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Laws of Motion:

Urban politics and the production of capital mobility in the United States

by

Jerome Mark Pendras

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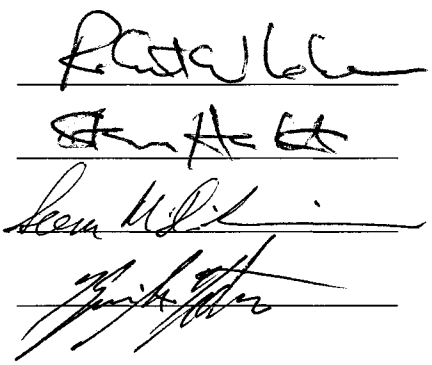

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ABSTRACT OF THE DISSERTATION

LAWS OF MOTION: URBAN POLITICS AND THE PRODUCTION OF CAPITAL MOBILITY IN THE UNITED STATES

BY

JEROME MARK PENDRAS

Dissertation Director:

Robert W. Lake

A premise underlying most theory and practice of urban politics is that spatial mobility is an inherent characteristic of capital and a natural and inevitable component of economic behavior within a free market economy. In contrast, this dissertation begins with the premise that the spatial mobility of capital is enacted through specific and identifiable institutional practices and that such practices are constructed and facilitated through and with the support of the state. The overarching goals of this research are to examine how the spatial mobility of capital is constructed and mediated, to consider the connection between the way that mobility is constructed and negative place-specific consequences in the United States, and to identify new strategies for confronting those consequences through local activism. These goals are pursued through two primary research components. One component analyzes secondary literature, and archived oral histories to identify how the mobility of capital has been understood and represented by participants on different sides of

two cases of locational conflict: one historical conflict (1977-1980) over the departure of the steel industry from Youngstown, OH, and one contemporary conflict over the outsourcing/offshoring of professional services jobs from Seattle, WA. This component reveals common representations of capital mobility and considers how such representations shape the process and outcome of local struggles over urban development. A second research component employs a critical legal geographic methodology to construct a legislative and judicial history of capital mobility in the United States. This history emphasizes the role of the state in constituting capital as mobile, both domestically and internationally, and illustrates the political processes through which capital's right to mobility has been achieved over time. The dissertation finishes with a concluding discussion of various approaches to challenging conventional understandings of capital mobility and strategies for reconceptualizing and legally redefining capital and/or the relationship between capital and place in ways that better reflect the needs and interests of the people and the places on which capital depends.

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Chapter One: Introduction

On September 19, 1977, the Youngstown Sheet and Tube Company announced plans to close its steelmaking facilities in Youngstown, OH, eliminating over 5,000 jobs in the Youngstown area. Two years later the United States Steel corporation announced similar plans to close two additional local facilities, eliminating another 3,500 jobs. These announcements were met with substantial resistance from a well organized Youngstown labor community. The subsequent three-year struggle to halt the plant closings and maintain the steel making industry and the steel industry-based community in Youngstown included community organizing and consciousness-raising efforts, an attempt at a labor-community buyout of abandoned plants, and a high-profile law suit brought in federal court aimed at enjoining US Steel from leaving town. The results of these efforts are by now well known: the Youngstown labor community failed in its efforts to keep the steel making industry in Youngstown.

Fast forward twenty five-years and 2,500 miles to Seattle, WA where, in 2002, Boeing, Microsoft, and Safeco Insurance, three of the largest private employers in the area, announced plans to outsource thousands of professional services jobs and invest millions of dollars in overseas facilities. These announcements have been met by a much less well-organized but no less determined Seattle labor community seeking to keep professional services jobs in the area, using some of the same consciousness-raising tactics as their Youngstown counterparts, coupled with immediate pressure on the state legislature to find statutory solutions. These efforts continue to unfold, attracting much attention during the 2004 election year. But only minor legislation has been passed to

date, and substantive gains in the near future for the Seattle labor community appear unlikely.

At the time of the Youngstown conflict, in the late 1970s, and throughout much of the 1980s, questions of local economic change, capital mobility, and deindustrialization received considerable attention from academic researchers, from a variety of perspectives. Most of this research, at least from critical perspectives, has settled on an explanation for the community and economic changes in Youngstown, and other similarly situated industrial cities, as unfortunate but inevitable consequences of global (capitalist) economic restructuring—fallout from the early rumblings of globalization. And by now an appreciation for the dynamics of globalization, global economic integration, the hyper-mobility of capital, and the competitive and entrepreneurial requirements of urban politics constitutes the common starting point for a significant percentage of urban research. In this light, revisiting substantive questions of capital mobility and deindustrialization may seem at best anachronistic and at worst like flogging a dead horse.

However, agreement regarding the dynamics of urban politics hasn't seemed to make place-specific community and economic dislocation any easier to avoid, and it certainly hasn't made it any easier to accept. As professional services jobs become increasingly subject to flexible industrial "requirements," the Seattle labor community, along with many other labor communities around the world, is beginning to confront many of the same challenges faced in Youngstown nearly thirty years ago, with few new strategies for

achieving an alternative outcome. In other words, despite all that has changed in the world of political economy over the past thirty years, it seems we have made little progress in confronting the challenges presented by capital mobility. The goal of this dissertation is to address this issue by reconsidering some of the assumptions guiding contemporary urban politics research and practice and by generating new ways of understanding and ultimately defining the mobility of capital.

The mobility of capital serves as the entry point for this dissertation for two reasons. One is that, as indicated above, capital mobility is almost universally identified in critical urban research as having a regressive influence on urban politics and development. Thus, it is important to consider strategies for understanding and confronting that influence. The second is that despite such recognition, existing critical urban political research frameworks provide no apparent way to challenge capital mobility: capital's capacity for mobility, which is said to enable it to escape place-specific regulatory efforts, makes challenging that mobility in any effective, productive, way impossible. I don't expect to identify a magic strategy for solving the problems of capital mobility here, but I do expect to begin an important process of asking critical questions about not just the consequences but also the causes of capital mobility.

This dissertation is based on a research project that approaches the issue of capital mobility through two research components. In one component, I examine how the mobility of capital has typically been represented in urban politics research and practice. I begin with an investigation of two cases of place-specific conflict over capital mobility.

One is the iconic case of conflict over the departure of the steel industry from Youngstown, OH between 1977 and 1980. The other is an emerging conflict over the outsourcing of professional services jobs from Seattle, WA. In both cases I analyze media coverage, press releases, research reports, oral histories (Youngstown case only), and other materials to determine how the mobility of capital, signified by the actions of plant closings and outsourcing, was represented and either justified or challenged by participants on both sides of these struggles. My analysis identifies five representational themes used by participants to make sense of the events being struggled over: economic necessity, morality and corporate responsibility, government participation, economic principles, and corporate rights and powers. These themes are explained and explored in detail in Chapter Three. What they indicate is a range of important and sophisticated understandings of the range of issues related to economic change and local development, but also the absence of substantive questions about the source of capital's mobility rights. There is much consideration of why capital should or shouldn't be allowed to exercise mobility (close plants, outsource jobs), but none of why capital *can* exercise mobility.

From the specific struggles over capital mobility, I move to an examination of how the mobility of capital has been approached and understood by academic researchers. Here I illustrate a similar absence of critical questions regarding the political character of capital mobility. To be sure, the issue of capital mobility has received extensive attention in academic circles. But that attention typically emphasizes the technical causes of capital mobility—innovations in communication and transportation technologies, changes in industrial organization and management practices, the development of new "placeless"

business logics—or, as noted above, it highlights the unavoidable *consequences* of capital mobility and the various ways capital mobility necessitates a certain approach to urban politics. Few researchers engage substantive questions about the *politics* of capital mobility. In most cases, the failure to consider the politics of capital mobility may be attributable to an overemphasis on the *economics* of capital mobility, or the extent to which capital mobility is an inherent and inevitable component of a naturally dynamic capitalist system. Regardless of the specific reasons, however, the inability to challenge capital mobility within existing urban politics research frameworks suggests the need for an alternative research approach.

The alternative research approach developed in Chapter Four draws important lessons from two particular bodies of research: poststructural feminism and critical legal geography. The poststructural feminism of JK Gibson-Graham (1996; 2002) opens up space for new inquiry into capital mobility by emphasizing the extent to which "capitalism" may be understood as a discursive product, one that has been theorized into a powerful monolithic creature with specific needs and requirements, but which may also be theorized differently. In this way, Gibson-Graham forces researchers to take seriously the "performativity" of their, and others', representational practices, challenging researchers to explain economic categories, practices, and circumstances without relying on "capitalism" as an explanatory device. The implication of this approach for the mobility of capital is that if capitalism is denied inherent qualities that necessitate a range of other actions, then it becomes necessary to explain capital mobility in new ways. In other words, if capital mobility is not explained by "capitalism," then we must look

elsewhere for that explanation. In light of the concept of performativity, one place to look for this explanation is in the discursive practices and processes which represent capital as mobile. From this perspective, the absence from urban research and practice of critical questions regarding the political character of capital mobility can be recognized as contributing to the production and/or reproduction of capital's mobility. Contesting that mobility or, rather, that representation of mobility, requires on one hand, consideration of why critical mobility questions have been absent from urban research and, on the other hand, the production of new knowledge about capital mobility, knowledge that advances an alternative and more politically open story of the mobility of capital.

Guidance in the task of producing new knowledge about capital mobility is taken from important developments in critical legal geographic scholarship. Here the focus is on the role of legal discourse in the production of space and the role of space in the production of law. Just as poststructural feminists have deconstructed the capitalist monolith and theorized openings for economic diversity, critical legal geographers have challenged the practice of "legal closure," and interrogated the social and political production of legal categories. The "closed" representation of law suggests that legal practice is a self-sufficient system of rational and objective reasoning, disconnected from everyday questions of ideology, politics, and power. Critical legal geographers challenge that understanding of law by viewing law and legal discourse as socially constructed, politically charged, and ultimately open-ended. For Blomley (1992: 238), this means that critical research efforts should focus on "revealing law's historical contingency" so that the terms and conditions of legal categories are denaturalized and brought from an

abstract and distant past into the realm of contemporary political struggle. The implication of this understanding for the present research is that the spatial mobility of capital may be viewed as the outcome of historical struggles over representation, over what capital should be, rather than as a reflection of inherent and natural qualities possessed by some prepolitical category called "capital." What requires explanation is then the various processes through which representations of capital have achieved for capital the political capacity for mobility.

The second component of this dissertation research project employs the lessons from postructural feminism and critical legal geography to produce a story of the production of capital mobility in the United States, a story that challenges the representation of mobility as an "inherent" and "natural" component of capital. The story developed here begins with a shift in focus from "capital" to "corporation," recognizing that the two terms are in many ways incommensurable. Among critical researchers, "capital" is typically understood as a process, specifically the process through which money circulates through the production of commodities to produce profit (more money) (Harvey, 1982). In that sense, capital is a much broader and more complex concept than that of the corporation. However, this research works from the understanding that while "capital" refers to the process of commodity production for profit, the terms and conditions under which capital operates (circulates) are shaped by the institutional forms through which commodities, money, and labor processes are organized. The corporation represents an important institutional form in this regard, and how capital operates through corporations is determined by laws. Investigating the legal production of the corporation as an

institution, and of corporate rights, is one way to understand, and ultimately challenge, the rights and powers of "capital."

The story of capital mobility in the United States is thus developed here in terms of the historical development of *corporate* mobility. I develop this story in two ways. I begin with the formal treatment of the corporation in the United States Supreme Court, followed by the legislative treatment of the corporation at the state level. In Chapter Six, I examine the emergence, in the seventeenth and eighteenth centuries, of the private corporation as a rights-bearing institution. In this chapter I consider how the case of *The Trustees of Dartmouth College v Woodward* (1819), established the general distinction between public and private corporations and defined the private corporation as, on one hand, constituted of propertied individuals and, on the other, as itself a form of private property. I then consider how the definition of the corporation asserted in that case established not only a particular legal understanding of the corporation as an institutional form, but also the bases for and the (narrow) parameters of the regulation of corporate organization and operation in the United States.

Whereas Chapter Six emphasized the judicially-defined composition of the corporation, Chapter Seven examines judicial attention to corporate regulation, approached in terms of the questions of judicial and legislative jurisdiction. Judicial jurisdiction refers to the determination of corporate citizenship, or whether the corporation can be considered a "citizen" entitled to access to federal courts, and, if so, of which state a corporation is a citizen and how the location of that citizenship should be decided. Legislative jurisdiction

also refers to the determination of corporate citizenship but for a different purpose. In that circumstance, the task of the Court is to decide which state's laws establish corporate powers and govern corporate behavior and which laws govern the behavior and treatment of a "foreign" corporation, or a corporation operating in a territory other than its "home" state. The range of cases examined in this chapter demonstrate how conceptions and definitions of the corporation and of corporate rights have changed over time, with each circumstance of deliberation contributing to the ongoing process of defining corporate rights and obligations—not only what the corporation is and how it is organized, but also how the corporation should behave and what can and should be done, and by whom, when the consequences of corporate behavior are undesirable. While both theoretical understanding and legal treatment of the corporation have changed since many of the cases discussed in Chapter Six were heard, these first engagements in the United States with substantive questions of corporate existence established a legal foundation that has enabled the ongoing expansion of corporate rights.

Chapter Seven moves on from the judiciary to examine how the corporation has been defined legislatively. Since the country's origin, authority over the creation and regulation of corporations has been assigned to and/or assumed by the state legislatures. The focus in Chapter Seven is on the evolution of the corporation from a narrowly defined and closely controlled special privilege to a broadly defined, loosely controlled, and generally practiced form of business organization. This chapter considers the relationship between the changes in judicial interpretations of the corporation, discussed in Chapter Six, a politics of corporate chartering that emerged in the second half of the nineteenth century,

and changes in the legislative definition and regulation of corporations. One point that, I hope, emerges clearly from this chapter is how the rights and powers exercised by corporations at any particular historical moment are the outcome of political struggle; they are the product of active political engagement by various interests in the processes through which corporations are defined and regulated.

Some readers may find the story developed over these three chapters of corporate legal history regarding the establishment and expansion of corporate rights and powers discouraging. But that is not how this story is intended; it is not intended as a story of the inexorable march to corporate domination, but rather as a story of the contingent development of corporate rights out of a series of political moments. Whatever rights and powers corporations posses must be recognized as political achievements. They reflect neither necessities of corporate organization, nor requirements of business, nor immutable economic imperatives. They are political gains achieved through struggle. And recognizing the development of corporate rights and powers as a political rather than natural process is one step toward challenging existing corporate rights and conceptualizing and advancing alternative definitions of the corporation. Chapter Eight begins the task of redefining the corporation by exploring some alternative readings of corporate rights and by identifying openings in the existing framework of corporate legal treatment which could be expanded as part of a political project aimed at developing alternative corporate legalities.

The mobility of capital is so commonplace by this point that it no longer seems political.

Under such circumstances, considering ways to question and challenge capital mobility may come off as foolish, if not futile. Nevertheless, this dissertation should be recognized as the start of an effort to call attention to the politics of capital mobility, to look past ready assumptions of corporate/capital mobility that circumscribe urban politics and development, and to consider new ways to advance progressive place-specific development opportunities.

Chapter Two: The consequences of mobility

This chapter recounts and reflects on two struggles over local economic change in the United States: the historical struggle over the departure of the steel industry from Youngstown, Ohio, between 1977 and 1980, and the presently unfolding struggle in Seattle, Washington, over the outsourcing of professional services jobs. The objective here is to describe the situations as they have unfolded over time, with full recognition that the stories to be told constitute one among countless possible representations of the Youngstown and Seattle experiences. The story of Youngstown, in particular, has been told in great depth and detail by others more intimately connected than I with the events as they played out at the time (see Lynd, 1982; Buss and Redburn, 1983; Rothstein, 1986; Fuechtmann, 1989; Bluestone and Harrison, 1982). Thus, in terms of the specifics of that case, this chapter offers no new details regarding "what happened" in Youngstown. Rather, this chapter revisits that struggle now, after more than twenty five years have passed, in hopes that doing so may not only reveal new ways of thinking about and understanding the Youngstown experience, but also new ways of confronting the concerns of local economic change more generally.

Examining the case of Seattle is a bit more complicated. As the circumstances in Seattle continue to unfold, there is no clearly defined story to follow. Some jobs have been lost and there is growing awareness of the instability of the professional services industry in the area, but there is nothing in Seattle resembling the socio-economic wreckage and labor and community unrest of Youngstown in 1980. Present day Seattle is more reminiscent of Youngstown in the late 1960's, when isolated job cuts raised some red

flags but popular attention to the matter waned with the next peak in the business cycle. This is perhaps the most compelling reason to consider these two cases together now, while lessons may be gathered from Youngstown that might help Seattle achieve a more promising future.

This chapter is divided into two major sections. Section One covers the Youngstown story, providing a general account of the Youngstown plant closings between 1977 and 1980, from the perspective of the steel industry, followed by a description of the struggle waged by the local labor community to stop plants from closing.[1] This section will also consider some of the policy remedies proposed at the time, in particular the plant closing legislation pursued at state and federal levels. Section Two covers the story of job loss in Seattle, in considerably less detail, as that story continues to unfold. As with the Youngstown story, this section will discuss some of the reasons for the job losses that have occurred in Seattle to date, as suggested by corporate supporters and representatives, the emerging efforts of the Seattle labor community to maintain professional services jobs in the area, and proposed legislation aimed at curbing outsourcing practices. In general, these two stories provide examples of conflict over local economic change generated or at least enabled by the mobility of capital. They provide a context within which to observe the consequences of capital mobility and to discuss the production and reproduction of corporate mobility rights and powers. The implications of these stories for contemporary understanding of the relationship between corporations and the places

[1] It became clear very early in the Youngstown struggle that the plant closures would have a profound impact on the community as a whole, not just those working in the steel plants. Thus, I use the term "labor community" here and throughout this chapter so as to envelop the various local participants in the plant closing conflict—workers, religious and community leaders, state officials, residents, etc.

in which they operate will be clarified through subsequent chapters.

Youngstown steel closes shop

The problem with Youngstown steel

The departure of the steel industry from Youngstown, OH., holds the dubious honor of being one of the most widely recognized stories of deindustrialization and economic transition in United States industrial history. Between 1977 and 1980, the closing of four Youngstown area steel making facilities resulted in the loss of approximately 10,000 jobs in the basic steel industry, and an estimated additional 50,000 jobs in related industries as the famous backward and forward linkages exalted by economists worked in reverse to erase local jobs dependent on steel production (Linkon and Russo, 2002). But the notoriety of the Youngstown story is not based only on such concentrated job loss; countless other industrial communities around the country experienced similar losses. Rather, what planted Youngstown firmly in the popular consciousness was the struggle by local residents and workers to resist corporate plant closing decisions. Local protests emerged shortly after the first announced plant closing in 1977 and continued in various guises through 1980, advanced primarily by a unique worker-community coalition called the Ecumenical Coalition of the Mahoning Valley, by local chapters of the United Steel Workers of America (USWA), and various other groups (Rothstein, 1986). The results of these local efforts are by now well known: the labor community was ultimately unable to avoid continued disinvestment and industrial collapse in the Youngstown area (Bluestone and Harrison, 1982; Lynd, 1982, 1987; Rothstein, 1986).

Nevertheless, there is much to gain from remembering the area's labor struggles and much to learn from what are otherwise recognized as failed efforts (Linkon and Russo, 2002). In particular, the Youngstown struggle represents a historical moment when the place-specific consequences of capital mobility were confronted on an unprecedented scale. Considering the outcome of the conflict, examination of the justifications for mobility provided by the steel companies involved and the challenges waged by the Youngstown labor community, is expected to reveal how the mobility of capital was understood by the participants in this struggle and how those understandings of capital mobility contributed to the production and reproduction of the capital's capacity for mobility.

Youngstown Sheet and Tube: Campbell Works/Brier Hill Works

In a press release simultaneously delivered to the local press, state officials, and union representatives on September 19, 1977, a day referred to locally as "Black Monday," the Youngstown Sheet and Tube Company announced plans to close its Campbell Works steel mill and move its regional headquarters to Chicago, eliminating 5,000 steel industry jobs in the Youngstown area. The company's other local steel mill, the Brier Hill Works, would remain open, forestalling the complete departure of Sheet and Tube from Youngstown, at least for the time being (YS&T, 1977: 1). According to company officials, the decision to close the facility was based on the Campbell Works' lack of profitability, which was in turn a consequence of several additional interrelated factors: falling product demand; rising competition from foreign suppliers (often at 'dumping'

prices)[2]; and high capital expenditures needed to remain in business, as determined by the rising costs of modernizing facilities and complying with mounting environmental regulations (YS&T, 1977). In particular, older plants like the Campbell Works (originally built in the early 1900s, with only piecemeal modernization over the years) required massive investment to achieve the environmental improvements and productivity gains needed to survive in an increasingly competitive steel industry. And with profits falling, such investment couldn't be justified: it was cheaper to close the older plants and concentrate production in more modern facilities (Lykes/LTV, 1978).

The profit squeeze behind the closing of the Campbell Works was not limited to Youngstown Sheet and Tube. By 1977, inadequate profitability was a common complaint throughout the steel industry, and other companies had either already completed or were planning similar plant shutdowns in other cities around the country (Bluestone and Harrison, 1982). The industry as a whole was suffering from what the American Iron and Steel Institute (the trade association representing steel producers) considered "serious difficulties" in their operating environment (AISI, 1980). These "serious difficulties" were traced to government policies that constrained profit-making capacity (AISI, 1980):

- Outdated tax laws, which allow producers to write off only the original purchase price of production equipment, not replacement costs. In an industry such as steel, in which depreciation timelines are relatively long (15-18 years), inflation makes equipment replacement costs much higher than the write-off amount based on original purchase price. This leads to excessive taxation and less money available for reinvestment.

[2] Dumping is defined here as selling a product, typically in foreign markets, at prices lower than production costs (AISI, 1980).

- The failure of the US Government to enforce its anti-dumping laws, allowing foreign producers to capture a greater share of the domestic market, and forcing domestic steel companies to compete against government subsidized foreign producers.
- Environmental and health and safety regulations, such as the Clean Air Act of 1970, the Clean Water Act of 1972, and the Occupational Safety and Health Act (OSHA), which force steel companies to spend heavily to upgrade their facilities in ways that do not contribute to profits, thus cutting into profit margins.
- The interference of government in the pricing of steel products, which keeps prices low while production costs (including labor and equipment costs) continue to rise, reducing profit-making capacity.

Some companies, due to newer facilities, favorable product niches, more substantial financial bases, or other factors, were better positioned than others to navigate this challenging environment. But lagging profits was nevertheless consistent across the industry. Consequently, Youngstown Sheet and Tube's decision to close the Campbell Works didn't solve its financial problems. Rather, on top of the persistent industry-wide conditions, the high costs of closing that facility soured the company's financial position even further (LTV/Lykes, 1978).

Closing the Campbell Works facility was thus not enough to save the company. Within three months of the Campbell Works closing, the Lykes Corporation, a New Orleans-based parent company of Youngstown Sheet and Tube, and Ling-Temco-Vought (LTV), parent company of Jones and Laughlin Steel, another steel company with facilities in the

Youngstown area, announced plans for a merger of the two conglomerates. The joining of Jones and Laughlin Steel with Youngstown Sheet and Tube would result in the creation of the nation's third largest steel company (after U.S. Steel and Bethlehem Steel) and, according to supporters, save each company from an otherwise unpromising future. As company representatives put it, through the merger "J&L's particular weaknesses can be alleviated without capital investment by employing YS&T's complementary strengths. Similarly, many of YS&T's problems can be solved through J&L's strengths" (LTV/Lykes, 1978: 38).

In the details of the merger, however, the losers of the deal were clearly the Youngstown steel-makers as the Youngstown operations didn't fit into the combined firm's overall production strategy (Brier Hill Unionist, 1978). A small segment of the merged company's business would include facilities within the Campbell Works (facilities not previously shut down by Sheet and Tube), but the Brier Hill plant, which was older and less efficient than similarly oriented plants owned by J&L in Aliquippa, PA., became redundant and therefore unnecessary (Lynd, 1982; Fuechtmann, 1989). The merger might potentially revive Lykes and LTV, but it would all but kill the companies' steel operations in Youngstown. After the final arrangements of the merger were completed in December 1979, roughly two years after Lykes' closing of the Campbell Works, the new company closed the Brier Hill Works, cutting an additional 1,500 steel jobs in Youngstown (Lynd, 1982).

United States Steel: Ohio Works/McDonald Works

Youngstown Sheet and Tube and Jones and Laughlin were not the only steel companies operating in Youngstown in the late 1970s. U.S. Steel (USS) also owned facilities in the area. And while USS may have been the largest steel-producer in the country, it was not above the profit difficulties affecting the steel industry as a whole at the time, and neither was it without its own antiquated facilities. In the spring of 1979, just as Lykes and LTV were negotiating changes to their operating arrangements, USS embarked on its own reorganization process, at the center of which was a plan to "evaluate every steel mill with an eye toward paring the hopeless cases" (Lynd, 1982: 137). In December of 1979, USS announced plans to close 15 steelmaking facilities and cut 13,000 jobs. Among the facilities to be closed were the Ohio Works in Youngstown and the McDonald Works in neighboring McDonald, together amounting to roughly 3,500 jobs. The company cited familiar justifications for the closing decision: the facilities were outdated, uncompetitive, and unprofitable, and the costs associated with modernizing them could not be justified in the face of better investment prospects elsewhere (in other facilities or other industries altogether) (Bluestone and Harrison, 1982; Lynd, 1982).

With the closing of four facilities over the three years between 1977 and 1980 (Youngstown Sheet and Tube's Campbell Works and Brier Hill Works; US Steel's Ohio Works and McDonald Works), the Mahoning Valley lost approximately 10,000 jobs in the steel industry, and subsequently roughly 50,000 jobs in ancillary products and services. While the organizational circumstances varied with each closing, the

justification given for the closing decisions remained consistent across the cases. Outdated facilities, insurmountable modernization costs, intense (and unfair) foreign competition, a prohibitive tax structure, and high regulatory compliance costs were said to damage beyond repair the profit making capacity of Youngstown's steel facilities.

No fighting for welfare

The loss of steel-making jobs in Youngstown was devastating in industrial and economic terms. But for many local residents, the job losses translated to much more: the disintegration of a way of life with which their senses of identity, stability, and self-esteem had become intertwined as one generation followed the next into the mills (Linkon and Russo, 2002). As Buss and Redburn (1983: 60) have shown, the conflict in Youngstown was about much more than lost jobs, it was about lost community, and about how the loss of jobs impacted the community as a whole:

> The unemployed worker who seeks new work immediately competes with, and perhaps displaces, someone with less experience and skill. The wife of a laid-off worker who finds a new part-time job is no longer able to spend her days as a hospital volunteer. The bar where workers gathered near the plant entrance, at first, gains patronage but some months later is forced to close. Workers on a railroad that carried steel between parts of the mill lose their jobs as well; two years after the shutdown, a residence hotel where these railroad men one stayed overnight between shifts, also closes down. Local governments that relied on property taxes paid by the steel company are forced to reduce services and lay off employees. Day after day, the media carry stories of both gloom and hope related to the local economy. Thus, the effects of the closing move outward, from those directly affected, to tough significantly the lives of virtually all in the community.

Consequently, few were content to sit back and watch the steel industry leave town without a struggle. In the struggle that emerged, it is important to keep in mind that the

focus of activist efforts was not simply on ensuring that laid off workers could find new employment, but that employment numbers be maintained to the extent possible *in Youngstown*, and, preferably, in the steel making industry, in order to preserve locally the community that had been built up over so many years.

Youngstown Sheet and Tube: Campbell Works/Brier Hill Works

The first and immediately most visible response to Youngstown-area plant closings came from the local chapters of District 26 of the United Steelworkers of America (USWA). By Tuesday, September 20, the day after Youngstown Sheet and Tube's Campbell Works closing announcement, local union representatives were busy gathering signatures for a petition to be taken to President Carter requesting relief for the steel industry. Calling for assistance in the form of "jobs, not welfare," the petition asked that the President and Congress grant "immediate relief to the American steel industry by imposing emergency import quotas, relaxing the E.P.A. standards, and allowing the steel industry to EARN A FAIR PROFIT" (Lynd, 1982: 23, emphasis in the original). Within two days the petition attracted 110,000 local signatures and was taken by 250 workers in a bus caravan to Washington. The swift mobilization effort revealed a desire among Youngstown area residents to do *something* collectively about the closing (Fuechtmann, 1989).

After the initial petition drive, however, response strategies among interested groups began to diverge. Not everyone was equally convinced that the plant closings should be so directly associated with government policies or that the steel companies were truly the victims they made themselves out to be. The profit squeeze of the late 1970s would not

have been so overwhelming, some argued, if steel companies had dedicated profits from past boom periods to facilities modernization rather than to diversification or dividends to stockholders (OPIC, 1977; Bluestone and Harrison, 1982). Given the track record of the company in question (Lykes), increasing profits for steel companies would not necessarily mean increased steel company investments in Youngstown facilities and could conceivably even undermine further local plant viability by facilitating corporate diversification strategies. Outright local support for the interests and arguments of the steel corporations therefore began to waver within a week after the initial closing announcement as different groups explored alternative responses (Lynd, 1982).

As union locals were gathering petition signatures to take to Washington, local religious leaders initiated a different approach, organizing the Ecumenical Coalition of the Mahoning Valley,[3] with the goal of initiating "a program of education and action to deal with this crisis" (ECMV, 1977). Comprised of representatives of various faiths from the Youngstown religious community, including Catholic, Protestant, Jewish, and Orthodox, the Ecumenical Coalition of the Mahoning Valley (hereafter, the Coalition) began as a loosely knit group of local religious leaders concerned with the impact of the plant closings on their communities and congregations, but quickly evolved into the most organized, active, and visible of the groups confronting the closings issue (Lynd, 1982).

The Coalition perspective had two main messages: that the closing of local steel making facilities be recognized as a *community* issue and not just a jobs issue, and that the plant

[3] Youngstown is located in the Mahoning Valley, named for the Mahoning River, the banks of which have been lined with steel-making facilities since the 1800s.

closings be considered in moral as well as economic terms (ECMV, 1977).[4] The details of the group's perspective were articulated in a seven-page "Pastoral Letter," distributed widely through participating parishes and local and national media outlets. Citing the linkages between job losses and "the human and community consequences of these losses—the strains on marriage and family life, increased depression, alcoholism and alienation, as well as lost confidence, ambition and self-respect," the Coalition urged that full consideration be given to the "individuals, families and communities left vulnerable and fearful" by the plant closing decision. In terms of the moralistic dimension, the Pastoral Letter insisted "that human beings and community life are higher values than corporate profits," that "corporations have social responsibilities to their employees and to the community," and that "government is required to preserve and defend human rights when private action fails to insure them."

While the Coalition avoided drawing conclusions in the Pastoral Letter regarding any one definitive *cause* of the crisis, it articulated clearly that one factor to be confronted was the economic behavior of the Lykes Corporation. The Lykes Corporation had assumed control over the Youngstown Sheet and Tube Company through a corporate merger and had since, claimed the Ecumenical Coalition, milked Youngstown Sheet and Tube of its assets and driven the company into failure. By abandoning Youngstown, the Lykes Corporation had "neglected [its] social responsibility" and then made matters worse by trying to "focus responsibility for their actions upon environmental laws, imported steel and governmental efforts to keep down the cost of steel." One of the primary objectives

[4] The passages quoted in the next three paragraphs are all taken from the Pastoral Letter of the Ecumenical Coalition of the Mahoning Valley (1977).

of the Letter was to refocus attention on the importance of corporate social responsibility and the moral dimensions of corporate decision-making. But the Letter also made it clear that Lykes should not shoulder all the blame; requiring equal attention were "local, national and international forces at work which create the environment for such actions."

In addition to its goals of education and consciousness raising, the Coalition actively participated in an effort "to save the jobs of the workers affected by the shutdown" through the purchase and/or takeover of the closed Campbell Works by a local worker-community coalition. Stressing that "the decision of the Lykes Corporation to close its Sheet and Tube operation does not terminate the Corporation's responsibility to the Mahoning Valley," the Coalition urged Lykes to "fully cooperate with the efforts of those exploring the feasibility of operation under different auspices." Additionally, the Coalition coordinated a strategy to generate financial support for the buyout plan, and committed itself to "join with others to advocate an effective national policy to retain in our region, basic steel and the jobs related to it." The policies to be pursued through this advocacy role included directed federal aid and procurement to distressed facilities in distressed areas (a policy that came to be known as "brownfield" development), and for "changes in economic policies which unfairly pit region against region for jobs and economic growth, encourage the development of conglomerates and neglect the needs of older and urban communities."

For the Coalition's buyout plan to work, it was essential to demonstrate the economic feasibility of a reopened Campbell Works under worker-community ownership. A quick

and modest preliminary feasibility study produced in December 1977 concluded that, with appropriate financing to back $535 million worth of investment over eight years, a reopened Campbell Works under worker-community ownership would be economically viable (Fuechtmann, 1989). The Coalition quickly realized that such massive capital investment for this type of project could only come from federal government sources. Thus, they turned their attention to Washington. In December 1977, the Ecumenical Coalition ordered a second, much more comprehensive feasibility study, funded by a $300,000 grant from the Department of Housing and Urban Development (HUD). The second study produced numbers similar to those in the first feasibility study ($500 million), but it also articulated the social advantages of the strategy, emphasizing the urban redevelopment benefits of "brownfield" projects, the potential for Youngstown to serve as a "national showcase" for community self-help in the face of industrial change, and the savings to the government in terms of welfare and other social service payments if the plant were to remain open (Lynd, 1982; Fuechtmann, 1989). These arguments found a receptive audience among many in Washington, with HUD Secretary Patricia Harris stating:

> This commendable community support is precisely the sort of local effort we are looking for in developing new Federal strategies to support areas like Youngstown that are determined to help themselves when faced with devastating plant closings (Fuechtmann, 1989: 249-250).

Receiving such accolades from HUD reassured the Ecumenical Coalition team, but HUD was not the only federal agency involved in the issue. The Economic Development Administration (EDA), on which federal support for the Ecumenical Coalition project

would ultimately depend, was not nearly so impressed by the proposal. Regardless of moral imperatives, $500 million was a lot to ask of the federal government for this type of project. However, without that level of investment the project would be pointless: not only would the reopened plant not make a profit, it would lose money, just as it had lost money for the Lykes Corporation before it was closed.

In the middle of the Ecumenical Coalition's efforts to establish the feasibility of the Campbell Works project, a challenge emerged that threatened to undermine the project at a crucial moment. In November 1977, two months after the announcement of the Campbell Works closing, the Lykes Youngstown Corporation (parent company of Youngstown Sheet and Tube) and the LTV Corporation (parent company of Jones and Laughlin Steel) announced their intention to explore a merger between the two conglomerates (Lynd, 1982). Two elements of this merger complicated the Ecumenical Coalition strategy. First, the merger made it difficult for the Ecumenical Coalition to plan a purchase strategy for the closed Campbell Works (it was also uncertain what role, if any, the Campbell Works would play in the merged corporation). Second, it was uncertain how the Lykes-LTV merger would impact the local steel market. If the merger was approved, the production that had been taking place at the Campbell Works would be shifted to a facility owned by former competitor Jones and Laughlin Steel. The merged company would thus not be dropping the Campbell Works market linkages, so the Ecumenical Coalition's reopened plant could not depend on those linkages as a source of revenue.

It was not at all certain, however, that the merger would be approved, as the Lykes Corporation's previous experience with mergers suggested that the proposed merger might not be good for the steel industry. Lykes had merged with Youngstown Sheet and Tube in 1969. A Justice Department review at that time warned against the merger due to a clear threat that the Lykes Corporation might divert steel revenues away from steel-making activities and invest them elsewhere. Steel companies were capable of generating massive cash flow, but they were also very capital intensive, with equipment maintenance and replacement costs in the hundreds of millions of dollars. Diversion of steel revenues, the Justice Department argued, could lead to a lack of maintenance and modernization and subsequent decline in steel-making capacity (Lynd, 1982). The merger was approved, nonetheless, in the absence of laws preventing the merging of two non-competitors; only mergers between companies in the same industry were viewed as anti-trust threats. The tragedy, from the perspective of Youngstown steel workers in 1977, was that the eventual outcome of the merger precisely mirrored the concerns voiced by the Justice Department in 1969 (OPIC, 1977).

Despite Lykes' merger history and despite the fact that, after an intensive four-month investigation, the Justice Department antitrust staff recommended that the merger be denied, Griffin Bell, then Attorney General, approved the merger against his staff's recommendations and, importantly, without conditions. Approving the merger without conditions meant there was no formal requirement for the companies to consider the impact of the merger on the local Youngstown population, no requirement to keep closed facilities operational so that others may use them, and no requirement to negotiate the

sale of closed facilities with the Ecumenical Coalition.

The approval of the Lykes-LTV merger had two immediate impacts. First, it made the Ecumenical Coalition plans to reopen the Campbell Works much less viable and therefore much less likely to succeed. It also brought about the closure of another Youngstown steel making facility: the Brier Hill Works (Lynd, 1982). As the two companies integrated their operations, Brier Hill was the one piece that didn't fit into the new production strategy. The closure of Brier Hill eliminated another 1,500 steel jobs in Youngstown and added pressure on an already stressed local economy.

With the viability of their project undermined, lack of support ultimately doomed the Ecumenical Coalition effort. While the campaign had picked up steam in the early months of 1979, with a revised and much improved feasibility study, a vocal commitment from unemployed workers, and a nod of approval and some assistance from USWA leadership, it was too late to reverse the forces in motion. At the end of March 1979, the EDA declared the Ecumenical Coalition project unfeasible and denied it federal funding, ending the struggle to reopen the Campbell Works under worker-community ownership.

United States Steel: Ohio Works/McDonald Works

As the struggle to keep the Campbell Works and Brier Hill Works operating came to a close, those active in the resistance efforts turned to the next likely closings: the Ohio Works and McDonald works of United States Steel (Lynd, 1982). Recognizing all the signs of imminent closure—outdated equipment, low profits, major investment

commitments in non-Youngstown facilities—local workers began to push for confirmation of U.S. Steel's plans for the Youngstown area. For its part, U.S. Steel pronounced repeatedly that it had no plans to close its Youngstown facilities *as long as they remained profitable* (Buss and Redburn, 1983). The company reiterated this position until November 27, 1979, when it announced plans to close the two plants, eliminating another 3,500 steel jobs in the area.

Whereas the Ecumenical Coalition spearheaded the challenge to the Campbell Works and Brier Hill closings, with important but more marginal participation from workers and local unions, in the challenge to U.S. Steel, local unions took the lead (Lynd, 1982). The first move was to hold a meeting at the union hall to discuss strategies. In that meeting, on November 29, 1979, which attracted well over 1,000 people, angry steel workers applied the same criticisms to U.S. Steel that had been lodged against the Lykes Corporation after the Campbell Works shutdown: U.S. Steel let local facilities deteriorate and had taken the profits, earned off the backs of the workers, out of Youngstown and invested them elsewhere (Lynd, 1982). Following that meeting, two successful demonstrations took place that gained some much needed attention and negotiating room for the local workers. One was a picket line that turned into the occupation of U.S. Steel headquarters in Pittsburgh. The other was a rally, picket line, and occupation of the U.S. Steel headquarters in Youngstown (Lynd, 1982).

Meanwhile, recognizing the significant yet limited impact public demonstrations might have on U.S. Steel's decision-makers, workers also chose to advance the struggle through

the courts. On Friday, December 21, 1979, a lawsuit was filed in federal court against U.S. Steel on behalf of a long list of plaintiffs (Lynd, 1982: 143):

> Congressman [Lyle] Williams; the four local unions representing production, maintenance, office and technical workers at the Youngstown Works (Locals 1330, 1307, 3073 and 3072); Local 1462, USWA, representing production and maintenance workers at Brier Hill, on the theory that the Brier Hill Works was just across the river from the Ohio Works and could be purchased and modernized with it; Local 1112, UAW, representing production and maintenance workers at the General Motors plant in Lordstown, who argued that their plant could get steel more cheaply if it were made locally; the Tri-State Conference on the Impact of Steel, composed of clergy and steelworkers with a special interest in "brownfield" modernization; and sixty-five individual steelworkers at the Youngstown Works.[5]

The lawsuit presented three claims against U.S. Steel. First, workers claimed that management had promised, through a variety of public and internal statements, that the Youngstown Works (which includes both the Ohio Works and McDonald Works facilities) would be kept open as long as profitability was maintained; that the facilities were profitable when the closing decision was announced; and that U.S. Steel was therefore in breach of contract (Lynd, 1982). The second claim emerged rather unexpectedly during the course of the lawsuit and was in fact suggested by Judge Lambros, the judge presiding over the case: that the plaintiffs possessed a "community property right" to the closed facilities. Judge Lambros reasoned as follows (Lynd, 1982: 166):

> It would seem to me that when we take a look at the whole body of American law and the principles we attempt to come out with...it seems to me that a property right has arisen from this lengthy, long-established relationship between United

[5] Congressman Williams was later dismissed from the case for lack of 'standing.'

> States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry. Perhaps not a property right to the extent that can be remedied by compelling U.S. Steel to remain in Youngstown. I think the law could not possibly recognize that type of an obligation. But I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.

The plaintiffs agreed with Judge Lambros's assessment of the relationship between U.S. Steel, Youngstown, and local workers, and added the community property right claim to the suit. Their request, based on these claims, was that U.S. Steel be required to either keep the plants open indefinitely or else at least long enough for the plaintiffs to gather the financing needed to purchase and modernize the plants themselves, under a revised version of the plan developed by the Ecumenical Coalition. When informed of the workers' claims and plans, David Roderick, chairman of the board of U.S. Steel, stated the company's position in the following way (Roderick, quoted in Lynd, 1982):

> We obviously would not be interested in selling the plants to a group of people that can only be successful if they were massively subsidized by the Federal Government. We are not, in other words, interested in creating subsidized competition for ourselves at other locations.

