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THE CONSTITUTIONAL VULNERABILITY OF AMERICAN LOCAL GOVERNMENT: THE POLITICS OF CITY STATUS IN AMERICAN LAW

JOAN C. WILLIAMS*

Unlike federal and state governments, American cities have no set place in the American constitutional structure. Consequently, courts and commentators have been able to define the scope of city sovereignty without the constitutional constraints that limit the scope of federal and state power. In this Article, Professor Joan Williams shows that courts and commentators have defined city status by incorporating their individual political beliefs into municipal law. Focusing primarily on the theories of Thomas M. Cooley, John F. Dillon, Justice William Brennan and the Burger Court's conservative majority, the Article shows how each theory resulted from its author's fears of excessive governmental power. The Article also shows that Gerald Frug's influential article The City as a Legal Concept can be viewed as yet another example of how commentators have used the issue of city status as a proxy for their political views. Professor Williams concludes that questions of city authority and liability should be determined by reference to cities' resources and responsibilities, rather than by agendas concerning governmental power in general.

Recent Supreme Court cases have suggested that cities and other local units have some measure of local sovereignty. These cases appear to contradict the traditional definition of cities as mere subdivisions of the state, with no inherent sovereignty.

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1. Cities, towns and other general-purpose local government units have the same legal status as do counties and the wide variety of water, fire, school and other special-purpose units called "special districts." No single term is available to describe all local government units with identical legal status; I have used "municipalities" and "localities" interchangeably to do so. See infra note 138. This terminological maneuver is not meant to imply that the practice of lumping together these disparate entities into one legal category is logical. It isn't. See infra note 366 and accompanying text.


3. C. ANTEIEAU, 1 MUNICIPAL CORPORATION LAW § 1.01 (1985).
The traditional version of municipal law was crystallized in the late nineteenth century by John F. Dillon. Dillon, an early corporate lawyer, had an abiding faith in the market system and a consequent concern to limit the scope of governmental power, both notions central to modern-day conservatism. Yet the conservative Burger Court majority has reached a conclusion opposite from Dillon’s on the basic principle of city power. Whereas Dillon strove to limit city power by arguing that cities had no inherent sovereignty, the Burger Court majority has exalted the power of localities through the principle of local government sovereignty. The current Supreme Court Justice whose opinions stress cities’ lack of inherent sovereignty is Justice William Brennan, who would be as uncomfortable with the political philosophy of John Dillon as he is with that of Justices Burger and Rehnquist.

This Article analyzes this confusing pattern. In doing so, it offers several insights into contemporary constitutional law. It shows first that the Supreme Court is proceeding on two inconsistent theories in recent cases in which localities play a central role. One set of opinions—Justice Brennan’s opinions expanding municipal liability in section 1983, antitrust and inverse condemnation suits—are premised on the idea that cities lack inherent sovereignty. In striking contrast, decisions of the conservative majority, including San Antonio v. Rodriguez and Milliken v. Bradley, often appear to assume that municipalities have an inviolable right to local autonomy.

4. See J. DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872). Dillon’s treatise was the first major treatise on American municipal law, although a previous treatise of municipal law had been published in 1864. POMEROY, AN INTRODUCTION TO MUNICIPAL LAW (1864).

5. See infra notes 78-95 and accompanying text.

6. See infra notes 101-117 and accompanying text.

7. See infra notes 210-15 and accompanying text.


Certain decisions of both the conservative majority and Justice Brennan contradict established tenets of constitutional and municipal law. Justice Brennan's opinions advocating an inverse condemnation remedy for unconstitutionally restrictive zoning regulations conflict with the principle of Supreme Court deference to regulatory legislation. The decisions of the conservative majority which cut back on the scope of the fourteenth amendment in deference to local autonomy also conflict with basic constitutional principles. Given that the fourteenth amendment allows courts to limit state sovereignty in order to vindicate federal constitutional rights, why should the sovereignty of localities, which are mere subdivisions of states, limit the reach of the fourteenth amendment when states' sovereignty cannot?

These critiques of Supreme Court case law may prove useful in litigation to civil rights advocates and proponents of strong land use controls. The Article's main goal, however, is to examine the political and ideological forces that have produced these sharp internal contradictions within the law. These forces are examined through an in-depth analysis of the four basic formulations of city status that have emerged since 1870: those of Thomas M. Cooley and John F. Dillon in the nineteenth century, and those of Justice Brennan and the Burger Court majority today. When these formulations are placed in their historical contexts, a pattern emerges: each author's theory of city status is closely linked with his desire to rein in excessive governmental power (although Cooley, Dillon, Brennan and the Burger Court majority are motivated by quite different nightmares of government run amok).

This Article's basic thesis concerning the constitutional vulnerability of cities begins from the fact that cities—unlike the states or federal government—have no set place in the American constitutional structure. Consequently, courts and commentators have been able to redefine city status without the textual constraints that limit reformulations of the status of the state and federal governments. The Article shows

13. See infra notes 283-84 and accompanying text.
14. See infra notes 139-40 and accompanying text.
15. See infra notes 35-39 and accompanying text.
16. See infra notes 40-43 and accompanying text.
17. See infra notes 216-21 and accompanying text.
18. See infra notes 126-27, 166-68 and accompanying text.
19. See infra notes 210-15 and accompanying text (Brennan); notes 78-98 and accompanying text (Dillon); notes 314-29 and accompanying text (Cooley); notes 190-95 and accompanying text (Burger Court majority).
21. The claim that textual provisions in the Constitution constrain judges' range of choice is, of course, a controversial one. This is not the place for an extended jurisprudential discussion. For now, I simply quote Arthur Leff: "I do not deny that we have to muddle. I just believe that not all muddles are identical in shape." Leff, Law and Technology: On Shoring Up a
that judges and commentators have responded by incorporating their attitudes toward governmental power (inseparable from their political beliefs) into municipal law. Thus, the history of cities' legal status is a startlingly pure example of politics as black letter law.\textsuperscript{22}

Doctrinal contradictions are one result. A far more important result is that crucial questions about cities—what should be the scope of their powers, for example, or their relationship to the state—have not been considered on their merits.\textsuperscript{23} This tradition should not continue in an era when seventy percent of America's population lives in cities,\textsuperscript{24} and forty percent of all government funds are spent at a local level.\textsuperscript{25}

Section I of this Article spells out Dillon's theory of city status and the Burger Court's contradictory principle of local sovereignty, and shows how both stem from their apprehensions about government efforts to redistribute wealth.\textsuperscript{26} Section II discusses Justice Brennan's recent municipal liability decisions and links them with liberals' fear of government encroachment on individual rights.\textsuperscript{27} Section III links Thomas Cooley's theory of inherent local government sovereignty with his Jacksonian fears of special interests and activist government.\textsuperscript{28} The Conclusion discusses the current impact of the constitutional vulnera-


23. One could say such questions were considered on their merits when states adopted home rule provisions. These provisions were originated by the Progressives and in some sense were designed to enact Cooley's theory, see infra note 200 and text accompanying notes 35-39. They established local control through broad and permanent delegations of state authority to localities through constitutional provisions or statutes. See S. SATO & A. VAN ALSTYNE, \textit{STATE AND LOCAL GOVERNMENT LAW} 135-36, 147-48, 155-56 (1971). However, commentators generally agree that courts have read home rule provisions much more narrowly than their drafters intended. See infra note 200. For a notable recent example, see Community Communications v. Boulder, 455 U.S. 40, 54-56 (1982) (Justice Brennan concludes that Colorado's home rule statute does not give Boulder the right to regulate cable television in an opinion that gives home rule statutes a very narrow reading). To the extent that the home rule provisions do represent a consideration on their merits of the various issues concerning the desirable scope of city powers and their relationship to the state, a strong claim can be made that the conclusions of this inquiry have been ignored (or, more accurately, distorted) by judges, who have persisted in using city status as a proxy for their diverse but intense apprehensions about excessive governmental power.


26. See infra notes 40-195 and accompanying text.

27. See infra notes 216-84 and accompanying text.

28. See infra notes 289-349 and accompanying text.
bility of cities. It also discusses Gerald Frug’s influential article *The City as a Legal Concept*. Frug’s article constitutes a recent and substantial contribution to the literature on city status. Writing as part of the critical legal studies movement, Frug linked the powerlessness of American cities with the need of “Liberalism” to destroy all intermediate institutions between the state and the individual. Although Frug’s analysis is different in many respects from the other major formulations of city status discussed in this Article, it is similar in one major way. Frug, like Cooley, Dillon, Brennan and the Burger Court majority uses the issue of city status as a proxy for his fears and aspirations about governmental power.

I. LOCALITIES’ LEGAL STATUS AND CONSERVATIVES’ FORUM-SHIFTING ARGUMENTS

This Section introduces the concept of political forum-shifting, which will play a central role in this article. The term “forum-shifting” has traditionally been used in civil procedure to refer to parties’ attempts to shift cases among different courts. More recently, the terms “forum-shifting” and “forum allocation” have been used in articles documenting Burger Court decisions that shift plaintiffs from federal to state courts. I will refer to these types of forum-shifting as “judicial forum-shifting.”

American lawyers have used a different type of forum-shifting argument in cases defining city status. Instead of shifting power among different courts, “political forum-shifting” shifts power among different levels of government. Three of the four formulations of city status in American law have involved political forum-shifting arguments. In each instance, the authors seek to shift power away from the level of government—local, state or federal—they fear most, to a different level.
of government they find less threatening. This section examines both Dillon’s formulation of city status and the contradictory Burger Court local sovereignty principle, and examines how each functions as a political forum-shifting argument. Section III shows that Cooley’s theory also functioned as a political forum-shifting argument. 33

The basic framework of municipal law was established in the second half of the nineteenth century. Until the 1850’s, American localities’ legal status was highly uncertain. 34 By 1870, two conflicting formulations had emerged. Thomas M. Cooley, whose 1868 Treatise on Constitutional Limitations was the most influential legal treatise of the late nineteenth century, 35 developed a theory premised on the principle of inherent local government sovereignty. 36 According to Cooley, the sovereign people had delegated only part of their sovereignty to the states. They preserved the remainder for themselves in written and unwritten constitutional limitations on governmental actions. 38 One important limitation was the people’s right to local self-government. 39

John F. Dillon offered an analysis that firmly rejected Cooley’s theory of an inherent right to local self-government. In his 1872 Treatise on Municipal Corporations, 40 Dillon asserted that cities are “crea-

33. See infra notes 285-349 and accompanying text.
34. See H. Hartog, Public Property and Private Power 5-7 (1983); Williams, supra note 22; Williams, Book Review, The Development of the Public/Private Distinction in American Law, 64 Tex. L. Rev. 225 (1985) [hereinafter cited as Development of the Public/Private Distinction] (American cities’ current legal status was not firmly established until circa 1850).
37. Cooley developed his theory both in his treatise, see T. COOLEY, supra note 35, at 34, 118-19, 189-90, and in Michigan Supreme Court cases decided shortly after the treatise was published. The People ex rel. LeRoy v. Hurlbut, 24 Mich. 44 (1871), was widely heralded as the leading case for the proposition that localities had inherent sovereignty. See Gere, Dillon’s Rule and the Cooley Doctrine, 8 J. Urb. Hist. 271 (1982).
A substantial literature exists on Cooley’s theory, written primarily as an off-shoot of the Progressives’ efforts to increase city powers, which led ultimately to the home rule movement. See, e.g., Eaton, The Right to Local Self-Government (pts. I-V), 13 Harv. L. Rev. 441 (1900), 13 Harv. L. Rev. 570 (1900), 13 Harv. L. Rev. 638 (1900), 14 Harv. L. Rev. 19 (1900), 14 Harv. L. Rev. 116 (1900) (five-part series on the historical background of Cooley’s theory); H. McBAin, MUNICIPAL HOME RULE (1916); F. Goodnow, MUNICIPAL HOME RULE (1895). For a very informative recent treatment, see A. SYED, THE POLITICAL THEORY OF LOCAL GOVERNMENT 53-65 (1966). Syed links Cooley’s theory with a tradition in American political thought that goes back to Alexis de Toqueville and Thomas Jefferson. Id. at 21-52.
38. A. SYED, supra note 37, at 54-56.
39. Cooley’s theories will be discussed in greater length in Section III. See infra notes 332-49 and accompanying text.
40. J. DILLON, supra note 4. Dillon’s treatise was as influential in municipal law as Cooley’s Constitutional Limitations was in constitutional law. It went through four editions before 1900, growing from the original one volume to five volumes.
tures of the state," with only those powers given by state statutes, which—pursuant to what came to be called "Dillon's Rule"—are strictly construed. Implicit in Dillon's analysis was a constitutional theory of cities' legal status quite different from Cooley's. In Dillon's view, localities had no inherent sovereignty because the sovereign people delegated their entire sovereignty to the states. Thus, municipalities' authority to act was derived exclusively from their status as agents of state government.

The crucial difference between Dillon and Cooley was Cooley's insistence that the people had intended a certain core of local sovereignty to remain inviolate. As courts and legislatures interpreted Dillon's view, states' powers over cities were broad, and perhaps absolute.

41. Id. Dillon does not use the terminology "creature of the state" but his assertions reflect this idea: "All corporations, public and private, exist and can exist only by virtue of express legislative enactment, creating, or authorizing the creating, of the corporate body," id. at 52; "municipal corporations are created by legislative act . . .". Id. at 95. The phrase "creature of the state" appears in the modern treatises on municipal corporation law. See, e.g., E. McQuillin, The Law of Municipal Corporations 143 (3rd ed. 1971).

42. J. Dillon, supra note 4 at 101-02, 103 n.1.

43. The people, of course, reserved some of their sovereignty through constitutional limitations on their government. For our purposes, Dillon's crucial claim was that the people did not delegate any part of their sovereignty to localities. This implicit constitutional analysis is never directly stated by Dillon: like a good advocate, he treats his most basic premise as self-evident.

44. The common notion is that Dillon advocated the doctrine that the state had absolute power over cities. Dillon did take this position in his capacity as judge as early as 1868 in City of Clinton v. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868). The case involved a railroad company authorized by the Iowa legislature to construct a two-mile connector railroad line. The railroad laid the line out partly along a city street, with no intention of paying compensation to the city. The court, per Dillon, held for the railroad in a widely quoted declaration:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation . . . the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.

Id. at 475.

This analysis was far from settled in contemporary case law, see Williams, City Powerlessness (Jan. 31, 1984) (unpublished paper given to joint meeting of Columbia University City Seminar and The Society for the Study of Early American Culture [hereinafter cited as City Powerlessness]). Dillon himself backed away from this absolutist position two years later in his treatise, noting "the adjudged cases present some contrariety of opinion respecting the scope of legislative authority over municipal corporations." J. Dillon, supra note 4, at 75.


The more common situation was when a legislature took over only a limited number of basic city functions, usually because the legislature was Republican and the city was controlled by Democrats. Control over patronage was also very often an issue, as it was in the situation that resulted in the famous early case of People ex. rel. Fernando Wood v. Draper, 15 N.Y. 352 (1857). The events leading up to Draper were typical: the Republican legislature abolished local police organizations in New York City and replaced them with a Metropolitan Police District controlled
though Cooley's theory provided potential limits on states' power over cities, it had been firmly rejected by American courts by 1900. Dillon's theory became accepted wisdom.

Cooley's theory is discussed in Section III. The remainder of this Section analyzes why conservatives a century apart—Dillon and the Burger Court majority—generated contradictory formulations of city status. The discussion will show that both formulations are by-products of political forum-shifting arguments designed to set sharp limits on governmental power. Dillon's principle that cities are mere creatures of the states will be analyzed first. The discussion then turns to the Burger Court's local sovereignty principle.

A. John Forrest Dillon: "Be Brave, Loyal and Successful!"

John F. Dillon has often been interpreted as an academic ally of the robber barons in the Gilded Age. This interpretation of Dillon is close to the mark. Yet legal scholars, in interpreting Dillon basically as a treatise writer, have overlooked the significance of the fact that Dillon was one of the early corporate lawyers. Dillon's career, examined in this light, takes on a new coherence. Throughout his life, Dillon sought to identify himself with the ruling elite by providing both expertise and a legal ideology that served its interests. This Section shows that Dillon's theory of city status and his "public purpose" doctrine are best analyzed as examples of laissez-faire constitutionalism, the legal ideology he helped create. Moreover, it shows that both these doctrines and the ideology behind them stemmed from Dillon's desire to limit the frenzied issuance of bonds by municipalities in the post-Civil War era.

by the Republican governor and senate. Draper was a rare case where the courts struck down the "ripper" legislation, see Id. at 52-56; J. Adams, Dictionary of American History 487 (1940); F. Goodnow, supra note 37, at 21-27; E. Griffith, A History of American City Government, The Conspicuous Failure, 1870-1900 212-13 (1974). See also infra note 348.

46. Formation of Traditions, supra note 45, at 39-41; H. McBain, supra note 37, at 12-17.

47. Dillon's theory remains accepted wisdom today, not only in municipal law, see E. McQuillin, supra note 41, at 8, but in American law in general. See Parker v. Brown, 317 U.S. 341, 351 (1963) (referring to a dual system of government, i.e., only the federal and state governments have inherent sovereignty).


52. See infra notes 74-94 and accompanying text.
Dillon was admitted to the bar in 1852 at the age of twenty-one and was elected town prosecutor the same year. From then on his career never faltered. A life-long Republican, he was elected to the local court at the age of twenty-seven, and to the Iowa Supreme Court soon thereafter. While on the Iowa court he gained national stature; President Grant appointed him to the Eighth Circuit in 1869.53

In 1879, in a move that bespeaks his ultimate ambition, Dillon left Iowa for New York City.54 Ostensibly he went to New York to accept an appointment to the faculty of Columbia Law School. Before Dillon left Iowa, however, he had been appointed General Solicitor of the Union Central Railroad Company, one of the largest railroads in the country.55 He retained Union Pacific as a client while teaching at Columbia, and rapidly added others. Within three years, "the calls for his services as a lawyer were so important that he concluded to devote his entire time to the practice of law," in the words of one contemporary chronicler.56 His clients eventually included Western Union, four ma-


Evidence of Dillon's ambition abounds. The story of how he became a lawyer is a good example. By the age of 19 he was a rising young doctor and the secretary of a local medical society. [I]f it had not been for two seemingly minor facts Doctor Dillon might have continued to practice medicine all his life and the bench and bar might have never known his judicial and law work. There were then not only few railroads, but few good wagon roads. So a doctor, to attend his patients, must needs ride horseback over muddy or sandy roads unfit for carriages. By some accident Dillon had a slight hernia which made it unsafe or unwise for him to ride horseback. Nothing daunted by this slight misfortune (which he often mentioned among his intimate friends as the reason for giving up the practice of medicine) Doctor Dillon resolved to study law.

RECOLLECTIONS AND SKETCHES supra, at 77. Dillon, who supported himself during this period by running a drug store, described his legal education in 1907.

[The next evening when young lawyer Howe and myself were taking our regular walk up and down the banks of the Des Moines river I turned to him and said, "Howe, I have made a great mistake. I cannot practice medicine in this country without being able to ride on horseback which I am utterly unable to do. I might as well admit the mistake and turn my mind to something else. I shall read law. Tell me, what is the first book that a student of the law requires?"

He answered "Blackstone's Commentaries. Have you got them?" He replied, "Yes, I have them and the Iowa Blue book of laws and those are the only books I have." He was kind enough to loan me his Blackstone and I began at once to read law in my little dilapidated office.

Id. at 188.

54. New York City was the undisputed center of corporate practice during this period. See Hobson, Symbol of the New Profession: Emergence of the Large Law Firm 1870-1915, in G. GAWALT, supra note 51, at 10.

55. 1 NAT. CYCLO., supra note 53, at 268.

56. Hubbard, supra note 53, at 78.
Dillon designed his career to join the corporate elite, not by becoming an industrialist himself, but by making himself indispensable to those who were. His generation invented the corporate lawyer. Before the Civil War, most lawyers for large corporations were company employees. Dillon carefully maintained his independence from his clients and, as a contemporary noted with some surprise, "in spite of his wealthy corporation practice, his services were never to be had in aid of sharp or questionable practices." Although he allied himself with the ruling elite, he viewed his role as one of consolidating their power by making them respectable, or, as he would no doubt have put it, holding them to high standards.

