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ARTICLES

FORERUNNERS OF THE PUBLIC AUTHORITY

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The authority has been described as the outstanding innovation in the public law of the present century.¹ Its characteristic financial structure may win it recognition as America's particular contribution in the field of municipal corporation practice. If sheer weight of numbers provides sufficient argument, the title is already secure.

No one would deny the galaxy of imitators which have followed the stellar example of the Port of New York Authority since its creation in 1921² or the apparent absence of those corporate bodies commonly called "authorities" from the standard histories written prior to that date. Such a combination of circumstances explains, even though it does not justify, the general impression that the public authority is "new." In view of the recently expanded prominence of the authority at all levels of contemporary political organization—from the international management of an inland seaway³ to the most provincial school

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1. McLean, *Use and Abuse of Authorities*, 42 NAT'L MUNIC. REV. 438 (1953); Nether-ton, *Area Development Authorities: A New Form of Government by Proclamation*, 8 VAND. L. REV. 678 (1955); Robson, *The Public Corporation in Britain Today*, 63 HARV. L. REV. 1321, 1348 (1950); and quotation from N.Y. State special commission at page 40 *infra*.

2. Much has been written about the Port of New York Authority. For a concise history of its development and a summary of its activities, see the article by its General Counsel, Goldstein, *The Port of New York Authority*, 5 J. PUB. L. 408 (1956). For a more complete study, see BARD, *THE PORT OF NEW YORK AUTHORITY* (1942).

3. Cohen and Nadeau, *Legal Framework of the St. Lawrence Seaway*, 1959 U. ILL. L.F. 29 (1959).

building construction⁴—it is expedient that this new agency be better understood.

The purpose of this paper is to glean the fields of history for evidence of those practices and social institutions which may have been forerunners of the public authority as it now exists in order that both its nature and its capabilities will be better known. Put another way, the doctrine of the economy of juristic concepts is to be tested as a fact of social science and as a tool of law.

Providing a satisfactory definition of a public authority is itself a difficult problem on which neither the legislators nor the lawyers are agreed. One of the best statements was drafted by Luther Gulick nearly twenty years ago:

An authority is a governmental business corporation set up outside of the normal structure of traditional government so that it can give continuity, business efficiency, and elastic management to the construction or operation of a self-supporting or revenue-producing public enterprise.⁵

He then goes on to list the Port of New York Authority, the Tennessee Valley Authority, and the British Broadcasting Corporation as "best known" illustrations. His examples and his definition clearly fit the general class of public corporations both at home and abroad. It may not be quite narrow enough to reflect the peculiarities of the financial structure and management characteristics which, some writers in the field⁶ insist, set apart the American species "authority" from the international

4. E.g., State School Building Authority, GA. CODE ANN. (1952) §§ 32-1401(a) to 32-143(a); Gerwig, *Public Authorities: Legislative Panacea?*, 5 J. PUB. L. 401 (1956); and Meuth, *The Development of Financing Public Improvements by Kentucky Municipalities*, 25 KY. L.J. 247 (1937).

5. Gulick, *"Authorities" and How To Use Them*, 8 TAX REV. 47 (1947); cf., COUNCIL OF STATE GOVERNMENTS, PUBLIC AUTHORITIES IN THE STATES 3-5 (1953); and Gerwig, *Public Authorities in the United States*, 26 LAW & CONTEMP. PROB. 591 (1961). "A Public Authority will be deemed to be a limited legislative agency or instrumentality of corporate form intended to accomplish specific purposes involving long-range financing of certain public facilities without legally or directly impinging upon the credit of the state."

6. Gerwig, *supra* note 4, at 390. "A major distinguishing characteristic of the public authority is its power to issue revenue bonds payable solely from charges made against the consuming public for use of facilities provided by the particular authority. Thus the welfare of the authority does not depend on tax revenue. The usual type of public corporation, financed entirely through general obligation bonds, is not generally accepted as a public authority."

genus "public corporation."⁷ It will, however, serve as an adequate frame of reference for the present discussion when supplemented by a further *caveat* regarding semantics.

Current American practice has become so enamored of the word "authority" that in addition to its legitimate use, it also appears in the titles of numerous public corporations which are not authorities on the basis of recognized criteria. Conversely, there are true authorities which completely omit the word from their corporate names. Along with technical applications, the older general usage continues to be employed. In the expression "the duly elected authorities of the community," reference is made to individual officials, not to corporate administrative agencies.

As mentioned above, the authority is but one of many specialized varieties of public corporations which have been used by the federal government almost from its founding⁸ and by nearly every industrialized country for more than a century. Other familiar forms include all sorts of special purpose districts for schools, health, irrigation, and public safety⁹ which are often collectively grouped with incorporated towns and cities under the convenient label of "municipal corporations." Since the municipality is generally accepted as the oldest form of public corporation¹⁰ and is much older than the familiar business corporation, it offers an appropriate place to begin the genealogy of the authority.

THE ANCIENT WORLD

PRE-ROMAN ANTIQUITY

Although Blackstone credited the Romans with "the honour of originally inventing these political constitutions"¹¹ [*i.e.*, corporations], subsequent research has demonstrated the relatively sophisticated development of numerous ancient cities prior to the founding of Rome. To trace the series of steps whereby human social organization evolved

7. Compare the definition of the port authority as given by Skehan, *The Port Authority*, 1959 U. ILL. L.F. 58 (1959).

8. The Bank of North America, chartered by the Continental Congress, December 31, 1781, is usually credited with having been first.

9. BOLLENS, *SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES* (1957); SMITH, *PUBLIC AUTHORITIES, SPECIAL DISTRICTS AND LOCAL GOVERNMENT* (1964).

10. MAINE, *ANCIENT LAW* 124 (5th ed.); Williston, *The History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105 (1888) and in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 195 (1909).

11. SHARSWOOD, *BLACKSTONE'S COMMENTARIES* 468.

through successive federations from the individual to the family,¹² to the phratry or clan, to the gens or tribe,¹³ and finally to the city is beyond the purpose of this study.

To attempt to extract all the corporate precedents which might be deduced from the ancient practices is also impracticable. The vital principle is the concept of corporateness:

To primitive man the groups which he knew—the family, the clan, the tribe, and the like—were not “fictions”; they were among his most important realities. He did not theorize about them; but he recognized in the group an entity different from and surpassing its members. And when these earliest groups began to disintegrate and were gradually replaced by artificial ones, the latter retained those marks of reality which their predecessors possessed.¹⁴

This made easy the recognition that the city and each of its subordinate groups was something separate and distinct from the human members who composed it. Capable of acquiring and disposing of property, the municipality acted through agents in much the same way it does today. Even in its refusal to intrude within those areas which were the exclusive concern of the gens and the families, the city demonstrated a restraint which one might now liken to a limitation on jurisdiction.

The ancient's awareness of the corporate nature of his city is suggested by his language. *Civitas* and *urbs* or their Greek equivalents, all of which we translate by the word “city,” were not synonymous in their day. To the ancients *civitas* was the social and political association of families and tribes, while *urbs* was the place of assembly and above all the sanctuary for the deities of this association.¹⁵ One might through force of circumstances be obliged to remove from his native *urbs*, but no human power existed to separate him from his *civitas*. Admittedly, worship formed the vital bond of ancient society, but it was no less

12. Lobingier, *The Natural History of the Private Artificial Person: A Comparative Study in Corporate Origins*, 13 TUL. L. REV. 41 (1938). “While the ‘corporation’ which Maine perceived in the archaic family may seem very remote from the modern juristic person of that name, the connection is direct and the process of tracing it, revealing.”

13. FUSTEL DE COULANGES, *THE ANCIENT CITY* 104. “Nothing is more closely united than the members of a gens. United in the celebration of the same sacred ceremonies, they mutually aid each other in all the needs of life. The entire gens is responsible for the debt of one of its members; it redeems the prisoner and pays the fine of one condemned. If one of its members becomes a magistrate, it unites to pay the expenses incident to the magistracy.”

14. Lobingier, *supra* note 12, at 68.

15. Fustel de Coulanges, *op. cit. supra* note 13, at 134.

corporate for having a religious foundation. Whatever its internal details, the ancient city was a viable, self-governing municipal corporation which bridged the era between petty priest-kings and imperial tyrants with demonstrations of group actions at various levels and for numerous purposes. So began the municipal corporation.