Roderick's position regarding the worker-community project became the basis for the plaintiff's third claim: U.S. Steel's refusal to sell to a potential competitor violated anti-trust laws.

When the lawsuit was filed, it was one element of a larger effort to maintain steelmaking

facilities in Youngstown. But as months passed, U.S. Steel showed no signs of softening its stance, and most workers directed their efforts toward their own survival, the lawsuit was all that was left of the three year struggle.

The three claims before the court—breach of contract, community property right, anti-trust violation—each faced difficult challenges. Though it was extensively deliberated, the first claim was dispatched fairly simply. The Court found there could be no breach of contract because the conditions of the contract were never realized—the company's supposed promise to keep the plants open if they became profitable was moot considering the plants never became profitable.[6]

With the community property right claim, the Judge was in an awkward position. It was clear that the claim was based on his own reasoning, but now that it was formally before the court, he could not find the authority to support it. While the argument was compelling that "United States Steel should not be permitted to leave the Youngstown area devastated after drawing the lifeblood of the community for so many years," no legally recognized community property right existed for him to enforce; such a property right would have to be achieved through future struggle. He concluded (Lynd, 1982: 176):

> Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation. Perhaps labor unions, now more aware of the importance of this problem, will begin to

[6] The defendant and plaintiff suggested different mechanisms for determining profit. According to the plaintiff's calculation the plants were profitable. According to the defendant's calculation the plants were not profitable. The Court adopted the calculation of the defendant.

> bargain for relocation adjustment funds and mechanisms and will make such measures part of the written labor contract. However, this Court is not a legislative body and cannot make laws where none exist—only those remedies prescribed in the statute or by virtue of precedent of prior case law can be given cognizance. In these terms this Court can determine no legal basis for the finding of a property right.

The dismissal of the contract and property claims left only the anti-trust claim to be decided. Here the plaintiffs found themselves in familiar, yet equally fruitless, territory. Judge Lambros needed more time to investigate the anti-trust claim and issued an injunction prohibiting U.S. Steel from dismantling any facilities until the claim's merit could be determined. Those involved in the case recognized that the Judge was likely to rule in favor of the plaintiffs on this claim. The injunction, originally fixed at 60 days, would provide the workers with the time needed to arrange financing to purchase the facilities once a decision was reached. Thus began again negotiations with the Economic Development Administration over loan guarantees to back a new worker-community ownership project at the Youngstown Works, more requests for feasibility studies, and more unfulfilled promises of support.

As the plaintiffs pursued federal financing to purchase the Youngstown Works, however, U.S. Steel agreed to lease several of the Youngstown Works' most valuable mills to a new company called Toro Enterprises. As the plaintiffs' worker-community ownership business plan depended on the availability of these same mills, the Toro lease invalidated the plaintiffs' feasibility studies and undermined their ownership strategy. With no financing to purchase the closed facilities and, with Toro in the picture, no facilities to purchase, the plaintiffs chose not to take the anti-trust claim to trial, opting instead to

settle out of court and achieve the greatest gains possible. Under the settlement, U.S. Steel agreed to keep in "mothballs" for five years (i.e. not in use, but still intact and in operating condition) three of the most valuable Youngstown Works mills for Toro Enterprises and/or Community Steel (if financing could be secured) to operate if they chose to do so. One other mill would be operated immediately and indefinitely by Toro, employing up to 160 workers. The settlement was far from ideal. It provided very few jobs and required very little from U.S. Steel. But at the end of three long years of struggle, it at least preserved some glimmer of hope for maintaining the steel industry in the Mahoning Valley.

Policy remedies: plant closing legislation

The actions of the Ecumenical Coalition, the various USWA locals, and their supporters, were not the only efforts put forward to address the industrial concerns in Youngstown. Other strategies included the construction of a national steel research center to develop technological and operational innovations for the steel industry (Hogan, 1978), a Steel Valley Authority, modeled after the Tennessee Valley Authority, to coordinate steel-industry policy throughout the region (Lynd, 1982), and various attempts to attract new corporations to the area to utilize the abandoned industrial infrastructure (Rothstein, 1989). None of these efforts succeeded in generating any promising alternatives to traditional steelmaking, and none provided any substantive relief to the Youngstown labor community.

One other strategy was to confront plant closings through legislation. At both the state

and federal levels various groups pushed for legislation to prohibit, or at least strongly discourage, corporations from closing and/or relocating industrial plants, and to assist communities experiencing closures with redevelopment (McKenzie, 1984). The Youngstown experience generated support for this strategy, and the state of Ohio was one of the first states to propose plant closing legislation (Harrison, 1987), but the strategy in general was motivated by the experience with plant closings shared by industrial communities throughout the country. In fact, the first piece of federal legislation was proposed (but not passed) in 1974, three years before Youngstown Sheet and Tube closed its Campbell Works (Harrison, 1987). Due to the ubiquity of plant closings in the 1970s and 1980s, the legislative approach was popular, especially among traditional industrial communities. But that popularity did not translate to the passage of substantive measures. At the federal level, intense resistance from the business community, some economists, and anti-government ideologues emphasized two primary concerns. One was that such legislation would raise the costs of doing business in the United States and thus contribute to economic woes rather than solve them. The other contention was that legislation of this type compromised important "free market" principles and represented both an unjustified infringement on management prerogatives and an unconstitutional violation of the rights of business owners (Rothstein, 1986). Consequently, by 1988, "approximately thirty-three states had considered the issue of plant closing legislation" but measures had passed in only seven (Levin-Waldman, 1992: 93).[7]

The country's first plant closing bill, a modest bill proposed before the business

[7] Maine (1971), Wisconsin (1975), Connecticut (1983), Massachusetts (1984), Hawaii (1987), Virgin Islands (1987), and Tennessee (1988) (Levin-Waldman, 1992).

community could organize to oppose it, was passed in the state of Maine in 1971. That bill was not far reaching, but it succeeded in raising awareness of the possibility of legislative action.[8] Despite Maine's early efforts, however, widespread state-level action emerged only after the National Employment Priorities Act of 1974 failed to gain passage at the federal level. That bill proposed much more stringent monitoring and management of plant closings than had been enacted in Maine. Applying to all employers with fifty or more employees, central provisions included a requirement for advance notification of between sixty days and two years, depending on the circumstances, before an expected closure or relocation; the establishment of a National Employment Relocation Administration (NERA), to be located within the Department of Labor, with authorization to investigate and determine the justification of proposed closures and to recommend whether and how much adjustment assistance should be provided in each case—in the form of technical and financial assistance to struggling firms and/or grants and loans to struggling communities; and the denial of federal tax benefits to any business closing or relocating against NERA's recommendations (McKenzie, 1984).

After the National Employment Priorities Act of 1974 failed to make it out of committee for a vote, different versions of the bill were subsequently introduced (and rejected) in 1977, 1979, and 1983. The 1977 version contained most of the elements of the 1974 bill, but included the important additions of greater emphasis on employee assistance—relocation, retraining, early retirement, health care maintenance—and a shift of the

[8] The Maine legislation effected the sole requirement of one month's advance notice from firms with 100 or more employees prior to relocation or closure, and a penalty for failing to give such notice in the form of a requirement to provide severance pay to affected employees of one week's salary for each year worked (Rothstein, 1986).

financial burden associated with these efforts away from the federal government and onto the employers responsible for the closure/relocation (H.R. 76). The 1979 version of the bill raised the minimum notification period to six months and extended employer responsibilities further by requiring employers to cover the relocation costs of workers accepting employment in another of the company's facilities, to continue pension and health care contributions for one year, and to pay affected workers 85% of their salary for up to one year after closing (Rothstein, 1986). It also required employers to pay 85% of one year's taxes to the local government in which the closing plant was located, and 300% of one year's taxes to the federal government in the event of an international relocation (McKenzie, 1984: 209-210). Finally, the 1983 bill retained all of the important provisions of the previous versions—relocation, retraining, salary, pension, health care, and tax maintenance—but placed greater emphasis on targeting federal assistance to struggling firms and the development needs of struggling communities in order to maintain employment bases and/or create employment alternatives (Harrison, 1987). As noted above, each of these bills was rejected, as were various other bills focused specifically on one or more of the plant closing concerns.[9]

The only piece of federal plant closing legislation to pass was the Worker Adjustment and Retraining Notification Act (WARN) of 1988, which stripped away all requirements of company payments for salaries, health care, pensions, relocation, redevelopment, or taxes, and focused exclusively on advance notification, requiring firms planning a

[9] Other failed federal bills include: National Economic Efficiency Act (1977); Labor-Management Notification and Consultation Act (1985); Employee Protection and Community Stabilization Act (1979); Voluntary Job Preservation and Community Stabilization Act (1978-1979); Employment Maintenance Act (1980) (Aboud and Schram, 1987).

substantial workforce reduction to provide various constituents with 60 days advance warning (Levin-Waldman, 1992).

Federal inaction signaled to the states that any immediate plant closing legislation would have be passed at the state level (Rothstein, 1986). Ohio introduced its bill in 1977, under the title the Community Readjustment Act (CRA). The clarity and extensiveness of that bill caused it to became a model for legislation both in other states and at the federal level (the Ohio bill is credited with providing the basis for the 1979 version of NEPA) (Harrison, 1987). Important provisions of the CRA included the requirement that employers provide one-year advance notification of a closing, a statement of justification, an economic impact statement, severance payment to workers of one-weeks pay for every year worked, relocation and retraining assistance, maintenance of health care costs for six months, and a payment of 5% of annual payroll to a county-based Community Readjustment Fund. That bill also required the state and affected counties to establish agencies (e.g. an Employee and Community Readjustment Administration) dedicated to investigating plant closing cases and to planning for new enterprise and employment development (Littman and Lee, 1984).

Whereas the federal legislative proposals confronted a range of ideological concerns related to the impact of such policies on the "free market," the chief contention of those opposing the Ohio bill was that it would damage the state's "business climate," thus increasing the costs of doing businesses in the state and making it much more difficult to attract new businesses to the state (OPIC, 1977). In response to this claim, the Ohio

Public Interest Campaign (OPIC), the primary motivating force behind the legislation, issued a press release titled "Business closing legislation won't place Ohio at a disadvantage," in which it attempted to reassure the business community that the bill would ultimately stabilize the state's economy (OPIC, 1977). But such reassurances were not enough to overcome opposition and, like so many other state and federal bills, the bill never passed (Rothstein, 1986), and neither was any other bill passed that could provide support to the Youngstown labor community.

By the end of 1980, the multifaceted three-year struggle to preserve jobs, an industry, and a way of life in Youngstown was substantially finished. In economic terms, the outcome was tens of thousands of jobs lost, a couple hundred jobs retained, and few prospects for future development. The social costs of such massive job loss, expressed in terms of community stress and disintegration, lost self esteem, increased rates of alcoholism, domestic abuse, and suicide, have been well documented (Buss and Redburn, 1982; Lynd, 1984; Bluestone and Harrison, 1982; Linkon and Russo, 2002). Youngstown would experience new industrial opportunities over time, in particular a GM automobile fabricating plant in the suburb of Lordstown and, later, a series of prisons in and around the area (Linkon and Russo, 2002). But the labor community associated with *steel* essentially vanished, along with the urban, social, and economic infrastructure on which it depended.

Seattle: 'ground zero' of white collar outsourcing

As noted at the outset of this chapter, in terms of the type of industry affected, the scale of industrial change, and the level of concern registered in the labor community, the story of job loss in Seattle hardly resembles that in Youngstown. In terms of the processes at work, however, and the arguments generated by conflict participants, the two stories are remarkably similar. The remainder of this chapter provides an account of the conflict in Seattle over the outsourcing of professional services jobs. The story of Seattle provides an excellent example, twenty-five years after Youngstown and the onset of deindustrialization in the US, of the continuation and/or reappearance of place-specific challenges to the consequences of capital mobility. In juxtaposing these two stories, the objective is to explore some of the differences and similarities between them and to consider whether, why, and how the Seattle labor community can expect to achieve gains that eluded the Youngstown activists.

Outsourcing professional services: riding the wave of productivity

The city of Seattle, like most US cities with any manufacturing base, struggled through the recession of the early 1970s against the concerns of capital flight and disinvestment (Sell, 2001). However, such issues have been dwarfed by the city's emergence in the 1980s and 1990s as a growth center for high technology and professional services (Fefer, 1997). With corporations such as Microsoft, Boeing, Amazon, Nintendo, AT&T Wireless, and numerous other, small, high-technology companies scattered throughout the region, Seattle has exemplified the strengths and benefits of embracing the transition from manufacturing to a service/information based economy.

In 2002, however, Microsoft, the largest computer software company in the world, announced plans to invest $400 million over three years to develop a "call center" and software development facilities in India, and plans to open a new research facility in China (Beckman, 2003c; Tonelson, 2003). Similarly, after relocating its headquarters from Seattle to Chicago in 2002, Boeing, the largest aerospace company in the world, announced plans to open a design center in Moscow for engineering services and plans to send technical manual development services to Chile (Tonelson, 2003). Such plans and announcements are consistent with national trends as companies such as General Electric, Hewlett-Packard, IBM, Citigroup, and Bank of America, among many others, have outsourced thousands of professional services industry jobs (e.g. customer service, product research, engineering, software development, telemarketing) to low-cost locations overseas (Gruenberg, 2003; Beckman, 2003c; Tonelson, 2003).[10]

Due to the character of sectoral employment practices, precise figures regarding the number of jobs lost as a result of outsourcing, both in Seattle and throughout the country, are hard to find (GAO, 2004). Unlike 1970s-style deindustrialization, the job losses related to outsourcing are not manifest through massive plant closings or other centralized decisions impacting thousands of workers at a time. The configuration of professional services is such that jobs may be lost one at a time, or in small groups, spread across countless businesses as firms reconsider which tasks to perform in-house

[10] In the emerging conflict over lost jobs and overseas investment, two terms are typically conflated. The term "outsourcing" generally means the contracting out of tasks that a company used to perform itself. Thus, outsourced jobs may or may not leave the local area where they used to be performed. When the recipient of an outsourcing contract is in another country, that is called "offshoring" or the sending of jobs overseas. For the sake of convenience, I use here only the term outsourcing, but in doing so I refer specifically to those outsourced jobs that have also been offshored.

and which to contract out to other service providers. According to a recent report by the US Government Accountability Office (2004: 1), job losses could range from between 100,000 and 500,000 in coming years. Another widely referenced estimate by Forrester Research, a private research consulting firm, put the number of outsourced professional services jobs at 830,000 by 2005 (Holt, 2004), and 3.3 million by 2015 (Greenhouse, 2004). One other figure, provided by the Washington Alliance of Technology Workers, puts the number of offshored jobs at more than 423,000 since January of 2000, as calculated from news accounts and employee reporting (WashTech, 2005).

In the Seattle area, according to the Washington State Employment Security Department, nearly 80,000 professional services jobs have been lost in recent years, though it is entirely uncertain how many of those losses are due specifically to outsourcing as opposed to the area's high tech recession (Beckman, 2003a). Regardless, various local companies have been linked to outsourcing practices, with most attention focusing on Boeing and Microsoft. Microsoft in particular has made a series of significant and high-profile investments in India, opening a call center with 270 employees in the city of Bangalore in 2003 and beginning work in 2004 on a new 250,000 square foot building that will be part of a high-tech "campus" in the city of Hyderabad that will eventually include several more buildings and several thousand employees (Dudley, 2004). The company has also pledged hundreds of millions of dollars of additional investment in both India and China (Beckman, 2003a). These moves have provoked some alarm in the Seattle area, despite the fact that the company's employment numbers in India are only a small fraction of the numbers employed locally—970 in India, compared with more than

27,000 in the Seattle area (Dudley, 2004)—and despite reassurances from Microsoft officials that the company intends to keep most of its "core functions" in the Seattle area.

Boeing has demonstrated similar outsourcing patterns. The relationship between Boeing and Seattle has always been a volatile one as Seattle's economic health has been closely linked to the company's production and employment numbers, which have fluctuated between a high of 104,000 and a low of 40,000 over the past thirty years (Sell, 2001). But whereas in the past concerns focused on the preservation of Boeing's local manufacturing base, present anxiety centers on the company's professional services, jobs previously thought safe from overseas pressures (Tonelson, 2003). These anxieties have been fueled in part by Boeing CEO Bill Condit's statement in 2002 of the company's intention to start "doing business in many different countries" rather than just "selling to the world" (Tonelson, 2003). That statement reflects a shift in the company's production strategy in recent years to "a systems integration mode of production, whereby manufacturing and design processes are distributed across an international network of risk-sharing partners" (Pritchard and MacPherson, 2004: 1). The implication of that strategy is that less of the design and engineering work will take place where it has traditionally been concentrated—in Seattle—and more of it will be performed by workers in other countries. So far, the company has opened a design center staffed with 500 engineers in Moscow, and a technical writing center with 400 employees in Chile (Tonelson, 2003). Seattle-based professional services workers fear that such developments may be only the first in a series of steps to ship high-wage technical jobs overseas. Meanwhile, the high profile relocation of Boeing's headquarters from Seattle to Chicago in 2001, though not

directly related to outsourcing, has stimulated additional concern over the company's commitment to the region.

Outsourcing has also been cited at other, smaller companies in the Seattle region, but, when not trained on Microsoft and Boeing, most attention has been focused on the outsourcing practices of various agencies of the Washington State government. The Department of Social and Health Services, the Department of Corrections, and the Washington State Health Care Authority have all been found to outsource professional services contracts—typically computer programming—to overseas workers (Beckman, 2003d). While state officials routinely claim to be unaware that their contracts are being performed out of the country (Mattera, 2004), they also cite increasing budgetary constraints that force them to cut costs wherever they can (Konrad, 2004). The bitter irony that outsourcing is viewed as a cost saving measure despite the fact that it increases the number of locally unemployed workers who become a drain on the state's unemployment benefits system is not lost on the Seattle labor community. Thus, whether state officials are outsourcing state contracts consciously or unwittingly, the result is the same: "millions of dollars in Washington state's shrinking tax revenues are leaving the country rather than circulating within the local economy" (Beckman, 2003d).

Other evidence of the practices and consequences of outsourcing is anecdotal, coming from scores of professional services workers who lost their jobs to overseas workers and have subsequently faced substantial difficulty finding comparable employment (Spotts, 2004; Nachtigal, 2003; Beckman, 2003b). Such anecdotal evidence can be moving and

informative, attaching tangible stories to the circumstances otherwise addressed only through faceless statistics. But it is not always effective in motivating policy-makers to initiate policy changes. The specific numbers, however, may not be that important, for regardless of the lack of clarity concerning exactly how many jobs have been outsourced to date and exactly how many more will be outsourced in the future, there is general agreement among those considering the issue that the outsourcing of professional services jobs has been widespread, that it will continue, and that it is likely to accelerate in coming years. Conflict in this case revolves around differences of opinion regarding how the outsourcing issue should be confronted.

Strong voices from the business community and a range of ideological supporters characterize the job losses in Seattle and elsewhere as the outcome of natural market processes and of the efficient allocation of resources (CSPP[11], 2004). If workers in other countries can perform the same jobs as domestic workers for less money, the argument goes, then smart investors should shift their resources to those overseas workers (Mann, 2003). Such is the nature of the market, according to Ann Livermore, head of services at Hewlett-Packard, because "a basic business tenet is that things go to the areas where there is the best cost of production," which means "you're going to see the same trends in services that happened in manufacturing" (quoted in Engardio, et all, 2003). Just as the globalization of manufacturing enabled the boom in information technologies and services that brought so much development to cities like Seattle (and, as is generally ignored, so much destruction to cities like Youngstown), the globalization of professional

[11] CSPP (Computer Systems Policy Project) is an advocacy group for the information technology (IT) sector, comprised "exclusively of CEOs" from some of the largest IT companies in the country, including Dell, Hewlett-Packard, IBM, Intel, and Motorola.

services will lead the way to that next "wave of productivity growth" (Mann, 2003: 2). Thus, rather than being seen as undermining domestic workers and economies, this process is represented as ultimately productive: it allows domestic workers to move up the "technology food chain" by clearing out "low value" jobs and redirecting domestic investment to higher value services (Greenhouse, 2003). The money saved through the use of cheap overseas labor enables expanded research and development spending and the potential for new technological innovations (Mann, 2003). And, as more people and businesses around the world incorporate information technologies into their lives, they will seek out the expertise of US workers and thus stimulate demand for domestic workers (CSPP, 2004). A globalized production network and the license for corporations to spatially shift investments in pursuit of cost savings are thus the cornerstones of the "free market" system that ensures perpetual technological and economic development (CSPP, 2004).

The only thing "to do" about outsourcing, according to this perspective, is to resist interfering with market processes through "protectionist" legislation (Lohr, 2004) and to invest in education so that domestic workers remain competitive for the highest value jobs (Nachtigal, 2004a). With the appropriate "growth-promoting government policy" (Business Week, 2003), employment growth and technological innovations will follow. What the country needs above all is to capitalize on its "entrepreneurial spirit and bold prowess" and to "have the courage to compete" with producers from around the world (CSPP, 2004: 6, 3). For the many espousing this view, a lack of courage in this regard, or the failure to embrace a globalized view of industrial interdependence, is what most

threatens to undermine domestic prosperity:

> In the end, globalization of software and services, enhanced IT use and transformation of activities in new sectors, and job creation are mutually dependent. Breaking the links, by limiting globalization of software and services or by restricting IT investment and transformation of activities or by having insufficient skilled workers at home, will put the entire prospect for robust and sustainable US economic performance at risk (Mann, 2003: 10).

Jobless in Seattle: Organizing outsourcing resistance

Not surprisingly, the labor community in Seattle, as well as the labor communities in other cities with substantial bases of professional services workers, have greeted the shift of "low value" service jobs to overseas workers with a bit less enthusiasm. For such workers, outsourcing is not an essential component of the natural process of international advancement and productivity growth, but rather an abandonment of domestic workers by irresponsible companies leveraging the country's industrial future for short term benefit (Beckman, 2003b). Noting that the only basis for the emerging competition is wages—not skills, or quality, or productivity—domestic workers and their supporters have begun to question who benefits from their willingness to compete on such terms. Thus, what is being developed by the Seattle labor community is not "the courage to compete" with cheap overseas workers but instead the courage to challenge the legitimacy of business practices that they believe undermine domestic economic development and stability.

Perhaps the two organizations most active in organizing the challenge to professional

services outsourcing have been the Washington Alliance of Technology Workers (WashTech), an organization established in 1998 as a bargaining unit for Microsoft temporary workers (Ervin, 1999), and the Society of Professional Engineering Employees in Aerospace (SPEEA), formed in the 1950s to represent Boeing's engineers (Eskenazi, 2000). These groups have confronted the outsourcing issue in a variety of ways. WashTech in particular has focused considerable effort on revealing outsourcing as a growing practice by commissioning research to identify who is outsourcing how many jobs and how such practices affect local employment and economic conditions (Mattera, 2004; Doussard and Mastracci, 2003). WashTech also maintains a website that serves as a resource center for news and information about local and national developments in the outsourcing conflict, providing a list of companies known to have outsourced jobs and a running tally of jobs lost to date (WashTech, 2005). Both groups have also been deeply engaged in an effort to raise general awareness of the outsourcing issue through organizing workers, events, and demonstrations, by generating news articles and press releases, and by speaking with the media and public officials about the current and potential impacts of outsourcing on the local economy. Finally, these groups have challenged the rhetoric used to justify outsourcing and focused local legislative debates on measures to curb outsourcing practices (Beckman, 2004). While no concrete victories have been achieved to date, these groups have succeeded in generating attention for the issue and in situating Seattle as "ground-zero of the outsourcing debate" (Tonelson, 2003).

Two significant challenges face the Seattle labor community in this struggle. One is that

professional services workers are notoriously difficult to organize (Eskenazi, 2000). Whereas Youngstown had its "Black Monday," there is no single moment after which everything changed in Seattle, no specific event to organize around. Various important moments can be identified that have contributed to the professional services malaise—such as the bursting of the technology bubble in 2001 (Doussard and Mastracci, 2003)—and to the demand for overseas workers—such as the Year 2000 "millennium bug" (Reason, 2001)—but those are not the kind of occurrences that motivate organized resistance. Furthermore, the practice of outsourcing is not particularly new; it has been a central component of the "flexibility" objective pursued by companies since at least the 1970s:

> Work peripheral to company's operations from transportation to janitorial services had been contracted to outside vendors for decades. Throughout the 1990s, business giants such as General Electric's Jack Welch and management guru Tom Peters trumpeted the value of 'focusing on core competencies' and farming out everything else (Dudley, 2004).

Thus, in their efforts to generate resistance, organizers faced the task of not only mobilizing a workforce known to avoid unions and/or collective action, but also of challenging widely accepted and practiced business strategies in a conservative political environment. But as the peripheral work being "farmed out" in recent years has increasingly been sent overseas rather than to other local (or at least domestic) companies, and as the unemployment rate among professional services workers in Seattle surpassed the 10% mark in 2002 (Doussard and Mastracci, 2003) more workers began to take an notice. The issue also generated a flurry of attention nationally during the 2004

presidential campaign as candidates sought to appease an increasingly concerned national labor community (Seelye and Becker, 2004). Outrage over the finding that state agencies have been outsourcing their own professional services contracts while many local workers search for work has generated additional support for the cause (Mattera, 2004).

As with the Youngstown struggle, much of the concern expressed by the Seattle labor community emphasizes questions of morality and corporate responsibility to workers. The practice of sending overseas what were previously high-quality and high-paying local jobs has been criticized as a betrayal of domestic workers and as an attack on domestic living standards (Beckman, 2003a). And corporate claims that their behavior is motivated by good intensions for domestic workers and economies have been undermined by the way they have gone about outsourcing jobs. The abuse of two federal guest-worker visa programs has provoked special contempt on the part of workers. One, called the H-1B visa program, allows companies to hire foreign workers to fill "specialty occupations that require theoretical or technical expertise in a specialized field" (USCIS, 2005). The other, called the L-1 visa program, allows companies with overseas subsidiaries to transfer to the US from abroad workers with "specialized skills" (Thibodeau, 2003). While both programs were designed to fill specialized gaps in domestic employment or to provide unique services otherwise unavailable, with 195,000 H1-B visas allocated in 2003 and more than 300,000 L-1 visa holders working in the US that same year (Doussard and Mastracci, 2003),[12] critics argue that both have been abused by corporations to put downward pressure on wages and to facilitate the

[12] There is ongoing legislative debate at the federal level over the maximum number of these visas to allow in any particular year. There is presently no upper limit to the number of L-1 visas. The cap on H-1B visas was adjusted downward from 195,000 in 2003 to 65,000 in 2004 and 2005 (USCIS, 2005).

outsourcing of professional services jobs (Nachtigal, 2004b).

In terms of wages, the primary argument is that "vague layoff protections and easily skirted standards for prevailing wages have helped many IT employers turn the visas into a steady means of procuring lower-cost labor" (Doussard and Mastracci, 2003: 9). Furthermore, many workers have complained of having to train H1-B guest workers only to be subsequently replaced by them (Gruenberg, 2003). The possibility of unwittingly participating in their own dismissal, and with the support of a federally sanctioned employment program, has been especially unsettling for workers. Such fears have been magnified under the L-1 visa program, through which companies have brought in workers from overseas subsidiaries for extended training and then sent them back to their home countries, where they established new divisions to assume responsibility for tasks previously performed in the US (Beckman, 2003b).

The justification provided by corporate supporters for the guest worker visa programs is the same as one of the central justifications given for outsourcing in general: a shortage of domestic workers with the appropriate level of technical expertise to satisfy domestic demand (Nachtigal, 2004b). As with the "free market" rationale discussed above, the emphasis on technical worker shortages serves to focus outsourcing debates and responses on worker education and training initiatives rather than on outsourcing restrictions. That argument has been heavily assailed by WashTech, SPEEA, and other groups critical of outsourcing. Though worker education is always important, the concentration on worker expertise, or lack thereof, is viewed as a strategic move designed

to place the blame for job losses on workers and to shift attention away from corporate profit motives (Nachtigal, 2004a). Aside from the obvious question of who bears the costs of retraining and educational advancement, critics argue that the ballooning number of experienced and highly-educated professional services workers who are unemployed undermines the worker shortage theory and suggests instead a lack of corporate commitment to domestic workers (Greenhouse, 2004). Either way, the education issue presents a difficult conundrum: employers claim to outsource overseas because they can't find enough skilled domestic workers, while domestic workers and students (potential workers) are becoming hesitant to develop skills for the kinds of jobs likely to be outsourced (Greenhouse, 2003). Furthermore, retraining is a difficult prescription for workers who have already achieved an advanced level of education, for "what do you tell the Ph.D., or professional engineer, or architect, or accountant, or computer scientist to do next? Where do you tell them to go?" (Greenhouse, 2003, quoting Congressperson Donald Manzullo).

Outsourcing activists thus insist that there is more to this issue than education and retraining and that alternative remedies must be explored. But this points to a second challenge facing the Seattle labor community: effective solutions to the problem of outsourcing are difficult to identify and difficult to defend in the present political-economic environment. As noted above, over the past thirty years the business strategy of pursuing maximum operational flexibility, of which outsourcing is a central component, has become deeply ingrained in the US popular consciousness, with the prosperity of cities like Seattle serving to exemplify the benefits of that strategy. Under these

circumstance, any proposed limitation on outsourcing is almost by definition a call for increased operational rigidity and is thus seen as a threat to future, though unforeseeable, development opportunities. Furthermore, as outsourcing has come to be viewed as the quintessential expression of industrial globalization, efforts to limit the practice are easily refuted as "protectionist" and at odds with conventional economic wisdom. Consequently, the debate over outsourcing has evolved into a choice between "free markets" and government intervention, between globalization and isolationism, between economic progress and economic regression.

Despite such practical and ideological hurdles, various legislative measures designed to curb outsourcing practices have gained support as more states have experienced the loss of high-value jobs. Federal action has thus far been confined to research (GAO, 2004) and congressional hearings (House Committee on Small Business, 2003a; 2003b) but, as of 2005, twenty-two states had proposed approximately thirty-six bills related to outsourcing, with five states passing some form of legislation (WashTech, 2005).[13] There is no one standard bill type proposed or adopted by all states, but common provisions include reporting requirements from corporations regarding the location of work to be performed under state contracts; the prohibition of offshoring any work under a state contract; funding to investigate the extent to which state contracts are being outsourced and the local economic impact of outsourcing currently taking place; and prohibitions on

[13] States that have passed some form of outsourcing-related legislation include Alabama ("strongly encouraging" state and local public institutions to use Alabama businesses for professional services), Illinois (reporting/disclosure of how much state contracting work will be performed overseas), New Jersey (research into local outsourcing and disclosure of jobs to be outsourced), Tennessee (limits state-contracting to U.S. citizens), and Washington (research to study the extent and impact of outsourcing within the state).

the extension of tax exemptions or other state benefits and development incentives to firms that outsource jobs from the state (any jobs, not only jobs from state contracts) (WashTech, 2005). When not focused on gathering information about outsourcing practices, most state bills thus aim to discourage outsourcing by eliminating the state as a client of corporations that outsource.

In Washington, the efforts of WashTech and SPEEA, among other interested parties, secured the passage in 2005 of one outsourcing bill, HCR 4405, to study the role of outsourcing in the state's economy. Specifically, that bill created a task force to study the extent to which outsourcing occurs on state contracts, the relationship between outsourcing and Washington state labor market conditions, the costs to the state of retraining workers made unemployed by outsourcing, the extent to which the state retains authority over its procurement decisions under the World Trade Organization and other international trade agreements, and, depending on funding availability, the economic benefits to the state of using in-state workers to perform state contracts, and the economic benefits to the state of companies from other states and other countries locating facilities within the state of Washington (HCR 4405). That bill did not take any steps to limit current outsourcing practices, and other proposed bills, such as HB 1725,[14] HB 2405,[15] HB2768, HB 2351,[16] HB 2352,[17] SHB 3186,[18] and SHB 3187,[19] which would have

[14] HB 1725 would have prohibited the outsourcing of state contracts (WashTech, 2005).
[15] Both HB 2405 and HB 2768 would allowed only individuals authorized to work in the United States to perform the work on certain state contracts.
[16] HB 2351 would have regulated certain personal information gathered by overseas call center workers and required call center employees to identify themselves, their employer, and their location to callers (HB 2351 Digest).
[17] HB 2352 would have discouraged employers from requiring employees to train their successors (HB 2352, House Bill Report).
[18] SHB 3186 would have required call center workers to provide their employer's identify and location.

placed some limitation on outsourcing activity, never made it out of committee for a vote. The research results from the task force created by HCR 4405 are expected by the end of 2005, and it appears that additional legislative considerations hinge on the nature of those findings.

After several years of struggle to investigate and raise awareness about the outsourcing of professional services, no substantive measures to curtail outsourcing practices in Seattle, or elsewhere,[20] have yet been passed, and support for future efforts is uncertain. Meanwhile, thousands of newly outsourced jobs are identified each month and domestic employment in professional services remains sluggish (WashTech, 2005). In Seattle, activists continue their efforts to mobilize public opinion and continue to put pressure on state legislators to find legislative strategies for keeping professional services jobs in the state, but it is entirely unclear what impact these efforts will have on the local economy and labor community.

Conclusion

The two struggles explored in this chapter exhibit as many differences as similarities. Differences between the historical moments and industrial sectors in which the cases are situated, the urban development histories of the two cities, the extent and intensity of the conflicts, and the local impacts of economic change (at least to this point), make them in some ways incommensurable. Yet their similarities, in terms of the sources of conflict,

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[19] SHB 3187 would have prohibited the outsourcing of work on state contracts (HB 3187, House Bill Report).

[20] To date, only the state of Tennessee has passed legislation that actively prohibits outsourcing, and that law applies only to state contracts.

the concerns raised, the arguments developed by conflict participants, and the illusiveness of effective resolution are important. For the purposes of the present study, these struggles exemplify the persistence across time and space of the place-specific consequences of capital mobility and the challenges facing groups seeking to stabilize local labor conditions and achieve some measure of community and economic security.

Youngstown is an iconic case of deindustrialization in the United States. It was through the conflict in Youngstown, and similar conflicts of the time, that the strategies of organizational and operational flexibility—meaning reduced responsibility to labor and the local community and increased capacity for spatial mobility—that guide contemporary business practices were first articulated.[21] While the Youngstown labor community raised questions regarding corporate morality, responsibility, and the rights of the community, corporations and their supporters responded with claims of economic necessity, the imperatives of competition, the importance of "free-market" principles, and corporate rights. The implication of the Youngstown labor community's failure to prevent local plants from closing was that the corporations involved were simply not responsible, morally or legally, to the workers or communities in which they were located. As Judge Lambros stated in the suit brought against US Steel, though many would agree that "United States Steel should not be permitted to leave the Youngstown area devastated after drawing the lifeblood of the community for so many years," there was no legal mechanism to support that moral claim. That there was no recognizable community property right to the steel making facilities located in Youngstown implied that the

[21] Of course, the concepts of comparative advantage, competitive advantage, division of labor, etc., existed long before the Youngstown conflict. But the modern interpretation of such concepts emerged in association with the deindustrialization occurring in the 1960s-1980s.

corporation's property right to those facilities included no obligations or responsibilities to the local community. Thus, despite the appearance of necessity and permanence in the relationship between the steel industry and Youngstown, the responsibility of the steel making corporations to the Youngstown labor community was only voluntary and temporary. Under such circumstances, the decision to continue or end operations in Youngstown was entirely a matter of corporate discretion.

One justification for the hardship experienced in Youngstown was that allowing investments to shift to more promising and profitable industries and sectors would ultimately stimulate economic development, both in general and in Youngstown in particular. Low-value, labor intensive jobs like steel-making might be lost in the process, but they would soon be replaced by higher-paying, higher-value jobs. That such an investment and jobs shift did in fact occur and is considered responsible for the high technology boom of the 1990s tends to overshadow the fact that most of the new investment and jobs appeared in cities like Seattle rather than Youngstown. Nevertheless, in terms of the national economy, the wisdom of the strategy of industrial flexibility has been until recently largely unassailable. The problem emerging in Seattle and numerous other cities around the country is that the high-value professional jobs that replaced many of the manufacturing jobs lost through deindustrialization are now themselves being sent overseas. If the American workforce can no longer anticipate its own technical superiority, and increased education and training does not guarantee some measure of economic security or advancement, then many wonder what jobs could possibly emerge to take the place of the high-technology jobs currently being sent overseas and how

American workers could hope to compete for such jobs without undermining domestic living standards.

Consequently, the recent loss of professional services jobs in Seattle has generated new but familiar concerns regarding corporate morality and economic security. They have also motivated a new wave of efforts to secure favorable conditions in the local labor community through legislative action. But the push for outsourcing-related legislation has also generated familiar arguments from the business community to discourage any government "interference" in corporate organizational or operational decision-making. Though this conflict is ongoing, it is becoming clear that nothing about the relationship between corporations and place has changed over the past twenty five-years to suggest that the Seattle labor community will be any more successful in their efforts to maintain professional services jobs than the Youngstown labor community was in maintaining steel-making jobs. That does not mean that the Seattle labor community is doomed to failure; there may be other factors that help secure a different outcome in Seattle. But apart from other factors, a challenge facing the Seattle labor community is that corporations continue to have no legal responsibility to the places in which they locate. Once again, the relationship thought to be necessary and permanent—this time due to worker training and expertise rather than long-standing tradition—has been revealed as voluntary and temporary. The question that remains unanswered through these struggles, and which will be examined over the remainder of this dissertation, is how and why the relationship between the corporation and place reflects and enables the spatial "flexibility" interests of corporations, and how that relationship might be challenged

and/or redefined so as to provide a greater degree of social and economic stability for place-specific labor communities.

Chapter Three: Confronting capital mobility

The struggles in Youngstown and Seattle described in the previous chapter provide examples of some of the consequences of capital mobility and the challenges facing place-specific labor communities looking to influence capital mobility practices. As noted, the outcomes in those struggles raise important questions about why the relationship between the corporation and place enables the spatial "flexibility" interests of corporations. The purpose of this chapter is to take a closer look at some of the actions and arguments generated by the participants in those struggles in order to analyze how the various participants approached the question of capital mobility. This is a difficult task in that struggle participants have not discussed these conflicts explicitly in terms of capital mobility, or "the relationship between the corporation and place." However, the argument here is that through an examination of different statements and silences, actions and inactions, it is possible to interpret how capital mobility was *treated*, if not exactly how capital mobility was *understood,* by those participating in these struggles.

The similarities between the Youngstown and Seattle stories are such that the two cases may be discussed together here. For, despite their differences, the same themes emerged in each case with regard to the explanations and/or justifications given for the industrial changes taking place and the actions taken by the participants to influence the direction of those changes. Once again, while I have labeled the struggles in Youngstown—over plant closings—and in Seattle—over outsourcing—as conflicts over the mobility of capital, they have not been discussed in these terms by participants. Thus, I treat the events around which the struggles have emerged—plant closings and outsourcing—as signifiers

of capital mobility and then consider how those practices were confronted in each circumstance.

My research focuses on a variety of materials produced through these struggles. Materials include hundreds of local and national media selections, press releases, research reports, statements from Congressional hearings, and oral histories (in the case of Youngstown). These materials were gathered through archival research at various locations in Seattle and Youngstown. In Youngstown, local media coverage from the *Youngstown Vindicator* between 1977 and 1980 was accessed through the archives at Youngstown State University, the Youngstown Historical Center of Industry and Labor, and the Youngstown Public Library. Also from the Youngstown Historical Center of Industry and Labor, I gained access to the personal archives of various Youngstown participants, which included a variety of clippings, statements, newsletters, research reports, and other miscellaneous materials, and approximately twenty oral histories from participants in the Youngstown struggle recorded by the Youngstown Historical Society. Due to the current nature of the Seattle struggle, most relevant research materials for that case, including local media coverage in the *Seattle Times*, through online research. Other materials, such as research reports and industry specific date, were gathered through meetings with representatives of two local organizations active in the struggle: the Washington Alliance of Technology Workers (WashTech), and the Society of Professional Engineering Employees in Aerospace (SPEEA). The website maintained by WashTech also provided a wealth of independent news coverage, legislative information, and additional outsourcing data.

I analyzed these materials in terms how the mobility of capital was represented and/or confronted in each and categorized the various representations into different themes. Some themes used with little frequency fell out of the analysis as idiosyncratic. Other themes used with greater frequency I organized into prominent representational categories. Overall, I identified evidence of five common representations of the events and of the various positions taken in relation to these events, which I have organized into the following categories, each of which is explored below: economic necessity, morality and/or corporate responsibility, government involvement, economic principles, and corporate rights and powers. In order to communicate a sense of how participants articulated these different explanations, a selection of exemplary quotes from participants is included in each section.