Dillon’s interest in municipal corporations, while it strikes a modern audience as incongruous with his ultimate ambitions, was a logical step along his chosen path. Municipal corporations were important during Dillon’s lifetime because municipal bonding was to nineteenth century corporate lawyers what mergers and acquisitions work is to corporate lawyers today. During the nineteenth century, a major focus of capitalists’ efforts was to provide America with a modern transportation system. Between 1820 and 1880, a transportation revolution was accomplished, as entrepreneurs built first canals and then railroads. After the Civil War, building proceeded with spectacular speed, partic-

57. "[Dillon’s] practice was lucrative, he was a shrewd businessman, and left a substantial estate." Id. at 79.
58. Like many modern corporate lawyers, Dillon could assess the business as well as the legal merits of his clients’ business dealings. See infra note 291.
59. Hubbard, supra note 53, at 79:
No man could come to Judge Dillon to get him to do things contrary to the right. Men consulted him to learn the truth of the matter and the law, and never to persuade him to try to do crooked things for them . . . He never, so far as I knew, speculated to make money, not even if, as a lawyer, he knew facts which might have been useful in a speculation. One senses again an aura of surprise that a lawyer so closely associated with the fast financial circles of Jay Gould should be so personally upright.
60. Evidently corporate law has been a high-intensity occupation from the beginning. According to one contemporary chronicler:
It is said that during [Dillon’s] early career on the bench he devoted so much time at home to his legal work that his wife felt he did not give enough attention to social affairs, and she said to him one day, "Why do you work so hard? Don’t you think you ought to give more time to your family and friends?" The Judge’s reply was that he had a reputation to make. And years afterwards when he had achieved fame as a great judge, author and lawyer engaged in general practice his answer to the same question was, "I have a reputation to keep."
Clay, supra note 53, at 448.
ularly in the West. In 1865, there were only 3,272 miles of track west of the Mississippi; by 1890, that mileage had risen to 72,473.62

This explosive rate of building required huge amounts of capital. Consequently, much of the financial structure of the country became inextricably tied to railroad bonds. From the beginning, railroads had received financial help from the public sector.63 After the Civil War, a typical scenario emerged: an entrepreneur would come into a tiny hamlet with a proposal to construct a railroad. He would tell residents that a railroad connection would make their town into a boomtown—the next Cincinnati, or even Chicago—so that their farmland would become prime urban real estate.64 To attain the wealth of Midas, all the town had to do was to issue bonds to help finance the railroad. Many towns did and the debt of municipalities rose exponentially during the course of the century.65

Many of the railroads financed by municipal bonds were in a precarious financial position, because their financial stability was predicated on increases in population that did not occur. By the 1860's, it was obvious that bonding by municipalities would soon become the focus of a major economic and legal maelstrom. Moreover, Iowa was at the eye of the storm. In 1853, the Supreme Court of Iowa had followed near-universal precedent in upholding towns' ability to issue bonds in aid of railroads.66 Then, in 1862, the court reversed itself and held that the state constitution prohibited municipal bonding. A number of cities, including Dubuque, repudiated bonds previously issued.67 Although the United States Supreme Court eventually held Dubuque lia-

64. D. Boorstin, supra note 62, at 120-31.
65. Department of Interior, Census Office, Report on Valuation Taxation and Public Indebtedness in the United States 672-99 (1844) (detailing public debt of cities, towns, and municipalities incurred for the purpose of financing railroad construction). The exponential increase in municipal railroad aid is evidenced by sharp rise in public debt between 1838 and 1880. For instance, by 1844 towns, cities, and municipalities in Ohio had expended $18,408,000, an increase of over 13 million dollars from the 1838 level. Id. at 526, 695. See also G. Taylor, supra note 61, at 92-93 (1951) (discussing state and local aid to railroads); Heath, Public Railroad Construction and Development of Private Enterprise in the South Before 1861, in 10 Tasks of Economic History 43, 52 (1950) (stating that southern states funded over half of railroads, capitalization costs).
66. Dubuque Co. v. Dubuque & Pacific R.R. Co., 4 Greene (Iowa, 1853) (Iowa case of first impression holding that country can issue bonds in aid of railroads). Note also the dissenting opinion, per Judge Kinney, stating arguments later adopted by the majority in granting an injunction against issuance of railroad bonds.
ble for repayment of its debt, the Iowa bond repudiation sent shock waves through the American business and financial community, which feared widespread repudiation of municipal debt and disruption of national credit markets. Dillon began his Treatise on Municipal Corporations shortly after the Iowa bond repudiation crisis began. The treatise's preface suggests a direct link between municipal bonding and his interest in localities. Dillon wrote: "it has, unfortunately, become quite too common with us to confer upon our [municipal] corporations extraordinary powers, such as the authority to aid in the construction of railways, or other undertakings, which are better left to private capital . . ."

According to one knowledgeable observer "Judge Dillon knew everything about municipal bonds." Dillon's analysis of the bonding crisis, and the solutions he advocated, were typically far-reaching. The United States Supreme Court, as concerned as Dillon about repudiations, became, in the words of one dissenting justice, "monomaniacs . . . bigots and fanatics" on the subject of bond repudiations. While the Supreme Court fixated on holding municipalities to every worthless issue, Dillon took a different approach. Dillon formulated two major doctrines designed to limit the power of municipalities. One, the public purpose doctrine, eliminated altogether the ability of towns to issue bonds for railroads or other "private" purposes. The second was even more far-reaching. Dillon's Rule, by making cities subservient to the state, sharply limited city power to undertake not only bonding, but any activity. Both doctrines functioned in a way characteristic of the ideology of which they were a part. In a sense, Dillon's ultimate solution to the bonding crisis was to participate in the creation of a new legal ideology that sharply limited governmental power over the economy.

68. Id. at 935-40. Fairman criticizes the Supreme Court's decision in the landmark case of Gelpcke v. Dubuque, 1 Wall. 175 (1864), in which the Supreme Court overruled a state supreme court's interpretation of its state constitution.
69. See H. Hyman, supra note 49, at 272-33, 376-77.
70. The crisis began in 1862, with State of Iowa ex rel. Burlington & Missouri R.R. v. County of Wapello, 13 Iowa 388 (1862) (holding that the Iowa constitution precluded issuance of bonds). Dillon's treatise took him six years to complete and was first published in 1872. See Stiles, supra note 53, at 118.
71. J. Dillon, supra note 4, at 102 quoted in H. Hyman, supra note 49, at 376.
72. C. Fairman, supra note 67, at 923. Fairman stresses that Dillon knew the financial as well as the legal aspect of bonding. Contemporary commentary suggests that Dillon was regarded as an absolute authority both on municipal law and on bonds. See Stiles, supra note 53, at 116-18. Dillon also wrote a book on municipal bonds: J. Dillon, The Law of Municipal Bonds (1876).
73. C. Fairman, supra note 67, at 920 (quoting Justice Samuel Miller).
An early and influential articulation of the premises of this ideology occurred in *Hanson v. Vernon*, an extremely influential bonding opinion Dillon wrote while he was Chief Justice of the Iowa Supreme Court. *Hanson* was the opinion in which Dillon broke sharply with established precedent and struck down an Iowa statute authorizing railroad bonds on the grounds that bonds could not be issued, nor any taxes raised, for "private" purposes. Prior practice left the decision concerning which purposes were public and which were private to the legislature; Dillon placed that decision clearly with the courts.75

Dillon's opinion in *Hanson* was soon overruled, yet it is worth examining in detail both because the "public purpose" doctrine ultimately predominated in American law, and because Dillon set forth in *Hanson* the framework of laissez-faire jurisprudence which most American lawyers know as the constitutionalism of the *Lochner* Court.78

Dillon began his opinion in *Hanson* by explaining to disappointed railroadmen that his decision served their long-term interests:

Our decision . . . will no doubt disappoint many other persons. I could have wished it otherwise; and I certainly approached the . . . question (of the bonds' validity) with a disposition . . . to sustain the act . . . if it could be done without a dangerous breach in those barriers which the constitution has erected to protect private property from legislative invasion.79

Thus, Dillon characterized the bonding controversy as one involving a clash between private property and government power. This for-
mulation would have seemed foreign to many of his contemporaries. Dillon, by focusing the issue around the central metaphor of a clash between government and property, introduced the central framework of laissez-faire constitutionalism. “Is the power of the legislature so transcendent,” he asked, “and is its arm so strong, that it may put it forth and grasp every man’s property?”80 Dillon responded with what was at the time an extremely innovative doctrinal argument, that the due process clause limited the legislature’s ability to “impose the tax” (i.e., authorize the bond issue).81 Use of the fourteenth amendment to protect property, rather than civil rights, is of course a hallmark of the constitutionalism of the Lochner Court.82 Dillon’s transmutation of the bonding question into a due process issue was an early instance in which a state law was invalidated on due process grounds because it violated property rights. Dillon continued:

Of what value, indeed, would be the boasted American idea of securing private rights, and the rights of a minority (for it usually is the minority and not the majority that needs protection) by constitutional limitations on the power of the legislature, i.e. on the power of the majority, if no tribunal existed to decide when the legislature disregarded these limitations?83

This statement begins to fill in the players in Dillon’s jurisprudential universe, and shows how he links the transcendent importance of private property with the need for activist judicial review. When the ma-

80. Id. at 40. For an explicit defense of private property by Dillon, see J. Dillon, PROPERTY: ITS RIGHTS AND DUTIES IN OUR LEGAL AND SOCIAL SYSTEMS (1897) [hereinafter cited as PRIVATE PROPERTY]:

Until lately the conviction among all our people has been general and unquestioned, that these great primordial rights, including the right of private property, whether gained by one’s own toil or acquired by inheritance or will, were protected and made firm and secure by our republican system of government. Such is the established social order. But in our own day, the utility as well as the rightfulness of these fundamental principles are drawn in question by combined attacks upon them and upon the social fabric that has been built upon them. This assault upon society, as now organized, is made by bodies of men who call themselves, and are variously called, communists, socialists, anarchists, or by like designations.

Id. at 8.

81. 27 Iowa 28, 45 (1869). Dillon miscited Cooley’s Constitutional Limitations for this analysis. In fact, Cooley’s treatise did not adopt the position Dillon was defending. See Constitutional Limitations, supra note 35, at 356-59. This is the kind of miscite that led to historians’ conclusion that Cooley’s jurisprudence was laissez-faire constitutionalism of the type identified with the Lochner Court. See infra note 292.

82. For a description of Lochner era jurisprudence, see L. Tribe, American Constitutional Law 434-55 (1978). Like Tribe, I use the term “Lochner” to refer both to the Court that actually decided the Lochner case, and to subsequent courts that accepted the Lochner Court’s substantive due process analysis. Thus, it describes the Supreme Court’s constitutional jurisprudence from the turn of the twentieth century until the mid-1930’s.

83. Hanson v. Vernon, 27 Iowa 28, 42 (1869).
majority, through the legislature, threatened private property, the judiciary had the duty to enforce constitutional guarantees designed to protect the minority's constitutional rights, notably property, "since few interests take a deeper hold on man than those which relate to property." 84

Dillon's reverence for private property is hardly surprising in a man who so clearly designed his life to join the corporate elite by serving as its spokesman and attorney. But Dillon retained a degree of intellectual independence. 85 After all, as he acknowledged, many railroadmen in need of funds must have been sharply disappointed by Hanson and relieved when it was overruled. Dillon's formulation of the bonding issue shows that he served not a social class but a social vision. This vision ultimately benefited the elite far more than would mere sycophantism, for it allowed the elite to argue that its self-interest served broad social goals.

The laissez-faire premises underlying Dillon's vision were quite explicit. In Hanson he responded to the railroad's arguments that his decision would retard growth with naturalistic imagery common in contemporary economics. 86 He expressed his "skepticism in the unhealthfulness of an artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprises ..." 87 More promising in the long run than the "unnatural stimulus" of public taxation was the natural functioning of the market system. But in order for the market to work, private property had to be secure, and property would never be secure unless a sharp and rigid line was drawn between the public and private spheres. The courts' duty to guard private property rights, originally explained by the Federalists on the grounds that property was a natural right, 88 for Dillon stemmed from the requirements of laissez-faire economics.

Traditional commentators have focused on the links between laissez-faire jurisprudence and contemporary political and economic conditions. Recent revisionists, notably Duncan Kennedy, have focused on

84. Id. at 42-43.
86. C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 52-55 (1930); B. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 64-94 (1931).
87. 27 Iowa 28, 59 (1869).
88. For a fascinating brief discussion of the way American political rhetoric has been adopted by successive generations to accomplish divergent policy goals, see E. WHITE, THE AMERICAN JUDICIAL TRADITION 367-75 (1976).
how laissez-faire jurisprudence functioned as an ideology. 89 The study of jurisprudence as ideology entails an analysis of how a particular jurisprudence creates a coherent rhetorical universe that functions to make its creators' social vision seem the most (or only) logical answer to the question of how society should function.

Hanson reflects a fairly well developed version of laissez-faire constitutionalism, which Kennedy has called classical legal thought. Kennedy shows how this jurisprudence transmuted policy choices, properly left to the legislature, into "objective" legal determinations properly left to judges (many of whom, like Dillon, identified with the corporate elite).

The premise of Classicism was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor. Each institution had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere. The justification of this judicial role was the existence of a peculiar legal technique rendering the task of policing the boundaries of spheres an objective, quasi-scientific one. 90

Dillon's public purpose doctrine shows how the notion that powers are absolute within their spheres served to translate a policy choice into an "objective," quasi-scientific holding. Before the public purpose doctrine, the issue of whether towns should issue railroad bonds was hotly contested in the political arena. 91 The issue was a political one because the legislatures' judgments concerning whether the purpose of a bond or tax was suitably "public" were considered final. In part because "public" and "private" were not yet viewed as dichotomous, mutually exclusive spheres, the line between public and private was viewed as open to political debate and negotiation. 92 In this context, for a judge to invalidate a bond issue on the grounds that the current system threatened capital markets would have seemed outrageously "political." In sharp contrast, it seemed entirely proper within the context of Dillon's jurisprudence for a judge to invalidate bonds that violated the public purpose doctrine, because the line between public and private came to be viewed as an objective, quasi-scientific one. Moreover, ac-

90. Kennedy, supra note 89, at 7.
91. See generally C. FAIRMAN, supra note 67, at 918-1116.
92. See Development of the Public/Private Distinction, supra note 34, at 230-34.
According to classical jurisprudence, one of the judiciary's major roles was to enforce a sharp separation between the public and private spheres.

Dillon's formulation of city status is equally characteristic of classical legal thought. Although Dillon claimed that he was only transmitting an ancient common law tradition when he crystallized his view of city status, he in fact played an active role in establishing city powerlessness as the norm. Dillon's formulation of city status functioned rhetorically in a way similar to the public purpose doctrine. Both doctrines set up two dichotomous categories. If the government action was for a "public purpose" or was "authorized by the state," it was valid. If the challenged action was for a private purpose or was not authorized by the state, it was invalid. Courts performed the technical task of determining to which mutually exclusive category the contested action belonged.

Both doctrines served to translate a policy question about which there was little consensus—the proper scope of city power—from the realm of the legislature into a technical legal judgment suitable for a judge. For example, Dillon's public purpose doctrine translated the question of what were proper projects for a town to finance through taxation into an "objective" determination of whether a given tax had a legally valid "public purpose." Similarly, Dillon's Rule and its accompanying doctrines turned the political question of whether a city ought to be able to engage in a given activity—to wipe out cholera, for example, or to build public housing—into a technical question of whether each action had been authorized by state law.

Dillon's formulation of city status, unlike the public purpose test, was a political forum-shifting doctrine. Whereas under the public purpose test an action not authorized by the state (i.e. a tax enacted for a "private" purpose) fell outside the competency of government altogether, under Dillon's Rule the power to undertake a contested action was merely transferred from one level of government (the municipality) to a different one (the state). Dillon's Rule accomplished its purpose because it shifted power away from the level of government Dillon most feared: municipalities. Dillon's continuing apprehension about municipalities shows that the crisis over bonding played a central role in his imagination.

Yet, the importance of local governments in the late nineteenth century went beyond their role in financing railroads. In the decades

93. J. DILLON, supra note 4, at 51, 57-58.
94. See City Powerlessness, supra note 44, at 41.
95. See H. HYMAN, supra note 49, at 377 ("With Dillon's text as guide, state after state increased constitutional and derivative statutory clauses designed to limit cities' functions, debt ceilings, voting-residence details, and tax structures."); see also Gere, supra note 37, at 278.
96. See supra notes 66-83 and accompanying text.
after 1850, localities were in many ways the major governmental presence in Americans' lives. Localities spent more money than the state and federal governments combined.\textsuperscript{97} No level of government yet engaged in extensive regulation, but with the dramatic growth in city population, pressure increased for governmental protection of public health and welfare. This led to proposals to provide adequate sanitation and other services as well as pressure to regulate business practices. Most governmental services were provided at the local level, and during this era such services potentially included construction of the basic infrastructure of the modern metropolis: water and sewer systems, public transportation and city parks.\textsuperscript{98} The importance of government at the local level and the increased demand for municipal services may well have reinforced Dillon's conviction that the primary threat of excessive governmental power was presented by municipalities.

Dillon's formulation of city status was typical of later forum-shifting arguments.\textsuperscript{99} It functioned to transfer decisionmaking authority away from the level of government Dillon feared most. The power was transferred to judges who could strike down city actions, and to states, from whom Dillon had less fear of governmental abuse. As the remainder of this Article will show, Dillon's was only one of a series of formulations in which the legal status of cities was a by-product of their authors' fear of governmental power.

\textit{B. The Burger Court Majority}

"(R)ights in property are basic civil rights . . . no less than the right to speak or the right to travel."\textsuperscript{100}

\begin{flushleft}
\textsuperscript{97} Local government spent 56\% of all government expenditures in 1902; states spent 8\% and the federal government spent 36\%. H. KAUFMAN, POLITICS AND POLICIES IN STATE AND LOCAL GOVERNMENTS 21 (1963). (Note that some scholars have pointed out that the federal government implemented a broad variety of policy objectives in the 19th century through financing mechanisms, such as land grants, that did not entail direct government expenditures. See, e.g., D. ELAZAR, THE AMERICAN PARTNERSHIP 238, 312-17 (1962)).

Current percentages are as follows: the federal government spends 70\%, states spend 18\%, localities spend 12\%. (All figures are calculated before intergovernmental transfers) ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM - 1982-83 (1984) (1982 figures cited).

Localities' debt also was substantially larger in 1902 than the debt of the states and the federal governments combined: localities' debt was $1.877 billion; states' debt was $230 million; the federal government's debt was $1.178 billion. H. KAUFMAN, supra at 22.

\textsuperscript{98} See H. HYMAN, supra note 49, at 226-66 (Hyman documents the pressure for increased government activism to solve new urban problems after the Civil War); FORMATION OF TRADITIONS, supra note 45, at 65-106.

\textsuperscript{99} See infra notes 169-86, 343-49 and accompanying text.

\end{flushleft}
Dillon was quite open about his feeling that the primary threat of excessive governmental power was the threat to private property. In sharp contrast, one searches in vain for explicit articulations of the social vision of the conservative Burger Court majority. This notable silence must be interpreted within the context of the Court’s rhetorical universe, which cannot be fully understood without reference to the Warren Court.

It is an accepted tenet of the American legal establishment that the Warren Court engaged in judicial activism to achieve social goals. The Burger Court, and Justice Rehnquist in particular, has reacted against the Warren Court by claiming that the Court should return to strict construction and abandon the dangerous practice of reading its own political philosophy into the Constitution. Thus the absence of explicit statements of political tenets in Burger Court opinions is hardly surprising. To extract the Court’s philosophy one must unearth the values implicit in its decisions. A close reading of the cases shows striking parallels between what Dillon and the Rehnquist majority identify as the principal danger posed by excessive governmental power.


