

Corporate Law and the Sovereignty of States

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This article explores the origins of a social form with lasting and profound sociological implications: the corporation. Though corporations date back as far as the Roman Republic, the early United States fostered a significant transformation in corporate law. Shortly after the American Revolution, several states pioneered a system whereby corporate charters became available to almost anyone (at a price), leading (eventually) to a proliferation of corporate charters unlike anything ever seen before in world history. This proliferation of corporate charters first occurred in colonies that were originally chartered as corporations: Massachusetts, Connecticut, and Rhode Island, all of which used the corporate organizational form for a wide array of social pursuits. These colonies also experienced repeated conflict with the Crown over the rights and privileges of corporations. As American "states," they built on these experiences to liberalize access to the means of incorporation and to elucidate the rights and freedoms of corporations. Other studies aptly document the diffusion of the corporate organizational form after 1800; this article takes up the antecedents to the use and popularity of the modern corporate organizational form. These observations do not supersede scholarly work regarding the economic origins of the American business corporation, but they do shed valuable light on the interdependence of states and markets, as well as the nature of institutional-legal transformation more generally.

INTRODUCTION

The rise of the corporate organizational form has long been regarded as one of the defining innovations of the modern era. Most scholars agree that it marks a critical shift in the relation of capital to enterprise and enterprise to labor (e.g., Berle and Means 1932; Chandler 1962; Hurst 1970; Perrow 2002; Roy 1997). Coleman (1982) goes so far as to portray the rise

of the corporation as part of a larger shift in modern social relations, a shift toward an "asymmetric society" where corporations dwarf both individuals and society.

Private corporations are "legal persons" entitled to do things ordinary individuals cannot, particularly when it comes to matters of financial management and legal accountability. Under common law, corporations have "perpetual succession": they exist beyond the lives of their

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founding members. Corporate assets are legally protected from both shareholders and creditors in many cases, thus creating a legal shield between corporate actors and corporate responsibilities. In the contemporary context, corporate assets are also subject to different taxation and regulation schemes than unincorporated businesses. The private, legal corporate form has evolved as a powerful tool for the growth and management of capital by providing incorporated organizations legal rights and protections not otherwise afforded to unincorporated ventures.

The legal structure of the modern corporate form derives from efforts in medieval Europe to grant legal autonomy to universities, towns, and ecclesiastical institutions. Trade guilds and commercial monopolies were also granted corporate status in special circumstances. Even the earliest corporations thus represent the delegation of state authority to subsidiary entities, a form of power-sharing that raised questions about the extent and limit of the powers of both the incorporator and the incorporated.

The ease of acquiring a corporate charter is one key example of the transformation of the corporation in the United States. Until the late nineteenth century, legal restrictions on the issuance of corporate charters were the norm under English common law, particularly after the Bubble Act of 1720 reaffirmed the need for businesses to secure a charter of incorporation from the Crown before issuing transferable shares of ownership (DuBois 1938). "To be a corporation was a special privilege, not an inherent right of individuals," notes business historian Joseph S. Davis (1917: I, 5–6). Following the American Revolution, however, the United States dramatically transformed this common law conception of restricted access to the means of incorporation. By opening access to incorporation and helping to spread the organizational form, these states catalyzed wider transformations in the legal and organizational structure of the American corporation. Following an early period in which a relatively undifferentiated corporate organizational form was used for a wide variety of purposes, innovations were made in the specificity of and access to corporate charters.

The contributions of this article are three-fold. First, I elucidate the role of the corporation in the colonial United States. The cases of Massachusetts, Rhode Island, Connecticut, New

York, and Pennsylvania are especially useful, so I examine these states in some detail. Second, the article contributes quantitative data on rates and purposes of interstate incorporation. Third, it corrects a general tendency in the literature on the history of the common law corporation to ignore some of the seminal conditions underlying the transformation of the corporation and the role of emerging polities therein. A detailed examination of this transformation sheds new light on the general relationship between the sovereignty of states and the construction of economic entities. This article also uses neo-institutionalist theory to explain how long-term exposure to and conflict over an ambiguously defined organizational form has promoted its widespread use following the political emancipation of those American colonies most experienced with that form.

This article does not aim to contradict the wide and well-respected literatures on either the economic or organizational imperatives underlying the emergence of the modern corporate organizational form or the diffusion of that form in the mid- to late-nineteenth century (e.g., Chandler 1977; Coleman 1982; Creighton 1990; Evans 1948; Handlin and Handlin 1945; Hartog 1983; Perrow 2002; Roy 1997). Instead, I focus on the important, and often overlooked, period before the corporation became a primary vehicle of American economic and civic action. I demonstrate that the proliferation of the corporate form in the early United States was related to those states' colonial experiences with the corporate organizational form. I argue that familiarity and experience with the corporate organizational form on the part of colonial legislators, attorneys, and ordinary citizens encouraged its continued use during the postcolonial period. In the early post-Revolutionary period, the specific utility of the corporation was less clear than its institutional accessibility. Notably, the corporate organizational form soon morphed from a relatively ambiguous form of social organization to a variety of legally- and organizationally-specific uses. During this period, both states and corporations struggled to define state authority over corporate rights. Such instances of institutional differentiation and legal reform merit serious sociological attention.

BACKGROUND

RIVAL EXPLANATIONS OF THE ORIGINS OF THE MODERN PRIVATE CORPORATION

Economic historians have found that many early Americans were wary of adopting the corporate organizational form for business purposes. Prior to the mid-nineteenth century, the legal advantages of incorporation were unclear—limited liability was not yet a standard benefit of incorporation, for example. The fear that corporations might be profligate with their funds offset any other would-be benefits. Creditors were much more likely to invest in family-owned businesses because families could be better trusted to take a long-term view of a business (Lamoreaux 1997; McGouldrick 1968). This challenges the prevailing belief among economists that the corporate organizational form originally rose to prominence (in the United States) out of the necessities of the marketplace (cf. Paskoff 1983). This does not negate arguments about its subsequent evolution as a valuable tool for economic activity (cf. Chandler 1962; Coase 1937; North 1990; Williamson 1981), but it does render a need to examine more carefully the noneconomic origins of the early American corporation.

Sociologists, too, have worked hard to uncover the social dimensions of economic markets and corporate behavior. The historical development of various schemes for organizing production, consumption, and exchange have been focal points for scholars working in this field (e.g., Adams 2005; Campbell and Lindberg 1990; Carruthers 1996; Coleman 1982; Dobbin 1994; Erikson and Bearman 2006; Evans 1995; Fligstein 1990; Mintz and Schwartz 1985; Mizruchi 1982; Roy 1997; Zelizer 1994). Nonetheless, despite their insistence that market norms and regulations are more a product of institutional and cultural schemas than organizational efficiency, economic sociologists often share with economists the view that the government generally intervenes in the economy in response to the perceived needs of the marketplace. In other words, while economists and economic sociologists differ about the motives for government action, they both see such action as a largely reactive and economically motivated process (cf. Biernacki 2005). Dobbin (1994), for example, sees railway regulation in the United States, France, and Britain as a series of

responses to perceived crises in the railway industry. Fligstein (2001:19) writes, “If producing stability in multiple markets requires rules, then governments are deeply implicated in defining the various social structures that stabilize markets,” thus emphasizing stabilization as a post hoc effort to introduce a desired condition. Seavoy (1982:xii, emphasis added) explicitly states that liberal incorporation laws were the product of an American political system that was “*highly responsive* to the needs of major interest groups and to the aspirations of its citizens.”

I will argue here that several post-Revolutionary state legislatures forged a radical new path in the legal regulation of incorporation activity not (or not only) because they saw it as the most efficient means of encouraging industry—some argued, in fact, that private corporations were the most inefficient means of doing so—but, in part, as a result of those states’ own origins as private corporations, as well as royal efforts to limit their powers as such. As I will show, the majority of private corporations chartered between 1780 and 1810 were not business concerns at all; they were churches, townships, schools, and voluntary organizations.

I also challenge the argument that the specific cultural background of the early American Puritans predisposed American society toward its particular form of market organization. Innes (1995) suggests, for example, that the Puritans’ belief in the Protestant Ethic predisposed them not only to value commerce and the accumulation of capital but also to see monopolies as inimical to the public interest. In turn, this cultural background supported the uniquely American version of neoliberal capitalism extant today. Indeed, English Puritans founded three early American business centers: Massachusetts, Connecticut, and Rhode Island. But if the cultural preferences of the Puritans were responsible for this outcome, then why did Puritan ventures in other parts of British North America, such as Providence Island in the West Indies, fail to found similar cultures of capitalism?

Though it runs counter to his own culturalist argument, Innes (1995:206–07) provides a telling answer to this question: the Massachusetts Bay Colony was erected on a unique legal basis, as were its offshoots, Connecticut and Rhode Island. All three were

originally chartered as private corporations. All three also faced long periods of uncertainty with regard to their legitimacy and rights as corporations. As a result of these struggles, liberal incorporation policies evolved in these colonies that encouraged further experimentation with the corporate organizational form.

