

## BOOK REVIEW

### PUBLIC PROPERTY, OLD AND NEW

#### A REVIEW OF

PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870. By Hendrik Hartog. Chapel Hill, North Carolina: The University of North Carolina Press, 1983. 283 pp. \$27.50

*Carol M. Rose\**

The City of New York functions as a kind of oversized experimental laboratory for the United States. The rest of us watch the antics of this great city with a mixture of anxiety and envy, both emotions stirred by the thought that what happens there may happen next where we live. We have dithered, fumed, and criticized as the city has opened its doors to immigrants, tossed highrises into the air, bloated its welfare programs, erupted over decentralized schools and open-door public higher education, teetered at the edge of bankruptcy and then pulled back—the last under the tutelage of a mayor who epitomizes the brassy, confident parochialism for which we have always adored and loathed New Yorkers. Some may think that Los Angeles has replaced New York lately as the bellwether of fashion, pop music, and bizarre fads, but for political theater, New York still leads the way.

Thus it is perhaps fitting that Hendrik Hartog's fine new book focuses upon eighteenth and nineteenth century New York City to illustrate an extraordinarily important historical transformation of our ways of thinking about city politics, and indeed about politics generally. Ostensibly, Hartog's *Public Property and Private Power*<sup>1</sup> is about the private property of a public body. This simple statement fails to capture the true subject of Hartog's book, however, because the book is really about our vocabulary of "public" and "private"—about the way

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\* Professor of law, Northwestern University. B.A. 1962, Antioch College; M.A. 1963, University of Chicago; Ph.D. 1969, Cornell University; J.D. 1977, University of Chicago School of Law. I am particularly indebted to Clint Francis and Ray Soloman for comments and suggestions. Any mistakes are, of course, my own.

<sup>1</sup> H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER. THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 40 (1983).

in which, over a century ago, those words became central in the way we think about cities.

Hartog's book begins by describing a strikingly simple New York City. For much of the eighteenth century, the city's government was thoroughly limited in its vision of what it might do, and oddly introverted in its methods for doing anything at all. According to Hartog, the city's governors focused their attention almost exclusively on the management of the city's corporate property,<sup>2</sup> and even in its policy decisions—most notably those concerning commercial development—the city depended almost entirely on citizens' responses to the way this city property was managed.<sup>3</sup> Perhaps the chief task of eighteenth century New York City was to develop port facilities. But the city undertook this task primarily by manipulating its corporate property. In order to pave some street segment at the waterfront, the city had to entice the upland owner by offering one of the city's waterfront lots, upon which the private donee (it was hoped) would build a wharf as well as pave the street—thus advancing two vital purposes.<sup>4</sup>

The city governors did almost nothing by the means we would now think normal, that is, raising taxes and making direct expenditures.<sup>5</sup> Citizens were expected, for example, to keep their own streets clean<sup>6</sup>—a duty that they fulfilled, to a distressing degree, by letting their pigs run about to forage for garbage in the streets.<sup>7</sup> So far did the protection of the public purse go that the wrongfully-accused citizen had to pay for the costs of his own trial and subsequent acquittal.<sup>8</sup> Yet this cajoling, miserly city government—far though it was from some Marxist picture of the state as a monopoly of organized force, or an Austinian view of the sovereign as commander—was peculiarly self-confident, secure in its chartered rights and independent property.

By the end of Hartog's story, in the middle of the nineteenth century, the city was larger in almost every way: more populous, much more complex and capable in its administrative structure, vastly more ambitious in its undertakings for public works. This was the New York City that had taken control of its own street layout,<sup>9</sup> had responded to epidemics by imperiously banning long-established church cemeteries—even though it had once granted the land for that very use<sup>10</sup>—

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<sup>2</sup> *Id.* at 40.

<sup>3</sup> *Id.* at 64-65.

<sup>4</sup> *Id.* at 48-52.

<sup>5</sup> *Id.* at 30-31.

<sup>6</sup> *Id.* at 62-63.

<sup>7</sup> *Id.* at 139-40.

