

**SYMPOSIUM: RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND
THEOLOGICAL PERSPECTIVES: ARTICLE: POLITICAL PERSPECTIVE:
INDIVIDUAL AND GROUP, NATURAL AND ACQUIRED RIGHTS: ON THE
NEED FOR UNCLEAR DISTINCTIONS**

Spring, 2005

Reporter

3 Ave Maria L. Rev. 171 *

Length: 21678 words

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+ Associate Professor of Law, Ave Maria School of Law. I would like to thank those who participated in the conference on "Rethinking Rights," and especially Brian Tierney and R. H. Helmholz, who responded in an extremely kind and constructive manner to my remarks, causing me to make changes I hope have improved my argument. I also am indebted to Kathleen Morkes, Guy Conti, Lucia Lee, Mary Ann Zivnuska, and Paul Rosen for their capable research assistance.

Text

[*171]

In this paper, I make an argument that is highly unusual and may seem scandalous to contemporary academics. I argue that we are drawing and enforcing analytical and practical distinctions with excessive clarity. The distinctions to which I refer are those between individual and group rights, and between natural and acquired rights. My objection to this drawing of clear distinctions rests on my view that the de-integration of concepts of person and group, and of nature and historical circumstance, actually has lessened our understanding of the nature and purpose of rights. I will begin with a discussion of a recent article by our esteemed colleague, Professor R. H. Helmholz,¹ because it characterizes so well the nature of the break between medieval and modern rights, and the roots of that break in a highly focused subjective individualism. I then argue that this subjective individualism is intimately connected with the modern dichotomization of the relationship between individuals and groups. I contrast this individualism with the views of medieval jurists.

I maintain that the medieval jurists saw human nature as having inherent dignity, derived from the person's creation in the image of God, and saw nature and its good as inherently social. Their thought valued individuals in their varied relations with one another, [*172] combining and balancing rights of persons with rights of groups incorporating these persons. Moreover, I will explain that because both man's dignity and his sociability were recognized, acquired and natural rights gained full recognition in the fundamental right of due process, a right that is in important ways substantive as well as procedural, natural as well as acquired, and applicable to groups as well as to individuals. The older, integrated view of human nature produced an integrated view of human rights, and of the necessary connections between individual and group, nature and historical circumstance.

¹ R. H. Helmholz is Ruth Wyatt Rosenson Distinguished Service Professor of Law at the University of Chicago Law School. Perhaps the most important legal historian writing today, he is the author of *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (2004), *The Ius Commune in England: Four Studies* (2001), and numerous articles exploring the relationship among the canon law, other continental precepts and practices, and the development of the common law.

American jurisprudence has moved away from the integrated medieval understanding, stripping municipalities of their corporate rights and recognizing only individual rights. The resulting de-integration of human nature and experience has set up a false opposition between individual and group, nature and historical circumstance, blinding us to rights' true bases and purposes. Human dignity, rooted in the person's innate sociability, has been reduced to individual autonomy - the assumption that individuals and their choices are the only "givens" on which rights may be based. As a result, intermediary institutions have been undermined, a development which has in turn undermined associative rights of independent importance in defending against tyranny.

Helmholz and the Character of Medieval Rights

In his recent article, *Natural Human Rights: The Perspective of the Ius Commune*,² Professor Helmholz contributes to what he calls a "revisionist strand of scholarship," rejecting the common view that natural rights were a creation of eighteenth-century philosophers in favor of "the conclusion that the medieval canonists and civilians understood and endorsed the notion that natural rights existed and could be asserted by individuals."³ Broadly supporting this revisionist view, Helmholz nonetheless seeks to make clear that "the medieval law took a decidedly less individualistic approach to rights than is common today."⁴ Unlike its modern counterpart, medieval [*173] law rooted rights in "tenets of natural and divine law, laws that God himself had created and implanted in men's consciousness."⁵ Under this law, the goal was to vindicate and to promote God's plan for the world, not, as in modern law, "to vindicate human choice, to promote the sacredness of human life, or to allow men and women to flourish as they chose."⁶

In showing that the medieval view of rights was decidedly less subjectivist and individualistic than its modern counterpart,⁷ Helmholz explains that "the creation of natural rights in the modern sense of the term belongs as much to a later age as it does to the Middle Ages."⁸ This may be taken as a correction of sorts to the work of the revisionist school in that it reintroduces the notion of an appreciable "break" in the development of rights, caused by the early modern rise of individualism.⁹ Because I accept Helmholz's characterization of this break, what follows may be seen as quibbling with him in regard to its implications. I aim to highlight the origins and effects of the excessively clear distinctions against which I argue.

Helmholz sees medieval rights as less indebted to a concern with the inherent dignity of the human person than the contemporary view.¹⁰ This opinion leads him to emphasize, for example, the limitations of the medieval right of the poor to sustenance.¹¹ He focuses in particular on the lack of an enforceable right of action, or even of any exception from existing laws against theft other than in cases of dire necessity.¹² Contrasting these very real limits with contemporary American judicial decisions aimed at preventing "the poor from being disadvantaged in travel,

² R. H. Helmholz, *Natural Human Rights: The Perspective of the Ius Commune*, [52 Cath. U. L. Rev. 301 \(2003\)](#).

³ *Id.* at 303-04; see also R. H. Helmholz, *Magna Carta and the Ius Commune*, [66 U. Chi. L. Rev. 297 \(1999\)](#) (detailing the impact of the *ius commune* on the drafting and importance of *Magna Carta*).

⁴ Helmholz, *supra* note 2, at 304.

⁵ *Id.*

⁶ *Id.*

⁷ See *id.*

⁸ *Id.* at 325.

⁹ See *id.* at 304.

¹⁰ See *id.*

¹¹ See *id.* at 305-08 (emphasizing limitations on the medieval right to welfare).

¹² See *id.* at 305-07.

litigation, and receipt of welfare benefits" and treating the protection of disadvantaged groups as a "fundamental interest," Helmholtz notes "a different spirit pervading American law than that which is found in the *ius commune*."¹³

Likewise, according to Helmholtz, the medieval "freedom to marry was something less than a natural right according to the modern [*174] understanding of the term."¹⁴ Why? Because the goods sought by this right were not bound up with a concern for individual autonomy and because the right of non-coerced marriage was limited. Helmholtz points out that the goal of the medieval lawyers in prohibiting coerced marriage was prevention of the "bad results" of an increased likelihood of adultery, considered a sin, and an increased difficulty of producing legitimate children, considered a social good.¹⁵ According to Helmholtz, such concerns, in effect, subordinated the individual desire for autonomy to the needs of the Church.¹⁶ He buttresses his point by noting that the Church's valuation of monastic over secular life allowed the vow of celibacy to trump the marriage vow, even at times when the marriage vow came first.¹⁷

One can accept Helmholtz's characterization of the nature of the right to marry in the medieval context without agreeing with his apparent view that the reasons given had more to do with the needs of the Church than with those of the person. Indeed, one might argue that the very distinction between objective and subjective rights that Helmholtz emphasizes should lead one to see this older view in more benign terms, as basing the right to marry in the objective needs of the person (rather than the Church or society *qua* society). The person himself, on this view, benefits from a life without sin, in a stable society based in family, religion, and religiously based morality. Where Helmholtz describes a right hemmed in by "the overriding goals of the church itself,"¹⁸ one could see a right by nature aimed at a good - virtuous participation in a good marriage (or better yet marriage to Christ) and a healthy society - and defined and limited by that good.