CONTRIBUTION TO EXISTING KNOWLEDGE

Law and legal development have long been focal points of inquiry in economic sociology. As mentioned earlier, economists and economic sociologists share a tendency to see state action as a response to market factors. This exploration of the colonial origins of American corporate law demonstrates the need to consider the institutional development of states and economic entities in tandem. Historian Charles Andrews (1934: I, 43) wrote, "The colonial governments in New England represent the system of a trading company applied to the political organization of a state." This observation is consistent with recent work by sociologists regarding the sociopolitical organization of markets and economic entities (e.g., Adams 2005; Carruthers 1996; Chibber 2003; Dobbin 1994; Erikson and Bearman 2006; Evans 1995; Fligstein 1990; Perrow 2002; Roy 1997).

Understanding the history of incorporation and corporate law is key to understanding the relationship between the state and the public and private spheres. Economic sociologists see corporate law as a product of firms' struggles to survive in the face of competition: most states face exactly the same challenge. The struggle of the American colonies to survive as corporate entities gave birth to the idea that such a right should be readily attainable. This is not meant to suggest that economic entities are solely the product of states but to illustrate the potential for institutional practices in one sphere to bleed into or transform those in other spheres (e.g., Clemens and Cook 1999; DiMaggio and Powell 1983; Friedland and Alford 1991; cf. Huntington 1968).

One generalizable observation we can make about this process regards the nature of legal change. In this case, and presumably others, American corporate law was not transformed by an original intent to change its substance but through changes to its relational structure, or the

relationship between incorporator and incorporated. One might refer to variance in the ability of different types of social actors to gain corporate charters as differences in their *relationship to the means of incorporation* (pace Marx). As Americans' relationship to the means of incorporation changed, subsequent revisions were made to the substance of the law of corporations, not vice versa.

Because the relational structure of the corporation (i.e., access to the means of incorporation) was fundamental to the revolutionary project of protecting legislative autonomy, we thereby see an important connection between struggles over political autonomy and the transformation of Americans' relationship to the state via corporate law. It is impossible to know exactly why legislators in these states persisted in their positive opinion of corporations in the face of prior difficulties chartering them. Indeed, ambiguous language in early American charters, coupled with legal ambiguity over the relative power of colonial and imperial legislatures to issue such charters, made the corporation an institution subject to revision and dispute (Clemens 1997; Clemens and Cook 1999; Friedland and Alford 1991; Meyer and Rowan 1977). Perhaps a long history of exposure to and familiarity with the corporate organizational form predisposed New England attorneys and entrepreneurs to consider the corporation a valuable means of establishing new enterprises. Furthermore, it is not uncommon for people to put heightened value on those privileges openly denied them. In tracing the trajectory of such denials and colonial responses, I argue that repeated conflict over the role of the corporation in the colonies led this legal-institutional form, once severely restricted in its dispersion, to be transformed into a widely accessible, often used legal tool in the early decades of the Republic. This is not an inevitable outcome, only the outcome of these specific circumstances. Nonetheless, these cases do point more generally to the importance of seeing state formation, legal development, economic development, and associational/civic development as mutually constitutive processes. In each case, we see organizational actors looking for legitimate means of establishment as "legal fictions" with competitive advantage over similar entities. The American move to decouple the right of incorporation from state purview is significant in

world-historical terms, as it establishes the increasingly global precedent of “freedom of incorporation.”

In more abstract terms, one might describe this process as an example of what Thelen (2003:225) calls “institutional layering,” or “the partial renegotiation of some elements of a given set of institutions while leaving others in place.” The content of the American corporation changed much more slowly than did its relational structure. Carruthers and Halliday (1998) might refer to this process of change as an illustration of “law’s recursive loop,” or the manner in which new legal doctrines form without conscious design but are instead post hoc responses to social and legal conditions that change and cumulate over time. Changes in the content of the corporation do not appear to have been a concern of those who originally transformed its relational structure. Instead, U.S. courts made these post hoc changes to bring American legal standards up to speed with the new competitive climate of corporate activity in the mid-nineteenth century.

One key circumstance that contributed to this process was the decision of legislatures in post-Revolutionary America *not* to adopt English statutory law. Instead, they declared themselves free to adopt pieces of English law while retaining the power to modify or ignore them as they wished (Brown 1964; Nelson 1994).¹ A successful jurisdictional break from England afforded American state legislatures a novel opportunity to reinstitutionalize their sociolegal conception of the corporation. The common law countries of the British Commonwealth retained the traditional conception of the corporation until late in the nineteenth century,

¹ To be more precise, most of the new American states formally adopted English common law but rejected English statutory law (Brown 1964; Horwitz 1971). The distinction lies in the belief that common law reflects timeless moral principles based on judicial interpretation of natural law, whereas statutory law reflects the specific dictates of the legislature. By the early nineteenth century, however, “the original natural law foundation of common law rules began to disintegrate” (Horwitz 1971:310). This led to the “Americanization” of the common law, or the notion that American judges can interpret law in light of the exigencies and needs of society, free of English legal precedent (Nelson 1994).

and long-standing differences between the two countries’ concepts of the corporation exist to this day (Karsten 2002; Kaufman forthcoming).

ANALYSIS

CATALYST: COLONIAL AMERICAN STRUGGLES OVER THE NATURE AND RIGHTS OF CORPORATIONS

The oldest “continually operating” corporation in North America is the President and Fellows of Harvard College.² Though founded in 1636, Harvard College did not become a corporation until 1650, at which time it was granted a number of rights, privileges, and immunities not otherwise available to educational institutions. The Harvard College corporation now had “perpetual succession,” or the right to pass itself from one set of administrators to another, thus guaranteeing that the institution would outlive its founders. The charter also established the College’s right to buy and sell property, “sue and plead or be sued and impleaded,” and choose “officers and servants.” The colonial legislature granted the College and its staff some exemption from “taxes and rates,” as well as “all personall civill offices militarie exercises or services watchings and wardings.”³ A few years later, following a brawl between Harvard students and Cambridge residents, it was decided that local law enforcement officials would have only limited power on campus, thus establishing the precedent of campus police and internal discipline in all but the most extreme cases (Morison 1936:24–25).

The incorporation of the College was not unusual under English law. Universities had long been considered private concerns worthy of legal incorporation, thereby providing their members some means of conducting collegiate affairs while assuring the “perpetual” life of the College. The Harvard charter is clearly modeled on that of medieval English universities. What is noteworthy, however, is the circumstance under which it was incorporated: whereas English corporations were chartered by the

² Harvard is not the oldest corporation in America but the oldest corporation still in existence.

³ A copy of the charter is reprinted in Morison (1936:5–8).

King with the consent of Parliament, the governing body that incorporated Harvard was a private corporation itself—the Governor and Company of the Massachusetts Bay in New England, which received its own corporate charter only 21 years earlier, on March 4, 1629.

It was common mercantilist policy for the King to grant charters to private overseas trading firms like the Massachusetts Bay Company. Normally, a group of English investors would pool their capital, incorporate, and then make arrangements to send hired colonists, or “merchant-adventurers,” abroad. This is how a Spanish Company, a Turkey Company, and a Levant Company were founded. In British North America, the Virginia Company, the Plymouth Plantation, and a Caribbean venture called the Providence Island Company were also chartered in this way. None lasted long in this incarnation, though, which is important because it is not only their founding as corporations but the colonies’ continued experiences with the corporate organizational form that is key to the institutional process studied here.⁴

Most British colonies were not founded as corporations, however. Much of British North America was originally settled either as “royal colonies” (colonies under the direct jurisdiction and rule of the King in Parliament) or “proprietary colonies” (colonies under the jurisdiction of specific patent-holders). Thus, the first of the New England “corporate colonies,” the Massachusetts Bay Company, is an unusual example. As famed English legal historian Frederic Maitland (2003:42) notes, the nature and experience of the New England colonies with the corporate organizational form is quite unique in common law history. In addition to its uniqueness, the Massachusetts Bay Company suffered 150 years of legal problems stemming from the manner under which it was incorporated. The legal representatives of the Massachusetts Bay Company did not file their charter application properly, rendering the charter suspect. The malleability and ambiguity of seventeenth-century English corporate law allowed for this kind of experimentation, though it also led to protracted legal battles over the intent and scope of the law.

A rival claim to the land granted to the Massachusetts Bay Company also weakened their charter. The land had previously been offered to a group called the Council for New England, which had established a corporation, the Dorchester Company, to settle the area. The Dorchester Company tried and failed to create a series of fishing villages along the coast north of Boston Harbor. Its legal representatives still argued for the continued validity of the Dorchester Company’s claim, though, and they repeatedly tried to have the Massachusetts Bay charter revoked. Such wrangling over the legal validity of land grant charters was a common feature of early American political geography (Kaufman forthcoming).