103. The claim that, despite Rehnquist’s protests to the contrary, Burger Court decisions are informed by the justices’ political vision, stems ultimately from tenets of legal realism widely accepted among American lawyers. For examples of cases where the conservative Burger Court majority has supported the federal government despite its ideology of opposition to federal power, see Haig v. Agee, 453 U.S. 280 (1981) (government can revoke passport of citizen who threatens to reveal names of CIA agents); Snepp v. United States, 444 U.S. 507 (1980) (government can enjoin ex-CIA agent from publishing memoirs).

Current law review articles challenging Rehnquist’s claims to be apolitical tend often to mobilize new conceptual technologies to provide added dimensions to this basic realist analysis. See, e.g., Denvir, Justice Rehnquist and Constitutional Interpretation, 34 Hast. L. Rev. 1011 (hermeneutics). For a recent, highly sophisticated version of the realist approach, see Sherry, Issue Manipulation by the Burger Court: Saving the Community from Itself, 70 Minn. L. Rev. 611 (1986). See also Kleven, The Constitutional Philosophy of Justice William H. Rehnquist, 8 Vt. L. Rev. 1 (1983) (provides a close reading of Rehnquist’s cases and concludes his approach is not consistently that of a “strict constructionist”). The traditional legal realist analysis is now most common in non-legal periodicals, see Fiss & Krauthammer, The Rehnquist Court, The New Republic (Mar. 10, 1982); Rehnquist’s and GOP Platform’s Voices in Close Harmony, The Washington Post, Sept. 2, 1980, at A-2, col. 1.
Many commentators have noted Rehnquist's and the Burger Court majority's solicitude for private property. One identified the central principle of contemporary Supreme Court jurisprudence to be "the recrudescence of libertarian thought that identifies liberty with private property." Others have drawn direct links between the Burger Court and the Supreme Court in the Lochner era. Cases cited include those that breathe new life into the contract clause, takings cases, and cases in which first amendment rights are limited in favor of property rights or their exercise is linked to control of economic assets. Less often noted, but equally significant, are cases in which the Court has upheld property qualifications in elections for a broad range of local government units.

Commentators also provide substantial evidence of the Burger Court's adherence to a philosophy of laissez-faire. Although the term laissez-faire is used primarily as an epithet today, the Burger Court's reluctance to make decisions that impede "efficiency" is readily translatable into laissez-faire terminology. Just as Dillon opposed remnants of mercantilism (such as railroad aid) because he feared impediments to the natural and desirable functioning of the market, many Burger Court cases are guided by a neoclassical "competition efficiency" para-

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105. Van Alstyne, supra note 104, at 66.

106. Id. at 73. See also Oakes, supra note 104, at 599-601, 615-16, 622; Nowak, supra note 104, at 599-616 (extended comparison of Burger Court with Lochner Court).

107. See Nowak, supra note 104, at 579-80 ("libertarian" Burger Court has found that the Bill of Rights and the fourteenth amendment do not justify judicial limitation of property rights); Dorsen & Gora, supra note 104, at 31 ("with few exceptions, the key to whether free speech will receive protection depends on an underlying property interest . . ."); Van Alstyne, supra note 104, at 72-79 (linkage of free speech with private property); Alternative to the Double Standard, supra note 104, at 93 (takings clause; first amendment). See also Denvir, supra note 103, at 1026-27 (takings and contract clause cases).


109. See, e.g., Fiss & Krauthammer, supra note 103, at 21.
City Status in American Law

digm which stresses the need to exclude political and social policy considerations so the market can function at maximum efficiency.110

The Burger Court’s emphasis on efficiency has much in common with laissez-faire theory. Dillon believed that the greatest threat of excessive governmental power was to property rights, and that governmental intrusion on property rights would be disastrous because it would severely threaten the market’s natural functioning.111 The conservative Burger Court majority has a similar solicitude for property rights because of a similar belief that the best approach to overall social welfare is to allow efficient operation of the market, which can only occur if property rights are secure.112

This analysis of the parallels between the Burger Court and Dillon, though by no means wrong, is oversimplified.113 It is important to remember that Dillon and the Burger Court operate within very different sets of givens; for example, Dillon fervently opposed the income tax.114 The lack of direct analogy extends beyond specific issues. A more accurate analysis would note the similarities between basic concerns without forcing Dillon and the Burger Court into an artificial parallelism. Both begin with a world bifurcated between mutually exclusive public and private spheres.115 To late nineteenth century conservatives, the primary threat to the private sphere was intrusion on property rights through redistributive programs (such as bonding, regulation, or the income tax).116 Contemporary conservatives still view the primary threat to the private sphere as involving intrusion on private property

111. See supra notes 74-88 and accompanying text.
112. Cf. Method, Results, supra note 110, at 622-27 (“All good things are scarce. Self-interested conduct is the Handmaiden of Scarcity. These are facts of life”).
113. Nowak’s analysis runs into even greater problems of oversimplification. Nowak, supra note 104, at 574-616.
114. Private Property, supra note 80, at 14-17 (“The most insidious, specious, and therefore, dangerous” threats to private property involve government’s power to tax; Dillon goes on to attack the proposed income tax). Supply-siders notwithstanding, the argument that no property is safe in the presence of a progressive income tax is today not a mainstream position.
115. Liberals also view the world as bifurcated between public and private, yet the parallel terminology hides quite different basic concerns. Liberals’ fears are focused on governmental intrusion into “private” individual rights, see infra text accompanying notes 210-15; conservatives’ fears are focused on forced governmental redistribution by means of intrusion into the private economic sphere.
116. See McCurdy, supra note 89, at 971 (“The simultaneous emergence of regulation, repudiation, and revulsion against corporate privilege threatened a multitude of vested interests on an unprecedented scale” after the Civil War).
rights, but the most common intrusions (in their view) now involve attempts to protect civil rights, due process rights or other individual rights.  

When all is said and done, the similarities between Dillon’s social vision and that of contemporary conservatives, while they should not be exaggerated, cannot be ignored. Why then did Dillon and the Burger Court generate contradictory formulations of city status?

2. THE TENSION BETWEEN NINETEENTH AND TWENTIETH CENTURY CONSERVATIVES’ FORMULATIONS OF CITY STATUS

Recent decisions of the Burger Court provide an intriguing contrast to Dillon’s basic framework of city powerlessness. In these recent cases, the Court has used local sovereignty language to support an internal limit on the reach of the fourteenth amendment and, for a

117. A veritable chorus of commentators has decried the Burger Court’s lack of receptivity (relative to the Warren Court) to individual rights, see, e.g., L. Tribe, supra note 82 (calling the Burger Court “authoritarian, unduly beholden to the status quo, and insufficiently sensitive to human rights and needs”); Lind, supra note 104, at 120 (Burger Court insufficiently sensitive to first amendment); Shapiro, supra note 103, at 294 (Burger Court sides with the government, against the individual, in cases involving individual rights); Comment, Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right, 43 U. PITT. L. REV. 1035 (1982).

118. The Court deferred to localities’ desire to exclude specific land uses in Warth v. Seldin, 422 U.S. 490 (1975) (neither residents, nonresidents nor organizations have standing to sue under the fourteenth amendment for remedy of exclusionary zoning); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (plaintiff with standing to sue under Warth has no remedy for exclusionary zoning under the fourteenth amendment because village’s “intent” to discriminate not adequately proven; case sets up “intent” test extremely difficult for plaintiffs to meet); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (opinion by Justice Douglas, joined by the Rehnquist majority) (zoning ordinance excluding student households withstands fourteenth amendment “rational basis” test applied to economic and social legislation); James v. Valtierra, 402 U.S. 137 (1971) (absent showing of racial discrimination, requirement that all low-rent public housing projects must be approved by a majority of voters does not violate the fourteenth amendment, but instead fosters democratic decisionmaking; referendum requirement allowed town to veto low-rent projects even if all zoning requirements were met); City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (provision in city charter providing that any changes in land use agreed to by City Council must be approved by majority vote in a referendum, does not violate due process clause of the fourteenth amendment; project at issue an apartment house); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion by Justice Stevens, joined by the Rehnquist majority, upheld a zoning ordinance restricting the location of new theaters showing sexually explicit movies); contra Moore v. City of East Cleveland, 431 U.S. 494 (1977) (zoning ordinance restricting maintenance of extended family households violates due process clause of the fourteenth amendment); Schad v. Mt. Ephraim, 452 U.S. 61 (1981) (zoning ordinance prohibiting live entertainment violates free expression requirement of first and fourteenth amendments).

Other important cases involve issues of school desegregation and finance that the Supreme Court majority and particularly Justice Burger, see Chesler, Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger, 18 HARV. C.R.-C.L.L. REV. 457 (1983), characterizes as issues of local control. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Texas school financing system based largely on the property tax satisfies the “rational basis” test of fourteenth amendment equal protection clause); Milliken v. Bradley, 411
time, to limit Congress' ability to regulate under the Commerce Clause. In sharp contrast to the traditional local government law doctrines crystallized by Dillon, Burger Court decisions setting out the principle of local government sovereignty reveal a pattern of solicitude for localities' structural integrity and a broad judicial deference to their programmatic choices. This Subsection begins by setting out the Burger Court cases and analyzing their use of Jeffersonian imagery. Part b examines how the principle of local government sovereignty functions rhetorically in a way similar to classical legal thought in general, and Part c relates the principle to Dillon's formulation of city status in particular.

a. The Burger Court's local sovereignty cases

The principle of local government sovereignty offers contemporary conservatives a powerful rhetorical strategy because it allows them to mobilize resonant Jeffersonian imagery. Thomas Jefferson, "the first, and also the foremost, advocate of local self government," originated the theory of local self-government. Like many of his contemporar-

U.S. 717 (1974) (absent showing that racially discriminatory acts of the state or a local district were a substantial cause of interdistrict school segregation, no constitutional wrong exists to support an interdistrict remedy).

Other cases in which the Court has deferred to local decisionmaking include: Rizzo v. Goode, 423 U.S. 362 (1976) (dicta imply limitations on federal courts' authority to remedy fourteenth amendment due process violations in ways that interfere with local decisionmaking); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (special district voting eligibility based on ownership of land and its assessed valuation does not violate fourteenth amendment equal protection clause); Ball v. James, 451 U.S. 355 (1981) (equal protection clause of fourteenth amendment is not violated by state statute limiting voting eligibility in special district elections to landowners and apportioning voting strength according to the amount of land owned). See also City of Memphis v. Greene, 451 U.S. 100 (1981) (absent proof of discriminatory intent, black residents of city foreclosed from claiming street closing violates equal protection clause of fourteenth amendment); Palmer v. Thompson, 403 U.S. 217 (1971) (city's decision to close public pool does not violate equal protection clause of fourteenth amendment).

In a few cases, the Supreme Court has refused to defer to local decisionmaking. E.g., Wright v. Council of the City of Emporia, 407 U.S. 451 (1972) (city's decision to withdraw from county school system to avoid participation in desegregation plan violates equal protection clause of fourteenth amendment); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (village ordinance limiting door-to-door solicitation of contributions by charitable organizations is unconstitutionally overbroad, violating the first and fourteenth amendments); Hynes v. Mayor and Council of Orodell, 425 U.S. 610 (1976) (municipal ordinance requiring advance notice be given to local police department by persons soliciting from house-to-house for charitable or political causes violates fourteenth amendment guarantees of free speech and due process of law); Fisher v. City of Berkeley, 106 S.Ct. 1045 (1986) (Court struck down local ordinance forbidding large political contributions to committees formed to support or oppose ballot measures).

120. See Gelfand, supra note 2, at 764.
121. A. SYED, supra note 37, at 38.
ies, Jefferson viewed all government as a potential threat to freedom. Yet, most of his fears were focused upon the federal government, whereas most of his hopes for democracy were focused on government at a local level.

Jefferson's fear of the federal government dated back to the revolutionary experience, which reinforced the long-standing English distrust of centralized power. Despite Jefferson's fierce advocacy of states' rights, his actual concern was with their relative power. He was interested not so much in strengthening state governments as in weakening the federal government.

Jefferson focused his aspirations for self-government at the local level. He advocated division of counties into "wards" of five or six square miles each. Each ward would function as a "little republic," exercising self-government in a broad range of duties. In 1816, Jefferson said:

In government, as well as in every other business of life, it is by division and subdivision of duties alone, that all matters, great and small, can be managed to perfection . . . . And the whole is cemented by giving to every citizen, personally, a part in the administration of public affairs.

Jefferson's linkage of local self-government and republican virtue has proved an enormously influential source of political imagery since its inception. As initially formulated, Jefferson's exaltation of local government did not apply to cities, which he abhorred. Jefferson envisioned his localities as semi-rural farming communities where yeomen met to agree on those matters that would be burdensome for each to handle alone.

The Burger Court's principle of local sovereignty is heavily dependent on imagery derived from the Jeffersonian tradition. Two distinct themes emerge in the Court's Jeffersonian rhetoric. In one set of cases, involving schools and zoning, the Burger Court has stressed the positive side of the Jeffersonian vision. These opinions, many of them written by Justices Burger and Powell, will be called the "local autonomy decisions." They consistently stress the virtues of "local autonomy," "community" and "local control" in terms that recall the Jeffersonian

122. See S. Fine, supra note 49, at 3-4 (discussing the doctrine of the "negative state").
123. A. Syed, supra note 37, at 41.
125. See A. Syed, supra note 37, at 43-44. For additional documentation of Jefferson's hostility to cities, see M. White & L. White, The Intellectual Versus the City 2-3, 12-19 (1962).
romance with self-government at the local level. Although Justice Rehnquist joined these opinions, and has at times himself expressed concern for local control, his own opinions stress a second aspect of the Jeffersonian vision. While the local autonomy opinions stress the positive value of local control, Rehnquist stresses the negative consequences of excessive federal power. These two themes act in concert in Burger Court jurisprudence to provide a rationale for the existence of a core area of local government sovereignty.

In the local autonomy opinions, the Court's Jeffersonian rhetoric is used to support decisions that limit the scope of the fourteenth amendment. Two important early examples were *San Antonio v. Rodriguez* (per Justice Powell) and *Milliken v. Bradley* (per Justice Burger).

*San Antonio v. Rodriguez* illustrates the central role played by the Court's Jeffersonian rhetoric in its abandonment of Warren Court activism. *Rodriguez* involved a challenge to Texas' school financing system, based largely on the property tax, which according to the plaintiffs resulted in lower quality education for poorer children. The *Rodriguez* court rejected the plaintiffs' claim that laws relating to education should be strictly scrutinized because education was a fundamental interest, in an opinion that sharply curtailed the "fundamental interest" analysis in constitutional law.

For our purposes, the crucial part of Powell's opinion in *Rodriguez* is not the decision's technical holding, but rather its use of the Jeffersonian rhetoric of local sovereignty as a rationale for limiting the reach of the fourteenth amendment. Powell asserted that a major reason for refusing to extend the equal protection clause to school financing was his concern to preserve the autonomy of local schools, and of localities in general:

126. For a systematic exploration of Chief Justice Burger's use of community imagery, see Chesler, *supra* note 118, at 457-62. Chesler links Burger's imagery with the New England notion of the homogenous "moral community." The relationship between the "moral community" and Jefferson's theory of local self-government is an intriguing area for future study of the way ideologies of diverse origins have converged in the jurisprudence of the Burger Supreme Court.


130. 411 U.S. 1, 1-12 (1973).

131. *Id.* at 33-38; see L. Tribe, *supra* note 82, at 1002-11 (1978).

132. The Court gave two basic reasons for its holding that the fourteenth amendment was not violated. First, it argued that wealth discrimination did not violate equal protection unless an absolute, as opposed to a relative, deprivation resulted. 411 U.S. 1, at 23-25 (1973). Second, the Court forwarded its local autonomy policy argument as an independent reason for relaxed minimum rationality, as opposed to strict scrutiny, review.
[W]e stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation . . . has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.133

This passage starts out with the traditional incantation of the sanctity of the state and the principle of federalism. But Powell’s real focus was on localities, as he readily made apparent by his reference to local fiscal schemes. A notable irony is that the fiscal scheme involved in Rodriguez was not imposed on the local level: the plaintiffs were challenging a mechanism of school financing imposed by the state of Texas.134 Why did Powell shy away from formulating the issue in Rodriguez as a clash between state autonomy and federal requirements, and characterize the case instead as involving issues of local autonomy?135

The short answer is that established constitutional theory made it difficult for the Court to argue that the scope of the fourteenth amendment was constrained by considerations of autonomy. During the battle in the 1960’s over whether the Bill of Rights had been incorporated into the fourteenth amendment, Justices Frankfurter and Harlan argued that the Bill of Rights should not be applied to the states in the interests of preserving the states as “laboratories” for innovation. Their position was ultimately rejected by the majority of the Court.136

133. Id. at 41.
134. Powell acknowledges this in his statement of the facts, 411 U.S. at 9-11, but blurs it in the quoted portion of the opinion, in which he asserts that his opinion is designed to protect local (as opposed to state) autonomy.
136. For descriptions of the “incorporation” controversy, see L. Tribe, supra note 82, at 567-69; B. Schwartz & L. Lesher, supra note 101, at 395-400; Heck, Justice Brennan and the Heyday of the Warren Court, 20 SANTA CLARA L. REV. 841 (1980). The full text of the famous “laboratories” quote is as follows: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.” New State Ice v. Liebman, 285 U.S. 262 (1932). The statement was originally made by Justice Brandeis in one of his opinions dissenting from the Supreme Court’s holdings striking down state legislation on substan-
The outcome of the incorporation battle made it awkward for Powell to argue that the fourteenth amendment’s scope should be constricted in the interest of preserving state autonomy. Powell’s focus on the need for the Court to defer to local autonomy is an attempt to avoid this pitfall. The attempt fails because the Supreme Court has long since accepted Dillon’s principle that cities are mere subdivisions of the states. If the need to preserve state autonomy is not a valid reason to constrict the scope of the fourteenth amendment, the need to preserve the autonomy of the state’s (subservient) subdivisions surely is not a valid consideration in limiting the amendment’s reach.

Powell’s incantation of the sanctity of local as opposed to state autonomy submerges these difficult problems. They nonetheless persist, for if states have absolute power over their subdivisions, and federal courts have full authority to invade state sovereignty (including, presumably, the sovereignty of states’ subdivisions) in order to enforce constitutional mandates, it seems illogical for the Court to cite considerations of local autonomy in constricting the scope of the fourteenth amendment.

In *Milliken v. Bradley*, a second case that highlights the doctrinal difficulties of the local autonomy opinions, Justice Burger used a rhetorical structure similar to that used by Powell in *Rodriguez*. *Milliken* involved a federal court order to desegregate Detroit schools. Because Detroit’s school-age population was overwhelmingly black, the district court ordered a metropolitan-wide remedy that involved busing city children into the suburbs, where most students were white. The Court, in an opinion written by Justice Burger, reversed the district court order, noting:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.\[^{137}\]

This language is reminiscent of Powell’s Jeffersonian rhetoric in *Rodriguez*. Moreover, it functions in a similar way. The local sovereignty language in *Rodriguez* was used to support creation of an internal limit on

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\[^{137}\] 418 U.S. at 741-42.
the coverage of the fourteenth amendment. In *Milliken*, similar lan-

guage was used to limit a court's ability to remedy a constitutional violation.

The analysis in *Milliken* highlights the acute doctrinal tension be-
tween Dillon's formulation of city status and the Court's local sover-
eignty principle. *Milliken* holds that although courts are free to enforce
the fourteenth amendment against the states, they cannot enforce it
against local government units in a way that treats those units as enti-
ties of "mere administrative convenience." Yet according to Dillon's
formulation of municipal law, that is exactly what local units are: not
only school districts, but also general-purpose governments such as cit-
ies, are units of "mere administrative convenience." 138 Under munici-
pal law, the boundaries of school districts, and of cities as well, may be
rewritten by states at will.