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Id.* at 158-75.

<sup>10</sup> *Id.* at 71-77. See also *Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. Sup. Ct. 1826).

and had taken over its own water supply and waterworks projects.<sup>11</sup>

But in one vital respect New York's position had declined: the city's legal autonomy had vastly diminished. By mid-century, New York's chartered privileges and independent corporate status had vanished. In law the city itself had become merely the creature of the state; as the notorious "Dillon's Rule" of the 1872 municipal law treatise put it, no city had more powers than the legislature granted, with any doubts to be resolved against the city.<sup>12</sup> Perhaps most important, New York City's ability to manage its corporate endowment, once the symbol and the reality of its chartered independence, was now held to be just another derivative power, subordinate like all the others to the state legislative will.<sup>13</sup>

What happened during this period? This is the subject of Hartog's book. In Hartog's view, what happened to New York was linked to something that happened to the American legal and political vocabulary over these years. The commentators and jurists increasingly distinguished between "public" and "private" authority, and, designating the city a "public" body, subordinated its authority to what came to be seen as the repository of *all* "public" authority, namely the state legislature. Perhaps the most striking element of this transformation was New York City's acquiescence in it: even early in the nineteenth century, the city sought authorization (or perhaps legitimization) from the state for various exercises of power.<sup>14</sup>

One might think this transformation was a purely accidental sequence of events, set in motion by the city's serious financial weakening during and immediately after the Revolutionary War.<sup>15</sup> In contrast, as Gerald Frug has suggested elsewhere,<sup>16</sup> one might view this whole development as a byproduct of the liberal intellectual position that according to Frug eschews intermediate authorities between individual and state, and hence naturally tends to undermine the communal autonomy of local government.

But another way to interpret the transition that Hartog describes is to view it as part of a larger rationalization of government in the nineteenth century, a rationalization of the sort that interested Max Weber.<sup>17</sup> One indeed might argue that the invention of a vocabulary of "public" and "private," along with the City's subordination to the

<sup>11</sup> H. HARTOG, *supra* note 1, at 224-25.

<sup>12</sup> *Id.* at 206-07, 236, 223-24. For Dillon's Rule, see also D. MANDELKER, D.C. NETSCH & P. SALISCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 83-84 (2d ed. 1977).

<sup>13</sup> H. HARTOG, *supra* note 1, at 259.

<sup>14</sup> *Id.* at 93-94, 97.

<sup>15</sup> *Id.* at 90-91.

<sup>16</sup> Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1074-80 (1980).

<sup>17</sup> 2 M. WEBER, *ECONOMY AND SOCIETY* 956-69 (G. Roth & C. Wittich eds. 1978).

larger form of “public” body, related to a transformation and centralization of administrative structures throughout the Atlantic world.

In the eighteenth century New York that Hartog describes, the city’s property-based governance looks strikingly similar to the governmental style that I shall follow de Tocqueville in calling the “Old Regime,”<sup>18</sup> a governmental style dominant in Europe from the late middle ages to the French Revolution. To a substantial degree, *all* government in this era rested on proprietary rights and privileges. An English monarch, for example, had been known to say that as King he intended “to live upon my own,”<sup>19</sup> reflecting the view that those who ruled should fund their rule through their own property and revenues, and not bother their subjects’ holdings. Although venerable, this view was unrealistic, at least in the case of royalty.<sup>20</sup> Indeed, in the century before Hartog’s story began, it was the great misfortune of the Tudors and Stuarts that kings frequently could not “live on their own,” although Charles I certainly tried.<sup>21</sup> Their inability to govern without the subsidies of their people—as embodied in Parliament—first cost them the political initiative, and ultimately a royal head.<sup>22</sup>