Most illustrative of this right by nature aimed at the good is the medieval subordination of marriage rights to religious vows. One could cease paying the marital debt of companionship and sexual relations and take on the religious, celibate life - but only with the consent of one's spouse.¹⁹ One had the right to choose to set aside one's marital vows, but only to take on other, more stringent vows [*175] aimed at a higher good, and only with the consent of the other person making up the marital relation.²⁰ This contrasts sharply with current practice, which leaves a spouse with no right to defend the marital bond against even the most capricious choice of one's spouse to dissolve it.

Thus we see the distinction between medieval rights, with their basis in an objective view of the human good, and modern rights, with their unswerving concern to vindicate the unlimited choice of each individual. As Helmholtz notes, medieval rights were not seen as goods in themselves; they, by nature, served higher ends, rooted in a religious vision of natural law and the nature of a good life.²¹ Moreover, individual autonomy-choice-was not a

¹³ *Id.* at 307-08.

¹⁴ *Id.* at 311.

¹⁵ *Id.* at 309.

¹⁶ See *id.* at 309-11.

¹⁷ *Id.* at 310.

¹⁸ *Id.* at 311.

¹⁹ I am indebted to Professor Helmholtz for bringing this historical fact to my attention. See Charles J. Reid, Jr., *Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* 140-41 (2004).

²⁰ See *id.*

²¹ See Helmholtz, *supra* note 2, at 318 (contrasting the modern notion of the right to a fair trial as an absolute good in itself with the medieval view, in which the right to a fair trial "was based upon an assessment of the needs of justice, as those needs were shown in the Bible and deduced from the tenets of natural law").

good in itself. ²² As the proper end of the right to vote was the election of the right people for the right posts, ²³ so, for example, the right to religious freedom was aimed at bringing the person voluntarily into the Church. ²⁴ Once that "right" choice was made, no abstract right to choose could allow for its subsequent rejection. ²⁵ Choice itself not being the good, there was no perceived need to keep it always open and available.

None of this requires, in my view, Helmholtz's dichotomization of a modern "regard for the inherent dignity of the human person" and the medieval grounding of rights in "reasons in texts taken from Roman law, natural law, and the Bible - texts that suggested that the needs of human society would be promoted by the observance of the rights." ²⁶ To avoid this dichotomy, we need only take seriously legal reasoning rooted in Christian theology and anthropology.

For example, Helmholtz leaves off his discussion of the grounding of the right to a fair trial with the observation that it was set in a reading of God's "trial" of Adam for eating from the Tree of the Knowledge of Good and Evil. ²⁷ God having given Adam the opportunity to present his "case" in defense of his conduct, the [*176] reasoning went, courts had a duty to do the same for those accused of crimes. ²⁸ What is missing here is an inquiry into the reasons why the pattern set by God should be followed. I submit that the answer to that question is that the pattern is just, and the human person, created in the image of God, has a duty to act as God would have him act. Equally important, the human person has an inherent dignity, according to which he ought to be treated - that is, with justice. The medieval jurists did not expend a great deal of ink on the notion that laws must respect the inherent dignity of the individual, not because they denied such dignity, but because it was inherent in their society and culture.

Even a cursory glance at prominent medieval thinkers demonstrates that they operated within a worldview according to which the twin aims of man - virtue and peace in the community during this life, and beatitude in the next - ordered conceptions of rights as well as other social and political goods. Augustine noted that a state without justice was nothing more than a band of robbers. ²⁹ Aquinas said a law is unjust when it is "contrary to human good ... [such as] when burdens are imposed unequally on the community" and went on to argue that because such laws "are acts of violence rather than laws[.]" such laws do not bind the conscience. ³⁰ The goal of the medieval state was a just order, one recognizing man's inherent dignity. Undermined over time by the rise of nominalism and its casuistical heirs, this older, realist, moral vision was rooted in moral theology, with its inherent concern for the good of the human person. ³¹

Of course, to seek the good of the person one must know what that person is. Modern theories, beginning from the proposition that merely exercising one's will ("choice") is an inherent good, require no moral anthropology, and indeed preclude one, because it would narrow the range of available choices. ³² A realist theory of rights, on the

²² See *id.* at 304.

²³ See *id.* at 312.

²⁴ See *id.* at 314.

²⁵ See *id.* at 315-16.

²⁶ *Id.* at 319.

²⁷ *Id.* at 317.

²⁸ *Id.*

²⁹ See Saint Augustine, *The City of God*, Book IV, ch. 4 (Marcus Dods trans., Modern Library ed., Random House 1993).

³⁰ Thomas Aquinas, *Summa Theologica*, Part I-II, Question 96, Article 4 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911).

³¹ See Romanus Cessario, O.P., *Introduction to Moral Theology* 229-30 (2001) (arguing that Ockham's nominalism led to the rise of casuist morality based in the notion of a "liberty of indifference" deferring moral questions in favor of the supposed good of individual will).

other hand, must be grounded in a thicker understanding of [*177] human nature. Most often encapsulated in references to Thomas Aquinas, the realist theory asserts that, because action follows being - realist philosophy does not make the Humean fact/value distinction - the nature of the person tells us the nature of proper human action. ³³ And, because the person who acts from intellect and will is created in the image of God, it is through rational purposive action aimed at the good that we become most like that which is our perfection, God. ³⁴ Because God is love, the purposive act of love brings us into His presence, our ultimate goal. ³⁵ Thus, there is a real, concrete basis to human rights in the medieval view - one grounded in a vision of the good for each of us, both in this life and in the next. That good differs from the modern good - choice - in that it has substance; by resting on human dignity rather than individual autonomy, it provides recognizable shape and limits to our rights. Where modern rights are "natural" in the radical sense of being treated as unquestioned first principles, earlier rights were seen as "natural" in that they grew out of human nature. ³⁶

Whether medieval or modern, all rights are shaped and limited by their ends. As Helmholtz points out, for example, "We treasure freedom of speech partly because we believe that the government of our country will be improved if we encourage the interchange of ideas and the fullest discussion of the merits of those who govern us." ³⁷ Helmholtz goes on to note that, while some other rights also are defined (and limited) in terms of their objectives, and some even would limit rights "in the interests of the well-being of the many," "adjusting human rights to fit the objective needs of society is not the usual contemporary way of thinking about such rights." ³⁸ Rather, rights today are seen as inhering in individuals whose autonomy - that is, their exercise of will qua will - is their proper end. ³⁹

Here, I think, we see the crucial distinction between medieval and modern rights, not merely in an objective versus subjective vision, but also in the separation of the person and his rights from society. [*178] Helmholtz argues that various rights today "more often than not ... are ends in themselves." ⁴⁰ But, to quibble again, I would argue that they remain means - to the unexamined end of individual autonomy. The reason rights today are utterly subjective is that we no longer are allowed to discuss ends in any meaningful sense.