Economic necessity

Economic necessity is far and away the most common representation for the circumstances confronted in each of these struggles, though the character of that 'necessity' is conceived somewhat differently in each case. In Youngstown, steel companies represented their plant closing decisions almost exclusively in terms of economic and financial pressures: steel plants had to be closed because they simply were not economically viable. While activists from the Youngstown labor community, and their supporters, contested the reasons for the economic pressures, most accepted that the shutdowns were the result of a poor financial outlook and a poor competitive position for the Youngstown facilities. But the "economic necessity" representation was not employed only to justify and overcome resistance to the closing of steel facilities; it also

served to discourage efforts to reopen facilities under new management. The following quotes illustrate these representations by participants on both sides of the conflict:

> "Unless detrimental conditions are promptly alleviated, a further decline of the domestic industry would appear to be inevitable, with tragic consequences for workers, firms and communities as well as the overall economy of the nation" (AISI, 1980: 1).
>
> "[The] cost/price relationship for products produced at these facilities [Campbell Works and Brier Hill] does not justify further investment of the company's resources and the continuation of its investment in raw material properties to support these facilities" (Jennings Lambeth, Youngstown Sheet and Tube President, quoted in Reiss (1977b))
>
> "This [plant closing] decision recognizes that this country continues to be flooded with low-priced foreign steel and steel in imported manufactured products, such as imported automobiles" (Y&ST company statement, quoted in Reiss (1977a)).
>
> "The theory behind it was that Indiana Harbor had a more modern facility that was more in the heart of the steel market, whereas the Youngstown flat-roll system was not. And, overall they felt that the profitability was such that they had to reduce the total production cost. And, the decision came to shut down the Campbell flat-roll area. And that's how it came to...If you don't modernize, as I said earlier, you're going to have a problem" (Cleary, Tom, Youngstown Sheet and Tube steelworker. September 20, 1991, Youngstown Historical Society, Oral history archive).
>
> "Economics is all I can figure. And I think our capacity, our competition. Competition's made a big difference. I'm very outspoken about that: foreign imports....And, geographically we were in a bad spot" (Kerrigan, Joe: April 11, 1991, Youngstown Historical Society, Oral history archive).
>
> "There wasn't any need for these mills. They didn't have any demand. That's not only Youngstown. They shut down many more mills in Pittsburgh that were bigger tonnage capacity than there was here. And Buffalo, they shut down the Lackawanna works, you know, and Cleveland, and then Toledo, and Chicago, where the mills were a little more modern they saved some of them. But for quite a long period of time they could hardly give the steel away that they produced here" (Luce, Merlin: April 23, 1991, Youngstown Historical Society, Oral history archive).
>
> "I have to think that the major thing was cheap sources of labor in other countries, and other countries getting into the market, along with the companies' decision in

> this country not to keep the steel plants modern. I think in so many instances it became just simply a profit type of thing because I think they had invested heavily in some of the foreign countries. And there was a new source of cheap labor. And so consequently I think they just decided, hey, we can get all the steel we need shipped from Japan to United States at $40 a ton cheaper. So why should we pay these guys over here $15/hour when we can ship it from Japan at $40/ton cheaper? And I think it was just a profit motivated thing, not to keep them in workable shape" (Gatewood, Arlette: April 24, 1991, Youngstown Historical Society, Oral history archive).
>
> "We can't afford to let social desires interfere with economic reality" (Father William T. Hogan, Professor and Director, Fordham University Industrial Economics Research Institute, Quoted in Reiss (1979)).
>
> "Initially we did think that there was a possibility [of reopening the Campbell plant]....But it just simply became a matter of not being able to come up with the capital that would be necessary to make them viable again. So again we had to face the hard reality that it just couldn't be done" (Gatewood, Arlette: April 24, 1991, steelworker, Youngstown Historical Society, Oral history archive).

In Seattle, "economic necessity" was represented a bit differently. Here, the emphasis was placed not just on competitive pressures but also on the technological capacities that make outsourcing a part of the economic "reality." For, while the typical reaction from the Seattle labor community was that corporate appeals to "economic necessity" were thinly veiled efforts to increase profits at the expense of workers and communities, most represented outsourcing as a product of technical advancements:

> "The advent of the Internet, standardization of methods, and creation of databases of information and knowledge enable the disaggregation of software and services into stages, which do not need to be done contiguously but can instead be done globally" (Mann, 2003: 6).
>
> "Advances in information technology (IT) and communications, coupled with a large pool of educated workers in some developing countries allow organizations to move services jobs overseas as part of a larger trend towards globalization" (GAO, 2004: 1).

> "U.S. employers are taking advantage of the internet and high-speed telecommunications to tap into large pools of educated workers in countries such as India and Russia where prevailing wage levels are far below those in the domestic labor market" (Philip Mattera, report prepared for WashTech (2004)).
>
> "Our competitors are doing it [outsourcing] and we have to do it" (Tom Lynch, Director of global employee relations, IBM, quoted in Greenhouse (2003)).
>
> "You can get crackerjack Java programmers in India right out of college for $5,000 a year versus $60,000 here. The technology is such, why be in New York City when you can be 9,000 miles away with far less expense?" (Stephanie Moore, Vice President for Outsourcing, Forester Research, quoted in Greenhouse (2003)).
>
> "Its globalization's next wave—and one of the biggest trends reshaping the global economy. The first wave started two decades ago with the exodus of jobs making shoes, cheap electronics, and toys to developing countries...Now, all kinds of knowledge work can be done almost anywhere...The driving forces are digitization, the Internet, and high-speed data networks that girdle the globe" (Engardio, et al., (2003))
>
> "To try to stop the globalization of the workforce is futile. It is a natural force....Technology is paving the way for, and making inevitable, the globalization of skilled jobs....As certain kinds of jobs dry up here, there is no reason to think that our talented workforce will not redeploy their skill in new directions and endeavors. In fact, the entrepreneurial spirit and the minimal structural barriers for business startups in the United States is the envy of the world. Look at the change as opportunity" (Mr. John Challenger, CEO, Challenger, Gray & Christmas, Inc., prepared remarks for the U.S. House Small Business Committee hearing: "The globalization of white-collar jobs: can America lose these jobs and still prosper?" June 18, 2003).
>
> "As globalization has made it possible for economic, political and cultural systems to cross national borders freely, it has also caused some shifts in the economic base of our country. This has negatively affected many U.S. jobs, both high-skilled and blue-collar, causing them to move overseas" (Congresswoman Nydia Velazquez (D-NY), Opening statement, U.S. House Small Business Committee hearing: "The offshoring of high skilled jobs," October 20, 2003).

Whether because financial conditions made local facilities unviable (Youngstown) or because economic pressures and technological innovations forced local employers to compete with and/or by using overseas labor (Seattle), the result was the same: local job

losses were represented, by participants on both sides of the conflicts, as necessary and, to some extent inevitable. Choices could be made to combat such losses, but they would likely be either futile, or ill-conceived in the face of important economic principles.

Morality/corporate responsibility

The second most common representation of the events taking place in Youngstown and Seattle focuses on morality, or the responsibility of corporations to their workers and the communities in which they operate. In both cases, this position was wielded as the strongest argument against the representation of economic necessity. Regardless of pressures, the suggestion here is that corporations *shouldn't* close plants or outsource jobs because of the moral implications of such actions. The discussion of the Youngstown conflict from the previous chapter indicated the extent to which emphasizing the moral dimension of plant closings constituted a primary motivation behind the efforts of the Ecumenical Coalition of the Mahoning Valley. But morality issues also figured prominently in the struggle as a whole. Typical arguments focused not just on the act of plant closures, but on the process of plant closures—how corporations carried out their plant closing plans—highlighting feelings of corporate betrayal and the need for corporate responsibility:

> "Out of your sweat and out of your muscle they took millions and millions, hundreds of millions and put it in hotels, Disneyland, everywhere except in Youngstown" (Marvi Weinstock, US Steel staff representative, speaking at a union hall, quoted in Salpukas (1979).
>
> "We're supposed to work, draw our paychecks, make the company prosper and be loyal. Don't you think the company or the government should be loyal to us and feel some responsibility for us?" (Anonymous steelworker, quoted in Lalli, 1977)

"We had no warning of a layoff. It was totally unexpected....We're angry because they deceived us. Five thousand jobs with the stroke of a pen" (Bill Sfera, president of USWA Local 1418, quoted in Quinn, 1977).

"It was like Pearl Harbor. We had heard only last Friday that there was no chance that this plant would shut down. I was laid off on Thursday" (George Chornock, steelworker, quoted in Quinn, 1977a).

"Who controls the companies? This isn't controlled by folks that worked their way up in the area. Even in the supervisory status. It's run by banks who control the paper, who control the debt, say keep Chicago running and shut Youngstown down. 'Cause some pencil pusher has figured out that it's too costly to run the Youngstown area. And that may be true. But they don't take into consideration the social damage.... There's communities at stake here. There's lives" (Ed Mann: April 16, 1991, Youngstown Historical Society, Oral history archive)

"The absentee landlords say they are going to close Brier Hill this year because they can make better profits elsewhere. We know Brier Hill is profitable, but Jones & Laughlin says it is not profitable enough. Profitable enough for whom? Keeping our jobs here will provide profits to the community. Our wages circulate through the community—they support many businesses—they buy food, clothing, shelter—they buy appliances, cars, beer, a child's bicycle, a new roof on the house. We pay taxes to federal, state and local governments to support vital services. Our taxes support schools. Steelmaking jobs provide the foundation for many other jobs in the Valley. If the steel industry leaves the Valley, people will leave the Valley. Most people have their roots here, strong family ties that they don't want to break. They must not be forced to leave. We have got to keep steel in the Valley" (Ed Mann, President, USWA Local 1462, prepared statement, n/d).

"We challenge those who would have families threatened with plant shutdown walk quietly to the gas chambers of unemployment, lest, by resisting, they disturb the climate for new investments. This is a cruel philosophy, which takes jobs away without consulting employees and then condemns them for fighting back! Why should men and women not fight for their jobs? Why should absentee corporations have unilateral authority to disrupt the lives of workers?" (ECMV, Press release, February 24, 1978).

"The decision to discontinue steelmaking in Youngstown was made, in perhaps a typical, nonchalant manner in some corporate board room, far removed from the scene of the crime. In the age of the multinationals and conglomerates, it seems like business as usual. We simply cannot tolerate such cruel and inhuman action. The people responsible for these decisions escape accountability for their behavior. It's time that changes" (USWA Local 1462, statement issued to Jones and Laughlin Steel Corporation, January 19, 1979).

"And the decision was made by not more than a handful of wealthy, white, males,

> somewhere in secret, you know. In other words, why couldn't the people vote on something this important. Because, if the people would have had a chance to vote on it, I'm sure they would have voted 95% against the closing. And, in the process, could've developed some alternatives, possibly, and save part of the industry, because it was done autocratically, from the top. These mills are not producing any profit, or not enough profit, so we'll shut them down and we'll get rid of that burden and expense of maintaining the workforce, and so on. So, its one of the great weaknesses of the democratic system that in an issue like that the people don't have a chance to vote on it, you know (Luce, Merlin: April 23, 1991, Youngstown Historical Society, Oral history archive).

In Seattle, the issue of morality and corporate responsibility was slightly different in that the responsibility demanded from corporations was not derived from a long history of industrial development but rather from two other factors. One was the commitment from workers and communities to maintain a skilled and technically advanced labor pool. The Seattle labor community felt that considering all they had done to remain competitive technically, outsourcing by corporations seeking cheap labor constituted a betrayal. A second factor was that as cities increasingly offered tax breaks and other incentives to attract new business, corporations accepting such incentives but then outsourcing jobs were criticized for betraying the public trust:

> "Like Americans everywhere, we believe that American corporations have a moral obligation to create and to keep good jobs in America" (AFL-CIO, 2004)

> "Companies like Boeing and Microsoft receive significant state and local tax breaks that are explicitly intended to stimulate economic development and job creation in Washington state. But now many companies are taking these tax breaks—really public subsidies from taxpayers—and then offshoring as much work as possible. Why should taxpayers in this state have to subsidize the elimination of their own jobs, through tax giveaways to companies that ship jobs overseas?" (Mike Blain, former WashTech president, quoted in Beckman (2003b).

> "Taxpayer-funded economic incentives to corporations, often provided through

> direct grants designed to spur local job creation, must be carefully monitored by state and local governments to ensure that these subsidies are not awarded to businesses that export job opportunities" (AFL-CIO, 2004).
>
> "I am dumbfounded to find out that our largest and most profitable corporations are offshoring the jobs that fueled the middle class through the boom of the '90s. Now is not the time for our corporations to sell us out again" (Corey Goode, laid off computer technician, quoted in Nachtigal (2003))
>
> "Increased global trade was supposed to lead to better jobs and higher standards of living for Americans by opening markets around the world for US goods and services. The assumption was that while lower-skilled jobs would be done elsewhere, it would allow Americans to focus on higher-skilled, higher-paying opportunities. But what do you tell the Ph.D., or professional engineer, or architect, or accountant, or computer scientist to do next? What higher academic credentials are they to aspire to next? They did what we said. Go to school and get the best education you can. Get a job in the technical field and you will be good to go. Now this can be done for less elsewhere" (Congressperson Don Manzullo (Il-16), Chairman, House Committee on Small Business hearing: "The globalization of white-collar jobs: can America lose these jobs and still prosper?).
>
> "Our professional and technical workers have made enormous personal sacrifices to gain the education and training necessary to achieve well-compensated and secure jobs....They deserve better than to be cast aside by corporations in the global chase for more easily exploited labor" (AFL-CIO, 2004).

The perceived lack of morality and responsibility from corporations generated some of the most intense expressions of anger, resentment, and betrayal from the Youngstown and Seattle labor communities. Disbelief that corporations could or would treat local communities so carelessly motivated emotional demands for corporations to behave differently. The appeals to morality and corporate responsibility contrast rather sharply with the acceptance of economic necessity discussed above, however. In that sense, disbelief seems centered on the fact that corporations are allowed to act in such destructive ways. Nevertheless, the call is for corporations to exercise some degree of compassion for the workers and communities which have fueled their prosperity.

Government participation

The role of the government figures prominently in both of the struggles examined here, from participants on both sides of the issues. For one reason or another, in both cases the government is generally viewed as the source both of the problem and of the solution. In Youngstown, government policies were said to compromise corporate profits and expose domestic industries and workers to foreign competition while also enabling corporations to organize and behave in ways that cost jobs for workers and communities (such as through mergers). Thus, on one hand getting the government to stop acting in certain ways was one form of argumentation. But government policies were also viewed as potential sources of relief, such as through tariffs on foreign steel imports and financing to help struggling corporations, communities, workers, or to fund new ventures (such as a worker-community buyout of the closed Campbell Works), and through legislative regulations of plant closing activities. General attitudes among the Youngstown labor community regarding the role of government in corporate mergers, community economic development, and plant closing legislation can be interpreted from the actions covered in the discussion of the Youngstown struggle. The controversial approval by the Department of Justice of the Lykes-LTV merger was seen as an active decision by the government to facilitate the closing of the Brier Hill facility in Youngstown; the federal government was recognized as the only viable source for financing the plan to reopen closed steel making facilities under worker-community ownership; and state governments were targeted for plant closing legislation in the absence of federal action. Other representations of government participation in the Youngstown struggle include the following:

> "Many years of government interference in steel company pricing decisions...have held down the industry's revenues and earnings during cyclical periods when market conditions would have permitted higher returns. Such policies have condemned the industry to a condition of chronically depressed earnings, and have impaired its ability to generate capital for investment" (AISI, 1980: 3).
>
> "Many of the workers feel let down by the federal government in general, and by President Carter in particular, for not doing enough to reduce the growing, low-priced imports of foreign steel" (Ellers, 1977).
>
> "We, the undersigned, petition the President of the United States, the Honorable Jimmy Carter, and the Congress to give immediate Relief to the American Steel Industry by Imposing Emergency Import Quotas, Relaxing the E.P.A. Standards, and Allowing the Steel Industry to EARN A FAIR PROFIT" (petition drafted by USWA Local 1462, signed by 110,000, and delivered to the White House, quoted in Lynd (1982)).
>
> "Unless we can get the Carter administration to install a tariff, we are going to see more firms operating on a marginal profit basis, closing down" (Lloyd McBride, USW International President, quoted in Quinn, 1977b).
>
> "Virtually every government incentive for industrial "expansion" is fully applicable to corporate relocations which do not result in any net expansion" (*Economic dislocation*, Joint report of the labor union study tour (1979)).

In Seattle, in addition to the tax breaks, subsidies, and other incentives offered by local governments to attract business, as discussed above, which suggested a moral obligation for corporations not to outsource jobs, various federal programs have been recognized as facilitating the outsourcing of jobs—such as through tax structures and visa programs. The government, particularly state governments were also looked to for legislative action to discourage or prohibit outsourcing practices. It may also be recalled, however, that the Washington state government, along will numerous other state governments, were revealed to not simply enable outsourcing, but to practice outsourcing on government contracts. Thus, the involvement of government has been a varied but consistent theme

throughout the Seattle outsourcing conflict:

> "Visa programs like H-1B and L-1 are in effect technology transfer pipelines that enable foreign professionals to gain knowledge and core competencies here and then take them, along with American jobs, when they return home" (AFL-CIO, 2004).
>
> "Many factors are pushing industries overseas. Today's U.S. tax code gives away billions of taxpayer dollars in subsidies to companies that transplant their factories, outsource production, and then hide profits in offshore tax havens" (Congresswoman Nydia Velazquez (D-NY), Opening statement, U.S. House Small Business Committee hearing: The offshoring of high skilled jobs, October 20, 2003).
>
> "Much of the debate on offshoring is framed in terms of free-market dynamics, yet the practice of exporting jobs is not limited to the private sector. As this report documents, the public sector, particularly state governments, is also making use of offshore labor. As infuriating as it may be when a company such as IBM or General Electric exports jobs, it is even more scandalous when taxpayer dollars are involved. Government is supposed to act in the best interest of the people, not imitate the relentless cost-cutting practices of for-profit corporations" (Philip Mattera, report prepared for WashTech: Your tax dollars at work...offshore: how foreign outsourcing firms are capturing state government contracts).
>
> "While off-shoring companies wanting to exploit workers in other countries instead of hiring U.S. workers and graduates will be difficult to deter, public policies that aid and abet runaway corporations must change" (AFL-CIO, 2004).

While it is clear that over the time between the Youngstown and Seattle struggles understandings of the role of government in corporate affairs became more nuanced, exactly how the government should participate in locating a solution to the problems being struggled over remained unclear. But regardless of the general uncertainty regarding what the role of government *should* be, these representations reflect is a general discontent with the perceived role the government has played in either producing or failing to remedy challenging economic conditions.

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Economic principles

The category of economic principles differs from that of economic necessity discussed above in the sense that whereas economic necessity refers to the profit motive, competitive pressures, and other financial or operational conditions that shape industrial practices, economic principles refers to general conceptions of how "the economy" works or should work. The typical appeal here is to the necessities of free market capitalism, or the free-enterprise system, and management or policy decisions are suggested or made so as to conform to various conceptions of what those principles require. Often, this influence of free market principles on participants is more implicit than explicit and is thus difficult to identify in clearly articulated statements. But when evoked, the appeal to free market principles is typically aimed at discouraging any type of government "interference" with market mechanisms or with corporate business practices. This strategy is most visible in the Youngstown case through criticisms of the dependence on government support to realize the worker-community steel plan and through resistance to plant closing legislation. However, it has also be represented as a cause behind the problem of plant closures in general:

> "By propping up an inefficient industry in inefficient ways on the one hand, you alleviate some human misery. But on the other hand you engender a low standard of living for workers and consumers in the long run" (William D. Nordhaus, member of the White House Council of Economic Advisors, quoted in Petzinger, (1977))

> "I think government's approach is basically a hands off approach, to let the market make these decisions....I mean, let's face it, the religion of this country is private enterprise and profit maximization. And I'm not saying it's an absurd ideology or that there isn't evidence to support it. We're seeing a lot of state economies around the world disintegrate and fail to compete effectively with market economies. But the down side of a market economy is that people get

> chewed up. And that was Youngstown" (Lynd, Staughton: April 29, 1991, Youngstown Historical Society, Oral history archive).
>
> "There is a movement afoot that seeks to destroy one of the last remaining vestiges of the free-enterprise system in the United States: the right of the firm to close up shop....The backers of these bills apparently fail to see that the passage of restrictive legislation in their states will place their states and cities at a serious competitive disadvantage in their attempts to attract industry" (McKenzie, (1984: 3-4)).
>
> "The bulk of criticism has been directed toward the concept for reopening the Campbell Works. Community/worker ownership invites a host of labels about free enterprise, capitalism, socialism and communism" (Peskin, 1978).
>
> "[I]nadequate government response stems in part from the widely shared and seldom questioned business ideology that unfettered corporate mobility is essential for economic prosperity" (*Economic dislocation*, Joint report of the labor union study tour (1979)).

The representation of the importance of economic principles is more explicit in the case of the Seattle outsourcing struggle. Here the line is somewhat blurred between the requirements of international competition and conceptions of general economic ideals, but the emphasis remains on importance of having faith in the market. Interestingly, the experience of job losses in manufacturing, which were replaced over time by higher-skilled, higher-paying professional services jobs (though typically in different locations), is often referenced as evidence of the value of allowing "the market" to send professional services jobs overseas in preparation for the next technological and occupational leap forward. Displaced Youngstown steelworkers might disagree with that logic, but it is nevertheless wielded in Seattle as a powerful demonstration of progress through adherence to economic principles:

> "Part of this new competitive reality is free market capitalism. To remain pre-

eminent in global markets, U.S. IT companies must be the most globally competitive companies....This means companies must have flexibility to align their operations as necessary to meet customer demands....Part of this new competitive reality must be a commitment to free trade, open markets and liberalized trade in services" (Congresswoman Nydia Velazquez (D-NY), Opening statement, U.S. House Small Business Committee hearing: The offshoring of high skilled jobs, October 20, 2003).

"Moving non-core and low-risk tasks to Indian developers allows [Microsoft's workers in Seattle] to focus on maintaining the technology edge" (Brian Valentine, Microsoft executive, quoted in Beckman, 2003a)

"We want to keep the doors open. I believe any effort to restrict market access will adversely impact the U.S. economy. The policy of protectionism will not take us anywhere" (Representative Jay Inslee (D-WA), quoted in Beckman, 2003b)

"It's not about one shore or another shore. It's about investing around the world, including the United States, to build capability and deliver value as defined by our customers" (Kendra R. Collins, IBM spokesperson, quoted in Greenhouse, 2003).

"If you go for a protectionist response, that's going to compound the problem of adjustment because we are a highly integrated international economy. We are the biggest traders in the world. We're in competition with countries like Britain. If they outsource to buy cheaper services and we are not allow to by protectionist policies, we will lose out in the international competition" (Jagdish Bhagwati, professor of economics, Columbia University, quoted in Dudley, 2004).

"Countries that resort to protectionism end up hampering innovation and crippling their industries, which leads to lower economic growth and, ultimately, higher unemployment" (CSPP, 2004: 9).

"All you can do in the Puget Sound area is increase the quality of the product. You can't control price of labor from other countries....The bottom line is really we don't have a choice, because we do not want to lower wages or our standard of living. We're not willing to do that, and we don't want to match the lower wage levels of foreign markets, so the only choice we have is to raise education" (Roberta Pauer, Washington State Employment Security Department labor economist, quoted in Nachtigal, 2004).

"[E]conomic forces are global rather than national or local, but American companies and workers can rely on the same can-do attitudes, entrepreneurial qualities and willingness to embrace innovation and change to prosper in this new environment as they have in the past" (CSPP, 2004: 7).

Reference to economic principles is thus often made in both positive and negative language: adherence to certain economic principles promises growth, development, and prosperity, while "interference" with such principles threatens economic breakdown. Similarly, economic principles and systems, such as capitalism, may be blamed for specific problems or else touted as the only hope for recovery. Either way, the economic principles representation is commonly mobilized to give context to if not justify corporate actions, to discourage new efforts to regulate corporate behavior, and to distance decision-making about remedies or alternatives from labor community activists.

Corporate rights/power

This final category of representation from the struggles in Youngstown and Seattle suggests the extent to which the corporations involved in the struggles, or the practices they are engaged in, can be effectively challenged. While the question of contestability might be a matter of political rights, it seems more commonly to be treated as a matter of political power. In Youngstown the perception of corporate power comes through in the sense of futility attached to the efforts to resist the closing decisions. Despite the fact that the entire conflict can be seen as a challenge to corporate power, and though the fight to preserve jobs in the community is almost always recognized as significant and worth while, the greatest emphasis is typically placed on failure—not entirely surprising considering the ultimate consequences experienced in Youngstown. In terms of corporate rights, the lawsuit brought against US Steel constitutes the clearest example of the willingness to challenge the political rights of the corporation. However, the outcome of that case also provided perhaps the clearest support for and reproduction of the formal

legal right of US Steel, and perhaps any corporation, to close and/or relocate facilities and investment. Either way, evidence of corporate power comes through clearest in the voices of steel workers:

> "In those days I just couldn't concept (sic) those people telling the big wheels of this nation how to operate their plants. So, I wasn't part of that at all....I knew that it done (sic) and it was done, it was finished, that was it" (Baxter, Russell, steelworker: July 25, 1991, Youngstown Historical Society, Oral history archive).
>
> "But the way it was, the workers had nothing to say whatsoever about it. 'This is our property. We shut it down. Period,' You know. And the government, being a government committed to the free market system, and, uh, the sacredness of private property, couldn't do very much about it" (Luce, Merlin: April 23, 1991, Youngstown Historical Society, Oral history archive).
>
> "We had a lot of rallies down there at Sheet and Tube. We used to raise some hell down there. To no avail. It was all to no avail. Nothing ever came out of anything.... Everything the Ecumenical Council did wasn't in vain. But when I use the word in vain, I mean that after all everything they did, which was all good, you understand, that after everything they did, the mill still shut down" (Baxter, Russell, steelworker: July 25, 1991, Youngstown Historical Society, Oral history archive).
>
> "So the union is totally always involved. But it's minimal what they can do. I mean if a company is going to shut a plant down. We fought for, by the way, one of the leading ones to get the federal legislation for, what is it, sixty days' notice. Which is, I mean, it's all meaningless. So they give you sixty days' notice and shut the plant down anyway" (Camens, Sam, steelworker: May 8, 1991, Youngstown Historical Society, Oral history archive).
>
> "It's that property rights just overrides every other constitutional right that you have" (Luce, Merlin: April 23, 1991, Youngstown Historical Society, Oral history archive).
>
> "Well, if you were David Roderick, and you were the chairman of the board of US Steel, as I came to view the situation, it was his fiduciary obligation to his stockholders to maximize the return on their investment. I mean, that's the way we think of it in this country. He didn't have a legal responsibility to the United States, or to his workers, or to communities in which his steel mills existed. His legal responsibility was to his stock holders....And I don't think its fruitful to say, oh Lloyd McBride has some unique personal responsibility, had Eddie Sadlowski defeated Lloyd McBride it might not have been that different because what are

> you supposed to do if you're a trade union and the board of directors of the corporation says that we're shutting down tomorrow? That's why I'm a radical. I don't think there are solutions to the plant closing framework with a structure where investment decisions are left to management. I don't think there is a right thing for labor to do in that situation" Lynd, Staughton: April 29, 1995, Youngstown Historical Society, Oral history archive).
>
> "That's big business. It was cut and dry. Big business has to report to the stockholders and if the stockholders aren't making any money, they don't want any religious groups coming in and spending more. And the only thing that was going to keep this alive here was a big influx in cash and a complete change of their thing and their operations.... But, it's big business, you know, if you're not making any money, you're going to die. And that's it" (McHugh, Francis: April 17, 1991, Youngstown Historical Society, Oral history archive).

In Seattle, the question of corporate rights and powers has not yet been pressed to the extent that it was in Youngstown. The very fact that so many corporations have successfully outsourced thousands of jobs and that efforts to limit or stop the practice have as of yet been unsuccessful indicates that at the very least corporations are asserting a right to shift jobs overseas. Debates in this struggle focus on whether something *should* be done about it, not whether anything *can* be done about it. One exception is the legislation passed in 2005 (H.B. 4405) calling for an investigation into outsourcing practices in the state. An element of that bill specifies the need to determine the extent to which the state has the authority to place outsourcing regulations on its procurement policies. The findings from that study should add an important component to the struggle:

> "Governments are going to find that they're fairly limited as to what they can do, so unionizing becomes an attractive option" (Tom Lynch, Director of global employee relations, IBM, quoted in Greenhouse (2003).
>
> "It would be foolish to stop companies from outsourcing. It would make our companies less competitive" (Robert Reich, former labor secretary under Bill Clinton, quoted in Madigan (2003)).

Appeals to corporate rights and powers rarely serve any purpose other than discouraging opposition to corporate actions. Whether such appeals are made prescriptively or descriptively, the implication is that corporations have the power, if not specifically the *right*, to act as they please and that neither the government nor individuals/workers/communities have the capacity to stop them. The representation of corporate power thus makes the possibility of challenging corporate power appear all the less feasible.

Conclusion

The representations discussed here communicate a sense of how the events being struggled over were treated by struggle participants. The quoted statements included constitute just a slice of the overall range of voices and opinions expressed in these struggles, but they represent well some common themes. Yet, it is important to remember that the different representational themes included here do not exist as such in the various materials and actions generated by struggle participants. Rather these themes have been defined by me according to my own interpretations of the Youngstown and Seattle struggles. Others may interpret these struggles differently than I have, and emphasis might just as easily be placed on different components than those emphasized here.

However, the objective is not to suggest an interpretation of these struggles that is inherently more accurate than any other possible interpretation, but rather to provide some evidence of key assumptions operating through these struggles, and, perhaps more significantly, to identify the absence of a particular line of critical inquiry. In terms of the

latter, I want to make it very clear that the purpose of this analysis is not in any way to judge the value or appropriateness of the various representations discussed. I do not wish to argue that anyone involved in these struggles somehow misunderstood the important issues or employed the wrong strategies in confronting their concerns. Rather, in the themes of economic necessity (and technological determinism), morality and corporate responsibility, government participation, economic principles, and corporate power, I want illustrate the absence of substantive questions about the source of capital's mobility rights and capacities.

In terms of confronting capital mobility, the first and most commonly employed strategy is to condemn the practice on moral grounds. Statements from activists include powerful and moving arguments for why it is important to reevaluate and challenge capital mobility as it is currently practiced—the arguments from Youngstown steelworkers, only some of which could be included here, are particularly compelling in this regard. Such arguments appeal to the principles of responsibility, community, and, implicitly, respect, in order to suggest that capital *shouldn't* exercise mobility in ways that damage place-specific labor communities. However compelling, these arguments do not identify why capital *can* exercise mobility in such ways. Consequently, the *political* character of the mobility of capital generally goes unexamined and becomes an invisible background element in these struggles. That is not to say that the role of government is ignored; in fact, the complex role government is a central theme in these struggles. But government is generally viewed as playing an enabling rather than a constitutive role in capital's mobility, and this is equally true in the Seattle struggle as it was in the Youngstown

struggle. Thus, it is the political component of capital's mobility that requires further investigation and explanation. The following chapter examines how the issue of capital mobility has been addressed by academic researchers and will consider whether and how the scholarship produced confronts the political character of capital's capacity for mobility.

Chapter Four: Urban politics and local development

Introduction

The relationship between capital mobility and urban politics and development that wreaked havoc in Youngstown and is beginning to present serious challenges for the Seattle labor community has received extensive attention from the academic community. This chapter will review the literature engaged with these issues, at least in geography and related disciplines, in order to illustrate two primary points. One is that a common thread in this literature is the identification of the geographic mobility of capital—the ability of capital investment and production facilities to be shifted from one place to another—as a source of place-specific social and economic dislocation and a significant barrier to place-specific efforts to improve and gain control over local political-economic conditions (Bluestone and Harrison, 1982; Cox and Mair, 1988; Harvey, 1982, 1989; Massey, 1995; Peck and Tickell, 1994; Brenner and Theodore, 2002). A second point to be illustrated here is that there exists in this literature a general lack of critical interrogation of the concept of capital mobility. That is not to say that researchers are not critical *of* capital mobility, but that mobility is typically assumed as an inevitable component of urban politics, an inherent quality of capital, and/or a natural form of economic practice. To the extent that the "naturalness" of capital mobility is questioned, emphasis is commonly placed on the state's role in opening new overseas markets for domestic corporations. But the source and history of capital's mobility is rarely questioned or considered.

Capital, mobility, and development

Chapter One presented stories of industrial change and struggle in Youngstown and Seattle. This section reviews and critically examines some of the arguments generated by scholars regarding why such changes emerged as they did and why effective solutions to the place-specific problems associated with those changes are difficult to identify. First to be examined is the understanding of urban politics and development generated in response to the deindustrialization and general industrial change of the 1970s. Next will be a consideration of how academic attention to urban politics has changed in the twenty five years between Youngstown and Seattle conflicts.

Deindustrialization and the challenges of urban politics

It may be recalled that the participants on different sides of the Youngstown conflict developed their own understandings and justifications for the changes experienced at the time. The steel companies involved pointed to their general lack of profitability due to various government taxes and regulations, intense and unfair foreign competition, the high cost of facilities maintenance and modernization, and the high costs of domestic labor (AISI, 1980; Bluestone and Harrison, 1982; Scheuerman, 1986). Under such circumstances, they claimed no alternative to plant closings, relocations, and investment reallocation. In contrast, the labor community pointed to the steel companies' lack of responsibility to local workers, ill-advised corporate mergers, a long history of poor management and investment choices, and a destructive political-economic environment that allowed and in some ways encouraged the kinds of actions taken by the steel companies involved (OPIC, 1977; ECMV, 1977; Bluestone and Harrison, 1982).

Research has generated support for most of the claims from both sides of the conflict. By this point, it is clear that by the end of the 1970s steel-makers indeed faced major challenges—profits were down, costs were up, competition from abroad was intense, and higher profits could be made in other industries or through other investment strategies (Castells, 1989; 1996). However, it is also clear that the companies had undermined their own profit-making capacities through poor management and investment decisions and had also actively disinvested locally and "milked" their Youngstown facilities for revenue to invest elsewhere, thus demonstrating a lack of commitment and responsibility to the local labor community (Bluestone and Harrison, 1982; Linkon and Russo, 2002). But understanding *what* happened in Youngstown does not explain *why* it happened. To understand why such conditions emerged in Youngstown, as well as in other places, required an examination of the changing conditions of urban politics and development more generally.

Arguably the most comprehensive and influential theorization of the relationship between industrial change and urban development in the 1980s, at least in geography and related disciplines, came from David Harvey's various efforts to theorize capitalist urbanization (1982, 1989, 2000). Drawing heavily from Marx's theorization of capitalism as a necessarily expansionary political economic system grounded in "the exploitation of living labor power in production" (Harvey, 1989: p.18) and following "inherent laws of motion" (p.18) that guide profit-seeking investment decisions, Harvey emphasized the connections between certain crisis tendencies inherent to capitalism and the production of (urban) space. Capitalist development, according to Harvey, originates within a certain

spatial environment, with defined markets for inputs (labor, resources) and outputs (goods and services), but crisis tendencies within capitalism—of falling profit and overaccumulation (simultaneous surpluses of capital and labor power)—motivate capital to seek out new opportunities for circulation (investment) (Harvey, 1989).

Harvey's work thus emphasizes a fundamental contradiction within capitalism: a dual requirement for fixity and mobility. Capitalists can only capture surplus value (profit) by investing in "the organization of cooperation and division of labor within the work process or by the application of fixed capital (machinery)" (Harvey, 1989: p.62)—in other words, by constructing the physical spaces in and through which surplus can be generated. To do so, capital invests time, effort, and money in pursuit of a "structured coherence" (p.32) among production, consumption, and labor concerns that satisfies its accumulation needs. This is what Harvey calls capitalism's perpetual search for a "spatial fix" (p.33), or the production of space(s) that allows capital to escape overaccumulation crises through geographical expansion. If that structured coherence falters, and an urban environment provides insufficient accumulation opportunities, capital must then "exit" (Piven, 1995: p.109) in one form or another—for example, through geographic relocation or the "switching" of investments to different sectors—in search of a new "spatial fix" and environments with more profitable opportunity structures. But 'exit' is costly to capital in that it entails abandoning the social and physical investments that went into achieving "structured coherence" in one place and starting over someplace else (Cox and Mair, 1991). Thus, an alternative strategy is typically for capital to use the *threat* of exit to gain new structural or regulatory changes that forward its accumulation needs—often

in the form of increasing its (potential) opportunities for exit (Cox and Mair, 1991). Regardless of how it is expressed, mobility is recognized in this theorization as an inherent characteristic of capital and a natural component of a dynamic capitalism.

The experience of Youngstown can be understood to closely mirror Harvey's theorization: adequate profits were generated for decades from Youngstown facilities, and steel companies used their political influence to extend their local profit-making opportunities without investing additional capital—through concessions from workers, delays on facilities modernization, time extensions on compliance with environmental regulations, etc. But the increasing costs of maintaining aging equipment and appeasing a well-organized workforce eventually led the steel companies to "exit" in search of better profit-making opportunities. Even if, after massive capital investment, additional profit could have been squeezed out of the Youngstown facilities, it likely wouldn't have justified continued operations if even higher profit could be generated from other investments in other sectors or locations.

Understanding the general dynamic behind industrial change and capitalist urban development, however, does not necessarily explain the fate of any particular place, and does not explain how and why some places change differently than others, or at different times, or with different consequences. Other scholars, often working explicitly or implicitly within Harvey's theoretical framework, thus focused inquiry on explaining some of the nuances of urban politics and development (or decline). Doreen Massey's work, in particular, emphasized that while it was essential to recognize job losses in

general as ultimately generated by "competitive production for profit," job losses in any particular place or industry should not be understood as "inexorably determined by some abstract 'logic of capitalist development'" (Massey and Meegan, 1982: 183). Rather, production should be recognized as a social process and a social relation in which different industries, companies, workers, and places are situated. To exemplify this point, Massey developed the influential concept of "spatial divisions of labor," which conceptualized different localities as connected to one another through the social relations of production "stretched" across space (Massey, 1994: 22). It is the 'stretching out' of social relations that links individual localities, and their residents, with the actions and decisions of others in other places. Consequently, all places exist in relation to other places, so understanding the conditions in one place requires investigating how that place is connected to the rest of the world and the nature of the social relations on which those connections are based (Massey, 1995).

Though widely celebrated, this understanding of place and of urban development also generated considerable debate through the 1980s and into the 1990s over the role of 'localities' (and/or the local scale) in political-economy. Scholars placed particular emphasis on determining the extent to which the fate of any particular locality was determined either by its unique qualities or by its position within a general configuration of stretched social relations (Massey, 1995). Should localities (and/or their residents) be thought of as the masters of their own destinies (and thus to blame for their own failures) or rather as simply cogs in a much larger machine (and thus the victims of changing 'requirements' and shifting priorities)? Is it even appropriate to focus research on a

concrete entity called a 'locality,' or should emphasis remain on the general social relations and economic flows and processes through which places are produced? Review of the literature reveals more conflict than agreement (Massey, 1984, 1995; Duncan and Savage, 1989; Cooke, 1989; Cox and Mair, 1988; Smith, 1987).

The concept of 'local dependence' developed by Kevin Cox and Andrew Mair (Cox and Mair, 1988; 1991) addressed a number of the debates by theorizing an approach to localities research that avoided simply collapsing the local within wider decision-making structures but also avoided reifying the local and providing it with fixed dimensions that could exist outside and/or independent of such structures.[22] The term itself refers to the idea that the general economic flows agreed by many to represent social relations "stretched across space" can create a "localized social structure," or a combination of a material realm of buildings, streets, homes, etc., and a social realm of relationships, histories, traditions, and beliefs (Cox and Mair, 1988, 1991). In this sense, a locality can be thought of as the abstract product of generalized flows, but also as a concrete place in which people live, work, and play (Cox and Mair, 1988). Some actors are dependent on the localized social structure for survival—in terms of product inputs, markets, job skills, social networks, etc.—while geographic mobility enables other actors to escape such local dependence. If changing (stretched) social relations produce place-specific consequences, therefore, it is the locally dependent actors who either suffer the

[22] It should be noted that Doreen Massey's "geological metaphor" for understanding the production of place, about which she expressed some ambivalence (Massey, 1994: 321), is similar to Cox's concepts of "local dependence" and "local social structure." That geological metaphor views each production relation as adding another layer to the dynamic mix of relations overlapping in a particular place and thus contributes another element to the unique place-specific mixture (Massey, 1994). An important difference I recognize, and my reason for focusing on Cox's concepts here, is that Cox took extra steps to relate the local social structure to a dynamic urban politics.

consequences or mobilize efforts to resist change or adapt to new conditions. Consequently, locally dependent actors tend to focus efforts on organizing the local social structure in ways that forward their interests. Because different local actors often represent different interests, however, conflicts arise over the terms or conditions of the local social structure. Nevertheless, agreements can also be reached among those sharing similar goals for the locality as a whole, leading to compromise in terms of organizing the local social structure as well as in representing the locality to the 'outside' world (i.e., attracting investment to the locality). Together the negotiation of conflicts, agreements, and representations come to constitute the realm of urban politics.

The nuances of urban politics and development introduced through Massey, Cox, and the locality debates suggested that though profit motives and other capitalist dynamics could be said to shape the general context within which any particular locality existed, the outcome of those dynamics, in terms of the presence or absence of job losses, new investments, or alternative development strategies, would depend on the character of the production relations in which that locality was situated and through which it had been produced. Thus, while it was possible to view the outcome in Youngstown as determined by the capitalist dynamics theorized by Harvey, for instance, the real *explanation* for Youngstown's particular experience was as an empirical question, answerable only through an examination of the unique constellation of (stretched) social relations of which Youngstown was a part—its industrial history, industrial sector, labor-management relations, geographic location, local political environment, etc.

These conceptual advancements helped generate new ways of understanding and explaining the place-specific industrial changes that had occurred in places like Youngstown or that were unfolding elsewhere at the time. But the burst of urban research motivated by deindustrialization also identified important changes to the practices of urban politics in general. The theorizations from Harvey, Massey, Cox, and others, indicated that the dynamic spatial relations linking different localities and actors together across space were undergoing a radical shift. That spatial shifts in investment patterns, production facilities, distribution networks, etc., were becoming more common and much easier to make pointed to capital's "great, and increasing, geographical mobility" (Massey, 1995: 55). As Harvey (1989: 18) put it, because "new systems of transport and communications reduce spatial barriers and roll back the possible geographical boundaries of exchange relations," recent advancements in those areas had greatly expanded the spatial range of capital investment and operation. In other words, while the actual spatial investment decisions of any particular firm, in any particular sector of any particular industry, might depend on a complex set of social relations, innovations in transportation and communication had increased the general *capacity* for mobility of all, or at least most, firms. Bluestone (1982: 54-55) summed up the changes occurring at the time:

> The capital mobility option has always been available to some extent. For example, back in the 19th century, the opening of the Erie Canal allowed firms to transfer production to communities all through upstate New York. What is different today is the distance and speed over which that transfer can take place. Satellite-linked telex communications and wide-body jet cargo aircraft provide an environment that, for all practical purposes, allows production to become spatially free.