By the eighteenth century, European governments had expanded their administrative capacities considerably. Nevertheless, these governments continued to experience enormous difficulties in raising revenues from their subjects, whose tax liabilities were exceedingly varied, and whose more influential members claimed exemption from levies altogether.<sup>23</sup> Even in the eighteenth century, governments had to rely on a standard method of administration inherited from the past—a method that can be summed up as follows: first, create an exclusive and lucrative proprietary right to perform some activity, then attempt to hedge the right with directions for its use, and finally grant it to someone and hope for the best. Thus Old Regime governments frequently granted a proprietary right in the form of a monopoly over some function that the governments hoped or expected the grantee then would carry out, paying himself from the profits of the enterprise. Clothmakers and charcoal producers (among many others) were

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<sup>18</sup> A. DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* (S. Gilbert trans. 1955). De Tocqueville argues that many of the centralizing aspects of post-Revolutionary French political life had been present in pre-Revolutionary France, but he also notes the substantially weaker and more fragmented character of Old Regime government. *Id.* at 108-09.

<sup>19</sup> R. LOCKYER, *TUDOR AND STUART BRITAIN, 1471-1714*, at 27-28 (1964).

<sup>20</sup> J.R. HALE, *RENAISSANCE EUROPE 162-63* (1977).

<sup>21</sup> C. RUSSELL, *THE CRISIS OF PARLIAMENTS: ENGLISH HISTORY 1509-1660*, at 37-38 (1971). For Charles I’s financial expedients in attempting to rule without parliamentary subsidies, see *id.* at 317-22. See also G.M. TREVELYAN, *ENGLAND UNDER THE STUARTS 156-94* (21st ed. 1949).

<sup>22</sup> W. NOTESTEIN, *THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS* (1924). For Charles I’s trial and execution, see C. V. WEDGWOOD, *A COFFIN FOR KING CHARLES* (1964).

<sup>23</sup> J.O. Lindsay, *Monarchy and Administration*, in 7 *NEW CAMBRIDGE MODERN HISTORY* (The Old Regime, 1713-63) 151 (1957).

granted monopolies on the sale of those products, through which it was hoped that they would keep good order in their industries;<sup>24</sup> the East India Companies—Dutch and English—received trading monopolies, to help them fund their enterprises;<sup>25</sup> the original individual or corporate proprietors of the colonies received the land itself, on the condition that they would undertake to settle and govern it.<sup>26</sup>

By the later seventeenth century, British government clearly was attempting to bring the colonies under closer central control, but this effort basically amounted to little more than the restoration of colonial patronage to London.<sup>27</sup> In any event, colonies and colonial offices by no means constituted the only types of “governmental” functions that were contracted out; so were all the others. Administrative functions themselves were treated as proprietary grants, both in England and even more on the Continent. Tax collection positions or military offices, for example, were sold or given out to favorites, as were judge-ships.<sup>28</sup> The grant of proprietary rights in governing functions of course defined the very essence of the patronage system on which Old Regime governments so heavily relied: a kind of monopoly property in some office yielded the emoluments that rewarded faithful service—but along with emoluments went governmental authority.

Land, commercial monopolies, administrative office—Old Regime practice treated these all as species of funded endowments or properties, thus anticipating modern law-and-economics commentators who equate property with an anticipated stream of income. These Old Regime “properties,” however, yielded not only monetary income, but political power as well. In a period of decentralized administrative techniques and primitive fiscal powers, governments simply took the easiest course by contracting out governing functions to what justly have been called “co-governors.”<sup>29</sup> As a result, every ruler in eight-

<sup>24</sup> 1 E. HECKSCHER, *MERCANTILISM* 254, 285-86 (M. Shapiro trans. 2d ed. 1955). See also G.M. TREVELYAN, *supra* note 21, at 101, 133.

<sup>25</sup> For the Dutch, see J.H. PARRY, *THE AGE OF RECONNAISSANCE* 215 (1964). For English trading companies generally, see 1 C.M. ANDREWS, *THE COLONIAL PERIOD IN AMERICAN HISTORY* 28-45 (1934).