Any objective view of rights and their proper ends, obviously, can lead to arguments over both the nature of the good and the best means of achieving it. Modern rights discourse tends to rule out of order any attempt to discuss such ends on the grounds that it is inherently dangerous and oppressive because it imposes a vision of the good (and its shaping of rights) onto each individual, thereby limiting that individual's autonomy. But I submit that this is an incorrect view of rights and their ends. Let me make my point by restating the realist/subjectivist contrast. Brian Tierney explains the roots of the subjectivist view when he points out that rights, understood as persons' rational, moral power to discern a sphere of autonomy within which they could licitly act as they wished, can be found developed in the works of medieval Decretists, widely diffused in Europe by the end of the twelfth century. ⁴¹ This

³² See *id.*

³³ See *id.* at 23.

³⁴ See *id.* at 24-29 (discussing the concept of the *imago Dei*, or image of God).

³⁵ *Id.*; see also Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr. & Mohammad H. Fadel, *Classical Religious Perspectives of Adoption Law*, [79 Notre Dame L. Rev. 693, 718 \(2004\)](#) (citing Peter Lombard's argument that all men are the adopted children of God, later used by Aquinas in developing the notion of adoption as a reflection of divine love).

³⁶ See Cessario, *supra* note 31, at 23.

³⁷ Helmholtz, *supra* note 2, at 324.

³⁸ *Id.* at 325.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Brian Tierney, *Origins of Natural Rights Language: Texts and Contexts, 1150-1250*, reprinted in *Rights, Laws and Infallibility in Medieval Thought* 615, 625 (1997).

sphere of autonomy was viewed as real, even though the rights were objective. Under the older realist view, however, this sphere was one of prudence, of the application of one's own God-given reason and will to determine how best to pursue one's proper ends. Today that sphere is one of indifference, as the nominalists would say, or at any rate of pure will, in which the individual's action is self-justifying.⁴²

It is difficult to conduct reasoned discourse concerning rights today because we have ruled out discussion of an essential element of their being as well as their practice - their purpose or goal. But I say this, not primarily to argue for a teleological vision of rights, but rather, primarily to argue against what I see at the root of today's non-teleological vision of rights: insistence on bright-line distinctions that oppose the individual to the group and historically grounded rights to rights inhering in our nature. We must re-integrate our understanding of human nature, and the person's social nature in particular, in order to understand human rights.

[*179]

Rights, Towns, and Persons

The historically rooted nature of rights extends to modern times, and to the most substantive of "natural" rights. For example, the right of free speech often is claimed to be absolute and trans-temporal.⁴³ Yet, as Philip A. Hamburger has pointed out, in America, even in the late eighteenth century, natural rights were understood to be subject to natural law and "retained under civil government only to the extent permitted by the Constitution and other civil laws."⁴⁴ As Hamburger puts it:

Prior to 1798, almost all Americans who asserted the right of free speech and press did not argue that they were, on that basis, free from the laws regulating seditious libel, other types of defamation, obscenity, or fraud. Nor did these Americans object to myriad laws distributing acquired rights, such as, for example, government employment, on the basis of the recipient's political opinions.⁴⁵

In part, the seeming contradiction of a natural right, such as free speech, being subject to limitations can be explained by the conviction that all rights are subject to natural law.⁴⁶ Eighteenth-century Americans deemed it unreasonable (and therefore against natural law) to hold that a natural right to free speech would protect speech that injures others through defamation, obscenity, and the like.⁴⁷ But the limits on free speech were not provided by reason alone; such "natural" rights were limited by constitutions, which might or might not fully protect them, and civil laws which might infringe on them in myriad ways. Such failures to protect natural rights were seen as reasons to change laws and constitutions.⁴⁸ But the particular applications of natural law through civil law themselves were subject to variation. "Constitutions and other civil laws could restrain natural liberty in varying degrees and ways and, nonetheless, could **[*180]** still be said to comport with natural law."⁴⁹ The lack of specificity in natural law,

⁴² See Cessario, *supra* note 31, at 229-30.

⁴³ See, e.g., Seth F. Kreimer, The Pennsylvania Constitution's Protection of Free Expression, *5 U. Pa. J. Const. L.* 12, 53 (2002) (citing *Kirmse v. Adler*, 166 A. 566, 569 (Pa. 1933) on the "absolute right" to free expression supposedly established by the Pennsylvania Constitution).

⁴⁴ Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, *102 Yale L.J.* 907, 908-09 (1993).

⁴⁵ *Id.* at 910-11.

⁴⁶ *Id.* at 913.

⁴⁷ See *id.* at 935-36.

⁴⁸ See *id.* at 935-37.

⁴⁹ *Id.* at 937.

along with its lack of enforcement mechanisms, created a vast area of civil law in which prudence was necessary to accommodate rights and circumstances.⁵⁰

Even the most natural and inalienable of rights must be made active through the integration of reason and experience. Rights must be enforced and to some extent even defined in a manner that recognizes the needs of public peace and private security along with the ends of the rights themselves. Even the most natural of rights is acquired, in its full nature, through custom and lawmaking.

My focus here will not be on the most abstractly "natural" of rights, however. Further, I will explicate the integrated vision of rights, not in religious texts or in canon law, but in the development of secular rights rooted in charters - acquisition - as well as natural law, and specifically in the development of secular rights in the English borough.⁵¹ I have made a more detailed argument concerning the nature and origins of municipal rights elsewhere.⁵² I will briefly summarize that argument here to make a fairly straightforward point: the medieval borough integrated individual with group and natural with historically acquired rights. It did this in large measure because it recognized the fundamentally social nature of the person; it defied modern attempts to de-integrate both the person and society. The borough did not possess the modern penchant for separating public from private and thereby devaluing the myriad activities that are primarily social.

As the groundbreaking historian of medieval corporatism, Otto von Gierke, observed, in the medieval view, corporate groups like the borough were seen as real in themselves, unifying individuals with **[*181]** the group.⁵³ This contrasts with the modern view, which sees the corporation as a fictional person utterly separate from the members.⁵⁴ Legal practice reflected the medieval, integrationist view. Rather than bestowing limited liability on a corporation seen as utterly separate from a more or less passive group of shareholders, the borough, for example, was seen as being possessed of a kind of joint and several liability.⁵⁵ Each member of the corporation was liable for its acts, and this included citizen liability for the taxes of the borough.⁵⁶ Yet, unlike a mere partnership, towns and other corporations gained the marks of incorporation, including potentially infinite life.⁵⁷

⁵⁰ See *id.* at 942-44.