Ancient Rome

All that has been said of the pre-Roman ancient city was equally true of Rome. During the period of the Republic, three distinct types of corporate bodies existed: (1) the State (*populus Romanus*), (2) the municipality (*municipium*), and (3) the private corporations of various kinds (*societas*, *collegium*, *sodalitium*, and *fraternitas*).¹⁶ There were in addition religious bodies, many of which had corporate characteristics while others did not.¹⁷ Little can be safely inferred from their names or from the use of *collegium* as in the College of Pontiffs, which was merely a group of officials. In spite of the considerable haziness as to details, it is clear that the Romans recognized the corporate body in law as an entity distinct from the persons who made it up, capable of enjoying all civil rights and liabilities in the region of property and contract.¹⁸

In addition, the great lawgivers made lasting contributions to the law of both municipal and business corporations. Only two points can be noted here. One was the secularization¹⁹ of the corporation which contributed to the "invention" of the trading company; the other was the extension of the scope of the *civitas* to limits which permitted its subdivision into smaller units.

That Rome never developed its concept of government beyond that of a city state has been suggested by Fustel.²⁰ Even when her dominion extended from Britain to the Euphrates, her political organization continued urban in its structure rather than national or imperial. The basic organs of government, the Roman Senate and the Emperor, corresponded to a city council and the mayor in function, outlook, and habit. How the limitations of this system contributed to the eventual collapse of the Empire is another story.

16. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 175 (3d ed. 1963).

17. POSTE, INSTITUTES OF ROMAN LAW BY GAIUS 118-120 (1904).

18. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 86 (1931).

19. HUNTER, INTRODUCTION TO ROMAN LAW 2 (1921). "At a relatively early stage the Romans made a great advance as compared with some other ancient peoples: they separated law from religious rites and moral rules."

20. Fustel de Coulanges, *op. cit. supra* note 13, at 374-388.

One interesting element was the continuing demand among the leaders of annexed or conquered peoples to become citizens of Rome. The fulfillment of these demands was an installment process extending over many years whereby principle was accommodated to necessity. The details cannot be considered here except to note that the granting of corporate character and the attendant rights to local communities was always an act of the state. Mere physical association did not produce municipal incorporation; that could come only from central authority.²¹

The logical consequence of giving Roman citizenship was the creation of communities of citizens residing in provincial towns many miles from the Eternal City. Their demand for legal institutions to permit the exercise of some if not all of their rights as Romans led to the recognition of limited local self-government. This implied a departure from the ancient unity of the city and the state, for it meant that at least some men could be citizens of Rome and at the same time have rights as members of a subordinate community.

This idea of double citizenship underlies the Roman term *municipium* which eventually denoted a township of Roman citizens with minor rights of self-government. The evolution of the word "municipal" from references first, to those who took the burdens of Roman citizenship without sharing in its privileges; next, to "gift takers," *i.e.*, those allied to Rome by treaties of friendship which were symbolized by the interchange of gifts; and finally, to citizens of subordinate towns, was necessarily a long, slow process. The ultimate result, however, was to establish a principle which became of great importance in the history of Roman, and consequently all western governmental institutions.²²

Thus, the ancient practice of the city, allowing the gens to have their customary assemblies which enacted laws that their members were bound to obey and the city was obliged to respect, was extended by Rome from a religious context into the political sphere. The operative idea was the same; namely, the capacity of the corporate body to adopt regulations for the management of its particular affairs. In a very real sense this principle is the foundation on which local self-government is based. It was a factor which contributed to the rise of the national state. It is an essential element of the public authority today.

The secularization of the ancient corporate concept in the area of public law, which established the *municipium* for the purpose of local government, was paralleled in the area of private law by the develop-

21. Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 600 (1924).

22. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 62 (1952).

ment of trading organizations for the conduct of trade. If one will be content not to press too hard on the distinctions which must have existed among partnerships with many partners, associations, guilds, and joint stock companies, he can safely infer that Rome made extensive use of something very like the modern business corporation. This of itself was no small contribution to economic development. Although little is known about the technical details of these organizations, it is evident that much more was done and understood than is now disclosed by the record.

A few examples from the fragments on which scholars agree will suffice to illustrate the early operation of practices which are still familiar. We know that in the days of the Empire, permission of the state (the emperor) was required in order to form a corporation (special legislation); unless, it was one of those groups such as burial clubs which enjoyed blanket authorization (general legislation). Burial societies, of course, were the forerunners of life insurance companies (mutual companies, no doubt).

Among the trading companies and the artisans' associations, it is difficult to draw the line of demarcation between the manufacturing-commercial corporations and the labor unions, and it is not necessary in order to demonstrate the rich development of the Roman corporation. Waltzing²³ catalogues more than one hundred fifty which have been traced and accurately defined. Their mosaics at Ostia, Rome's ancient port, are a tourist's must.²⁴

At the opposite end of the scale, the best known "investment corporations" were those formed to bid on government contracts to collect the taxes in a given area. Strange as it may sound in modern countries, farming taxes is a practice which existed from Biblical times well into the present era and, in a sense, into the public authority. It frequently recurs in the development of the municipal corporation. The tax farming corporations of Rome are an interesting example of using a private business organization in lieu of governmental agencies to perform a public function. That is how "new" that feature of the public authority may be.

With only fragmentary data on which to base inferences, conclusions are impossible; but it seems probable that the imperial approval of the many corporations, when granted, may have been due more to

23. WALTZING, *ETUDE HISTORIQUE SUR LES CORPORATIONS PROFESSIONNELLES CHEZ LES ROMAINS* (1899).

24. CARCOPINO, *DAILY LIFE IN ANCIENT ROME* 175-184.

a desire for a convenient means of regulation than to facilitate private profits. Not subject to conjecture, however, and consistent with the central idea is the fact that the system of Roman corporations as coordinated by Augustus' legislation and the edicts of his successors permitted each trade body to set up rules valid for all its members.²⁵ It was hardly industrial democracy, but it was the germ of an idea still very much a part of today's corporate practice—including that of the public authority.

The temptation to explore further details of Roman corporations and to draw comparisons with the present scene must be resisted. Not only would a welter of detail confuse the objectives of the inquiry, but it might imply a continuity of tradition which is not the fact so far as the common law elements of our corporation law are concerned. The Roman withdrawal from England was total so far as legal institutions were concerned, and domestic influences had gone a long way in developing corporate concepts by the time Roman ideas were re-introduced by the canonists and civilians.²⁶ Accordingly, it must be recognized that the chronological order of presentation implies no comparable continuity for the development or introduction into Anglo-American law of the themes discussed. The objective here is to illustrate the public authority's debt to history, not to trace the history of the corporation. That field already has a large bibliography.

THE MIDDLE AGES

The major threads of corporate development during the Middle Ages can be identified with three words: church, borough, and guild. Each illustrates the strength of themes which recur throughout corporate life—community of interest based upon place, as a borough; and community of interest based on a particular subject matter, as a guild. Equally characteristic is the joining of both forces as illustrated by the parish and trading company.

While the Universal Church was concerned with the individual soul, the medieval community was based on classes and ranks, within a limited and local order, feudal or municipal. The unattached individual during the Middle Ages was one condemned either to excommunication or to exile: close to death. To exist one had to belong to an association—a household, manor, monastery, or guild. There was no

25. *Id.* at 183.

26. *But see* Lobingier, *supra* note 12, at 51.

security except through group protection and no freedom that did not recognize the constant obligations of a corporate life. One lived and died in the identifiable style of one's class and one's corporation.²⁷

THE CHURCH

The achievements of the medieval Christian Church in providing a link between the ancient and modern cultures are beyond debate. The present relevance of that history lies in the early concern which daily experience forced the Church to have in what is now called the concept of corporateness.²⁸ When a wealthy believer made a gift "to the Church," had he given it to his local parish, to the immediate diocese, or to the whole mystical body of believers? If a group of persons (either lay or clerical) separated from its usual parish or town and set up a new monastery or convent, or simply wandered about Europe obeying a common discipline, what was the status, what were the capacities, of such an organization?

These questions involved very practical considerations of church administration and authority besides the metaphysical ones that intrigued the doctors of theology and law. The result which is of interest for this summary was the revived recognition of the corporate entity as a force or body independent of or distinct from the individuals of whom it was composed. Naturally enough, much of the debate and many of the conclusions were expressed in theological terms, but the *persona ficta*, the fictitious person concept of the corporation, was the lasting contribution.²⁹ The name of Pope Innocent IV (1243-1254), "the father of the modern theory of corporations,"³⁰ is associated with this principle because of his *Commentaries*; but it is likely that he was more nearly the appellate judge than innovator.³¹

This view is supported by his English contemporary, Bracton, from whose writings the following passage is often quoted as the earliest discussion of the corporation in English legal literature:

If an abbot, prior, or other collegiate men demand land or an advowson or the like in the name of their church on the seizin of their predecessors they say "and whereof such an abbot was seized in his

27. MUMFORD, *THE CITY IN HISTORY* 269 (1961).

28. Vinogradoff, *supra* note 21, at 601.

29. Stevens, *The New Ohio General Corporation Act*, 4 U. CINC. L. REV. 428 (1930).

30. Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 665 (1926); POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* 494 (2d ed. 1898).