The Massachusetts Bay Company charter was further threatened by English suspicions about religious heresy in the colony. In 1633, a special Commission for Regulating Plantations (colloquially referred to as the “Laud Commission,” after its head, William Laud, Bishop of London) investigated claims that the colonists were religious extremists violating church policy. For a short time, the Laud Commission tried to restrict emigration to the colony. In July 1634, they went so far as to demand that the company’s corporate charter be submitted to them for inspection (Bremer 2003).

The Company’s response to the Laud Commission’s request is significant, for it is a landmark departure from both English colonial policy and corporate law. The governing council of the Massachusetts Bay Company resolved “not to return any answer or excuse” to official requests that they deliver their charter to England for scrutiny. They forestalled a second request by claiming that they could not do so until the colony’s legislative assembly next met, several months hence. England responded by threatening to send a military envoy to seize the Massachusetts Bay Company charter by force. The colonists in turn built military fortifications in strategic locations around Boston Harbor, including a sentry post at Beacon Hill, the current site of the Massachusetts State House. Though no British convoy ever arrived to seize the charter, the very fact that the company had refused to assent to royal orders was a violation of the common law understanding of corporate privilege (Handlin and Handlin 1969:93): corporations served “at the king’s pleasure,” meaning that special privileges were

⁴ The spelling of all proper nouns has been changed to match modern usage.

granted them with the proviso that they would remain directly accountable to the King and Parliament.

The leaders of the Massachusetts Bay colony sought to resist such intrusions. They could do so in part because they had taken the unusual step of bringing their charter and corporate seal—a medallion used to stamp all official corporation documents—with them across the Atlantic. As long as Massachusetts possessed the seal, it possessed *de facto* power to act as a corporation (Bremer 2003). This, coupled with the migration of a majority of the corporation's officers to Massachusetts, meant that the colony and the corporation were now unified in a single place. "This removal was a fact of the greatest importance not only in the history of New England," writes historian Herbert Osgood (1896:505), "but in the development of modern governmental forms." The New England Puritans' repatriation of their corporate seal was a signal step in transforming the corporate organizational form from a simple legal privilege to the basis for an entire polity.

Though the Massachusetts Bay Company managed to keep its charter (for the time being), its subsequent decision to charter a college brought new problems. Despite Massachusetts's insistence that it had the right to charter a college, English law at the time clearly stated that corporations could only be founded with official license from the King (Andrews 1934). The Massachusetts Bay Company issued Harvard its charter during a period of jurisdictional uncertainty following the execution of Charles I.

The American colonies were largely left alone, legally speaking, throughout the political turmoil of the English Civil War. Settlers from Massachusetts founded the new colonies of Connecticut and Rhode Island and successfully gained corporate charters for each, further extending the reach of this new conception of the corporation-as-political-organization. The Glorious Revolution brought new troubles for the corporate colonies of New England, however. In England, Puritans lost much of their previous political power, and the new regime sought to rein in its American subjects. This was a period of great legal-jurisdictional uncertainty in Britain: England was in transition to a new system of parliamentary rule under a new monarch, William of Orange. There was a concerted effort to "rationalize" what had previously been a hap-

azard, slapdash array of independent colonies and wayward settlements. Though the impetus for reform was felt throughout British North America, the New England colonies bore the brunt of it.

The Massachusetts Bay Company officially lost its corporate charter in 1684. For several years, Massachusetts existed in legal limbo, as did all subsidiary corporations associated with it, including Harvard College. Where did this leave New England's already-chartered corporations, legally speaking?

Increase Mather, president of Harvard at the time, sought to find out during a trip to England in the spring of 1688. He was traveling as ambassador for both the College and the Company, their fates being legally and symbolically intertwined. Mather's trip lasted three years, during which time King James II was deposed and William of Orange crowned in his place. Mather made repeated requests for royal resolution on the corporate powers of the New England colonies. "Answer was made," writes Mather (1691:21), "that it should be so if I desired it, but that a better way would be for the General Court [i.e., legislative assembly] of the Massachusetts Colony to incorporate their College, and to make it an University, with as ample privileges as they should think necessary." The king in council was thus sending the matter back to New England for action.

Unfortunately, this parry left New Englanders in the lurch, for few believed that colonial charters had the same force of law as those issued directly from England. As late as 1772, for example, the royal governor of Massachusetts, Thomas Hutchinson, was asking the Lords of Trade for resolution on this matter. As Hutchinson rightly observed, there was nothing in the bylaws of the colony stating whether royal or colonial charters held preeminence. He asked that the Massachusetts charter be revised "to abridge or restrain the Prerogative which is in the Crown of creating Corporations" and stressed that every time the colonial assembly passed such acts, it only strengthened "the exception that is taken to this part of the Prerogative [i.e., royal monopoly over the power to grant corporate charters]" (Davis 1917: I, 18). Governor Hutchinson was in fact correct. The Board of Trade clearly stated that "Incorporation should arise from the bounty of the Crown by letter patent, rather than by act of

[colonial] Assembly” (Davis 1917: I, 18). Enforcement of this policy was never consistent, however. Most colonial corporations were either overlooked or simply tolerated by royal authorities. “Indeed, of the many [business charters] that must have been passed upon,” writes Davis (1917: I, 18), “only five seem to have been disallowed.” English legal authorities were not doing much to prevent incorporation, though they were not encouraging it either. Other colonies used corporations, but none as widely and passionately as New England, where the corporation remained a cherished ideal for collective governance.

On October 7, 1691, Massachusetts received the official seal of England, thus reestablishing the colony’s legal existence following the revocation of its corporate charter. The seal came with the added proviso, though, that the King could now appoint a royal governor to oversee affairs in the colony and all laws passed by the colonial legislature were subject to a royal veto within three years of their passage. The King’s changes to the Massachusetts Bay charter were an obvious blow to the colonists. Mather writes at length about his struggles to preserve the original charter, as well as his eventual realization that further resistance might goad the King into rescinding colonial autonomy altogether. Harvard’s struggles, moreover, were nowhere near over. The College’s charter was nullified by the annulment of the original Massachusetts Bay charter, and it had yet to be reinstated. Speaking on behalf of Mather and the Fellows of the College, James Allen said (quoted in Morison 1936: II, 518; cf. Herbst 1982): Harvard without a charter “will indeed be no Reall Colledge, but quickly come to be nothing at all.”

In May of 1692, Mather drafted a new charter creating a Harvard College corporation of 10 men with virtually unlimited control over the affairs of the college. In July of 1696, word arrived from England that the 1692 charter was being “disallowed” because it did not provide the Crown the right to “visit” the college (i.e., oversee its affairs) (Morison 1936: II, 512, 517). This issue of corporate freedom from royal (i.e., state) oversight was key to the New England colonists. Colonial Massachusetts, Rhode Island, and Connecticut were unique in seeking colonial, rather than royal, charters for their first universities—the other six institutions of

higher education founded in the colonial period were chartered by the King in Parliament rather than their respective colonial legislatures (Baldwin 1898, 1901; Davis 1894). Interestingly, Yale’s overseers came to blows over a similar matter with the Connecticut General Assembly nearly a century later, in 1784, when they challenged the state legislature’s self-proclaimed right to “visitation” in response to complaints about the lackluster state of affairs at Yale (Dana 1784).

The illegal incorporation of Harvard College is relevant to the political development of the Massachusetts Bay colony in more ways than one. The College was an important social project to the Puritans, one meant to create an ample supply of human and social capital in the colony. It resonated, too, with settlers’ general sensitivity to issues of contract and title. Townships and common lands were often created as corporate trusts (*Private Statutes* 1780–1800). In addition, a fair percentage of the colony’s leading doctors, lawyers, preachers, teachers, politicians, and businessmen would later be Harvard graduates. Many seventeenth-century New Englanders saw the fate of the College as part and parcel of the long-term health of their colonies. They likely passed such concerns on to their children, especially those who attended Harvard themselves. Their ideas about charter rights would also travel with them across the country as New Englanders started migrating westward in search of open land.

The College charter issue remained wholly unresolved until 1707, when the Massachusetts General Court (i.e., the provincial legislature) simply declared that the 1650 charter had never been repealed or annulled, thereby reinstating it. Hofstadter (1955:106) refers to this compromise as an “admission of the hitherto uncertain right of the [Massachusetts] General Court to charter a college without sanction from the Crown.” As a result, the legal standing of the College remained ambiguous until after the American Revolution, when the Massachusetts state legislature promptly took action to confirm the College’s charter (Maier 1992, 1993).

In point of fact, the legal power to grant corporations remained ambiguous throughout the colonies before Independence. Except in cases where such powers were explicitly granted, “the colonial assemblies which undertook to create corporations were forced to rely upon an implied

power so to act, and the question whether this implication was justified remained somewhat unsettled throughout nearly the entire colonial period" (Davis 1917: I, 17).