⁵¹ Boroughs are difficult to define in medieval usage and difficult to differentiate from other population centers. See 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 642 (Cambridge University Press 2d ed. 1996) (1898) (arguing that "in the thirteenth [century] no strict definition of a borough was possible"). We know, however, that boroughs had certain characteristics that enhanced their importance and communal character; with their roots in earlier royal military encampments, boroughs enjoyed greater self-government, representation, and corporate existence than other localities in medieval England. See [id. at 634-38](#) (arguing that by the time of the Norman Conquest, the borough was "a unit" that had corporate personality and had to be dealt with as a unit rather than as a collection of vassals).

⁵² See Bruce P. Frohnen, *The One and the Many: Individual Rights, Group Rights and the Diversity of Groups*, 107 *W. Va. L. Rev.* (forthcoming 2005).

⁵³ See, e.g., Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, [50 *U. Pitt. L. Rev.* 575, 582-84 \(1989\)](#) (summarizing Gierke's characterization of medieval corporate groups as constituting a reality incorporating and going beyond their individual members).

⁵⁴ See Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1089 (1980).

⁵⁵ See H. Ke Chin Wang, *The Corporate Entity Concept (Or Fiction Theory) in the Year Book Period*, 58 *Law Q. Rev.* 498, 507-08 (1942).

⁵⁶ *Id.*

⁵⁷ By the last part of the fifteenth century, a charter (which would now be considered a charter of incorporation) did not bestow limited liability, yet still bestowed on the town the so-called five points of incorporation: the right to have perpetual succession and a common seal; the right to sue and be sued; the right to own property; and the right to issue bylaws - to have its own will, though one for which its corporate members were fully responsible. Susan Reynolds, *An Introduction to the History of English*

This view of corporate groups like the borough had its model in the Christian view of the incorporation of all Christians into one Body of Christ (the Church).⁵⁸ In the corporation of the Church, the pope served temporally as the head in that he had more power than each individual. But the Church's individual members, as a corporate body, also had authority - for example, by enacting canon laws the pope could not simply ignore.⁵⁹

English charters and common law both were suffused with canonist and corporatist assumptions and forms.⁶⁰ Thus, ecclesiastical corporate bodies found an analogy in secular bodies, particularly in **[*182]** the borough. By the thirteenth century, the English borough could be likened to a religious order, having "a permanent purpose that keeps it together just as a religious house is kept together by the purpose of glorifying God."⁶¹ A freeman of Norwich, for example, would take as his civil purpose to protect the rights or "franchises and liberties" of that borough.⁶²

Charters, or "formal documents describing the rights and obligations on each side of a feudal relationship,"⁶³ were common means by which both kings and lesser lords granted privileges (for a price) to burgesses or local borough leaders.⁶⁴ Charters from the crown played an important role in establishing corporations and their laws. During the medieval era, "gradually, English law came to view charter grants as grants of corporate status."⁶⁵ By 1200, boroughs were receiving seals with their charters, which their heads used to commit the whole in conducting business.⁶⁶

As a corporation, boroughs held important rights, such as freedom from personal service.⁶⁷ They also developed rights of self-government rooted in the recognized right to declare and follow local custom.⁶⁸ In addition, boroughs held numerous economic rights regarding taxes⁶⁹ and maintenance of local monopolies,⁷⁰ defying any coherent public/private distinction.

Medieval Towns 113 (1977); cf. Pollock & Maitland, *supra* note 51, at 487 (observing that the non-liability of members was not essential to incorporation).

⁵⁸ Cf. Brian Tierney, Religion and Rights: A Medieval Perspective, 5 *J.L. & Religion* 163, 170-71 (1987) ("Christian individualism was balanced by [a] vision of the church as one body, united to Christ as head, a body in which the members could help and sustain one another, spiritually through their prayers, and corporally through works of charity.").

⁵⁹ See Eric Enlow, The Corporate Conception of the State and the Origins of Limited Constitutional Government, [6 *Wash. U. J.L. & Pol'y* 1, 21 \(2001\)](#).

⁶⁰ See generally William W. Bassett, Canon Law and the Common Law, 29 *Hastings L.J.* 1383 (1978) (summarizing the varied influences of canon law on the development of English common law).

⁶¹ Pollock & Maitland, *supra* note 51, at 686.

⁶² *Id.* Norwich here is referred to as a "city," but Pollock and Maitland point out that this is merely another term for a borough, one usually but not uniformly applied to a borough with its own cathedral. See *id.* at 634. Pollock and Maitland draw most directly the parallel between church and borough, placing both in the category "corporations." See *id.* at 510.

⁶³ Joan C. Williams, The Invention of the Municipal Corporation: A Case Study in Legal Change, [34 *Am. U. L. Rev.* 369, 378 \(1985\)](#) (referencing Marc Bloch, *Feudal Society* 275-78 (L. A. Manyon trans., 1961)).

⁶⁴ See Reynolds, *supra* note 57, at 97-98. Burgesses were those wealthy enough to have paid borough dues. See *id.*

⁶⁵ Williams, *supra* note 63, at 381.

⁶⁶ See, e.g., Pollock & Maitland, *supra* note 51, at 683.

⁶⁷ See *id.* at 664-65.

⁶⁸ See *id.* at 660-61.

⁶⁹ See *id.* at 662-64.

⁷⁰ See J. C. Holt, *Magna Carta* 57-59 (2d ed. 1992).

Borough rights applied to corporate members as well. The towns' corporate freedom from external interference included the freedom of individual citizens from servitude to external lords.⁷¹ Other rights accrued to borough members according to their status. For example, burgesses gained the right to be tried in the borough court rather than [*183] in the court of the local lord.⁷² Still other rights, such as freedom from attachment of one's chattels by another borough, accrued to all borough members, regardless of their status.⁷³

Central to the liberty of boroughs was their right to appoint their own officials and thereby exercise control over their internal affairs. Grants of the "farm of the borough" made citizens corporately responsible for the annual royal dues and transferred to them the right to appoint the reeve who accounted to the crown for payment.⁷⁴ Over the medieval era, boroughs also purchased rights to appoint their own tax collectors, coroners to oversee the bailiffs, local judges, and mayors.⁷⁵ With these rights, a majority of the corporation members could act for the whole, with each individual member exercising rights of control through the group.⁷⁶

Most important among local officials was the mayor. Unlike reeves and bailiffs who, while appointed by the citizens, still had financial and administrative responsibilities to the king, mayors were purely urban officials; they symbolized and put into action the borough's unity.⁷⁷ In the borough, the mayor filled a role analogous to that of heads of ecclesiastical bodies.⁷⁸ As the head of the corporate group of the borough, the mayor was the nexus of individual and group rights. Individual burgesses had the right to choose their mayor; the mayor as an individual had the right to exercise the powers of his office. The borough as a corporate body had the right to act through the mayor, to be free from interference from lords and even from the king in areas protected by the charter, and to control their common destiny in terms of legal proceedings, economic activity, and everyday, customary relations.

