereign grant. The franchises of London are fortified not only by the prerogative charters but by sanction of Parliament itself. Firth, *Municipal London* 18-21.

¹⁵ Holdsworth, *History of English Law* 395 in which he quotes Madox, *Firma Burgi*, ch. II, sec. 6, to this effect: "The corporation fitted the Townsmen for a stricter union among themselves and for a more orderly and steady Government and for a more advantageous course of Commerce."

¹⁶ Pollock & Maitland, *History of English Law* 673.

was exercised by the acquiescence of the Crown.¹⁷ We find, however, that by the time of the Commonwealth the law recognized in them the power of enacting such wholesome and good laws and ordinances for the better government, oversight and correction of the borough or city and the people thereof as to the governing authorities should seem good and proper, "so as they be not repugnant to the laws of the nation nor against the public and common good of the people" within or without their limits.¹⁸ Such local legislative power was seldom expressly granted by charter; it was as formerly rather incidental to the preservation of the ancient customs assured to the borough by the Crown. So that by the law of the realm, those who made by-laws had to show, in the absence of a grant express or implied, that the power had been exercised by them from time immemorial.¹⁹ Unfortunately, however, this power of local legislation continued to be exercised in the majority of the boroughs by small, inefficient, self-continuing and self-serving bodies.²⁰ The inevitable result was a progressive decay of local government in England from the close of the fifteenth century down to the time of the Reform Acts of 1835.

The movement to abolish the representation of the "rotten boroughs" in Parliament at that time led to an investigation of the entire system of local government. The report of the Royal Commission published in 1835²¹ revealed such a startling state of affairs that Parliament was induced to enact the same year the Municipal Corporations Reform Act,²² which sought to replace the existing chaotic conditions with a uniform system of responsible local government based upon popular suffrage. This act, following closely after the reform of representation in Parliament, gave a new life to municipal institutions in England under legislative rather than prerogative sanction.²³ The Municipal Corpo-

¹⁷A notable example is to be found in the collection of building regulations known as Fitz-Elwyne's Assize of Buildings, Liber Albus 276-293, reprinted as a supplement to the (1928) 17 National Municipal Review No. 9.

¹⁸Shepherd, Corporations, Fraternities and Guilds 81.

¹⁹1 Pollock & Maitland, History of English Law 646.

²⁰Vine, English Municipal Institutions 10.

²¹First Report of the Commission to Inquire into the Municipal Corporations in England and Wales, 1835. Pages 16-49 of this report are reprinted in Reed & Webbink, Documents Illustrative of American Municipal Government 1-29.

²²(1835) 5 & 6 Wm. IV, Ch. 76.

²³The legal status of the boroughs prior to the Reform Act was the subject of a monumental study by J. R. Willcock, which was published in 1827, under the title of The Law of Municipal Corporations.

rations Act of 1882,²⁴ which is the general law now in operation, while not abridging the common law prerogative of the Crown, nevertheless prevents its granting charters of incorporation with the powers conferred by the Act save with the advice of the privy council and on petition of "the inhabitant householders." Parliament alone may grant unusual powers not incident to common law corporations. Though the theory of prerogative creation is still maintained, nearly all municipal corporations in England are now parliamentary in character.²⁵

It is apparent from this brief summary that the influence of the English borough system upon the development of local government in the United States cannot be considered of preponderant importance. While it is true that the borough charters furnished various models for the incorporation of cities in the colonies, yet the theory of their relation to the general government, based as it was upon the royal prerogative, could not well fit in with the constitutional organization of the American state, and consequently from the legal point of view the early English decisions have been found to be only remotely applicable to the questions which have come before our courts.²⁶

The English colonists of America naturally carried with them the common law and their local institutions. Throughout colonial days their economy was largely agricultural, with settlements widely scattered. In New England and in certain parts of New York the people of these rural communities set up for themselves agencies to provide for their local governmental needs. The division of the settled portions of the colony into self-governing towns became general at an early day in Massachusetts and the other New England colonies. These became at once local governmental units²⁷ and subordinate agencies of the colonial administration. The existence of these local governmental agencies was

²⁴For the intermediate legislation from the Act of 1835 up to and including the Municipal Corporations Act of 1882, which consolidated some forty existing statutes, see Lely, *Law of Municipal Corporations*:

²⁵"The Crown has always possessed the power of creating corporations Broderick and Bunce, *Local Government and Taxation in Great Britain* 1, 271, and conferring franchises. See 1 Kyd, *Corporations* sec. 61; but where privileges and powers are to be conferred, which are not recognized by the common or statute law, an Act of Parliament is necessary." Rawlinson, *The Municipal Corporations Act*, 8th ed., p. 293.