Significantly, some colonial legislatures made a concerted effort to hide acts of incorporation in language that avoided specific reference to incorporation itself. Connecticut's Yale College, founded by Harvard alumni, took this route after noting the extensive difficulties Harvard faced in achieving incorporation. As Hofstadter (1955:36) writes:

The Connecticut clerics faced a dilemma. To get a charter from the legislature was to risk the total dissolution of the college, as the charter might readily be voided by the Crown if the college received unfavorable attention; but to seek a royal charter was to run the risk, as the Massachusetts men had learned, of inviting royal and Episcopal interference. Yale's founders decided to solve this problem as best they could by getting a charter from the colonial legislature and by masquerading their college under the most trivial guise, hoping that English indifference to or ignorance of colonial affairs would leave it unmolested. Hence they called it not a 'college' but by the more modest title 'collegiate school'; hence they call its head not the president, as at Harvard, but the 'rector.'

In this case, Connecticut seemed reluctant to use, or at least publicize, Yale's use of the powers of incorporation.⁵ Ultimately, Yale had to wait 44 years, until 1745, before it was officially incorporated. Dartmouth College, which originally sought a similar grant from Connecticut, was denied a charter by the governor and council "upon the ground that their action would not be valid if ratified in England . . . and that a corporation within a corporation might be troublesome as Yale College had sometimes been" (quoted in Shirley [1895] 1971:22). "Similar caution dictated the general policy of all the colonial legislatures [with noted exceptions] in matters of this description," writes legal historian Simeon Baldwin (1909:242).

Why did corporate status matter so much to institutions like Harvard and Yale (and the New

Englanders behind them) when they had managed to function for so long without it? The answer reveals much about American legal development. Under their original, common law conception, corporations (partially) protected their members' assets from creditors and lawsuits and also afforded investors a means of holding assets in perpetuity. Incorporation was a "legal fiction" that placed a defensive shell around Americans' assets, thus improving investors' chances of preserving and indeed building upon them. In England (and the rest of Europe), such privileges were hard to procure; in Puritan New England, by contrast, they were part and parcel of government policy.

As William Smith, a New York lawyer, wrote in a 1767 letter (quoted in Shirley [1895] 1971:24), "This [incorporation] is the only way to render the project permanent, to secure wisdom and council equal to the work, to defend it against opposition, and to encourage future donations." Massachusetts's private statutes incorporating nonprofit organizations like Christ Church, Boston (incorporated 1789) and the Scots Charitable Society (incorporated 1786) also mention the need to incorporate to bring suit against individuals for debts owed (*Private Statutes* 1805).

Incorporation was also seen as an important legal protection of institutional autonomy. Smith's letter continues, "I shall [only] add that a charter is more necessary for such an institution in this country than it can be in England. An incorporated body will not only acquire rights maintainable by law in the courts of justice, but command the favor of the government, who without that sanction, may at such distance from the Crown oppress the undertaking a thousand ways and utterly destroy it." In sum, incorporation offered private organizations multiple legal powers useful in pursuing their goals.

Equally pressing is the question of the colonists' desire to defend their provincial charter rights in the face of opposition from royal authorities. For example, religious dissenters looking to escape persecution in Puritan Massachusetts founded Rhode Island. Though granted a royal charter of incorporation in 1643 by King Charles I, Rhode Islanders immediately sought recertification of their corporate status following the restoration of the monarchy after the English Civil War. They (rightly) feared that a change of rule in England might jeopardize the

⁵ This reluctance may help explain why the Connecticut state session books do not contain complete records of private statutes incorporating companies. Connecticut's unique experience with, and approach to, the corporation deserves much further attention.

legitimacy of their charter. Charles II granted Rhode Island a new charter in 1663, permanently instituting religious freedom in the colony. This charter granted Rhode Island unprecedented autonomy from the Crown and gave the legislative assembly almost complete control over colonial affairs. This charter was seen as an important safeguard in fending off territorial incursions initiated by her neighbors, Massachusetts and Connecticut. Ambiguity in charters regarding territorial boundaries was a huge source of anxiety and contentiousness during the early colonial and post-Revolutionary periods (Kaufman forthcoming). Provincial charters were thus important to New England colonists not only for legal protection from the King, but also for protection from neighboring colonies. After the American Revolution, Rhode Island resisted signing the new United States Constitution because its citizens saw confederation as a potential threat to Rhode Island's local autonomy. Despite widespread dissent, Rhode Island retained its 1663 charter until 1842, thus signifying the extent to which the colonists viewed the original charter rights as sacrosanct and immutable (Andrews 1934; Conley 1977; Richman 1905).

The Connecticut case is equally telling. In Hartford in the 1680s, residents attempted to hide their corporate charter when asked to cede it to Westminster.⁶ Settlers from Massachusetts seeking new land spearheaded Connecticut's incorporation. Though the Massachusetts General Court recognized the founding of this new colony, official sanction was only sought from the Crown after the restoration of the monarchy. Charles II incorporated Connecticut in 1662, adding a proviso that allowed it to usurp the independent colony of New Haven, which wanted no part of Connecticut. Because New Haven lacked a corporate charter of its own, it had few legal means to defend its jurisdictional autonomy. Thereafter, Connecticut wielded its corporate charter as an important

weapon in boundary disputes with New York, Rhode Island, and Massachusetts (Andrews 1934; Bremer 2003; Mann 1987; Martin 1991). Charter rights were thus perceived as a vital component of interstate, as well as international, political autonomy.

Incorporation was clearly a key part of the New England Puritans' vision for their new society. The colonies were established as chartered corporations, and the corporate principle was widely used in trying to people them. One especially important and controversial domain of early American corporate law was the practice of incorporating townships, or subprovincial polities. "New England's first leaders needed no coaching in how to put together a business corporation," writes Martin (1991:137). "Nor was it a great logical leap to apply the principles for settling the colony to settling a town. . . . The very first towns in New England, which were founded, not by colonial legislatures, but directly by the plantation companies, were governed by these same business principles governing plantation companies."

Towns were governed by those men and women (yes, women) who owned suitably large parcels of land therein, much as a corporation is governed by its shareholders today. Myths of New England town meetings notwithstanding (Putnam 2000; Tocqueville 1988), many early New England towns were run by absentee landlords who had no qualms about denying suffrage to propertyless settlers (Martin 1991). Though specifics varied from township to township and colony to colony, the corporate organizational form was integrally related to the collective political life of colonial New England.

While common in New England, other American colonies lacked comparable experience using the corporate organizational form as the basis for settlement. Massachusetts, Connecticut, and Rhode Island all existed for at least their first 50 years as private corporations. The remaining 10 colonies were founded either as royal provinces (e.g., New York) or proprietary colonies (e.g., Pennsylvania), or they were converted to one of these following very short periods of incorporation (e.g., Virginia, which was originally chartered as a corporation but was soon converted to a royal colony, at a time when the entire colony still contained only a few hundred settlers).

⁶ The Charter Oak, where the document was hidden, remains an important symbol of Connecticut state history; it now graces the back of their newly minted state quarter. Remnants of the oak, which fell in 1856, were made into token objects, including an oak chair that still sits in the State Senate (Cohn 1988).

Unfortunately, it is hard to know with certainty how many corporate charters were issued in each of the colonies prior to the American Revolution because: (1) charters could be issued by either the colonial legislatures, Parliament in England, or both and (2) corporations were sometimes founded without official license from either of the above legislative authorities, as was the case for many township corporations. The length of the colonial period also makes examining all annual legislative records in detail an enormous task. I thus looked at the legislative records of the Massachusetts General Court for several decades (*Province of the Massachusetts-Bay, Colonial Session Laws*): from 1660 to 1670 and 1710 to 1720, for example, the General Court did not issue any corporate charters, though it seems townships were nonetheless created using the corporate organizational form extant at the time (Martin 1991).⁷ In the decade immediately preceding the Revolution, 1760 to 1770, the Massachusetts General Court issued 33 charters. Notably, none of these were for explicitly business purposes: 29 charters created township corporations and four created religious organizations.

These variable rates are consistent with the changing constraints put on the General Court's powers of incorporation in these periods. In the 1740s, for example, the Massachusetts General Court ran afoul of the Lords of Trade for incorporating townships. Since each township in the colony was guaranteed representation in the legislative assembly, jurisdictional control over the means of creating new township corporations was a potentially contentious issue. Thereafter, the Lords of Trade intervened in a number of attempted township incorporations in Massachusetts, reigniting debate about the colony's right to create corporations. The Lords of Trade objected to the expansion of the General Court and argued that Massachusetts could not incorporate new townships without

royal assent. Nonetheless, the practice of incorporating towns continued apace. Debate and legal contention over the colony's powers of corporate issuance continued until 1775, when Massachusetts formally broke with the Crown. "One of the first acts passed by the [Massachusetts] General Court in 1775, after the resumption of the charter, was that which removed all conditions imposed in the earlier incorporation of towns, and which, furthermore, granted to all incorporated districts both the status of towns and full rights of representation" (Cushing 1896:26–27). The exact nature and legitimacy of those rights, on the other hand, were still poorly understood. The corporation was, at this time, an institution with clear legitimacy but unclear content and form. These characteristics made it highly susceptible to emulation, contestation, and adaptation, all of which would help further transform the institution after the Revolution. This brings us directly to the question of what happened to the corporate organizational form during and after the American Revolution.

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**THE CORPORATION AFTER AMERICAN
INDEPENDENCE**

Despite their many ambiguities and uncertainties, so-called "charter rights" were a motivating concern for many, but not all, American revolutionaries. With a long history of charter disputes, New Englanders were especially attuned to this issue.⁸ A major catalyst that transformed complaint into rebellion in Massachusetts, for example, was a 1773 royal decision to ignore statutes in the Massachusetts Charter of 1691 stipulating that government officials be paid by the provincial legislature, thus providing the legislature informal veto power. This decision was perceived as a major violation of colonial jurisdiction and charter rights. A commentator in the *Massachusetts Spy* (quoted in Maier 1972:219) wrote, "The moment that he [the King] or they [his ministers] attempt to render themselves independent of the people, that moment their authority ceases, they themselves break the compact with the

⁷ Towns in colonial Massachusetts were not generally chartered prior to the late eighteenth century. Nonetheless, their organizational structures and legal foundations were conceived along the same lines as chartered corporations. Following the Revolution, dozens of towns in Massachusetts were explicitly chartered by the legislature (Martin 1991; *Private Statutes 1780–1800*).

⁸ Systematic evidence is hard to muster, but it would appear that charter rights were not a significant topic of protest in the other colonies.

people [i.e., the charter], and from that moment the people become alienated from their jurisdiction, and have a constitutional right to form their government anew.”

One argument in support of the rebellion in Massachusetts was the sanctity of the colony’s charter. “We have ever supposed our Charter the greatest security that could be had in human affairs,” declared the people of Weymouth, Massachusetts, in response to the controversial Stamp Act of 1765 (quoted in Reid 1987:97). In 1772, when members of the Massachusetts legislature argued that their charter guaranteed them control over the royal governor’s salary, the royal governor replied, in the words of historian Bernard Bailyn (1974:204), that “the Massachusetts charter was not a treaty between two independent states but a Crown gift of limited powers granted to a group of petitioners.” Clearly, the citizens of Massachusetts felt otherwise. They were agitated about the issue of corporate charters and their jurisdictional right to issue them. Rhode Islanders expressed similar concerns. They were extremely active in pre-Revolutionary protests against the King and mustered troops for battle only days after Massachusetts militiamen fired on the British at Lexington and Concord. Politicians in other colonies had political grievances with the

Crown; however, they rarely expressed them in terms of corporate autonomy.

English colonial authorities repeatedly attempted to restrict the New England colonies’ liberal use of the corporate organizational form. The revocation of the original Massachusetts Bay Company charter in 1684 was partly justified on grounds that the company had exceeded its corporate powers. As late as the 1740s and ’50s, the Lords of Trade were attacking the incorporation of townships in Massachusetts (Cushing 1896:20–21). In response, the new Massachusetts state legislature tackled the charter question almost immediately. According to one account (Cushing 1896:262): “One typical peculiarity of the Massachusetts constitution [of 1780] was the careful manner in which the corporate privileges and property rights of the President and Fellows of Harvard College . . . were confirmed to them.” Another account said: “The great men who formed the constitution of 1780, knew how sacred pre-existing chartered rights were” (Josiah Quincy quoted in Cushing 1896:262). Any uncertainty about the College’s corporate status was thus quickly resolved.

Examination of the session laws of several state legislatures from 1781 through 1810 sheds further light on the history of the corporation in post-Revolutionary New England. Figure 1

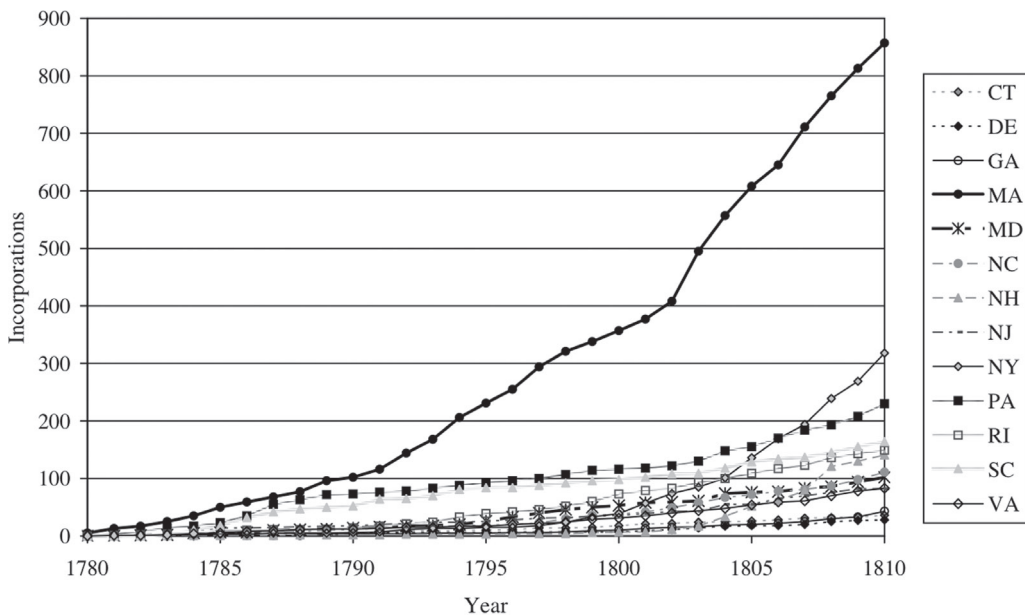


Figure 1. Cumulative Incorporations by State (1780 to 1810)

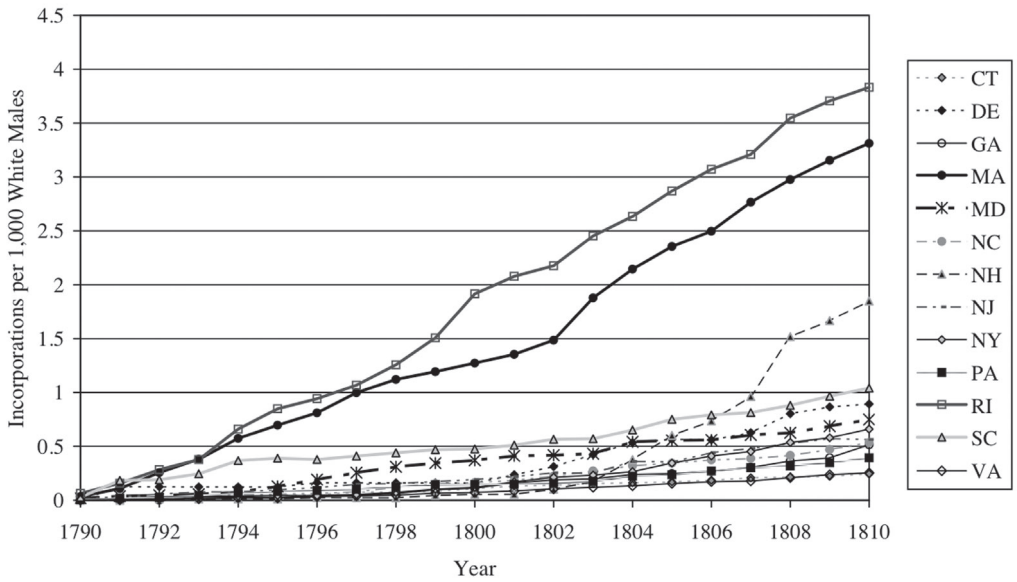


Figure 2. Cumulative Incorporations per 1,000 White Males (1790 to 1810)

shows the cumulative number of corporate charters issued (for all purposes) in the 13 original American states. I counted charters by examining all the published statutes passed in each respective legislature for each year between 1780 and 1810.⁹ Each incorporating statute was recorded and coded as one of eight different types of enterprise: business, infrastructure, polity (townships and districts), education, religion, charity, learned and other miscellaneous societies; groups with indeterminate or ambiguous purpose were coded as “other.” I coded multipurpose organizations, such as charitable schools, by their primary function (e.g., “education” in the case of a school for paupers). Figure 2 shows state incorporation rates standardized by the estimated number of white males in each province.¹⁰

⁹ Corporations created via general incorporation laws could not be counted in this manner because no legislative acts were required for their issuance, nor could I find records of charters otherwise granted. Nonetheless, Evans (1948:10) says that few, if any, were issued in this early period and refers to the time as “the period of the special charter.” Further study should evaluate this assertion, though finding the appropriate documents for this prebureaucratic period of American history will be difficult indeed.

¹⁰ I extrapolated yearly population figures from the 1790, 1800, and 1810 U.S. Censuses. I use the white

male population, as given in the Census, as a rough proxy for the eligible pool of voters. Per capita figures based on the total population were not significantly different from those shown here. Unlike every other state examined, Connecticut’s legislative records offer an incomplete account of corporate issuance. The published state session laws do not record private statutes before 1789 and the subsequent published records appear to be substantially incomplete.¹¹ I therefore believe that the number of charters reported in the Connecticut state session laws, as shown here, underrepresents the actual number. Though minor variations may exist in the figures reported from other states, I did not find any reason to suspect the general magnitude of charters reported. Efforts to find alternative sources on Connecticut incorporations were unsuccessful. Given the narrative history of incorporation in post-Revolutionary Connecticut, and its earlier history as a contested corporate colony, I hypothesize that, like Massachusetts and Rhode Island, it would have had higher-than-average

male population, as given in the Census, as a rough proxy for the eligible pool of voters. Per capita figures based on the total population were not significantly different from those shown here.

¹¹ While reviewing the Connecticut state sessions records, I discovered that they had many probable omissions—they contain alterations to charters that are not recorded in prior meetings of the legislature, for example. Several known municipal incorporations were also missing from the state session laws.

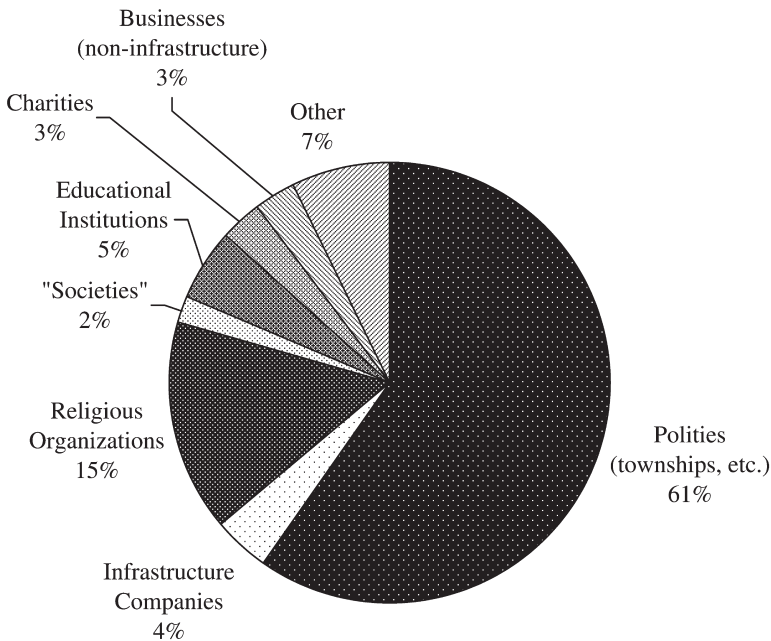


Figure 3. Incorporations (by type): Massachusetts, 1781 to 1790

incorporation rates for the period examined here. Unfortunately, I know of no means of testing this hypothesis.

In terms of raw numbers, Massachusetts was by far the leader in corporate issuance (Figure 1): 857 charters were issued from 1780 through 1810, whereas the next largest incorporator, New York, issued only 318, a little more than one-third as many. Pennsylvania was next, with 230 charters; followed by South Carolina with 164 and Rhode Island with 149.

Adjusted for (white male) population size, Rhode Island was the nation's leading incorporator, followed by Massachusetts (Figure 2).¹² All other states had far lower per capita incorporation rates. Though complete data are not available for Connecticut, it is plausible that over the first 20 years of the Republic the three former "corporate colonies" of New England (Massachusetts, Connecticut, and Rhode Island) were well ahead of the other states in the number of corporate charters issued relative to their levels of demographic expansion. This is the

case for Massachusetts and Rhode Island, at least. Unfortunately, adequate means of standardizing incorporation rates by the relative economic development of each state are not available—reliable industrial, agricultural, and trade figures for this period are virtually nonexistent. We do know that unincorporated businesses, townships, and churches were quite common at this time (Karsten 1997; Lamoreaux 1997; Paskoff 1983). How exactly these unincorporated entities differed from incorporated entities in their jurisdictional and legal powers is an inordinately complex issue beyond the scope of this article. It would require, for example, state-by-state analysis of the complex and ever-changing law of contracts, property rights, taxation, torts, and so forth. This topic, though, is very much worth further investigation.

One question we can answer, at least indirectly, is how and why state legislatures began issuing corporate charters in the immediate post-Revolutionary period. To answer this question, I focus specifically on the types of enterprise chartered by the Massachusetts General Court. Figure 3 shows the breakdown of charters (into eight different categories) issued in Massachusetts from 1781 to 1790: a remarkable 61 percent of charters were issued to new townships and districts. As mentioned earlier, there

¹² Absent accurate state-level population data for 1780 to 1790, Figure 2 assesses per capita incorporation rates only for 1790 to 1810.

is direct precedent for this in the pre-Revolutionary disputes between the Massachusetts legislature and the royal governor over the issuance of township charters. The second largest category of incorporation, religious organizations (mostly churches, as well as a few parish organizations), represents 15 percent of the total. Incorporations for business purposes (businesses plus infrastructure companies) make up only a small portion of the total (7 percent). In concert with the original corporate-commonwealth model of the Massachusetts Bay Company (Innes 1995; Martin 1991), the new state legislature continued to deploy the corporate model largely as a means of creating new civic and ecclesiastical polities.

Figure 4 shows the second decade of incorporation in post-Revolutionary Massachusetts, 1791 to 1800. During this decade, Massachusetts issued a total of 255 charters, in contrast to 97 in the previous decade. The state legislature appears to have gained momentum in its overall issuance of charters. We do not know, though, what percentage of this trend was due to an increased supply of charters (i.e., increased ease of acquisition of charters), as opposed to an increased demand (i.e., more requests for charters). The extant state records do not provide information about charters requested but not granted.

We do know that the Massachusetts General Court issued 70 new township charters between 1791 and 1800. Nearly as many charters were issued to religious organizations and infrastructure companies. Interestingly, the increase in religious incorporations seems to have been triggered by a decision in the state legislature regarding mandatory taxes for support of Congregationalist (i.e., Puritan) churches. Beginning in the late 1780s, only those non-Congregationalist taxpayers who could prove that they were members of an incorporated non-Congregationalist church could qualify for exemption from local church taxes, thus prompting numerous requests for church charters (McLoughlin 1971:636–59). A number of non-tax-exempt Congregationalist churches received charters at this time as well. This is evidence that incorporation was increasingly seen as a desirable appendage of church organization even for those congregations that would not benefit from the tax exemption.

Several other states, by contrast, handled the church-state question differently. For a short period, the Virginia state legislature refused to issue charters to religious organizations (Buckley 1995). Pennsylvania, which had a long tradition of noninterference in religious affairs, opted to pass a general incorporation law in 1791, allowing any church, literary, or charitable organization to obtain a charter upon application to the attorney general (Frost 1990). Among the original 13 states, five others—New York (1784), New Jersey (1786), Delaware (1787), Georgia (1789), and Maryland (1802)—also passed general incorporation laws for religious groups.¹³ The motivation for liberal issuance (but not “general incorporation”) in Massachusetts, on the other hand, appears to indicate a desire to control, rather than liberate, religious congregations, which is consistent with that state’s earlier history of church-state interaction (Innes 1995). This highlights the high degree of ambiguity underlying the post-Revolutionary institution of the corporation: there was substantial disagreement across and within states about whether the issuance of corporate charters was best seen as a means of strengthening or weakening state power over corporations. Such disagreements continued well into the nineteenth century, when most states began clarifying these distinctions by creating and regulating different categories of corporations with different expectations.

Politics, too, was an important and highly unpredictable source of ambiguity in the course of the early American corporation. Factional disputes in state legislatures could decide the fate of charter requests above and beyond the abstract considerations incumbent on such decisions (c.f. Handlin and Handlin 1945; Hartz 1948). In early nineteenth-century New York, for example, opposing political parties chartered rival banks (Hammond 1957). Pennsylvania deserves special mention in this respect, given its anomalous history regarding freedom of incorporation. Late eighteenth-century Pennsylvanians were strongly divided over this issue (Brunhouse 1942). In 1784, an anti-incorporation bloc in the legislature sought to

¹³ Dates in parentheses indicate the year of passage of general incorporation laws. The number of corporations made under these laws is not known.

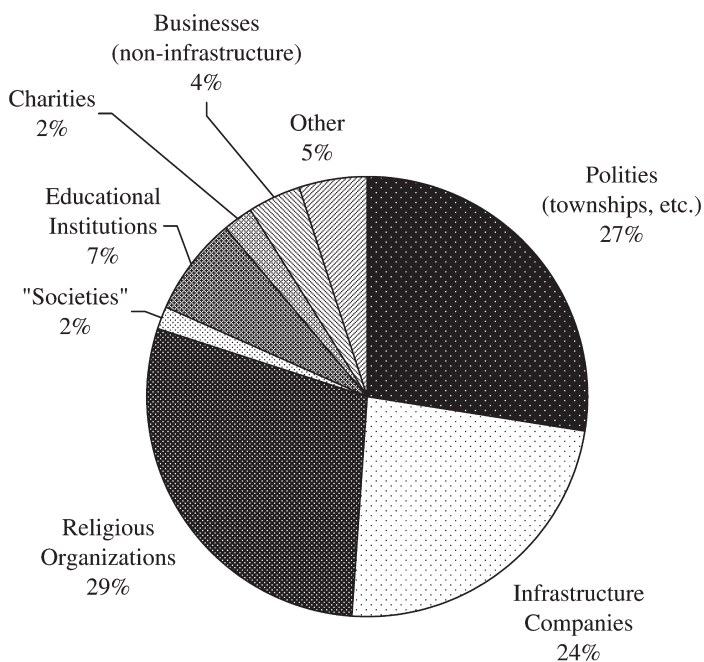


Figure 4. Incorporations (by type): Massachusetts, 1791 to 1800

block incorporation of Philadelphia, as well as the newly reorganized University of Pennsylvania (formerly the College of Philadelphia). Though both were eventually chartered, the state legislature remained reluctant to issue special charters of incorporation throughout this period. This anticorporate stance seems to stem from the state's earlier history as a proprietary colony under the personal, and largely unpopular, authority of the Penn family. Members of the "antiproprietary" party in Pennsylvania saw corporate charters as a potential extension of Penn family privilege and so opposed them. Unlike Massachusetts, whose history stressed the need for the legislature to protect its right to issue charters at will, Pennsylvanians were split over perceived abuses of power. As late as 1810, Pennsylvania had issued fewer "special" charters per capita than all of the original 13 states save Virginia (and Connecticut, though figures for this state are incomplete).

The comparison between Pennsylvania and Massachusetts sheds interesting light on the fate of the two states' economies in the post-Revolutionary period. Numerous scholars have commented on the relatively late start of large-scale manufacturing in Pennsylvania, despite the

presence of an otherwise vibrant textile industry based on small workshops and family-owned businesses (Paskoff 1983; Perrow 2002; Scranton 1983; Shelton 1986; Ware 1931). Though endogenous factors related to the industry merit consideration (e.g., availability of natural resources, proximity to ports and rivers, presence of skilled workers), scholars often overlook that the Pennsylvania state legislature was comparatively unwilling to grant corporate charters for this purpose at this time.¹⁴ That the first corporate manufacturing concerns in the United States were created in Massachusetts seems similarly related to that state's willingness to use governmental power to encourage and protect private entrepreneurship. Rhode Island also quickly leaped to the fore as a center of large-scale American textile manufacturing. Connecticut, too, became a center of early American industry, though the role of incorporation in these advances is less clear there. I

¹⁴ During this period, general incorporation laws in Pennsylvania did not cover business organizations. This precludes the possibility that I simply failed to note their proliferation in the state session laws.

hypothesize that early American entrepreneurs first built vast new plants in New England in part because of those states' favorable policies toward would-be incorporators. The familiarity of local attorneys and entrepreneurs with the corporate organizational form also likely promoted its use in New England. In most other states, by contrast, unincorporated companies remained the predominant form of business organization throughout this period (Fenstermaker 1965; Lamoreaux 1997). The exact causal order of the relationship between incorporation and economic development deserves further study. Examination of the papers and diaries of early industrialists might provide evidence concerning their decisions about where to locate and in what legal-organizational form, for example. Though rarely extant today, records of legislative debates over the issuance of charters would help shed further light on this issue as well.

Because it was not possible to locate records of failed appeals for incorporation, I can only conjecture about the size and scope of demand for corporate charters during this period. In addition to the legislatures' sudden new ability and willingness to grant charter requests, New Englanders' motivation to seek incorporation appears to stem in part from that region's particular legal culture, ensconced as it was in a long tradition of litigiousness and jurisdictional dispute (Hoffer 1992; Mann 1987; Tomlins and Mann 2001). Presumably, both mimetic and competitive isomorphism were also at work here (DiMaggio and Powell 1983): a first wave of incorporations likely encouraged others to follow suit. The Massachusetts session law records contain veritable "incorporation waves," such as June 19, 1801, when three different turnpike companies were incorporated. Regional clusters were also evident, especially in western and northern Massachusetts (Maine was still part of Massachusetts at this time), where bunches of charters were simultaneously requested by neighboring towns, churches, schools, charities, and businesses.¹⁵ In-state lawyers, too, probably promoted the pursuit of

corporate charters, given the legal fees such applications would generate for them.

In supply-side terms, many state legislatures seem to have learned by the 1810s that corporate chartering could be an important source of revenue and capital control. Legislators often required groups seeking incorporation to pay licensing fees, taxes, and anything else the legislature could think of. Bank charters, for example, often required recipients to invest large sums in state-appointed enterprises and pay taxes to the state in exchange for the privilege of doing business. "In 1813 and 1822 as a price for renewing their charters, the Baltimore banks had to form a turnpike company, buy its stock, and manage it," reports Fenstermaker (1965:17). "The City Bank of New Haven in 1831 had to buy \$100,000 of stock in the Hampshire and Hampton Canal Company, and the Quinibaug Bank had to purchase \$100,000 of the capital stock of the Boston, Norwich, and New London Railroad Company in 1832." Many chartered banks were obliged to loan a given percentage of their capital stock to citizens engaged in local farming or manufacturing. In some cases, banks were required to pay a "bonus" for their charter, as did the Bank of South Carolina in 1801 and the Louisiana State Bank in 1814 (Fenstermaker 1965).

Presumably, the balance of power in respective state legislatures was an important component in attaining consensus on charter appeals. In Pennsylvania, as previously mentioned, a strong anticorporate faction in the legislature sought to block incorporation of the city of Philadelphia and the University of Pennsylvania. Regional rivalry between eastern and western Pennsylvania state legislators also stymied early efforts at passing special acts of incorporation for transportation companies (Hartz 1948). In other states, such as New York in the early 1800s, competition between rival political factions led to a flurry of charters issued to partisan banks (Hammond 1957). Legislative factionalism regarding corporate charters helps explain why these two states were early adopters of general incorporation laws, which likely helped avoid partisan bickering over individual charters.

Most American states eventually adopted this less invasive approach to chartering corporations. Interestingly, the three New England states, plus New Hampshire, were laggards in

¹⁵ I have not confirmed the statistical validity of such observations. Only a portion of charters indicate the location of the applicants.

this respect. Well into the twentieth century, they did not have constitutional provisions “requiring [business] incorporation under general laws” (Evans 1948:11). Apparently, they were loath to relinquish state control over the means of incorporation, a legacy, perhaps, of their earlier struggles to exact such control from the Crown. These states, especially Massachusetts, also placed relatively strong regulatory constraints on in-state businesses. By the Progressive Era, Massachusetts was well ahead of the nation in terms of corporate regulation (Abrams 1964).

TRANSFORMATION OF THE AMERICAN CORPORATE ORGANIZATIONAL FORM, 1810 TO 1850

Public opinion about the nature and desirability of private corporations in the early Republic was far from unanimous; much of it was downright hostile. The role or form of the corporation was not yet settled either. Well before Andrew Jackson’s famous anticorporate campaign, politicians and journalists were quoting Adam Smith on the dangers of corporate monopolies. In 1826, leading American jurist James Kent exclaimed in his *Commentaries on American Law* ([1826] 1871: II, 220): “The demand for acts of incorporation is continually increasing, and the propensity is the more striking, as it appears to be incurable; and we seem to have no moral means to resist it.” These fears largely reflected the conventional English conception of the corporation as a restricted royal grant. Many Americans viewed corporations as government-sanctioned monopolies, with the dangerous ability to interrupt the natural course of society.

Nonetheless, it was hard to argue down the cause of incorporation given the vast number of private companies already incorporated in some states. The more politicians railed against the dangers of incorporation, the more they lent credence to the (proto-Madisonian) argument that the best protection against the dangers of corporations was to allow more companies to incorporate (Horwitz 1977; Kaufman 1999). The “freedom of incorporation” doctrine gained rhetorical support from both sides—those who sought to use legislative power to encourage free enterprise, as well as those who feared the power of unduly restrained free enterprise.

By the 1820s, American courts began addressing issues that the legislatures had raised regarding the rights and privileges of corporations. A series of landmark court cases—*Dartmouth College v. Woodward* (1819) being the most famous—sought to revise American corporate law in ways consistent with the activities of actual American corporations, now so plentiful in number. Over time, state and federal courts not only upheld the notion of freedom of incorporation but also began to defend the sanctity of the private corporation from state interference (Horwitz 1977). Arguably, judges expanded their conception of the public good to embrace America’s increasingly brisk economy. Private gain was heralded as a key component of the public good, a rationalization that would subsequently come to undergird all American political-economic policy (Appleby 1984; Dobbin 1994; Hurst 1964, 1970). It is difficult to piece out the cause-and-effect relationship between evolving standards of corporate law and republican neoliberal ideology. We do know, at least, that the corporation’s role in the polity had been growing, exponentially in some jurisdictions, since the founding of the Republic.

Beginning in the 1790s, but not culminating until the late nineteenth century, state legislatures throughout the United States began institutionalizing a new form of access to the means of incorporation: general incorporation laws. These enabled entrepreneurs to receive charters of incorporation without special legislative approval (Creighton 1990; Evans 1948; Roy 1997; Seavoy 1982). This meant that the means of incorporation were now open to any group that could complete the necessary paperwork. In addition to incorporating for-profit businesses, general incorporation laws were widely used to charter voluntary associations (e.g., fraternal lodges, charities, societies, sodalities, and congregations), both as a means of protecting group assets and as a template for expanding and federalizing such organizations (cf. Clemens 1997; Hall 1992; Kaufman 2002; Skocpol 2003).