31. Lobingier, *supra* note 12 at 60.

demesne," etc. They do not in their account trace a descent from abbot to abbot, or prior to prior, nor do they mention the abbots or priors intermediate (between themselves and him on whose seizin they rely), for in colleges and chapters the same body endures forever, although all may die one after the other and others may be placed in their stead; just as with flocks of sheep, the flock remains the same though the sheep die.³²

Whether these decisions were the conscious implementation of a preconceived policy or the candid summary of observable behavior patterns has puzzled many students³³ for years.

Whatever its origin, the important idea of this doctrine was that the familiar religious bodies enjoyed a perpetual existence, that they were corporate, and that the corporation had no soul. Having no soul they could not, and need not, receive the sacraments of the Church. It was a *persona ficta*, an imaginary person. The concept was apt. The phrase may have been inept. Later writers fell into the trap of transliteration instead of translation, and generations of law students have learned the words of John Marshall that a corporation is an artificial being known only in contemplation of law.³⁴ Intangible, yes; existing as an image in men's minds, yes; but "fictitious," no.

A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity. . . . A corporation is an entity—not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the church.³⁵

Corporations are well known to all sorts and conditions of men: to the tax collector, to the burger, to the merchant and buyer in the market place. What a mountain of legal debate that unhappy phrase initiated.

The basic contribution of the medieval theologians, nevertheless, survived and prospered in ways they could not foresee. The religious roots of the idea of the corporation as a person as well as the powers of the crown are reflected in Coke's definition:

32. Bracton, f 374 b.

33. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350 (1906); Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (1911); and Vinogradoff, *supra* note 21.

34. *Dartmouth College v. Woodward*, 4 Wheat (U.S.) 518, 636 (1819).

35. Machen, *supra* note 33.

. . . the opinion of Manwood, Chief Baron, was this as touching Corporations, that they were invisible, immortal, and that they had no soule; a Corporation is a body aggregate, none creates soules but God, but the King creates them, and therefore they have no soules: they cannot speak, nor appear in person, but by attorney.³⁶

The idea of the corporation as an imaginary person is not the only contribution of the Church to corporation law, but it must suffice to represent the others. Interesting to note is the fact that the application of *persona ficta* is equally appropriate whether the corporation is religious or lay, municipal or commercial, public or private. It is the foundation of the familiar argument in support of the public authority, that it is a separate, independent entity and not a part of the government bureaucracy.³⁷

The Borough

How medieval Europe fought its way out of the dark ages which followed the collapse of the Roman Empire has been chronicled many times in terms of the rise of feudalism and the romantic quests of the knights errant. Less familiar and probably more important is the concurrent story of the use made of towns: first, in achieving more stable society; then, by kings to control their too powerful barons; and finally, in the role of incorporated towns in furthering the collapse of feudalism.³⁸

Reduced to its minimum essentials, feudalism was a system of land tenure in exchange for military service. Agriculture was the foundation of the economy, and the operating units—whether knight's manor or peasants' vill—endeavored to be as nearly self-sufficient as possible. For purposes of mutual security, for agriculture, and for primitive warfare, feudalism was reasonably efficient. For purposes of trade beyond the local manor or village, however, for development of any but the simplest crafts, and for fostering a fluid and creative society, the towns early asserted their superiority.

One of the dominant themes running through this period in the history of towns is defense. Mutual protection was, of course, a factor

36. Quoted in WILLCOCK, *THE LAW OF MUNICIPAL CORPORATIONS* 15 (1827).

37. Seidman, *The Theory of the Autonomous Corporations*, 12 *PUB. ADMIN. REV.* 89 (1952).

38. Willcock, *op. cit. supra* note 36 at B. "The institution of municipal corporations is said . . . to have conduced more than any other circumstance to the emancipation of Europe from the thralldom of the feudal system."

creating feudalism, too; but towns were older. The characteristics of the Roman walled camp are familiar. In the period between Roman withdrawal and effective feudalism, Europeans developed the custom of retreating to hilltops in times of danger. Crude defenses were replaced by permanent walls, and homes were established within them. Traders found greater safety to display their wares, and the market place became the location for the fair. The commerce of the fair required speedy justice and courts were added. The managers of the place combined with the managers of the crafts, frequenting the fair to provide more efficient and safer conduct of public business; and in this way, the town demonstrated its value to its members.³⁹

This kind of corporate action was largely self-initiated and without any concern for permission or approval. It was, however, in conflict with the basic structure of the feudal society in which it was developing, particularly with respect to all sorts of dues, tolls, and other imposts which can be generalized in modern terms as taxes. Any feudal lord who thought that the town impaired his revenues might be expected to regard it with limited approbation.

There were, however, benefits to be secured by the local barons which they were assiduous in exploiting. Although there was infinite variety as to details, the common pattern was that the feudal lord would grant the freemen of a town exemption from all feudal tolls and charges in exchange for their paying him a fixed sum every year.⁴⁰ This sum was divided among the burgers or collected in turn by such means as they might arrange.^{40.1} It was a revival of the Roman practice of farming taxes to a corporation, only now the corporation was composed of the residents (or some of them) of a place instead of distant investors seeking profits.

39. MAITLAND, *DOOMSDAY BOOK AND BEYOND* 193 (1897). "The establishment of a market is not one of those indefinite phenomena which the historian of law must make over to the historian of economic processes. It is a definite and a legal act. The market is established by law . . . which prohibits men from buying and selling elsewhere than in a duly constituted market. To prevent an easy disposal of stolen goods is the aim of this prohibition. Our legislators are always thinking of the cattle-lifter."

40. *Id.* at 203. "The definition of a burgess may involve the possession of a house within or hard by the walls . . . They are united in and by the moot and the marketplace, united under the king in whose peace they traffic; and then they are soon united over against the king, who exacts toll from them and has favours to grant them. They aspire to farm their own tolls, to manage their own market and their own court. The king's rights are pecuniary rights; he is entitled to collect numerous small sums. Instead of these he may be willing to take a fixed sum every year, or, in others words, to let his rights go to farm."

40.1. Stubbs, *Select Charters* 41-44 (1890).

The King exacted his tolls and taxes from the townsmen, and they tried to win from him the recognition of their rights of meeting and market. They strove to eliminate the middlemen. They offered a fixed round sum as the farm of their borough, and desired to assess for themselves in their own manner the relative liabilities of burgesses to make up that sum. Thus the payment of the *firma burgi* by the community was the beginning of municipal self-government, and a step—though not the final step—in the direction of corporateness.⁴¹

A second advantage that the feudal nobility found in towns was a means to garrison defensive positions without paying for soldiers. Both in England and on the continent, kings made grants of frontier provinces as an inducement to secure the protection or extension of their domains. The nobles, created to defend the marches, found castles and soldiers exceedingly expensive; but the grant of municipal privileges to a company of craftsmen or traders would serve to assure their locating at a designated place. By defending themselves, their market, and their goods, the townsmen effectively contributed to the protection of the frontier and to the aggrandizement of their patron as well.

A widely recognized rule of feudal law provided that any serf or villein who escaped from the land to which he was legally bound and who managed to remain in a town for a year and a day, became free. A man freed from his lord's land might expect in time to become a freeman of a town. Both steps represented a significant improvement in status, and provided a ready inducement for the recruiting which was conducted to build new towns. Even when military defense was not a factor, economic colonialism was, and the road to self-improvement was the road to town.

In such circumstances it is not surprising that numerous local lords undertook to grant municipal charters or to settle controversies by "confirming" purported rights which the borough claimed and the lord disputed.⁴² It is also apparent that centers of population which grew up without the benefit of any recognized authority, saw the benefits to be realized from corporate status and proceeded to organize themselves in imitation of their neighbors. This form of municipal creation Vinogradoff called the result of "social attraction" which is "manifested by organic process apart from any agreement or definite expression of the

41. Carr, *EARLY FORMS OF CORPORATIONS*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 170 (1909).

42. Willcock, *op. cit. supra* note 36, at B; Leach, *Beverly Town Documents*, 14 SELDON SOCIETY (1900).

will."⁴³ It is a part of the background for the classic formula of the early writers that a municipal "corporation may exist by prescription, or the King's charter, but that franchise cannot be claimed by any other authority."⁴⁴

In view of the tax money, the political power, and the personal prestige involved in these undertakings, both the French and the English kings insisted that only the crown could grant municipal charters. Initially the royal position seems to have been simply a part of the continuing rivalry between the king and barons; but as the boroughs and guilds grew in power, the rule acquired new importance. Ultimately it achieved equal stature with the canonists' rule of *persona ficta*. Dean Stevens summarized it by saying:

The other notion, that a corporation is created by sovereign authority, was the skilful defense of the English Crown against the growing power of group units. The entities existed, they had to be subdued, not created. Therefore it was established that they could not exist legally without a sovereign grant of authority. These two theories, so ancient that their independent origins are commonly forgotten, have been coalesced into a single theory of a legal person that it is fictitious because it is law created.⁴⁵

Restated as "only the state can grant municipal incorporation," the rule remains in effect as formulated by the medieval kings, although in most countries the power has now been shifted to the legislature.