Due Process and the Borough

There are deep connections between corporate rights acquired and developed in borough charters and the rights of individuals, [*184] including such "natural" rights as that to due process. I want to focus in particular on due process because this right shows how the modern, de-integrationist view fails to capture the nature of rights. Due process is neither fully procedural nor fully substantive. Clearly this right refers to a process, but that process, be it local jury trial or some other form, involves substantive institutions (pre-existing court structures, rules, and persons) as well as substantive decisions regarding underlying issues, such as those regarding how far the protection of free speech properly extends. Moreover, the question of what process is "due" points to a right that is both historically acquired (that is, rooted in charter or custom) and natural (that is, applying to all persons regardless of their station).

The history of due process begins with Magna Carta which gave rights to trial according to "the law of the land."⁷⁹ Local borough citizens had the right to appeal to the king on the grounds that local laws and procedures were unfair.⁸⁰ From these rights, in part, due process grew.

⁷¹ Reynolds, *supra* note 57, at 100.

⁷² See Pollock & Maitland, *supra* note 51, at 643-44 (also noting that the king's jurisdiction was not eliminated).

⁷³ See *id.* at 675.

⁷⁴ Reynolds, *supra* note 57, at 102-03.

⁷⁵ See Pollock & Maitland, *supra* note 51, at 656-57.

⁷⁶ See generally Wang, *supra* note 55 (discussing individual liability and the corporation during the Year Book period of English law).

⁷⁷ Reynolds, *supra* note 57, at 109.

⁷⁸ See James Tait, *The Medieval English Borough* 255 (1936).

⁷⁹ See Magna Carta 39 (1215), reprinted in Holt, *supra* note 70, at 441, 461 ("No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.").

Here I want to look in particular at developments during the reign of Edward I (1272-1307). Whereas previous kings had simply revoked charters or warrants known to them to exist, Edward set in motion a general quo warranto inquiry into all exercises of franchises.⁸¹ This required the development of formalized procedures. If the party successfully answered the writ of quo warranto, the franchise was maintained; if not, it was confiscated by the crown.⁸²

Edward's goal was not to abolish franchises.⁸³ When a subject was the recipient of an adverse ruling in quo warranto, the usual result was the imposition of a substantial fine, followed by the grant of a royal charter.⁸⁴ Edward did not seek the revocation of franchises, but rather their definition, along with recognition of their revocability for misuse:

[*185]

If the abbot of St Albans had the right to appoint his own coroner for the liberty of St Albans, he took on himself the responsibility for seeing that the coroner's rolls were duly kept, and that the coroner was available when required; when these conditions were not fulfilled the king took back the privilege and appointed a coroner himself.⁸⁵

One crucial, though perhaps unintentional, by-product of Edward's aggressive program was the partial fulfillment of Magna Carta through the establishment of due process rights in the guarantee of "each man's own liberty, warranted by a charter, upheld in the courts."⁸⁶ Edward sought to be systematic in his treatment of charters, so as to establish that all of them came from him, and that certain acts and omissions would lead to their revocation. Because of this, he established regular, systemic quo warranto proceedings. In enforcing these procedures, jurists of the era established procedural rights - expectations rooted in law that regularly would be vindicated in court. This due process went so far as to show that the king, as a person, was not above the law, and established norms according to which every person might enforce his or her rights.⁸⁷

Further, by the sixteenth century at the latest, the charters themselves, and thus the king's powers, were deemed incapable of either changing the common law or of altering the rights and duties of private persons as fixed by that law.⁸⁸ Charters were part of, rather than superior to, the common law. Indeed, during the earlier parts of the

⁸⁰ See Pollock & Maitland, *supra* note 51, at 661.

⁸¹ Helen M. Cam, *Liberties and Communities in Medieval England 175* (Barnes & Noble 1963) (1944) (stating that "from 1254 onwards the justices in eyre, as part of their ordinary routine work, were charged to inquire into the assumption of liberties without warrant").

⁸² *Id.*

⁸³ *Id.* at 181 (observing that Edward "was far from wishing to do away with private jurisdictions and have all the work of local government done by royal officials alone").

⁸⁴ *Id.*

⁸⁵ *Id.* at 207. They continue, "All through the reign the juries of the countryside were being invited to tell the king's justices in eyre what they knew of persons who had had liberties granted to them and had used them otherwise than the grant prescribed." *Id.* Furthermore, what Edward "wanted was to get down in black and white what rights his subjects might lawfully claim, and to assert in an unmistakable manner the principle that they held these rights from him and only so long as they exercised them to the good of the realm." *Id.* at 181

⁸⁶ *Id.* at 183.

⁸⁷ When Earl Warenne was called to defend his Stamford charter in Lincolnshire, he claimed that Edward himself had granted his charter. Edward's attorneys asserted the defense that, prior to becoming king, Edward had himself usurped the liberties in question and, therefore, had no power to grant them. *Id.* at 176 ("In Lincolnshire (1281) he claims return of writs and other liberties in Stamford, under a charter given him by Edward himself in 1263. The king's counsel points out that the liberties in question had been unlawfully usurped by Edward himself when he was lord of Stamford, and that he, being, as he was then, a private person, had no power to grant usurped liberties; as he has no other warrant, the earl loses these franchises.").

⁸⁸ See W. S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 *Yale L.J.* 382, 392 (1922).

medieval era, in particular, towns without charters were treated [*186] little differently from those with such charters.⁸⁹ Thus, municipal rights, even outside the borough, were real and respected as part of the "law of the land" insisted upon in Magna Carta. Custom or usage, the basis of the common law, was not mere tradition, but right. It established what process was due, and even what actions, what sphere of autonomy, were to be protected by that process.

Rights, then, were real, though they could be revoked for abuse. Increasingly, a right was defensible at law, liable to abolition only for cause and through proper procedures. Thus, even the more obviously "acquired" rights of persons with a given status (such as a borough's mayor) were also bound up with the "natural" and "inalienable" right to due process. In effect, the attempt to set charters on a systemic footing undermined the unchecked power once exercised by kings who simply revoked them at will, replacing that haphazard power with a system of procedures for enforcing the duties and the rights imposed by charters. The result was a generalized, even "natural," right to proceedings following set rules and modes, and to the enjoyment of the rights bestowed by valid charters.

The Significance of the Death of Municipal Rights

A central problem of legal history is the ubiquitous nature of the response, "So what?" So what if township law once integrated individual and group, acquired and natural rights? To begin answering that question requires a brief look at how and why municipal rights were destroyed. This destruction is at least as much an American as an English story because the tradition of municipal rights, if not so much of local charters, was transferred to America. It is a story of the liberal hostility to groups mediating between individuals and the state; a hostility with its roots in a reductionist anthropology and sociology, both of which focused on breaking all naturally complex combinations into their simplest parts.⁹⁰

American municipalities lost their rights in large measure because judges and legislators during the early republican period could not, or would not, understand and accept their mixing of economic, social, [*187] and political functions.⁹¹ Early on, there was a demand that municipal corporations be defined as either public or private.⁹² In the end, the public classification won out, and municipalities were utterly subordinated to the states.⁹³ In the end, the law reflected the modern reduction of public life to individual and state, leaving no room or intellectual apparatus available to understand the role and rights of corporate groups.