<sup>26</sup> J.H. PARRY, *supra* note 25, at 284-85; 1 C.M. ANDREWS, *supra* note 25, at 259. For an example of an early charter, see R. HAKLUYT, *VOYAGES* 279 (I.R. Blacker ed. 1965) (“The Letters patents, granted by the Queenes Majestie to M. Walter Raleigh, now Knight, for the discovering and planting of new lands and Countries, to continue the space of 6 yeeres and no more . . .”). For a later proprietary colony, see “The Charter for the Proviencie of Pennsylvania, 1681,” in M. KAMMEN, *DEPUTYES AND LIBERTYES* 164-66 (1972).

<sup>27</sup> J.H. PARRY, *supra* note 25, at 285; J.H. PLUMB, *THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1675-1725*, at 128-29 (1967).

<sup>28</sup> C.B.A. BEHRENS, *THE ANCIEN REGIME* 50-52 (1967); F. FORD, *ROBE AND SWORD: THE REGROUPING OF THE FRENCH ARISTOCRACY AFTER LOUIS XIV* 105-115 (1953).

<sup>29</sup> 1 E. HECKSCHER, *supra* note 24, at 255-56. For the term “co-governor,” see Gerhard, *Problems of Representation and Delegation in the Eighteenth Century*, in *LIBER MEMORIALIS SIR MAURICE POWICKE* 123 (1965).

eenth century Europe, including the so-called “absolutist” rulers, faced an incredible maze of semi-autonomous corporate co-governing bodies, each tenaciously holding to its proprietary charter.<sup>30</sup> The colonies only extended this manner of governance to distant areas that were even more difficult to control directly.

It was quite in accord with Old Regime governmental practice, then, for colonial New York City’s corporate charter to include an endowment of property to assist the “corporation” in governing. The same was true of towns in England. Penzance—to name another now-famous port town that, like New York, was chartered in the seventeenth century—also had an endowment from whose revenue the town officials carried out town policies.<sup>31</sup> To be sure, few other cities in the colonies received corporate charters and endowments,<sup>32</sup> but few others had New York’s potential as a seaport; it was typical of Old Regime practice to foster the development of that unique resource through a grant of corporate status and property to the city.

It was typical too that New York City, in turn, governed by “spending” its property, making grants to those who would carry out the city’s projects. As Hartog points out, these property grants were not necessarily a sign of corruption, as later commentators thought; rather, these grants were the classic mode by which Old Regime governments carried out policy.<sup>33</sup> Parenthetically, the government of the United States carried out its policies in much the same manner during the nineteenth century, “spending land” in order to settle the west,<sup>34</sup> drain the Mississippi swamps,<sup>35</sup> and build universities.<sup>36</sup>

Modern law-and-economics scholars might tell us that this governance through property grant—essentially contracting out various self-reimbursing functions—should be the equivalent of governance through centralized taxation and bureaucratic administration. These two types of governance, however, differ crucially in the degree of administrative competence that they require. To levy and collect taxes, to budget, to undertake projects and police expenditures, would have presupposed a standardized bureaucratic organization that was scarcely in

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<sup>30</sup> See, e.g., H.C. JOHNSON, *FREDERICK THE GREAT AND HIS OFFICIALS* 243, 259-63 (1975) (Prussia); M. WALKER, *GERMAN HOME TOWNS 1648-1871*, at 154-60 (1971); G. LEFEBVRE, *THE COMING OF THE FRENCH REVOLUTION* 15-20 (1947) (France); C.B.A. BEHRENS, *supra* note 28, at 179 (France). The extreme example of territorial and legal fragmentation was eighteenth century Germany. See Rose, *Empire and Territories at the End of the Old Reich*, in *THE OLD REICH* 61, 62-63, 70 (1974).

<sup>31</sup> 2 B. WEBB & S. WEBB, *THE MANOR AND THE BOROUGH* 406-408 (1924) (contained in Vol. 3 *ENGLISH LOCAL GOVERNMENT (1906-1929)*).

<sup>32</sup> H. HARTOG, *supra* note 1, at 21.

<sup>33</sup> *Id.* at 45-46, 51-52, 65.

<sup>34</sup> Homestead Act of 1862, 43 U.S.C. §§ 161-180 (repealed 1976).