While many American states delegate to an administrative official the power to issue charters to private business corporations in accord with general legislation, the creation of a public corporation—including the public authority—continues the exclusive prerogative of the legislature. If any new ingredient has been added by this generation, it may be found in the authorities jointly created by two or more states, as the Port of New York Authority;⁴⁶ or by two nations, as in the case of the St. Lawrence Seaway.⁴⁷ No feudal precedent for joint undertak-

43. Vinogradoff, *supra* note 21, at 599.

44. Willcock, *op. cit. supra* note 36, at 21. "A corporation which has existed from time immemorial is called prescriptive, and supposed to have been originally constituted by sufficient authority."

45. Stevens, *supra* note 29, at 426.

46. Note, *Port District: General Considerations of an Important Type of Municipal Corporation*, 9 DE PAUL L. REV. 74 (1959).

47. Cohen and Nadeau, *Legal Framework of the St. Lawrence Seaway*, 1959 ILL. L.F. 29 (1959).

ings comes to mind. Even these novel incorporations are consistent with the ancient rule that only the highest level of government in the realm can grant charters creating municipal corporations.

The Guild

The importance of the guild in the economic life of the Middle Ages cannot be exaggerated.⁴⁸ In general, there were two types: (1) the craft guilds which were localized in a particular town or area; and (2) the itinerant guilds whose members traveled from town to town, from fair to fair, and from country to country. Both types enjoyed the same general organization as the boroughs; both had received charters of creation or of recognition from some recognized sovereignty. Smith argues that the fact that most guilds held property probably explains why they were among the earliest cases of incorporation.⁴⁹ Membership was a valuable status, and every guild possessed one or more exclusive privileges.

In many cases, the distinctions between the freemen of a borough and the freemen of a guild are hard to trace. If there were not numerous examples of both operating concurrently in the same place, one might mistake them for equivalents. Undoubtedly, each influenced the other in their formative periods. Their old charters imply little or no conscious distinction in the minds of the draftsmen, and the operative words used to create a guild or to incorporate a town were used interchangeably.⁵⁰ Both Coke and Holt supposed them to be identical.⁵¹ Perhaps the most famous remnant of the guild system, and one of the most dramatic demonstrations of its intimate relation to borough government is the City of London which is still administered for all practical purposes through its liverymen.⁵²

As in the case of the boroughs, the benefits to the guild were derived

48. The history of the guild (gild) has a large bibliography. A few of the best known authorities are: GROSS, *THE GILD MERCHANT* (1890); LAMBERT, *TWO THOUSAND YEARS OF GILD LIFE* (1891); SELIGMAN, *TWO CHAPTERS ON THE MEDIAEVAL GUILDS OF ENGLAND* (1887); SMITH, *ENGLISH GILDS* (1870); and UNWIN, *THE GILDS AND COMPANIES OF LONDON* (Kahl ed. 1964).

49. Lobingier, *supra* note 12, at 55.

50. Williston, 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 195 at 198.

51. Leach, *op. cit. supra* note 42 at xxi. "At Beverly at the date of Thurstan's charter, [c. 1130] the burgesses and the merchant gild seem to have been one and the same body, . . . under two different aspects. As time went on they became entirely separate."

Carr, *op. cit. supra* note 41 at 179.

52. GLASSPOOL, *THE CORPORATION OF THE CITY OF LONDON* (1924); UNWIN, *THE GILDS AND COMPANIES OF LONDON* (1964).

from their monopolies and the benefits to the crown from farming revenues. What relevance does the medieval guild have to the public corporation? The answer lies in the illustrations it provides of the early exercise of familiar corporate powers: the power to sue and to be sued as a corporation, to own real and personal property, to have a corporate seal, and to enact bylaws. It also demonstrates the use made by government of an incorporated body of experts to administer a technically specialized problem.⁵³ In the first instance, regulation and control of trade was the most common public concern and spread from matters of simple weights and measures at the local market and fair to international trade with the Hanse cities and the monopolies of the Cinq Ports.⁵⁴

Among the valuable "freedoms" commonly granted to guilds, was the power to enact ordinances for the regulation of their own members, for the regulation of the craft entrusted to them, and for the regulation of the places, *e.g.*, the market place or fair, where the monopoly was exercised.

The guild statutes are the most interesting, as they are the most abundant remains of the institutions themselves. They touch on many phases of human interest and duty, in some respects taking the place of modern municipal regulations, and are an important source for the history of civilization in the Middle Ages. But valuable as they are in subject matter, their chief bearing upon our present theme lies in the manner of their enactment. The guilds applied the democratic principle in their legislation.⁵⁵

Among the many contributions to corporate law which were made by the guilds, one of the most important, the principle of transferable shares, was introduced indirectly. The apparent example was the practice followed by Italian cities in raising public loans in the thirteenth and following centuries.

53. KRAMER, *THE ENGLISH CRAFT GILDS AND THE GOVERNMENT* 24 (1905); Leach, *op. cit. supra* note 42 at lxi. "The Townsman and craftsmen both wanted protections: the former wanted it as consumers against fraudulent dealing and false work; the latter wanted it as producers, against the unfair competition of such fraud and falsity . . . in weaving and fulling, in dyeing and tanning, only experts could detect fraud, and the general public had to rely on the organization of the trade itself. The assize of cloth and leather, so to speak, had to be taken through the searchers of the cloth and leather trades, and the community delegated its powers to them for the purpose."

54. Brodhust, *The Merchants of the Staple*, 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 16 (1909).

55. LOBINGIER, *THE PEOPLE'S LAW* 20 (1909).

The loans were divided into shares (*luoghi*) and the names of the owners were registered in special books. The shares not only passed to the heirs in case of the owner's death, but could be freely bought and sold.⁵⁶

How this device contributed to the development of the Italian joint-stock company, and it to the English counterpart, involves several centuries of legal developments. It is not free from controversy; but it is generally accepted that the merchant guilds played a significant role in introducing these "foreign" ideas into England, even though they themselves appear to have made no use of the arrangement. Since the joint-stock company was well established before the guilds passed from the scene, it seems to be a reasonable conclusion.⁵⁷

As with the modern public authority, there was infinite variety and no more than illustrative examples may be mentioned. The London Brewers' Records of 1422 enumerates one hundred forty,⁵⁸ ranging from mercers, grocers, and drapers through every imaginable trade to bakers, salters, and haymongers. Like the authorities of today, the guild operated a monopoly. Some, such as the right to collect all the tolls for crossing a particular river, have their modern counterparts. Also, like the authority, the guild operated with its own, *i.e.*, private funds as opposed to those of the crown.⁵⁹

Today, an authority raises capital by selling bonds to private investors and guarantees them with a pledge of its revenues. Yesterday, the guild sold memberships, levied assessments, collected tolls, and perhaps borrowed to finance its operation. Thus, using private capital, the guild conducted an essentially private business operation and at the same time, performed duties of regulation, inspection, and control on behalf of the crown. The public authority's use of private capital to conduct the business of the public is not new. It is no exaggeration to suggest that in many ways the medieval borough and guild live on in the public corporations of today.

56. Mitchell, *Early Forms of Partnership*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 193 (1909).

57. HOLDSWORTH, 8 HIST. OF ENG. LAW 207 (1929). "There can be little doubt that the origin of the joint stock principle, like the origin of so many other principles of our modern commercial law, must be sought in mediaeval Italy."

58. Unwin, *op. cit. supra* note 52 at Appendix A II.

59. Leach, *op. cit. supra* note 42 at xli.

EXPANDED HORIZONS

THE JOINT-STOCK COMPANY

In 1554 the first English joint-stock company was chartered;⁶⁰ in 1784 New York enacted the first American general incorporation law.⁶¹ Between those two dates the major chapters in the history of the evolution of the joint-stock company are concentrated. It is a romantic story, intimately concerned with the age of discovery and colonization of the "New World." Not only the western hemisphere was involved but remote areas of Africa, India, and the Far East were as well. Merely to call the roll of some of the better known names conjures images of faraway places and memories of high adventure.⁶²

Great constitutional conflicts in the struggle toward representative democracy grew out of controversies with the joint-stock companies. For example, the House of Lords lost its original jurisdiction over civil cases as a result of its effort to do justice to a British merchant wronged by a joint-stock company.⁶³ This landmark case in the matter of the Lords' jurisdiction deserves new recognition as an early demonstration of the company/corporation's importance as a unit whose activities have had direct and indirect political consequences. Reformers may be interested to note that the unfortunate Skinner was totally denied the justice that everyone appears to have recognized was due him—an unsung martyr to social progress.⁶⁴

Most of the official names were tediously long, as "Gouverneur and Assistants of the Citie of Raliegth in Virginia" or the "Company of Merchants of London Trading to the East Indies."⁶⁵ Perhaps the longest name belonged to the company chartered under the title of "Merchants Adventurers of England for the discovery of lands, territories, isles, dominions and signiories, unknown and not before that late adventure or enterprise by sea or navigation commonly fre-

60. Lobingier, *Natural History of the Private Artificial Person*, 13 TUL. L. REV. 58 (1939).

61. Baldwin, *Private Corporations in the Colonies and States*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255 (1909).

