

1988

Corporations and Society: Power and Responsibility

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Recommended Citation

Sara A. Engle, *Corporations and Society: Power and Responsibility*, 86 MICH. L. REV. 1243 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/17>

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CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY. Edited by *Warren J. Samuels* and *Arthur S. Miller*. New York: Greenwood Press. 1987. Pp. xv, 328. \$45.

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.¹

Upon the bicentennial of the United States Constitution, it seems fitting to examine the import of *Santa Clara*, a terse but momentous Supreme Court decision. In *Corporations and Society: Power and Responsibility*, Warren J. Samuels² and Arthur S. Miller³ undertake this task. The book traces the history of corporate personhood from the *Santa Clara* decision through the modern age of corporate giantism, and offers new perspectives on the social and political implications of corporate power. It provides a timely review of the role of the corporation in constitutional law and should inspire dialogue on important legal issues.

Corporations and Society, a collection of essays, is divided into four parts. Part 1 focuses on the doctrinal origins and development of the

1. *Santa Clara Co. v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (Chief Justice Waite for a unanimous court).

2. Warren J. Samuels, Professor of Economics at Michigan State University, is the author of *THE CLASSICAL THEORY OF ECONOMIC POLICY* (1966), and the editor of *THE CHICAGO SCHOOL OF POLITICAL ECONOMY* (1976) and of the annual, *RESEARCH IN THE HISTORY OF ECONOMIC THOUGHT AND METHODOLOGY*.

3. Arthur S. Miller, Professor Emeritus of Constitutional Law, George Washington University, is the author of *THE SUPREME COURT AND AMERICAN CAPITALISM* (1968); *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* (1976); and *POLITICS, DEMOCRACY, AND THE SUPREME COURT* (1985).

corporate theory in which *Santa Clara* figured prominently. Next, the book examines the use of the legal language of corporate personhood as a mechanism for social control and economic planning. In part 3, several authors consider the policy implications of corporate personhood and explore the consequences of the exercise of corporate power. Finally, part 4, which characterizes the corporation as an institution of private governance and social control, offers specific policy suggestions aimed at the democratization of the corporation.

The book's examination of *Santa Clara* properly begins with an analysis of the doctrinal history of corporate personhood. First, Morton J. Horwitz explores competing corporate theories rooted in nineteenth century thought and considers their influence on the *Santa Clara* court.⁴ Horwitz traces the evolution of legal thought from the grant theory to the natural entity theory, a theory which has often been associated with the *Santa Clara* decision. Horwitz argues that while the natural entity theory served to legitimate emerging large-scale enterprise, it did not fuel the decision in *Santa Clara*.⁵ The treatment of doctrinal history is furthered by Martin J. Sklar, who argues that the constructs of corporate personhood and limited liability, as well as the accommodation of corporate organization by state law, created a legal environment conducive to corporate growth (p. 66). Sklar devotes particular attention to developments in antitrust law and concludes that antitrust jurisprudence, which eventually adopted a rule of reason standard, also represented an adaptation to corporate capitalism.⁶

The articles which comprise part 2 examine the role of legal language in defining social and economic reality. John J. Flynn's essay on the use and misuse of the corporate personhood concept provides an illustration of this theme.⁷ Flynn assails the holding in *Santa Clara* as a "serious misuse of concepts for legal purposes" (p. 133). He criticizes the Court for failing to reveal its reasoning (p. 133) and for neglecting to consider the consequences of its decision to extend constitutional protection to the corporate entity (p. 139). Flynn contends

4. The theories examined include the grant theory, the aggregate theory, and the natural entity theory. Under the grant theory, the corporation is regarded as an artificial being, created by the state and limited by its charter of incorporation. The aggregate theory rests on the notion that the corporation derives its power from the shareholders and emphasizes the property rights of shareholders. Finally, the natural entity theory personifies the corporation, treating it as an individual, rather than a mere aggregation of shareholders. Pp. 20-21.

5. Horwitz contends that the natural entity theory was just being formulated at the time *Santa Clara* was decided. Instead, he argues, the Justices more likely proceeded from an aggregate vision of the corporation, motivated by a desire to protect the property rights of the shareholders. P. 23.