<sup>35</sup> General Swamp Land Act of 1850 (current version at 43 U.S.C. §§ 982-984 (1982)).

<sup>36</sup> Morrill Act of 1862, 7 U.S.C. §§ 301-305, 307, 308 (1982).

place in the eighteenth century. Such a structure indeed was impossible on any scale, given a legal climate in which each mini-territory, notable person, or corporate entity had its own peculiar privileges, charters, and property.<sup>37</sup> Government by property grant, on the other hand, offered the much simpler approach of lump-sum expenditure combined with more or less irrevocable delegation of authority.

Hence, in the Old Regime governmental style, property necessarily carried overtones of political authority. For a thinker like Alexander Hamilton, who regarded the Old Regime style of corporate co-governance as *imperium in imperio*—and as such the very antithesis of government itself<sup>38</sup>—no form of property could have been more dangerous than the property of a general governmental body like the Corporation of the City of New York. Precisely that property raised the possibility that the city would operate as *imperium in imperio*. Thus it is especially interesting to find Hamilton appearing in the pages of Hartog's book, offering opinions that the city did not own the submerged lands near the New Jersey shore,<sup>39</sup> and did not retain proprietary rights in piers once the pier lands had been granted to individuals.<sup>40</sup> Hamilton's doubts about the city's corporate property were entirely consistent with his rejection of the Old Regime's pattern of government, where local municipal property tended to fragment sovereign authority.

In Europe, where the fragmentation of governmental authority certainly had advanced much further than it had in the new United States, administrative rationalization was hastened by the French Revolution. The Revolution's wholesale destruction of local corporate autonomy and co-governing aristocratic privilege<sup>41</sup> took permanent form in Napoleon's codification of uniform laws and consolidation of a bureaucratic state<sup>42</sup>—an example mimicked with greater or lesser success all over Europe, most notably in Napoleon's client states in Italy and Germany.<sup>43</sup>

The French-led rationalization of government may have been accompanied by the view that larger scale governments were the more legitimate. In Europe as in the United States, the status of municipal governments became particularly problematic in the early nineteenth century, not only because of these governments' anachronistic charters and endowments, but perhaps also because of their small scale. The

<sup>37</sup> See *supra* note 29 and accompanying text.

<sup>38</sup> THE FEDERALIST No. 15, at 108 (A. Hamilton) (C. Rossiter ed. 1961); THE FEDERALIST No. 20, at 138 (A. Hamilton & J. Madison) (C. Rossiter ed. 1961).

<sup>39</sup> H. HARTOG, *supra* note 1, at 115-16.

<sup>40</sup> *Id.* at 120-24. Hamilton seemed to have no objection to the City's exercise of authority so long as that authority derived from the State's delegation. *Id.* at 134-35, 149-50.

<sup>41</sup> G. RUDE, REVOLUTIONARY EUROPE 1783-1815, at 110-13 (1965).

<sup>42</sup> *Id.* at 231-33. See also 1 G. LEFEBVRE, NAPOLEON 151-54 (J.E. Anderson trans. 1969); 2 *id.* at 160-68 (J. E. Anderson trans. 1969).

<sup>43</sup> O. CONNELLY, NAPOLEON'S SATELLITE KINGDOMS 339-41 (1965).

early nineteenth century was an era of municipal reform, aside from in France itself, perhaps most notably in England<sup>44</sup> and in Prussia.<sup>45</sup> While one cannot ask for everything in a book about one city, one minor regret with Hartog's book is its absence of any comparative material on the contemporary European treatment of municipal government.

In the United States, the emerging possibilities for rational administration do seem to have been accompanied by a kind of mental association of good government with large, and presumably rationalized government. That view of government was explicit in the Federalist Papers, where larger scale representation was depicted as an improvement in the art of government,<sup>46</sup> and where Hamilton suggested that the most able political talents would be drawn to the larger arenas of the Federal government.<sup>47</sup> What followed in the nineteenth century was the evolution of an extraordinary hostility to cities, which Hartog here documents in the case of New York, and which Gerald Frug has documented for cities more generally.<sup>48</sup> If "public" administration were to be rationalized, then the Old Regime's decentralized governmental style, with its grants of property to local co-governing bodies, would have to cease.