62. Carr, *Select Charters of Trading Companies*, 28 SELDON SOCIETY (1913), contains forty-one representative grants ranging in date from 1530 to 1707, edited from the Patent Rolls in the Public Record office. The editor's extensive introduction (136 pp.) is doubtless the authoritative discussion in the field.

63. *Skinner v. The East India Company*, 6 S.T. 710 (1666).

64. Emerson, *CORPORATE AND POLITICAL POLICY IN A JURISDICTIONAL BATTLE: SKINNER V. THE EAST INDIA COMPANY (1666)*, 33 DETROIT L.J. 1 (1955).

65. Williston, *The History of the Law of Business Corporations before 1800*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 199 (1909).

quoted.”⁶⁶ Abbreviation became a practical necessity and those which are commonly remembered are better known by shorter designations such as the African Company, the Russia Company, and the Turkey Company, and, perhaps most familiar to Americans, the Hudson Bay Company.

The gradual and logical progression from the many-member partnership to the regulated company, to the joint-stock company, to the corporation cannot be traced here. Only two points particularly relevant to the future public authority can be noted. First emphasis should be given to the magnitude of the role of the stock company as an institution in the establishing of America. This was pointed out by Chief Justice Simeon E. Baldwin of the Supreme Court of Errors of Connecticut more than half a century ago.

The law of corporations was the law of their being for the four original New England colonies. Of whatever else they might be ignorant, every man, woman, and child must know something of that. It governed all the relations of life. This was true, whether the government to which they were subject was set up under a charter from the crown or those who held a royal patent, or—as in New Haven—was a theocratic republic, owing its authority to the consent of the inhabitants. The one rested on the law of private corporations *de jure*: the other on that of public corporations *de facto*.⁶⁷

The same position is shared by the American historian, Edward P. Cheyney, who added, “In fact the whole advance of English discovery, commerce, and colonization in the sixteenth and early seventeenth centuries was due not to individuals, but to the efforts of corporate bodies.”⁶⁸

To trace the naturalization of the corporation in the New World would occupy several volumes⁶⁹ and would add only corroborative detail. The role of the stock company, however, should not be limited to the initial settlements. On the contrary:

. . . as fast as the plantations grew into communities their inhabitants naturally reproduced the corporate institutions with which they

66. Carr, *supra* note 62 at xxx.

67. Baldwin, *supra* note 61, at 236.

68. Cheyney, *Some English Conditions Surrounding the Settlement in Virginia*, 12 AM. HIST. REV. 512 (1907).

69. E.g., DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS*, two volumes (XVI and XVII) of Harvard Economic Studies (1917).

and their fathers had been familiar in the mother country. The earliest of these to spring up in America were of the type which we should now designate as *public* corporations—such as towns, boroughs, and cities; but before the end of the colonial period a considerable number of truly *private* corporations had been established, for ecclesiastical, educational, charitable, and even business purposes.⁷⁰

The second characteristic of the joint-stock company which foreshadowed the modern public corporation was its ability to attract and manage large sums of private capital for public purposes. This capability, perhaps more than any other, led to its superseding the merchant guilds as a vehicle for prosecution of overseas trade. The large amounts of capital required to outfit and maintain colonizing-trading ventures, the extended period before expeditions returned, the need of patents from the crown, and the high risk of loss all combined to make group cooperation essential at the dawn of the colonial era. The joint-stock company proved itself adapted to this purpose and its growth was rapid, in terms of numbers, in terms of varied applications⁷¹ other than overseas trade, and in terms of development toward the familiar business corporation.

Professor Williston reports that upwards of two hundred companies had been formed by 1720 for the prosecution of every kind of enterprise, including one for "Insurance and Improvement of Children's Fortunes" and another for "Making Salt Water Fresh."⁷² The greater portion of the companies operating in this period were not incorporated and when writs of *scire facias* were issued to inquire into their right to usurp corporate powers, many came to an end. This episode precipitated by the Bubble Act⁷³ produced a sudden collapse of the enormously inflated public credit which carried many weak businesses to disaster along with the fraudulent ones. Its influence on subsequent corporate legislation was felt for many years thereafter.

In order to appreciate the framework in which the joint-stock company operated as well as the business corporation into which it evolved, its relation to the government or the crown must be kept in mind.⁷⁴

70. Davis, *op. cit.* supra note 69, vol XVI, at 4.

71. E.g., Carr, *supra* note 62 at xi lists exploration, foreign trade, colonization, mining, fishing, industry, banking, insurance, and water companies.

72. Williston, *supra* note 65, at 202.

73. 6 Geo. I, c. 18 §§ 18-22 (1720); repealed, 4 Geo. IV, c. 94 (1825).

74. Laski, *The Early History of the Corporation in England*, 30 Harv. L. Rev. 583. "The relation . . . between monopolies and joint-stock enterprise is the dominant note of the time."

No such ideas of corporate independence which the Victorian businessmen espoused were known or dreamed of in the seventeenth and eighteenth centuries.

The modern joint-stock corporation grew out of the union of the ideas of association for the government of a particular trade by those who carried it on, and of combination of capital and mutual cooperation, suggested and made necessary by the great expense incident to carrying on trade with distant countries. But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds.⁷⁵

That this appears to have become accepted law by the beginning of the eighteenth century is illustrated by a classic quotation from one of the earliest (but anonymous) writers in the corporate field. In a book published in 1702 and aptly entitled *The Law of Corporations*, the author says:

The general intent and end of all civil incorporations is for better government, either general or special. The corporations for general government are those of cities and towns, mayor and citizens, mayor and burgesses, mayor and commonalty, etc. Special government is so called because it is remitted to the managers of particular things, as trade, charity, and the like, for government, whereof several companies and corporations for trade were erected, and several hospitals and houses for charity.⁷⁶

The concept that the purpose of a stock company is to combine the public objective of managing and ordering the particular trade in which it is engaged, as well as the private one of profit for its shareholders, is also to be found in the charters granted to the so-called "new" business corporations, particularly in the recitals that the company shall have the exclusive control of the trade entrusted to it.⁷⁷ The similarities between these early practices and the public authority of this decade need not be labored.

75. Williston, *supra* note 65, at 200.

76. ANONYMOUS, *THE LAW OF CORPORATIONS* (1702), cited by Williston, 201.

77. Carr, *op. cit. supra* note 62 at lxvi *et seq.*

COLONIAL CORPORATIONS

As already noted, American colonial history is the history of the corporation. The American Revolution, as a trial by combat, was the court of last resort in the prolonged controversy over the doctrine of the inviolability of the grants and franchises contained in the colonial charters.⁷⁸ Stated another way, the basic question of the period in the field of corporation law was concerned with the nature and legal status of the corporations which were created by the colonial charters.

The problem divided into several major areas: (1) there were questions dealing with the right of the English government to change corporations chartered in England and functioning in America; (2) there were disputes regarding the subordinate public corporations created by the crown-chartered American companies in exercise of their alleged powers; and (3) there were doubts as to the legality of the companies and corporations created by the colonial legislatures for private business ventures.⁷⁹

In the early 1600's, there were only three trading companies with English charters playing a significant role in the colonies: the East India Company, the Royal African Company, and the Hudson Bay Company.⁸⁰ These were soon followed by the proprietary companies which evolved into the thirteen rebellious states. Their metamorphoses from business to municipal corporations and the colonists' insistence on the freemen's inherent right to local self-government as part of the rights and privileges of Englishmen is the central theme of the eighteenth century, the foundation issue underlying the American Revolution.

Along the way, the monopolies previously enjoyed by the "regulated" companies were wiped out by the Parliament which came into office with the Glorious Revolution of William and Mary in 1688.⁸¹ In 1717, the Attorney General and the Solicitor General combined to oppose granting a charter to a proposed marine insurance company as a dangerous experiment.⁸² The Parliament, in 1741, responded to the fears of the Governor of Massachusetts with legislation. He was alarmed by the formation in that colony of the largest voluntary joint-stock company then known, the "Manufacturing Company" or Land-bank of Massachusetts. The act of Parliament passed in that year made unlawful

78. Baldwin, *supra* note 61, at 236 and 252.

79. Davis, *op. cit. supra* note 69, Vol. XVI, at 30.

80. Baldwin, *supra* note 61, at 249.

81. *Ibid.*

82. *Id.* at 250.

the establishment of or transaction of business in any English colony by any unincorporated joint-stock company having transferable shares and consisting of over six persons.⁸³ Severe penalties were provided, and this extension of the Bubble Act of 1720 to the colonies continued the law of the land for every American colony until the Revolution.