For those concerned with the social and economic vitality of cities, the impact of this enhanced capital mobility on urban politics was unsettling, for it placed "even the best-managed and the most efficiently organized industrial city under a perpetual cloud of uncertainty (Harvey, 1989: 32).

Since the 1970s, the question of how cities can and should respond to the challenges and uncertainties of capital's ever-increasing capacity for mobility has occupied a substantial portion of urban research (Clavel, 1986; Judge, *et al*, 1995; Massey, 1994, 1995; Harvey, 1989, 2000; Cox, 1997; Jonas and Wilson, 1999). Much of this work has drawn from and extended the theoretical foundations discussed above in order to consider how capital mobility has changed the nature and outcome of urban politics and development. The typical conclusion, at least from critical theorists, is that enhanced capital mobility has resulted in a regulatory "race to the bottom" as places use tax abatements, subsidies, debt-financing, reduced labor and environmental standards, and other strategies to compete with one another for mobile capital investments (Hackworth, 2002). By dedicating valuable resources to the attraction and maintenance of capital, such place-competition, and thus the capital mobility to which it is a response, has been found to limit progressive development agendas and generally to circumscribe place-based activism aimed at achieving social and economic security and stability.

A variety of different research streams have emerged over the past thirty years that investigate the processes of urban politics under conditions of capital mobility, with the most prominent examples being regime theory (Lauria, 1999), growth machine analysis

(Logan and Molotch, 1987; Wilson and Jonas, 1999), and neoliberal urbanism (Brenner and Theodore, 2002). And, while there are important differences between these approaches in terms of their research assumptions and analytical frameworks, their general treatment of capital mobility is largely the same.

The common thread through these theorization is that "inherent laws of motion" make capitalism perpetually dynamic and expansionary (Harvey, 1989: p.18). The spatial mobility of capital has thus been incorporated into research as an operating assumption and then situated as an explanation for other phenomena—capitalist (uneven) development, the spatial patterning of social relations, the nature of urban politics, place-based social conditions. But that assumption of capital's mobility, or rather the political character and the history of that mobility, has not itself been investigated. As a result, the practice of deindustrialization has been treated as an unavoidable consequence of capital's 'logical' employment of spatial mobility as a way to escape geographically defined regulatory environments.[23] Similarly, urban politics has come to be understood as circumscribed in a way that requires cities to conform to the interests of mobile capital and thus severely limits the potential for progressive local development, broadly defined.

Changing industrial practices and the rise of the "new economy"

On the most general level the "new economy" refers to the changes information technologies (IT) have brought to the ways economies function. In technical terms, such

[23] The term 'regulation' is used here and in this literature in the broadest sense of the word to refer not just to government regulations but also place-specific formal and informal relationships, social norms and values, competitive advantages/disadvantages, environmental conditions, and other factors that affect profit making opportunities (Goodwin and Painter, 1996; Jones, 1997).

changes include "revolutions in electronic computational and communications capabilities that have stemmed from the development of transistors, semiconductors, and the myriad of applications" which both create new occupations specializing in the development of new technologies and generate new productivity gains through the integration of such technologies into existing economic practices (Beyers, 2002: 2). As Castells explains, what distinguishes the 'new' from the 'old' economy is that information serves as both raw material and product; information, in the form of research and development, is used to develop ever better mechanisms for processing information (Castells, 1989).

In social terms, the 'new economy' has been explained as a shift in the social relations of production in favor of flexibility—in relation to the commodities or services to be produced, the location(s) of production, the organization of production, and the time-frame of commitment to any particular economic practice and/or the labor employed in that practice. An important mechanism for achieving that flexibility is the contracting relationship: short term agreements (contracts) for the supply of specific goods or services that can be cancelled, renegotiated, or relocated as dictated by changing economic conditions (Klein, 2000). In this way, organizational flexibility helps companies to more easily shift directions, literally and figuratively, with regard to production, while innovations in information technologies facilitate that push toward flexibility by improving the infrastructure for fast, easy communication across whatever distance is called for by the organizational structure.

The new economy is thus best understood not in terms of the replacement of old with new industries but rather in terms of the development of what Castells argues is a new industrial logic that restructures where and how industries operate. According to Castells (1989: 81), technological and organizational changes enable the simultaneous division and centralization of different production functions—manufacturing, assembly, research and design, marketing— producing a specific and "self-reproductive" economic geography:

> [D]ifferent functions of production and segments of labor in the industry exclude each other in spatial terms, because the upper level of the industry is so valuable, so unique, so irreplaceable, that the locations where such labor performs its functions tend to increase dramatically in quality, and even more in value and price, so becoming exclusive and ruling out the location there of lower-level functions and of strategically less important labor...In this way, the spatial division of labor is self-reproductive and self-expansionary. As jobs and economic growth depend more and more upon the performance of high-technology industries, localities fighting for their survival try to compensate for their lack of technological skills by offering convenient conditions for the bottom end of the production process.

In other words, the organizational and spatial division of labor of the new economy means that manufacturing, or the standardized functions at "the bottom end of the production process," could locate anywhere (decentralization). On the other hand, cumulative causation then shrinks the number of places capable of competing for high-value industrial processes, thus reducing the locational options for specialized professional services firms and leading to the centralization of high-value functions in a small number of "world cities."

One important question raised by this emergence of the new economy is how and why some places become centers of concentration for high-value professional services while others compete only for lower-value positions. The attractiveness for manufacturing firms of low wages, low taxes, and "a political environment hostile to unionism and lax in its enforcement of environmental regulations" (Gibson, 2004: 39), has been well established, though less has been said about why these factors come to be the only assets some places have to offer. As for the high-value functions, Castells (1989: 150-151) suggests the following:

> The reasons for the persistence of this centralized locational pattern for the top level of information-intensive industries are still the same as those pointed out years ago by the literature on office location: trusted person-to-person contacts in the decision-making process at the highest level; existence of a business social milieu with strong cultural connotations; prestige of location in a given place; importance of the fixed assets represented by the real estate owned by companies in the CBDs, assets that could be devalued in case of a massive exodus from the area; consolidation of a network of ancillary services around major firms and organizations, a network that provides diversity and versatility of supplies.

The development of such assets thus originates and then builds from some combination of historical coincidence, chance, and purposive investment (typically on behalf of the state) in such areas as military research and development, higher education, and infrastructure, with the added significance of "the social and cultural characteristics of the area, in terms valued by their professional employees" (Castells, 1989: 66).

The implications for urban politics of an economy in which "the organizational logic is placeless," are clear (Castells, 1989: 169). Whatever spatial competition contributed to

the process of deindustrialization of the 1970s and 1980s has been intensified, accelerated, and expanded through new organizational and operational practices, for, as Gibson (2004: 46) notes, "not every city can be a 'global city.' Not every city gets to be a center of trade, finance, and international investment; there simply aren't enough producer services or command functions to spread around" (Gibson, 2004: 46).

According to this theory, the outsourcing pressures facing Seattle and others are in some ways unexpected but in other very consistent with new economy dynamics. For, on one hand, the specificity of professional services, the exclusivity of high-value locations, and the importance of an extensive high-technology infrastructure and a highly skilled and educated labor force, would suggest a substantial competitive advantage for Seattle over other cities of the world. However, on the other hand, technological advances that standardize more of the products and services of the new economy, coupled with the emergence of strength in the areas of higher education, technological expertise, and infrastructure by India, China, and Russia, among other countries, has undermined the competitive advantage of cities like Seattle and made high-value functions increasingly subject to the spatial competition more common to manufacturing.

It requires little effort to illustrate the mobility assumptions embedded within Castells's theory of the new economy. The mobility of capital is understood to be determined entirely by technical and organizational developments. New industrial practices simply "call for a flexible location pattern" (Castells, 1989: 104). And though this understanding of contemporary industrial practice has come under considerable criticism, that criticism

typically focuses on the *facility* of spatial mobility, or the *degree* of placelessness, not on the placeless logic motivating economic behavior. Once again, the objective of this critique is not to suggest that no such placeless logic exists, or that the new economy does not exhibit flexible location patterns. Rather it is to suggest that capital mobility is not explained by these logics and patterns and that instead explaining these logics and patterns requires an examination of the history and origin of capital mobility.

Fordism/post-Fordism and the state

In the discussions of urban politics and the new economy presented above, the state is conspicuously absent. This is because the role of the state in the industrial and economic practices described in these theories has typically been backgrounded—the state is recognized as involved but primarily in a facilitative role, adding formal political force to changes already occurring as a result of other factors. However, in other studies the state figures much more prominently. Regulation theory, which includes elements of both the capitalist dynamics affecting urban politics and the spatial dynamics of new industrial practices, is perhaps the most influential body of research in which understanding the complex role of the state and other institutions in the workings of the economy serves as a key focus (Jessop, 1994).

The specific origins of regulation theory have assumed an almost folkloric status within the literature. Early theoretical development emerged roughly in the 1970s in France from the work of institutional economists reacting against both the neoclassical acceptance of economic equilibrium and the traditional Marxist acceptance of a rigid

structuralism (Goodwin and Painter, 1995). Theorists were looking for a more structural understanding of crisis but also a more contingent and agency-centered understanding of economic structure. In this sense Painter and Goodwin (1995) couch the origin of regulation theory "within the context of Western Marxism (and to some extent contemporary post-Marxism), The Frankfurt School, Althusserian structuralism (with its concept of overdetermination), Marxist historians, Gramscian cultural studies and contemporary discourse theory" (p.338).

Regardless of the theoretical origins, early theorists based their inquiries on the observation that *somehow* capitalism had survived for hundreds of years without the 'inevitable' collapse supposedly necessitated by its inherent tensions and contradictions (generally speaking, between capital and labor). How, they asked, could capitalism persist despite its fatal flaws? Aglietta (1979) was one of the first to link together the pieces of early theory (at least for the English speaking world). He theorized that social relations were solidified in structural (institutional) forms and that such institutional forms in turn had various impacts on social relations. Furthermore, both social relations and structural forms could be seen to have an effect on economic relations of production and consumption. Thus, social relations, institutional forms, and economic relations were connected in such a way that changes in each could effect changes in the others and that economic (political-economic) stability could be viewed as a product of their effective coordination. As will be clarified below, while the effective coordination of these forms and relations is not carried out *by* the state, it is understood to be carried out *through* the state (Jessop, 1994).

To facilitate research on the development and operation of regulatory frameworks, regulation theorists developed a set of operationalizing concepts derived from a hierarchically ordered series of abstractions:

- Mode of production: The relationship between social relations and economic organization. This is the concept of the highest abstraction. Capitalism is a mode of production.
- Regime of accumulation (ROA): The overall set of social forms that guide the accumulation process. When there is a steady regime of accumulation, there exists a range of different agreements or 'compromises' (investment time-frames, distributional norms (wage relation), production-consumption balances, forms of competition, etc.) that divert critical attention away from the mode of production and focus it on negotiations over normative compromises.
- Mode of regulation (also called the mode of social regulation): The actual set institutions and practices through which regulation takes place in support of the established regime of accumulation (and therefore mode of production). This is where the compromises of the regime of accumulation get codified in day-to-day practices and institutional forms. Thus the MSR reproduces the fundamental social relations on which the ROA depends and steers the practices that make the ROA work.

It is the interaction of these three concepts that constitutes 'regulation.' Yet it is essential to note that while the interaction of these ideas/norms/practices/institutional forms can produce the relative stability of an economic system, such regulation does not eliminate or overcome inherent systemic flaws and contradictions in the (capitalist) mode of

production. Rather, regulation postpones and/or displaces conflict through coordinated social action (compromise) carried out through a varied ensemble of institutional forms. If/when this ensemble begins to unravel, the crisis tendencies inherent to the (capitalist) mode of production reemerge. In this sense, three different types of crisis are identified (Boyer, 1990; DiGiovanna, 1996):

- Cyclical crisis: reflects the business cycle of boom and bust, which can be smoothed out through fairly minor institutional reshuffling and/or lower-grade reconfigurations of the mode of regulation.
- Structural crisis: the result of systemic contradictions becoming deeper or more widespread than minor institutional changes can address. This type of crisis is discussed in terms of a 'crisis of regulation' because it implies that the regulatory/institutional ensemble that constitutes the mode of regulation is no longer strong enough to reproduce the social relations necessary to support the present regime of accumulation.
- Systemic crisis: complete breakdown of the mode of production (capitalism) as a result of the breakdown of the regulatory framework/capacity.

In short, this theoretical position suggests that the creation and coordination of various institutions can support a regime of accumulation in a way that produces a relatively stable economic period. However, tension and contradiction is always present, meaning that crisis is always around the corner and when it reemerges there is an inevitable scramble to establish some type of new regulatory framework ('institutional fix') (Peck and Tickell, 1994).

In the language of regulation theory, the processes of deindustrialization and the emergence of the new spatial practices of the new economy discussed above are seen as part of the spatial and regulatory scramble associated with the transition from Fordism to post-Fordism (Peck and Tickell, 1994).[24] Fordism is the name given to the regime of accumulation that emerged from post-WWII global restructuring efforts and succeeded in establishing and maintaining a relatively stable relationship between the processes of production and consumption for nearly four decades before breaking down in the 1970s as a result of structural crisis (Jessop, 1994). According to Jessop (1994: 255) that relative degree of political-economic stability under Fordism was a result of a mutually beneficial relationship between the (national) state and capital:

> [T]he dynamic of Fordism is closely related to the form and function of the Keynesian welfare state and it in turn has important implications for the dynamic of Fordism. Several aspects are worth noting....In managing the wage relation and labour market policies, and guiding aggregate demand, [the state] helped to balance supply and demand without the violent cyclical swings characteristic of competitive markets. Moreover, by holding out the promise of smoothing economic fluctuations and securing stable, calculable growth, [the state] also permitted Fordist firms to secure increasing returns to scale and encouraged them to invest....[T]he state [also] acquired a key role in integrating the capital and consumer goods industries and managing the wage relation to this end. It invested in infrastructural projects, promoted economies of scale through nationalization or merger policies, encouraged Fordist mass consumption through its housing and transport policies and generalized norms of mass consumption through intervention in labour markets and collective bargaining and through its provisions of collective consumption.

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[24] There has been some debate around terminology. While some view the flexible specialization of the new economy as evidence of a new "post-Fordist" regulatory configuration (Jessop, 1995), others see the continuation and exacerbation of old problems and thus only evidence of an "after-Fordist" regulatory uncertainty (Peck and Tickell, 1994). I use the term post-Fordist simply for the sake of convenience, the question of whether a stable new regulatory configuration has in fact emerged is irrelevant to the present discussion.

Clearly, this level of state activity required considerable capital expenditure. However, the strong economic performance of the post-war period

> generated tax revenues to finance welfare expansion and also provided the material basis for a class compromise between capital and labour. Moreover, insofar as full employment was achieved in a labour market which was relatively unified rather than segmented, it also reduced the volume of primary poverty among working families. This in turn created room for more generous income maintenance programmes for other groups...and/or for welfare expansion into other areas (Jessop, 1994: 256).

It is difficult to imagine what could possibly bring an end to this wondrous blend of social harmony and economic prosperity. And, indeed, regulation theorists have been generally hard pressed to identify clear *causes* of the demise of Fordism.[25] The most common justification for the breakdown of the Fordist balance is, on one hand, the growing internationalization of production in the 1960s and 1970s that brought competition with foreign low-wage producers, low-cost commodity imports, and falling profits for domestic producers (Peck and Tickell, 1994), and, on the other hand, the rising social power of labor (pushing wages to unacceptable heights) and the overextension of state social programs, which squeezed profits from a different direction and generated a growing distaste for the high costs of the welfare state (Jessop, 1994).

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[25] This has been one important critique of regulation theory: it may be effective in terms of describing and *contextualizing* economic and regulatory transition but it is ultimately unable to *explain* such transition. This difficulty is often associated with the fact that regulation theory emerged through historical analysis of a perceived regulatory system. Thus, regulation theorists were able to 'see' Fordism in place and theorize how it worked, sustained itself, and eventually collapsed, but not to develop any level of understanding of how such regulatory compromises get constructed *in general*, how they change, or what type of compromise one could expect to emerge after Fordism (Painter and Goodwin, 1995; Peck and Tickell, 1994).

Determining the accuracy of these developments as sources of Fordist transition is beyond the scope of the present discussion. Regardless of causes, the result of the Fordist crisis, according to regulation theorists, has been a wealth of new post-Fordist organizational and regulatory configurations. The emergence of new industrial practices, discussed above in terms of the "new economy," are characterized here as forms of "flexible specialization" or "flexible accumulation," whereby the placeless logics and flexible location patterns described by Castells (1989) are part of a systemic effort to construct a new regime of accumulation that can restore and stabilize profit-making opportunities. The implications of flexible specialization for urban politics are also familiar: different cities are pitted against one another as "hostile brothers" competing for specialized industrial operations.

As the Fordist regime of accumulation was primarily understood as a regulatory system coordinated through *national* scale state institutions, however, the bulk of attention from theorists has been focused on understanding the substantive changes in state form associated with the post-Fordist transition. In general three changes in the form and/or structure of the state have been identified (Jessop, 1990). One is "destatization," or the shifting of certain government operations to private and/or non-profit sectors. A second is "denationalization," or the devolution of state decision making to local and regional scales. A third is "internationalization," or the establishment of international political institutions such as the World Trade Organization, NAFTA, and the European Union, among others, to coordinate international political-economic policies and practices. These changes have been recognized as important elements of the 'hollowing out' of the

national state (MacLeod and Goodwin, 1999), meaning the rescaling of governance in general in which "the basic territorial-institutional frameworks of urban governance are being dramatically reshuffled and re-scaled" in pursuit of a new regulatory framework that restores opportunities for capital accumulation (Brenner, 2001: 3). What these changes mean, essentially, is that governance functions are no longer centralized at the scale of the national state, but are instead distributed throughout different state bodies and institutions operating at various spatial scales.

The various political and social implications of these state and scalar shifts have been examined by others elsewhere (Wolch 1990; Lake, 2002; Peck, 2001). All of these changes are broadly associated with processes of globalization, that is, increased political coordination across national borders (the post-Fordist internationalization of the state) and, perhaps more importantly, the greatly increased spatial range of economic practices (discussed above in terms of the new economy and flexible specialization). Globalization will be discussed in a bit more detail in the following chapter. Here it is important to emphasize how post-Fordist state restructuring affects urban politics. Whereas the industrial practice of flexible specialization leads firms to seek flexible location patterns, the denationalization of the state is said to place great responsibility for urban development on sub-national states (MacLeod and Goodwin, 1999). Fordism was recognized as "*national* insofar as the national territorial state assumed the primary responsibility for developing and guiding Keynesian welfare policies on different scales" (Jessop, 2002: 60, emphasis in original). According to Jessop (2002: 60), this meant that:

> local and regional states tended to act mainly as relays for policies framed nationally, modifying them into the light of local conditions and the balance of forces but not initiating radically different policies. In particular, economic and social policies at the urban and regional level were orchestrated in top-down fashion by the national state and primarily concerned with equalizing economic and social conditions within each of these national economies.

No longer could cities depend on the national state, through federal grant programs, for example, to ensure their economic viability (Lake, 2002). Rather, cities became responsible for finding their own ways to generate or maintain local economic activity. Yet, the increased proclivity among firms for flexible operational and locational patterns narrowly circumscribes any particular city's options in this regard, leading Peck and Tickell (1994: 311, emphasis in original) to conclude that the real outcome of post-Fordist rescaling is that:

> local regulatory systems (particularly local states) have been conferred *responsibility without power:* regulatory responsibilities have been handed (or have drifted, as they have been shunned by nation states) down from the nation state level, but localities can wield little in the way of political-economic power in the context of globalizing accumulation and global deregulation.

According to this understanding, the ultimate result of the regulatory changes that began in the 1970s with the breakdown of Fordism and continue to unfold through the search for a kind of post-Fordist compromise, is, among other things, increased spatial competition between cities vying for favorable, or even just viable, economic activities. As cities aim to construct a "good business climate" to attract the mobile capital investment needed to stabilize their economies they are faced with a choice between lost development opportunities or "regulatory undercutting" to secure whatever investment

they can get. In other words, this is the same "race to the bottom" discussed above, approached from a different angle.

Debates over the processes, forms, and configurations of the Fordist/post-Fordist transition have generated many more complexities than can be covered here. But the goal of this discussion is not to determine the existence or non-existence of a new regulatory framework, or to sort out the intricacies or evaluate the descriptive accuracy of regulation theory. Rather, it is to illustrate, first, that capital mobility is recognized by regulation theorists to constrain urban politics in ways that compromise progressive development opportunities, and, second, that despite being generally critical *of* capital mobility, regulation theorists have not recognized the need to focus critical research *on* capital mobility. The following statement by Painter and Goodwin (1995: 337) illustrates this point:

> Marx's abstract accounts of the 'laws of motion' of capital and the 'necessary tendencies' of the accumulation process are of fundamental significance for political economy....However, the regulationist project is somewhat different. While not denying the importance of *necessary* tendencies to uneven development, regulation theory focuses principally on the *non*-necessary relations that determine which specific periods and places see what kinds of accumulation and economic growth.

Contingency, in other words, while recognized as an important focus of research in regulation theory, only goes so far. After all the intricate theorizations about modes of production, regimes of accumulation, state rescaling and restructuring, and flexible and specialized industrial practices, the state and social relations can only affect pregiven

'necessary tendencies' or mediate the consequences of capital mobility. The mobility of capital itself is assumed to derive from some other 'inherent' laws of economic behavior, and research and analysis on urban politics and development begins only after that assumption has been made.

Conclusion

Not all urban politics research frames urban political-economy in the broad terms of capitalist spatial dynamics discussed in this chapter. In particular, various feminist and post-structuralist researchers have responded to what they recognize as an overly structuralist and functionalist approach to the process of urban space production (Gilbert, 1999; Gibson-Graham, 1996) and a narrow conception of politics that provides little room for the reproduction or change of urban systems to be driven by non-economic/growth concerns and/or by human agency (Clarke, Staeheli, and Brunell, 1995; Gibson-Graham, 1996; Gilbert, 1999). Other important efforts have also explored the potential for alternative local development projects that construct a different relationship between capital and place (Shuman, 1998; Imbroscio, 1997; DeFilippis, 1997, 2004; Gibson, 2001; Community Economies Collective. 2001). All of this work is essential to generating new ways of understanding and approaching place, community, and urban and economic development, and constitutes an extremely important counterbalance to the economism and structuralism found in much of the research examined above.

In terms of the present discussion, however, these valuable alternatives focus on different questions and thus provide little assistance in reconsidering and challenging capital mobility in the terms discussed here. For the majority of that alternative research emphasizes what *else* is or can be done to influence the production of urban space

(Clarke, Staeheli, and Brunell, 1995; Gilbert, 1999), or how to construct different processes and institutions of local community and economic development. But they do not challenge capital's supposedly inherent capacity for mobility (but see Gibson-Graham, 1996), do not question how and why the capital that is currently treated as "placeless" or free from "local dependence" has achieved the political capacity for mobility, do not consider the possibility of actively redefining capital's mobility rights and capacities, and do not consider the potential for redefining and restructuring the relationship between capital and place that presently allows for the mobility of capital.

The scholarship discussed in this chapter represents just some of the various approaches to urban research found in geography and related disciplines. Nevertheless, it illustrates well how the mobility of capital has typically been treated by those within the academic community aiming to make sense of the changing circumstances confronted in the struggles discussed in Chapter One. The argument made here is not that the dynamics and consequences identified in that research are incorrect, but rather that capital's 'inherent' capacity for mobility is embedded within that research as an unexamined assumption. Consequently, capital mobility is situated as an explanation for various processes and outcomes, but never itself explained. The question of how and why to approach an explanation for capital mobility is addressed in the following chapter.

Chapter Five: Theorizing alternatives

Introduction

There is no doubting the theoretical strength, empirical richness, and political engagement of the body of work discussed in the previous chapter. However, three primary critiques of that work suggest the need for an alternative approach to urban research. First, the majority of the research discussed assumes the spatial mobility of capital and then situates that mobility as an explanation for other phenomena—capitalist (uneven) development, the spatial patterning of social relations, the nature of urban politics, place-based social conditions—without critically investigating the political character and history of that mobility itself. Second, despite the linkage made in the literature between capital mobility and regressive political-economic conditions, critical research typically focuses on the negative consequences of capital mobility and avoids consideration of political-economic alternatives to unfettered mobility in the first place. When alternatives are considered, they often focus on constructing new place-specific forms of capital rather than on redefining existing forms of capital in more place-specific ways (DeFilippis, 2004; Imbroscio, 1997). Third, because the capacity for mobility enables capital to escape geographically defined regulations, researchers often discount place-specific activism as an effective mechanism for influencing capital behavior or improving local conditions (Harvey, 1989; Jonas and Wilson, 1999; Peck and Tickell, 2002).

Combined, these theorizations reinforce understandings of capital mobility as natural and politically unassailable and leave very little room for those experiencing the negative

place-specific consequences associated with capital mobility to participate in or gain influence over the decision-making processes that shape their economic futures. The purpose of this chapter is to suggest an alternative approach to the study of urban politics and development. This alternative approach is derived from theoretical advancements articulated in two bodies of scholarship: postructural feminism, and critical legal geography.

Poststructural feminism

Poststructural feminism provides an ideal starting point due to its critical focus on "capitalism" and/or the "capitalist economy." The notion that "inherent laws of motion" give capitalism a naturally dynamic and expansionary quality and consequently impose a range of constraints and requirements on urban politics, as theorized by Marx and extended and refined by Harvey (1982; 1989; 2000), was discussed above. The implication of that idea is most popularly recognized in terms of Joseph Schumpeter's concept of "creative destruction," whereby the creative force of progress requires, and is built from the ruins of, the destruction of previously established ways of being. Capitalist economic evolution according to this theorization takes on an inevitable quality, evoking an image of "the progressive emergence of ever more efficient, more competitive, and therefore dominant forms of capitalist enterprise, technology, and economic organization" (Gibson-Graham, 1996: 115).

Poststructural feminists, led by the innovative work of J.K. Gibson-Graham (1996; 1999; 2001), have criticized such representations of capitalism for discursively constructing a

monolithic and self-reproductive economic system that is impervious to revolutionary efforts and always out of reach of transformative politics. Arguing that "it is the way capitalism has been 'thought' that has made it so difficult for people to imagine its supersession," Gibson-Graham (1996: 4) has sought to theorize capitalism differently. That project is comprised of two primary strategies. One is to identify and deconstruct the discourse of capitalist hegemony in order to illustrate how the overwhelming presence and power of capitalism has been discursively produced, often by the very same scholars and activists seeking to challenge it:

> [T]he virtually unquestioned dominance of capitalism can be seen as a complex product of a variety of discursive commitments, including but not limited to organicist social conceptions, heroic historical narratives, evolutionary scenarios of social development, and essentialist, phallocentric, or binary patterns of thinking. It is through these discursive figurings and alignments that capitalism is constituted as large, powerful, persistent, active, expansive, progressive, dynamic, transformative; embracing, penetrating, disciplining, colonizing, constraining; systemic, self-reproducing, rational, lawful, self-rectifying; organized and organizing, centered and centering; originating, creative, protean; victorious and ascendant; self-identical, self-expressive, full, definite, real, positive, and capable of conferring identity and meaning (Gibson-Graham, 1996: 4).

A second strategy is to theorize existing and potential openings for transformative politics and to identify forms of economic difference. Here the focus is on identifying the various ways that capitalism, or the world of economic practices, is already different than its monolithic representation, is already "different from itself" (Gibson-Graham, 1996: 15). Noncapitalist moments and processes, such as certain class processes and different forms of surplus distribution, can be identified that exist with, rather than within, capitalism as expressions of economic difference. Emphasizing such moments and processes both

undermines the representation of capitalism as a monolithic and homogeneous entity and reveals a broad array of revolutionary political practices that presently exist and deserve support, though they may be more subtly revolutionary than Marxist/leftist scholars have traditionally been willing to acknowledge (Gibson-Graham, *et al.*, 2000). The hegemony of capitalism, following this approach to theorization, "becomes a feature not of capitalism itself but of a social articulation that is only temporarily fixed and always under subversion" (Gibson-Graham, 1996: 15).

The aim of the present project is considerably less ambitious than the critical retheorization, transformation, and displacement of capitalism. But it takes important inspiration from the anti-essentialist approach to capitalism and economic systems exemplified by Gibson-Graham and other postructural feminists (Cameron, 2000; Hotch, 2000; St. Martin, 2001; Pavlovskaya, 2004). For, as discussed above, in much urban scholarship the mobility of capital is represented as an essential component of a dynamic capitalist economic system and thus "explained" in terms of capitalist requirements. But if capitalism is denied a true "essence," if it is denied inherent qualities that necessitate a range of other actions, then it is deprived of its explanatory power. It then becomes necessary to explain capital mobility in some other way at the same time that it becomes possible to challenge the terms and conditions under which mobility is practiced. Furthermore, that capitalism can be recognized as a discursive product suggests that other components of capitalism, such as capital mobility, may be recognized as similarly discursively produced.

The focus on discursive production evokes the powerful concept of "performativity," or the notion that discursive representations "are implicated in the worlds they ostensibly represent" (Gibson-Graham, 1996: ix). Rather than reflect an objective reality, theorizing and other representational practices can be seen as one of the various practices through which that "reality" is constructed. It is the concept of performativity that enables one to appreciate how theorizations of capitalism as stable, overpowering, and expansive, contribute to the construction of a capitalism that is stable, overpowering, and expansive. Understanding performativity in this way makes the task of constructing alternative theorizations, of constructing new knowledges, an important form of political practice that "actively shapes 'reality' rather than passively reflecting it," a practice that is in itself "a world-changing activity" (Gibson-Graham, 2001: 101).

It is in this light that the representations of capital mobility discussed above and in Chapter Two should be understood: the failure to question or challenge the mobility of capital contributes to the constitution of capital mobility as unquestionable or incontestable. Those who represent capital, intentionally or unwittingly, as inherently or naturally mobile perform acts that help imbue capital with such qualities. My efforts to reveal capital mobility as an unexamined assumption within urban politics theory (in terms of the scholarship examined above) and practice (in terms of the struggles discussed in Chapters One and Two) can thus be viewed as one step in the production of a different knowledge of capital mobility.

A second step in the production of a different knowledge of capital mobility is to develop

an alternative story of capital mobility, one derived not from assumptions of inherent and natural qualities or general requirements of economic systems, but rather from a broad array of political moments and practices. In developing this alternative story I have chosen not to consider whether or to what extent capital presently practices spatial mobility. That political project has begun to be explored usefully by others, who typically illustrate the extent to which capital is not nearly as mobile as it is represented to be, that capital does not move as easily, as often, or across the same spatial range as globalization theorists and others tend to claim (Kelly, 1999; Yeung, 1998). As a critique of and counterbalance to popular "borderless world" and "end of geography" theorizations, that research is extremely important. However, the argument it represents remains a technical one: various technological considerations limit, for now at least, the ability of capital to move effortlessly across space. Investments of time, money, and energy, in other words, often induce some degree of fixity. The implication is that capital *can* exercise spatial mobility, but sometimes chooses not to, for a variety of reasons. My concern is less with frequency than it is with capital's general political capacity for mobility: why *can* capital exercise spatial mobility?

Critical legal geography

The alternative story of capital mobility to be developed here focuses on the production of capital's political capacity for mobility. Specifically, the focus here is on capital's formal legal right to exercise mobility, for whatever else can be said about the struggles in Youngstown and Seattle, one conclusion is that in exercising mobility and otherwise altering the spatiality of investment patterns, the practices of the capital involved in those

particular struggles have been recognized and treated as formally legal. Despite the various negative consequences, then, capital was legally permitted to behave exactly as it did. One approach to understanding and challenging capital mobility, to producing an alternative story of capital mobility, is thus to investigate and articulate a history of the legal construction of capital's mobility rights.

Inspiration for this task is drawn from important developments in critical legal geographic scholarship (Blomley 1992, 1994a, 1994b). Just as poststructural feminists have deconstructed the capitalist monolith and theorized openings for economic diversity, critical legal geographers have challenged the practice of "legal closure," interrogated the social and political production of legal categories, and theorized the connections between law and space. Legal closure refers to "the characterization of law as an autonomous, self-sufficient field that can be marked off, in several important ways, from the vagaries of social and political life" (Blomley, 1994a: 7). Through legal closure, law is said to possess a rational and reasonable objectivity that makes it possible for lawyers and jurists to reach appropriate legal decisions through a "formalist" interpretive process. "Formalism" here means, on one hand "a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice" but, more broadly, it refers to "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary" (Unger, 1983). In both its guises, formalism suggests that once "the facts" of any particular legal dispute are known, the apolitical and determinate rationality of legal

analysis makes *the* appropriate resolution to that dispute forthcoming. It means that though key terms and concepts may have multiple and contested meanings, decisionmakers (lawyers/jurists) may treat such terms and concepts as if their meanings were singular and agreed upon, while denying that the choice among competing definitions is a political one, or indeed that it is a choice at all (Schauer, 1988). As somehow divorced from the values, politics, power, and contingencies of social life, law and the formalist legal process become an invisible background component of existence, the effects of which are benign and neutral.

The difficulty with law, in other words, or rather with the practice of formalist legal closure, is that the struggles and debates over important legal categories all seem to be located somewhere in the distant past, while the politics of the present are confined to extra-legal outcomes. Legal categories thus become frozen in time and place, normalized in a way that makes them appear to be natural, neutral, and timeless, and pushed to the background of social interaction. Critical legal scholars have attempted to destabilize the practice and effect of legal closure by illustrating how law and legal discourse are socially constructed and politically charged and thus "not only deeply implicated in the messy and politicized contingencies of social life but actually constitutive of social and political relations" (Blomley, 1994: 7-8). Critical legal scholars use the method of legal history, among other strategies, to theorize law as "a fluid and open textured arena of discourse which conditions the very manner in which we understand social life" (Blomley, 1992: 238). The discourse of law, according to this perspective, is thus the important terrain where key legal concepts and categories are struggled over, where the

terms of law are set in ways that shape social relations and conditions. This shaping role of legal discourse plays out in a variety of ways:

> Legal discourse constructs roles for us, such as 'owner' and 'employee,' and tells us how to behave in those roles. Legal discourse atomizes us as discrete individuals and then prescribes formal channels (contracts, corporations, marriages, and so on) through which we can reconnect. Legal discourse splits the world into categories that filter our experience, distinguishing a set of harms that we must accept as the hand of fate or our own fault—such as poverty—from those actions that we may resist as wrongfully forced upon us—such as racial discrimination in hiring practices. In this, legal discourse sets limits on what we can imagine as practical options... (Blomley, 1992: 238).

The production of legal histories, aimed at revealing law's ultimate openness, is thus one way to expand the realm of political practice. By denaturalizing legal constructions, critical legal investigation removes some of the limits legal closure has placed on the political imagination and reopens legal categories to political struggle:

> Critical legal histories can...challenge the assumed objectivity of present legal forms and categories by tracking the history of *contemporary* legal consciousness....If legal categories are shown to have not always been 'out there' but are the product of past historical contingencies...they become 'unfrozen' and the possibility for opposition can emerge (Blomley, 1994: 23, original emphasis).

As law is not only a product of history, however, but also of geography, Blomley (1992, 1994a) argues that history should not be the only perspective from which to situate a critical interrogation of law. In addition to embedding law within a particular history, critical legal investigation should seek to embed law within a particular geography, should consider how conceptions of geography (of place and space) constitute and are

constituted by the terms and categories of law (Blomley, Delaney, and Ford, 2001). This is where critical legal *geography* may be distinguished from a more general critical legal studies: critical legal studies scholars tend to treat law aspatially, or as playing out across a passive spatial terrain (Blomley, 1994).

Yet space, as so many geographers and others have illustrated, is not passive and featureless, but rather hotly contested and richly textured. Generally speaking, space is recognized in critical geography not as a simple surface across which various social and political relations and processes play out, but rather as a dynamic entity, one that both shapes and is shaped by those relations and processes. However, as Blomley (1994: 27) notes, despite the attention of geographers to the complexities of the production of space, "geographers appear blasé about the law." When law does make it into geographic analysis, it is often as a fixed, external category that has spatial effects or otherwise acts *on* space. Clark (1989) criticizes such attention as a type of "impact analysis," whereby the relationship between law and space is unidirectional: law acts on space and not the other way around. The challenge presented by the concept of critical legal geography is thus that critical geographers recognize and take seriously the role of law and legal discourse in the production of space.

As for the reasons for the exclusion of law from critical geography, there is no one definitive explanation, but a couple possible explanations can be identified. One is that the "closed" character of legal discourse may render the social and political components of law equally invisible to critical geographers as it does to other social actors. Another,

more complicated explanation is the noted ambivalence among critical geographers about the progressive potential of political rights. This argument deserves closer attention.

Following Marx (1978), rights are a often treated by critical geographers and others on the Left as a bourgeois device, one that more often serves the (class) interests of the powerful than the change interests of the powerless. The state, according to this perspective, is wrapped up in the capitalist project in such a way that it is essentially a "capitalist state" (Clark and Dear, 1981), the functional options of which are limited by various structural restrictions and requirements.[26] Achieving a change in political rights thus signifies a change *within* the existing social order, not a change *of* the existing social order, which suggests at the outset a truncated horizon for social change (Blomley, 1994b). A similar argument is that political rights within liberal individualistic legal culture must be so narrowly construed and specifically worded that they do damage to nuanced goals and claims and act as a barrier to a more general discourse of morality (Mitchell, 1997). In both cases, political rights are viewed as a diversion from the "real" political project of more substantive social change.

There are at least three reasons to persist with an emphasis on rights despite these arguments. First, if one refuses the discourse of the capitalist monolith and its singular vision of social change, as suggested by poststructural feminists,, and denies the use of "capitalism" as an explanation for other social and political activity (such the actions of

[26] The typical limitations on the capitalist state are understood in terms of the need to navigate the often conflicting functions of satisfying the interests of capital (facilitating accumulation) and maintaining the social conditions on which the state's legitimacy depends (justifying the social and economic system and securing democratic support (Barrow, 1993; Hirsch, 1981).

the state), then political rights become at least one among a variety of arenas for the pursuit of substantive social change. Another, perhaps more compelling, argument is that for those who have been denied political rights, the struggle for rights constitutes more than a diversion from "real" politics (Blomley, 1994b). The civil rights and feminist movements have both wielded rights-discourse as a powerful tool for substantive social change. The case of Youngstown provides another illustration of this argument, for after years of pickets and rallies and meetings and marches, the departure of US Steel from Youngstown was enabled, in part, by the absence of an enforceable community property right. The potential value to the Youngstown labor community in that case of a positive political right to local industrial infrastructure is immeasurable.

The Youngstown case raises another important argument in favor of emphasizing political rights. A community property right may have provided the Youngstown labor community with some hopeful opportunities once US Steel had closed its Youngstown facilities, but the ability of US Steel to close those facilities in the first place was based on its own corporate property rights. In other words, somehow US Steel had achieved, through the state, the positive political right to leave Youngstown. A critical focus on rights thus enables not just the legitimation of progressive new rights claims, but also the very important questioning of existing rights that engender negative consequences. Mitchell (1997: 122) clarifies this point:

> At a time when the globalization of capital is aided and abetted at every step of the way by states...; when, under the name of free trade and unfettered markets, capital is free to systematically crush any vestige of social life not yet under its sway, free to create a world in which the immiserization of the many so as to

> aggrandize the very, very few is packaged as inherently *just*; then those who seek to create a better world have few more powerful tools than precisely the language of rights, no matter how imperfect that language may be.

Mitchell raises two important points here. One is the role of the state in the production of political rights. Despite various claims that "natural rights" originate from some divine or natural source, formally institutionalized political rights can exist only by way of the state (Dewey, 1927). It is therefore essential to understand how and why the state participates in creating certain political rights, especially when those rights are found to have generally recognized negative consequences for certain people and places. How the state participates in rights production is an empirical question, to be answered through research. The answer to the question of why the state participates as it does will depend on one's understanding of the state. As noted above, those who view the state as structurally positioned to serve certain purposes and interests may explain the state's role in rights production in terms of predetermined requirements, such as the requirement for the reproduction of capitalist accumulation opportunities (Harvey, 1982). From this perspective, rights may be understood as created *by* the state to satisfy certain functional necessities. An alternative perspective, one I adopt in this project, is to view political rights as created *through* the state. This approach avoids any predetermined explanation for state behavior and instead views the state's actions as determined by contingent social and power relations. Follows Jessop's (1990; 2002) state theorizations, this perspective recognizes the state as a social relation, as an "institutional ensemble" produced through social interaction, which certainly shapes, but is equally shaped by the balance of power in society. The form or function of the state, as well as the terms and conditions under

which the state may be used to support or reject certain rights claims, should therefore not be assumed a priori, but should rather be identified as active arenas for political struggle.

This points to a second issue raised above by Mitchell: the importance of the "language of rights." Blomley (1994b) suggests that rights discourse, that is, the formulation and mobilization of rights claims, can be very empowering for activists involved in progressive movements. However, he also warns that the pressing of rights claims in the courtroom can be very disappointing and disempowering for these same groups. Due to the resources presently demanded by courtroom activity and the generally conservative tenor of the courts, marginalized groups and other social change activists are often at a disadvantage in the courtroom environment. What this means is that those taking up law and political rights as an important component of progressive political struggle should be strategic about how and where to advance that project most effectively. The courtroom may not be the most effective place from which to attempt to produce changes in the state. A more promising strategy may be to produce new state actions through "the progressive use of rights for mobilization and critique" (Blomley, 1994b: 420), to use the language of rights to identify and push for different types of social change.

The critical legal geographic project is a challenge to scholars and others to transcend common disciplinary barriers so as to recognize how law and space are mutually constitutive, to appreciate how "the legal and the spatial are, in significant ways, aspects of each other" (Blomley, Ford, and Delaney, 2001: xviii). It also requires an openness to the state as a site of political struggle and the strategic use of the language of rights.