²⁶See comment of Perley, C. J., in *Eastman v. Meredith*, (1858) 36 N. H. 284, 72 Am. Dec. 302.

²⁷For a résumé of the several theories of the historic origin of the New England Towns the reader may be referred to chapter III of Sly's valuable monograph on *Town Government in Massachusetts*.

early recognized in Massachusetts²⁸ where the colonial legislature from the first assumed itself to be the source of their life and jealously prescribed the methods they should follow²⁹ in exercising the powers conferred upon them.

In Connecticut and Rhode Island a similar development took place,³⁰ and many of the towns were incorporated by legislative act. In Connecticut, the towns were formally incorporated as early as 1639.³¹ In this colony, and in Rhode Island as well, in legal contemplation the towns held their powers as grants from the state and subject to the control of the legislative assembly.³² When these colonies became states, the same principle of the subordination of the towns to the legislative will was carried over into legislation and judicial decision.³³

The New England towns with their democratic legislative organization and efficient elective selectmen became a most potent force toward the development of local self-government, not only in New England colonies but later in all the states of the American Union. They were from the first local self-governing units exercising delegated powers with a quasi corporate status. They supplied our ancestors not only with an ideal of home rule, but

²⁸Whitmore, Colonial Laws of Massachusetts 47, paragraph 66 of the "Liberties of the Massachusetts Colonie in New England" reads as follows: "The Freemen of every Township shall have power to make such by-laws and constitutions as may concerne the welfare of their Towne, provided they be not of a Crimall, but onely of a prudential nature, And that their penalties exceede not 20 sh. for one offence. And that they be not repugnant to the publique laws and orders of the Countrie. And if any Inhabitant shall neglēct or refuse to observe them, they shall have power to levy the appointed penalties by distresse."

²⁹Whitmore, Colonial Laws of Massachusetts 195, 196, 199. For a succinct statement of the history of the Massachusetts town organization, see monographic note by Horace Gray, Jr., to Commonwealth v. City of Roxbury, (1857) 9 Gray (Mass.) 451, 485. The decisions in Massachusetts recognize that many towns were incorporated prior to the general act of 1788; see, for example, Windham v. Portland, (1808) 4 Mass. 381, 390, which refers to the following acts of incorporation: Newburyport, 3 & 4 Geo. III, ch. 9; Cohasset, 10 Geo. III, ch. 7; West Springfield, 14 Geo. III, ch. 12; Ludlow, 14 Geo. III, ch. 1. See, also, Magison & Bouve, Statute Law of Municipal Corporations in Massachusetts 1-10; Garland, New England Town Law 17-18.

³⁰Howard, Local Constitutional History of the United States 59.

³¹Howard, Local Constitutional History of the United States 59, note 2.

³²Webster v. Harwinton, (1864) 32 Conn. 131, 136; State ex rel. v. Williams, (1896) 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Newport v. Horton, (1900) 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330. See, also, McBain, Doctrine of an Inherent Right to Local Self Government, (1916) 16 Col. L. Rev. 190, 299.

³³The same statement also applies to Maine and New Hampshire: Hooper v. Emery, (1837) 14 Me. 375; Eastman v. Meredith, (1858) 36 N. H. 284.

demonstrated that in a democratic state such an ideal was not incompatible with subservience to the supreme legislative authority. It may be debatable whether even during the later colonial days we can properly call the Massachusetts towns true municipal corporations, but they certainly assumed this character in 1786, when the general court formally declared them to be bodies politic and corporate with power to make by-laws for the directing, managing and ordering their prudential affairs.³⁴ In legal contemplation they were public corporations created by the state; their charter rights were not the result of contract but were held and administered in trust for the benefit of their inhabitants and of the general public. Despite the democratic organization of their local government, so far as their political and legal status were concerned the New England towns were the nearest historical prototypes of the municipal corporations that were later developed throughout the nation.

In addition to the New England towns reference must be made to the Long Island towns of the colony of New York, which in their organization and liberties closely resembled those of the adjacent colonies to the north. Some of these towns were erected under the Dutch régime and their property and privileges assured to them by the Duke's Laws of 1664, including the power to enact local ordinances for their own welfare.³⁵ The extent of the power of local legislation thus assured to the towns as expressed by the Duke's Laws of 1664 indicates the close resemblance in this respect to the New England towns. Indeed from the similarity of the language, there can be little doubt that this provision was taken directly from the Liberties of Massachusetts previously referred to.³⁶ Other towns with similar powers were created

³⁴Mass. Gen. Laws, ch. 75, pp. 250-255. See, also, Sly, Town Government in Massachusetts, ch. III.