*Milliken v. Bradley* and *San Antonio v. Rodriguez* appear to reinvigorate Cooley's argument 139 (expressly rejected by state courts in the
period 1870-1900) that a core of local government sovereignty should
be accorded constitutional status. These cases conflict sharply with Dil-
lon's premise that the people delegated all their sovereignty to the
states. Yet, these cases explicitly embrace Dillon's basic tenet that cities
are subdivisions of the states. 140 Consequently, a central contradiction
recurs: if local units such as municipalities and school districts are mere
subdivisions of the states, how can their inviolable core of local sover-
eignty function to limit federal courts' ability to enforce fourteenth
amendment mandates on the states? Perhaps the Court senses the se-
vere doctrinal difficulties in *Milliken* and *Rodriguez*, for in neither case
is its deference to local autonomy elevated to the level of a formal hold-
ing. Instead, in both cases—and in the other cases discussed below—the
quasi-constitutional principle of local sovereignty serves to divert atten-
tion from the fact that established federalism principles are not avail-
able to justify constrictions on the ability of plaintiffs to recover under
the fourteenth amendment.

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138. Contemporary usage groups general-purpose local governments (villages, towns, cit-
ies) and special-purpose units (school districts, water districts, fire districts et. al.) under the gen-
eral word "municipalities" or "localities." See E. McQuillin, supra note 47, at 130-32. Dillon clas-
sified both groups as public corporations but he distinguished between general-purpose local
government units, which he considered "municipal" corporations and special-purpose units,
which he did not. J. DILLON, supra note 4, at 30.

139. Although the scope of Cooley's "inherent sovereignty" doctrine was never entirely
clear, see Gere, supra note 37, at 285-87, he probably intended localities to exercise sole control
over local affairs. Given the tradition of local control over schools, control over schools presuma-
bly would be included within towns' inherent powers.

140. See *Milliken*, 418 U.S. at 727 (Burger quotes with approval trial court holding that
school board is a "subordinate entity of the state"). The traditional analysis also underlies Powell's
failure to identify clearly whether the state or localities are involved in *Rodriguez*: since cities are
mere creatures of the state, it doesn't matter.
Rodriguez and Milliken are part of a larger trend in which the Burger Court extols local autonomy to constrict the scope of the fourteenth amendment. Many of these cases involve zoning. In six cases, the right of a municipality to zone out low- and moderate-income people, student households, and pornographic theaters has been upheld in the face of fourteenth amendment challenges. In two additional cases, the conservative members of the Court joined dissenting opinions upholding towns' right to zone out extended families and nude dancing.

Like the opinions in Milliken and Rodriguez, many of the zoning opinions use explicit Jeffersonian imagery. Two notable examples are Chief Justice Burger's dissenting opinion in Schad v. Mt. Ephraim and the Court's majority opinion in Village of Belle Terre v. Boraas. In Schad, Burger argued that a zoning ordinance prohibiting nude dancing should be upheld in the face of due process and first amendment challenges. His opinion could not be more explicit in its rhetoric of local control: "a community of people are—within limits—masters of their own environment. . . . Citizens should be free to choose to shape their community so that it embodies the conception of the 'decent life.'" In extremely broad dicta reminiscent of Cooley's doctrine of inherent sovereignty, Burger asserted in Schad that communities should have broad control over "local concerns."

In Belle Terre, the Court once again used the Jeffersonian imagery of community values and local control in upholding an ordinance excluding student households. The Court said that towns should be al-


144. Moore v. East Cleveland, 431 U.S. 494, 531 (1977) (Stewart, J., dissenting) (arguing that town ordinance-excluding extended families should be upheld). Chief Justice Burger also voted to uphold the ordinance, on the ground that federal courts are too busy to decide such cases, given the plaintiff grandmother's failure to seek a zoning variance. Id. at 521 (Burger, C.J., dissenting).


146. Id.


148. 452 U.S. at 87.

149. See supra text accompanying notes 35-39.

150. 452 U.S. at 87.
lowed "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." For the Burger Court majority, which joined Justice Douglas' Belle Terre opinion, the case was consonant with the five other decisions upholding exclusionary zoning in the interest of local control. In the zoning opinions discussed above, the Court set up a rhetorical universe in which the exclusionary choices of municipalities are canonized as self-rule, while fourteenth amendment mandates are characterized as intrusive central government controls. The Court's use of Jeffersonian rhetoric serves to blur the underlying issue of how to define the "community" entitled to self-determination. Of the myriad possible "communities" available—from the neighborhood to the nation—the Court chose to focus its solicitude upon predominantly white, relatively affluent suburbs that were opposing the introduction of low- and moderate-income housing or other "undesirable" uses. The Court's im-

151. 416 U.S. at 9.
152. Justice Douglas’ opinion was joined by Chief Justice Burger and Justices Rehnquist, Stewart, Powell, Blackmun and White. Justices Marshall and Brennan wrote dissenting opinions.

Zoning experts have expressed surprise that Justice Douglas should have sided with the Rehnquist majority in Belle Terre. See N. Williams, Jr., 3 American Land Planning Law § 66.34 (1974). Douglas’ opinion, however, illustrates his strong commitment to a constitutional right to privacy. Justice Douglas incorporated into contemporary constitutional law the constitutional right to privacy first articulated by Justice Brandeis in Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See Public Utilities Comm’n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J. dissenting) (Douglas asserts that music on streetcars violates right to privacy); Roe v. Wade, 410 U.S. 113, 152 (1973) (the most famous right to privacy case). One senses in Belle Terre the tension between Douglas’ populism and his commitment to a right to privacy.

153.  See supra notes 141-43.

154. The Burger Court opinions upholding referendums that impose requirements with exclusionary effects stress the importance of direct participation in decisionmaking at a local level, thereby mobilizing the Jeffersonian view (which also underlies the zoning cases discussed in the text) that government becomes more trustworthy the closer it is to the people. See Eastlake v. Forest City Enters., 426 U.S. 668, 673 (1976); James v. Valtierra, 402 U.S. 137, 143 (1971) (“This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local government funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community”). The analysis also underlies certain other cases that make no explicit reference to Jeffersonian values, such as Warth v. Seldin and Arlington Heights.

155. The dissent in Schad (per Burger) described the town as “a small enclave . . . a placid 'bedroom' community,” 452 U.S. at 84. In Belle Terre the village is described as “a middle class, suburban residential community,” 416 U.S. at 10. In Moore, the majority referred to the community involved as “white suburbia,” 431 U.S. at 508. Arlington Heights involved a suburb of Chicago, forty percent of whose population is black, in which only 27 of the 64,000 residents were black at the time the case was decided. 429 U.S. at 558; Bureau of the Census, U.S. Dept. of Commerce, 1980 Census of Population and Housing P.-2, P-247 (1983). The plaintiffs in Eastlake argued that the primary motive behind the town’s zoning provision was to “build walls against the ills, poverty, racial strife, and the people themselves, of our areas . . . ” creating “a veritable choke collar against change in the large lot, single family, residential use.” Brief for Respondent at 9-10, Eastlake v. Forest City Enters., 426 U.S. 668 (1976). In Warth v. Seldin, the ordinance was enacted by the town of Penfield, a suburb of Chicago. The U.S. Census Report
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agery is powerful because, whereas an argument defending the self-determination of an individual bigot is no longer a strong rhetorical position, the need to preserve a town's right to control its community life, without conformity enforced by Big Brother, resonates with pervasive contemporary concerns.  

This discussion shows that important doctrinal contradictions persist throughout the local autonomy cases. The Court has generally dealt with these difficulties by ignoring them. In National League of Cities v. Usery, Justice Rehnquist confronted these issues directly and offered a potential solution.

National League of Cities, beloved of legal commentators, is no doubt familiar to most readers. It involved a Congressional enactment that extended the minimum wage to state and local employees. The decision by Justice Rehnquist overruled a precedent decided only eight years earlier and struck down the statute. The decision stunned the legal community for several reasons. The most important was that National League of Cities, for the first time in forty years, struck down a Congressional statute regulating commerce as an unconstitutional intrusion on state sovereignty. The case outraged many observers, who foresaw a new Lochner era, and delighted certain others, because it provided a variety of perspectives from which to tease Justice Rehnquist.

showed that in 1970, of the 23,782 people residing in Penfield, only 60 were members of minority groups. Brief for Petitioners at 2, Warth v. Seldin, 422 U.S. 490 (1975).

156. The reference to Big Brother refers, of course, to George Orwell's 1984. G. ORWELL, NINETEEN EIGHTY-FOUR (1949).


160. The Lochner Court stopped striking down statutes enacted under the Commerce Clause in the mid-1930s. See L. Tribe, supra note 82, at 450-55.


National League of Cities addressed directly the issue the Court had skirted in Rodriguez and Milliken. These cases did not resolve the question of how local sovereignty could function as a limitation on federal power over states if cities were mere subdivisions of the states. National League of Cities did, by holding that the tenth amendment functioned as a constitutional limit on federal power over state (and, consequently, local) governments.\textsuperscript{163} The tenth amendment, which had not been heard from in years, asserts that the states reserve to themselves all rights not given to the federal government.\textsuperscript{164} Rehnquist parlayed this into a holding that Congress, acting under the Commerce Clause, could not act in a way that jeopardized a state’s ability to fulfill “traditional governmental functions.”\textsuperscript{165}

National League of Cities offered a solution to the problem presented in the local autonomy cases. It held that local autonomy served as a limit on the federal government because the tenth amendment limited federal power over the ability of states to fulfill essential governmental functions.\textsuperscript{166}

Although National League of Cities offered a way of resolving the internal contradictions in the Burger Court local sovereignty cases, its potential was never realized. National League of Cities was decided in 1975; by 1976, the Burger Court had held in Fitzpatrick v. Bitzer\textsuperscript{167} that the tenth amendment did not serve as an internal limit on the fourteenth amendment. In 1985, only a decade after it was handed down, National League of Cities was decisively overruled.\textsuperscript{168} These developments have robbed the Burger Court’s principle of local sovereignty of a firm doctrinal basis. Given that the fourteenth amendment is premised on the ability of courts to invade states’ sovereignty in order to vindicate federal constitutional rights, how can the sovereignty of a

\textsuperscript{163} 426 U.S. at 842-43.
\textsuperscript{164} U.S. CONST. amend. X.
\textsuperscript{165} 426 U.S. at 852.
\textsuperscript{166} Whereas Powell and Burger formulated the clash as one between local autonomy and federal power, Rehnquist formulated the clash in National League of Cities as one between state and federal power, despite the fact that his examples of functions traditionally served by the states were of services traditionally provided largely by local government. Included in Rehnquist’s list were fire prevention, police protection, sanitation, public health, and parks and recreation. 426 U.S. 833, 851. Figures compiled by the U.S. Department of Commerce show that these functions all either carried out primarily or exclusively by local governments. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 7 (1982).

Thus, Burger and Powell characterize the clash as one between the federal and local governments, even when a state (not local) financing system is involved, see supra text accompanying notes 134-37, whereas Rehnquist characterizes the clash as between the federal and state governments, even when local (not state) services are involved. The difference in characterization provides a vivid illustration of the way courts manipulate their analysis of city status to reach the desired results.

\textsuperscript{167} 427 U.S. 445 (1976).
state’s “mere subdivision” limit the fourteenth amendment’s reach? After *Fitzpatrick v. Bitzer* and the overruling of *National League of Cities*, arguments advocating limits on the scope of the fourteenth amendment in order to preserve local autonomy appear weak indeed.

In summary, the Burger Court has often used Jeffereonian rhetoric to limit the power of the federal government by arguing that federal courts cannot invade the sphere of local control. Justice Rehnquist in *National League of Cities* made a similar argument—that the federal legislature could not invade the sphere of local sovereignty. The next Subsection will show how both principles function as political forum-shifting arguments.

*b. The local sovereignty principle as a forum-shifting argument similar to those in classical legal thought*

The rhetorical structure of both classical legal thought and the jurisprudence of the Burger Court majority flows from an initial, cardinal premise: that a court’s task in judging cases is to make technical, legal judgments, not political ones.169 This stance necessitates a jurisprudence that allows judges to decide cases without direct reference to their political values. This goal is often easy to accomplish170 but becomes awkward in cases contemporaries view as inherently political.

As was noted above, one rhetorical strategy used in classical legal thought was the theory of powers absolute within their spheres. This strategy allowed courts to strike down a maximum hour law or a proposed city activity, not on explicit laissez-faire grounds, but on the grounds that the state legislature or the city did not have the “authority” to make the policy choice in question. Thus, maximum hour laws were held unconstitutional because the people had not delegated to state legislatures the power to pass them (*Lochner*);171 nor had the state delegated to cities authority to undertake a wide range of other activities of which the court disapproved (*Dillon’s Rule*).172 In each case, a

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169. *See supra* notes 90-94 and accompanying text.

170. The claim that judges’ choices are technical, not political ones, is relatively easy to support, for example, when the case involves, the “mailbox rule.” *See, e.g.*, *Morrison v. Thoelke*, 155 So. 2d 889 (Fla. 1963).

171. *Lochner v. New York*, 198 U.S. 45, 57 (1905). The Court’s holding that the New York statute violated the fourteenth amendment was, in essence, a holding that the people had not delegated to the legislature the right to pass the statute. The basic constitutional analysis, rarely articulated, is that the people have delegated to the legislature the ability to act in a broad range of contexts, but not the power to violate the people’s constitutional rights. (The people reserved to themselves the right of free speech, right to practice their religion, and other constitutional rights).

172. *See, e.g.*, *Sears v. Ogden City*, 533 P.2d 118 (Utah 1975) (statute declaring that a city may “purchase, receive, hold, sell, lease, convey and dispose of property, real and personal, for the benefit of the city . . . and may do all other things in relation thereto as natural persons” held insufficient to authorize city to convey a vacated street to the local school district without consider-
judgment of political appropriateness was transformed into the technical issue of whether the legal actor involved had the authority to make the policy choice in question.\textsuperscript{173}

The Burger Court majority has proceeded in many instances in a similar fashion, turning hotly contested policy issues into questions of whether a given legal actor is acting within its proper sphere. Thus, the question of how much free medical care hospitals should provide the poor becomes a question of whether the issue can properly be raised in court by a given plaintiff;\textsuperscript{174} the question of what constitutes proper criminal procedures becomes a question of whether the issue should be decided by the state or federal courts.\textsuperscript{175}

The Court's principle of local government sovereignty functions in a similar way. It turns a wide range of substantive policy questions into questions of whether the federal government has the power to enforce constitutional mandates\textsuperscript{176} or pass contested legislation,\textsuperscript{177} or whether it is precluded from doing so because the problems at issue cannot be solved without violating local sovereignty. Like Dillon's Rule and its accompanying doctrines, the Court's principle of local government sovereignty functions as a political forum-shifting argument. It limits the power of the federal government—the level of government that contemporary conservatives consider the greatest threat—through an argument that the locality has sole authority to make the challenged policy decisions. In the school cases discussed above, for example, the Court held that the federal government lacked power to forbid large

\textsuperscript{173} This is not to say that, during the \textit{Lochner} era, the Supreme Court was never explicit about the political value judgments that underlay its jurisprudence. Sometimes it was very explicit. \textit{See e.g.,} \textit{Ex Parte Young,} 209 U.S. 123, 165-66 (1908) (\textit{Lochner} era decision concerning the relationship of federal and state courts, stating explicitly that the decision was necessary to protect property rights), \textit{quoted in} \textit{Weschler, Federal Courts, State Criminal Law and the First Amendment,} 49 N.Y.U. L. Rev. 740, 762 (1974).


\textsuperscript{176} \textit{See supra} note 118 (cases cutting back on the fourteenth amendment in deference to local policy choices, sometimes using explicit Jeffersonian rhetoric to establish that the activities at issue are properly in the sphere of local control).

disparities in funding of local schools (Rodriguez), or to impose a metropolitan-wide desegregation scheme (Milliken). The Court leaves no doubt, however, that the local governments involved could change their programmatic choices to meet the plaintiffs’ concerns.178

The Court has used its forum-shifting local sovereignty argument to defer to local political and programmatic choices in a wide range of other contexts.179 The most famous example is Rizzo v. Goode180 a case in which the plaintiffs alleged brutality by the Philadelphia police. Justice Rehnquist’s formal holding was that Rizzo presented no case or controversy.181 However, his opinion gained attention primarily because it seemed to imply that federal courts had no authority to enjoin allegedly unconstitutional police conduct since principles of federalism precluded intervention in delicate local policy matters best left to local control.182 In Salyer Land Co. v. Tulare Lake, another Rehnquist opinion, the Court once again weighed an alleged fourteenth amendment violation against the defendants’ interest in local control.183 Tulare Lake upheld a provision that only property owners could vote184 in local water district elections, noting that the California legislature could reasonably have concluded that landowners were entitled to local control.185

In each case, whether it involved schools, zoning or other local political or programmatic choices, the Court used its local sovereignty principle as a forum-shifting argument to defer to local control. Yet, as commentators have pointed out, the Burger Court does not always de-

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178. Both cases clearly formulate the issue involved as one of whether the federal government can impose its will on local officials. If local officials themselves choose to meet the plaintiffs’ demands voluntarily, the opinions’ language strongly suggests that the Court would be as deferential to that decision as it is to the localities’ decision to fight the plaintiffs’ demands.

179. See supra notes 141-56 (discussing zoning cases).


181. Id. at 372-73.

182. Id. at 375-76, 380. A subsequent case citing Rizzo provides an excellent illustration of how Rehnquist has used the rhetoric of local sovereignty to further his jurisprudential goals. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court, citing Rizzo, held that no case or controversy existed in the so-called “chokehold case,” involving a challenge to police use of “chokeholds” in contexts in which the police had not been threatened with violence. The Lyons opinion did not contain the Jeffersonian rhetoric of local control contained in Rizzo; it simply cited Rizzo as established precedent. Nonetheless, one suspects that Rehnquist’s local autonomy rhetoric in Rizzo was helpful in gaining a majority for the opinion.


184. The challenged system gave votes proportional to acreage owned, id. at 730-31, so the plaintiffs (who leased their land) were disfranchised, id. at 731-33.

185. Id., at 731. Note that Salyer’s holding, which appeared to apply only to localized special districts that offered a very limited range of services, was vastly expanded in Ball v. James, 451 U.S. 355 (1981). See also Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 (1981) (Rehnquist opinion in which the Court, citing Younger v. Harris, 401 U.S. 37 (1971), upholds local assessment practices, stressing the need to avoid “intrusiveness” by federal courts, 454 U.S. at 114).
fer to community autonomy. The Burger Court, like Dillon, uses political forum-shifting arguments to accomplish specific political goals. The following Subsection pinpoints the contexts in which the Court defers to local control.

c. The political values underlying the Burger Court's local sovereignty cases

The Burger Court's rhetorical strategy is similar to Dillon's; so too are its underlying political goals. Dillon's central goal was to limit government power that threatened property rights through redistributive programs disruptive of the natural functioning of the economy. This Subsection discusses the related political values served by the Burger Court's local sovereignty principle.

To grasp the practical impact of the justices' Jeffersonian rhetoric in the local autonomy cases, one must return to basic demographics. By 1970, the intertwined issues of racial and economic discrimination had become closely linked with the fight between city and suburb. As cities became poorer and blacker, and suburbs became richer and whiter, housing and school discrimination issues took on a city/suburb dynamic in many metropolitan areas. The Court has used the principle of local autonomy to refuse relief for discrimination in housing or schools whenever such relief requires changes in a city's basic metropolitan structure. The Court's local sovereignty principle enabled it to eviscerate fourteenth amendment equal protection requirements in the large number of cases in which discrimination in housing or schools cannot be remedied without alteration of local boundaries or local duties.

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186. 454 U.S. 290 (1981). For example, in Fisher v. Berkeley, 106 S.Ct. 1045 (1986), the Court struck down a local ordinance forbidding large political contributions to committees formed to support or oppose ballot measures. Burger's solicitude for local autonomy was notable in its absence when Berkeley used its autonomy to attempt to preserve rent control.

187. For an example of the close relationship between racial and economic discrimination, see Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983), (Mt. Laurel II) 67 N.J. 151, 336 A.2d 713 (1975) (Mt. Laurel I) (brought as both an economic and a race discrimination case; decided on grounds of economic discrimination).