Investigating the production of capital mobility

For the purposes of the present project, the lesson to be gathered from the poststructural feminist and critical legal geographic work discussed above is that economic categories (such as capitalism, capital, and political rights), and the institutional environments which shape political-economic behavior, are socially constructed and historically contingent. They are created by people, out of the chaotic, contingent, and deeply political interactions among people at specific times and in specific places, not delivered ready-made from some prepolitical realm of social organization. The spatial mobility of capital, following this understanding, may be seen as the contingent outcome of historical struggles over representation, over what capital is and will be allowed to become, over what capital *should be*, rather than as a reflection of inherent and natural qualities possessed by some prepolitical category called "capital." The argument put forward here is that failure to recognize capital's mobility as a political product, as produced through contingent historical and ongoing political action and struggle, may preempt researchers and others from challenging or considering practical alternatives to currently observable forms of the spatial mobility of capital.

The following three chapters investigate the historical legal construction of the corporation as an institutional form and of the political rights achieved by and for corporations in the United States, with particular emphasis on the right to spatial mobility. The story articulated in these chapters is critical and legal in that its purpose is to examine a historical process through which certain political rights were produced, rights that are presently taken for granted in urban politics research and practice as

natural and/or inherent. It is a critical legal *geography* in that it emphasizes both how legal constructions enable political practices (mobility) that figure prominently in the production of space, and how conceptions and perceptions of space are embedded within the legal arguments and representations examined. In all respects it should be recognized as one among many possible approaches to understanding the historical production of capital mobility. For instance, the focus here is on the general production of mobility rights, not the execution of those rights. An equally interesting and instructive story could likely be told about various spatially contextualized experiences with the interpretation, enforcement, and execution of mobility rights. However, a valuable legal geography of that sort will have to wait for another research project.

The first step in this investigation is the redirection of critical focus from "capital" to "corporation." I recognize that "capital" as used by academic researchers typically refers to something other than, more than, a particular institutional form, such as the corporation. It is understood as a process, in particular, the process of the circulation of money through the production and exchange of commodities in order to produce profit (more money) (Harvey, 1982). In this sense, the term capital is quite a bit more complicated than the legal form of the corporation. Harvey (1982: 20), makes this much clear: "Capital...should be defined as a process rather than a thing. The material manifestation of this process exists as a transformation from money into commodities back into money plus profit: M—C—(M + Δ M)." And this definition of capital, for Harvey (p. 376), implies a particular understanding of capital mobility:

> If spatial integration is achieved through the circulation of capital over space, then our attention must focus on how capital and labour power move. We cannot here appeal to common bourgeois notion of the mobility of separate 'factors of production'—'things' that can be shunted from one point in space to another. The Marxian conception is necessarily somewhat more complicated. Capital can move as *commodities*, as *money*, or as a *labour process* employing constant and variable capital of different turnover times.

Yet, the attachment to this "complicated" and abstract concept of "capital," I argue, contributes to the difficulties associated with social change activism. According to Harvey's (and thus Marx's) definition, "capital" has no edges, no particular form to combat or organize against. Yet, in order for "capital" to circulate, to act in any way, it must do so through individuals and/or formal institutions. In other words, whether in the form of a commodity, money, or a labor process, the terms and conditions under which capital operates (circulates) are shaped by the institutional forms through which commodities, money, and labor processes are organized. The corporation represents one important institutional form through which capital operates; and how capital operates through corporations is determined by laws. Investigating the legal production of the corporation as an institution, and of corporate rights, is thus one way to understand, and ultimately challenge, the rights and powers of "capital."

As the concern of this research is not only with the corporate political rights in general, but rather with the particular corporate political right to mobility, the investigation conducted through the following three chapters focuses on the legal construction of the relationship between the corporation and place. I approach this investigation in two ways. I begin with the formal treatment of the corporation in the United States Supreme Court,

followed by the legislative treatment of the corporation at the state level. Review of US corporate jurisprudence reveals at least three primary circumstances in which the Supreme Court has confronted the definition of the corporation and corporate rights—when considering questions of corporate composition, judicial jurisdiction, and legislative jurisdiction.

Chapter Six focuses on corporate composition, or the question of what a corporation is, who and/or what is included in the definition of a corporation, and who and/or what has authority over corporate organization and behavior as a result of that definition. While that chapter is ostensibly centered around one particular Supreme Court case (*The Trustees of Dartmouth College v Woodward* (1819)) it includes a lengthy discussion of the history of the corporation prior to that case in order to provide some context for the Court's deliberations. Chapter Seven examines the definition of the corporation as produced through the Court's engagement with the questions of judicial and legislative jurisdiction. That chapter focuses on a wide range of cases identified by various legal scholars as central to defining corporate rights and powers. The number of cases that relate in some way with the definition of the corporation or with the establishment of certain corporate powers is essentially limitless. Thus, it is important to note that the cases included in Chapter Seven are those that relate in some way to corporate rights and powers defined *in terms of place*. This point should become clear as the chapter progresses. Chapter Eight then examines the treatment of the corporation from the legislative perspective. Due to the number of particularities in the treatment of the corporation among the various state legislatures, this chapter also narrows attention to

specific components of the legislative process that are particularly relevant to the relationship between the corporation and place.

Each of these chapters follows the same general methodology. I have used legal reviews to identify important cases and processes related to the definition of the corporation and corporate rights and powers, but I have included and emphasized only cases and processes which I recognize as particularly relevant to the question of corporate mobility and/or the general relationship between the corporation and place. Some legal scholars have, for one reason or another, considered how a particular decision or argument from the Court or a certain legislative development has affected the corporation-place relationship. In such circumstances, I have included the views of such scholars in my discussion. However, generally speaking the analyses and interpretations included in the following chapters are my own, based on a close reading of the cases and accounts included, with an eye to spatial statements, metaphors, and implications. Consequently, the story developed over the next three chapters should be understood as *a* history of the production of capital mobility in the US based on *a* reading of a particular slice of the historical record. Others might stress other important cases, practices, and developments, or else interpret the elements included here differently than I have. That is to be expected: there is no one best way to understand the corporation or corporate mobility rights. Nevertheless, the history presented here represent a history that at the very least complicates the treatment of mobility as an inherent, natural, and politically unassailable characteristic of "capital" and thus serves well the purposes of this research project. Additional comments and considerations will be discussed in the concluding chapter.

Chapter Six: The public and the private corporation

Introduction

The purpose of this chapter is to examine the historical foundations of the legal relationship between the corporation and place and the historical production of corporate mobility rights in the United States from the perspective of corporate composition. The question of corporate composition concerns the determination of whom and/or what constitutes the corporation and therefore who has final authority over corporate decision-making and whose interests must be taken into consideration when corporate decisions are made. The primary case to be investigated in this section is *The Trustees of Dartmouth College v. Woodward (1819).* The *Dartmouth* case is widely recognized as establishing a distinction between public and private spheres of corporate activity, a distinction which has shaped the legal treatment of corporations in the United States ever since but which also had not previously existed in corporation law. Thus, in order to appreciate the significance of the *Dartmouth* case and the context in which that case was heard it is necessary first to explore the history of the corporation as an organizational form prior to the nineteenth century. This exploration will focus primarily on the development of the corporation in England, from which the United States inherited the corporation, and will emphasize the legal and conceptual evolution regarding the corporation that the *Dartmouth* ruling reflected and perpetuated.

The corporate form of organization

The corporation as a form of organization is generally recognized as an invention of the Romans (Blackstone, 1765-1769). However, it is the English who developed the

corporation into the commercial institution recognizable to modern observers. Since at least the 11th Century, the English adopted the form as a way to aggregate the effort and investment of disparate individuals in pursuit of collective interests—typically for civil organizations such as cities, universities, churches, and charities, but towards the beginning of the 17th century increasingly for exclusively commercial activities as well (McLean, 2004). But, as Gerald Frug (1980) explains in an exceptional essay on corporate legal history, prior to the nineteenth century, all corporations, whether exclusively commercial or engaged in what would now be considered "public" activities, were treated equally under the law. The contemporary division of corporations into the categories of public and private, whereby the composition and activities of corporations in each category are subjected to different forms of state management and control, did not exist among medieval corporations. Understanding how and why corporations were transformed in England from "complex economic, political, and communal associations" (p.1083) of the medieval period to the neatly categorized public and private entities in evidence today can help to clarify not just the role of the corporation in Western society but also the contemporary relationship in the US between private corporations and the places in which they operate.

Detailed discussion of the particulars of medieval city organization and operation is beyond the scope of the present discussion. What's important to recognize here are some unique legal characteristics of English medieval corporations. Frug (p.1083) offers the following description:

> The medieval town was not an artificial entity separate from its inhabitants; it was a group of people seeking protection against outsiders for the interests of the group as a whole. The town was an economic association of merchants who created the town as a means of seeking relief from the multiplicity of jurisdictional claims to which they, and their land, were subject. These merchants gained their autonomy by using their growing economic power to make political settlements with others in the society, specifically the King and the nobility. They achieved a freedom from outside control that was made possible by, and that allowed to be enforced, a strong sense of community within the town. This autonomy for the merchants and their ability to establish their own communal rules were recognized in the legal status of the town.

The towns were just one form of corporate activity in the Middle Ages, and not all medieval corporations exhibited such complex properties. But the towns did provide a prominent example, prior to the emergence of public/private classifications, of the legal integration of political, economic, and territorial elements within the corporate form of organization. And this integration contributed to the cities' distinct culture and degree of political power.

The existence of a communitarian spirit, however, should not be mistaken for egalitarianism. Medieval towns were organized hierarchically and ruled by an oligarchic elite. Their survival, according to Frug (p.1086), was based on the concept of functional harmony, which motivated members to contribute their efforts to the maintenance of the overall system.

> No part of society represented the product of individual agreement; hierarchy was everywhere....Each organization allowed its members, and the group as a whole, to contribute something to the working of society, and to be a constituent part of

the harmony of the whole.

Furthermore, as "a strict identity established between individual interests and the town's interest" (p.1084), the town as a unit "protected the worker from competition and exploitation, regulated labor conditions, wages, prices, and apprenticeships, punished fraud, and asserted the town's interests against neighboring competitors." The persistence of medieval towns across centuries suggests at least some degree of success with regard to this functional harmony.

Despite the claim that medieval town corporations were "free from outside control," and regardless of the autonomy they may have achieved in terms of operations, all corporation were understood to be the legal creation of the King, established to carry out, implicitly or explicitly, the King's interests (Blackstone, 1765-1769). Thus, it was the specific nature of the relationship with the King, rather than the absence of the King's "interference," that enabled medieval towns to achieve their complex political-economic character:

> The King's relationship to the economic elite in the towns was one of mutual dependence as well as mutual suspicion. The assumption of control of the cities by this largely self-perpetuating oligarchy created a conflict with the craftsman and the proletariat within the towns, a conflict which dominated the towns' political life. The elite was thus forced to seek outside support for their privileges, particularly from the King. In addition, the elite increasingly looked to the King for social advantages and legal protection. The King, for his part, favored control by a small group upon whom he could depend for financial and administrative support (Frug, 1980: 1090-1091).

This relationship between the King and town elites sheds some doubt on the organicism of whatever functional harmony was achieved in the medieval city. Yet regardless of whether functional harmony was organic or coerced, or whether it ever truly existed, by the end of the seventeenth century a growing diversion of interests among the individual town inhabitants, the town as an entity, and the state (King) eventually brought an end to the unique legal arrangement that constituted the medieval town corporation.[27]

On one hand, growing hostility within the cities caused elite interests to be viewed as a threat to the well being to the cities' individual inhabitants, a threat that required central state involvement to avoid societal unrest. On the other hand, though medieval towns contributed much to the political and financial interests of the crown, and other corporations with similar legal characteristics, such as the African Company, the East India Company, and the Hudson's Bay Company, also fueled mounting English colonial ambitions (Williston, 1888; McLean, 2004), the growing power of such corporations caused them to be viewed as "so many commonwealths by themselves, independent of the Crown and in defiance of it" (Frug, 1980: 1093, quoting Levin, 1969: 48). In response to such intolerable political competition, the King asserted his right to revoke the charters of corporations behaving unacceptably, according to his own definition.[28]

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[27] Parallels between current support for private corporate rights and the arguments put forward by medieval oligarchs in defense of town autonomy are remarkable. Just as contemporary corporations claim a range of political rights under the US Constitution, medieval oligarchs "resisted royal interference as an inroad on the basic rights of Englishmen, since the liberty of the towns and the protection of freehold interests, such as the corporators' freehold interest in the corporate franchise, had been established by the Magna Carta" (Frug, 1980: 1091).

[28]Charles II successfully challenged, and subsequently revoked, the charter of the city of London, in 1682. However, as a result of the Glorious Revolution of 1688, the London decision was reversed, restoring the London charter and establishing the irrevocability of the corporate charter, at least by the King. Parliament retained the power to revoke charters. At the time, the friendliness of Parliament to corporate interests

The tensions that eventually undermined the legal autonomy of the medieval town can be understood both as a reflection of and contribution to the development of the political theory of liberalism. The thrust of liberal theory that challenged the stability of the medieval city, Frug argues, was the conceptualization of the world in terms of complex dualities, whereby "the world is divided into spheres of reason and of desire, of fact and of subjective values, of freedom and of necessity, of the development of the self and of the need for communal relationships, of the free interaction of civil society and of the demands of the state" (p.1075). Blomley (1994: 108) suggests another element of this conceptual development, "the generalized liberal critique of all collective structures" and the simultaneous assertion of only two legitimate spheres of influence, "one containing the increasingly autonomous individual, the other consolidating collective authority in the body of the nation-state" (Blomley, 1994: 108). As the medieval city did not fit precisely into either of these two spheres, but exhibited elements of both, its power came to be viewed as a threat both to the state and to individual interests.

The consequence of being both and neither state/individual at a moment when the world was being divided up into essential dualities was the forced translation of the medieval city into one or the other. It is at this moment of translation that we can begin to see the definitive emergence of a public/private distinction among corporations. To safeguard individual rights, the city becomes a component of the state, with deliberately circumscribed political powers. Once again, Blomley (1994: 108) provides a useful summary of this moment:

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indicated no threat to corporate operations.

> Whereas previously the city was regarded as a corporation that could hold certain rights and wield power, these two functions were now divided. The city, as a public corporation, came to be regarded as an entity to be identified with the power wielding state. The private corporation (the firm), conversely, became a rights holder, subject to the predations of public corporations such as the city. The effect was to force a distinction between city power—regarded as a suspect form of coercive power—and corporate power—characterized as the rights of a protected agency (or 'legal person') exercised in the name of liberty.

I will discuss the emergence of the rights holding private corporation in greater detail below.

First, one example of the city's "public" transformation may prove helpful. As Blomley (1994) illustrates, authority over "local legal jurisdiction" and "urban legal institutions" (Blomley, 1994: 100) were centerpieces of the medieval city that both enabled the close regulation of economic practices and helped to define local community membership. Yet, the production of the common law[29] in the sixteenth and seventeenth centuries, very much a component of the institutionalization of liberalism, integrated on a national scale England's very fractured and disparate legal geography and undermined the legal authority of the city:

> The emergence of a national system of common law (common to all) was itself premised on the selective and forcible cooption of a decentralized ("communal") legal mosaic in which sovereignty was indistinct and multivocal, rather than an inexorable process of legal rationalization....In the process, the function of many local institutions—such as the shire court—began to change from an element within a localized and relatively autonomous set of legal institutions and practices to a component within a national system. They became, for the first time, component parts of the 'local state,' charged with the 'bottom-up' task of collecting spatial information on crime and disorder, and the 'top-down' task of administering central law. Their 'horizontal' character essentially disappeared, given their new location within a 'vertical' system of spatial surveillance and

[29] The common law is...

administration (Blomley, 1994: 78).

In the translation of the medieval city to fit the liberal distinction between public and private spheres of activity, the city thus became a public entity, essentially an arm of the state, and in the process lost much of whatever power and autonomy it had exercised under medieval conditions.

The above discussion covers important elements of the legal history and evolution of the corporation in general as a form of organization. Frug's (1980) work in particular links the demise of city power and autonomy directly with both the assertion of a public/private division in corporate law and practice and the emergence of the distinctly "private" corporation. Using the medieval town as the touchstone of urban power and autonomy, he illustrates the legal shifts that transformed the medieval city from an integrated economic, political, and communal unit into the state controlled "public" corporation that it is today. This focus on the production of city "publicness" and powerlessness is likely due to the historical moment at which he was writing—the onset of widespread deindustrialization and urban economic restructuring of the late 1970s-early 1980s—when the inability of cities to control their political and economic futures was becoming especially apparent. And though Frug recognizes that modern society is so ensconced in liberal ideology that it is difficult for us to fully understand and appreciate the collective identity and sense of communalism fostered by the medieval city and that for the modern observer "the idea of the town as a community would appear largely as a cover for the advancement of particular interests" (Frug, 1980: 1085), his ultimate aim is

to restore some of the city's complex public/private functions as part of a radical democratic political project centered around the empowered city.

I wish to take nothing away from Frug's analysis or his political project. Instead I want to build from his work and advance it in an alternative direction. Frug focuses his critical efforts on undermining the argument in favor of city "publicness." Blomley (1994) maintains a similar focus in his work, lamenting the loss of private power among cities and the rise to power of the rights holding private corporation. One problem with pursuing city autonomy through restructuring the legal status of *the city* is that any combination of radical democracy and city power still must contend with the rights and powers of existing private corporations. Unless the concept of the private corporation is itself destabilized it is difficult to imagine how city power and autonomy could be achieved. The privateness of the private corporation is thus the component of the story that demands critical investigation and justification. This task is taken up in the following section.

The Corporation in the US Context

The history of the legal transformation of the English medieval town provides the necessary background for understanding the production of the singularly public corporation. But an investigation of the private corporation is best conducted within the US context, for it is in the US that the private corporation became the standard form of organization for commercial activity (Handlin and Handlin, 1945). In many respects, the

United States is a product of corporate activity.[30] The Hudson's Bay Company, the Plymouth Company, the Massachusetts Bay Company, and the colonies of Virginia, Connecticut, Rhode Island, and Georgia all exercised a unique legal arrangement with the English Crown not unlike that of the English medieval town. And, as Davis (1965: 3) explains, the corporate form was also used for a variety of other purposes in colonial America:

> From the founding of Jamestown to the days of the Revolution, successive shiploads of British subjects brought with them larger and larger familiarity with the corporation,--for plantation and town organization, for charitable, religious, or literary foundations, for trading and local business purposes....It is therefore not surprising that from a very early date the corporation should have played a prominent role in American life.

Yet, in America, like in England, the distinction between public and private corporations "was a differentiation completely unknown before 1800" (Handlin and Handlin, 1945: 19-20). This is not to say that early American corporate activity was not commercial or profit-oriented. Some of it was, and some of it wasn't, but all corporate activity was treated equally under the laws of the time. During the colonial period, when most corporate activity was in one form or another under English control and dedicated to public works, education, or charity, such uniform legal treatment caused few problems (Davis, 1965). In the working out of a new formal governance structure after the American Revolution, however, and with the increased prevalence of corporate commercial activity towards the end of the eighteenth century (Handlin and Handlin, 1945), the uncertain legal position of the corporation became more problematic.

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[30] I am referring here to the colonial settlement of what would become the United States of America, not the geographic territory that was already well occupied and utilized by the various indigenous inhabitants.

While the corporation's position in the fledgling US may be attributable to some extent to the legacy of hazy legal treatment received in the English context, in practical terms most difficulties stem from the fact that the corporation was not included in any of the country's founding documents. The US Constitution speaks of "citizen" and "persons," but makes no mention of corporations. This absence of explicit attention has been the cause of much speculation and has been the subject of ongoing debate (Mark, 1997). One widely shared perspective emphasizes the founders' and early citizens' opinion of the corporation as a questionable and potentially dangerous institutional arrangement that could centralize wealth and power in ways that compromise democratic principles and practices (Bakan, 2004; Grossman, 1998; Mark, 1987; Millon, 1990). Brandeis (1933) summarizes this position well:

> Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes. It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.

Whether motivated by these or other concerns, however, the silence of the US Constitution with regard to the corporation has left the relationship between corporations and the state a matter of ongoing interpretation. Most commonly the Constitution has

been interpreted to confer no federal authority over the legal creation and regulation of corporate organizations, apart from concerns of interstate commerce and, as will be discussed below, matters of contract.[31] Instead, from the nation's earliest days authority over chartering and regulating corporations has been assumed by the legislatures of the individual states (Mark, 1997), which, at least until the second half of the nineteenth century, tightly controlled both the process of incorporation and the powers of corporate organizations. Not unlike the process in England, charters of incorporation specifying in detail the parameters of corporate composition, duration, and purpose, were granted on a case by case basis through passage of special legislation, and typically only to realize generally recognized public needs, such as for infrastructure, banking services, utilities, etc. (Millon, 1990; Hurst, 1970). This tight legislative control reflected a central role for the state in corporate affairs.

While the state legislatures asserted control over the creation of corporations through the chartering process, and Congress substantially ignored the issue altogether during the nation's early years, the Supreme Court assumed the role of negotiating the relationship between corporations and the states and of interpreting the rights and duties of corporations under the US Constitution (Mark, 1997; Schane, 1987). Thus, though the states had the power to create corporations, it was the Supreme Court that defined corporate parameters and determined the legal place of the corporation within the US context.

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[31] Mark (1997) argues that the lack of federal authority over corporate chartering is highly debatable. For various reasons, but primarily because corporate activity was especially local at the time of the country's origin, state legislatures assumed control over this function. But Congress has chartered corporations and could conceivably assume authority over this realm. Debates emerge periodically over the appropriateness of such a shift in corporate chartering practice.

One of the first and arguably most significant examples of Supreme Court influence over corporate affairs can be found in the case of *The Trustees of Dartmouth College v. Woodward (1819)*, in which the Court asserted a distinction between public and private corporations.[32] As discussed above, in a formal legal sense no such distinction existed prior to the nineteenth century. And while different writers suggest different motivations for the emergence of this distinction in the American context,[33] substantially all who consider the issue point to the centrality of the *Dartmouth* case. How the *Dartmouth* court understood and defined the corporation thus warrants close examination.

The public, the private, and Dartmouth

The explicit concern in *Dartmouth* was whether the corporate charter for Dartmouth College should be understood as the type of contract protected under the Contracts Clause of the US Constitution[34] and, if so, whether legislation passed by the New Hampshire legislature in 1816, which would have altered that charter, should be nullified as unconstitutional. After extensive deliberation, reflected in a long and detailed opinion, the Court found that the charter of incorporation of a "private" corporation was a contract between the state and the corporation's founders, which could not be repealed, amended, or otherwise altered by the state without the corporation's consent. The Court thus found New Hampshire's proposed charter changes impermissible under the US Constitution and

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[32] In fact, the first Supreme Court case to assert a public/private distinction was *Terrett v. Taylor* (1815). However, the Court made such an assertion in that case without any substantive consideration. Thus, *Dartmouth* is the recognized authority over the issue.

[33] Frug (1980) suggests the distinction was designed to undermine the position of the city, based on the goal of national unity and the fear of real local democracy among the nation's founders. Hurst (1970) and Dodd (1936) emphasize the links between private commercial privileges and economic development goals. Others focus more specifically on the need for investor protections.

[34] Article 1, Section 10: "no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

ruled in favor of the Trustees of Dartmouth College.

As discussed above, at the time the *Dartmouth* case was heard no explicit distinction between public and private corporations existed in statutory or case law in either the United States or England. Thus, it is worth exploring in some detail the Court's understanding of the corporation that led them to their decision in this case. In this regard, two complimentary, yet distinct, lines of reasoning can be found in the opinions of the Court, one developed by Chief Justice Marshall as the official opinion of the Court and the other developed in the concurring opinions of Justices Washington and Story. Both approaches recognized a legal distinction between public and private corporations, characterized the charter of incorporation as a contract, and concluded that Dartmouth College was a private corporation not subject to government control. However, the different opinions emphasize different bases of justification. While Chief Justice Marshall focuses on the purposes for which the corporation is created, the opinions of Justices Washington and Story place more significance on the corporation's private foundation. Both forms of justification warrant close attention.

That the corporate charter should be viewed as a contract, Chief Justice Marshal found beyond question: "It can require no argument to prove, that the circumstances of this case constitute a contract." Thus, the important question was whether the charter was the type of contract specifically protected under the terms of the US Constitution. The US Constitution, according to Chief Justice Marshall's interpretation, protects contracts exclusively of the type "which respect property." Thus, the deciding factor would be

whether the Dartmouth charter constituted specifically a property-based contract, a question that would itself be answered through evaluation of the charter details. But, first Chief Justice Marshall established the criteria by which the Dartmouth charter would be evaluated:

> If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New-Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States. But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case.

Chief Justice Marshall thus separates corporations into two types subject to different degrees and qualities of state involvement: public corporations were to be understood as subject to the whims of the legislature, while private corporations were "unconnected with government" and not subject to legislative control. The object of judicial review would be to consider the foundation and purposes for which Dartmouth College had been incorporated and to "most seriously to examine [the] charter, and to ascertain its true character." Upon review, Chief Justice Marshall observed the origin of Dartmouth College to be "the Indian charity school, established by Dr. [Eleazer] Wheelock, at his own expense" in 1754, which was subsequently incorporated, in 1769, after Dr. Wheelock attained additional funds and eventually a corporate charter, in England, in order to expand his activities on a site provided in the colony/state of New Hampshire. In

this sense, Dartmouth College was "endowed by private individuals...and, as far as respects its funds, a private corporation." As will be discussed below, for Justices Washington and Story, finding the foundation of the corporation to be private was enough to determine the case. But for Chief Justice Marshall, the question to be answered was whether the objects or purposes for which the corporation was chartered, or the very act of incorporation itself, could cause the corporation to be more appropriately classified as public, regardless of the "privateness" of its foundation. The matter of corporate purpose was the first engaged:

> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?

In response to this question Chief Justice Marshall noted that the charitable and educational practices Dr. Wheelock conducted through his "Indian charity school" prior to incorporation should be considered private activities, funded and directed voluntarily and independently by Dr. Wheelock himself. Thus, there is nothing about education that should be considered inherently "public," nothing that justifies the full subjection to "the will of the legislature" of all individuals or institutions engaged in educational services. Based on this understanding, Chief Justice Marshall shifted his focus to the act of incorporation, considering whether the decision to carry on educational activities under corporate seal should turn public what had previously been private activities. Once again,

the grounds for treating Dartmouth's foundation as "private" are addressed more directly by Justices Washington and Story. Chief Justice Marshall asserts the private foundation and considers instead whether and how the particular form of state involvement justifies full state control over the corporations created. His approach to this question has become one of the most widely quoted statements on the nature of the corporation:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence....Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created.

The charter of incorporation creates the corporation, specifies the corporation's rights and powers, and serves as the locus of ultimate authority over corporate operations. The corporation is, therefore, whatever it is defined to be in the charter. However, the central role of the state in creating the corporation—through the chartering process—begged the question of who should rightfully exercise control over the resulting "artificial" creation:

> Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied?

For Chief Justice Marshall, this is the central uncertainty to be resolved by the Court: does the "artificial" nature of the corporation justify absolute state control over what would otherwise be regarded as "private"? His engagement with this issue is deceptively simple. In essence, he contends that control for the state over the corporation is confined to the moment of charter negotiation. As states review all charter applications it should be assumed that they approve only those charters that serve positive ends:

> The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant....If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature....

The process of charter negotiation provides the state with the opportunity and the power to reject or modify charters for corporations that exhibit structural, organizational, or behavior characteristics contrary to the interests of the state and/or the public. But once charters have been approved, they are contracts, and because they are contracts the simple fact that the state was essential to their creation does not give it power to unilaterally change charter terms and conditions. Thus, nothing about the relationship between the state and the corporation justifies ongoing state control over "the character of the institution."

> From the fact that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not

> grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes.

The next matter taken up concerned the population to be served by a corporation. If the foundation of the corporation is private, and nothing in the act of incorporation or the language of the charter implies a public character, could a corporation still be considered public based on the population it serves? In other words, who has a legitimate claim to the benefits of a corporation's actions? This is a complicated matter that overlaps directly with the question of corporate foundation, with the question of whose interests the corporation includes and represents. Once again Chief Justice Marshall turned to the details of the Dartmouth case, considering "for whose benefit the property given to Dartmouth College was secured." Against the defendant's contention that the residents and state of New Hampshire could claim an interest in the corporation's activities, Chief Justice Marshall offered the following:

> The particular interests of New-Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New-Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New-Hampshire, but because it was 'most subservient to the great ends in view,' and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut river....So that the objects of the contributors, and the incorporating act, were the same; the promotion of christianity, and of education generally, not the interests of New-Hampshire particularly.

According to this interpretation of the charter, the place in which the corporation is located is incidental to the corporation's existence. While donations of land formed a constitutive part of the Dartmouth corporation, the *private* nature of those donations conferred a defensible interest only to the donors, not to the state or to the population of the state within which that land was situated. While this component of Chief Justice Marshall's opinion ostensibly addresses the question of the population to be served by the corporation, it more significantly speaks to corporate composition, to the constitutive foundation of the corporation. The population of New Hampshire, as represented by the state legislature, could claim no rights over the operation and/or the benefits of Dartmouth College because the Dartmouth corporation was defined by the Court as constituted exclusively of the private property of the donors. As noted above, Chief Justice Marshall acknowledged that the Dartmouth foundation was private in nature but did not explain or justify why the character of the foundation should determine the character of the corporation and/or the relationship between the corporation and the state. That justification is provided in the concurring opinions of Justices Washington and Story.

Chief Justice Marshall found nothing in the foundation, purpose, nature, or orientation of the corporation to justify its subjection to state control and therefore ruled in favor of the Trustees of Dartmouth College. Despite being extensively argued and compelling, however, his decision relied primarily on reason and he cited very few sources to support his conclusions (American Law Review, 1874). In contrast, and perhaps as a consequence, Justices Washington and Story sought authority for their similar

conclusions in legal precedent, particularly in English jurisprudence. Justice Story stated this approach explicitly, suggesting that in order to address the questions raised in the *Dartmouth* case:

> It will be necessary...to institute an inquiry into the nature, rights, and duties of aggregate corporations at common law; that we may apply the principles, drawn from this source, to the exposition of this charter, which was granted emphatically with reference to that law.

The full details of Justice Story's excursion into common law understanding of the corporation are unnecessary for the present discussion. It will suffice to note that, following Blackstone (1765-1769), Justice Story finds corporations divisible into the primary categories of spiritual and lay, and within the lay category into the categories of civil and eleemosynary. He then suggests a further distinction:

> Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution.

Justice Washington, recognizing the same distinction, emphasized the qualities of private corporations:

> But private and particular corporations for charity, founded and endowed by

> private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and, as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it.

Corporate status in the common law, according to Justices Washington and Story, is thus determined by the source of corporate funding and the purpose of corporate activities. In contrast to public corporations, whereby the state is authorized "to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure," the legislature cannot "interfere" in the affairs of private corporations because such corporations are the private property of their founders and/or investors. The foundation of private property thus circumscribes the regulatory powers of the state:

> When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or devest (sic) the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change, or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well settled doctrines of the common law.

The "authority" to which both Justices Washington and Story appeal in affirming the unique relationship between the state and private corporations is primarily the English case of *Philips v. Bury* (1694), which addressed similar questions regarding the ultimate authority over corporate organization and management and the interpretation of the

corporate charter. Other authorities are also cited regarding the basic definition and understanding of the corporation, in particular Blackstone (1765-1769) and Kyd (1793-1794), but *Philips v. Bury* is relied on most heavily in resolving the concerns particular to *Dartmouth*. The *Philips v. Bury* case engaged the issue of visitatorial rights associated with eleemosynary corporations (charities). The specifics of the case are not relevant to the present discussion. What is important is how the case approached matters of corporate composition and control. Justice Holt, who delivered the opinion of the court,[35] defined visitation as "an authority to inspect the actions and regulate the behavior of the members that partake of the charity," and determined visitatorial rights according to the character of a corporation's foundation:

> In order that we may better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government and such as are for private charity. Those that are for the public government of a town, city, mystery or the like, being for public advantage, are to be governed according to the laws of the land. If they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's courts....Private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and, therefore, if there is no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors who are to proceed and act according to the particular laws and constitutions assigned them by the founder....So that patronage and visitation are necessary consequents one upon another....It is an appointment of law; it arises from the property which the founder had in the lands assigned to support the charity, and as he is the author of the charity, the law gives him and his heirs a visitatorial power.

This visitatorial right, as defined by Justice Holt, provides the basis for the public/private distinction asserted by the *Dartmouth* court: with the investment of property comes the

[35] At the time, Justice Holt's was in fact a dissenting opinion. However, the case was subsequently reversed by the House of Lords.

right of visitation. Corporations founded through private property are private corporations with specific "powers, rights and privileges [that] flow from the property of the founder." By investing their property in the founding of a corporation, individuals obtain the right to determine how that corporation will be organized and managed.

And it is this right of property that, according to Justice Story, makes the charter of the private corporation a contract which the state may not unilaterally alter without violating the US Constitution. The charter is an agreement that ensures founders and/or donors that their intentions, as articulated in the charter, will guide corporate behavior, in perpetuity, and free from government interference:

> From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter....As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation.

Once again, the contract established is exclusively between the state and those donating or investing private property in the corporation. The Court recognized no other constitutive components and no other interests represented by the corporation, with Justice Story taking special pains to reiterate Marshall's denial of any responsibility of the corporation to place in which it is located:

> The franchises granted by the charter were vested in the trustees in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demenses of the corporation, held by

> it, not, as the argument supposes, for the use and benefit of the people of New-Hampshire....There were not, and in the nature of things could not be, any other cestui que use entitled to claim those funds....No particular person in New-Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object.

In summary, the Court ruled in favor of the Trustees of Dartmouth College on the grounds that Dartmouth College was a private eleemosynary corporation, founded and constituted exclusively by private donations, and incorporated to pursue private educational ends under the visitatorial authority of its trustees, all of which meant that the Dartmouth College charter was a contract protected under the Contracts Clause of the US Constitution. As the Court spent most of its effort establishing the authority of the charter in determining corporate rights and powers, in the end, the case turned on the terms and language of the Dartmouth charter. Nothing in that charter was found to confer to the New Hampshire legislature the power to alter the charter terms or otherwise influence the organization or operation of the Dartmouth corporation.

Discussion

The case of *The Trustees of Dartmouth College v. Woodward* was important at the time it was heard but its significance has increased substantially with time. While many of the limitations it placed on the powers of the state over "private" corporations[36] were mostly overcome through specific language subsequently included in corporate charters and state constitutions reserving the state's right to amend and/or revoke charters, the definition of the corporation developed in the case significantly bolstered corporate rights and powers.

[36] Though it dealt specifically with private eleemosynary, or chartable, corporations, the decision has been applied equally to all private corporations.

As one late-nineteenth century commentator notes, though the *Dartmouth* decision has gathered a long list of supporters, it also represents a serious obstacle to anyone concerned by the expansion of corporate power (American Law Review, 1874: 190):

> It frequently stands in the way of what all admit would be beneficent legislation, and places many corporations monopolizing enormous privileges and wielding enormous influence—influence so great as often to shape legislation and control political action—entirely beyond governmental control, so long as they keep within the limits of vague and loosely worded acts of incorporation originally drawn up by themselves. Since the decision, a new class of corporations have sprung up and extended their operations over all the continent, of a character such as was before unknown....To these great associations, often so powerful as to constitute *quasi* sovereignties, the decision in the Dartmouth College case has been indeed, not a *Magna*, but a *Major Charta*, for it has conferred upon them an independence such as the East India Company in its palmiest days never possessed, or even aspired to.

I will save for the following chapter consideration of the consequences of the *Dartmouth* decision and its implications for the subsequent understanding and treatment of the corporation in the US. Here I want to focus on the decision itself and critically analyze some of the arguments on which that decision was based. In doing so, however, I want to make clear my goals. The purpose of analyzing the *Dartmouth* decision is not to evaluate the correctness of the ruling, to expose gaps in reasoning or logical inconsistencies, or to suggest that a different decision *should have* been reached. Rather, my objective is to examine some of the political assumptions that guided the *Dartmouth* decision and to suggest that at the very least a different decision *could have* been reached. The aim is to emphasize the contingency of the *Dartmouth* decision in the hopes that doing so can contribute to an alternative contemporary politics of corporate regulation.

Perhaps the best place to start this analysis is with the legal distinction between public and private corporations that served as the basis for the Court's decision. As discussed in the first half of this chapter, prior to the *Dartmouth* case no such distinction existed anywhere in the laws of either England or the United States.[37] True, the complex legal status of the medieval town and the colonial trading corporation had been under assault in England for some time, and support for the distinction, as far as the Court was concerned, could be found in the common law, but the distinction itself as articulated did not exist prior to the Court's assertion of it. In this sense, Justice Story's statement that "[a]nother division of corporations is into public and private" can be recognized not as an observation of an existing division but rather as a critical moment in the creation of that division. The uttering of the words and the passage of the decision brought the division into reality in a legal sense.

Whether the *Dartmouth* Justices intended to assert a distinction where none existed is a matter of speculation. What can be examined is the formally articulated basis on which that distinction was made. The primary source here is the case of *Philips v. Bury*, concerning visitatorial rights. One compelling argument, extensively developed in an American Law Review editorial (1874), suggests that the question of visitation confronted in *Philips v. Bury* is different from the question of legislative power raised in *Dartmouth*. At the time the Dartmouth charter was issued—in 1769, by George the Third—the powers of Parliament were recognized as omnipotent. Chief Justice Marshall recognized as much in his decision: "According to the theory to the British constitution,

[37] Note, once again, that the public/private distinction had been asserted previously in the US Supreme Court case of *Terrett v. Taylor*, in 1815, but the Court in that case did not deliberate the issue.

their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned."

Furthermore, parliamentary powers did not apply differently to different types of corporations; Parliament exercised the same authority over corporations with public or private foundations, making the public/private distinction worked out by the *Dartmouth* court superfluous.[38] A "private" foundation may distinguish one corporation from another in certain respects—such as visitation—but it shouldn't affect legislative authority over the franchise. The visitatorial rights assigned to the founders and donors of private charities pertained more to the day to day management of corporate operations and had no impact on the powers of Parliament over corporate charters. In this sense, the legislative powers exercised by Parliament were different from and "higher" than the visitatorial rights emphasized by the Court. Making changes to a corporate charter may not have been a wise move for parliament. But it would have been a legitimate exercise of power.

If Parliament possessed the authority to alter corporate charters it is unclear from any of the opinions of the Court why the matter should be treated differently under the authority of the legislature of New Hampshire, which, Chief Justice Marshall noted, was the successor to the crown's "rights and obligations." This is doubly true given Justice Story's

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[38] Even if the distinction were warranted, Handlin and Handlin (1945: 19-20) note that Dartmouth should more appropriately have been considered a civil rather than eleemosynary corporation: "Until [1800] corporations were either clerical or lay, with the latter further divided into eleemosynary and civil. There is no doubt that at their origin business corporations like universities came under the heading of civil. Both Kyd and Blackstone put the Bank of England, the East India Company, and the insurance and manufacturing companies in the same category as boroughs, universities, and the College of Physicians" (Handlin and Handlin, 1945: 19-20).

insistence on an "inquiry into the nature, rights, and duties of aggregate corporations at common law," under which the Dartmouth charter was granted. The implication is that:

> [U]nless there was a contract here irrevocable or unalterable even by Parliament,—unless it was understood at the time the charter was granted that there was no department of government which could revoke or amend it without a violation of public faith,— the power of the State of New Hampshire...over the charter and over the college was as plenary and omnipotent as the power of the British Parliament would have been (ALR, 1874: 228).

According to this critique, then, the Court's ruling was clearly erroneous. Nevertheless, the choice of the Court was to disregard the question of parliamentary omnipotence and to treat the matter instead as a question of visitatorial rights. The development of the public/private distinction in corporate law is one outcome of this decision, which carries forward additional implications and consequences to be explored in the following chapter.

A second and closely related critique of the *Dartmouth* decision pertains to the Court's understanding of contracts and its interpretation of the Contracts Clause of the US Constitution (American Law Review, 1874). As discussed above, the Court's treatment of this case under the concept of visitatorial rights enabled it to view the corporate charter of the privately founded corporation as a contract between the state and those committing property to the corporate purpose. And as a contract the corporate charter was protected from legislative interference by the US Constitution. On one hand, there is evidence to support the claim that the term "contracts" in the US Constitution originally applied only to "debts" with the intended purpose of the Contract Clause being to prohibit state

legislatures from canceling private debts, not to prohibit state legislatures from passing the sort of legislation attempted in this case (American Law Review, 1874).

On the other hand, and much more importantly, it is uncertain why individual states, as supposedly sovereign entities, should be permitted to contract away powers that are inherent to the exercise of sovereignty—such as powers of taxation, conscription, or, as in this case, corporate regulation. If charters of incorporation issued by the legislature are binding contracts unalterable by a subsequent legislature, then any particular legislature has the power to compromise the capacity of a future legislature to govern, has the power to compromise, in essence, a future legislature's sovereignty. This conception of contract thus circumscribes state powers to a startling degree:

> To rescind the exemption from taxation, when it proves burdensome to the State; to attempt to limit the powers incautiously granted to the railway company, when shown to be mere instruments of oppression and extortion; to repeal the monopoly of furnishing an essential article of food, even to save two hundred thousand people from starvation, —are not wise and beneficent acts of legislation, but laws impairing the obligation of contracts, breaches of public faith so contrary to sound principles of government that they are classed with *ex post facto* laws and bills of attainder! Chief Justice Marshall did not mean this; but his decision means this to the present generation (American Law Review, 1874: 192).