³⁵O'Callaghan, Documents Relating to the Colonial History of New York, p. 226; 1 New York, Colonial Laws (1894) p. 6.

³⁶Note 28 supra. This particular provision of the Duke's Laws may be found in the Easthampton Book of Laws (1665), Collections of the New York Historical Society for the year 1809, pp. 385-386, and reads as follows: "Whereas in particular Townes many things do arise, which concerne onely themselves, and the well Ordering their Affairs, as the disposing, Planting, Building and the like, of their owne Lands and woods, granting of Lotts, Election of Officers, Assessing of Rates with many other matters of a prudential Nature, tending to the Peace and good Government of the Respective Townes the Constable by and with the Consent of five at least of the Overseers for the time being, have power to Ordaine such or so many peculiar Constitutions as are Necessary to the welfare and Improvement of their Towne; Provided they bee not of a Criminaill Nature, And that the Penaltyes Exceed not twenty Shillings for

by patents of the English royal governors, and as early as 1691, the colonial assembly established the well known county-township system by which the towns were also constituted subordinate administrative agencies with a local collector and assessors and made election districts for choosing members of the board of county supervisors.³⁷ That many of these towns were bodies corporate with local legislative powers, resembling in the latter respect the later village organization, is apparent from numerous adjudications wherein their property rights were involved.³⁸

Not only in New England, but elsewhere it became necessary that each colony should be laid out into administrative units for general governmental purposes. In the southern colonies this unit was the county, upon which was charged most of the duties of a general governmental nature, which in New England were imposed upon the towns. These larger involuntary governmental units served admirably the purpose of their creation, but covering so large and sparsely populated a territory they were neither called upon nor were they fitted to exercise local governmental powers. For ecclesiastical and minor administrative purposes, they were divided into loosely organized territorial divisions called townships or parishes.³⁹ Indeed, local government of the kind even approximating that which prevailed in New England was practically non-existent except in the Long Island towns and in the larger centers of population.

It is in the central and southern colonies, however, that we find the germ of our modern city organization, modeled upon the example of the English boroughs. It has been noted that the English borough charters were grants made by the Crown in the exercise of its prerogative. Naturally upon the development of urban communities in the colonies similar charters were granted by the royal governors as representatives of the Crown. Indeed,

one Offence, and that they be not Repugnant to the publique Lawes: And if any Inhabitant shall neglect or refuse to observe them The Constable and Overseers shall have power to Levie such fines by distress."

³⁷New York Laws, Van Schaack, 1774, pp. 3, 6, 35.

³⁸North-Hempstead v. Hempstead, (1828) 2 Wend (N.Y.) 109; Denton v. Jackson, (1817) 2 Johns. Ch. (N.Y.) 320; Brookhaven v. Strong, (1875) 60 N. Y. 56; Easthampton v. Kirk, (1877) 68 N. Y. 459; Southampton v. Mecox Bay Oyster Co., (1889) 116 N. Y. 1, 22 N. E. 387. As to general township organization in the Colony of New York, see opinion of Vann, J., in People v. Board of Tax Commissioners, (1903) 174 N. Y. 417, 67 N. E. 69.

³⁹For a résumé of the organization and functions of the parish in Maryland and the southern colonies, see Howard, Local Constitutional History of the United States 117-134.

the commissions to royal governors usually gave them expressly the power to exercise the royal prerogative in the colonies.⁴⁰ Outside the New England colonies many of the leading towns were thus incorporated with property rights and powers of local government more or less extensive.⁴¹ Some of the early charters, as that of St. Mary's City in Maryland (1667),⁴² effected scarcely more than a naked incorporation of the inhabitants of the locality with a group of officers modeled on the English plan, with power to hold and administer property, but without any express grant of local legislative powers.