188. In 1981 blacks comprised 57.2% of the central city population while the percentage of whites was only 24.6%. In the suburbs, only 18.7% of the population was black, with whites comprising 33.8%. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 27 (1984). The mean income of urban black households was $15,585, compared to a mean income of $28,023 for white suburban households. Id. at 461. In addition, 34.4% of inner city blacks were living below the poverty level compared to only 11.4% of inner city whites. Id. See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CENTRAL CITY, SUBURBAN FISCAL DISPARITY 5, 8 (1977).

189. See Miliken v. Bradley, 418 U.S. 717, 735 (1974) (federal district court barred from ordering metropolitan-wide school desegregation plan despite the finding that any less comprehensive a solution than a metropolitan area plan would result in an all-black school system imme-
The Court’s use of the local sovereignty principle to protect suburban spheres in some sense parallels Dillon’s use of his formulation of city status. Both served to protect private property (the taxpayer’s wallet or the suburban enclave) against redistributive intrusions—taxation to finance bonds (in the case of Dillon) or federal courts’ efforts to enforce constitutional requirements (in the Burger Court opinions).

The values underlying Rehnquist’s local sovereignty cases parallel Dillon’s even more closely. In Tulare Lake, for example, Rehnquist persuaded the Court to defer to a local decision that allowed only property owners to vote, a holding that mirrors Dillon’s attempts to protect private property. Similarly, in National League of Cities, Rehnquist used local autonomy principles to limit the reach of the minimum wage/maximum hour legislation; the parallels with Lochner are striking. In both instances, Rehnquist’s concern to protect the power of private property is reminiscent of the goals Dillon articulated in Hanson v. Vernon, which undergirded the laissez-faire constitutionalism of the Lochner Court.

Rehnquist shares with the local autonomy cases a desire to limit the power of the federal courts. His rhetoric of local control is one aspect of his larger project of introducing federalism as an internal limit on federal court jurisdiction in a wide range of contexts, and on Congress as well. The broad principle articulated in Rizzo v. Goode, that the ability of federal courts to remedy individual rights should be sharply limited in any context in which a remedy might interfere with local autonomy, arguably creates a sphere of local control much broader than that created by the local autonomy cases.

190. Note that the Supreme Court, like Jefferson himself, has not used the Jeffersonian rhetoric of local control to argue for local control of cities. See supra text accompanying notes 124-25.


Rehnquist's most ambitious use of Jeffersonian rhetoric appears in *National League of Cities*, where he persuaded a majority of the Court to invalidate a Congressional statute regulating commerce as an unconstitutional intrusion on state sovereignty for the first time in forty years.\(^\text{193}\) The striking fact is not that *National League of Cities* was overruled\(^\text{194}\) but that the opinion was ever handed down. It is an indication of the power of Rehnquist's Jeffersonian rhetoric that he could persuade a majority of the Court in *National League of Cities* to join him in challenging the strongest taboo in contemporary constitutional jurisprudence in a way they shortly thereafter found embarrassing.\(^\text{195}\) Yet, the resonance of Jeffersonian rhetoric should not be allowed to overshadow the doctrinal difficulties that result when the rhetoric is combined with existing constitutional and municipal law principles.

**II. Localities' Legal Status and Liberals' Fear of Governmental Power**

Justice Brennan's opinions expanding the potential liability of local governments in section 1983,\(^\text{196}\) antitrust,\(^\text{197}\) and inverse condemnation suits\(^\text{198}\) form an important contrast with the Burger Court's lo-

\(^{193}\) *National League of Cities* was virtually the first instance of Supreme Court invalidation of economic legislation on constitutional grounds since the *Lochner* approach was abandoned in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).


\(^{195}\) To be less formalistic, Justice Rehnquist persuaded Justice Blackmun in a way Blackmun later found embarrassing. In *Garcia*, Blackmun gives many indications that he is frustrated and embarrassed, primarily over unsuccessful attempts to define traditional governmental functions, see, e.g., 105 S.Ct. at 1011 ("Thus far this Court has made little headway in defining the scope of governmental functions deemed protected under NLC"); with attempts to correlate traditional functions with the governmental/proprietary distinction, 105 S.Ct. 1015. ("To say that the distinction between 'governmental' and 'proprietary' proved to be stable, however, would be something of an overstatement . . . . It was this uncertainty and instability that led the Court . . . . to conclude that the distinction between 'governmental' and 'proprietary' functions was untenable and must be abandoned"); and with other available standards, 105 S.Ct. 1016 ("Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable").


cal sovereignty decisions. Justice Brennan shows little of the concern for local government sovereignty evidenced by the conservative Burger Court majority. On the contrary, Brennan often relies heavily upon the principle established by Dillon that cities have no inherent sovereignty. 199

Justice Brennan's opinions do more than simply cite Dillon's basic constitutional analysis. Knowledgeable observers believe that if Brennan's positions were to predominate, American cities would lose much of the independence they gained at the turn of the century when home rule statutes gave cities broad authority over local affairs. 200

The deep rift between the Burger Court majority's local sovereignty decisions and Justice Brennan's municipal liability opinions has not been widely noted. 201 An analysis that separates Brennan's decisions from those of the Burger Court majority makes both sets of opinions more comprehensible. Both sets of opinions reflect an attitude toward municipalities that is a function of their desire to rein in excessive governmental power. Not surprisingly, the justices focus on very different scenarios of potential governmental abuse. Whereas the Bur-
ger Court majority identifies forced governmental redistribution as the greatest potential threat.\textsuperscript{202} Justice Brennan is concerned with the threat of governmental intrusion on individual rights.\textsuperscript{203} This Section shows how Justice Brennan's municipal liability opinions are a byproduct of his battle with Justice Rehnquist over the scope of federal plaintiffs' civil rights remedies.

\textbf{A. Justice Brennan's Political Philosophy and Jurisprudence}

"He just blew up. I think his exact words were 'He's done it again. He's pulled another one.'"

New Jersey Chief Justice Arthur T. Vanderbilt responding to news of President Eisenhower's appointment of Brennan to the Supreme Court.\textsuperscript{204}

"His critics put it simply, if crudely: Earl Warren was mongrelizing America from within, and he was selling it to the Communists from without."\textsuperscript{205}

Brennan was appointed to the Supreme Court because he was Catholic and a Democrat.\textsuperscript{206} It soon became clear he was also a liberal. Brennan became a staunch ally of Chief Justice Earl Warren (another Eisenhower appointee) and Warren's closest personal friend on the Court.\textsuperscript{207} Brennan's appointment gave Warren a solid core of four votes, and, for the first time, a fluctuating majority in favor of an activist approach.\textsuperscript{208}

\begin{itemize}
\item \textsuperscript{202} \textit{See supra} notes 190-95 and accompanying text.
\item \textsuperscript{203} \textit{See infra} notes 210-15 and accompanying text.
\item \textsuperscript{204} L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 355 (1967). Eisenhower referred to Brennan as "my second Supreme Court mistake." J. POLLACK, EARL WARREN — THE JUDGE WHO JUDGED AMERICA 194 (1979). (Earl Warren was his first. \textit{Id.}).
\item \textsuperscript{205} B. SCHWARTZ & S. LESHER, supra note 101, at 102.
\item \textsuperscript{206} J. POLLACK, supra note 204, at 194. \textit{See also} L. KATCHER, supra note 204, at 355 (explaining that Eisenhower wanted to appoint a Democrat to attract Democratic and independent votes).
\item \textsuperscript{207} B. SCHWARTZ, supra note 101, at 204-06. For an in-depth recent assessment of Brennan as the "glue of the liberal majority" of the Warren Court, see Heck, \textit{Justice Brennan and the Heyday of Warren Court Liberalism}, 20 SANTA CLARA L. REV. 841 (1980). (The quote is from Totenberg, \textit{Conflict at the Court}, in READINGS IN AMERICAN GOVERNMENT 75/76, 162 (1975)). \textit{See also} Heck, \textit{The Socialization of a Freshman Justice: The Early Years of Justice Brennan}, 10 PAC. L.J. 707 (1979); Galloway, \textit{The Early Years of the Warren Court: Emergence of Judicial Liberalism (1953-1957)}, 18 SANTA CLARA L. REV. 609 (1978).
\item \textsuperscript{208} B. SCHWARTZ, supra note 101, at 165, 198-205, 208. The four activists were Warren, Black, Douglas and Brennan. For a discussion of the importance of the bond between Warren and Brennan, see \textit{id.} at 127.
\end{itemize}
Brennan explicitly articulated his rationale for judicial activism in 1965, noting "the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions" in the form of lawsuits. "In this way," he continued, "important aspects of the most fundamental issues confronting our democracy end up ultimately in the Supreme Court for judicial determination." In Brennan's view, the most important issue facing the Supreme Court during his tenure has been the defense of individual rights against governmental intrusion. Brennan noted in 1965:

Over the past 30 years ... the chief subject of the cases coming to the Court has concerned the relationship of the individual to the Government—State and Federal—that is, with the interpretation and application of the limitations upon governmental power embodied primarily in the Bill of Rights.

Brennan has consistently advocated innovative constitutional remedies for individual rights violations during his tenure on the Supreme Court. When he joined the Court, a major source of controversy between Justice Frankfurter and the activists was the question of whether the Bill of Rights could be applied to the states through the fourteenth amendment, the so-called "incorporation" controversy. Brennan (in opposition to Frankfurter) supported the notion that substantial portions of the Bill of Rights had been "incorporated" into the fourteenth amendment, a position that broadened the scope for indi-

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209. W. Brennan, The Role of The Court — The Challenge for the Future (lecture delivered Mar. 19, 1965), reprinted in AN AFFAIR WITH FREEDOM 316 (S. Friedman ed. 1967). Brennan's judicial activism also stems from legal realism. In the same speech, he decried classical legal thought's claim that law was autonomous from politics.

None of us in the ministry of the law ... can deny that Law has sometimes given cause for complaint, that Law has isolated itself from the boiling and difficult currents of life as life is lived. This was not so before the 19th century. ... However, [during that period] the vogue of isolating law from the other disciplines ... [produced] a notion of law wholly unconcerned with the broader extra-legal values pursued by society at large or by the individual.

Id. at 320.

Brennan's message was that law inevitably involves political choices; hence the importance of an activist approach designed to forward desirable political goals.


211. Brennan's appointment in 1956 brought him to Washington at the peak of the McCarthy era. (In fact, because Brennan had spoken out against McCarthy, McCarthy voted against Brennan's appointment to the Supreme Court—he was the only senator to do so.) S. Friedman, supra note 209, at 10.

America's cold war paranoia brought to the Supreme Court a long string of cases in which plaintiffs with real or imagined links to the Communist party claimed violations of their constitutional rights of free speech and against self-incrimination. See W.T. MITAU, supra note 101, at 11-48. As a consequence, many of the fundamental issues before the Supreme Court in the early years of Brennan's tenure involved the Bill of Rights.
vidual rights suits against the states. Brennan also played a central role in the famous Warren Court cases that mobilized the equal protection clause to address issues such as school desegregation and reapportionment during the 1960's. His commitment to providing innovative constitutional remedies continued in the late sixties and seventies, when he played an important role in extending the reach of both the equal protection and due process clauses. He applied the fourteenth amendment in novel contexts, and helped develop the theory that the Court should strictly scrutinize government actions that burden "fundamental interests."

212. Heck, supra note 207, at 847-50 ("Brennan's mark is perhaps most apparent in the cases incorporating provisions of the Bill of Rights into the fourteenth amendment.").

Frankfurter, who had taught Brennan at Harvard, probably assumed at first that Brennan would vote with the conservative bloc. B. SCHWARTZ & S. LESHER, supra note 101, at 127. But Frankfurter soon became disillusioned: "I always encouraged my students to think for themselves," Frankfurter is supposed to have said, "but Brennan goes too far." B. SCHWARTZ, supra note 101, at 205.

213. Brown v. Board of Education, 347 U.S. 483 (1954), was decided before Brennan joined the Court, but Brennan played an active role in the subsequent cases implementing Brown. See Monell, 436 U.S. 658, 663 n.5 (Brennan's list of twenty-three cases involving school boards); W.T. MITAU, supra note 101, at 60-78 (description of early compliance problems).

Brennan played a central role in the Little Rock desegregation case, in part because he felt strongly about the issue, in part because Chief Justice Warren tended to assign him to crucial cases due to his faith in Brennan's ability to gain votes for the activist position. See B. SCHWARTZ, supra note 101, at 289-305; B. SCHWARTZ & S. LESHER, supra note 101 at 128.

214. Not only did Brennan write Baker v. Carr, 369 U.S. 186 (1962), he played a major role in persuading other members of the Court to vote in favor of the activist position. See B. SCHWARTZ, supra note 101, at 189, 193-94. (For a recent discussion of Brennan's mastery of drafting opinions designed to garner Court majorities, see Tushnet, Book Review, The Optimist's Tale, 132 U. PA. L. REV. 1257, 1262-65 (1984)).

215. Justice Douglas articulated the theory that strict scrutiny was triggered when the state threatened or deprived an individual of certain "fundamental interests" in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down law requiring compulsory sterilizations for moral turpitude). In Skinner, Douglas' holding was based in part on equal protection and in part on the fundamental interests theory. Brennan preserved this ambiguity in Shapiro v. Thompson, 394 U.S. 618 (1969), which struck down a welfare residency requirement, based in part on the constitutional right to travel, in part on the fundamental interests theory, i.e. that the case involved deprivation of "food, shelter, and other necessities of life," 394 U.S. at 627.

Ultimately, the theory that cases involving fundamental rights should involve strict scrutiny review was rejected by the Burger Court. The Court did not overrule cases that applied the fundamental rights analysis; instead, it refused to characterize interests as "fundamental." See, e.g., San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (fact that some children received a better education than others did not amount to deprivation of a fundamental right). The "fundamental interests" theory was firmly put to rest by Justice Powell in Garcia v. San Antonio, 105 S.Ct. 1005 (1985).

For a discussion of Brennan's role in Shapiro v. Thompson and Warren's dissent, see B. SCHWARTZ, supra note 101, at 725-32.
B. Justice Brennan's Municipal Liability Decisions

Brennan apparently views his decisions holding that plaintiffs can sue municipalities under 42 U.S.C. section 1983216 as the logical modern extension of his thirty-year commitment to the defense of individual rights. Much of the recent civil rights litigation has been brought under section 1983,217 and extension of section 1983 liability is to the 1980's what the incorporation controversy was to the 1960's. Moreover, as will be shown below, Brennan's opinions advocating increased antitrust liability for municipalities,218 as well as his famous dissent in San Diego Gas & Electric v. San Diego219 advocating an inverse condemnation remedy in zoning cases, are also linked to his goal of allowing plaintiffs broad remedies for violations of individual rights. What urbanists have considered Brennan's nigh-monomanical insistence on broad city liability220 stems from his desire to control federalism principles devel-
oped by Justice Rehnquist, which restrict civil rights plaintiffs’ ability to recover in federal courts.221

1. MUNICIPAL LIABILITY UNDER SECTION 1983

An understanding of Justice Brennan’s role in extending section 1983 liability to municipalities must begin with a closer look at the school desegregation cases of the 1960’s and 1970’s. The seminal case of Brown v. Board of Education,222 decided two years before Justice Brennan was appointed to the Supreme Court, held that segregated school systems violated the fourteenth amendment’s guarantees of equal protection. Brown precipitated a plethora of litigation against school boards, much of it under section 1983.223 By the mid-1970’s, the school desegregation cases had come to represent an unsettling contradiction to some members of the Supreme Court, including Justice Brennan.

In 1961, the Supreme Court had held in Monroe v. Pape224 that municipalities were not “persons” and so could not be sued under section 1983.225 This holding raised serious questions about the doctrinal status of section 1983 lawsuits against school boards, which were a type of “municipality.” As of 1977, these questions remained unanswered, but certain members of the Court decided that the time had come to

221. See infra notes 235-44 and accompanying text.
223. For a discussion of early cases, see W.T. Mitau, supra note 101, at 51-79.
225. Monroe held that although municipalities could not be sued in their own names, municipal officials could be sued in their official capacities. Monell left the latter holding intact, 436 U.S. at 663 n.7.
answer them. The result was *Monell v. New York City Department of Social Services*,\(^\text{226}\) a case involving a constitutional challenge by female New York City teachers to the Board of Education’s policy requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. The Supreme Court granted certiorari on the issue of whether cities and school boards were “persons” under section 1983, and held they were.\(^\text{227}\)

A major factor in the *Monell* decision was the Court’s desire to retain federal constitutional jurisdiction in section 1983 cases involving school boards. Although Justice Brennan’s treatment of the issue in the majority opinion was laconic,\(^\text{228}\) Justice Powell’s concurring opinion provided a fuller discussion.\(^\text{229}\) After describing *Monroe v. Pape* and a line of cases associated with it, Powell continued:

This line of cases . . . is difficult to reconcile on a principled basis with a parallel series of cases in which the Court had assumed *sub silencio* that some local government entities could be sued under section 1983 . . . . If we continue to adhere to *Monroe*, grave doubts would be cast upon the Court’s exercise of section 1983 jurisdiction over school boards.\(^\text{230}\)

Brennan’s concern to save the school board desegregation cases explains his decision in *Monell*, but it does not explain his holding two

\(^{226}\) [436 U.S. 658 (1978)].
\(^{227}\) Id. at 662-63.
\(^{228}\) Id. at 663-64. Brennan did not discuss the contradiction between *Monroe v. Pape* and the school board cases directly. Yet his opinion did cite a case (decided the previous term) in which the contradiction had been noted. Mt. Healthy City Bd. of Educ. v. Boyle, 429 U.S. 274, 279 (1977). Moreover, after overruling *Monroe v. Pape*, Brennan cited twenty-three cases in which school boards were defendants in § 1983 suits. Monell v. New York, 436 U.S. 658, 663 n.5 (1978).

\(^{229}\) Powell appears to have had a second motivation for his position in *Monell*. Before *Monell*, *Monroe v. Pape* forbid all § 1983 suits against cities. As a consequence, some courts allowed plaintiffs to sue for constitutional violations directly under the Constitution, by means of so-called *Bivens* actions. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (violation of fourth amendment by a federal agent gives rise to a federal cause of action in damages); *Note, Damages Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 (1976) (describing *Bivens* suits against cities).

The language of Powell’s *Monell* opinion indicates that his concurrence was motivated in part by his desire to eliminate *Bivens* actions against cities. 429 U.S. at 710. In fact, few courts have upheld *Bivens* suits against cities since *Monell*.

\(^{230}\) 436 U.S. at 710-11. Powell seemed to imply that the conflict between *Monroe* and the school board cases was tolerable so long as the Supreme Court ignored it, but once it had directly reconsidered *Monroe v. Pape* it had no choice but to overrule the case if the school board cases were to be saved.

Few commentators have noted that the Court in *Monell* adopted a compromise position. *Monell* held that cities were liable if constitutional violations resulted from official policy, but not on a respondeat superior theory. A brief in support of the plaintiffs had argued that cities should be liable not only for official policies that proved unconstitutional, but also by respondeat superior. See Amicus Curiae Brief of National Education Association and Lawyers’ Committee for Civil Rights Under Law, at 24.
years later in Owen v. City of Independence. Owen involved a procedural due process violation in the firing of a city employee. The Court held that the city had no immunity under section 1983 despite the fact that, at the time the employee was fired, the Supreme Court case requiring a pretermination hearing had not yet been handed down.

Brennan's holding in Owen that municipalities have no good faith immunity in section 1983 suits was profoundly disturbing to urbanists, who feared massive damage judgments for actions that did not appear unconstitutional to municipal officers when they were undertaken. Brennan saw Owen as part of his on-going battle with Justice Rehnquist over the scope of citizens' ability to recover for violations of their constitutional rights by governments and their officials. This controversy involves three separate issues: the scope of section 1983, the eleventh amendment immunity, and immunity of officials sued in their individual capacities. Only the first two of these issues are relevant here. The section 1983 issue is whether governmental units (states and cities) are "persons" under section 1983. The eleventh amendment issue is whether states are immune from damage suits in the federal courts (even in the event that such suits are theoretically allowed under section 1983).

The first round of the struggle over governmental immunity came in 1974 in Edelman v. Jordan, in which Justice Rehnquist held that the eleventh amendment barred awards of retrospective damages from state treasuries in federal courts. Justice Brennan dissented in Edelman, asserting that the eleventh amendment did not bar damage suits.