Prior to the Act of 1741, only three business corporations had been chartered by colonial legislatures. After the Declaration of Independence until the end of the century, the number of incorporations granted probably did not exceed two hundred fifty.⁸⁴ The restrictions imposed on corporations by the crown clearly failed to meet the needs of an expanding economy, and interesting features are found in the expedients used to approximate the corporation's advantages. In Connecticut, for example, when plans for Yale were being formed, the ill consequences which had followed the Great and General Court of Massachusetts in presuming to give Harvard a charter in 1650 were well remembered; and the Connecticut Assembly, guided by its counsel, Judge Samuel Sewall, carefully avoided giving any definite form of incorporation to the ten trustees or "undertakers."⁸⁵ Half a century was to pass before formal incorporation was achieved. The modern lawyer may find difficulty in believing that the simple omission of the common words of art from a charter would exempt unlawful acts from the sanctions of the statute, but the evident presence of Yale is eloquent testimony to the success of the stratagem.

Another expedient employed was to give adjoining proprietors of lowlands or the proprietors situated along a common watercourse, the power to associate for improving their properties in such manner as a majority might determine.

Some of these drain companies were made quasi-corporations and could sue in the name of the treasurer. They were really public agencies, created on account of the interest of the State in regulating a use of land or water shared in by many under separate titles, and it was no part of their purpose to make money for their members. Indeed their powers extended over those who might not desire to come into them precisely as is the case with municipal corporations.⁸⁶

83. Mitchell, *supra* note 56, at 192. ". . . the essence of a joint-stock company does not consist in the principle of limited responsibility, but rather in the prolongation of the corporate existence and organization of the company beyond the life of its members and in the free negotiability of the shares."

84. Baldwin, *supra* note 61 at 242; Davis, *op. cit. supra*, Vol. XVII, at 6.

85. Davis, *op. cit. supra* note 69, Vol. XVI, at 21.

86. Baldwin, *supra* note 61, at 245.

The kinship between these quasi-corporations and the public authority is easily seen.

Of the charters granted prior to 1800 for moneyed corporations, two-thirds were of a quasi-public character, such as for the improvement of transportation facilities by roads, bridges, and canals, or by deepening rivers or harbors. Fewer than eighty corporations existed which involved daily contacts with the public and included twenty-eight banks and twenty-five insurance companies.⁸⁷

The number, however, of public and municipal corporations, or religious societies, academies, library companies, and of public quasi-corporations such as the drain companies, was very large by the end of the century. The gift of the American Revolution to the law of corporations—the principle of freedom of incorporation or organization under general laws—had been quickly applied in several states. New York led the way with a general incorporation law in 1784. Delaware followed in 1787,⁸⁸ and Pennsylvania in 1791. This new philosophy marked the end of the common law doctrine that a corporate charter evidenced special trust in the incorporators which implied a trust and justified a liberal construction of its rights and powers. So far did the pendulum swing for both business corporations and municipal ones that the courts soon held a corporation to have no powers except those necessary for the proper exercise of its express powers or indispensable to the fulfillment of the public purpose to be attained. For this principle to become known as “Dillon’s Rule” took many years, but its origin was early in the days of the Republic.⁸⁹

Perhaps the most significant effect of the American Revolution on corporate law, or of the general incorporation statutes which followed the end of hostilities, lay in the separation which resulted, whereby the private business corporation became distinct from the public or municipal corporation. Before 1800, the primary reason for incorporation was to serve some public purpose. After 1800, business and economic reasons were adequate motives.

These historic developments have left permanent evidence of the past on the law of corporations:

. . . as to the points which modern business corporations have in

87. See Davis, *op. cit. supra* note 69, Vol. XVII, at 332, “Appendix B: American Charters to business corporations 1781-1800, classified by objects and arranged . . . in chronological order.”

88. LAWS OF DELAWARE, II, 879 (1797).

89. *Cf. City of Clinton v. Cedar Rapids & M.R.R.Co.*, 24 Iowa 455 (1868).

common with the early guilds and municipalities, the law relating to them dates back farther than almost any other branch of the law, while as to the points which belong exclusively to the conception of the business corporation, the law has been formed very largely since 1800. And not only had a body of new law to be thus formed, but old doctrines laid down by early judges as true of all corporations, though in reality suited only to the kinds of corporations then existing, had to be discarded or adapted to changed conditions.⁹⁰

One further corporate doctrine was developed in this period which should be mentioned: that a corporation can acquire a legal existence under the laws of several states by accepting a charter from each.⁹¹ This had been done at the outset by the Bank of North America, chartered by the Continental Congress in 1781⁹² and then by Pennsylvania in 1782. What began as a doubtful novelty, ultimately became standard operating procedure. Eventually, the States of New York and New Jersey in creating the Port of New York Authority under the state compact clause of the Constitution, carried the practice a step further by combining in the creation of a single corporation by their joint act.⁹³

THE INDUSTRIAL ERA

THE NINETEENTH CENTURY

The American and French Revolutions which closed the eighteenth century released, or at least reduced, in those countries the political restraints which previously had inhibited the easy formation of corporations for the convenience of private enterprise. Stimulated by the mounting pressure of those forces now collectively called "the industrial revolution," the business community lost no time in utilizing the corporation as a convenient receptacle in which to pool extensive capital, diverse skills, specialized management, and divided risk.⁹⁴

90. Williston, *supra* note 65, at 204.

91. Baldwin, *supra* note 61, at 253.

92. Cf. note 8 *supra* and note 95 *infra*.

93. Goldstein, *The Port of New York Authority*, 5 J. PUB. L. 408 (1956); BARD, *THE PORT OF NEW YORK AUTHORITY* (1942).

94. Seidman, *The Theory of the Autonomous Corporation*, 12 PUB. ADMIN. REV. 89 (1952). "The industrial boom of the 1870's marked the beginning of what has often been described as the 'era of the corporate revolution' in the United States. Prior to the Civil War, use of the corporate form in the industrial field was confined almost entirely to the textile industry. But the transition from an agriculture to an industrial economy, accompanied as it was by the rapid growth of 'big business,' greatly stimulated

Although the first corporation chartered after the American Revolution was a public one,⁹⁵ the characteristic feature of nineteenth century corporate life was the extensive expansion—both in number and in size—of private commercial corporations and the overshadowing by them of the older public corporations. So complete was this change of relative importance that hardly a century later after several generations of *laissez faire* political and economic philosophy, the widespread revival of the public corporation by the New Deal was castigated as state socialism.⁹⁶ At the same time, proponents of the policy were prophesying that:

. . . with the growth of government-owned business corporations there will be development of a field of administrative and substantive law broad in extent and challenging to the pioneer who undertakes to explore its contents and area.⁹⁷

Anyone even slightly familiar with developments in the public law field knows how true this forecast was. A random comparison of articles in the law journals will demonstrate it.⁹⁸ Whether the issue is tort liability or the adoption of a liberal policy of free incorporation, the validity of the charge is not the question. The point simply illustrates how quickly in human affairs the privilege of yesterday becomes the right of tomorrow.

From the standpoint of the national government, it can be said fairly that the entire nineteenth century was a period in which the government encouraged private operations where profit and general welfare combined, and not a period of government operating through state-owned corporations.⁹⁹ Wherever the corporate device was used, it

the use of the corporate form because of the advantages it offered in the way of limited liability and pooled investment."

95. *The Bank of North America, Act of Dec. 31, 1781*, 7 JOURNAL OF CONGRESS 257-8.

96. Reed, *Government Controlled Business Corporations: A Symposium*, 10 TUL. L. REV. 79 (1935).

97. *Id.* at 88.

98. E.g., compare: Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1918) with Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 HARV. L. REV. 714 (1961).

99. Reed, *supra* note 96, at 81. The scarcity of federal corporations prior to 1916 demonstrates the point. During the short-lived First and Second Banks of the United States, only the interest of the federal government was not more than twenty per cent. It was 1902 before the stock of the Panama Railroad Company (which had been chartered as a private corporation in New York State in 1849) was acquired. Not until World War I were government-owned corporations organized on any significant scale.

seems to have been adopted because it facilitated the participation of private capital rather than because it was regarded as a sound method of government operation.¹⁰⁰

The extensive development of the privately owned commercial enterprise created a new dichotomy of corporations based upon ownership, and classifications in terms of *public* corporations and *private* corporations replaced the time honored *ecclesiastical* and *lay* classifications of the earlier commentators.¹⁰¹ Whatever other implications this development may suggest, it is relevant here as the basis of a portion of the working terminology now used in the field.