Hence the vocabulary that splits "public" and "private," which Hartog so ably documents with respect to New York City, equally works a split in the Old Regime's association of property and government. In the modern vocabulary, "property" is depoliticized into the "private" property of individuals, and "government" is de-propertyed into the range of "public" activities best managed by the large-scale centralized state. Under the new liberal principle, as Frug has argued,<sup>49</sup> the individual confronts the centralized state, with no room for the quasi-autonomous, corporatively-organized "intermediate powers"<sup>50</sup> endemic to the Old Regime polity. In this climate of opinion, the legal doctrines also tend toward the model that Hartog and Frug describe: as in Dillon's Rule, the presumption is against local power, and whatever power a locality has derives from the larger state. An inter-

<sup>44</sup> LOCAL GOVERNMENT IN BRITAIN AND FRANCE 12-13, 29-30 (J. Lagroye & V. Wright eds. 1979). For a more extensive description of the English municipal reforms, see 2 B. WEBB & S. WEBB, *supra* note 31, at 748-55.

<sup>45</sup> H. HEFFTER, DIE DEUTSCHE SELBSTVERWALTUNG IM 19. JH. 92-98 (1950). The historian, Walther Hubatsch, describes municipal reform as the only one of the early 19th century Prussian reforms that continues to influence modern Germany. W. HUBATSCH, DIE STEIN-HARDENBERG-SCHEN REFORMEN 148-56 (1977).

<sup>46</sup> THE FEDERALIST No. 10, at 83-84 (J. Madison) (C. Rossiter ed. 1961).

<sup>47</sup> THE FEDERALIST No. 68, at 414 (A. Hamilton) (C. Rossiter ed. 1961).

<sup>48</sup> Frug, *supra* note 16, at 1099-1120.

<sup>49</sup> *Id.* at 1076, 1126.

<sup>50</sup> 2 C.L. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 112 (C.W. Carthers ed. 1977).

esting question is why the centralization of governmental authority largely stopped at the level of the individual states in the nineteenth century United States. The answer may lie at least in part in the limitations even of nineteenth century administrative competence.

The modern attitude of hostility to local intermediate governing bodies has continued to this day, and to some degree has become federalized as national institutions have grown stronger. Toward the end of his book, Hartog relates a tale with a curiously contemporary ring: the sad episode of the Brooklyn Ferry, the monopoly franchise that supposedly was a permanent part of New York's corporate endowment.<sup>51</sup> By the mid-nineteenth century, Brooklynites were complaining loudly that the city's monopoly was exploiting them for the city's own benefit. The city ultimately could not defend its "property," despite the ferry monopoly's origin in the city's pre-Revolutionary chartered endowment. First the state legislature, and then the state courts, simply removed the monopoly on the ground that the city's extortion of the helpless citizens of Brooklyn was not a properly "public" use of the city's delegated authority.<sup>52</sup>

There are several modern versions of this little tale of local willingness to exploit outsiders and the centralized government's response thereto. One version is the set of complaints about "tight little islands," the communities that use their zoning powers to exclude the poor and to inflict the costs of low income housing on their less fortunate neighbors.<sup>53</sup> In our day, this practice also has been ruled to be insufficiently "public."<sup>54</sup> Then too, one now sees some effort to control another version of local exploitation of outsiders: some states now attempt to moderate the local pro-development campaigns that seem blithely oblivious to the pollution problems that will be placed on nearby communities.<sup>55</sup> Aside from damage to outsiders, modern commentators have low expectations for local governments' fairness even to their own citizens; local governments are thought to be especially subject to corruption and to rule by stable cliques that freeze out minorities.<sup>56</sup> These suspicions have resulted in the recent efforts to control local fecklessness by subjecting local—but not state—governments to the discipline of anti-trust suits,<sup>57</sup> civil rights damage claims,<sup>58</sup> and court-imposed adminis-

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<sup>51</sup> H. HARTOG, *supra* note 1, at 240.