232. Id. at 630 n.10.
233. See supra note 220. Justice Brennan's citations in Monell dramatize how differently he views civil rights suits against cities than do urbanists. Urbanists may envision a typical § 1983 suit as a developer's suit claiming that the value of his land has been destroyed by restrictive zoning; Brennan evidently envisions the typical § 1983 suit as involving a beating administered to an innocent citizen by Sheriff Screws. Screws v. United States, 325 U.S. 91 (1945) (lawsuit under § 242, the predecessor of § 1983). Citing Scheuer v. Rhodes, 416 U.S. 232 (1974) (the case involving the killing of four students by Ohio national guardsmen), Brennan noted in Monell that "owing to the qualified immunity enjoyed by most governmental officials, many victims of municipal malfeasance would be left remediless if the city were allowed to assert a good-faith defense."


236. Id. at 677. The Court held in 1945 that the eleventh amendment bars suits for money damages against a state, Ford Motor Co. v. Dep't. of Treasury, 323 U.S. 459, 462 (1945), unless the state consents to be sued. In Parden v. Terminal Ry., 377 U.S. 184 (1964), the Warren Court held that a state's consent need not be explicit. The Edelman court narrowed Parden by showing...
awards against states by their own citizens in any circumstances.\footnote{237} Justice Marshall did not adopt Brennan’s views, but argued (in part) that no official immunity existed in the specific circumstances involved in \textit{Edelman}. Marshall’s argument began from the accepted premise that Congress may abolish eleventh amendment immunity whenever it wishes to do so. Marshall argued that Congress had indicated its desire to abolish immunity whenever a section 1983 suit was involved.\footnote{238}

Not until 1979, in \textit{Quern v. Jordan}, did Justice Rehnquist write a majority opinion rejecting Marshall’s argument that section 1983 “pierced” states’ eleventh amendment immunity.\footnote{239} During the period from 1974 to 1979, Brennan and Rehnquist carried on a running battle over the scope of governmental immunity to damage suits.

In a 1976 opinion, Rehnquist introduced in dicta an argument of crucial importance for our purposes.\footnote{240} He bolstered his claim that states were not “persons” under section 1983 by arguing that, since \textit{Monroe v. Pape} established that cities were immune from section 1983 suits, states were a \textit{a fortiori} immune as well.\footnote{241} Two years later, in \textit{Monell}, Brennan and the majority overruled \textit{Monroe v. Pape} and held that cities were liable under section 1983 where city policy contravened the constitution. Immediately after \textit{Monell}, Brennan began to argue that \textit{Monell} undercut the premise that states were not “persons” under section 1983. He argued that states’ exclusion was premised on that of cities. Therefore, since \textit{Monell} made cities “persons” under section 1983, states should also fall within that designation.\footnote{242}

In \textit{Quern v. Jordan}, Rehnquist held both that (\textit{Monell} notwithstanding) states were not persons under section 1983, and that states’ eleventh amendment immunity was not overridden by section 1983.\footnote{243} Brennan, outraged, responded that the holding concerning the scope of

\begin{itemize}
  \item that the Burger Court would at times require fairly explicit indications of a state’s intention to consent to a suit.
  \item \footnote{237} 415 \textit{U.S.} at 687 (Brennan, J., dissenting). Brennan’s position was that the eleventh amendment applied only when a state was sued by citizens of a different state.
  \item \footnote{238} \textit{Id.} at 688 (Marshall, J., dissenting). Marshall’s argument was that, although eleventh amendment immunity existed in some contexts, Congress could override it if it showed the requisite intent to do so. Section 1983, according to Marshall, showed that Congress intended to override eleventh amendment immunity in all contexts involving deprivation of plaintiffs’ federal rights under § 1983. While Marshall’s argument did leave some cases where eleventh amendment immunity was appropriate, his argument would have eliminated immunity in a broad band of civil rights cases and federal statutes.
  \item \footnote{239} 440 \textit{U.S.} 332 (1979).
  \item \footnote{241} \textit{Id.} at 452.
  \item \footnote{242} \textit{Hutto v. Finney}, 437 \textit{U.S.} 678, 703 (1978) (Brennan’s concurring opinion asserts that the Court’s opinions in \textit{Monell} and \textit{Fitzpatrick v. Bitzer} had rendered “the essential premise of our \textit{Edelman} holding . . . no longer true”); \textit{Quern v. Jordan}, 440 \textit{U.S.} at 350-51 (“The premise of [\textit{Edelman’s}] reasoning was undercut last term” in \textit{Monell}).
  \item \footnote{243} 440 \textit{U.S.} at 338-40.
\end{itemize}
section 1983 was merely dicta.\textsuperscript{244} Thus, when \textit{Owen} was being decided in the following year, Brennan considered the scope of states' section 1983 liability to be an open question for the court. Brennan's holdings in \textit{Monell} and \textit{Owen} served to expand cities' potential liability in section 1983 suits, and to leave the way open for a possible holding that both states and cities were persons under section 1983, and moreover enjoyed no elements of governmental immunity.

In summary, from Brennan's standpoint, \textit{Monell} and \textit{Owen} represent merely the most recent skirmish in his long-standing battle with Justice Rehnquist to ensure that the Constitution offers effective remedies to plaintiffs deprived of individual rights by governmental action.

\textbf{2. JUSTICE BRENNAN AND MUNICIPAL ANTITRUST IMMUNITY}

In \textit{Monell} and \textit{Owen}, Justice Brennan persuaded the Court to adopt his position that municipalities should not extend official immunity to section 1983 suits against cities. Brennan has had more difficulty in persuading the Court to impose liability on cities under the antitrust laws and inverse condemnation doctrine. In both these areas, Brennan has gone further, faster than the majority of the Court has been willing to follow.

The first major case involving municipal antitrust liability was \textit{City of Lafayette v. Louisiana Power & Light}.\textsuperscript{245} \textit{City of Lafayette} reversed a thirty-five-year-old assumption that cities were immune from antitrust liability. Prior to \textit{City of Lafayette}, courts had assumed that cities as well as states were exempt from the antitrust laws under the "state action" exemption established by \textit{Parker v. Brown},\textsuperscript{246} a 1943 case that held that Congress did not intend the antitrust laws to apply to states. The \textit{Lafayette} court was badly split. Brennan wrote the majority opinion, but he received a majority of votes only for his holding that cities were not automatically immune from the antitrust laws. Brennan went on to suggest that a city would be immune only if its action was "authorized or directed" by the state. But Brennan could not garner a majority for this position, so the question of when a city could qualify for "state action" immunity under \textit{Parker v. Brown} was left unanswered.\textsuperscript{247}

The most pressing question after \textit{City of Lafayette} was whether home rule cities were automatically immune from antitrust liability.

\textsuperscript{244} Id. at 351 (Rehnquist's assertion is dicta); 440 U.S. at 350 ("It is deeply disturbing... that the Court should engage in today's gratuitous departure from customary judicial practice and reach out to decide an issue unnecessary to its holding").

\textsuperscript{245} 435 U.S. 389 (1978).

\textsuperscript{246} 317 U.S. 341 (1943).

\textsuperscript{247} 435 U.S. at 414. "State action" antitrust immunity should not be confused with the "state action" doctrine under the fourteenth amendment. The two are totally unrelated.
Home rule cities have sovereignty over local affairs either by statute or by constitutional provision (both designed to overrule Dillon's Rule and its accompanying doctrines).\textsuperscript{248} After City of Lafayette, many city attorneys assumed that the actions of home rule cities would qualify automatically for "state action" immunity, because under most home rule provisions states expressly delegate authority over local affairs to cities.\textsuperscript{249} Thus, when a cable television company sued Boulder, Colorado, claiming that a city-ordered moratorium on expansions of cable television service was a restraint on trade, Boulder’s attorneys argued that the city was immune from antitrust liability because Colorado’s home rule provision meant that Boulder was acting as the state in its handling of city affairs. The Supreme Court in City of Boulder v. Community Communications disagreed.\textsuperscript{250} Justice Brennan, writing for the majority, asserted that Colorado’s home rule provision showed only that the state was neutral, not that it had authorized regulation of cable television.\textsuperscript{251}

Justice Brennan was insistent in both City of Lafayette and City of Boulder that his opinions did not signal a return to the city subjection of the late nineteenth century. During that period, Dillon's Rule meant that cities had to be able to point to a specific statute granting explicit authority to undertake a proposed activity.\textsuperscript{252} Brennan denied that the Court’s antitrust decisions would recreate this situation, and asserted that City of Boulder "does not mean . . . that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization" before it may properly assert that its action was taken as "state action" (and therefore is immune).\textsuperscript{253} Municipal attorneys disagreed with Brennan’s assessment. The city’s attorney said after the Boulder decision:

The political impact may be the biggest ultimately because the Court did not hold that cities cannot be immune; it simply held that they didn’t have any independent dignity under our federal system. And therefore they had to go running back to the state legislature, literally, to get their ticket punched for each new activity which was subject to challenge. That kind of

\textsuperscript{248} See supra notes 42, 200.
\textsuperscript{249} Home rule statutes that do not delegate authority over local affairs normally delegate to cities even broader authority to undertake actions not in conflict with state law. See supra note 200.
\textsuperscript{250} 455 U.S. 40 (1982).
\textsuperscript{251} Id. at 55-56.
\textsuperscript{252} See, e.g., Lafayette v. Cox, 5 Ind. 38 (1854); Willard v. Killingworth, 8 Conn. 247 (1830); S.P. Clark v. Davenport, 14 Iowa 496 (1863); Kyle v. Malin, 8 Ind. 34 (1856); Richmond v. McGirr, 78 Ind. 192 (1881); Kansas v. Swope, 79 Mo. 446 (1883); Spengler v. Trowbridge, 62 Miss. 46 (1884); Charleston v. Reed, 27 W. Va. 681 (1886); Portland v. Schmidt, 13 Or. 17 (1887).
\textsuperscript{253} 435 U.S. at 415.
an operation—a reorienting of our political power—seriously undermines the whole home rule movement, which is based on the principle that local people at the grass roots could decide their own police power objectives and local policy.\(^\text{254}\)

Not only has the impact of Brennan’s decisions arguably been to reinstitute Dillon’s regime;\(^\text{255}\) Brennan also revitalized Dillon’s language of city subjection, which had been quiescent in recent municipal law. Brennan’s antitrust opinions stressed America’s “dual system of government”;\(^\text{256}\) “We are a nation not of ‘city states’,” he reminded the Court, “but of States...”\(^\text{257}\) Brennan also stated that “Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.”\(^\text{258}\)

Though Brennan felt self-conscious about using Dillon’s rhetoric of city subjection,\(^\text{259}\) he did so nonetheless because this rhetorical strategy allowed him to turn a liability into an asset. The traditional city-as-creature-of-the-state analysis presented problems for Brennan: for if cities were merely subdivisions of states, why then were cities not im-


\(^{255}\) A close examination of the municipal antitrust cases so far decided suggests that federal courts have given cities a much broader rein under the antitrust laws than late 19th century state courts did under Dillon’s Rule. This trend is confirmed by Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985), which sets up a test for state action that municipalities should not in many instances find difficult to meet. See Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985) (town actions qualify as “state action” immune to antitrust requirements when town activity is authorized by state law; rejecting alternative test requiring town activity to be actively supervised by state in order to qualify as state action).

In cases in which courts perceive some wrongdoing, however, they have felt free to find that municipal action was not properly authorized by state law, and so have imposed antitrust liability. See, e.g., Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981), rev’d, 700 F.2d 226 (5th Cir. 1983) (verdict reinstated), modified en banc, 735 F. 2d 1555 (5th Cir. 1984) (treble damages imposed on Houston for antitrust violations). Unity Ventures v. County of Lake, No. 81-C-27456 Antitrust & Trade Reg. Rep. 598 (BNA) (N.D. Ill. filed 1981) (treble damages imposed on the Village of Grayslake and the County of Lake (Illinois) for antitrust violations); Vickery Manor Serv. Corp. v. Village of Mundelein, 575 F. Supp. 996 (N.D. Ill. 1983) (city not immune from antitrust liability unless action was expressly authorized by state statute or was a reasonable or foreseeable use of expressly granted powers). For a comprehensive review of antitrust challenges to land use regulation, see Deutsch, Antitrust Challenges to Local Zoning and Other Land Use Controls, 60 CHI.-KENT L. REV. 63 (1984). It remains to be seen whether courts will now be less reluctant to find cities liable for antitrust violations because of the statute passed recently precluding municipal liability for treble damages, Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984). Now that the threat of treble damages has been eliminated, federal courts may well become more active in overseeing city behavior (via antitrust suits) in a way similar to the way state courts oversaw city behavior (via Dillon’s Rule) in the late 19th century.


\(^{257}\) Id. at 54 (quoting a dissenting Court of Appeals opinion, 630 F.2d at 717).

\(^{258}\) Id. at 50 (quoting City of Lafayette, 435 U.S. at 412-13).

\(^{259}\) See supra note 253 and accompanying text.
Brennan dodged this problem by separating two aspects of Dillon's formulation that traditionally have been linked: the principle that cities have no inherent sovereignty, and the doctrine that cities are subdivisions of the state. Boulder's attorney had combined these two doctrines in the traditional way, arguing that the city enjoyed the state's immunity because it was merely an agent of state power. Brennan responded that the city was not automatically entitled to state action immunity precisely because it was a creature of the state with no independent sovereignty, and so was not entitled to the same protection the state received.

The source of Brennan's fervor for municipal antitrust liability is suggested by the case he cites for the principle that ours is a dual system of government: Edelman v. Jordan. This cite provides the key to understanding why Monell and the municipal antitrust cases were inextricably linked in Brennan's mind. Monell and City of Lafayette were decided virtually simultaneously, and involved some parallel doctrinal issues. In both, Brennan argued that cities should not enjoy immunity despite the fact that states were immune. Brennan also stressed in both opinions that cities (unlike states) were "persons" under the statutes involved. Brennan's subtext: that even if the federalism concerns en-

260. 455 U.S. at 52-53.
261. Id. at 53-54. Brennan's attempts to adhere to Dillon's traditional tenets and yet to distance the city from the state make City of Boulder a deconstructionist's dream: the decision degenerates into incoherence under only mildly rigorous analysis. One contradiction is noted in the text: if a state has delegated all its authority to a home rule city so that the city exercises all state powers with respect to city affairs, why isn't the city immune under Parker v. Brown? A second internal contradiction in Brennan's analysis is that, while he assumes the city is a governmental entity, he also refers to the city as "corporate," apparently implying that cities are not immune from the antitrust laws because they are more like private corporations than like public entities. See Development of the Public/Private Distinction, supra note 34 (detailing long history of the confusion over whether the city is public or private).

262. 435 U.S. at 412. Brennan's cite was to a footnote in Rehnquist's opinion distinguishing between counties and states for eleventh amendment purposes. Edelman v. Jordan, 415 U.S. at 667 n.12 (distinguishing Lincoln County v. Luning, 133 U.S. 529 (1890)).

263. Monell was argued on November 2, 1977 and decided on June 6, 1978; City of Lafayette was argued on October 4, 1977 and decided on March 27, 1978.

264. Monell, 436 U.S. at 662, 690-91; City of Lafayette, 435 U.S. at 394-97. In Monell, Brennan relied on legislative history to support this conclusion; in City of Boulder, he relied on Dillon's rhetoric of city subjection in stressing that cities were dramatically different from states because of their lack of inherent sovereignty.

Of course, the Court could have held that cities were "persons" under the antitrust laws and not under § 1983 or vice versa. Nonetheless, it is not difficult to see how a holding that cities were not persons under the antitrust laws would have seemed to Brennan to threaten a similar holding under § 1983.
capsulated in *Edelman* are relevant in suits against states, they are irrelevant in suits against cities or other local government units.  

Brennan’s insistent rhetoric of city subjection can best be viewed as part of a successful attempt to control what Brennan views as the damage done by *Edelman*. Rehnquist may have won his attempt to preclude damage remedies for violation of individual rights against states, the municipal liability cases say, but Brennan has tried to ensure that the 62,500 local government units will not receive the same immunity.

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265. For this reason Brennan was persistent in attempting to incorporate the rhetoric of city subjection into a majority opinion. He originally wrote the “dual system of government” language into his plurality opinion in City of Lafayette, 435 U.S. at 412, and then incorporated it into his majority opinion in City of Boulder, 455 U.S. at 53.

266. The analysis presented by no means implies that Justice Brennan is indifferent to the antitrust consequences of his municipal antitrust opinions. He has, in fact, a long history of support for the antitrust laws. See Jencks v. United States, 353 U.S. 657 (1957); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Baltimore & Ohio R.R. v. United States, 386 U.S. 372 (1967). In all three of these decisions Brennan argued for broad application of the antitrust laws. See B. Schwartz, supra note 101, at 222-24, 475-79, 671-72. See also W. Douglas, *Autobiography — The Court Years* 163 (1980). My only contention is that both in the antitrust municipal liability cases and the inverse condemnation cases, Brennan’s fervor is attributable to his concerns about how Rehnquist’s *Edelman* doctrine will affect plaintiffs’ ability to recover damages for violation of individual rights, a topic he clearly feels more deeply about than either antitrust or zoning.


268. In Fisher v. City of Berkeley, 106 S.Ct. 1045 (1986), decided as this Article was in the final stages of publication, Brennan received a setback to his attempt to expand municipal antitrust liability. The case involved a challenge to Berkeley’s rent control ordinance on the grounds that it constituted a conspiracy to monopolize in violation of section I of the Sherman Antitrust Act. Justice Marshall’s majority opinion never reached the issue of whether Berkeley’s rent control ordinance was exempt “state action” under *Parker v. Brown*. Instead, the Court held that no antitrust violation existed because no conspiracy existed in Berkeley between the local government and the landlords. The Court analogized Berkeley’s action to a restraint imposed by a single firm, which would not violate the antitrust laws even if it had the same economic effect as a conspiracy would have had.

Brennan was the sole and vigorous dissenter. He disagreed, first, with the majority’s basic antitrust analysis, claiming that past precedent such as California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), did not require proof of concerted action for a finding of preemption. Brennan claimed, second, that even if concerted action was required, a “functional combination” existed between Berkeley and the landlords. Finally, he said that the Berkeley ordinance was not exempt “state action,” since (according to Brennan) it was not passed pursuant to clearly articulated state policy. Brennan, therefore, would have held Berkeley liable for conspiracy to monopolize.

Although Brennan’s opinion claims that the majority’s holding “excludes a broad range of local government anticompetitive activities from the reach of the antitrust laws,” 106 S.Ct. at 1051, in fact the Berkeley holding appears inapplicable in cases in which local governments themselves are engaged in monopolistic activities, such as in Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985) (municipality required adjacent areas to be annexed in order to receive trash treatment service, arguably an attempt to monopolize), or City of Boulder, 455 U.S. 40 (1982) (city arguably created monopoly with respect to cable television service.) In cases such as *Town of Hallie* and *City of Boulder*, where a claim can be sustained that the locality itself is attempting to monop-
3. JUSTICE BRENNAN AND INVERSE CONDEMNATION: "AFTER ALL, IF A POLICEMAN MUST KNOW THE CONSTITUTION, WHY NOT A PLANNER?" 269

The Brennan opinions most incomprehensible to urbanists and city planners are his opinions advocating a damages remedy in cases in which a court invalidates local zoning as a regulatory "taking." 270 Traditionally, the only remedy available to a landowner in this context was invalidation of the unconstitutional portion of the zoning ordinance. 271 Recently, landowners have begun to ask not only for invalidation, but also for "interim" damages to reimburse them for the period during which the unconstitutional zoning was in effect. 272

Since 1980, the Supreme Court has granted certiorari in three cases involving the issue of whether a damages remedy is constitutionally required when a zoning regulation goes too far. To the amusement and relief of planning lawyers, the Supreme Court has failed each time to reach the merits, 273 arguing in each opinion that the case did not properly present the inverse condemnation issue. 274 Planners' amusement at the Supreme Court's hurry up and wait approach is matched only by their dumbfounded disbelief at Brennan's role in the inverse condemnation controversy. 275 As in the municipal antitrust cases, Brennan has gone further in advocating liability in the inverse condemnation cases than the majority of the Court has been willing to follow. In fact, in the inverse condemnation context, Brennan's position has never been


270. See supra note 220.


274. If one takes the Supreme Court at its word, one must conclude that the Court is experiencing a regrettable lack of expertise in its decisions to award certiorari. Agins, 447 U.S. 255 (1980) (no taking had occurred); San Diego, 450 U.S. 635 (1981) (no final judgment on the issue of whether a taking had occurred); Hamilton Bank, 105 S.Ct. 1352 (1985) (administrative actions of zoning authorities not final; plaintiff should have applied for a variance and attempted to recover damages under state statutory procedures).