In spite of its simple origin and apparently clear meaning in the foregoing context, the word "public" when applied to corporations creates still an ambiguous term.¹⁰² For example, corporations which are closely held, as by the members of one family or a few families, as was the Ford Motor Company, may elect to make their shares available to many investors by meeting the respective requirements of the Security Exchange Commission and of the stock exchanges for trading in the open market. In such event, the companies are said to have "gone public" as opposed to having been "closely held."

In both cases, one can say that the corporation is publicly owned. The difference depends upon the techniques employed. The Reconstruction Finance Corporation is owned by the public, organized as a political entity in the form of the nation. General Motors is owned by the public, otherwise unorganized, as a myriad of individual investors.¹⁰³ The curious feature lies not so much in the distinctions of structure between the two organizations as in the similarities of the results where heavy personal and corporate income taxes reduce the net earnings per share of stock to levels not greatly different from the return on tax exempt public corporation bonds. This fact has a major influence in assuring a continued market for the securities issued by the public authorities.

A further separation between business and government resulted from

100. Reed, *supra* note 96, at 81; Field, *Government Corporations, a Proposal*, 48 HARV. L. REV. 775 (1935).

101. Williston, *supra* note 65, at 195, citing Coke, Blackstone, and Kyd on Corporations.

102. Field, *supra* note 100, at 777. "The concept of a corporation is a troublesome one, and upon analysis lacks that precision of constituent elements and boundaries so commonly associated with it."

103. Thurston, *Governmental Proprietary Corporations*, 21 VA. L. REV. 352 (1935).

the Borough Reform Act of 1835¹⁰⁴ in England, and its American counterparts as individual states acted to correct the more flagrant abuses in their respective cities.¹⁰⁵ Generalization about such diverse situations is dangerous, but it appears clear that one effect of these reforms was to reduce the private, proprietary, profitable-for-a-few nature of a city and enhance its role as an administrative unit for local government and a device for popular self-determination. Another result was the emphatic distinctions which were developed between the municipal corporation and the business corporation, thereby making their reunion in the public authority a far more dramatic achievement than it actually was in the light of historic precedent.

THE SPECIAL PURPOSE DISTRICT

In both England and America, wide use was made of the special purpose district as a vehicle for reform, where municipal organization already existed, and as a means for providing selected services where municipal organizations were absent or inadequate to do the job.¹⁰⁶ First used for relief of the poor and then for school purposes, the special district was quickly adopted for fire protection, public health, water, and other utilities.¹⁰⁷

In its earlier applications the special district was organized on a geographical basis, and all taxable properties within the district were charged with a proportionate share of the cost. Where the district was created to provide free education or fire protection, there was no alternative source of revenue. District organizations and management were based upon the ratepayers, and adherence to a form of popular democracy was common.

The key test of a special district as a separate unit of government is not whether its governing body is appointed or elected or even ex

104. MUNICIPAL CORPORATION ACT OF 1835, 5 & 6 Will. IV, c. 76; LELY, *THE LAW OF MUNICIPAL CORPORATIONS*, xii (1882).

105. Williams and Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177 (1937). Massachusetts revised its Constitution in 1820 providing for city government for the first time. Virtually every other state enacted constitutional revisions during the following years, particular attention being given to limitations on taxing and borrowing. See note 111 *infra*.

106. Foley, *Revenue Financing of Public Enterprises*, 35 MICH. L. REV. 1 (1936); Dearing, *Turnpike Authorities in the United States*, 26 LAW & CONTEMP. PROB. 741 (1961).

107. Williams and Nehemkis, *supra* note 105 at 187; Porter, *A Plague of Special Districts*, 22 NAT. MUNIC. REV. 545 (1933).

officio The basic determinant is whether the district possesses substantial freedom from other governments in its fiscal and administrative operations.¹⁰⁸

Whenever the services became technically more complex, as in furnishing water or electricity, the districts tended to be less and less oriented to their geographical boundaries or to their residents and more to the subscribers who paid for the service provided. Soon the necessary income of the district was typically derived from monthly payments for services rendered rather than from annual taxes.¹⁰⁹

A middle course still commonly employed, as in the case of water district finance, is to assess the landowners of the district and to use the resulting tax revenue to pay off the bonds which provided the capital construction. Charges paid by the consumers for service defrays the operating expenses.

In some situations, such as the operation of toll bridges or tunnels, there is no geographical area or population which affords any logical basis for organizing or selecting the management of a special purpose district. This problem is met in the act of incorporation by providing for the composition of the corporation, either by appointing designated officials or by giving the power of appointment to a suitable executive, typically the governor or mayor.

THE REVENUE BOND

Concurrent with the growth of the special district device, the principle of the special fund was developed to finance the construction of the plants and accouterments which the growing demand for public services required. Briefly stated, the special fund doctrine affirms that:

. . . obligations payable solely from a special fund derived from the revenues of the enterprise for the acquisition or improvement of which such obligations are issued do not constitute bonds or debts within the meaning of constitutional limitations or restrictions of bonds or incurring of indebtedness.¹¹⁰

As a result of an earlier period of reform, most state constitutions contained provisions limiting municipal borrowing to a stated percentage

108. BOLLENS, *SPECIAL DISTRICT GOVERNMENTS* 35 (1957).

109. Fordham, *Revenue Bond Sanctions*, 42 COLUM. L. REV. 401 (1942).

110. Foley, *supra* note 106 at 7.

of assessed valuation.¹¹¹ As a child of necessity, the special fund theory and its twin, the revenue bond, were utilized to escape those constitutional and statutory limitations. When their use by the municipality to finance capital outlays for internal improvements was judicially attacked, it was a simple matter to transfer the project to a special district and to pledge its revenues from the services to be rendered instead of the municipality's committing revenues to be derived from taxation. Most state courts had found no difficulty in ruling that the debts of the special district were not the debts of the municipality,¹¹² but special funds within the municipality were. The doubts cast on the special fund system precipitated a plethora of legislation creating urban and rural improvement authorities.¹¹³

The triumph of the special district as a borrowing agency was not achieved without resistance. Many constitutional lawyers at the time and students of the problem today still doubt the validity of allowing a city to do indirectly what it cannot legally do directly. The objection is more than a doctrinal one, having practical application in assessing the true borrowing power of a community. Without attempting to collect all the arguments, the following quotation is representative of the local responsibility school of thought:

The revolution accomplished by the special fund doctrine, the full flower of which is the revenue bond, has thus completed the annihilation of effective control by debt limits. It is widely thought that revenue financing provides services, at no cost to the taxpayer, which directly and accurately relate benefits to burdens, and which for the first time—by solid emphasis on management—apply to government the criteria and utilize the powerful economic motivations that work well in private enterprise.

But the successful by-passing of debt limits, though freeing government units to seek needed private capital, obscures the debt status of the issuing municipality to the point of almost complete confusion.¹¹⁴

In spite of all objections, by the end of the nineteenth century, all

111. Gerwig, *Public Authorities in the United States*, 26 LAW & CONTEMP. PROB. 596 (1961); Williams and Nehemkis, *supra* note 105.

112. *Kennebec Water District v. City of Waterville*, 96 Me. 234 (1902); *People v. Salomon*, 51 Ill. 37 (1869).

113. Foley, *supra* note 106 at 9.

114. Virtue, *The Public Use of Private Capital: A Discussion Relating to Municipal Bond Financing*, 35 VA. L. REV. 293 (1949); Morris, *Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234 (1958).

these techniques and an infinite variety of combinations and mutations as well, had been worked out so that the necessary intellectual and legal elements were available with which to meet the challenge of the new era. Actually, a demonstration case was initiated in Maine¹¹⁵ before the century closed. The newly created Kennebec Water District utilized the principles of the special purpose district (instead of the municipality), employing use charges for services rendered (instead of taxation of property) to secure the payment of bonds which were sold to the public in order to finance the purchase or construction of plant and equipment. The last particular, the use of revenue bond financing,¹¹⁶ was destined to become the distinguishing mark of the public authority; but who among its sponsors in 1899 could foresee the dominant role this device was to play in the expansion of municipal facilities and in the explosion of the municipal bond market during the decades following World War II?

THE TWENTIETH CENTURY

With the arrival of the new century, all the elements which contribute to the make-up of the public authority were at hand. Only two things more were needed—a proper name and recognition. For the name, an English precedent was followed. For recognition, nothing contributed more than the success and prominence of the first and biggest authority of them all, the Port of New York Authority. Writing about the experiences of New York in an exhaustive report to the State Legislature in 1953, the reporter for the Commission declared:

The public authority is one of the most significant developments in modern governmental administration. It has captured the imagination of the public and has gained substantial support in the investing community. Over the last fifty years the public authority device has grown into a significant element of government, and its area of operation has spread into a number of divergent fields. So great has been its growth

115. *Kennebec Water District v. City of Waterville*, 96 Me. 234, 52 A. 774 (1902); *Maine Laws* (1899), c. 200. The water district included all or parts of several municipalities; had power of eminent domain; it could charge for services, but could not levy taxes; could issue bonds which were declared to be obligations of the district and not of the towns.

116. Fordham, *Revenue Bond Sanctions*, 42 COLUM. L. REV. 396 (1942). "The term 'revenue bond' is employed in this discussion as a matter of convenience to identify more or less long-term obligations of public corporations or agencies . . . which are payable solely from the revenues of particular properties or services as distinguished from the familiar tax-supported general obligations of local government units."

that the public authority requires recognition as a significant vehicle for public administration.¹¹⁷

As previously observed, the United Kingdom had experimented with many forms of special purpose districts to cope with internal improvement problems. The management of seaports with their complex facilities has been among the oldest and most difficult municipal administrative problems. The medieval city-states of Genoa and Venice have been credited with having developed the earliest public authorities known in order to administer maritime law in connection with the handling of ships and cargo in the harbors.¹¹⁸ As early as 1857, a district was organized to resolve the problems created by the rivalries between Liverpool and Birkenhead;¹¹⁹ a similar arrangement was set up for Glasgow under the Trustees of the Clyde Navigation.¹²⁰ Although the organization of these agencies was more like that of a trust than of a corporation, it made no significant difference in the operations. The success of these experiments led to the adoption of a similar special organization for the Port of London in 1908.¹²¹

In British usage, it had long been customary (as it still is) to call all local government organizations, cities, boroughs, towns, agencies, districts and their officials "authorities."¹²² It is a generic term and applies to a wide variety of situations; it has long been similarly used in America also, although less commonly. For example, shortly after the Civil War, the Supreme Court of Illinois in upholding the creation of a special purpose district with a single function and the power of taxation, went on to say:

There is no prohibition . . . against the creation by the legislature, of every conceivable description of corporate authority, and when created to endow them with all the faculties and attributes of other pre-existing corporate authorities. Thus . . . there is nothing . . . to prevent the legislature from placing the police department of Chicago, or its fire

117. NEW YORK TEMPORARY STATE COMM'N ON THE COORDINATION OF STATE ACTIVITIES, PUBLIC AUTHORITIES UNDER NEW YORK STATE 3 (1953).

118. FAIR, PORT ADMINISTRATION IN THE UNITED STATES 14 (1954).

119. MERSEY DOCKS AND HARBOUR BOARD ACT, 1857.

120. Fair, *op. cit. supra* note 118 at 15.

121. PORT OF LONDON ACT, 1908, Sect. 1; see now PORT OF LONDON (CONSOLIDATION) ACT, 1920, Sect. 6.

122. *Government Control over Local Authorities*, 123 JUST. P.S. LOC. GOVT. R. 73 (1959).

department, or its water works, under the control of an authority
¹²³

In all probability, the use of the word "authority" in the Act of Parliament which established the Port of London Authority was virtually equivalent to giving the agency no name at all. Its selection is said to have been proposed by Lloyd George because of the many tasks which the act gave the new organization "authority" to do.¹²⁴

That which had been a generic term in the London of 1908, nevertheless, became a word of art in the New York of 1921, when the joint resolutions of two states and the concurrence of the Congress created the Port of New York Authority.¹²⁵ Although drawing heavily on the English experience, the Port of New York incorporated many distinctive features. In place of a governing board chosen by wharfingers, rivercraft operators, the Admiralty, the London County Council, and others;¹²⁶ the governing board of the Port of New York is appointed half by the Governor of New Jersey and half by the Governor of New York. Instead of financing by Act of Parliament and dues from members, the distinctive feature of the financing of the New York Authority was the issuance of its own bonds, guaranteed by the pledge of its revenues to be collected from tolls charged the users of its services. Thus by a series of historical accidents, the name "Authority" was attached to a form of public corporation which has now been recognized as a separate classification based primarily on the particulars of its financial structure.¹²⁷

The revival of public corporations under the pressures of World War I and the New Deal¹²⁸ and the proliferation of the public authority as an agency for international,¹²⁹ interstate,¹³⁰ state, and municipal man-

123. *People v. Salomon*, 51 Ill. 37, 59 (1869).

124. Edelstein, *The Authority Plan—Tool of Modern Government*, 28 CORNELL L.Q. 182 (1943).

125. N.Y. LAWS 1921, c. 203; N.J. LAWS 1921, c. 152; consent of Congress to the compact, 42 STAT. 174 (1921).

126. GRIFFITH AND STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 283 (1963).

127. THE COUNCIL OF STATE GOVERNMENTS, *PUBLIC AUTHORITIES IN THE STATES* 3 (1953); Edelstein, *supra* note 124 at 177; and Fair, *Port Authorities in the United States*, 26 LAW AND CONTEMP. PROB. 703 (1961).

128. Wehler, *Government Controlled Business Corporations*, 10 TUL. L. REV. 98 (1935). "There . . . have been attained, by the device of the American government-controlled business corporation, an achievement in swift statecraft and creative force seldom excelled in the history of American political institutions."

129. Niagara Falls and Buffalo-Fort Erie Bridges, New York and Canada; Hahn;

agement of specialized services in the decades following World War II are outside present consideration. It is sufficient to note that it has become a numerous clan with every indication that the trend will continue.¹³¹

. . . The evolution of the Public Authority as an instrument of government is not yet complete; perhaps it is even too early to predict with confidence what its ultimate form will be. Yet the examples of the past thirty years attest the hasty pace with which we are experimenting with Public Authorities as replacements for organized political subdivisions of the states in the performance of many functions.¹³²

RECAPITULATION

How new is the public authority? Clearly, the foregoing survey does not attempt to cover the long and eventful history of the corporation, of which story the evolution of the public authority is only a part. What was attempted and what hopefully has been demonstrated is that virtually every age of human experience has made its contribution to the institution which now collects our highway tolls, runs our airports, builds college dormitories, and administers a host of other services, literally too many to enumerate.

In the ancient family and tribe, we discern a concept of corporateness which built their cities and organized their worship. The Romans developed, refined, and utilized the corporate principle as a basis for organizing trade, industry, and provincial municipalities. The canonists and the civilians made intellectual and practical contributions to the evolving corporation which the freemen of the boroughs and the guilds forged into functioning realities of town and craft.

Inspired by the examples of the renaissance Italian bankers and traders and goaded by Spanish and Portuguese rivalry, the Elizabethan merchant adventurers evolved the joint-stock company to perform undertakings beyond the resources of any single individual and demonstrated the power of pooled capital. The age of exploration led to the age of en-

International and Supranational Public Authorities, 26 LAW AND CONTEMP. PROB. 638 (1961).

130. The Lake Champlain Bridge, New York and Vermont; Leach, *Interstate Authorities in the United States*, 26 LAW AND CONTEMP. PROB. 666 (1961).

131. SMITH, PUBLIC AUTHORITIES, SPECIAL DISTRICTS AND LOCAL GOVERNMENT 2 (1964); Compare also the Appendices with Foley's article at p. 30 listing (A) revenue bond legislation, (B) authority legislation, and (C) cases construing revenue obligations.

132. Netherton, *Area Development Authorities: A New Form of Government by Proclamation*, 8 VAND. L. REV. 683 (1955).

lightenment, and the joint stock-company with its unequal controls yielded under government pressure to the state-chartered corporation and its concepts of one share, one vote, to which was eventually added the principle of limited liability.

The industrial revolution received this heritage and developed it in numerous ways. It worked out new relationships between government and business and new ways to finance both. It demonstrated the utility of the corporate device for private profit and for public regulation for works of charity and institutions of religion. Before the nineteenth century ended, the era of the corporate revolution was in full swing, and the "big government" of World War I and the New Deal used the experience of "big business" to fashion its own particular corporate instrument.

Drawing upon the rich examples of the past, society of today has created its own corporate form peculiarly suited to present needs and has called it a "public authority." Seen in the context of its many forerunners, little about it is new, except the recent recognition of the wide variety of uses to which it may contribute. Even its name is old, being new only in the special sense which it now symbolizes. As Fustel de Coulanges wrote a century ago:

The past never completely dies for man. Man may forget it, but he always preserves it within him. For, take him at any epoch, and he is the product, the epitome, of all the earlier epochs. Let him look at his own soul, and he can find and distinguish these different epochs by what each of them has left within him.¹³³

What is true of man is equally true of man's institutions. Of the better known social institutions, none has a longer history or greater vitality than the corporation, whether self-initiated or state chartered. And, in the family of corporations, none is more demanding of wider attention than the rambunctious adolescent, the "new" public authority.

133. FUSTEL DE COULANGES, *THE ANCIENT CITY* 14 (Small transl. 1873).