The point of this line of critique is that the interpretation of the concept of contract that enabled the decision in the *Dartmouth* case, reinforcing preceding Supreme Court decisions regarding similar questions of contract,[39] undermined the sovereign prerogatives of the state legislatures. In contrast, a different interpretation of legislative authority, one more reflective of parliamentary power, could have led the Court to view

[39] Most significantly, *Fletcher v. Peck* (1810), *New Jersey v. Wilson* (1812), and *Terrett v. Taylor* (1815).

sovereign prerogatives as inalienable through negotiation or contract. And such a different conception of contract would likely have produced a different decision in the *Dartmouth* case.

A final component of the *Dartmouth* decision requiring critical attention is the conception of the corporation as exclusively constituted by and responsible to its propertied founders/investors and the associated insistence by the Court on the incidental nature of corporate location. In one sense, these issues were covered under the concepts of legislative power and sovereign prerogative discussed above; if the legislature had been interpreted to possess the omnipotence of Parliament, then the character of the corporate foundation would have been irrelevant and the New Hampshire legislature would have had full authority to regulate the corporation. But as it was, the character of the foundation became the decisive factor in the decision. Because the foundation of the corporation was private, the Court's assertion that "the particular interests of New-Hampshire never entered into the mind of the donors," was sufficient to limit both legislative control over the corporation and claims by any "particular person in New Hampshire" to the benefits of the corporation's activities. This understanding of corporate composition requires clarification.

To adequately address this issue it is necessary to revisit the Court's general conception of the corporate form of organization. While the English case of *Philips v. Bury* shaped the Court's understanding of corporate regulation and control, the more fundamental question of corporate definition was drawn primarily from Justice William Blackstone's

Commentaries on the Laws of England (1765-1769). According to Blackstone, corporations are to be understood as "artificial" persons "created and devised by human laws." They may be divided into various categories—ecclesiastical and lay, civil and eleemosynary[40]—and created for various functions—government, commerce, charity—but in all cases the purpose of the corporation as a legal institution is to provide special protection for certain political rights:

> [A]s all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

While a variety of rights are recognized as "inseparably incident to every corporation,"[41] chief among the rights to be protected by the corporate form, at least as regards eleemosynary corporations,[42] is the right of property. Drawing explicitly from *Philips v. Bury*, Blackstone recognizes the visitatorial rights of those donating property in the corporation, emphasizing their right "to see that that property is rightly employed, which would otherwise have descended to the visitor himself." The important difference

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[40] In fact, the first division recognized by Blackstone is between corporations sole and aggregate, whereby corporations sole "consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages." The King is an example of this type of corporation. Corporations sole and ecclesiastic corporations (spiritual corporations) are not relevant to the present discussion.

[41] Blackstone acknowledges five "powers" in particular: 1. To have perpetual succession....2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors: which two are consequential of the former. 4. To have a common seal....5. To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void.

[42] It will be recalled that the *Dartmouth* Court defined Dartmouth College as a private eleemosynary corporation.

between visitatorial and legislative powers has already been discussed, and it is worth noting that Blackstone appears to have had a considerable appreciation for that difference, alluding on several occasions to Parliament's "absolute and transcendent authority." Nevertheless, that a donation or investment of property could confer even a visitatorial right is a notion that can be traced to a particular understanding of property.

Blackstone's approach to the concept of property is rooted in a combination of religious and natural rights. On one hand, he recognized all property as ultimately derived from God:

> In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.

This is a particularly Christian perspective on the relationship between humans and nature, gathered primarily from the Bible.

On the other hand, private property is a fundamental natural right to which each individual is entitled. Here Blackstone draws explicitly from Locke to define private property as the product of labor, whereby during some moment of "primeval simplicity" the occupancy and use of land or other object conferred a natural right of ownership to whomever applied their individual labor to what had previously been held in common.

With increases in population and societal complexity, however, "it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." A framework of laws therefore emerged to protect the property rights of individuals or, as Blackstone defined it, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

Such is the nature of property rights advanced by Blackstone and adopted by the *Dartmouth* Court: a form of "despotic dominion" derived from God, developed in nature, and protected through law. It reflects a liberal world view in which individuals exist independently of one another, with independent needs and interests that they pursue for personal gain and seek to protect from others. Yet this is not the only way to understand either the individual or property. For example, communitarians view the isolated and independent individual as a conceptual and practical impossibility as the needs, interests, capacities, and rights of individuals are inherently socially derived and politically produced (Dewey, 1927). And Frug's (1980) discussion of the legal history of the medieval town illustrates that, at the very least, other conceptions of property, such as communally held, have existed and could have been referenced in this case.[43] Once again, the point of recognizing such alternative conceptions is not to suggest that the Court defined property *incorrectly*, but rather to recognize that the *Dartmouth* Court utilized a particular understanding of property associated with a particular political perspective. A different conception of property may have produced a different decision in the case.

[43] Examples of alternative conceptions of property will be explored in greater detail in Chapter 7.

Conclusion

The purpose of this chapter has been to explore the emergence of a legal distinction between public and private corporations. In the first half of the chapter the English medieval town was used as an example of corporate activity prior to the public/private distinction, whereby the medieval town operated as a complex legal institution that integrated political, economic, and territorial components. The twin interests of nationalism and individualism, however, spurred by the emergence of liberal political philosophy, undermined the autonomy of the medieval town and stripped it of its legal complexity. The medieval town subsequently became a "public" corporation, with rights and powers closely controlled by the state. And it is this transformation to "publicness" that, according to Frug (1980), explains the relative powerlessness of contemporary cities.

While exceptionally detailed and informative, Frug's investigation covers only half the story of the public/private corporate distinction. And, though it is clear that in its "public" transition the city lost important elements of autonomy, there seems to be some degree of justification for this: the oligarchic structure compromised social justice and equality, at least by twenty-first century standards. Left unclear and unjustified by the emergence of "public" corporations is the legitimacy of a distinctly private realm of corporate activity supposedly beyond the reach of state control. The second half of the chapter attempted to explain the "privateness" of private corporations.

The formally defined "private" corporation emerged at the beginning of the nineteenth

century through the US Supreme Court case of *The Trustees of Dartmouth College v. Woodward* (1819), the first case in which the public/private distinction was asserted and deliberated in a substantive manner. The Court claimed to derive the distinction from the treatment of the corporation in the common law, in which, according to the Court's interpretation, control over a corporation was a matter of visitatorial power determined by the character of its foundation; corporations founded by the state using public resources were public and subject to state control, while those founded by private property were private and subject to the private control of the donors, founders, and/or investors. In turn, the property-based charters of private corporations were defined as contracts ensuring the protection of the property invested in the corporation.

As discussed above, the Court's decision to view the *Dartmouth* case as a question of visitatorial rather than legislative power was a curious one with serious political implications. The argument put forward here is that this decision can be understood as motivated by a political attachment to a liberal individualist understanding of property and ownership in which owners legitimately exercise a "despotic dominion" over their property "in total exclusion of the right of any other individual in the universe" (Blackstone, 1765-1769). Under this conception of property, the role of legal structures and state actions is to institutionalize and defend rights originally derived from God and nature. Thus, though the corporation was recognized by the Court as "an artificial being, invisible, intangible, and existing only in contemplation of law," the purpose of the private corporation was to protect the natural rights of donors/investors who chose to commit their property to a corporate purpose. It is in this sense that Chief Justice

Marshall defined the private corporation as the donors' representative, a legal creation that serves as "the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal." And it is for this reason that only the donors' interests, as articulated in the charter and as interpreted by the Court, are given authority over a corporation's structure and management.

Two important implications for the understanding and legal treatment of the corporation in the US follow from the Court's decision, both of which will be examined in detail in the following chapter. First, the significance of defining the private corporation as the private property of its founders, donors, and/or investors cannot be overstated. As will be discussed in the following chapter, while different ways of understanding the rights of the corporation have emerged since the *Dartmouth* case and have influenced the nature and direction of corporate regulation, the conception of the corporation itself as the private property of investors remains substantially unchanged. And, from a legal standpoint, as a form of private property, the corporation is to be organized and managed according to investors' interests, as opposed to the interests of the state or the public. Second, the "contract" status of the corporate charter, itself based on the propertied foundation of the corporation, placed the charter at the center of debates regarding corporate rights and powers. As any particular corporation was to be understood as simultaneously enabled and restricted by the terms of its charter, the chartering process acquired new political significance. The resulting politics of corporate chartering brought a new level of complexity to the task of corporate regulation.

Chapter Seven: The corporation and the Court

The distinction between public and private corporations asserted through the *Dartmouth* case established the corporation as the private possession of the individuals whose property is invested in the corporation and established the corporate charter as a contract which the state cannot unilaterally alter. The purpose of this chapter is to consider how from such a foundation, whereby the corporation was considered the "assignee" of investors' rights, the corporation itself came to be treated as a private individual with its own political rights. This chapter will also consider the consequences of this understanding of the corporation for the relationship between corporations and the place(s) in the which they operate.

The evolution of the corporation[44] into a rights-bearing entity occurred over time through a combination of state legislative changes, in which the conditions of corporate organization and operation were restructured, and a series of Supreme Court decisions, in which the corporation was interpreted to possess different qualities in different circumstances for different purposes. The two processes worked simultaneously and in complimentary ways to define and redefine corporate rights and powers in the United States. The legislative treatment of the corporation will be examined in the following chapter. With regard to the role of the Supreme Court, this chapter focuses on two topics of deliberation: judicial jurisdiction and legislative jurisdiction. I will begin with the question of judicial jurisdiction, which concerns the determination of corporate citizenship, or whether the corporation can be considered a "citizen" entitled to access to

[44] Unless otherwise stated, the term "corporation" as used in this chapter refers to the private corporation as defined in *The Trustees of Dartmouth College v Woodward* (1819).

federal courts, and, if so, of which state a corporation is a citizen and how the location of that citizenship should be decided. The primary cases to be investigated in this section are *The Bank of the United States vs. Deveaux (1809)*, *Louisville, Cincinnati & Charleston Railroad Co. v. Letson (1844)*, and *Marshall v. Baltimore & Ohio Railroad Co.(1853)*. I will then engage the question of legislative jurisdiction, which also concerns the determination of corporate citizenship but for a different purpose. The task here is to decide which state's laws establish corporate powers and govern corporate behavior and which laws govern the behavior and treatment of a "foreign" corporation, or a corporation operating in a territory other than its home state. The primary cases to be investigated in this section are *The Bank of Augusta vs. Earle (1839)*, *Paul v Virginia (1868)*, *Pensacola Telegraph Company v Western Union Telegraph Company(1877)*, *Pembina Mining Co. v. Pennsylvania(1888)*, and *Southern Railway Company v Green (1909)*.

Each circumstance of deliberation and each change in the legislative treatment of corporations (corporate chartering) examined in this chapter contributes to the ongoing process of defining corporate rights and obligations—not only what the corporation is and how it is organized, but how the corporation should behave and what can and should be done, and by whom, when the consequences of corporate behavior are undesirable. Both theoretical understanding and legal treatment of the corporation have evolved significantly since the cases discussed in this chapter were heard. However, the argument put forward here is that these first engagements in the United States with substantive questions of corporate existence established a legal foundation that enables the ongoing development of corporate rights.

There are two points to keep in mind with regard to the story presented in this chapter. First, the focus of this discussion is on the development of a place-capital relationship that enables corporations to achieve and exercise mobility rights. Consequently, analysis concentrates only on the elements of corporate history most directly related to the development of these rights, passing over other components of corporate composition and behavior of equal general importance but less relevant to the aims of this particular research project. Second, the objective in developing this historical perspective is not to emphasize an immutable structure of corporate legality or an essential narrative of corporate evolution. Rather the goal is to reveal corporate rights and powers as ultimately contingent political achievements that remain open to political challenge.

Judicial jurisdiction

The Bank of the United States vs. Deveaux

The first Supreme Court case to consider the corporation as a form of organization in a substantive manner concerned the matter of judicial jurisdiction. In the case of *The Bank of the United States vs. Deveaux* (hereafter *Deveaux)*, the central issue was whether the Bank of the United States, a Pennsylvania corporation, could be considered a "citizen" of Pennsylvania for the purposes of a law suit brought in federal court. The circumstances of the case are as follows. The Bank of the United States, chartered by Congress in the state of Pennsylvania, opened a branch office in the state of Georgia but refused to pay the taxes required by that state. In response, Thomas Robertson, under the direction of Peter Deveaux, a Georgia tax collector, entered the Georgia branch of The Bank with a gun and forcefully removed from its vaults $2,000, roughly the amount of taxes owed to the state.

The Bank subsequently brought suit in federal court against Deveaux for the actions.

As the federal courts are reserved for disputes between citizens of different states, the task of the Supreme Court in this case was to determine its own jurisdiction, which required the court to define the locus of citizenship of The Bank of the United States. The Bank itself claimed citizenship of the state of Pennsylvania, basing this claim not on the fact that the corporation had been chartered in that state, but rather on the assertion that the members of the corporation were all Pennsylvania citizens. Thus it was urged that the suit be viewed as brought by the individual Bank members operating "in their corporate capacity." The corporation was the official party, but the individual corporate members were to be recognized as the real plaintiffs. As several commentators have noted, denial of this claim to citizenship would have meant the barring of corporations from federal courts (Schane, 1987; Millon, 1990; Mark, 1997).

Chief Justice Marshall delivered the opinion of a unanimous Court, ruling in favor of The Bank of the United States, and securing the corporation's right to federal court. This opinion was reached through the Court's decision to "look to the character of the individuals who compose the corporation" to determine corporate citizenship. The corporation itself was not to be considered a citizen, "for the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court." But it could represent the citizenship interests of its members who enter the court "under their corporate name." The reasoning behind this particular definition of the corporation has important implications for the

legal treatment of the corporation in the US.

The Bank of the United States claimed a right to federal court based on two factors. One was the terms in its charter of incorporation. The other was the citizenship of its members, which differed from the citizenship of the defendants. After dismissing the charter-based claim for lack of substance, the court approached the second in the following manner, with Chief Justice Marshall introducing the language he would later use in *Dartmouth*:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.

The key point for consideration was how the corporation should be recognized by the Court: as an independent legal entity, or as "a company of individuals." The difficulty for the Court was that, while *Deveaux* was not the first case to feature a corporation as a plaintiff, it was the first case in which the corporation's right to be a plaintiff was challenged. Thus, the Court had no substantive US-based legal precedent to draw from in developing its position. In the absence of relevant US case law, the Court looked to the English courts for guidance, recognizing, as it would again in subsequent cases, the extent to which legal understanding of the corporation in the US was "derived entirely from the English books."

The specific case consulted was the case of *The City of London vs. Wood*, argued in 1701. In that case, which also focused on the issue of judicial jurisdiction, it was decided that though a corporation, in this instance the City of London, is "a mere incorporeal legal entity" the court "could look beyond the corporate name, and notice the character of the individual" when settling jurisdictional questions. Other particulars of the *City of London* case aren't relevant to the present discussion. Of primary importance is that the *City of London* decision was taken by the *Deveaux* court "to be a full authority for the case now under consideration," enabling the Court to affirm federal jurisdiction based on the diversity of citizenship between the individual corporate "members" and the defendants. According to the Court's reasoning,

> That [corporate] name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted.

The corporation is thus nothing but a shell that represents its individual members, making the location of corporate citizenship synonymous with the location of member citizenship. This is where the *Deveaux* case ends, the task of determining diversity of citizenship, and thus federal jurisdiction, accomplished.

Several components of the *Deveaux* ruling warrant critical review. First, the decision to consult English law is important in that it was neither necessary nor politically neutral

(Mark, 1997). It is true that the US inherited the concept of the corporation from the English (and the English from the Romans), but that did not necessitate the Supreme Court's adoption of English legal precedents. As Mark (1997) explains, in the prior case of *Head & Armory v. Providence Insurance Co.* (1804), the Court had opened the door to English law by suggesting the application of the common law to US corporate governance. By taking this approach the US Supreme Court ignored various state court decisions regarding the corporation, "which might have suggested state-by-state variation in the conception of the corporation," and instead imposed "a single, universal understanding of what constituted a corporation" (Mark, 1997: 421-422), as derived from the English experience. The connection suggested in *Head & Armory* was made explicit in *Deveaux.*

The implication is that in the absence of any inherently accurate or appropriate way to understand the corporation the Court selected an approach that reflected ingrained political leanings regarding corporate legal treatment. As others have noted, the Court was not inclined to deny corporations access to the federal courts and it utilized various conceptual strategies to ensure federal jurisdiction (Schane, 1987; Mark, 1997). So much is clear from Chief Justice Marshall's remarks on the subject:

> Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority...but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favour of the right of incorporated aliens, or citizens of a different state from the defendant to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this point is shaken.

What can one follow if not the unexamined assumptions of "intelligent men"? But without Congressional action on the issue, the Court had little to work with to support this position (Mark, 1997). Its solution was to reach deep into English law to evoke the lessons from *The City of London vs. Wood.*

Another important component of the *Deveaux* case is the Court's recognition of the individual as the foundation of the corporate form of organization. The specifics of corporate composition wouldn't be worked out in detail for another ten years through the *Dartmouth* case. But as with *Dartmouth*, the focus on the individual in *Deveaux* narrowed the range of interests represented by the corporation and to which the corporation could be held responsible. As *Deveaux* dealt exclusively with the question of judicial jurisdiction, the implications of the Court's definition of the corporation for corporate management and control were not explored. But attaching corporate citizenship to the citizenship of the individual members constituted the corporation as a private possession. No other entity—the state, the local community, workers—was recognized as enough a part of the corporation to influence the determination of citizenship. Only "members," tacitly understood as propertied investors, were constitutive of the corporation.

Finally, through the *Deveaux* case corporations were defined as capable of at least some form of citizenship status, to be determined in this instance according to the citizenship status of the corporate members. As Schane (1987) argues, this is important because even if that citizenship status is narrowly defined and attached to corporate "members" rather

than the corporation itself, using the language of citizenship in relation to the corporation establishes a mental connection that opens a path for viewing the corporation as a citizen in its own right. Thus, "[t]hrough the medium of a common label, corporations and people are rendered similar to each other" (Schane, 1987: 7). As will be discussed below, subsequent cases built on the suggestion that as a type of citizen the corporation must also be a type of "person," in the legal sense, with all the rights and powers that attend such a designation.

Louisville, Cincinnati & Charleston Railroad Co. v. Letson

At the time *Deveaux* was heard, corporations were still predominantly local affairs, owned and operated by local investors to address local needs (Davis, 1965). Thus, the practice of looking to the citizenship of corporate members to determine the citizenship of the corporation could still yield one definitive location of citizenship (Mark, 1997). But the growth in size and complexity of corporate ownership and operation throughout the nineteenth century made determining corporate citizenship a much more complicated affair. So quickly had the corporate landscape changed that by 1844, when the Court once again faced questions of jurisdiction and corporate citizenship, the *Deveaux* ruling no longer seemed appropriate. Consequently, the case of *Louisville, Cincinnati & Charleston Railroad Co. v. Letson (1844)* introduced a new approach to defining the corporation in the US.

In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* (hereafter *Letson*), the plaintiff Letson, a citizen of the state of New York, brought suit against the Louisville,

Cincinnati & Charleston Railroad Co., a corporation chartered in South Carolina, for failure to live up to the terms of a contract. The Railroad contended that the suit could not be heard in federal court because two of its members were citizens of the state of North Carolina and two of its members were corporations that included members from the state of New York. The contention was that, according to the US Constitution, federal jurisdiction is only justified in cases between citizens of different states *and* when "the suit is between a citizen of the state where the suit is brought and a citizen of another state." Furthermore, following the strategies developed in *Deveaux* and *Strawbridge v Curtis*,[45] no diversity of citizenship could be established. Considering the terms of the suit, the task for the Court was thus twofold. It had to determine whether there was in fact no diversity of citizenship among the members of the corporation and the plaintiff, and it had to determine whether the corporation should be considered a citizen of the state of South Carolina, in whose Circuit Court the case was filed.

The Court began with the following statement:

> Our first remark is, that the jurisdiction is not necessarily excluded by the terms, when "the suit is between a citizen of the state where the suit is brought and a citizen of another state," unless the word citizen is used in the Constitution and the laws of the United States in a sense which necessarily excludes a corporation.

In other words, before considering the location of corporate citizenship the Court had to

[45] The case of *Strawbridge v Curtis* (3 Cranch, 267) established a formula for calculating diversity of citizenship in which "if there be two or more plaintiffs and two or more joint-defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction, and in cases of corporation to limit jurisdiction to cases in which all the corporators were citizens of the state in which the suit is brought."

first determine whether it was legally possible for a corporation to be treated as a "citizen" with rights under the US Constitution. To answer this question the Court found it necessary to articulate its understanding of the corporation as an organizational form.

> A corporation aggregate is an artificial body of men, composed of divers constituent members ad instar corporis humani, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its members together; and in which the whole frame and essence of the corporation consist.

The Court thus began with the by now familiar definition of the corporation as, at its base, comprised of individuals. The unique element of the *Letson* Court, however, was the use of biological metaphors and the emphasis on the various state-conferred rights and powers that "bind and unite" a diversity of members into a distinct entity. Considering that corporations are chartered in particular states and typically only suable in their state of incorporation, the Court asked, shouldn't citizenship status be determined according to the location of the distinct corporate entity, or, as the Court put it, "the locality of the corporation," rather than the citizenship status of the various founders and investors? Using only its own sense of reason and citing no legal authority, the Court answered this question in the affirmative:

> A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state.

The implication of this reasoning was a full-scale rejection of legal precedent concerning questions of federal jurisdiction in suits involving corporations. The Court made a strong assertion of this position : "we feel free to say that the cases of Strawbridge and Curtis and that of the Bank and Deveaux were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed." The "consequences and inferences" rejected by the Court were those suggesting that the corporation be defined exclusively in terms of its members rather than as an entity worthy of independent recognition. Once again, the Court made a point of clarifying its thoughts on the matter:

> But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment....It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.

Based on this conception of the corporation—as itself a person and a citizen of its state of incorporation, at least for the purposes of judicial jurisdiction—the Court found the diversity of citizenship necessary for the case to be heard in federal court and supported the Circuit Court ruling in favor of Letson.

The Court's decision in this case constituted a clear departure from the judicial procedures and corporate understanding developed in *Deveaux*. Yet in reaching its

decision the Court claimed to "assert no new principle," finding support for its approach and conclusions from a selection of other cases emphasizing the existence of a corporate entity worthy of independent legal recognition. Chief among these supporting cases was *The Trustees of Dartmouth College v Woodard*, in which Chief Justice Marshall detailed a range of qualities associated with the corporation as "an artificial being." According to the *Letson* Court's interpretation of *Dartmouth*, though the corporation may be an "artificial" creation and may exist "only in contemplation of the law," it is nevertheless an identifiable entity. The laws that create a corporation create an institution with legal properties and capacities that are independent of those possessed by its members. It is the corporation itself that may, through legal recognition, hold property, exist in perpetuity, and act as an individual. In fact, that is precisely the point of incorporation: to create an entity with powers and privileges not otherwise available to individuals.

Another quality attributed to the corporation implying a degree of independent materiality was the quality of "habitancy." Here the *Letson* Court turned once again to the common law, citing two different instances in which the corporation was said to be an inhabitant of a particular geographic location. In one case, Lord Coke interpreted an English statute regarding a tax on all inhabitants as applicable to corporations: "every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire...are said to be inhabitants there within the purview of the statute." In another case, *King v Gardner*, corporations were similarly found capable of being "occupiers or inhabitants." Even in *Deveaux*, a case otherwise overruled by the *Letson* Court, language was found defining the corporation as an

inhabitant. It is on these various suggestions of independent corporate existence that the *Letson* Court ultimately based its conclusions:

> We confess our inability to reconcile these qualities of a corporation -- residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought. When the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Courts jurisdiction.

Thus, in direct contradiction to the *Deveaux* Court's assertion that the corporate "name, indeed, cannot be an alien or a citizen...but the persons whom it represents may be the one or the other," the *Letson* Court defined the corporation as a citizen and established "habitancy," that is, residence and operation in a particular state, as the basis for corporate citizenship.

Marshall v. Baltimore & Ohio Railroad Co.

Not surprisingly, the *Letson* decision proved controversial in the legal community of the time. The treatment of the corporation as a "person"—even an "artificial" one—and a "citizen"—even if only for the purpose of judicial jurisdiction—was found to be such a substantial departure from established doctrine regarding the corporation that, though it lasted nearly ten years, the decision was often assailed in dissenting opinions of the Court. In response, a frankly strange, and ultimately equally controversial, alternative emerged through the case of *Marshall v Baltimore & Ohio Railroad Co.* in 1853.

The central component of *Marshall v Baltimore & Ohio Railroad Co.* (hereafter *Marshall*) was, once again, a question of federal jurisdiction over a case involving a corporation. The difficulty was that the averment submitted by the plaintiff Marshall, that is, the statement declaring the standing of the parties in the Court, defined the Baltimore and Ohio Railroad Company as "a body corporate by an act of the General Assembly of Maryland." The contention raised by the corporation was that such an averment should not be sufficient to secure federal jurisdiction, presumably based on the fact that though the corporation was chartered in Maryland, it included members from Virginia, the home state of the plaintiff, thus negating diversity of citizenship. The critical question, therefore, was whether such an averment was justified by the *Letson* decision, or, more precisely, whether it was appropriate for corporate citizenship to be defined according to the state in which a corporation was chartered.

Despite the controversy, the Court in this case recognized the implications of dismissing the *Letson* decision:

> Confiding in its stability, numerous controversies involving property and interests to a large amount, have been heard and decided by the circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments to have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community. There are no cases, where an adherence to the maxim of "stare decisis" is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts.

In the interests of peace and stability, the Court allowed the averment and reinforced the legitimacy of federal jurisdiction. But it did so using terms significantly different than

those developed in *Letson*.

The problem for the Court was that on one hand it was reluctant to support the *Letson* conception of the corporation, but on the other hand it was motivated, like the *Letson* Court, by a reluctance to allow the Baltimore & Ohio Railroad Co., or any other corporation, to escape federal jurisdiction by distributing members throughout the states of the union. Doing so, according to the Court, would be the equivalent of denying any individual engaged in a conflict with a corporation the constitutional privilege of seeking "impartial justice" through the federal courts:

> If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable.

The *Deveaux* ruling opened the door to just such political maneuvering. Yet the *Letson* decision, by emphasizing the corporate entity itself, raised other complications, namely the difficulty of reconciling the "artificial" and "intangible" nature of the corporation with the consequences of corporate behavior:

> [A] citizen who has made a contract, and has a "controversy" with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

In other words, the corporation may be "a mere legal entity," but it acts through the means of the "natural persons" who represent it. It is both an artificial entity, created by the laws of a particular state, and an association of individuals, some of whom may be citizens of different states. The final opinion of the Court reflected precisely this dual conception:

> The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary habitat of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and can find them there and nowhere else....The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the General Assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State.

In this way the Court merged elements of *Deveaux* and *Letson* under the bold assertion that regardless of any evidence to the contrary, all corporate members would be assumed to be citizens of the state in which the corporation was chartered. This allowed the court to acknowledge that corporations have a "home" state, by the laws of which they are created and are to be held accountable, but that they act through their members and representatives, who must be recognized as "the real parties" to any conflict involving the corporation. The assumption, or rather the assertion, that corporate members are citizens of the same state as "the habitat of a corporation in the place of its creation" would serve as a judicial convenience that takes both the corporation and its members into consideration.

Once the Court settled the matter of jurisdiction, it went on to deliberate other elements of the controversy between Marshall and the Baltimore & Ohio Railroad Co., which essentially amounted to a contractual dispute concerning payment to Marshall for services rendered. The details are irrelevant to the present examination.

While it is clear from the text of the opinion that a sincere effort was made to confront injustices and overcome inconsistencies produced by previous opinions of the Court regarding federal jurisdiction in cases involving corporations, the plainly counterfactual approach espoused by the *Marshall* Court is hard to take seriously. While there may have been a historical moment when it could be accurately assumed that all corporate members were necessarily citizens of a corporation's state of incorporation, by 1844 that was clearly not the case. Therefore, to determine corporate citizenship based on an assumption of member citizenship but then forbid the submission of any evidence to the contrary amounted to the "embracing of a legal fiction" (Schane, 1987: 9) and the institutionalization of a form of willful delusion. And the *Marshall* decision was indeed widely assailed on precisely these terms.

Yet, perhaps more importantly, and as emphasized in three strongly worded dissents by *Marshall* justices, a striking absence from the *Marshall* decision was any discussion of whether a corporation should be considered a "citizen" under the US Constitution. Unlike *Deveaux*, or even *Letson*, the corporation's capacity for citizenship was assumed in the *Marshall* opinion. The only question was how that citizenship should be determined. This may be due to the fact that the primary concern in *Marshall* was not whether corporations

should be allowed to access federal courts but rather whether they should be allowed to avoid them. The Court sought corporate accountability through federal jurisdiction, ignoring evidence from other cases, such as *Deveaux*, suggesting corporate use of the federal courts as a way to escape local accountability. Nevertheless, that the capacity for citizenship was no longer a point of concern constituted a significant gain for corporate interests, legitimating the corporation as a legally defensible organizational form and shifting the focus of legal deliberation from the possibility of citizenship to the type or quality of citizenship.

Practically speaking, the *Marshall* decision was ultimately no different than the *Letson* decision: corporate citizenship was to be determined according to where the corporation was incorporated. And for some the legal fiction in *Marshall* was no more onerous than the one developed in *Letson* and *Deveaux* conferring to corporations citizenship status and access to federal courts. The dissent in this case from Justice Daniels makes this position clear, arguing that no amount of conceptual wrangling can change the fact that "under the second section of the third article of the Constitution, citizens only, that is to say men, material, social, moral, sentient beings, must be parties, in order to give jurisdiction to the federal courts..."

Any argument that justifies federal jurisdiction must therefore be based upon a legal fiction. Whether that legal fiction is rooted in the citizenship of corporate members (*Deveaux*), the place of incorporation (*Letson*), some combination of the two (*Marshall*),

or some other consideration[46] is beside the point. As will be discussed below, how a corporation's "home" is defined is extremely important for a variety of reasons. But in terms of the specific question of federal jurisdiction, what matters most is that the corporation has been found capable of citizenship and therefore entitled to certain rights under the US Constitution.

Legislative jurisdiction

The common link between the cases examined above, aside from their contributions to the establishment of corporate access to federal courts, is their attention to questions of place. Each attempted to locate the corporation within a specific geographic territory, to define the corporation's "home," producing in the process various conceptions of both the corporation and corporate location. But federal judicial jurisdiction is not the only issue to require formal consideration of the relationship between the corporation and place. The issue of legislative jurisdiction raised many similar questions and consequently demanded similar lines of inquiry. Legislative jurisdiction refers to the question of which laws govern corporate activity. As noted in the cases examined above, in order for a corporation to exist in a legal sense it must be incorporated by the laws of a particular state.[47] Conflict arises when there is disagreement regarding how much authority this relationship confers to the state legislature over "domestic" corporations, or corporations operating within their state of incorporation, and which legislature has authority over "foreign" corporations, or corporations operating outside of their state of incorporation.

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[46] The *Dartmouth* case justified federal jurisdiction on the "contract" nature of the conflict in that case. The position articulated here by Justice Daniels would also deny federal jurisdiction in that and other similar cases.

[47] It is possible for a corporation to be chartered by Congress, but incorporation is generally recognized as a state concern (Mark, 1997).

The Bank of Augusta vs. Earle

The foundational case in the area of legislative jurisdiction is *Bank of Augusta v. Earle* (1839). In this case, the Bank of Augusta, charted in the state of Georgia, issued a bill of exchange to Joseph B. Earle, through an agent in Mobile, Alabama. When Earle refused to repay the bill, the bank brought suit in federal court. Earle contended that as a corporation the bank did not have the power to make contracts in Alabama and that the bill should therefore be considered void. The central question in the case was therefore whether corporations have the power to make contracts beyond the borders of their state of incorporation. The gravity of this question for the operation of corporations and for the general conditions of US political-economy were clear to the Court:

> A multitude of corporations for various purposes have been chartered by the several states; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular state by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid, or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the states in which they are made, they cannot be enforced in the Courts of Justice.

Judgment in this case against the Bank of Augusta, in other words, would have brought into question not only the powers of corporations in general but also the countless interstate corporate contracts already in existence at the time throughout the United States. The Supreme Court avoided such turmoil by ruling in support of the Bank of Augusta in this case, declaring the contract valid and legitimating the Bank's authority to operate in Alabama, or any other state from which it has not been expressly prohibited.

As this case was heard after *Deveaux* but before *Letson*, the accepted mechanism for defining the corporation and determining corporate rights and powers was to consider the character of the individual corporate members. The success of that strategy in securing federal jurisdiction for the Bank of the United States led the Bank of Augusta in this case to use the same strategy to secure another form of privilege. The Bank of Augusta argued that it was comprised of citizens of the state of Georgia and that, according to Section II of Article IV of the US Constitution, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Therefore, the citizens comprising the Bank of Augusta should not be prohibited from contracting in the state of Alabama. In essence, this was an effort to extend the *Deveaux* ruling to include contracting rights by way of the "privileges and immunities" clause of the US Constitution.

In addressing this issue, the *Augusta* Court acknowledged as valid and proper the conclusions reached in *Deveaux* and the practice employed in that case of looking "to the character of the persons composing a corporation" when considering the question of judicial jurisdiction. But it denied the applicability of *Deveaux* to questions of corporate contracting and refused to adopt a similar approach in the *Augusta* case. Its reasons for doing so, as expressed in the majority opinion delivered by Chief Justice Taney, are worth quoting at length:[48]

[48] The clause of the Constitution referred to in this passage is the "privileges and immunities" clause, which reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

> If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself.... Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.

As will be discussed in the following chapter, Chief Justice Taney's concern for the loss of state control over "corporate franchises" would prove warranted. But perhaps most significantly, this passage suggests the Court's primary motivation for denying the applicability of *Deveaux* to this case was not that that approach was inappropriate for the *Augusta* case but rather that the consequences of such an approach would be unacceptably grave: it would essentially declare limited liability an unconstitutional privilege, a declaration the Court was clearly not prepared to make. Instead, the Court took an alternative approach that enabled interstate contracting yet avoided a substantive engagement of the privileges and immunities clause. After denying the applicability of *Deveaux*, the Court turned to the lessons from *Dartmouth* that established the centrality of the charter in determining corporate powers. To determine the permissible range of

activity for any particular corporation, the Court argued, it was necessary to review the terms of the corporation's charter:

> [I]t may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a corporation, does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.

The first task for the Court was thus to determine whether the Bank of Augusta was authorized by its Georgia charter to contract in Alabama. Finding that it conferred "the general power to purchase bills without any restriction as to place," the Court determined that the Bank's charter authorized it to operate anywhere outside of Georgia, at least "so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction." In other words, according to the Court, though the charter did not authorize operations in the specific state of Alabama, the absence of any geographic restrictions in the charter enabled the Bank to operate anywhere the laws of Georgia that created the Bank were recognized and honored and anywhere the activities of the Bank were not prohibited. The Court's second task was then to determine whether the laws of Alabama permitted the Bank to contract in that state. This determination would depend on the Court's interpretation of the concept of comity.

Comity refers to the practice among different nations of honoring each other's laws provided such laws are not in direct conflict. Generally speaking, when conflict does

arise the laws of the nation in which the parties are located and in which the conflict develops take precedence. Yet, very importantly, when local law is silent or otherwise has not articulated a position on a matter that has received foreign legal treatment, the local government is assumed to adopt the foreign laws, provided they do not otherwise contradict the local government's known policies. Silence, according to the Court's reading of comity, equals acquiescence.

The relevance of the concept of comity to the *Augusta* case is derived from the Court's explicitly territorial understanding of the nature of the corporation. Corporate existence and operation, according to the Court, depended on and was confined to the actions of a particular state:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

This did not, however, mean that corporations were confined to their "place of creation." Rather, corporate operation was linked to wherever the laws of its home state were recognized and honored:

> [A]lthough it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another.

As odd as this conception of the relationship between the corporation and the state may sound to modern readers, it caused little controversy at the time. In fact, the innovation of the *Augusta* court was not its interpretation of the corporation or of comity but rather its application of comity in the domestic arena of the United States and its extension of comity to the realm of contracts. Comity had previously been considered only in terms of international legal conflicts. But the *Augusta* court found that the customary observance of comity among the states, both through formal legislation and informal practices such as trade, confirmed the applicability of the concept to legal conflicts between different states of the union. Of particular importance in this regard was the widespread and previously unchallenged practice of allowing foreign corporations to sue in state courts. The acceptance of comity of suit, as this practice is called, implied the acceptance of comity of contract, according to the Court, as matters of contract "are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied." Though this reading of comity established the rights of corporations to contract outside of their states of origin, the Court reinforced the primacy of state regulations in all matters of corporate operation:

> Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied.

The remaining task for the Court was thus to consider what the legislature of Alabama had to say about the matter of foreign banking corporations operating within the state. Two sources were found to be relevant. One source was the Alabama Constitution, which

specified in some detail the conditions under which banks could be organized and operated within the state, none of which were met by the Bank of Augusta before it enacted its contract with Joseph Earle.[49] However, as the constitutional stipulations made no specific reference to foreign banking corporations, the Court interpreted the Alabama constitution to apply only to domestic banks incorporated by the Alabama legislature. The absence of explicit inclusion of foreign corporations within the Alabama banking laws and the silence of the Alabama legislature on the issue suggested to the Court that Alabama intended to permit the operation within the state of Banks chartered in other states, under the conditions articulated in their home-state charters.

A second source of attention to the issue of foreign corporations dealt not with banking specifically, but rather with Alabama's experience with comity more generally. One Alabama state court decision (2 Stewart's Alabama Reports, 147), provided foreign corporations with the comity of suit, which the Court already concluded implied comity of contract. On the basis of this decision, and the absence of express constitutional or statutory language, the *Augusta* Court concluded "there is no law of the state which attempts to define the rights of foreign corporations." Once again, as far as the Court was concerned, silence implied acquiescence and suggested that the state of Alabama, for whatever reason,[50] did not intend to subject foreign banking corporations to the same strict regulatory terms faced by domestic banks.

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[49] Specifications included two-thirds majority approval by the legislature for any new bank charter or branch, a reservation of two-fifths of the bank's capital stock for the state, substantial state participation in bank direction, debt collection requirements, and capitalization requirements prior to commencement of operations.

[50] The suggestion by the Court was that the Alabama legislature may have valued the competition introduced by foreign banking corporations.

The Court's ruling—that the Bank of Augusta was permitted to make contracts in the state of Alabama—set the stage for legal policy regarding foreign corporations in the US context. It meant that all states had the power to define the behavior of domestic and foreign corporations and that if a corporation's state of origin enabled it to operate abroad it could do so, anywhere its powers were recognized as legitimate by the comity of states. The exception was when the laws of any particular State regarding foreign corporations expressed otherwise, be that through outright prohibition or alternative regulation. However, that which was not expressly prohibited was to be permitted. The primary lesson here was that state legislatures should specifically articulate how foreign corporations are to be treated within the state, for in the absence of such articulation, the practice of comity enables foreign corporations to exercise whatever powers are afforded them in their charters of incorporation. Thatcher (1891: 54, emphasis in the original) makes this point clearly:

> A corporation created in one State has no *right* to do business in another. It is generally allowed to do so by comity....One State by incorporating a company to do business in another does no more than to permit the company, as a corporation of its creation, to *seek* admission into that other State. It lies with the other State to say whether admission shall be granted or not.

This conclusion, and the arguments of the majority in this case in general, suggests much latitude for state control over corporate behavior, both domestic and foreign, as States may articulate their regulatory policies through the state legislatures. Yet that suggestion of state power is misleading. Considering the Court's understanding of comity, and their

generous interpretation of what constitutes an assenting silence, state legislatures are placed in a defensive position vis-à-vis corporations. Rather than requiring foreign corporations to seek approval for intrastate activities, states must constantly and actively *prohibit* undesirable corporate actions through detailed legislative acts. Oversight or ambiguity in this area could leave citizens and territories from one state open to exploitation from foreign corporations operating under generously constructed charters. The Court's rejection of the *Deveaux* ruling indicated clearly their intent, in concept if not in practice, of preserving for the states the power to control the domestic behavior of foreign corporations. Yet, regardless of any particular state's success in channeling foreign corporate behavior in acceptable ways, the Court's understanding of comity and of the relationship between the state and corporations had the effect of making state actions appear to *restrict* rather than define corporations and their rights and powers, thus invoking images of state interference in corporate affairs.

Another essential point to remember is that *Augusta* is the first Supreme Court case to directly and substantively consider the rights and powers of foreign corporations. The Court invoked and interpreted comity in a way that *defined* rather than reflected the practice of comity in the US context, which in turn *created* rather than revealed the rights and powers of corporations acting outside of their state of incorporation. The Court may cite different authorities to legitimate their position, but the choice of approach and the handling of key components—the definition of the corporation, the definition of comity, the interpretation of Alabama's banking laws—are highly subjective. The Court's decision to conceptualize the corporation differently than had been done in *Deveaux*, provides a

good example of both the contingency and the instrumentality of the Court's deliberations: the Court may employ whatever reasoning it wishes to effectuate desired conditions, conceptualizing the corporation as exercising the rights of its individual members for one purpose (judicial jurisdiction) and as an artificial legal person with its own rights for other purposes (contracting, liability).

The various resulting definitions of the corporation thus reflect not a natural essence of the corporate form of organization but rather a politically motivated interpretation of the corporation designed to enable certain corporate rights and powers—in this case, the right to perform interstate contracts. Justice M'Kinley, in an extensive dissent to the majority ruling in this case, crystallized this point and suggested the motivation behind the Court's position:

> Because banks cannot make money in places and by means not authorized by their charters; because they may lose by contracts made in unauthorized places; because the commerce of the country may be subjected to temporary inconvenience; and because corporations in the north, created for manufacturing purposes only, cannot, by the authority of their charters engage in commerce also; this doctrine, which has not heretofore found a place in our civil code, is to be established.

To acknowledge the role of subjectivity here is not to suggest that the decision reached is any more or less valid than other decisions that might have been reached. But it does illustrate the degree to which all such decisions are politically charged, contingent, and ultimately contestable.