6. Sklar reasons that the court ultimately construed the Sherman Act as embodying the common law in order to provide more certainty and predictability, thereby facilitating corporate growth and reorganization. Pp. 74-75.

7. For an informative discussion of the language of corporate personhood, see Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 562 (1987).

that the *Santa Clara* court's positivist application of the corporate personhood concept gave rise to a legacy of judicial manipulation. He argues that the Court, in the wake of *Santa Clara*, repeatedly used the concept of corporate personhood as a vehicle to impose its economic views.⁸ Flynn concludes that the formulation of coherent legal standards to regulate corporations will not be feasible until the misuse of the concept of corporate personhood is rectified.

The third part of *Corporations and Society* focuses on the policy consequences resulting from the use of the corporate personhood concept. First, David Dale Martin explores the legal/constitutional asymmetries inherent in the personhood concept. He focuses on what he perceives to be double standards in antitrust law; noting, for example, that while the personhood concept extends protection to the corporation, it provides no protection to individuals from the corporation's power. Next, Walter Adams and James W. Brock, in a collaborative effort, consider the implications of this imbalance of power. They provide an insightful analysis of the effects of corporate giantism on society. After examining the social consequences of the American auto industry's exercise of corporate power, the authors conclude that the power of the corporate giants extends far beyond the capacity to influence price. They argue that implicit in the concentration of big business is the power to "exert inordinate influence" on social planning and allocation of resources (p. 232). Because such power remains unchecked, the authors recommend closer scrutiny and increased regulation of big business.

The final part of *Corporations and Society* begins with Arthur S. Miller's examination of the so-called "secret constitution."⁹ He recognizes the political and economic power exercised by the corporation to influence governmental policymaking in furtherance of its private interests, and argues that, in fact, the corporation operates as an institution of private governance. While state and federal governments must operate within the confines of the Constitution, the system of private governance remains unchecked. Miller notes the asymmetry between corporate rights and corporate duties as evidence of the need to control and democratize the corporation (pp. 257-59). He is critical of the public/private dichotomy which pervades constitutional law and favors a policy which would impose upon the corporation concomitant constitutional duties.¹⁰

8. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (where the Court "assumed without discussion that the protections of the fourteenth amendment are available to a corporation" in striking down a state tax which discriminated against foreign corporations); *Bell v. Maryland*, 378 U.S. 226 (1964) (where the decision implicitly involved the fourteenth amendment rights of a corporate person).

9. The "secret constitution" refers to the system of private 'governments' comprised of powerful corporations. P. 242.

10. See pp. 256-57. *Accord*, Berle, *Constitutional Limitations on Corporate Activity — Protec-*

The imbalance between rights and duties is further addressed by Martin Benjamin and Daniel A. Bronstein in their analysis of the moral and criminal responsibility of the corporation. They argue that because the corporation is entirely goal-directed, it is incapable of understanding acts which are wrong in and of themselves (pp. 279-80). Moreover, unlike a natural person, a corporation may not be punished through incarceration. Because the corporation cannot be treated as a person under the criminal law, the authors conclude that it is inappropriate to extend to it many of the legal and constitutional protections enjoyed by human persons, such as the right against self-incrimination (p. 280).

The emergence of corporate giantism poses some important legal and constitutional questions about the appropriate role of the corporation in the socio-economic and political structure of American society. *Corporations and Society: Power and Responsibility* is successful in its effort to further the debate on these issues. The book demonstrates the asymmetrical treatment of the "corporate person" in constitutional law and reveals the inordinate power and influence exercised by the corporate giants. While its characterization of the corporation as a form of private governance is controversial and possibly conclusory, this perspective of the corporate entity may serve to stimulate development of appropriate limitations on corporate power. *Corporations and Society: Power and Responsibility* provides an interdisciplinary invitation to reevaluate the role of the corporation in American society. The book presents an insightful analysis of the legal and constitutional issues raised by the predominance of corporate capitalism and is well worth reading.

— Sara Anne Engle

tion of Personal Rights From Invasion Through Economic Power, 100 U. PA. L. REV. 933, 942-43 (1952)

[A corporation should be] subject to constitutional limitations which limit action as is the state itself [limited]. . . . The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree.