



What the Founding Fathers Really Thought About Corporations

8:45 AM Thursday April 1, 2010 | [Comments \(15\)](#)

Brian Murphy (<http://www.baruch.cuny.edu/wsas/academics/history/bmurphy.htm>), a history professor at Baruch College in New York, knows a whole lot about corporations in the early days of the American republic. When the Supreme Court struck down restrictions on political spending by corporations in January, the ruling (<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>) (pdf!) struck him as dramatically at odds with how the Founding Fathers saw the role of the corporation. As he put it in a comment to this blog: (<http://blogs.hbr.org/fox/2010/01/what-milton-friedman-actually.html#c064366>)

The majority opinion is discovering corporate rights in a Constitution written by people with a dramatically different conception of corporate power and the limits thereof, and an understanding of citizenship as something based on accountability and membership in civil society.

That intrigued me, and an e-mail discussion with Murphy followed. After writing that it would be nice to hear more from historians in today's economic debates (<http://blogs.hbr.org/fox/2010/03/wresting-the-economic-debate-a.html>), it seems only right to hand the podium over to a historian, so here's a slightly condensed version of our virtual chat.

Q: The corporations of the early days of the republic were very different beasts than those of today. They seem to have been creatures of government — or at least of politicians — right?

A: That's right. Americans inherited the legal form of the corporation from Britain, where it was bestowed as a royal privilege on certain institutions or, more often, used to organize municipal governments. Just after the Revolution, new state legislators had to decide what to do about these charters. They could abolish them entirely, or find a way to democratize them and make them compatible with the spirit of independence and the structure of the federal republic. They chose the latter. So the first American corporations end up being cities and schools, along with some charitable organizations.

We don't really begin to see economic enterprises chartered as corporations until the 1790s. Some are banks, others are companies that were going to build canals, turnpikes, and bridges — infrastructure projects that states did not have the money to build themselves. Citizens petitioned legislators for a corporate charter, and if a critical mass of political pressure could build in a capital, they got an act of incorporation. It specified their capitalization limitations, limited their lifespan, and dictated the boundaries of their operations and functions.

I should add, too, that as part of this effort to democratize corporations, state charters specifically spelled out how shareholder elections were to be conducted to choose directors. Corporations were supposed to resemble small republics, with directors balancing interests among shareholders. When they printed material or conducted correspondence, it was usually in the name of the "President, Directors, and Shareholders of the X Company."

A couple months ago the Supreme Court ruled that restricting corporate political spending amounted to restricting free speech. In this view, corporations are pretty much equivalent to people. Would that have seemed reasonable to the Founding Fathers?

In a word, no.

I read this opinion carefully — I'm trained as a historian, not a lawyer. Chief Justice Roberts lays out an ideologically pure view of corporations as associations of citizens — leveling differences between companies, schools and other groups. So in his view Boeing is no different from Harvard, which is no different from the NAACP, or Citizens United, or my local neighborhood civic association. It's lovely prose, but as a matter of history the majority is simply wrong.

Let me put it this way: the Founders did not confuse Boston's Sons of Liberty with the British East India Company. They could distinguish among different varieties of association — and they understood that corporate personhood was a legal fiction that was limited to a courtroom. It wasn't literal. Corporations could not vote or hold office. They held property, and to enable a

shifting group of shareholders to hold that property over time and to sue and be sued in court, they were granted this fictive personhood in a limited legal context.

Early Americans had a far more comprehensive and nuanced understanding of corporations than the Court gives them credit for. They were much more comfortable with retaining pre-Revolutionary city or school charters than with creating new corporations that would concentrate economic and political power in potentially unaccountable institutions. When you read Madison in particular, you see that he wasn't blindly hostile to banks during his fight with Alexander Hamilton over the Bank of the United States. Instead, he's worried about the unchecked power of accumulations of capital that come with creating a class of bankers.

So even as this generation of Americans became comfortable with the idea of using the corporate form as a way to set priorities and mobilize capital, they did their best to make sure that those institutions were subordinate to elected officials and representative government. They saw corporations as corrupting influences on both the economy at large and on government — that's why they described the East India Company as *imperium in imperio*, a sort of "state within a state." This wasn't an outcome they were looking to replicate.

What changed in the interim?

Well, we have a Civil War, and to prevent former Confederate states from infringing on the rights of freed slaves, the 14th Amendment extends "equal protection" to all American citizens. Section 1 specifies that this applies to all "persons" and in an 1886 Supreme Court case involving a railroad, the court's reporter — a former railroad president — writes a note saying that the justices agreed that a corporation qualified as a person. This isn't in the opinion itself, and some legal historians think it's a moot issue, but Justices William Douglas and Hugo Black later cite it as a momentous event. Either way, what's clear is that in the late 19th century, far more equal protection cases were heard by the Supreme Court where corporations were plaintiffs than freedmen. The Court — not the legislatures or the Congress — allowed the personhood distinction to slip away.

Some legal scholars defend the granting of personhood to corporations as a useful innovation — it allows corporations to enter into contracts, for instance. Do they have a point?

Yes. One of the original purposes of corporate charters in the United States was to allow groups of people to file lawsuits, and be sued, in courts. But it wasn't absolutely necessary — if you and your partners formed a joint-stock company, you created an entity that had bylaws and directors and could enter into contracts and enforce them in courts. What the corporate charter did was grant additional privileges to this basic joint-stock company framework. In the case of state-sanctioned infrastructure projects — turnpikes and bridges — corporations usually held monopolies or exclusive rights of some kind. In the case of early American banks, their biggest privilege was limited liability and favored status as deposit institutions for state revenues, which usually gave them *de facto* monopolies.

So the corporation doesn't merely arise because it's a convenient legal form. Instead, it was a useful tool for capital formation because it carried economic privileges that protected investors and enabled them to externalize all kinds of risks and costs. That's why charters are difficult to obtain in early America. You have to spend political capital to get one passed through two legislative houses and signed by a governor's pen.

When general incorporation acts are eventually adopted by states in the early nineteenth century, the states' intent is to level the playing field and disentangle themselves from the political power — and burden — of choosing among rival groups of charter-seekers. The intent of these laws is therefore the opposite of what the Court asserted in *Citizens United*. Free incorporation was meant to limit the power of corporations by democratizing the corporate form through dilution. It was supposed to be a giant leap in distinguishing between public and private spheres of activity.