The loss of municipal rights had its origins in the social contract and individualist thinkers, including Hobbes and Grotius, who opposed medieval corporate groups as obstacles in the way of individual freedom and state efficiency.⁹⁴ Gerald Frug characterizes James II's late seventeenth-century suit seeking to subordinate the city of London to his rule as a struggle between the Hobbesian view that a municipal charter was a state interest and the Lockean view that it was an individual right. The King's Hobbesian view won out, but neither side any longer grasped the older reality of a municipal charter as the recognition of a group incorporating its members rather than standing utterly outside them.⁹⁵ As Frug notes, the London case was reversed by the Revolution of 1688 and its opposing interests mollified by the political victory of a locally based Parliament.⁹⁶ But a crucial set of beliefs and practices

⁸⁹ See Wang, *supra* note 55, at 499-500.

⁹⁰ For a more complete history of this, see Frohnen, *supra* note 52. For a consideration of the nature of liberal epistemology, the liberal drive to simplify in analysis and practice, and the resulting effects of this tradition, see Thomas A. Spragens, Jr., *The Irony of Liberal Reason* (1981).

⁹¹ See Frohnen, *supra* note 52 (summarizing the line of cases that increasingly narrowed the scope of licit municipal conduct).

⁹² See Frug, *supra* note 54, at 1099-105.

⁹³ See *id.* at 1105-09.

⁹⁴ See *id.* at 1089.

⁹⁵ See *id.* at 1092-94.

⁹⁶ See *id.* at 1094.

was being lost: that of charters as particular grants within a common law tradition rooting rights in custom and usage, and that in a tradition wherein corporate groups like the township exercised significant autonomy.

Soon after the American Revolution, courts in the United States began distinguishing between "private" corporations set up for some self-interested end, and "municipal" or "quasi" corporations serving the public.⁹⁷ During the same era, courts in New England began defining municipal rights according to statutory standards rather than [*188] usage and common law procedures.⁹⁸ In *Stetson v. Kempton*,⁹⁹ the Massachusetts court specifically held that towns in that state were municipal corporations, and that they held only those powers given by the relevant statute.¹⁰⁰ Massachusetts was not the only state to begin distinguishing corporations as either public or private around this time. In 1818, in *Eustis v. Parker*,¹⁰¹ "New Hampshire courts also viewed their towns as public and employed the terminology of public and private corporations."¹⁰² In New York, the issue of municipal corporations was more complicated than in New England because New York City and Albany both were powerful cities with royal charters.¹⁰³ But, despite such political considerations, the result in New York, and the rest of the United States, was akin to that in New England.

A key turning point in the history of American local government came with *Trustees of Dartmouth v. Woodward*.¹⁰⁴ In this case, the United States Supreme Court had to determine whether the state of New Hampshire could intervene in the affairs of the private corporation of Dartmouth College. The Court established the legal distinction between municipal corporations and corporations set up for business or charitable purposes.¹⁰⁵ In holding that the legislature could not alter the college charter, the Court emphasized the private, contractual nature of the charter, deeming it a vested property right of the original grantor.¹⁰⁶ Chief Justice Marshall went further, stating that the legislature had the right to alter "public" corporations, like municipalities, on account of such corporations being mere instruments of the state government.¹⁰⁷

⁹⁷ See Williams, *supra* note 63, at 421-22 (noting that, in 1809, the term "municipal corporation" was applied to towns in [Dillingham v. Snow, 5 Mass. 547, 554 \(1809\)](#), in which Chief Justice Parsons contrasted the very limited powers of parishes with the broad powers of municipal corporations "to assess and collect money for the maintenance of schools and of the poor, and for the making and repairing roads, and for some other purposes").

⁹⁸ See *id.* at 422 (stating that, in [Mower v. Inhabitants of Liecester, 9 Mass. 247 \(1812\)](#), "the court's opinion once again set up an opposition between "corporations created for their own benefit" and "quasi corporations," and linked Massachusetts town powers with state statutory authority").

⁹⁹ [13 Mass. 272 \(1816\)](#).

¹⁰⁰ *Id.*

¹⁰¹ [1 N.H. 273 \(1818\)](#).

¹⁰² Joan Williams, The Development of the Public/Private Distinction in American Law, [64 Tex. L. Rev. 225, 234 \(1985\)](#) (book review).

¹⁰³ See Howard Lee McBain, The Law and the Practice of Municipal Home Rule 3-6 (1916) (ascribing state restraint to the small size of towns during this period).

¹⁰⁴ [17 U.S. \(4 Wheat.\) 518 \(1819\)](#).

¹⁰⁵ See David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, [147 U. Pa. L. Rev. 487, 497-505 \(1999\)](#).

¹⁰⁶ Williams, *supra* note 63, at 395.

¹⁰⁷ Barron, *supra* note 105, at 501-02 (quoting [Dartmouth, 17 U.S. at 504, 4 Wheat. at 638](#)).

[*189] Because New England had already accepted the public/private distinction, the Dartmouth case, therefore, merely confirmed the ongoing trend of treating cities and towns as public corporations.¹⁰⁸ This was seen in New York, where, although confusion regarding the status of local governments reigned for forty years after Dartmouth, the trend toward destruction of municipal rights was clear. In 1857 the New York state legislature asserted its utter dominance over municipal governance, proclaiming its freedom to intervene at will.¹⁰⁹ The courts affirmed this power in *People ex rel. Wood v. Draper*,¹¹⁰ upholding the right of the state legislature to abolish the local police departments of New York City and Brooklyn and to replace them with a state-controlled Metropolitan Police District. The court reasoned that the state legislature possesses "the whole law-making power of the state."¹¹¹

By 1907, the Supreme Court confirmed that local governments were completely subservient to the state. In *Hunter v. City of Pittsburgh*,¹¹² the Court declared,

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them... . The State ... at its pleasure may modify or withdraw all such powers, ... repeal the charter and destroy the corporation... . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.¹¹³

Today, then, municipalities stand to the states as boroughs stood to the English monarch prior to formalization of quo warranto proceedings. Charters provide no substantive rights either to the municipality as a corporate group or to the local citizens as members **[*190]** of that group. Altered or revoked at will, without cause or due process, the charters are nothing more than statements of current policy. This situation resulted from a decades-long campaign to strip municipalities and their citizens of rights of self-government in their localities. Mayors, town councils, and other local leaders lost the right to exercise control over local administrations and even to set up and control their own police forces-rights that heavy-handed kings during the medieval era had ceded to the boroughs. The citizenry, from having the right to control its own local affairs in a wide range of areas including economic regulations, health, safety, and morals, lost direct control in the town meeting and even the right to a meaningful suffrage in the locality, as cities increasingly became mere administrative units doing the bidding of the state. As municipalities lost rights necessary for control of their own destinies, so did their citizens.