A related nineteenth-century transformation of the corporate organizational form was the construction of different legal categories of corporation. Originally, American law made no distinction between public and private corporations. Municipal governments were viewed, in

fact, as little more than publicly owned landholding companies, a practice that dates back to medieval England, where the sanctity of a city charter revolved around ownership of city property, or commons (Hartog 1983; Teaford 1965). Beginning in the 1810s and '20s, American courts began to differentiate the rights and powers of public corporations from those of privately-held corporations (Newmyer 1976). In addition to certifying the civic benefits of private, for-profit corporations, the courts formally reframed public corporations as direct appendages of state power. Such corporations had a responsibility to the people and could only own property as a public trust. Thus construed, "a public corporation was nothing but an agency of the state; whereas a private corporation assumed the character of a private citizen" (Hartog 1983:193–94). This new definition of public corporations was quite similar to the pre-Revolutionary common law definition of a corporation—it was the court's new conception of the private corporation that was truly innovative (Appleby 1984; Horwitz 1971, 1977). American courts began to rein in public corporations while at the same time granting private corporations unprecedented freedom. This marks a turning point in the legal rationalization of the American corporation following an earlier period of experimentation and dissemination.

In terms of institutional theory, this differentiation marks an effort to more clearly define the functions and forms of the corporation. It follows an earlier period in which a relatively undifferentiated, ambiguous organizational form spread and gained increasing legitimacy. Scholars of nineteenth-century corporations might closely examine debates over the relative pros and cons of rationalizing corporate law in this manner. Why exactly courts and legislatures were motivated to do so is not clear (cf. Karsten 1997). I hypothesize that the courts' decisions declaring the sanctity of private corporations were, in part, a reaction to the increased density of private corporations, itself the product of earlier legislative willingness to freely grant private charters. That is, American jurisprudence regarding corporations appears to have evolved only after many state legislatures had already institutionalized freedom of incorporation. Though a formal test of this hypothesis is beyond the scope of this article, it deserves further attention. If true, this would support

Carruthers and Halliday's (1998) concept of "law's recursive loop," the notion that new legal doctrines have a pronounced tendency to evolve not as conscious, purposive doctrine but as post hoc responses to changing, cumulating social conditions. The former corporate colonies of New England first supported the widespread use of the corporate organizational form long before the courts and legislatures began refining their conceptions of the corporation. Only after the proliferation of corporations, and much litigation between competing corporations, such as *Charles River Bridge v. Warren Bridge* (36 U.S. 420 [1837]), did the courts begin to tackle the subtleties of corporate law in earnest.

CONCLUSIONS

This article elucidates several significant processes for institutional theory. First, I demonstrate that the common law corporation originally existed as a relatively undifferentiated organizational form, one that could be used for a variety of purposes. Second, I show that several British North American colonies began using the corporation in ways not intended or approved by the King in Parliament. Third, I argue that experience with the corporate organizational form in these colonies helped cultivate knowledge and appreciation of that form over time, despite royal opposition to its continued use. Fourth, I show that these same colonies chartered unusually high numbers of corporations after Independence, many for enterprises that standard economic histories of the corporation do not commonly consider. Fifth, I argue that American legal doctrine regarding the corporation only began grappling with the nuances of corporate law after an initial proliferation of corporations in the American states. We thus see the expansion and transformation of a now common sociolegal institution through indirect means. Royal resistance to its use, as well as domestic, noneconomic preferences associated with its desirability, encouraged the early development of an institution that would later inspire the creation of a new sphere of legal doctrine.

One might characterize the early development of the corporation in the United States as a case in which a relatively undifferentiated institution persisted despite struggles over its content and relational structure. In turn, this accentuated its desirability in a period of new-

found political opportunity (i.e., Independence). The ambiguity underlying conflict over colonial use of the corporation later became an impetus to imitation, adaptation, and transformation. After an initial period of selective proliferation (primarily in New England), the corporation rapidly diffused across the country and became increasingly differentiated, rationalized, and bureaucratized. All of this is consistent with the sociological variant of institutional theory (see review in Clemens and Cook 1999).

A less predictable outcome of this process is the weakening of state control over an institution that some colonial politicians desired to control. The shift of control from the Crown to the separate states marks a shift in the perceived locus of controversy. As colonists, Puritan politicians sought to repatriate control over corporations by extolling the right of colonial legislatures to create and regulate them. Following Independence, with state autonomy firmly in place, the need to exert this control lapsed. This points to the need to study the connections between corporate institutions and state formation in a world-historical perspective. Because corporations are legal fictions created by states, their fates are inevitably intertwined. The concurrent rise of corporations and politics in the Puritan colonies of New England is a unique factor in American political development (Kaufman forthcoming).

Seen from this perspective, Americans' well-noted capacity to form not only for-profit but also nonprofit private organizations (Tocqueville 1988) is directly related to America's history of support for, and conflict over, states' power to create corporations. Given the evidence at hand, Americans' unusual propensity to "associate" does not appear to be the result of Americans' ingrained preferences, nor the absence of state organizations dedicated to related pursuits. American voluntarism instead appears directly related to state support for private corporations, or at least the unprecedented willingness to grant charters of incorporation. Novak (2001:172) writes: "Nineteenth-century legislators, judges, and commentators defended associations not as alternatives to a legal-constitutional state, but as constitutive components of it. . . . [Associations] were in fact legally-constituted and politically-recognized delegations of rule-making authority and public resources."

The relational transformation of the corporate organizational form changed the very meaning of private enterprise in the early United States. While the right of governments to regulate commerce was upheld, the notion that only exceptional circumstances demanded incorporation waned. Having made the means of incorporation so readily accessible, American courts and legislators faced efforts to define the exact rights and responsibilities of corporations. Courts and legislatures have not always been consistent in their vision of the American private corporation, but the long-term trend has been toward greater corporate autonomy, except in cases where the openness of markets is at stake (Dobbin 1994).

Though there is already a long tradition of scholarship dedicated to the subject of the American corporation and its historical origins, few, if any accounts focus on the colonial origins of American corporate law, its prehistory as it were. American corporate law is increasingly the norm in international commerce and some unarticulated form of the American "freedom of incorporation" doctrine is common in most developed nations today (Chandler 1977; Coase 1937; Coleman 1982; Fligstein 2001; North 1990; Williamson 1981). This makes understanding the uniquely American origins of this doctrine especially significant.

Without legislative willingness to charter private corporations, the economic and political development of the "first new nation" (Lipset 1973) might have been vastly different. By freely endorsing a legal entity above and beyond individual trusts and partnerships, American state legislatures released a force that would only begin to realize its potential in the decades to come. American jurists and legislators could have easily constructed American civil law around British common law precepts, and they often did. In the case of corporate charters, however, some American states forged new ground, much of which would later be copied worldwide.

A further observation following from this study regards the nature of American corporate governance. Building on English common law practice, the New England Puritans espoused the idea that only shareholding members of corporate colonies and townships should be full participants in their governance. They made clear distinctions between freeholders and other residents (Martin 1991). These

colonies were thus governed primarily by and for large property-owners. The modern American corporate system has adopted an incarnation of this institutional frame: profit-sharing with employees is rare, and corporate governance is run in the interest of management and shareholders rather than employees or society as a whole (Coleman 1982; Perrow 2002; Roy 1997). Future studies should explore parallels with state-corporate relations in other nation-states. Presumably, for example, corporatist arrangements in Western European polities stem in part from their civil law trajectories of strict state control over corporations and the means of incorporation.

By changing citizens' relationship to the means of incorporation, certain American states radically changed the balance of social and economic power in the Western world. Weber (1978) devoted much of his career to understanding the legal foundations of such power. Though he did not comment much on the particularities of American law, his extensive study of comparative law pointed in this direction: "If, by virtue of the principle of formal legal equality, everyone 'without respect of person' may establish a business corporation or entail a landed estate, the propertied classes as such obtain a sort of factual 'autonomy,' since they alone are able to utilize or take advantage of these powers" (p. 699).

The arguments presented here, though preliminary, point to the importance of studying political, economic, civic, and legal developments as mutually-constitutive processes. Freedom of incorporation doctrine did not grow in a juridical vacuum nor solely in response to perceived economic needs. It was the result of a century and a half of struggle and debate over the right of intermediary associations to exist as full-fledged polities. This clearly demonstrates the importance of considering colonial antecedents and long-term processes in the study of national institutional development. It also reaffirms social scientists' newfound interest in issues of institutional durability and change, processes whereby longstanding organizational forms come to have new significance and meaning over time (Clemens and Cook 1999; Pierson 2004; Thelen 2003). The corporate organizational form has evolved more quickly in some polities than others, but its ramifications are now felt worldwide.

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