Paul v Virginia

As noted above, though the *Augusta* case was presented under the "privileges and immunities" clause of the US Constitution, the *Augusta* Court avoided a substantive engagement of the applicability of that clause to corporations by focusing on the issue of comity. With the case of *Paul v Virginia* (1868) the Court faced this question once again.

The conflict in *Paul v Virginia* concerned legislative statutes in the state of Virginia requiring all foreign insurance corporations, or their local agents, under penalty of a fine, to obtain a license and to post bonds "according to the extent of the capital employed" before being permitted to operate in that state. The plaintiff, Samuel Paul, a Virginia citizen acting as an agent for several New York-based insurance corporations, complied with neither of these stipulations before issuing policies in the state of Virginia. For his actions Paul was fined fifty dollars, which he subsequently challenged in federal court as a form of discrimination against foreign corporations that was prohibited under the "privileges and immunities" and the "commerce" clauses of the US Constitution.[51]

The Court easily dismissed the commerce clause objection on the grounds that "[i]ssuing a policy of insurance is not a transaction of commerce." For the privileges and immunities objection the Court turned to the *Augusta* case for guidance. While the *Augusta* Court had recognized the validity of the *Deveaux* definition of the corporation, it denied the applicability of *Deveaux* because extending that decision to the realm of

[51]The privileges and immunities clause (Article IV, Section II) states "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The commerce clause (Article I, Section VIII) states that "Congress shall have the power...to regulate commerce with foreign nations, and among the several States."

contracting would have had unacceptable consequences for corporate activity. Thus, that the corporation could be considered a citizen for one purpose did not mean that it must be a citizen for all purposes. Between *Augusta* and *Paul v Virginia*, the cases of *Letson* and *Marshall* had come before the Court. Those two cases introduced new mechanisms for determining corporate citizenship, but neither recognized the corporation as a citizen for any reason other than securing federal judicial jurisdiction. In *Paul v Virginia* the Court reinforced that position, emphasizing the lack of precedent for giving corporations the privileges and immunities of citizens.

But besides a lack of legal precedent, the Court cited other important reasons for maintaining a narrow view of corporate citizenship status:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.... But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

The right to form a corporation and the conditions under which any corporation may operate were considered by the Court to be special privileges granted according to the prerogative of a particular state legislature, not constitutional entitlements with which states must not interfere. This position was extremely important in that it reconfirmed the

status of the corporation as a legal product of the state while simultaneously reinforcing the power and authority of each state to regulate the behavior of corporations, both foreign and domestic. The final opinion of the Court provided a forceful statement encapsulating this perspective:

> The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created....The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States -- a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

This is all language adopted from *Augusta*, and in that sense *Paul v Virginia* introduced no new doctrine into corporate jurisprudence. However, whereas in *Augusta* the specifics of the case were interpreted to support corporate contracting rights in the absence of an explicit prohibition, in *Paul v Virginia* the specifics of the case were interpreted to support the power and authority of the Virginia legislature to prohibit and/or condition the contracting rights of foreign corporations seeking to operate within the state. Thus, this case provided the first and strongest example of territorial limitations on corporate operations in the US and the powers of states vis-à-vis corporations. It also legitimated the practice among state legislatures of distinguishing between residents and non-residents. As Henderson (1918: 105) notes, this justified variations in state regulatory

practices based on different classes of "citizens," with residency constituting an important such class:

> Where the fact of nonresidence itself is one of the relevant factors in a legislative problem, clearly a state can meet the situation by a proper classification. The state can require of all business within its borders certain standards of security and responsibility, and it can insist that nonresidents comply with these standards. If the fact of nonresidence makes compliance more difficult, nonresidents can be forced to make greater exertions than are necessary on the part of residents.

Paul v Virginia firmly established this policy of legislative control over corporate behavior, denying corporations protection under the privileges and immunities clause of the US Constitution.

Pensacola Telegraph Company v Western Union Telegraph Company

At this point it is important to take a moment to examine a circumstance of judicial attention to the corporation that is outside of the jurisdictional concerns otherwise emphasized in this chapter. An important limitation to the power of states to prohibit or condition the operation of foreign corporations within state territory is when a corporation is engaged in "interstate commerce." As the US Constitution reserves to Congress the power "to regulate commerce with foreign nations, and among the several States," the legislative power articulated in *Paul v Virginia* did not apply to corporations engaged in such activity. While *Gibbons v Ogden* (1824) is generally recognized as the first Supreme Court case to deliberate the question of federal authority over interstate commerce, it was the case of *Pensacola Telegraph Company v Western Union Telegraph Company* (hereafter, *Pensacola Telegraph*), in 1877, that confronted the issue in terms of

state legislative power over foreign corporations.

The conflict in this case was over the establishment and operation of telegraph lines in the state of Florida. In December of 1866, the Florida legislature had granted an "exclusive privilege and right" to the Pensacola Telegraph Company to construct and operate a telegraph line through two counties in that state. In July of that same year, the US Congress passed an act "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes." In that Act, Congress conferred upon any telegraph company incorporated in any state of the Union the right to "construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States." In 1874, the Western Union Telegraph Company acquired the right of another Florida railroad company, which was located within the territory over which the Pensacola Telegraph Company had been granted exclusive privileges, and proceeded to construct there a telegraph line. The Pensacola Telegraph Company subsequently brought suit to preserve its exclusive privilege. Referencing the clause of the US Constitution granting to Congress the power "to regulate commerce with foreign nations and among the several states," the Western Union Telegraph Company contended that the exclusive privilege granted by the Florida legislature was void in the face of the Congressional act of 1866.

The question facing the Court in this case was whether Congress had the power to authorize a foreign corporation, in this case the Western Union Telegraph Company, incorporated in the state New York, to operate within the territory of another state

without the latter state's consent. As discussed above, the decision in *Paul v Virginia* had firmly established the legislative power of the states, with the Court in that case concluding that whether and how foreign corporations operated within the territory of a state was a matter of state legislature discretion. However, the Court's decision also recognized a potential limitation of the commerce clause to that discretionary power. That limitation had not applied in that case because insurance was defined as not included under the definition of "commerce." But the powers of Congress under the commerce clause were not in question.

In *Pensacola Telegraph* the circumstances were different: the telegraph was defined as integral to commerce, indicating that "it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation." By granting an exclusive privilege to the Pensacola Telegraph Company over telegraphic communication passing within or through a particular area of Florida, the Court concluded, the Florida legislature "clearly has attempted to regulate commercial intercourse between its citizens and those of other States," constituting an encroachment on the powers of Congress to regulate interstate commerce. Consequently, the Court dismissed the effort by the Pensacola Telegraph Company to enjoin the Western Union Telegraph Company from operating with the specified area of Florida.

Unlike the other cases examined in this chapter, *Pensacola Telegraph* was not a case in which the location or status of corporate citizenship was in question. Rather, this case

confronted a question of federalism. It has been included in this chapter because it complicates the findings from the other cases considered here in important ways. The power of Congress to override state regulatory policies regarding foreign corporations and the associated limitation on the authority of state legislatures to regulate corporations engaged in interstate commerce have significant implications for the rights, powers, and spatial behavior of corporations in the US. The dissent in this case from Justice Field articulates the important concerns in this regard:

> Let this doctrine be established, and the greater part of the trade and commerce of every State will soon be carried on by corporations created without it. The business of the country is to a large extent conducted or controlled by corporations; and it may be, as was said by this court in the case referred to, [*Paul v Virginia*] 'of the highest public interest that the number of corporations in the State should be limited, that they should be required to give publicity to their transactions, to submit their affairs to proper examination, to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.' All these guards against corporate abuses the State would be incapable of taking against a corporation of another State operating a railway or a telegraph line within its borders under the permission of Congress, however extortionate its charges or corrupt its management....Indeed, it is easy to see that there will remain little of value in the reserved rights of the States, if the doctrine announced in this case be accepted as the law of the land.

As will be discussed in the following chapter, Justice Fields' concern that the Court's ruling in this case would contribute to the dissolution of corporate accountability and the expansion of power among corporations engaged in interstate commerce would prove prophetic.

Pembina Mining Co. v Pennsylvania

Returning to jurisdictional issues, the decision in *Paul v Virginia* is generally recognized as an important moment in the history of US corporate jurisprudence because of the support it delivered to legislative discretion over legal treatment of the corporation. However, that legislative discretion would prove short lived as a result of two factors. One was the new interpretation and application of the commerce clause to corporate activity discussed above. The other was the passage of the Fourteenth Amendment to the constitution. The question of the applicability of the Fourteenth Amendment came before the Court in 1887 through the case of to *Pembina Mining Co. v Pennsylvania.*[52]

Passed after the Civil War, in 1868, the Fourteenth Amendment was intended as a protective measure against racial discrimination. The pertinent part of that Amendment is Section One, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The second sentence of the Amendment is substantially similar to Article IV, Section II,

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[52] The case of *Santa Clara County v Southern Pacific Railroad (118 U.S. 394 (1886))*, is most famously referenced for defining the corporation as a "person," specifically a person within the meaning of the Fourteenth Amendment to the US Constitution. However, as that assertion was made there without discussion of any sort and without citing any precedent, it provides no indication of why that assertion was made. The case generally credited with supplying the reasoning for the Santa Clara decision, *The Railroad Tax Cases, 13 F. 722, (1882)*, deliberated the issue extensively. However, I have chosen not to include that case because it appeared in a circuit court in California rather than the US Supreme Court, the source of authority for the other cases included in this study.

of the Constitution, the difference being the recognition of national privileges and immunities in addition to the privileges and immunities of the citizens of each state. The third sentence, pertaining to due process and equal protection of the laws, introduced important new safeguards against various types of legal discrimination. It took roughly twenty years for this Amendment to be applied to conflicts involving corporations, and once that happened, the Fourteenth Amendment, somewhat ironically and not without substantial criticism,[53] became a powerful force behind the expansion of corporate rights and powers. The case of *Pembina Mining Co. v Pennsylvania* exemplifies the subtleties of that expansionary process.

The Pembina Mining Company was a corporation chartered in the state of Colorado but with an office in the state of Pennsylvania. The point of controversy in the case was a tax issued by the state of Pennsylvania on the corporation for an office license. The corporation contended that the tax was issued in violation of the "privileges and immunities" and the "commerce" clauses of the US Constitution, as well as the portion of the Fourteenth Amendment to the Constitution that prohibits states "to deny any person within its jurisdiction the equal protection of the laws."

In essence, the *Pembina* case confronted the same questions as those raised in the case of *Paul v Virginia.* Accordingly, the *Pembina* Court denied the application of the "privileges and immunities" and the "commerce" clauses to corporations. As the language in *Pembina* is taken directly from the *Paul v Virginia* ruling, it is unnecessary to revisit here the Court's treatment of those issues. The significance of *Pembina* is to be found in the

[53] See the discussion in *The Railroad Tax Cases, 13 F. 722, 1882.*

Court's engagement with the equal protection clause of the Fourteenth Amendment. The applicability of that Amendment was considered in the following way:

> The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included.

However, the Court continued:

> The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more.

The implication of the Court's position is that while it denied any infringement of the Fourteenth Amendment rights *in this case*, it asserted that the Fourteenth Amendment could apply to corporations in general because "under the designation of person there is no doubt that a private corporation is included." In other words, though the Court supported the position asserted in *Augusta* and in *Paul v Virginia* that a corporation could not be a "citizen" within the meaning of the word as used to protect "privileges and immunities" under the US Constitution, it could be treated as a "person" with the right to

equal protection of the laws.[54] This was the strongest connection yet established by the Court between corporations and persons, and it suggested few limits to the range of individual rights capable of adhering to the corporate form.

It is important to note the basis on which this decision that the corporation could be a "person" with special rights was reached. No particular case law was cited as previously establishing the corporation as a "person." Cited instead was a conceptualization in which the corporation was nothing more than persons of which it is constituted:

> Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.'

This conceptualization can be recognized from *Dartmouth*, in which the corporation was defined as the private property of founders and investors, whose rights warranted constitutional protection. The *Pembina* Court acknowledged some remaining legislative powers over corporate operation despite the Fourteenth Amendment protections, but these powers would prove slim in the face of corporations wielding the rights of individuals:

> The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits....It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have

[54] Corporations would soon also be defined as "persons" with the right to "due process of law," in the case of *Western Union Telegraph Company v Kansas*, 1910.

> offices in them...The states may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment.

Yet the Court also acknowledged an important condition on this legislative power:

> The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign.

As will be discussed below, this commerce clause exception stripped state legislatures of a significant portion of whatever discretionary powers remained in the wake of the corporation becoming a "person."

Southern Railway Company v Greene

While in *Pembina* the Court's decision was based, in part, on the supposition that the corporation in question was "not a corporation within the jurisdiction of Pennsylvania," the case of *Southern Railway Company v Greene* (hereafter, *Greene*), argued in 1909, presented a different scenario. In that case, the Southern Pacific Railway Company, a company chartered in the state of Virginia, fulfilled all the requirements of the state of Alabama to operate a railroad in that state, in the year 1894. In 1907, the Alabama legislature passed a new law requiring all foreign corporations operating within the state to pay an annual franchise tax, calculated according to the amount of capital stock utilized by the corporation within the state. Excepting those corporations engaged in

interstate commerce, the statute prohibited any foreign corporation from operating within the state of Alabama until the tax was paid.

The Court heard this case upon the contention from the corporation that the Alabama law violated the corporation's rights to due process and equal protection of the laws as established in the Fourteenth Amendment. "That a corporation is a person, within the meaning of the Fourteenth Amendment," the Court asserted, "is no longer open to discussion." So much had been established in *Pembina*. The question, therefore, according to the Court, was "Is the plaintiff corporation a person within the jurisdiction of the State of Alabama?" Did the fact that the Southern Railway Company had been permitted to enter the state and subsequently had "acquired property of a fixed and permanent nature" and constructed extensive business relations based on that permission, entitle that corporation to equal treatment of the laws within the state? The opinion of the Court was that it did:

> We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.

Based on this understanding, the Court continued...

> We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal

protection of the laws.

In the absence of an absolute state legislative right to prohibit or condition the domestic operation of a foreign corporation, a right which had been established in *Paul v Virginia* but was subsequently undermined in *Pembina* and *Pensacola Telegraph*, the primary contention of the state of Alabama was that the fact that the franchise tax was not required of domestic corporations should not make it impermissible. Such a tax was said to be "an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment." The Court agreed that a system of classification establishing differential rates of taxation could be enforced without violating the terms of the Fourteenth Amendment. However, to be legitimate such classification must be "based upon some real and substantial distinction," not a distinction "arbitrarily made without any substantial basis." The Court found the place of incorporation, on which the state of Alabama had based its distinction, not sufficiently "real and substantial" to warrant differential rates of taxation. The Court's decision followed from this finding:

> We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution.

Discussion

The cases discussed in this chapter have in common an engagement by the Supreme

Court with questions of corporate definition and of corporate rights and powers. In every case but *Pensacola Telegraph*, the outcome of that engagement depended explicitly on some conception of the relationship between a corporation and its location. In most of these cases, in other words, defining corporate rights and powers was a matter of determining not just what the corporation is, but where it is, where it was created, and what it means when a corporation attempts to operate beyond the borders of its "home" territory. Thus, as corporate rights and powers evolved over time, so evolved the legal conception of corporate location; and as the legal conception of corporate location evolved over time, so evolved corporate rights and powers.

In *The Bank of the United States v Deveaux*, the first case in which the Supreme Court considered the corporation in a substantive manner, the corporation was defined, on one hand, as "an invisible, intangible, and artificial being," a "mere legal entity," and "certainly not a citizen." On the other hand, the corporation was also defined in that case as "a company of individuals" whose rights and interests were represented by and transferred to the corporation. The intangibility of the corporation precluded its capacity for citizenship, but as constituted by individuals, the *Deveaux* Court reasoned, some form of citizenship status for the corporation was essential, at least for the purpose of securing federal judicial jurisdiction. To conclude otherwise would be to suggest that when individuals participate in a corporation they surrender certain of their constitutional rights, a suggestion the Court was not prepared to make. Such a view, of course, was entirely possible only under a particular understanding of the corporation: if the corporation is comprised exclusively of individuals, and if the corporation is nothing in

itself but a convenient label for identifying an association of individual investors, then those individuals should receive the same constitutional protections regardless of whether they act as individuals or "in their corporate character." A different understanding of the corporation—for example, as composed of other and/or additional individuals and interests, or as an entity in itself the membership of which was irrelevant—would have produced different corporate rights, specifically, in this case, no right to access federal courts. But regardless of how else the corporation could have been understood, the understanding developed in the case meant that corporate location was determined according to the location of citizenship of the corporate members, i.e. investors. And, in 1809, when the *Deveaux* case was heard, those corporate members were all located, coincidentally, in the same state in which the corporation was originally incorporated.

The next case to address these matters was *The Trustees of Dartmouth College v Woodward*, in 1819. That case was discussed in detail in the previous chapter and won't be revisited here, except to note its role in reinforcing the practice established in *Deveaux* of looking to the corporate membership in order to determine corporate rights. *Dartmouth* was not concerned with questions of citizenship, but it did define the corporation as the product, the creation, of a particular state legislature. Whatever rights and powers a corporation possessed were those articulated in the charter of incorporation negotiated with the legislature of the state in which it was created. As discussed in the previous chapter, this relationship conferred no special rights to the state legislature over the corporation beyond the process of charter negotiation. However, it did root corporate rights and powers within a particular political-geographic territory, and it is this

understanding of a corporation's "home" that shaped the deliberations in *Bank of Augusta v Earle*.

The *Augusta* case both supported and rejected the approach to the corporation developed in *Deveaux*. It provided support for the notion that a corporation could be treated as a citizen (through its corporate members) for the purpose of judicial jurisdiction, but rejected the extension of such citizenship status to the realm of contracting. Instead, the *Augusta* Court adopted the *Dartmouth* emphasis on the charter of incorporation. In doing so, however, the *Augusta* Court forged a much more explicit connection between the corporation and its location of origin, suggesting that, as a legal creation, the corporation could only exist where the laws of its state of incorporation were obligatory. A corporation could only be said to exist, in the legal sense, within the territory of the state in which it is incorporated. Anywhere else it could only be "recognized," that is, recognized as a legitimate institution according to the laws of its state of origin.

This "geographic theory" of corporate existence, as Henderson (1918) called it, established a framework for regulating corporate behavior. On one hand, it recognized the charter of incorporation as constitutive of the corporation's rights and powers and therefore as the source of authority regarding the parameters of corporate operation. As asserted in *Dartmouth*, every state legislature had the power and opportunity to approve charters only for those corporations exhibiting desired organizational or operational qualities. On the other hand, it suggested that state legislatures also had the power and opportunity to legislate policies regarding the domestic behavior of foreign corporations.

Therefore, in the absence of express language to the contrary, state legislatures should be understood to assent to the domestic operation of foreign corporations under the conditions of the corporation's foreign charter. While this framework implied considerable state legislative power, the Court's interpretation of the case details indicates the relative ease with which that power could be circumvented. Furthermore, subsequent Court cases and an intense politics of corporate chartering, discussed in the following chapter, further undermined whatever legislative power followed from the *Augusta* decision.

The case of *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, argued just five years after *Augusta*, in 1844, supplied the first blow to legislative power by asserting a new approach to conceptualizing corporate citizenship. The *Deveaux* approach to corporate citizenship had satisfied the needs of the Court at the time, in part because corporations were organized and operated relatively simply. But more complex circumstances complicated the search for the corporation's "home." The *Letson* Court addressed this concern by abandoning the *Deveaux* decision and attaching citizenship directly to the corporation.

At first glance, there is no apparent reason why the *Letson* decision would compromise legislative power over either domestic or foreign corporations. It underlined the place-specific nature of the corporation suggested in *Augusta*, though without citing *Augusta* specifically, by emphasizing the "locality of the corporation" and the corporation's capacity for "residence" and "habitancy." It also emphasized the "artificial" nature of the

corporation, following *Dartmouth*, which suggests power in the hands of the legislature over its artificial creations. And it even altered its conception of and approach to the corporation not so as to allow the corporation access to the federal court but rather to prohibit the corporation from escaping federal jurisdiction.[55] Nevertheless, the *Letson* Court undermined state legislative authority over corporations by defining the corporation as a "person" within the state of its creation and therefore "capable of being treated as a citizen of that state, as much as a natural person." This was a substantial departure from corporate doctrine and it opened the door for the corporation to access extensive political rights under the US Constitution, which individual state legislatures could not restrict.

But corporate access to Constitutional rights would come later, in *Pembina* and *Greene*, and other similar cases. First, the case of *Marshall v. Baltimore & Ohio Railroad Co.* provided yet another conception of the corporation. As the *Letson* decision came to be viewed as too much of a conceptual leap, yet the continued growth in the size and complexity of corporations made the *Deveaux* ruling even less palatable, the *Marshall* Court offered one final alternative. Here the citizenship of the corporation was determined according to the citizenship of the corporate members, but under the clearly dubious assumption that *all* the corporation's members were citizens of the same state in which the corporation was chartered. The motivation behind this "legal fiction" is not entirely clear beyond holding corporations accountable in federal court. But what is

[55] There is here a politics of jurisdiction. In some circumstances local courts might be more advantageous to a corporation. In other circumstances a corporation might prefer its chances in federal court. When and why a corporation or an individual might prefer federal over local courts is a question beyond the scope of the present research project.

important about the *Marshall* case is that it illustrated the evolution of corporate rights through the disappearance of a previously contentious issue: the corporation's capacity for citizenship. In contrast to previous cases confronting similar concerns, the question in *Marshall* was not whether it was possible for the "artificial" corporate being to be treated as a citizen, but rather how that citizenship should be determined. By 1853, a significant question regarding the legitimacy of the corporate form had therefore become settled in the eyes of the Court.

While the question of the corporation's capacity for citizenship was settled, at least for the time being, the parameters of state legislative power were (and are) still being deliberated. It should be noted that since *Dartmouth* the mechanism for regulating domestic corporate operations was well established: state legislatures could control domestic corporations through the chartering process. But the foreign corporations continued to operate under a degree of uncertainty. The *Augusta* Court had established a framework of legislative power, but then rejected the application of that framework to the case at hand. *Paul v Virginia* offered the best example of how the legislative discretion articulated in *Augusta* could be used to condition and control foreign corporate behavior. The foundation of that case was the Court's conception of the corporate form as a type of state-conferred privilege, one that other states were not bound to recognize or honor. Using the language of *Augusta*, as well as that case's understanding of corporate location, *Paul v Virginia* illustrated how and why foreign corporations could be treated under special legal categories. Of course, as witnessed in *Augusta*, the potential remained for the Court to interpret the details of any subsequent case in ways that circumvented the

Paul v Virginia ruling, but important legal principles supporting state legislative powers were in place. The problem, for those concerned with corporate regulation, is that *Paul v Virginia* represented the beginning of the end for substantive state legislative discretion.

Though not concerned with questions of corporate definition or citizenship, one of the strongest challenges to state legislative discretion came in 1877 through a "commerce clause" dispute in the case of *Pensacola Telegraph Company v Western Union Telegraph Company.* That Congress has the power to regulate interstate commerce is clearly articulated in the US Constitution, and that federal laws take precedence over state laws in relation to interstate commerce was established in 1824 through the case of *Gibbons v Ogden* (9 Wheat. 1).[56] But nothing in either of those sources of authority, or any other case confronting questions of commerce, had been interpreted to enable Congress to authorize a corporation chartered in one state to engage in business within the borders of another state. That Congressional authority was asserted in *Pensacola Telegraph.* As Henderson (1918: 116) notes, the *Pensacola Telegraph* decision undermined the *Paul v Virginia* doctrine by prohibiting state legislatures from denying or conditioning the domestic operation of foreign corporations engaged in interstate commerce:

> With the denial of the right to exclude, there fell to the ground, as to these corporations, the whole traditional theory by which state regulation of foreign corporations had been justified. For if the right to exclude is denied, the right to admit on condition necessarily falls with it.

[56] The details of the case of *Gibbons v Ogden* are beyond the scope of the present discussion. I t will suffice to note that the Court ruled that navigation is an element of commerce, over which Congress the laws of Congress are supreme, causing a New York state law conferring monopoly rights over navigation on a local waterway to be unconstitutional and void.

While the *Paul v Virginia* doctrine still applied to any corporation seeking entrance into another state to engage there in strictly domestic commerce, *Pensacola Telegraph* removed from state legislative authority an entire class of corporations. Once again, there is nothing in the commerce clause of the US Constitution necessitating this interpretation and nothing in previous cases coming before the Court to suggest that Congress should possess such authority. The contrary is in fact more apparent, as Justice Field emphasized in his dissent, noting the extent to which the position advanced by the majority in this regard was "novel and startling."

Nevertheless, the commerce clause restriction on legislative discretion passed into case law by 1877. An important element of this development is that the commerce clause acted as a restriction on state legislatures without providing any alternative source of corporate regulation. With the prohibition on individual state legislatures from regulating foreign corporation engaged in interstate commerce Congress did not step in to fill the regulatory gap. Though Congress *could* regulate such corporations, it chose not to, which meant that corporations engaged in interstate commerce were subject only to the regulations imposed in their home-state charters of incorporation. With the delegitimatization of the corporate charter as a regulatory instrument, discussed in the next chapter, this left interstate commercial corporations beyond existing regulatory frameworks.

The *Pensacola Telegraph* decision constituted an assertion of federal power and state legislative limitations rather than corporate rights, though the result was to greatly

enhance the powers of interstate corporations. By 1880, corporations were still not recognized as citizens for any reason other than federal judicial jurisdiction and thus continued to possess only those rights and powers formally articulated in their charters. State legislatures continued to possess the power to define domestic corporations and to prohibit or condition the domestic operation of foreign corporations not engaged in interstate commerce. That changed in 1887 with the case of *Pembina Mining Co. v Pennsylvania.* The *Pembina* Court allowed the corporation to be considered "under the designation of person" within the meaning of the Fourteenth Amendment to the US Constitution. The Court did not say that the corporation was a person, only that it could be treated as a person for legal purposes. But the result was the same. As a person, the corporation could access the rights of persons under the US Constitution, in this case the Fourteenth Amendment right to equal protection of the laws.

Though the *Pembina* Court refused to support the corporation's claim of discrimination based on the details of that case, the Court's opinion set the general terms for sustaining Fourteenth Amendment challenges brought by a corporation against "discriminatory" state legislation. Those terms were put into practice in *Southern Railway Company v Greene*, in 1909. The *Greene* Court drew explicitly from the *Pembina* decision to support the "personhood" of the corporation. The primary difference between the two cases was the Court's determination of corporate location. In both cases the corporations in question were recognized as foreign to the states in which the conflicts brought to the Court had arisen. Yet, while the *Pembina* Court declared the corporation in that case to be "not a corporation within the jurisdiction of Pennsylvania," the *Greene* Court defined the

Southern Railway Company as "a person within the jurisdiction of the State of Alabama." This is important because apart from forcing the Alabama state legislature to confer on the Southern Railway Company essentially the same rights as persons within the state, it also broke from the concept of comity employed since *Augusta*. Under the *Augusta* Court's interpretation, the rules of comity meant that when a corporation from one state operated within the borders of another state the corporation did not actually "migrate to another sovereignty," but rather was recognized as legitimate under the laws of the home state. Because the corporation is an artificial being that exists "by force of the law," it cannot continue to exist "where that law ceases to operate." By designating the Southern Railway Company as a person within the jurisdiction of a state other than the state in which it was created, the *Greene* Court abandoned the "geographic theory" (Henderson, 1918) of corporate existence. This abandonment is reflected in the Court's determination that the location of incorporation was not an acceptable basis for classifying the subjects of taxation. Place, in other words, as in the place of incorporation, the place of organizational definition, and the place of legal responsibility and democratic accountability, had thus been formally defined as an arbitrary and non-substantial characteristic of the corporation.

Conclusion

The cases discussed in this chapter demonstrate the instability of corporate definitions and the instrumentality of Court deliberations. These cases also illustrate the Court's willingness to work *around* corporate spatiality, to reconceptualize and redefine the corporation in a legal sense in order to accommodate changing corporate spatial

practices. Rather than hold corporations accountable to specific legal principles, or allow legality to circumscribe corporate behavior, the Court shifted legal principles to match corporate behavior. That is not to suggest that legal principles should be irrevocably fixed in essential categories. Rather, it is to say that the way such principles change should be understood as a question of politics and not a reflection of the Court's improved capacity for discovering the true nature of the corporate form. Acknowledging this type of judicial politics can help ensure that the legal principles enabling corporate rights and powers remain open to subsequent political challenge from alternative perspectives.

But the Court's willingness to accommodate changing corporate spatial practices begs the question of what enabled those spatial practices to change in the first place. If corporations were defined in *Dartmouth* as the creations of state legislatures, with only those rights and powers articulated in their charters, then changes in corporate organization, or behavior, or spatiality, must be associated with changes to corporate charters and/or to the corporate chartering process. The simple fact that the *Deveaux* Court could find all members of the Bank of the United States to be citizens of the same state, while the diversity of corporate membership in *Letson* and *Marshall* led those Courts to engage in such conceptual gymnastics in order to sustain federal jurisdiction suggests that even between the years 1809 and 1844 some fundamental change had occurred with regard to how corporations were organized and managed. The process and politics behind the chartering of corporations will be examined in the following chapter.

Chapter Eight: Corporate chartering and legislative control

As a parallel narrative to early corporate jurisprudence, this chapter will examine the historical legislative treatment of the corporation in the United States. The evolution of the corporation from a narrowly defined and closely controlled special privilege to a broadly defined, loosely controlled, and generally practiced form of business organization can be traced quite clearly through changes in the state-based corporate chartering process. This chapter will thus examine and discuss that corporate legislative evolution. The focus will be on the developments that occurred in the nineteenth century, roughly corresponding to the era of judicial treatment of the corporation explored in the previous chapter. The objective will be to illustrate the relationship between changes in judicial interpretations of the corporation and changes in corporate legislative practice in order to construct a more complete understanding of the nature of corporate rights and powers.

Incorporation through special legislation

The absence of the corporation from the US Constitution implies no federal authority over the legal creation and regulation of corporate organizations, apart from concerns of interstate commerce. Authority over matters of incorporation has therefore been assumed, since the country's earliest days, by the individual states (Mark, 1997). As noted in Chapter Three, the reason for the corporation's exclusion from the Constitution is uncertain but is commonly attributed to the founders' and early citizens' fear of the corporation's centralizing and monopolistic tendencies (Bakan, 2004; Grossman, 1998; Mark, 1987; Millon, 1990). Consequently, state legislatures tightly controlled the process of incorporation and the powers of corporate organizations up through the mid-nineteenth

century by granting charters on a case by case basis through passage of special legislation. That special-legislative chartering process both reflected and reinforced the idea of the corporation as a "legal fiction" or an organizational form created by the state, with no real presence outside of that state-sanctioned existence. The most definitive statement encapsulating this position is the famous opinion offered in 1819 by Chief Justice Marshall in the case of *Trustees of Dartmouth College vs. Woodward*: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."

As discussed previously, from this perspective the corporation exists exclusively through the mechanism of the chartering agreement, making the state author of corporate rights and obligations and making the corporate charter a contract establishing the parameters of both state and corporate behavior. Chief Justice Marshall's assertion in *Dartmouth* that the "objects for which a corporation is created are universally such as the government wishes to promote," suggested that the state's control over the chartering process provided all the regulatory power needed to ensure corporations would serve the interests of the public. By his estimation, the chartering process worked in the following way:

> Charitable, or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes...apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created.

Unfortunately, at least for those concerned with the expansion of corporate power, history has shown the chartering process to work quite differently. It is true that state legislators have had the power and opportunity to hold corporations accountable to the public interest, broadly defined, and that the earliest corporate charters in the United States narrowly defined corporate composition, duration, and purpose (Butler, 1985). Brandeis (1933) summarized this historical moment:

> Limitation upon the amount of the authorized capital of business corporations was long universal....Limitations upon the scope of a business corporation's powers and activity were also long universal....[T]he duration of corporate franchises was generally limited to a period of 20, 30, or 50 years. All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state. The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or otherwise. The power to hold stock in other corporations was not conferred or implied. The holding company was impossible.

The power and opportunity of state legislatures to enforce such limitations, however, also provided them the power and opportunity to permit corporations to evade these or any other limitations, for the right price. Thus, while the special legislative component of the incorporation process enabled state control and democratic oversight of corporate behavior through "the careful consideration of charters and the limitations embedded in them" (Mark, 1987: 4), it also enabled extensive political corruption as legislators exploited their position to profit from political favoritism (Horwitz, 1985; Steffens, 1905). There seemed to be very few limits to state legislative prerogative in this regard:

> Each corporate charter, therefore, was adopted for the benefit of a specific group

> and, initially, each was unique with respect to its provisions for powers, duration, limited liability, voting rights, and other incidents. In fact, some of the special chartering bills provided specific relief from taxation. Lobbying, logrolling, and bribery...appeared early and developed rapidly in connection with bills for special charters (Butler, 1985: 141).

Corruption in the special chartering process undermined not only the legitimacy of the corporate charter as a regulatory instrument but also belief in state legislatures as the guardians of the public interest against insurgent corporate power brokers (Mark, 1987). Though corporations could be held accountable to the powers and purposes articulated in their charters, they could also use influence to define themselves in those charters however they wished. As Stoke (1930: 552) put it, corporations could simply "secure from the legislature whatever rights and privileges they could persuade it to give."

Several developments eventually motivated change in the chartering process. First, lost faith in charters and growing public outrage over the complicity of legislatures in corporate abuses of power fueled popular demands for "universal access to the corporate form" (Mark, 1987: 6).

Consistent with the populism of the Jacksonian era, the suggested solution was "free incorporation," or the adoption of what came to be called general incorporation laws (Millon, 1990; Mark, 1987). Second, the expansion of interest throughout the nineteenth century in engaging in business through the corporate form brought heavy pressures on state legislatures. Working out the particulars for each corporation's constellation of privileges took an increasing amount of effort, generating support for change both from

overburdened legislators and from a disgruntled public concerned with the amount of time and money being wasted on special chartering (Butler, 1985). A third motivation for change in the chartering process was increased pressure on state legislatures due to spatial competition. Butler (1985) argues that two "exogenous" developments brought state legislatures into direct competition with one another for the revenues generated through the chartering of corporations. One such development was technological change, primarily in transportation via advancements in railroad and canal systems. The other was the Supreme Court's ruling[57] that state legislatures could not discriminate against corporations engaged in interstate commerce. Consequently, state legislatures no longer exercised a kind of spatial monopoly over the granting of corporate privileges. This last point warrants closer attention.

As noted in Chapter Four, most early American corporations were organized and operated on a local scale, mobilizing local resources to provide local products or services, with very few engaged in interstate operation (Butler, 1985; Mark, 1997; Frug, 1980; Davis, 1917). Thus, prior to the technological and judicial developments mentioned above, most corporations were neither technically nor politically capable of interstate commerce. Special chartering enabled state legislatures, if properly motivated, to grant individual corporations the power to operate beyond the borders of the state. This is how conflicts such as those confronted in the early cases of *Deveaux*, *Augusta*, *Letson*,

[57]Butler (1985) identifies *Paul v Virginia* (1869) as the case establishing the commerce clause precedent, whereas in Chapter Four, I attach that development to *Pensacola Telegraph Company v Western Union Telegraph Company* (1877). In the former case the connection to the commerce clause was implied, in the latter case it was made explicit. Either way, the point is the same: the Court's interpretation of the commerce clause introduced an important new element to the politics of corporate chartering.

Marshall, and *Paul*, came before the Court.[58] But the Court's decisions in those cases, producing an unsteady mix of new corporate rights and preserved state legislative powers, created an ambiguous environment for interstate commerce and meant that until *Paul* and *Pensacola Telegraph* "the constitutional status of foreign corporations was still in doubt" (Butler, 1985: 151). The development of commerce clause protections on the one hand and the constitutional rights of individuals on the other changed that situation by creating for corporations the political capacity for interstate commerce.

The consequences of these developments for the politics of corporate chartering cannot be overstated. By producing for corporations the political right to incorporate in one state and engage in business in another, without the consent, or even against the will, of the latter state, the Court effectively constructed a situation in which state legislatures had the responsibility for chartering corporations but not the authority to regulate them. The result has been a competition among the states for corporate revenues that continues to circumscribe corporate regulation.

General incorporation laws

Spatial competition among the states for corporate chartering revenues evolved with the development of what are called "general incorporation laws." By setting incorporation parameters and procedures by types of business rather than on an individual basis, such

[58] It will be recalled from *Augusta*, however, that express permission in the charter to operate in specific foreign territories was not always necessary, depending on the Court's interpretation of the corporation's charter. The absence of spatial *restrictions* in the charter could be taken to imply that the corporation could operate anywhere it was not explicitly prohibited. Language in a corporation's charter enabling foreign operation brought the responsibility of regulating the corporation's foreign behavior onto the legislature of the foreign state.

laws "dispensed with the need for a special act of the legislature, making corporate charters available simply upon compliance with certain generally applicable filing requirements and submission to standardized substantive regulations" (Millon, 1990: 4). Beginning in earnest between the years of 1845 and 1875, general incorporation laws removed legislators from a direct role in chartering specific corporations and otherwise transformed incorporation from a legislative to an administrative procedure, thus limiting state officials' opportunities for privilege peddling and facilitating the expansion of the corporation as an organizational form (Butler, 1985).

But the shift to general incorporation did not happen all at once. Rather it happened gradually over time and space in a way that maintained numerous opportunities for legislative corruption, if slightly reconfigured, and constructed a complex landscape of corporate regulation. As Butler (1985) explains, in moving away from special chartering, most states transitioned through a dual system of incorporation. Under the dual system, some corporations would incorporate under general laws while others would do so under special laws. A New Jersey law passed in 1849, for example, established general procedures for the chartering of corporations engaged in "manufacturing, mining, mechanical, agricultural or chemical business within the state" (Stoke, 1930: 560), and set standard parameters around the capitalization, duration, and reporting requirements of firms chartered under the act. Laws of this type removed from legislators control over the organization of corporations in these industries, but left intact the special legislative process for other corporations in other industries. Thus, to incorporate under the general incorporation act required much less of the corporators, especially in terms of the costs of

lobbying and bribery, but it also yielded fewer corporate privileges. Which laws applied to which corporations was therefore a matter of corporate purpose, to some extent, but primarily a question of political power as "legislators gave inferior privileges to smaller firms while continuing to sell the superior privileges (in the form of a special charter) to firms that valued the privilege more highly" (Butler, 1985: 143). Special charters remained preferable for many corporations because of the profit-making opportunities they provided: "The businessmen who secured special charters from the legislature at great expense converted them to a competitive advantage that gave them an above normal net rate of return on their investments (Butler, 1985: 147)."

Consequently, the market for special privileges during the dual incorporation era continued, and in some ways intensified, in those businesses falling outside the boundaries of general incorporation statutes.

In contrast to specially granted charters, the regulations on corporate composition, organization, and operation enforced through general incorporation laws, at least initially, were thus quite strict. Legislatures used general incorporation laws as a way of maintaining a more uniform and demanding regulatory structure in certain industries. That situation changed by the 1870s after most states prohibited special chartering altogether. With corporations no longer able to gain privileges on an individual level, lobbying and other forms of influence shifted to the acquisition of privileges for corporations in general. Why this shift occurred has much to do with how it occurred.

The first state to enact a full prohibition of special legislative chartering was Louisiana, in 1845. After that, one or more states followed suit every few years through the 1870s (Butler, 1985). Some states enacted the prohibition through state constitutional revisions, some through legislation, but the general motivation was the same: continued popular calls for curbing corruption, unburdening legislators, and limiting corporate powers. That the only of these three goals to be realized was the unburdening of legislators was due in large part to the judicial changes discussed above. As the Supreme Court interpreted corporations to have specific constitutional rights and interpreted the commerce clause of the US Constitution to circumscribe state legislative power vis-à-vis foreign corporations, many corporations, especially those with significant capitalization, could now review the various state corporate statutes and choose to incorporate in whatever state offered the most favorable conditions.

Under these circumstances, states such as Louisiana, and others with strict general incorporation laws, were at a disadvantage in relation to states like New Jersey, where special privileges could be obtained until 1875 (Stoke, 1930). Just as dual incorporation provided some corporations with more extensive privileges than others operating within the same state, differential chartering procedures provided corporations chartered in some states with more extensive privileges than those chartered in other states. By extension, the state willing to confer the most extensive corporate privileges had an advantage over others in the emerging competition for corporate chartering revenues.[59] Butler (1985: 156) explains the choice facing state legislatures at this time:

[59] Chartering revenues were generated through such mechanisms as filing fees, franchise taxes, and property taxes, strategically calculated to be high enough to generate state income but low enough to remain inviting to corporate directors.

> Once the spatial monopolies for corporate privileges had fallen away after *Paul*, legislators faced both new challenges and new opportunities in the changed legal environment. One opportunity open to states was to pass liberal general laws to attract incorporators from across the nation and to increase the revenues of the legislators' home states with taxes and franchise fees on the firms chartered under their laws but operating in other states. In essence, state legislators were presented with the opportunity to export some of the costs of their state government.

Thus emerged in the US a politics of incorporation that Grandy (1987) refers to as "chartermongering." Regardless of social, political, or economic consequences, opportunistic states could provide whatever chartering privileges attracted the greatest number of suitors, in the process undermining the only framework for corporate regulation in existence at the time. The consequence, as Brandeis (1933) explains, was a great dismantling of corporate organizational and operational limitations:

> The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporations laws....The race was one not of diligence but of laxity. Incorporation under such laws was possible; and the great industrial States yielded in order not to lose wholly the prospect of the revenue and the control incident to domestic incorporation.

There has been much debate over whether chartermongering has caused a "race to the bottom," by undercutting all substantive limitations on corporate behavior, or instead a "race to the top," by generating laws that provide the most efficient environment for corporate profit making (Grandy, 1987). This is not a debate I care to engage. Either way the result of chartermongering has been the dismantling of whatever corporate

regulations existed prior to the 1870s. Whether one views that dismantling as a positive or negative development depends on one's political perspective.