<sup>52</sup> *Id.* at 255-58.

<sup>53</sup> Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

<sup>54</sup> Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (local zoning must take into account the general welfare of citizens outside municipal borders).

<sup>55</sup> For a review of legislative efforts to control local land use actions that have extra-local costs, see F. POPPER, *THE POLITICS OF LAND-USE REFORM* (1981).

<sup>56</sup> See, e.g., Waggoner, *Log-rolling and Judicial Review*, 52 U. COLO. L. REV. 33 (1980).

<sup>57</sup> Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

trative reform.<sup>59</sup> It is noteworthy that at least some of these current efforts would subordinate municipalities to federal law as well as state law.

Given the developments in legal thinking that Hartog so graphically illustrates in the case of nineteenth century New York City, and that seem to continue and expand in the present, one has to wonder at the extraordinary resilience of local government. In the very prime of Dillon's Rule, later nineteenth century state legislation and state constitutional provisions moved to secure home rule to localities. Moreover, as Robert Ellickson has pointed out in a criticism of Frug's work,<sup>60</sup> local governments simply do not pay attention to the restraints that Dillon's Rule would impose upon them. Instead, they readily dabble in an extraordinary range of activities that, in today's political vocabulary, we would designate as "private"—such as operating banks, or selling sportswear and lightbulbs<sup>61</sup>—and on the whole, no one seems to mind except for would-be competitors.

What, then, do local governments have going for them, now that we make the public/private distinction, and now that we supposedly have no place in principle for autonomous local governments situated between the citizenry and the state? Clearly, one thing they have is their influence in the state and national legislatures, whatever their theoretical disabilities. As Hartog points out, New York City could get much of what it wanted in Albany no matter how weak the City's legal position was in principle.<sup>62</sup> Second, as Tiebout's famous article reminds us,<sup>63</sup> local governments give people a choice. When people choose to reside in one place or another, they are buying into a package of goods and services, and they very well may want to leave some room for local autonomy so that they have a variety of packages from which to choose.

Finally, local government does seem more amenable to personal participation, and in some decisions—such as those about their children's schools or the buildings on their street—people may not want a centralized bureaucratic decision, no matter how rational. People may want a place where their PTA membership will weigh with the school board, and where they can yell at their local zoning commission.<sup>64</sup> No matter how weak the legal status of local governments, then, their practical status may be considerably stronger.

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<sup>58</sup> *Owen v. City of Independence*, 445 U.S. 622 (1980).

<sup>59</sup> *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

<sup>60</sup> Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1570-73 (1982).

<sup>61</sup> *Id.*

<sup>62</sup> H. HARTOG, *supra* note 1, at 219, 263.

<sup>63</sup> Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>64</sup> See C. PERIN, *EVERYTHING IN ITS PLACE* 188-92 (1977); Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 911 (1983).

Clearly, New York City is far too large to allow for any idyllic notions of direct civic participation—not that New Yorkers do not try to participate directly.<sup>65</sup> What else does the city have going for it? The answer is almost too obvious: it has the excitement, the glamour, the bustle that always have drawn people to the metropolitan potpourri, and that give the big cities a unique kind of intellectual and emotional richness. Hartog's book reminds us that New York has been living off its capital for a very long time, but the city may have more capital than anyone ever thought. Perhaps when the city can no longer exploit one type of capital—its waterfront lots and its ferry monopoly—it can come up with another in the form of its intellectual drawing power. Perhaps, finally, this intellectual and emotional capital continues to give the city a *de facto* corporate autonomy that is not so different from what it enjoyed in the eighteenth century—a position as *imperium in imperio* that the city retains in fact despite its loss in legal theory.

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<sup>65</sup> See A. ALTSCHULER, *COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATION IN LARGE AMERICAN CITIES* (1970) (chiefly about the Brownsville area of New York).