Contemporary Implications

The insistence that only individuals can have rights, along with the view that social relations and circumstances should not shape them, has destroyed other important rights and is destroying the very social institutions that allow us to exercise even individual rights in meaningful ways. Today, life is separated into public and private, or more accurately, political and individual spheres. Thus, rights are seen as protections for individuals against state action. Group rights today do not attach to groups; they attach to minority cultures. The essential concern of multiculturalism, to take the prime example of "group" rights activists, is the protection of national minorities and, to

¹⁰⁸ Williams, *supra* note 102, at 240 (observing that "although most New England lawyers by 1820 accepted the existence of two mutually exclusive categories of public and private corporations, they had yet to agree on how to define the 'publicness' of municipal corporations or the 'privateness' of business corporations").

¹⁰⁹ See Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 237 (1983).

¹¹⁰ [15 N.Y. 532 \(1857\)](#).

¹¹¹ Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, [23 Fordham Urb. L.J. 1, 13 \(1995\)](#) (citing [Wood, 15 N.Y. at 543](#)).

¹¹² [207 U.S. 161 \(1907\)](#).

¹¹³ [Id. at 178-79](#).

a lesser extent, ethnic minorities. These minorities are groups with their own distinctive customs and modes of life that are outnumbered by a majority and therefore not likely to be protected by the democratic process.¹¹⁴

This individualistic vision of rights has brought with it a purely negative view of liberty, in which we seek merely to protect autonomous individual choices rather than to leave room for more positive exercises of rights such as political participation beyond the mere casting of a ballot. The right to control one's destiny in **[*191]** combination with one's fellow citizens is not a minor thing, and it requires real, active, vital, and rights-bearing communities in which to participate. This right requires a complex of other rights that are both natural and historically acquired, individual and communal.

Contemporary thought certainly makes much of the dignity of the person and of his or her right to autonomy. One need only reference the so-called "mystery passage" from *Planned Parenthood v. Casey*¹¹⁵ and its assertion of a right to "personal dignity and autonomy" to make clear the contemporary emphasis on open expressions of respect for individual autonomy.¹¹⁶ Such statements, first of all, lack serious moral anthropology. Contemporary jurisprudence does not ask why personal liberty, dignity, and autonomy are (or should be) protected. Personal dignity and autonomy are merely unquestioned first principles; they are radically "natural."

This, of course, is where the dichotomy between individual and group is created. Contemporary rights jurisprudence treats social institutions and communities themselves as the "purely conventional product of the arbitrary preferences of individuals."¹¹⁷ On this view, social institutions are mere contractual agreements created for the convenience of their members; they are "simply what individuals choose to make of them."¹¹⁸ Individual autonomy is total; families, churches, and local communities have no nature of their own and are to be made and unmade as individual members see fit.

Thus, contemporary jurisprudence seeks to liberate individuals from every form of social bond that might limit individual, autonomous choice. From being seen as the fundamental units of society, the "unwritten constitution" of "institutions, customs, manners, conventions, and voluntary associations which may not even be mentioned in the formal constitution, but which nevertheless form the fabric of social reality,"¹¹⁹ has become a potential danger to the ultimate good of autonomy with no inherent value of its own.

[*192] With its roots in a right to privacy developed by the Court over the course of the twentieth century,¹²⁰ the notion that the font of particular rights is the "natural" right of individuals to develop their own lifestyles and personalities as they choose has transformed American law and society. This development of privacy law is clear in its origins and trajectory. Yet it is little discussed in the mainstream literature because it is so central to abortion jurisprudence, and so lacking in philosophical or precedential justification. From *Griswold*,¹²¹ supposedly

¹¹⁴ See Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, [12 J. Contemp. Legal Issues 661, 666 \(2002\)](#); see also *id.* at 661 (stating that multicultural liberalism seeks to protect minority cultures while making the majority culture or nation more just in the process).

¹¹⁵ [505 U.S. 833 \(1992\)](#).

¹¹⁶ [Id. at 851](#) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

¹¹⁷ Kenneth L. Grasso, *Liberalism, Civil Society, and the Promise of Compassionate Conservatism*, 36 *Intercollegiate Rev.* 24, 26 (2001).

¹¹⁸ *Id.*

¹¹⁹ Russell Kirk, *Enemies of the Permanent Things* 168 (Sherwood Sugden & Co., rev. ed. 1984) (1969).

¹²⁰ See generally Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991) (describing the rise and atomizing effects of the doctrine of a right to privacy, rooted especially in the argument of Samuel D. Warren and Louis D. Brandeis in *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890)).

protecting the family's right to a sphere of privacy in sexual matters, to Eisenstadt,¹²² making clear what should have been obvious, that the right so protected was purely individual, to Roe¹²³ and eventually Casey,¹²⁴ the individual has become ever more paramount, and ever more separated from the most fundamental of social institutions, the family.¹²⁵

And families are not the only targets. No private association any longer has the right to control its membership. Application of non-discrimination laws has subjected all mediating institutions to governmental oversight; courts will strike down even religion-based membership rules if they are not so consistently applied and so emphasized as to be central to their identity as an "expressive association."¹²⁶ The ability of the Boy Scouts to maintain control over eligibility requirements for its scoutmasters is, I submit, not likely to endure.¹²⁷

The dangers attendant upon the simplistic bifurcation of society into political and private spheres have been elucidated previously. The French thinker Bertrand de Jouvenel argued that the French revolutionary state became totalitarian "by destroying in the name of the mass, which it claimed to represent, though its existence was **[*193]** only a fiction, the various groups, whose life was a reality."¹²⁸ Jouvenel emphasized the importance of "makeweights," - interests representing sections of the nation, be they based in class, region, or profession - for limiting the potentially absolute power of the state.¹²⁹ In the name of a fictional "mass," the French revolutionary state swept away these makeweights, leaving individuals isolated and causing them to lose "the instinct of association and the tendency to form societies within society, which had in other days been the precious bulwarks of liberty."¹³⁰

Jouvenel understood that the multiplicity of authorities provided by mediating corporate groups - the multiplication of centers of power and legitimation to which individual persons may turn to in time of need - increases the person's ability to carve out a sphere of meaningful autonomy. Sociologist Robert Nisbet argued:

Individual liberty ... is only possible within the context of a plurality of social authorities, moral codes, and historical traditions, all of which, in organic articulation, serve at one and the same time as "the inns and resting places" of the human spirit and intermediary barriers to the power of the state over the individual.¹³¹

¹²¹ [*Griswold v. Connecticut*, 381 U.S. 479 \(1965\)](#).

¹²² [*Eisenstadt v. Baird*, 405 U.S. 438 \(1972\)](#).

¹²³ [*Roe v. Wade*, 410 U.S. 113 \(1973\)](#).

¹²⁴ [*Planned Parenthood v. Casey*, 505 U.S. 833 \(1992\)](#).