The Montgomerie Charter of New York (1730)⁴³ was an elaborate document providing for the organization of the local government and conferring broad powers for the control of the public streets, wharves and markets and the regulation by ordinance of the conduct of the inhabitants. The corporate body consisted of the mayor, aldermen and commonalty of the city, the latter made up of the freeholders who were given the power to elect the aldermen and certain other subordinate officers annually by elections held in each ward. The ordinance making power, however, was strictly limited in point of time, it being necessary to reenact the body of ordinances annually. Like powers were conferred upon Philadelphia by Penn's charter of 1701,⁴⁴ but the local authority was made up of a small group of citizens consisting of the mayor, recorder, eight aldermen and twelve common councilmen appointed by the justices for life. Under this undemocratic organization, the city functioned down to 1789, when the state legislature granted a charter with a representative electorate and broad ordinance making powers.⁴⁵ Similarly the early charters granted to Annapolis and Norfolk pro-

⁴⁰ Davis, Essays on the Earlier History of American Corporations 7-13.

⁴¹ See Fairlie, Municipal Corporations in the Colonies, (1898) 2 Municipal Affairs 341 republished as chapter 4 in his Essays in Municipal Administration. The author enumerated some twenty such boroughs which received charters between 1641 and 1746.

⁴² For a copy of this charter, see note to *McKim v. Odom*, (1828) 3 Bland Ch. (Md.) 407, 416.

⁴³ Kent, Charter of the City of New York with Notes thereon (1836), which contains the successive charters of 1686, 1708 and 1730. New York City continued to operate under the Montgomerie Charter of 1730 till 1830. Also, reprinted in Reed & Webbink, Documents Illustrative of American Municipal Government 34-48.

⁴⁴ Reprinted, Reed & Webbink, Documents Illustrative of American Municipal Government 49-58.

⁴⁵ Reprinted, Reed & Webbink, Documents Illustrative of American Municipal Government, 60-68; see, also, Allison & Penrose, History of Philadelphia 14-33.

vided for close corporations, not responsible in any way to the general body of inhabitants.⁴⁶

Almost from the beginning the colonial assemblies assumed a relationship to the chartered cities similar to that of Parliament to the boroughs. Numerous instances may be cited of attempts to confirm the charters granted by the royal governors⁴⁷ and even to confirm the powers of the governor himself.⁴⁸ We have already seen that an act of Parliament was necessary to confer upon chartered boroughs governmental powers in addition to those established by immemorial custom. By analogy, the colonial legislatures asserted that powers of local taxation, local judicial administration, care of the highways and police regulation lay within their province, and either exercised these powers directly or imposed their administration upon the chartered cities. But few instances have been found where the colonial legislature of a royal colony assumed either the power to grant charters or to modify the rights assured by them to the localities.⁴⁹

It thus appears that prior to the revolution, the control of the colonial legislatures over the cities created by royal charter was extremely limited. The various cities applied from time to time for authority to levy taxes for specified local purposes, and the acts of the colonial legislatures conferring this power constitute the nearest approach to a legislative control over their activities. But from the organization of the new state governments it was assumed that the legislature was the source of all new corporate powers. The claim of control over the powers of the chartered cities which had been made sporadically by the local legislatures was but a phase of the conflict between the colonies and the mother country. When the Revolution came and the new states

⁴⁶12 Virginia, Stat. at L., Hening 602.

⁴⁷The following instances are cited in Professor McBain's article on The American Colonial City, (1925) 40 Pol. Sci. Quart. 185; Maryland Act 1705 confirming charter of Annapolis; New York Act 1732 confirming the Montgomerie Charter of New York, 2 New York Colonial Laws 732; Virginia Act 1736 confirming charter of Norfolk, 4 Virginia, Stat. at L., Hening 451.

⁴⁸Act of Virginia Legislature recognizing the power of the Governor to grant a charter to Williamsburg, 3 Virginia, Stat. at L., Hening 451.

⁴⁹An apparent exception may be noted in the act of the General Assembly of New York in 1702, ch. 110, attempting to regulate the elections in the city of New York. This act was rejected by the Queen in Council in the same year. See 1 New York Colonial Laws 490. The only act of incorporation apparently was that of Charles City, 1720, by the legislature of South Carolina, which action, however, was annulled the succeeding year by the Lord Justices in Council. I Davis, Essays on the Earlier History of American Corporations 7-13.

provided for their political organization, the legislative branch of the government became the depository of the legislative powers formerly included within the royal prerogative, including the power to grant charters of incorporation.⁵⁰ All the new post-revolutionary charters were legislative in character, but the legal status of the cities operating under colonial charters had to await a half century of constitutional development to become approximately certain. As late as 1830, we find Chancellor Kent basing his construction of the Montgomerie charter of New York upon the analogy of the rights assured to private corporations.⁵¹

