

Incorporating the Public Interest: Economic Thought and the Common Law, 1590-1630

David Chan Smith
Wilfred Laurier University

Abstract

English legal thinking about corporations, including municipalities and professional societies, developed rapidly from the end of the sixteenth century onwards. Litigation arose in particular over corporate privileges and prompted judges to consider how to regulate these companies. This paper surveys unpublished cases and judicial opinions for the period 1590-1630 to trace the evolution of legal attitudes towards the corporation and its regulation. In doing so, this paper argues that ideas about the public interest and concerns about corporate authority guided these judicial decisions and anticipated later disputes over the privileges of commercial companies.

The economic attitudes of the early Stuart judiciary remain murky. An earlier generation of historians argued judges such as Edward Coke held an incipient *laissez-faire* attitude. However, Barbara Malament's intervention placed judicial action within an earlier pattern of Tudor paternalism. Rather than signs that the judges were opposed to regulation, their decisions reflected attempts to maintain full employment and to restrict the expansion of the royal prerogative. This paper expands Malament's findings, by arguing that the privilege of corporate self-governance drew the heightened attention of the judiciary. Philip Stern has recently argued that the early modern corporation should be understood as a form of polity or state. Similarly, the early seventeenth century common law recognized this role of the company in governing trade and commerce, and acted to regulate its legal authority. This was especially the case where company powers were exercised over those outside the membership. The desire to regulate legal power, rather than underlying economic ideas, shaped the judicial approach to corporations. Appeals to the public interest and the corporation's duty to govern a market or society justified the delegation of powers to enforce monopolies, make by-laws, and even punish violators. Litigation tested corporate interference in labor or commercial markets against the standard of the public good and ideas of reasonableness. Yet determining whether the exercise of corporate privileges was in the public interest occasioned significant disagreement and so in some cases the judges could appear to rule in favor of free labor, while at other times agreeing to protect closed markets.

Judges were well aware of the problem of self-interest that influenced the actions of corporations and their members. Corporations might pursue policies strictly for their own advantage and to the detriment of the larger public good, undermining legal assumptions about the responsibilities of government. The concern that such large agglomerations of legal and economic power would inevitably prejudice corporate action was still in the future. But by considering cases involving both commercial companies and municipalities, this paper is able to suggest the origins and significance of this tension within the corporate form.

This analysis has three consequences. First, the paper will provide a clearer picture of the legal framework within which the commercial corporation developed in England. Second, the paper traces cultural and legal attitudes towards companies and expectations of corporate conduct, explaining how commonwealth language might also be imposed on the corporation, its actions, and

regulation. Third, the paper eschews the consensus view that the economic thought of the period was hegemonic. Instead, by using the example of corporate privileges, the paper suggests how the corporation and expectations of its conduct generated significant disagreement among lawyers.