¹²⁵ I make this argument at greater length in Bruce Frohnen, *Liberation Jurisprudence: How Activist Courts Have Torn Family and Society Asunder*, *Fam. Pol'y*, May-June 2001, at 1.

¹²⁶ See [*Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 \(2000\)](#) (holding that the Boy Scouts may refuse to install a homosexual male as a scout leader on the grounds that its members express themselves through the organization's public statements and conduct, which indicate disapproval of homosexual conduct).

¹²⁷ See Frohnen, *supra* note 125, at 10-12.

¹²⁸ Bertrand de Jouvenel, *On Power: Its Nature and the History of Its Growth* 294 (J. F. Huntington trans., Viking Press 1949) (1945).

¹²⁹ See *id.* at 286-87.

¹³⁰ *Id.* at 290.

¹³¹ Robert Nisbet, *Uneasy Cousins*, in *Freedom and Virtue: The Conservative/ Libertarian Debate* 38-39 (George W. Carey ed., 1998).

Medieval Europe provided the seedbed for rights because it was pervaded by competition among vigorous secular authorities and a separate, institutionalized Catholic Church. "Since neither the spiritual nor temporal power could wholly dominate the other, medieval government never congealed into a rigid theocratic absolutism in which rights theories could never have taken root."¹³²

The medieval European multiplicity of authorities extended beyond king and pope and took on an institutionalized, juridical form. Harold Berman has shown how important the existence of multiple types of law was for the growth of rights and liberty.¹³³ According to Berman, the overlapping of courts, forms of law, and jurisdictions meant that "the same person might be subject to the **[*194]** ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, a merchants' court in a sixth."¹³⁴ The result was the growth of a legal tradition in which the person was recognized as the center of a nexus of relations, able to exercise meaningful choices and having individual dignity, rights, and an appropriate sphere of autonomy.

In addition to protecting individual persons from the state (and, in contemporary circumstances, the multinational corporation),¹³⁵ groups themselves embody individual purposes; they provide their members with the means by which to exercise individual autonomy in forging common ends.¹³⁶ Modern liberalism's hostility toward groups mediating between the individual person and the centralized state has resulted in the stripping of important rights from those groups.¹³⁷ With the loss of these corporate rights has come the loss of important rights traditionally attaching to individuals acting within mediating groups. The rights of towns, for example, once provided an important vehicle for public freedom, consisting of active participation by local citizens in basic decisions affecting their lives, decisions that made one's individual autonomy actually matter, in concrete practice, to one's life. As a result, at least since 1800, people in America have had a decreasing ability to control their own lives as they have ceded participatory control to bureaucracies, capitalist managerial elites, and the trends of utilitarian consumerism.¹³⁸

The modern view of rights is very liberating of the individual. But it "liberates" the individual from the social relations that make possible the pursuit of substantive goods, and that make rights defensible and coherent. The result is a radical decline in human freedom and meaningful autonomy, a decline accomplished in the name of individual rights.

[*195] We may take as a case in point the situation regarding free speech in Canada. The Canadian Parliament recently passed Bill C-250.¹³⁹ This legislation amends Canada's federal hate crimes law to include speech against sexual orientation.¹⁴⁰ Perhaps of most interest in regard to this legislation is the legislature's refusal to make two

¹³² Tierney, *supra* note 41, at 626.

¹³³ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 10 (1983).

¹³⁴ *Id.*

¹³⁵ See Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, [36 Am. Bus. L.J. 391, 395 \(1999\)](#) (arguing that mediating institutions stand between the individual and social megastructures, including the multinational corporation).

¹³⁶ See Johannes Messner, *Social Ethics: Natural Law in the Western World* 472 (J. J. Doherty trans, B. Herder Book Co. rev. ed. 1965) (arguing that "the particular right of the free association to autonomy consists in the full right to frame its purpose and statute as long as the public interest or the rights of others are not affected").

¹³⁷ See, e.g., Frug, *supra* note 54, at 1080 (describing the decline of city power due to liberal hostility to such mediating groups).

¹³⁸ See *id.*

¹³⁹ Bill C-250, *An Act to Amend the Criminal Code*, 2d Sess., 37th Parl., 2002-2003.

¹⁴⁰ Criminal Code, R.S.C. ch. C-46, 318(4) (1985) (Can.) ("In this section, 'identifiable group' means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.").

amendments: the first would have ensured that religious teachers and clerics retain full freedom to teach traditional Judeo-Christian views regarding sexuality; ¹⁴¹ the second would have distinguished between homosexual persons and homosexual activities, allowing for condemnation of the latter though not the former. ¹⁴²

Some may be confident that harsh application of this law will not follow. But already, before passage of Bill C-250, worrisome prosecutions have occurred. ¹⁴³ A printing company, for example, that declined to print Toronto's annual gay pride day literature was sued under the human rights law, fined heavily, and then forced to print the materials or close up shop. ¹⁴⁴ A court also ordered a Catholic parochial school to admit an openly homosexual teenage boy with his older male lover to the school prom, refusing even to allow the canceling of the event. ¹⁴⁵ A Canadian was forced to pay damages to three homosexuals offended by an advertisement he placed in a Saskatchewan newspaper that reprinted a series of verses from the Bible condemning homosexual practices. ¹⁴⁶

Might there be a political compromise, preventing widespread suppression of unpopular religious views? Perhaps, and perhaps not. With no corporate groups remaining with the right to express their views in the public square, we are left only with lobbying organizations seeking to manipulate the state to do their bidding. Rights have become meaningless verbiage, used to impose the will of the most powerful, be it a majority or a court, on those whose "rights" [*196] are out of favor with power. As Jouvenel argued, one no longer even seeks freedom from power in order to live one's chosen way; one has no choice but to seek to control power and use it to reshape society, forcing everyone to share one's way of life, as the only possible means of pursuing it for oneself.

Too much emphasis on the distinctions between individual and group, and between the historically rooted and the absolute, has caused us to lose sight of the relationships in which we live, in which we not only find, but meaningfully exercise, our freedom. The liberal penchant for analysis that reduces all things to their smallest, simplest elements has caused us to reduce rights to individual, absolute rights that by nature conflict. Far better, I would argue, to be part of one or several of many groups with their own ends, even if they compete for power and influence, than to be a lone bearer of infinite rights, who can look for protection of these rights only to the principal source of their endangerment, the unitary state.

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¹⁴¹ See Thought Crime Becomes a Reality in Canada: An Interview with Michael O'Brien, Ignatius Insight, at www.ignatiusinsight.com/features/mobrien thoughtcrime sept04.asp (on file with the Ave Maria Law Review).

¹⁴² See id.

¹⁴³ See id.

¹⁴⁴ See id.

¹⁴⁵ See id.

¹⁴⁶ Owens v. Saskatchewan (Human Rights Comm'n), [2002] S.J. No. 732, 2002 SKQB 506, 2002 SK. C. LEXIS 1219 (Dec. 11, 2002).