It seems evident from this brief summary that municipal corporations in the United States drew little more from the colonial cities which functioned under royal charters than the example of complete corporate status and forms of internal organization. The New England township system probably contributed more to the theory of the legal relation of the later municipal corporations to the state, as well as to the spirit of local self-government, than did the chartered cities to the south. This latter contribution may easily be over-emphasized, as local government throughout the states was vitalized by the general acceptance of the principles of the Declaration. But in this and all other respects, except the form of organization of the local administration, we find in the self-governing towns of New England and New York the closest legal prototype of the cities, incorporated towns, boroughs and villages, which exist today. Like our present day municipal corporations they were in legal contemplation corporate entities, created by the state for public purposes, with or without the consent of their inhabitants and subject for their continued existence upon the legislative will. Their powers were only those that had been expressly delegated or necessarily implied, but among these was always the power to enact local ordinances consistent with the general laws of the commonwealth. On the other hand, the chartered colonial city, like its prototype the English borough, was a voluntary corporation, the incorporators often being a small select class of individuals, with a status similar to that of a pri-

⁵⁰Several of the early constitutions expressly recognized this power to be in the state legislature: see Pennsylvania, constitution, 1776, sec 9; Maryland, constitution, 1776, art. XXXVIII; New York, constitution, 1777, art. XXXVI.

⁵¹The reader may compare the position taken by the colonists that their charter rights were free from the control of Parliament with the theory of Storey, Kent and Webster that under the constitution all chartered corporations whether created for public or for private purposes should be free from legislative control.

vate corporation and under a charter subject to forfeiture for misuser or nonuser of its franchises.

It was from these two widely divergent types of public corporations that the American state had to fashion its concept of the local government units with local ordinance making power which later became our cities, incorporated towns and villages. Under the written constitutions adopted after the Revolution, through the principle of the division of powers, the executive was deprived of the prerogative power of creating public corporations,⁵² and this power became merged in the higher parliamentary powers committed to the state legislatures. Newly incorporated cities and towns from then on naturally became corporations as under parliamentary charters and subject to forfeiture only at the will of the legislature. Their ordinance making power was no longer hampered by the restrictions incident to the royal prerogative. Their charters whether in fact prayed for or assented to by the people of the locality became in point of law involuntary, with no element of a contractual relation between the municipality and the state. That outside of New England their local governmental organization became representative instead of direct was an incident of practical adaptation of the institution to larger and more complex communities.

It may be argued with considerable force that from the constitutional point of view the colonial legislatures never exercised sovereign power and therefore could not create municipal corporations with local legislative powers. The answer is that in New England at least the local legislatures did exercise such powers under claim of right and that their claims were substantiated by the Revolution. We are therefore justified in evaluating their corporate status by the standards of our modern constitutional and legal principles, as were the courts of Connecticut and Rhode Island when they held that the towns never did have any inherent rights of local self-government.⁵³ Although the charters granted

⁵²Upon the adoption of state constitutions at the time of the Revolution, the powers of the executive became limited by strict enumeration and the power of creating corporations thereby confined to the state legislatures. The Pennsylvania constitution of 1776, by section 9, expressly conferred the power "to grant charters of incorporation" and "to constitute towns, boroughs, cities and counties" upon the general assembly. The New York constitution of 1777, art. 36, confirmed the existing grants and charters, transferring the appointment of such officers as had previously been appointed by the colonial governor to a legislative council, presided over by the state governor, "until otherwise directed by the legislature." See further, McBain, *Law and Practice of Municipal Home Rule*, ch. I.

⁵³See note 32, *supra* p. 351.

by the colonial legislatures in New England may have had no wider legal effect than those granted by the royal governors, it is significant that they seem to have been regarded between the immediate parties concerned as parliamentary charters, and upon their confirmation either by express act or implied recognition by the state legislatures they became so from both the political and legal point of view.

Nevertheless, we have to ascribe to the legal position of the colonial chartered cities a tremendous influence on the political as distinguished from the legal status of our modern municipal corporations. From them we derived the theory that, if not in law, cities should in fact be regarded as voluntary corporations and that the legislature should create them only upon the solicitation of their inhabitants. This theory was ascendent in the early post-colonial years and was reinforced by the democratic movement that followed in the next generation. When the encroachments of the legislatures became too marked, it led to the curtailment of the legislative power by the enactment of constitutional limitations upon the creation of municipal corporations or the regulation of their internal affairs. The failure of these limitations to assure any practical independence in local self-government has led many of our states of late to transfer the power to create municipal corporations and define their charter powers from the state legislatures to the people of the localities in the attempt to work out a practical domain of home rule.