275. See supra note 220 and accompanying text.
adopted by the full Court. The authoritative statement of his position remains his famous dissent in *San Diego Gas & Electric v. City of San Diego* in 1981, in which Brennan insisted that landowners whose property is “taken without due process by overregulation must be able to recover damages.”

“If a policeman must know the Constitution,” Brennan asked in *San Diego*, “why not a planner?” Some zoning experts have interpreted this question as a sign of Brennan’s ignorance. They remind Brennan that courts have never been able to articulate clear-cut tests defining when regulation goes too far and becomes a taking. Therefore, they argue, awarding damages to all affected landowners every time a zoning restriction is struck down as overregulation would eviscerate zoning, since localities with today’s tight budgets would be forced to abandon all rigorous zoning limitations for fear of financial ruin.

Brennan’s inverse condemnation opinions strike not only urbanists but many other observers as exceedingly odd. For, in these decisions, Brennan has emerged as the Burger Court’s chief defender of property owners chafing under stringent economic regulations. How did Brennan, who graduated from law school during the *Lochner* era, and who throughout his career has been very deferential in re-

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276. Although Brennan’s position never has been adopted by the Court, his dissent did receive four votes, and Justice Rehnquist indicated in a concurrence with the majority that he was in basic agreement with Brennan’s position.


278. 450 U.S. at 661 n.26.

279. *See, e.g.*, Williams, Smith, *supra* note 220, at 197. A good place to assess Brennan’s understanding of takings law is his majority opinion in *Penn Cent. Trans. Co. v. New York*, 438 U.S. 104 (1978). The opinion has a long discussion of prior takings cases, 438 U.S. at 122-35, which graphically conveys to the informed reader Brennan’s inability to formulate any focused takings analysis. Brennan follows his discussion with a new takings test that is very much at odds with the standard takings test in state zoning cases without appearing to recognize what he is doing.

The standard state law “confiscation” test is that a zoning regulation is not a taking unless the regulation destroys completely the value of the land regulated, because no feasible uses of the regulated land would remain. *See, e.g.*, Norbeck Village Joint Ventures *v. Montgomery County Council*, 254 Md. 59, 259 A.2d. 700 (1969).

State courts generally require that a landowner must have some reasonable opportunity to use his land, i.e., an opportunity that will bring a reasonable return. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 7.04a (1974 ed. & Supp. 1986) (noting that “there is a basic nationwide rule” although “a few states provide exceptions to this”).

In *Penn Cent. Trans. Co. v. New York*, 438 U.S. 104 (1978), Justice Brennan appeared to endorse the reasonable return test in some passages, but in others he intimated that a taking occurs whenever zoning or related restrictions interfere with a landowner’s reasonable investment-backed expectations. The latter formulation appears to guarantee to landowners some increment of land’s speculative value — a standard very different from that established by the reasonable use test (particularly where state courts hold that a reasonable use exists unless every permitted use is unfeasible).


viewing economic legislation,²⁸² so abruptly lose his *Lochner*
inhibitions?

The answer is far from clear. Planning lawyers would rest easier if they could convince Brennan that his inverse condemnation opinions involve the kind of close Supreme Court scrutiny of regulatory legislation that the Court (with Brennan’s enthusiastic concurrence) has avoided since the famous *Carolene Products* footnote.²⁸³ If Brennan were to accept this argument, he could draw a sharp distinction between the inverse condemnation cases and the cases he cares about most—those involving damages remedies for civil rights plaintiffs. For the present, however, Brennan remains unconvinced. He appears to believe that the only way to preserve a damages remedy for civil rights plaintiffs under section 1983 is to advocate damages for landowners in zoning contexts as well. The fact that landowners ordinarily append section 1983 claims to their inverse condemnation suits presumably reinforces Brennan’s belief that the inverse condemnation issue is closely intertwined with the future of section 1983. Because Brennan sees the issues as closely linked, he supports an inverse condemnation remedy, since the last thing Brennan wants is precedent in which a plaintiff whose constitutional rights have been violated is precluded from a damages remedy.²⁸⁴

### III. Cooley’s Inherent Local Government Sovereignty as a Political Forum-Shifting Argument

A pattern has emerged: Dillon’s formulation of city status and the Burger Court majority’s local sovereignty decisions both function as political forum-shifting arguments, designed to rein in municipalities and the federal government, respectively. Brennan’s municipal liability decisions stem from his desire to rein in government in order to protect individual rights. Each of these formulations of city status thus functions to contain that aspect of governmental power which, in the view of its author, presents the greatest potential for abuse.

²⁸². *See Alternative to the Double Standard, supra* note 104, at 58-73 (description of the rise and development of the double standard). Brennan was part of the Warren Court activist majority that brought the double standard to its current status. *See supra* note 208.

²⁸³. United States v. *Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). In the *Carolene Products* footnote, Justice Stone made a now-classic statement of the distinction between general regulatory legislation and government restrictions on fundamental constitutional values such as individual rights. The *Carolene Products* footnote is widely cited for the principle that the Court will not engage in strict scrutiny of economic legislation.

²⁸⁴. After all, Rehnquist’s holding in *Edelman* was not that the plaintiffs were precluded by the eleventh amendment from a remedy, but only that they were precluded from suing for damages. *Edelman* left plaintiffs free to sue the state for injunctive relief. That is what Brennan’s disagreement with Rehnquist in *Edelman* is all about.
This Section shows that Thomas M. Cooley's theory of local government sovereignty also functioned to limit governmental abuse through a forum-shifting argument. Unlike Dillon, who identified localities as the chief threat of governmental power run amok, Cooley viewed state legislatures as the chief source of governmental abuse. Cooley's distrust of state legislatures derived from his Jacksonian disapproval of "special interests." He believed (with considerable justification) that special interests had "captured" late nineteenth century state legislatures. For Cooley (as for the conservative Burger Court majority), the Anglo-Saxon tradition of self-government was America's best hope of reining in unruly government and preserving American freedoms. This Section first discusses Cooley's politics and jurisprudence, and then explains how his theory of inherent local government sovereignty functioned as a political forum-shifting argument.

A. Distrusting Power and Revering Liberty: The Jacksonian Core of Cooley's Thought

"The power of legislation, and the power of aggregated capital, sometimes one and sometimes the other, has (sic) been at the work of oppression and robbery. As against the masses, they have always been hand in hand."

John Pierce, Michigan radical consistently praised by Cooley in the 1850's.

"The Lawyer is and should be conservative . . . the path of wisdom is to keep an eye on old landmarks."

Cooley during the Civil War.

285. M. MEYERS, supra note 61, at 17 ("A wealthy planter needs no editorial or legislative hired hand; a wealthy banker of this era cannot do without them, where incorporation requires special charter grants"). See also G. VAN DEUSEN, THE JACKSONIAN ERA 103 (1959); R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 57-61 (1977).

286. Cooley's inherent right to self-government is actually one of a number of constitutional limitations designed to rein in unruly government. See infra text accompanying notes 331-48.

287. The phrase "distrusting power and revering liberty" is from Paludan, supra note 36 at 606.


Dillon, Brennan and the Burger Court majority can be categorized as “liberals” or “conservatives” in the modern sense of each term with only a limited amount of oversimplification; Cooley cannot. Cooley combined elements that today seem clearly liberal with other elements that seem unmistakably conservative.

Dillon was the ideal type of a corporate lawyer in the Gilded Age, who made it his business to know more about his clients’ business than they did. His grasp of the financial aspects of railroad and other business deals was highly valued. Cooley, on the other hand, was not interested in finance, nor in fact in business at all, except as it was implicated in his consuming passion: government.

See also C. Fairman, supra note 67, at 923.

290. See supra note 49.

291. See Green Bag, supra note 53, at 447:
A prominent banker who frequently has occasion to obtain Judge Dillon’s opinion of the legal aspects of his financial transactions is always desirous to know what the judge thinks of the matter in hand from the business side. “Ask the Judge,” he would instruct his representative, “what he thinks of the ‘deal’ as an investor; would he put his own money in the venture?”

See also C. Fairman, supra note 67, at 923.

292. Until 1960, Cooley was consistently interpreted as an ally of the robber barons by historians in the Progressive historiographical tradition, see, e.g., C. Jacobs, supra note 49, at 27 (1954). See also B. Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court 18-41 (1942); S. Fine, supra note 49, at 127-30, 142-44 (1956); E. Corwin, Liberty Against Government 137-38 (1948); C. Haines, supra note 86, at 127-34.

In the early 1960's Professor Alan Jones offered a revisionist interpretation of Cooley in his dissertation and three articles that grew out of it. Jones, The Constitutional Conservatism of Thomas McIntyre Cooley (unpublished Ph.D. dissert., Univ. of Michigan, 1960); Laissez-Faire Constitutionalism, supra note 288; Jones, Thomas M. Cooley and the Interstate Commerce Commission, 81 Polit. Sci. Q. 602 (1966) [hereinafter cited as Cooley and the ICC]; Jones, Thomas M. Cooley and the Michigan Supreme Court: 1865-1885, 10 Am. J. Leg. Hist. 97 (1966) [hereinafter cited as Cooley and Michigan Supreme Court]. Jones' work was used by Harold Hyman in his acclaimed book on Reconstruction. H. Hyman, supra note 49. Hyman's thesis is that the Civil War opened up the possibility of vastly expanded governmental power, but that a generation of lawyers (including Cooley and Dillon) ensured that this new potential was never realized. While Hyman showed an awareness of Jones' work, id. at 372-75, he stressed Cooley's conservatism, id. at 354-55, 516-19, 537, in contrast to Jones, who stressed Cooley's adherence to political positions today associated with liberalism, e.g., his adherence to equal rights.

The most recent historian to consider Cooley's life and work is Phillip Paludan, see Paludan, supra note 36; P. Paludan, A Covenant With Death 249-81 (1975). Paludan, a student of Hyman, repeats Hyman's basic question: why did Reconstruction fail to deliver to blacks the equality promised by the abolitionist movement? Paludan, in effect, generalized Jones' interpretation of Cooley, as a man whose Jacksonian preconceptions severely limited his ability to deal with Gilded Age problems, into an interpretation of an entire generation. See Cooley and Michigan Supreme Court, at 111-120 (equal rights, freedom of the press).

Thus, Jones' interpretation of Cooley seems established in the historical literature, but its implications remain largely unexamined by constitutional scholars, who continue to treat Cooley's theory of constitutional limitations as indistinguishable from the Supreme Court's Lochner era jurisprudence. See, e.g., L. Tribe, supra note 82, at 438-40. Tribe's failure to appreciate that Cooley's theory of constitutional limitations was designed to accomplish political goals very different from those it was ultimately used to accomplish is one instance of lawyers' persistent tendency to overlook the way in which identical rhetoric is used by different generations to support very differ-
Cooley's interest in law was an aspect of his interest in politics. He came from a political family. His father was active at Democratic meetings; his uncle ran for Congress on the Democratic ticket; a half-brother wrote editorials in the political rhetoric of the radical "loco-foco" wing of the Democratic party. Cooley carried on the family tradition with a long-standing commitment to loco-foco principles. For his first ten years in Michigan, Cooley's interest in literary and political pursuits seems to have been stronger than his commitment to his legal career. His position as editor for two radical Democratic newspapers and his other political activities may well have hindered his success as a lawyer, just as similar activities twenty years later may have cost him a seat on the United States Supreme Court.

Cooley's career differed markedly from Dillon's in ways that highlight the differences between them. Whereas Dillon resigned a federal judgeship to practice corporate law, Cooley neither enjoyed nor was notably successful in law practice. For the bulk of his career Cooley divided his time between teaching, publication, and his position as justice of the Michigan Supreme Court. Like Dillon, Cooley was involved with railroads. But Cooley didn't represent them, he regulated them, as the first chairman of the Interstate Commerce Commission.

In the 1850's, Cooley as a "Progressive Democrat" advocated ideas still associated today with American liberals: equal rights, free

ent goals. See supra note 88. Lawyers' retrospective oversimplification of doctrinal development greatly limits their ability to spot and understand doctrines' manipulability.

293. Laissez-Faire Constitutionalism, supra note 288, at 759.

294. Id. at 753. In contrast, Dillon was suitable for a federal judgeship because, during an era when Republicans dominated national politics, Dillon was a lifelong "party regular" in the Republican party. Dillon joined the Republican party when it was the antislavery party, and continued to feel comfortable with the G.O.P. as it became increasingly allied with big business and the wealthy in the post-civil war period. Cooley's alliances with national parties were somewhat fragile. He began as a Free Soil Democrat. He changed to the Republican party during the 1850's when the Democratic party became the party of slavery, but became increasingly uneasy with the G.O.P. in the late 19th century. In fact, some of Cooley's anti-corporate decisions while on the Michigan Supreme Court probably contributed to the breaking of the Republican machine in the 1870's, and a movement arose to draft him to run for governor as the candidate of a coalition of Democrats and Liberal Republicans. Id. at 106-08. Evidence suggests that none of this free thinking endeared him to party regulars.


296. Id. at 313. In his later years Cooley moved away from legal scholarship towards political science and history. In 1881, Cooley began to teach in the school of political science. In 1884 he gave up his position on the law faculty; the following year he accepted a position in the literary department teaching American history and constitutional law. 4 DICTIONARY OF NATIONAL BIOGRAPHY 392 (1930).

297. Cooley was appointed to the ICC as a symbol of integrity that both the railroads and the public could trust. Cooley and the ICC, supra note 292, at 612. At first, Cooley's Jacksonian percepts impeded his ability to make the Commission's work effective. Gradually, however, Cooley proved willing to take severe sanctions against the railroads. Id. at 616-19. See infra note 328 and accompanying text. Note that Hyman glosses over all of this. H. HYMAN, supra note 49, at 354-55.
speech, and hostility to privileged and powerful corporate interests. These values persisted throughout Cooley's life. After the Civil War, his focus on equal rights led him to champion the rights of newly emancipated blacks. Cooley was also extremely supportive of freedom of the press. He played a major role in a series of Michigan Supreme Court decisions constricting the liability of newspapers on first amendment grounds, and noted, with justifiable pride, in 1883: "No court has gone further than has this in upholding the privileges of the press, and very few so far."

Cooley's apprehension about the risk that powerful corporations would distort political processes also sounds quite modern. In an 1871 description of the Dartmouth College case, Cooley noted that the case had created "the most enormous and threatening powers in our country. Some of the great and wealthy corporations," he noted, "have greater influence in the country and upon the legislation of the country than the states to which they owe their corporate existence." Cooley warned his students of the "struggle between the power of corporations and the rights of the people."

Much of Cooley's language sounds familiar because it is part of an American political tradition that dates back to the Jacksonian era. Yet, the values and the rhetoric Cooley shared with modern liberals should not blur important differences between contemporary liberalism and Cooley's social vision in its original context.

One hallmark of contemporary liberalism that Cooley did not share is its hostility to laissez-faire. Cooley was a staunch advocate of free market principles. His advocacy of laissez-faire was part of his Jacksonian antipathy toward "special interests," a term used to refer to the wealthy and powerful corporations that dominated state legisla-

298. Laissez-Faire Constitutionalism, supra note 288, at 754-55.
299. See, e.g., People ex rel. Workman v. Board of Educ. of Detroit, 18 Mich. 399 (1869) (Cooley decision upholding black child's right to a free public school education); Cooley and Michigan Supreme Court, supra note 292, at 119-20.
301. Id. at 117.
303. See Laissez-Faire Constitutionalism, supra note 288, at 756.
304. Id. Cooley's hostility to corporations is one major difference between him and Dillon. Another is Cooley's hostility to judicial review. See Cooley and Michigan Supreme Court, supra note 292, at 109-13. Jones points out that Cooley's distrust of judicial review is itself enough to disqualify Cooley's jurisprudence from being laissez-faire constitutionalism. See Laissez-Faire Constitutionalism, supra note 288.
305. Much "progressive" rhetoric passed from progressive Jacksonian Democrats to the late 19th century Progressives, through the New Deal, to present day liberals.
tures for their own pecuniary gain. One example of special interests' abuse that particularly troubled Cooley was the success railroads had in financing their endeavors through publicly issued bonds.

Once again we return to bonding. For an appreciation of Cooley's attitude towards municipal bonding, additional background is in order on the "transportation revolution" of the nineteenth century. The prior discussion told only the second half of the story, for railroad companies did not begin by aspiring to municipal issuance of their bonds. Early entrepreneurs went first to state legislatures, and the states themselves played the major role in financing canals and railroads in the early decades of the nineteenth century. As a result, after the severe panic of 1837, over one hundred million dollars worth of state bonds were outstanding. Many projects defaulted, and the solvency of a substantial number of states was severely strained.

An immediate outcome was a rash of state constitutional provisions prohibiting states from issuing railroad bonds. By midcentury, virtually all states in the Union were forbidden from issuing bonds in aid of railroads or other projects. Yet, the prohibitions on state involvement proved an empty victory, for soon the "special interests" had obtained authorization from state legislatures to allow municipalities to issue railroad bonds.

To Cooley, the railroadmen's maneuver proved the loco-foco premise that unlimited legislative power resulted in the exploitation of the many for the benefit of the few. Laissez-faire to Cooley meant that the legislature should stay out of the economy because "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the

307. For a general introduction to the Jacksonian era's hostility to "special interests," see M. Meyers, supra note 61.
308. See supra text accompanying notes 61-65.
309. The most famous example was the Erie Canal, financed in large part by the state of New York. A. Heins, Constitutional Restrictions Against State Debt 3-6 (1963).
310. Laissez-Faire Constitutionalism, supra note 288, at 755. Of the one hundred million dollars debt, over forty million dollars was attributed to railroad building, the remaining sixty million to canal building. A. Heins, supra note 309, at 6-7; G. Taylor, supra note 61, at 92.
312. A. Heins, supra note 309, at 8-9; Pinsky, supra note 311, at 277-78; G. Taylor, supra note 61, at 375-78.
profits of the stronger." Cooley expressed his version of laissez-faire in classic Jacksonian rhetoric: "The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

Thus, Cooley's intense disapproval of municipalities' issuance of railroad bonds was an outgrowth of his Jacksonian tenets. This is amply illustrated by his controversial decision in People v. Salem, in which Cooley (as had Dillon one year earlier) struck down municipal railroad bonds as unconstitutional. From a doctrinal standpoint, the two decisions were similar, but the differences between the two far outweigh those similarities. While Dillon formulated the issue as involving a clash between governmental power and property rights, Cooley's opinion reflects his Jacksonian view that legislatures' authorization of railroad bonding was one example among many of legislatures' pandering to special interests:

"The discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming, or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim of State government."

Not only did Cooley's rhetoric differ from Dillon's; Cooley's decision also had a very different substantive impact on the parties involved. People v. Salem invalidated bonds already issued, and in doing so destroyed the value of seven million dollars worth of outstanding bonds. Dillon's decision did nothing of the kind. Hanson v. Vernon did not involve any bonds actually issued; it only declared unconstitutional a state statute authorizing issuance of bonds in the future.

Cooley was not disturbed by invalidation of outstanding bonds, because such invalidation vindicated the rights of the many and thwarted special interests who had used undue influence to procure authorization of the bonds. Dillon, on the other hand, felt that once bonds had been issued creditors' rights should be respected. "(I)t will be well," he said in his treatise, to hold municipalities to their bonds, "if it shall teach municipalities the lesson that if, having the power to do so,
they issue negotiable securities, they cannot escape if these find their way into the hands of innocent purchasers."  