Chief among the "lesser states" fueling and capitalizing on the "race of laxity" was the state of New Jersey (Grandy, 1987; Stoke, 1930; Butler, 1985). While the sate of Delaware is widely recognized today as the home to many of the largest US companies, the Delaware corporation laws found so attractive to contemporary corporations were modeled after those developed in New Jersey during the nineteenth century. As it thus appears that all roads to modern corporate law pass through New Jersey, the following brief examination of New Jersey statutes will provide an illustration of the development of general incorporation laws in the US and the evolution of legislative treatment of the corporation more generally.

The New Jersey effect

By 1846, when New Jersey passed its first general incorporation law, applying exclusively to "manufacturing, mining, mechanical, agricultural or chemical business within the state" (Stoke, 1930: 560), the practice of legislative facilitation of corporate profit making was well established. Railroad companies, particularly the Camden and Amboy, the Pennsylvania, and the New Jersey, along with various canal and turnpike companies, had been receiving special privileges, such as tax exemption and monopoly rights, from the legislature for years (Stokes, 1930; Steffens, 1905). As noted above, the changes to the state's chartering procedures introduced with the general incorporation act in 1846 were not comprehensive and did not include the outright prohibition of special

charter, even for those corporations covered by the act—that change would not come to the state until 1875. The 1846 act was also relatively modest in scope—most of the components that would come to define New Jersey chartering policies were added to the act later through amendments and revisions (Grandy, 1987). But as a first step away from the special legislative system, its significance lay in the establishment of certain procedures and requirements common to all corporations chartered under the act. Important requirements included the reporting of debts and assets on an annual basis; debt limits equal to the amount of capital stock; liability of stockholders and directors for deficient capital stock; the engagement of business exclusively within the state; the holding of director and stockholder meetings within the state; that the president, but not necessarily all directors, be a resident of the state; the specification of corporate duration, though in the absence of express language the corporation would be assumed to have perpetual existence; and that the legislature would retain the power to alter and amend any charter granted under the act (Keasbey, 1899; Stoke, 1930).[60]

The first revision to the 1846 act came in 1849. That revision included provisions that the legislature could no longer provide special charters to the types of businesses covered under the act; that the duration of the corporation be limited to fifty years; that the corporation define its purposes with greater specificity; that directors be elected by the stockholders; that a majority of the directors be residents of the state; that the corporation keep its main office within the state; and that corporations follow stricter reporting

[60] This last requirement, the reservation of legislative discretion, was a common component included in state chartering policies throughout the United States in the wake of the *Dartmouth* decision that, unless otherwise stated, the charter represented an irrevocable grant of rights and privileges to the corporators and/or corporation.

requirements (Stoke, 1930). It is clear that the intention of these initial general chartering laws was to present an effective alternative to the corruption and regulatory laxity experienced under the special chartering system. And the absolute prohibition on the granting of special charters to at least some corporations was one more step toward the installation of general incorporation procedures for all corporations in the state. While general incorporation laws may have been popular among the general public, they were strongly resisted by corporate interests, for "those who had been granted monopolies, tax exemptions, or other favors were bent upon maintaining their privileges against adverse legislation by any available means" (Stoke, 1930: 562). Thus, whatever pressure the public brought on the legislature to clean up the corporate chartering process was matched by corporate maneuvers to preserve access to special privileges.

The dual system of incorporation continued in New Jersey for roughly thirty years, expanding access to the corporate form while also preserving the market for special charters. During that time other amendments to the 1846 law were passed more or less each year,[61] typically as a means for making incorporation under general incorporation laws more attractive (Butler, 1985). Of particular significance was an amendment passed in 1865 which, according to Stoke (1930: 562), "paved the way for the national expansion of New Jersey corporations." Among other changes, the 1865 law gave corporations chartered under the act the right to hold property and otherwise operate outside the state's borders, stating clearly that "any company organized under the

[61] Other amendments were passed in 1850, 1852, 1853, 1854, 1857, 1860, 1867, 1873, and 1874. On one hand, the series of amendments reflected the ongoing struggle within the state between the advocates of general and special incorporation laws. On the other hand, the amendments illustrate the open-endedness and political nature of corporate legal status. Each year, different definitions and constructions of the corporation were passed into law, with each law creating different corporate rights and powers.

provision of the act to which this is a supplement may carry on a part of its business out of this State; provided that a majority of the persons associated together in the organization of such company shall be citizens and residents of this State" (Laws of New Jersey, 1866: 344, quoted in Stoke, 1930: 562). The caveat regarding domestic citizenship of the corporate members indicated a lingering discomfort with interstate corporate activity at a time when most business still took place within state boundaries and the status of foreign corporations was still uncertain. Within ten years the domestic citizenship provision was removed.

The passage of general incorporation laws in other states, rising awareness of corporate abuses of power, and the steady drain of special corporate chartering legislation on legislative resources suggested to state legislators that it was only a matter of time before New Jersey passed its own comprehensive general incorporation laws (Cadman, 1949). Consequently, rather than wait for changes to come through a constitutional convention, as was the experience in most other states, which would subject the entire state constitution to revision and limit the influence of legislators over the nature of the changes made, the New Jersey legislature proposed an amendment to the state's existing constitution (Butler, 1985). The 1875 constitutional amendment forbade the granting of special legislative charters to any corporations for any reason and required the legislature to pass general incorporation laws "under which corporations should be organized and corporate powers of every nature obtained" (Keasbey, 1899: 205). But the requirement that a general incorporation law be passed did not specify how it should be passed or how it should be structured. Thus, the same legislative body that had led the way in the selling

of special corporate privileges now had "an almost free hand in deciding on the terms of the charters to be granted under general laws" (Cadman, 1949: 200). According to both Cadman (1949) and Butler (1985), this unusual level of involvement among the legislators explains, at least in part, why New Jersey took the lead in initiating interstate chartering competition. The passage of the 1875 general incorporation statutes make it clear "almost at once...that the lawmakers would move in the direction of extending and enlarging the corporate privileges that could be obtained by filing under general laws" (Cadman, 1949: 200).

The 1875 general incorporation act integrated the many amendments and revisions that had been passed over the years in relation to the original 1846 act, and continued the same trajectory of making general incorporation laws more attractive to corporate founders and directors. Under the act:

> No previous public notice was required....No limit was placed upon the amount of capital stock. No tax of any kind was imposed upon the franchise or privilege of incorporating. No tax was laid upon the capital stock, and it was declared that the real and personal estate of all corporations thereafter formed should be taxed the same as that of individuals.[62] (Keasbey, 1899: 207).

Perhaps the most important change introduced with the 1875 revision, however, was that it was clearly and intentionally crafted to appeal to founders and directors from outside the state. A previous 1865 amendment had extended qualified support to corporations interested in engaging in some activity outside of the state. But the 1875 revision went

[62] These policies would soon be revised to include fees and taxes large enough to generate additional revenue for the state but small enough not to act as a deterrent to current or potential incorporators.

much further: it "allowed corporations to be formed without regard to the residency of the incorporators or the corporation's primary place of business" (Butler, 1985: 157). The only requirement was that all corporations maintain a "principal office" and an "agent" within the state.

The 1875 revision to the general incorporation act opened the door to competition between the states in the business of corporate chartering. However, that competition did not really begin in earnest until after the passage of two more revisions, one in 1888, the other in 1896. That is not to say that other revisions did not occur between 1875 and 1896.[63] Rather revisions were passed at a pace and level of detail that place most of them beyond the scope of the present discussion.[64]

The significance of the 1888 revision was that it enabled corporations to purchase, hold, and sell stock in other corporations; in other words, it legalized corporate consolidation via "trusts" and "holding companies" (Butler, 1985: 161). According to various commentators (Keasbey, 1899; Grandy, 1987: Stoke, 1930), the 1888 revision itself was somewhat nebulous in its scope and intentions, so it wasn't until a subsequent amendment in 1893 that the full meaning and impact of the new corporate powers became apparent. For all intents and purposes, New Jersey had, on one hand, passed a bill legalizing a form of corporate organization and behavior actively resisted and/or prohibited by other states

[63] Nearly every year produced some revision to the general incorporation procedures and altered the range of corporate powers. Steffens (1905: 47) provides a critical summary of the process: "The Jersey law specified the things for which a company might be incorporated, and after 1891 the list grew year by year till, in 1896, charters were made perpetual and instead of a list of permissions, the Revision Act said any 'three or more persons may become a corporation for any lawful purpose or purposes whatever,' and then followed a list of exceptions."

[64] Issues subject to revision included the minutiae of member and director voting rights, taxation rates, capitalization and debt ratios, reporting specifics, accounting methods, etc.

while, on the other hand, it encouraged corporations to circumscribe the prohibitions of such other states by incorporating in New Jersey. The journalist Lincoln Steffens (1905: 42-43) summarized and assailed this policy in a characteristic rant:

> With the United States as a nation of men and women up in arms against trusts, there was need of a state where public opinion was conservative. With demagogic legislators in Congress, and in most of the states, passing laws expressive of the public will, there was a demand for a state legislature that would enact the will of the corporations. With business men everywhere forming pools, and trusts, and gentlemen's agreements to break the law or to get around it, and failing because, though there were trustees there was no trust, and while there were agreements, there were so few gentlemen—with all these difficulties abounding in the Union, there was money in it for the state that would throw down her sister states and give a license to business to do business just as business pleased; lawfully, widely, with a legislature to defeat the general public will, and courts to compel private, corporate good faith.

Keasbey (1899: 30) reiterated this position, in a somewhat less venomous tone, noting that this law enabled corporations to incorporate in New Jersey specifically so that they could operate throughout the country in ways that "had been declared in other states to be in restraint of trade and contrary to public policy."

New Jersey was not the only state at this time to be experimenting with liberalizing its chartering laws, however. Other states, particularly Maine, West Virginia, Delaware, and Maryland, were also looking for ways to attract corporate business (Steffens, 1905; Stoke, 1930). What set New Jersey apart at this time was a strategy devised by a corporate legal advisor named James B. Dill. The strategy entailed not just opening the laws of New Jersey to foreign corporators, but actively advertising around the country the state's incorporation benefits and assisting foreign corporators with the New Jersey

incorporation process (Butler, 1985). While these services were to be provided by a private corporation rather than a state agency, the first corporation established to fill this role—The Corporation Trust Company of New Jersey—was organized by Dill and a former New Jersey Governor, and included the Secretary of State on its board of directors. As Steffens (1905: 44) put it, "This was graft. This company was organized to graft upon the incorporating function of the state, and the state was in on it." The company, of course, cannot be held responsible for the state's incorporation laws, though Dill is generally recognized as the primary force behind both the 1888 and the 1896 revisions. But it did capitalize on those laws and enable their "success."

Like the general revision of 1875, the revision of 1896 clarified and integrated into one coherent body the many revisions that had occurred over the previous twenty years. By this time, incorporation had become a standard procedure, including very few limitations on how, why, or for how long a corporation could be chartered. Thus, "the famous revision of 1896," as Steffens (1905: 48) termed it, continued yet again the permissive trajectory of the state's chartering policies:

> The powers of the corporations to amend or change their charters were enormous. A corporation could change the nature of its business, change its name, increase or decrease it capital stock, change the locations of its principal office in the state, extend its corporate existence, change its common stock into one or more classes of preferred stock, and make any other alterations desired, by a vote of the directors representing two-thirds of the stockholders, provided the amendment could legally have been part of the original charter (Stoke, 1930: 573).

The 1896 act served as the base for the state's chartering policies until 1913, when

Woodrow Wilson, then Governor of New Jersey, passed the "Seven Sisters Act," a strict antitrust bill aimed at reeling in corporate powers. The bill succeeded in discouraging the chartering of trusts and monopolies in the state of New Jersey but not elsewhere, as Delaware, which had been intensely competing with New Jersey in the corporate legislative "race to the bottom," simply absorbed New Jersey's chartering business (Butler, 1985). Delaware continues to be the state of choice for corporators seeking the greatest array of privileges.

One question left unaddressed in this discussion is the relationship between New Jersey and other states during this period. How did other states react to having their corporate regulatory policies undermined by New Jersey? In one sense, it didn't much matter how the other states felt about New Jersey's chartering policies. The corporate rights and powers defined by the Supreme Court that enabled New Jersey's actions also limited the legal range of response available to other states. While the commerce clause restrictions were clearly the most debilitating, especially with regard to the idea of prohibiting outright any corporation chartered in New Jersey, corporate rights under the Fourteenth Amendment—specifically, due process and equal protection of the laws—tied the hands of state legislatures even further. And as if that weren't enough, New Jersey also defended its policies by linking the treatment of foreign corporations operating in New Jersey to the treatment of New Jersey corporations operating in other states (Granby 1987). Thus, whatever legislative discretion any state could exercise over New Jersey corporations after the Supreme Court's interpretation of corporate rights and powers was further tempered by the potential for economic damage, especially given the

concentration of corporations operating under New Jersey charters.

Conclusion

From the various special privileges granted under the special legislative chartering system through the endless stream of revisions to general incorporation laws, most clearly illustrated by the experience of New Jersey, it becomes clear that the rights and powers exercised by corporations at any particular historical moment are the outcome of political struggle; they are the product of active political engagement by various interests in the processes through which corporations are defined and regulated. Thus, as with the judicial treatment of the corporation discussed in the previous chapter, changing constructions of the corporate form in the legislative arena reflect not the discovery of the true and essential nature of the corporation but rather the perceptions and political convictions of those in position to define how corporations are to be legally understood and treated.

For those concerned by the expansion of corporate power and interested in identifying ways to bring corporations within an effective and democratic regulatory framework, the history presented in this chapter may appear discouraging. With the complicity of the courts and various legislatures, the corporate juggernaut dominates this story, progressing from one privilege, right, and power to the next while providing few apparent openings for political challenge. However, the goal here has been to identify the legislative evolution of the corporation not as an inevitable path that proves the incontestability of corporate power, but rather as a contingent political process that is ongoing and remains

open to contestation.

Whatever rights and powers corporations posses must be recognized as political achievements. They reflect neither necessities of corporate organization, requirements of business, nor immutable economic imperatives. Recognizing the development of corporate rights and powers as a political rather than natural process is one step toward conceptualizing and advancing alternative conceptions of the corporation. The next step is then to identify openings in the existing framework of corporate understanding and legal treatment which may be accentuated and expanded as part of a political project aimed at developing alternative corporate legalities. This next step is explored in the following chapter.

Chapter Nine: Alternative legalities and progressive potentialities

In this dissertation I have thus far challenged the mobility of capital in two ways. On one hand, I have identified a common absence from urban politics research and practice of critical questions about, and challenges to, the political character of capital mobility, and considered how and why the absence of such questions and challenges contributes to the naturalization of capital mobility. On the other hand, I have developed a story of the historical and political production of capital mobility (in terms of the institutional form of the corporation) as a way to denaturalize that mobility and reopen to political struggle the legal categories of the corporation and corporate rights. That story as told here is admittedly, though unintentionally, bleak, as it appears to place greater emphasis on the ways corporate rights have been expanded than it does on how they might be narrowed. In some ways that criticism is a fair one: my goal has not been to deny that corporate rights have been greatly expanded over the past two hundred years, that corporations presently possess extensive mobility rights,[65] or that corporations exercise those rights relatively easily and often. This is true in the same sense that I do not wish to argue that labor community activists in Youngstown and Seattle employed/employ incorrect or inappropriate strategies in their struggles against corporate mobility practices, or that academic theorizations of urban politics and development based on the mobility of capital are mistaken.

However, to view the story of capital mobility presented here as primarily a story of the immutability of corporate rights and powers would be, I believe, missing the point. For,

[65] It is not, in fact, entirely correct to say that corporations have mobility rights. There is no such thing as a corporate mobility right. Rather, corporations presently possess a variety of other political rights that make mobility possible or, more precisely, make it very difficult to *prohibit* mobility.

however successful corporate interests have been in achieving certain political rights, recognizing those rights as *achievements* rather than as reflections of natural or inherent qualities is important. If those rights are political achievements then they are politically contestable. If they are based on contingent, though politically powerful, conceptualizations, representations, and definitions of the corporation, then they may be contested through alternative corporate conceptualizations, representations, and definitions.

A third approach to challenging the mobility of capital is thus to reconsider the corporation, to develop and assert new ways of defining what the corporation is and what it may do. This could easily serve as the basis for another dissertation, so I will explore this approach only briefly here, providing some examples of how the corporation is being/can be redefined in more socially progressive ways. I divide the examples to be explored here into two categories. Generally speaking, included in the first category are strategies that accept the corporation as currently defined but challenge and redefine how various corporations may behave. In the second category are strategies that attempt to retheorize the corporation itself or reconceptualize specific corporate rights.

Confronting corporate behavior: progressive potentialities

Numerous efforts can be identified that in one form another present a challenge to how corporations behave. None that I explore here focuses specifically on the issue of capital mobility, but all can be recognized as engaging the relationship between corporations and the places in which they locate and operate. Each can be understood to look past, if not

directly question and challenge, the inviolability of corporate "rights."

Corporate charters movement

The strategy that most directly engages the corporate history discussed previously in order to confront contemporary corporate power is the corporate charters movement. To call the various efforts to expose the vulnerability of corporate charters a "movement" may be a overstatement, but the approach is gaining support. It may be recalled that one product of the Court's ruling in the case of *The Trustees of Dartmouth College v Woodward* (1819) was the designation of the corporate charter as a contract between the state and the corporate founders/investors, which the state could not alter without the consent of the corporate members, *unless the right to do so was reserved by the state in the terms of the original charter.* As a result of that decision, every state in the country subsequently adopted *quo warranto* ("by what authority") language into their corporation laws, either by statute or constitutional provision, reserving the right to revoke the charter of any corporation found to have acted beyond its authority or in ways that otherwise violated the public trust (Benson and Dugger, 1999). Though *quo warranto* reservations became a significant component of nineteenth century corporation law, the evolution of chartering practices—from special legislation to simple administrative procedures under general incorporation laws—and the subsequent undermining of the charter as a regulatory instrument, caused attention to the state's reserved powers in this regard to fade.

Consequently, *quo warranto* was a largely ignored, if not forgotten, component of

corporation law until very recently. But in recent years various legal activists have resurrected the concept as a way to challenge corporate power, presenting *quo warranto* as the best available option for those seeking to challenge the seemingly unbounded power of the contemporary corporation (Benson and Dugger, 1999: 53):

> Most of us proceed as if the state is limited to fighting corporate abuses one pollutant at a time, one layoff at a time, on human rights violation at a time. This has systematically tilted the playing field in favor of giant corporations....Quo warranto is the one remedy that can cut through the very root of this corporate wrongdoing rather than merely trim its branches. An attorney general who is committed to state sovereignty and intent on combating the most serious, costly crime, which is corporate crime, should understand that *quo warranto* is the most effective tool available (Benson and Dugger, 1999: 54-55).

The power of *quo warranto* lies in the fact that it enables activists of any sort to use a corporation's own record of activity as evidence against the corporation's right to continue operations, while simultaneously forcing any particular corporation to "show in a judicial proceeding by what authority it continues to exist" (Benson and Dugger, 1999: 52). It this sense, neither the existence nor the behavior of the corporation is taken for granted.

The most visible example of the *quo warranto* strategy in action has been the case formulated by the National Lawyer's Guild against the Union Oil Company of California (Unocal). Citing various crimes and other harms committed by Unocal over the years, the National Lawyer's Guild asked the California attorney general to investigate the company and, if evidence of illegality were found, to appoint an official to take over the management and operation of the corporation so as to protect the interests of workers,

communities, and others currently dependent on the corporation. While the those behind the Unocal charter revocation effort recognize that success in this particular case is a long shot, they also recognize the symbolic importance of this type of struggle and the value of calling attention not only to the state's role in creating (chartering) corporations, but also the state's power to revoke charters and to otherwise condition the terms under which corporations do business in any particular state.

Bringing the political character of the corporation and corporate rights and powers to the public consciousness is undoubtedly an important step in the more general project of redefining the corporation. However, I recognize two primary limitations to the charter revocation strategy. One is that "the discretion of prosecutors whether or not to bring actions is normally given wide berth" (Benson and Dugger, 1999: p.53), meaning that the ultimate decision to bring *quo warranto* actions against a corporation is left almost entirely to state attorneys general. Thus, achieving any level of certainty with this strategy is difficult. A second limitation, apart from the prospect of bringing a courtroom-based legal challenge against a heavily-resourced corporation, is that the *quo warranto* doctrine is essentially a "corporate crime-fighting tool" that focuses on a corporation's illegal activity, on existing laws that a corporation has broken, not on the destructive elements of a corporation's formally legal behavior. I am more concerned here with how certain corporate behavior, such as the outsourcing of service jobs or the closure/relocation of a manufacturing plant, achieved legality and how that status of legality makes the corporate behavior in question difficult to challenge. Nevertheless, efforts to revoke corporate charters represent at least some form of substantive challenge

to the corporate entity at a time when corporate power appears particularly inviolable.[66]

Conditioning corporate practices

Another strategy for challenging corporate power, one that approaches the corporation from a slightly different perspective, is the placing of various conditions on the behavior of corporations receiving public assistance. Just as the strategy of charter revocation uses the state's role in the creation of corporations to gain leverage over corporate behavior, activists seeking to force a greater degree of local accountability from corporations use corporate dependence on public subsidies, tax abatements, loans, and other development incentives to demand behavioral changes. Living wage laws, local hiring provisions, affordable housing construction requirements, heightened environmental regulations, and community development funding are just some examples of the types of conditions increasingly being placed on corporations receiving public assistance (ILSR, 2005). Also like charter revocation, this strategy represents a welcome effort to curb corporate abuses of public support and bring greater accountability to corporate practices. The focus, however, remains on the behavior of existing corporations as opposed to the conditions under which corporations are brought into existence.

A variation on the theme of local conditioning can be found in the form of the Community Reinvestment Act (CRA). Originally passed in 1977 and then significantly

[66] A variation of the charter revocation strategy are "three strikes" ordinances that apply to corporations. This approach recognizes that corporations are treated legally as "persons" for a variety of reasons, many of which strengthen corporate "rights" to behave in destructive ways, and attempts to hold corporations accountable for their actions in the same ways other "persons" are held accountable. The result is the same as the with charter revocation: corporate violators are prohibited from operating where ordinances are in place.

expanded in 1989, the CRA was passed as a way to require all "regulated financial institutions" to "demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business."[67] As opposed to regulating only those corporations receiving financial or other forms of direct support from the state, the CRA encompasses all corporations seeking to operate as "insured depository institutions." Any financial corporation seeking to relocate, expand, or merge with another financial corporation must file an "application for a deposit facility" with a federal regulatory agency, which will review the application according to "the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods." Thus, though the consequence of building a poor CRA record won't necessarily affect a corporation's existing operations, it could jeopardize a corporation's future plans:

> [B]ecause most significant forms of bank expansion require applications subject to CRA scrutiny, the Act represents a meaningful threat that the responsible federal agency will deny a bank's application to expand. Thus any bank that contemplates establishing new branches, acquiring other banks, or merging into or being acquired by another bank must consider the possibility that its business plan will be stymied by an adverse CRA ruling (Macey and Miller, 1993: 300).

As a regulatory measure, the CRA makes the termination of a certain corporate behavior found to be destructive—in this case, the "redlining" of poor and/or minority communities—the condition under which a corporation may operate. But it also enforces a particular understanding and practice of corporate banking, specifically, that banking be locally responsive and accountable. Under the CRA, it is simply not acceptable for a

[67] The Community Reinvestment Act is codified at 12 U.S.C §§ 2901-2907.

corporation to, for instance, accept deposits in a particular banking branch but not provide credit and financing to the community from which deposits were accepted. To be a banking institution, at least one with a promising future, means operating locally in a responsible and equitable way. Of course, the CRA is not always enforced appropriately or uniformly and does not eliminate redlining. But it is an effort in that direction and it represents a uniquely spatially oriented approach to regulating corporate behavior.

Hazardous waste regulation

Another good example of how corporate "rights" may be conditioned in ways that prohibit certain practices and consequences is the regulation of environmental pollutants. As Lake and Johns (1990) have illustrated, the consequences of the absence of effective regulations in the area of solid and hazardous waste disposal, revealed in the form of such environmental disasters as Love Canal, Times Beach, and the Valley of the Drums, motivated the passage in the 1970s and 1980s of the Resource Conservation and Recover Act (RCRA), an extensive new federal regulation that "provided a definition of hazardous waste, established a system for tracking hazardous waste from generation to disposal, and set standards severely restricting land disposal of hazardous waste" (Lake and Johns, 1990: 491). Through complex coordinations between different levels and branches of government, the RCRA constructed an intricate network of systems designed to ensure that those generating hazardous materials are responsible for what happens to the materials they produce. The RCRA is not specifically articulated in terms of *corporate* waste generators, but as applied to corporations it makes corporate waste-generators responsible not only for their own actions but also for the actions of anyone with whom

they have contracted for the handling or disposal of their waste. In this sense, the RCRA prohibits waste-generating corporations from externalizing at least a certain level of responsibility for the waste they produce.

As an approach to controlling corporate behavior, hazardous waste regulation defines how and to whom corporations are to be responsible and prohibits corporations from defining themselves differently. To be sure, the hazardous waste regulations established through the RCRA and other measures do not hold corporations fully responsible for waste generation and disposal. Lake and Johns (1990) and Lake and Disch (1992) illustrate clearly that while the RCRA makes corporations more accountable for hazardous waste, the majority of disposal costs—financial and social—are born by federal, state, and local governments. In other words, such regulations force corporations to internalize a certain degree of responsibility but continue to permit and enable corporations to externalize most of the costs associated with waste production in general.

Nevertheless, there is a glimmer of possibility in hazardous waste regulations. Corporations could undeniably generate greater profits if they were not responsible for the "safe" disposal of their waste. But they do not have the option of pursuing profit in that way, at least not legally. Appeals to profit requirements, economic principles, and competitive pressures are thus not permitted to affect levels of corporate responsibility for waste. Attached to the "privilege" of operating a business in a way that produces hazardous waste is the requirement to remain accountable to the people and the places where that waste will be handled or disposed.

The task in gathering lessons from the example of hazardous waste regulations is to consider what other areas of corporate behavior warrant the same level of attention as corporate environmental practices. If environmental responsibility can be defined as internal to the corporation, why not other forms of responsibility, such as responsibility to the labor communities where corporations operate? Representative William Ford (D-Michigan) (1983) articulated this sentiment in a statement delivered at a Congressional hearing on plant closings in the 1980s:

> Nothing in current law or in current business practice in this country requires the decisionmakers to take into account when making their decision the costs that will be imposed upon people who have ties to the targeted facility. Unlike our environmental laws, which balance a corporation's profit and license to operate against the health and welfare of its neighbors downwind and downstream, our labor law does not balance the benefits of capital mobility against the health and welfare of those who pay the cost of disinvestment.

Identifying exactly how to go about achieving such gains for specific labor communities is a difficult task. But the example of hazardous waste regulation indicates that it is both possible and worth pursuing.

Reconceptualizing the corporation: alternative corporate legalities

The above strategies illustrate a range of progressive alternatives to the assumption and acceptance of indisputable corporate power. Others certainly exist. The goal here is not to be comprehensive but rather to provide some representative examples. Generally speaking, the common thread through all of the strategies examined above is a focus not on what the corporation is but rather on what it may or may not do, on the types of

behavior that should be allowed or prohibited to corporations. Arguments are thus typically expressed in terms of the consequences of corporate actions—consequences that require remediation through the passage of new laws or regulations capable of circumscribing corporate behavior in new ways. An alternative approach is to reconceptualize the corporation itself, to consider how a different understanding and legal definition of the corporation or of certain corporate rights might produce a different range of acceptable corporate behavior. The primary difference between the two approaches is that in the latter corporate rights are recognized as contingent, as subject to interpretation, and therefore open to contestation. Challenging or limiting corporate behavior thus becomes a matter of reinterpreting the political rights that have previously been used to justify corporate actions, rather than adding new conditions, prohibitions, or regulations to a fixed set of existing rights.

In this section I examine one particular example of this type of approach that relates directly to the issue of plant closures/relocations discussed in previous chapters. The explicit focus of this example is on the reconceptualization of property, rather than the reconceptualization of the corporation, but it has relevance for corporate theorizing in two ways. On one hand, as the corporation has itself been defined as a form of private property, the example discussed below complicates the conception of the corporation as rightfully controlled exclusively by its founders and investors. On the other hand, it complicates the character of the property rights any corporation can claim to possess. In both respects, it opens up the relationship between the corporation and place to critical reconsideration.

The example discussed here is based on an article by Joseph Singer (1988) titled "The reliance interest in property." In this article, Singer sets as the basis for his analysis the struggle in Youngstown, OH., between US Steel and the local labor union[68] over the closure and subsequent demolition of US Steel's local steel-making facilities in the early 1980's. He focuses on how the concept of "property" was addressed in this struggle and argues that the court case through which the local union attempted to either prohibit the local plant closure or else to force US Steel to sell plant to the union (*USWA Local 1330, et al., v US Steel*) was decided incorrectly, based on a misconception of property. He then develops an alternative conception of property on which, he insists, the case should have been decided. In the course of doing so, he provides a useful example of how corporate rights and powers may be challenged through an alternative reading of law that uses "the counterprinciples *already existing in the legal system* as a basis for criticism of the principles in the legal system" (p.630, original emphasis).

The particulars of the suit filed against US Steel by the Youngstown labor community were discussed in Chapter One of this dissertation. It will be recalled that one of the claims asserted by the plaintiffs in that case was a "community property right" that entitled them to force US Steel to "assist in the preservation of the institution of steel in that community" and to "be restrained from leaving the Mahoning Valley in a state of waste and from abandoning its commitment to that community" (USWA Local 1330, 1980). It will also be recalled that the judge in that case found that he could not enforce

[68] Singer focuses primarily on the issue of labor rather than community in his article, though most of his insight extend beyond a narrow definition of labor.

such a property right because, however just it may appear, "the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation" (USWA Local 1330, 1980). Singer's (p. 621) objective is to illustrate the extent to which the judge's position in this case was mistaken and to identify various legal precedents and supports that could have, and should have, been marshaled to uphold the plaintiffs' community property right claim:

> I do not want to be so disingenuous as to claim that recognition of such entitlements would not constitute a substantial change in the law, but I do want to assert that the legal system contains a variety of doctrines—in torts, property, contracts, family law and in legislative modifications of those common law doctrines—that recognize the sharing or shifting of various property interests in situations that should be viewed as analogous to plant closings. If I am right, the courts had access to enforceable legal rules based on principles that could have been seen as applicable precedent for extension of existing law by creation of this new set of entitlement.

Singer's investigation of the doctrinal examples of shared property rights is complex and beyond the scope of the present discussion. What's important here is his argument that the inability of judges to recognize "the sharing and shifting of various property interests" is a product of the understanding of social relationships they choose to advance—different understandings of social relationships lead to judges to look for and recognize different types of legal precedents. To explicate this point, Singer contrasts two models of property: the "free-market model" and the "social relations model" (p. 633). The free market model presents an image of property as derived from "a core of possessive individualism" (p. 634), whereby individuals are autonomous, self-interested, and isolated from each other absent voluntary agreements (contracts) to associate with one

another. Individual property owners from this perspective are free to use or dispose of their property as they see fit and are also "immune from having their property interests transferred to others against their will" (p. 635).

In contrast, the "social relations model" of property derives from an understanding of individuals as inextricably connected to one another through various means and mechanisms that cannot be collapsed into the formal category of voluntary agreements or contracts. Social interaction is not a choice individuals make voluntarily, but rather a condition of life. Thus, individuals are fundamentally interdependent and "situated in various relationships with others that continue over time" (p. 655). Property rights, according to this perspective, are a form of "recognition of obligations that emerge over time out of relationships of interdependence," which are often created so as "to protect the interests of individuals in relying on the continuation" of those relationships (p.653).

The model that pervades current judicial treatment of property, according to Singer, is the free-market model, which has lead judges to approach conflicts over property, such as those reflected in plant closing struggles, by asking narrow questions about "who owns the property" rather than more expansive questions about "who has a right to say something about the use or disposition of the property" (p.641). A social relations model, in other words, would lead judges to recognize the extent to which property rights are not singularly held but rather relationally produced, and to find supporting evidence for such a perspective already embedded within and recognized by various elements of law, specifically "rules about adverse possession, prescriptive easements, public rights of

access to private property, tenants' rights, equitable division of property on divorce, welfare rights" (p.622). The intricate details of these different areas of law are not important here. What is important is what they say about how property rights are held.

Singer argues that as a socially produced and relational category a property right does not enable a property owner to do whatever she wants with "her" property, but rather situates a property owner within a network of other legally protected interests. Singer's approach to property thus complicates the concept of ownership with the question of control. Formal legal ownership says nothing about control. Control, or the freedom to act in particular ways with respect to property, is an outcome of mediation among competing interests. The *meaning* of ownership, and of property rights in general, is thus produced through and defined by ongoing social relationships, not by the legal category of "owner." In this sense, rights do not flow determinately from the status of ownership, but rather substantive ownership flows from a particular constellation of rights. By revealing these qualities of property and demonstrating existing institutional support for their acceptance in the courts by judges, Singer (p. 638) makes the case for extending this understanding of property to the realm of industrial relations in general and to the circumstance of plant closings in particular:

> Can the company blow up the plant when the workers want to buy it? To answer this question by looking for the owner...is a species of conceptualism; to say the company can blow up the plant *because* it owns it states a conclusion rather than a premise. It does not give us a reason to allocate rights between the workers and the company in this way. Both the workers and the managers have legal rights of access to the plant that arise from their relationships with each other and with others. The real issue is how to allocate those entitlements...We decide who wins the dispute on the grounds of policy and morality, and then we *call* that person the

owner.

Here Singer offers a conceptualization of the corporation that differs considerably from the one I have presented. In many ways, the story of the political production of corporate rights I developed in previous chapters may be understood as a story of the production of the free market model of property as applied to the corporation: the corporation is comprised exclusively of individuals, and various forms of corporate regulation are prohibited because such regulations would infringe upon the rights of corporate founders and investors to make decisions about their property. The development and presentation of that story constituted my effort to illustrate the politically contingent and contestable character of corporate rights. Singer's approach is different in that he looks to how existing legal configurations differ from the free market model that supposedly guides legal decision making. In other words, regardless of how the corporation was initially defined, and regardless of how judges choose to interpret the law in any particular case, the existing structure of corporate law reflects various contradictions that reveal other existing and potential conceptualizations of the corporation.

For instance, though the judge in the case of *USWA Local 1330 v US Steel* ruled that the US Steel corporation was the owner of the Youngstown steel-making facilities and as owner could use or dispose of them as it pleased, that ruling is specious, Singer argues (p. 639-640), because of the indeterminate character of corporate ownership:

> Both state incorporation laws and the charters of specific corporations define a complex set of powers divided carefully between shareholders and management

> and among shareholders themselves. Federal and state labor laws further divide power between management and labor. This complex of legal relationships is heavily regulated and there is no one who resembles a fee simple owner or even a tenant in common. Stock may be traded but the new shareholder does not immediately get the right to go in and use the factory owned by the corporation; her powers as an 'owner' are regulated and limited. The identification of a single owner of corporate property fits badly the modern reality.

Singer thus recognizes in the existing configuration of laws related to corporate ownership a different reality than the one suggested by the free-market model of property and/or the model of corporate ownership supported by the judge in *USWA Local 1330 v US Steel.* This does not mean that the law already recognizes something along the lines of a community property right. Rather it means that if a social-relations model of property were adopted then the judge in that or similar cases would find evidence of existing legal principles that enable and justify the extension of law in ways that can recognize new rights claims—such as the claim to a community property right. At the very least, a different vision of social relationships would enable different questions about how to adjudicate property conflicts:

> The image of the corporation as the fee simple owner of its own property is an image that has outlived its usefulness. A better paradigm would focus on the industrial relations between and among the thousands of persons who participate in the ongoing affairs of the business or who depend on its success. These persons include management, shareholders, workers and their families, suppliers, and government entities. The rights of these thousands of persons are only partly governed by contract. The business constitutes a network of ongoing relationships. The factory is a locus for this network. Rather than ask who owns property, we should ask who has a right to say something about the use or disposition of the property. If we ask this question, it turns out that *in every case* we will identify more than one person because property rights in corporate enterprises are *always* shared. Given this fact, the proper normative question then is how to allocate power among the persons with legally protected interests in the property.

As illustrated through this review, two forms of challenge to corporate rights and powers are evident in Singer's approach to property. First, Singer acknowledges that whatever rights and powers corporations possess have been produced through law. And by demonstrating the existence of conflicting and contradictory understandings and treatments of the corporation within law, he exposes the decision by any particular judge to promote one understanding of the corporation rather than another as a political choice, based on particular presumptions and a particular vision of social relationships. In the terms discussed in Chapter Five, Singer thus exposes how formalist legal closure actively and politically advances a constellation of corporate rights based on free-market principles at the expense of alternative perspectives.

Singer presents a second challenge to corporate rights through a reconceptualization of property that also serves as a reconceptualization of the corporation. Here he walks a fine line between denaturalizing one conception of the corporation and essentializing another. For, as a legal category produced through social relations, the corporation shouldn't be understood as having any one definition, as having one essence that can be identified as more true or more real than any other possible representation. Thus, a definition of the corporation derived from a "social relations" perspective shouldn't be considered any more reflective of the true nature of the corporation than one derived from a "free market" perspective.

However, as *only* a legal category, the corporation is defined by law. Thus, in a practical sense, the corporation is what the law says it is. And, according to the majority of judges

presiding over cases involving corporations over the past two hundred years, the law says the corporation is the private possession of its founders and investors. To combat that apparent legal reality, Singer suggests an alternative reading of how the law defines the corporation, an alternative interpretation of what the law says. In doing so, he suggests a progressive alternative corporate legality that has generally been marginalized by the discourse of the "free-market model" of property. At the very least, then, Singer's alternative reading demonstrates that whatever else the law says, it *also* says that included in the corporation are various competing interests that have been and may be recognized in the courts. Whether and how judges or others may use his alternative reading to extend formal recognition to new definitions of or claims against the corporation and/or corporate property remains to be seen.

Conclusion

The strategies discussed in this chapter illustrate some examples of how the corporation may be redefined in socially progressive ways. None focuses specifically on capital mobility and none immediately reverse the rights and powers achieved for corporations over the past two hundred years. But all illustrate how the legal definition of the corporation is open to contestation, how corporate rights are not fixed and immutable, and how, in many ways, the corporation is already different from how it is commonly represented. The task is to continue to find new ways of understanding and theorizing the corporation and corporate rights, particularly with regard to mobility, that may redefine in more progressive ways the relationship between corporations and the places in which the locate and operate.

Perhaps the greatest critical question generated by the knowledge produced through this dissertation is how, and by whom, alternative conceptualizations of the corporation can be expected. It is difficult to imagine what kind of success or support the strategy of "reconceptualizing the corporation" would have under the emergency circumstances faced by the Youngstown and Seattle labor communities. The legal assertion of a community property right, which became an important component of the Youngstown struggle, may be informative here. It may be recalled that in the case of *USWA Local 1330, et al., v US Steel*, all moral authority pointed to the legitimation of a community property right for the Youngstown labor community, or at least to the enforcement of some degree of corporate local responsibility. However, in the absence of a formal legal mechanism already in existence, the judge ruled that no such right could be recognized or created by the court. That argument is largely unsatisfactory, and it has come under direct criticism, as discussed above. Nevertheless, it raises two important questions about the strategy of critical legal challenge developed in this dissertation. One is the question of efficacy: how effective can legal criticism and challenge be in advancing progressive development and/or social change goals? As discussed in Chapter Five, Blomley (1994b) has addressed this question directly, finding that, as the Youngstown labor community discovered, the courtroom is generally not the best place to forward progressive rights claims. Rather, "the progressive use of rights for mobilization and critique" (Blomley, 1994b: 420), which I consider a reference to the task raising social consciousness and/or pushing for *legislative* gains, may prove more effective. But that suggests that struggles over political rights or legal categories are most effectively waged proactively as part of

ongoing social change efforts rather than defensively during moments of emergency and crisis. Which raises difficult questions about who should/could engage in this type of struggle and how support for such efforts could be mobilized and maintained. For, even in the Youngstown struggle, where Judge Lambros suggested that the establishment of a community property right could be the focus of future political efforts, no such political effort emerged.

These are challenges facing advocates of critical legal (geographic) analysis. There is no particular answer to the question of who could/should engage the strategy other than this: anyone and everyone who sees some value in it. For my part, I consider that scholars and academic researchers, due to their ability to conduct long-term research and their distance from the immediate crisis management aspects of urban politics and development, for example, are particularly well positioned to conduct this type of analysis. This dissertation constitutes the first of what I expect will be an ongoing effort of my own to pursue progressive social change through critical legal geographic research.

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Curriculum Vita

Jerome Mark Pendras

Education

2005	Rutgers, The State University of New Jersey, Geography, Ph.D.
1999	Rutgers, The State University of New Jersey, Geography, MA
1994	University of Washington, International Studies, BA

Professional History

2004	Department Fellow, Department of Geography, Rutgers University
2001-2003	Graduate Student Instructor, Department of Geography, Rutgers University
1999-2001	Research Associate, Center for Urban Policy Research, Rutgers University
1998-1999	USAID Program Coordinator, Local Democracy in Poland, Center for Russian, Central, and East European Studies, Rutgers University
1995-1997	Co-Founder/Director, MK International, Seattle, WA/Quetzaltenango, Guatemala

Publications

(Accepted)	"The strengths and limitations of regulation theory in explaining local economic change" *The Middle States Geographer*
(Forthcoming)	"Whither critical inquiry?" *The Professional Geographer*
2002	"From local consciousness to global change: asserting power at the local scale" *International Journal of Urban and Regional Research*, V. 26, No.4, pp. 823-833