Moreover, the theory of the private corporate character of the municipal corporation has had no little influence upon the common law incidents of its property rights and its liability in tort. Indeed, throughout the nineteenth century the interplay of the public corporate and the private corporate theories is met with at every point. The private corporate theory was invoked by those who wished to fortify the private nature of the property rights of the municipality and by those who wished to find a basis for imposing liability in tort for the acts of its officers and agents. This has resulted in the well known double capacity theory of our municipal corporations as at once governmental agencies of the state and as instrumentalities to meet the peculiarly local needs of the inhabitants. But the distinction between voluntary and involuntary incorporation has long ceased to be a basis for predicated corporate or quasi-corporate capacity. All local public corporations are given the status of municipal corporations to the

extent that the state confers upon them a portion of its sovereign power of local legislation.⁵⁴

We cannot too strongly emphasize, however, that in legal theory the municipal corporation is strictly public in character, the creature of the legislative power of the state, whether that power is exercised directly, or by the state legislature, or by the people of a given locality. From the principle that the legislative power of the state is the sole source of its corporate life follows the generally accepted rule that a municipal corporation possesses only those powers which are expressly granted or necessarily implied to carry out the express powers. Where this legislative function has been shifted to the local electorate by the home rule provisions of the state constitution, it is still necessary to confer additional powers by charter amendment.⁵⁵ So, also, the domain of the home rule powers must yield to the general legislative policy of the state and contract more and more as the state expands the scope of its activities and as public policy requires the subordination of existing local activities to the interests of the state at large.⁵⁶ From the legal point of view, therefore, no vestige of the incidents of the old prerogative charter remains; the corporate character of our municipal corporations has become parliamentary both in theory and in practice.

The objection may be raised that it is improper to describe charters adopted by the local electorate as parliamentary in legal theory. In a sense this objection is valid, but so far as charter making powers are taken away from the state legislature and committed to the people of the locality, these become for this purpose the legislative authority of the state.⁵⁷ The impossibility of setting up an imperium in imperio under our constitutional system is recognized by the courts, and the broad supervisory

⁵⁴The term quasi corporations used in the earlier decisions connoted a corporate capacity more distinct from that of private corporations which the true municipal corporation was conceived to more closely resemble. *Riddle v. The Proprietors*, (1810) 7 Mass. 169, 186. The term "quasi municipal corporation" is now applied to distinguish local governmental corporations which act solely as agencies of the state from the municipal corporation with powers of local self government.

⁵⁵See, however, the contrary construction of the home rule amendment in Ohio, where the courts have adopted the theory of a general grant of powers to the home rule cities. *Lorraine St. R. R. v. Public Utilities Commission*, (1925) 113 Ohio St. 68, 148 N. E. 577.

⁵⁶*Ex Parte Daniels*, (1920) 183 Cal. 636, 192 Pac. 442; *Lovejoy v. Portland*, (1920) 95 Or. 459, 188 Pac. 207; *Schneiderman v. Sesenstein*, (1929) 121 Ohio St. 80, 167 N. E. 158; *Adler v. Deegan*, (1929) 251 N. Y. 467, 167 N. E. 705; *Carlberg v. Metcalf*, (1930) 120 Neb. 481, 234 N. W. 87.

⁵⁷*Tremayne v. St. Louis*, (1928) 320 Mo. 120, 123, 6 S. W. (2d) 935.

powers that may be exercised by the state legislature in its control of taxation, indebtedness, education, health and police reduce the exclusive domain of home rule to an extremely small compass. The extent of home rule powers therefore still largely depends upon the will of the state legislature.⁵⁸ But whatever the domain of the home rule charter may be, the relation of the municipal corporation to the state is not that of a private corporation, but of one created by the state for public purposes and subject to dissolution only by the legislative power. It has taken over a century of development to bring the municipal corporation to the well defined position it now occupies in our constitutional system. By and large, this result has been the work of our courts, constantly construing new legislation and adjusting its interpretation to the limitations of the federal and state constitutions. The precedents they had to work with, drawn from the examples of English and colonial experience, were meager indeed for the task they had before them, but upon them they have reared an institution vitalized by the principles of representative constitutional government, capable of expanding or contracting to meet local necessities, easily adaptable to new forms of organization and readily adjustable to such judicial or legislative control as the technique of more efficient administration may from time to time require.

⁵⁸As an example of legislative policy enlarging the domain of home rule see *Board of Education v. City of Racine*, (Wis. 1931) 236 N. W. 553 which reviews the recent legislation in Wisconsin delegating to cities a larger control over local education.