B. Cooley’s Post-Civil War Conservatism

The Civil War changed Thomas Cooley’s social vision both directly and indirectly. His horror at the consequences of convulsive political change changed him directly by clipping the wings of his radicalism. Before the war, Cooley’s self-image was (in modern terms) near-Maoist:

[C]onservatives are a little out of date in this part of the country, and most of us think that everything in the moral and political world as well as the physical is better torn down and rebuilt every ten years.  

Amidst the slaughter of the 1860’s Cooley’s passion for convulsive change was markedly diminished. “The lawyer is and should be conservative,” he stated in 1863, “the path of wisdom is to keep an eye on the old landmarks, particularly the common law.” Yet it should be noted that Cooley did not stop there: “In the life of nations,” he continued, “conservatism and progress must be found to go hand in hand; and the lawyer, instead of opposing all change and living as much as possible in the past, must be awake to the living present, and hopeful of the future.”

Cooley proved as good as his word, when, after the Civil War, certain of his Jacksonian preconceptions were sorely tried by the Gilded Age. The two great tasks facing American government during this period were control over corporate interests and equality for freed slaves. Neither could be accomplished without a massive increase in the exercise of federal power, which Cooley resisted on two grounds. First, such an increase required radical innovation, a prospect that frightened Cooley after the Civil War. Second, an increase in government power contradicted Cooley’s Jacksonian precept of negative government: the belief that the government’s duty was to keep its citizens from injuring

323. See J. Dillon, supra note 4, at Sec. 416. Fairman points out that the third parties who bought the bonds, far from being “innocent,” were in fact speculators who bought large quantities of defaulted paper at deep discounts. C. Fairman, supra note 67, at 924-25.
324. Laissez-Faire Constitutionalism, supra note 288, at 754.
326. See Paludan, supra note 36, at 598-601.
each other, and otherwise to "leave them free to regulate their own pursuits of industry and improvements." 327

Ultimately, towards the end of his life, Cooley began to acknowledge the need for increased federal power to control corporate interests. As the first chairman of the Interstate Commerce Commission (ICC), Cooley gradually concluded that effective control of railroads in the public interest required exercise of direct federal authority. 328 Cooley's experience at the ICC was the culmination of much he found unsettling about the Gilded Age. One scholar has linked Cooley's self-described "despondency" and his breakdown in 1889 with inner strain produced by the inadequacy of his pre-Civil War social vision to handle the problems of a rapidly industrializing and urbanizing era. 329

This assessment of Cooley's political outlook shows that he was neither a liberal nor a conservative according to modern definitions. Moreover, it shows that Cooley was not apprehensive about governmental abuse by municipalities (as was Dillon) nor by the federal government (as are modern conservatives), but by state government. The following section shows that Cooley's theory of constitutional limitations, and his doctrine of the inherent sovereignty of localities, can be viewed as political forum-shifting arguments designed to control state legislatures.

C. Cooley's Inherent Right to Local Self-government as a Political Forum-Shifting Argument

Cooley published his Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union in 1868. The book went through six editions, sold more copies and was more frequently cited than any other book on American law published in the last half of the nineteenth century. 330 It became, in the words of one historian, "America's second constitution." 331

Although Cooley's treatise was used by Dillon and others as the raw material for laissez-faire constitutionalism, 332 the book itself is best understood as an attempt to rein in state government. The book's central premise, apparent from its title, is that constitutional rights are

327. See S. Fine, supra note 49, at 3-4 (discussion of the "negative state"). The Jacksonians inherited the concept of negative government from the Jeffersonians. (The definition quoted is Jefferson's, quoted in Paludan, supra note 36, at 601). See also id. at 602, 614.
329. See Laissez-Faire Constitutionalism, supra note 288, at 771 n.79. Compare Paludan, supra note 36, at 103-41 (Paludan implies that Cooley never gained any appreciation of his ideas' unsuitability in the post-Civil War period).
331. See Paludan, supra note 36, at 598.
332. See C. Jacobs, supra note 49, at 98.
best assured by limitations on the states. This premise was a change from the founders' original conception, expressed in the Bill of Rights, that the centralized power of the federal government was the primary threat to traditional liberties. In 1868, Cooley's change seemed apt for both prospective and retrospective reasons. Prospectively, Cooley's conception provided a central role for the fourteenth amendment in post-Civil War jurisprudence.\textsuperscript{333} Cooley's assumption that states presented the primary threat to freedom was readily molded into a constitutionalism that mobilized the fourteenth amendment to limit states' efforts at business regulation.\textsuperscript{334}

Yet Cooley's novel conception of the constitution was motivated not by these prospective concerns with a laissez-faire future, but by retrospective concerns generated by his Jacksonian past. Cooley considered the chief threat to freedom and prosperity to be not state legislatures' regulatory enactments, but their tendency to be captured by powerful corporate interests. In 1870, Cooley still used Jacksonian imagery to describe abuse by state legislatures: "The source of danger is in a few men having so much moneyed power. They can make great consolidations. They are able to exercise more influence over the state legislatures than both political parties."\textsuperscript{335} Nearly fifteen years later Cooley's basic vision remained unchanged. While defending most capitalists, he decried "robbers and plunderers" and warned that "poverty is never so much in danger of becoming master as when capital unjustly manipulates the legislation of the country."\textsuperscript{336}

Cooley gave a more systematic statement of his distrust of state legislatures in 1878. "The American people," Cooley began, "conferred no unlimited authority."\textsuperscript{337} Cooley reminded the reader of various constitutional limitations, and then discussed their raison d'etre in terms that would have sounded quite foreign to the founding fathers\textsuperscript{338} but that are resonant of Cooley's nineteenth century concerns. The basic goal of constitutions, according to Cooley, is to rein in errant legislatures. "It must be conceded," Cooley admitted, "that in the original establishment of American constitutions no special distrust of legislative bodies was manifested. . . . But the country was not slow to discover the need of some other check upon representatives than that which was afforded in frequent elections."\textsuperscript{339}

\begin{itemize}
  \item \textsuperscript{333} See generally B. Twiss, supra note 292; C. Haines, supra note 86, at 143-65; E. Corwin, supra note 292, at 116-68.
  \item \textsuperscript{334} See supra note 332.
  \item \textsuperscript{335} Cooley and the ICC, supra note 292, at 605.
  \item \textsuperscript{336} Id. at 608.
  \item \textsuperscript{337} Cooley, Limits to State Control of Private Business, 54 Princeton Rev. 233 (1878) [hereinafter cited as State Limits on Business].
  \item \textsuperscript{338} See G. Woods, The Creation of the American Republic 1776-1787 343-63 (1969).
  \item \textsuperscript{339} State Limits on Business, supra note 337, at 234.
\end{itemize}
Cooley then recited an early case of legislative fraud, but only as a warm-up to his major instance of legislative abuse.

The legislation in aid of private individuals and corporations would first attract attention, not only because of its magnitude, but because around it has clustered much that was questionable, and not a little that proved to be corrupt.\(^\text{340}\)

Cooley mentioned municipal assistance to railroads as a particularly prevalent offense, and began an extended discussion before he caught himself, noting, "The evils that have resulted from such legislation [authorizing municipal bonds], equally with the incidental benefits, are foreign to the present discussion" (as indeed they were).\(^\text{341}\)

For Cooley, as for Dillon, outrage about railroad bonding is essential background for understanding his political forum-shifting arguments. Both men cared deeply about bonding, yet their concerns led them to quite different conclusions. Dillon disapproved of municipal bonding because it was, in his view, exactly the kind of governmental interference that would disrupt the economy.\(^\text{342}\) Hence, for Dillon, the optimal solution was to limit not only the ability of municipalities to issue bonds, but also their governmental authority in general, so that towns interfered with the market neither by regulating business, enacting taxes, nor providing services. For Cooley, the issuance of railroad bonds by municipalities—invariably authorized by state legislatures—was merely the most egregious example of class legislation for "special interests." For Cooley, therefore, the larger solution was not to rein in municipalities, but to control state legislatures. His theory of local government sovereignty was one of a number of doctrines designed to accomplish this goal.\(^\text{343}\)

\(^{340}\) Id. at 236.

\(^{341}\) Id. at 237.

\(^{342}\) See supra notes 86-89 and accompanying text.

\(^{343}\) Cooley's theory of inherent municipal sovereignty in particular, and his constitutional theory in general, can be viewed as part of an on-going Jacksonian strategy to limit the power of state legislatures that began with the state constitutional conventions of the 1840's. These conventions, often dominated by radical Jacksonian Democrats, replaced earlier state constitutions with new ones that contained detailed limitations on state legislative power. See Laissez-Faire Constitutionalism, supra note 288, at 755 (documenting mid-century constitutional conventions). Cooley's constitutional theory continued this Jacksonian strategy, merely changing the focus of political activism from constitutional conventions to the courts. Cooley's theory crystallized a series of constitutional limitations on state legislatures as the basic framework of constitutional law. Some were written into the federal or the state constitutions or both. But Cooley's major innovation was his assertion that other important constitutional limitations were unwritten ones. See Constitutional Limitations, supra note 35, at 85, 129; Cooley, Comparative Merits of
Cooley's theory of inherent local sovereignty did not deny that the state had the authority to set up municipalities and even to appoint some city officers on an initial and provisional basis. Where Cooley and Dillon diverged was on the breadth of states' control over functioning municipal governments. Dillon concluded that state control was virtually unlimited, and gave states the authority to replace city officers or even to abolish city governments altogether. Cooley disagreed. In *The People ex rel. LeRoy v. Hurlbut*, Cooley wrote that "The right in the state is a right, not to run and operate the machinery of local government, but to provide for it and put it in motion." \(^3\)\(^4\)\(^5\) Hurlbut involved the question of whether the state legislature could establish a board of public works for Detroit and appoint not only its initial but also its permanent members. For Dillon, the answer would have been easy: yes, because the city is the creature of the state. Cooley framed the issue quite differently: "The question, broadly and nakedly stated can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure?"\(^3\)\(^4\)\(^6\) Cooley answered no:

The state may mould local institutions according to its views of policy and expediency; but local government is a matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at its discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.\(^3\)\(^4\)\(^7\)

The context of *Hurlbut* illustrates the Jacksonian roots of Cooley's principle of inherent local government sovereignty. The case arose when the state legislature attempted to control appointments to a commission with substantial power over city funds and city patronage. Thus, *Hurlbut* involved exactly the kind of grasping by special interests

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*Written and Unwritten Constitutions*, 23 Am. L. Rev. 311 (1889) (Cooley concludes unwritten constitutions are better).

One important such limitation was the public purpose doctrine, which Cooley had invented to end municipal issuance of railroad bonds. The principle of inherent local sovereignty was another.

344. 24 Mich. 44 (1871).
345. *Id.* at 110.
346. *Id.* at 95-96.
347. *Id.* at 108.
that raised Cooley's Jacksonian ire. In decisions after Hurlbut, Cooley generally deferred to the state legislature, but he included strong dicta reiterating the doctrine of inherent local government sovereignty. Thus, the doctrine remained as a potential check on the state legislature in contexts where special interests' behavior proved sufficiently outrageous.

This analysis shows that Cooley's theory of inherent municipal sovereignty was only secondarily an attempt to empower localities themselves. Like Dillon's formulation of city status and the Burger Court's local sovereignty principle, it was primarily a political forum-shifting argument. Whereas Dillon wanted to shift power away from localities, and the Burger Court majority wants to shift power away from the federal government, Cooley's theory was designed to shift power away from state legislatures "captured" by special interests.

IV. CONCLUSION: THE CONSTITUTIONAL VULNERABILITY OF LOCAL GOVERNMENT

This Article suggests that each of the four major formulations of city status was motivated by an agenda concerning government power. Dillon's theory that cities are creatures of the state was a by-product of his desire to limit government interference in the economy. Cooley's theory of inherent local sovereignty reflected his desire to limit the manipulation of government by special interests. The Burger Court's quasi-constitutional principle of local sovereignty stems from contemporary conservatives' desire to constrict the size and power of "big government." Brennan's formulation of city status in the municipal lia-

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348. One useful way to view Cooley's doctrine is as a weapon courts could use in so-called "ripper cases," see supra note 45, in which Republican legislatures "ripped" powers away from Democratic localities. A classic "ripper" case occurred in Michigan in 1865. People v. Mahaney, 13 Mich. 481 (1865), concerned a situation where the legislature replaced Detroit's police chief with a state superintendent of police. Similar incidents occurred in many states. (An early, classic example was People v. Draper, 15 N.Y. 522 (1852)). The reason: the police force was a rich source of patronage, which legislatures wanted to wrest from cities. Cooley was not far off the mark in viewing cases such as Mahaney and Hurlbut as instances where the legislature was captured by special interests.

349. E.g., Board of Park Comm'rs v. Common Council of Detroit, 28 Mich. 227, 240 (1873) ("it is a fundamental principle in this state . . . that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government"); People v. Common Council of Detroit, 29 Mich. 108 (1874). Note that in both cases, Cooley ultimately upheld the legislature's action, influenced presumably by his belief in a narrow scope of judicial review. Cooley's inherent sovereignty discussions in each case are clearly dicta.

350. See supra notes 86-88 and accompanying text.

351. See supra notes 314-29 and accompanying text.

352. See supra notes 101-17 and accompanying text.
bility cases is designed to allow redress of governmental intrusions on individual rights.\textsuperscript{353}

When juxtaposed with these four major theories of city status, Frug's analysis in \textit{The City as a Legal Concept}\textsuperscript{354} has certain familiar elements. Like Cooley, Dillon, Brennan, and the Burger Court majority, Frug is drawn to an analysis of city status by an agenda concerning government power in general. Frug, writing as part of the critical legal studies movement, argues for a reimagined city that, by functioning as a participatory democracy, will eliminate the alienation that (he feels) pervades life in late capitalist society.\textsuperscript{355}

Though Frug's interpretation parallels those of the other authors studied, it also differs in a basic way. Cooley, Dillon, Brennan and the Burger Court all share an apprehension about the potential for abuse inherent in powerful government. This fear is a persistent element in American political ideology,\textsuperscript{356} and American municipal law has been shaped by it. In sharp contrast to the four other authors, Frug focuses not upon his fears, but upon his aspirations for public power. He rejects the long-standing American distrust of government in favor of a reformist attitude that exalts government's potential to create a new society.\textsuperscript{357}

In this effort, Frug represents the third generation of twentieth century reformers who have sought to reformulate city status as a first step in redefining the body politic in order to solve pressing social problems. At the turn of the century, the Progressives aspired to reshape the city into an institution run by experts, whose knowledge and vision would solve urban problems that had resulted from industrialization and immigration.\textsuperscript{358} In the 1960's, Great Society activists renewed and updated the Progressives' belief that America's most pressing social

\textsuperscript{353} See supra notes 210-15 and accompanying text.

\textsuperscript{354} Frug, supra note 30.

\textsuperscript{355} \textit{Id.} at 1068-73. Frug has since developed his critique of bureaucracy in Frug, \textit{The Ideology of Bureaucracy in American Law}, 97 HARV. L. REV. 1276 (1984). He continues to view participatory democracy as the chief alternative to bureaucracy, and to view bureaucracy as "the primary target for those who seek liberation from modern forms of human domination." \textit{Id.} at 1295. Frug's alienation critique is in the Marxist tradition, see Frug, supra note 30.

His romance with participatory democracy derives from a New Left agenda established in the 1960's, see J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY viii-ix (1980). Frug takes the virtue of participatory democracy as a given. (Compare Mansfield's extremely sophisticated analysis of the potential of participatory democracy: she analyzes (as Frug does not) its potential strengths and weaknesses in various concrete contexts.)

\textsuperscript{356} See S. FINE, supra note 49, at 3-4, 9-14.

\textsuperscript{357} \textit{Id.} at 167-68. Most people today associate this reformist tradition with the New Deal.

problems could be solved by redesigning city governments to give cities more power. Frug’s proposal to reshape the city into a participatory democracy is the latest manifestation of this tradition, which for nearly a century has viewed cities as “the hope of democracy.”

American reformers’ romance with the city is one aspect of what could be called the whore/madonna syndrome in American local government: the tendency of American intellectuals to caricature cities in a schematized way as either the hope or the downfall of virtue in government. The negative branch of the syndrome was elegantly documented by Morton and Lucia White in their famous study *The Intellectual Versus the City.* Frug’s *The City as a Legal Concept* brings this tradition into the legal literature, in its positive (“madonna”) mode. The tendency of American courts to use city status as a proxy for their attitude towards governmental power is thus a specialized example of a broader tendency among American intellectuals to project onto cities their fears and aspirations about government.

The question that remains is whether this tendency has consistently redounded to cities’ detriment. It has not. Cities have had some victories, and exist today as units of government that exercise substantial regulatory power and provide important services. Though Frug takes city powerlessness as axiomatic, his approach is unpersuasive because he fails to distinguish between the ideology of city powerlessness and the question of whether cities in fact are powerless. Cities are not “powerless,” though their constitutional position has made them vulnerable in a way quite different from that Frug suggests.

360. F. HOPE, supra note 358.
361. M. & L. WHITE, supra note 125. Actually, the Whites documented both branches of the whore/madonna syndrome. Though they focused upon American intellectuals’ hostility towards the city, they also acknowledged “it is now [1961] fashionable for many American intellectuals to express tender concern for the city’s future.” Id. at 1. Intellectuals’ negative attitude towards the city stemmed from a number of elements. Apprehensions about the dramatic changes precipitated by industrialization and immigration played a role, as did the abiding American mistrust of governmental power. For examples of judicial suspicion of local decisionmaking in the land use context, see D. MANDELKER, THE ZONING DILEMMA 104 (1971); Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon, 10 Willamette L.J. 358, 364-66 (1974)*; Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against, 9 Urb. L. Ann. 69, 75, 88-101 (1975).* For a discussion of the Federalist roots of the American distrust of power exercised at a local level, see Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy,* 71 CAL. L. REV. 837, 855-57 (1983).
362. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, supra note 25, at 8 (Table 2) (documenting municipal expenditures for education, highways, public welfare, housing/urban renewal). Cities also exercise important regulatory functions.
363. Frug’s assertion that cities are powerless follows a discussion of various legal restrictions on cities, including the basic principle that cities have no inherent sovereignty. Frug, supra note 30, at 1062-66. Later in the article, Frug finds it “tempting” to link the “crisis in the cities” with “city powerlessness,” id. at 1067, though he does not at that point (and never does) analyze the actual powers cities exercise, as opposed to the legal ideology of city powerlessness.
Cities are more vulnerable than states and the federal government because they occupy a different constitutional position. The Constitution provides a framework for American political discourse that distinguishes to a substantial extent between the question of whether any level of government should exercise a particular power and the question of which level of government will do so. In discussions of city power these two questions rarely have been adequately separated. Courts considering city status have tended to submerge questions concerning the proper role of cities, to focus instead on agendas concerning government power in general.

Take for example Brennan's municipal liability cases, in which localities have been subjected to potentially massive antitrust and section 1983 liability in contexts in which the state and federal governments are immune. The cases involve a difficult question: Do the differences between the resources and responsibilities of localities and those of other levels of government make liability appropriate at the municipal but not at the state or federal levels? Astonishingly, this question is never fully addressed. In the cases involving section 1983 liability, it is never even mentioned. Justice Brennan does discuss the peculiar characteristics of municipalities in his antitrust opinions, but his analysis is neither sustained nor convincing.

The absence of thoughtful discussion in American law about the role of cities qua cities within the federal structure is characteristic not only of the municipal liability cases, but of all four formulations of city status, and of the reformist tradition as well. The constitutional vulnerability of cities stems not so much from a consistently hostile attitude towards American cities, as from a tendency to decide basic issues concerning city status without reference to cities' peculiar resources and responsibilities.

This venerable American tradition of deciding issues of city status by default should be replaced by an effort to define a suitable role for cities and other units of local government. In an age when seventy percent of all Americans live in metropolitan areas, and forty percent...
cent of all funds are spent at the local level, it is time to reconsider the issue of city status on its merits.

368. See Advisory Commission on Intergovernmental Relations, supra note 25, at 6.