

Michigan Law Review

Volume 93 | Issue 6

1995

Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations

Alfred F. Conard
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Business Organizations Law Commons](#), [Legal History Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/27>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COOK AND THE CORPORATE SHAREHOLDER: A BELATED REVIEW OF WILLIAM W. COOK'S PUBLICATIONS ON CORPORATIONS

*Alfred F. Conard**

A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS, AS APPLICABLE TO RAILROAD, BANKING, INSURANCE, MANUFACTURING, COMMERCIAL, BUSINESS, TURNPIKE, BRIDGE, CANAL, AND OTHER PRIVATE CORPORATIONS. By *William W. Cook*. New York: Baker, Voorhis & Co. 1887. Pp. xciv, 787.

Although William W. Cook is best known today as the donor of the University of Michigan Law Quadrangle, he was chiefly known during his active life as the author of the leading treatise on the law of corporations. First published in 1887, his treatise "became at once the standard work on corporation law," according to Cook's obituary notice in the *Yearbook of the New York City bar*.¹ A century later, when Morton Horwitz surveyed the evolution of corporation law in the late nineteenth and early twentieth centuries, he cited Cook more often than any other author of a treatise on corporations.²

* Henry M. Butzel Professor Emeritus, University of Michigan Law School. A.B. 1932, Grinnell; LL.B. 1936, Pennsylvania; J.S.D. 1942, Columbia; LL.D. 1971, Grinnell. — Ed.

1. Henry Winthrop Hardon, *Memorial of William Wilson Cook*, in *N.Y. CITY B. ASSN. Y.B.* 1931, at 365, 366. "The treatise," as the term was used by Hardon and by the present review, embraces Cook's A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS (1st ed. 1887) and its continuation under the titles, A TREATISE ON STOCK AND STOCKHOLDERS AND GENERAL CORPORATION LAW (2d ed. 1889), A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW (3d ed. 1894), and A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK (4th ed. 1898, 5th ed. 1903, 6th ed. 1908, 7th ed. 1913, 8th ed. 1923) [hereinafter COOK, TREATISE, *supra* note 1 ([edition number] [year])].

2. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 65-107 (1992). I counted fourteen references to various editions of Cook's treatise, *supra* note 1, in Horwitz's notes 55, 60, 79, 101, 110, 113, 118, 128, 162, 164, 167, 179, 191, 193. Cook's nearest rival was SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS (1st ed. 1894) [hereinafter THOMPSON, COMMENTARIES, *supra* note 2 ([edition number] [year])] with thirteen citations — Horwitz's notes 30, 54, 56, 119, 168, 178, 183, 184, 204, 205, 207, 208, and 210. I found four citations to various editions of JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (1st 1832, 6th ed. 1858, 7th ed. 1861, 11th ed. 1882) [hereinafter, ANGELL & AMES, TREATISE, *supra* note 2 ([edition number] [year])] in Horwitz's notes 126, 139, 209, and 210. Horwitz made four references to VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (1st 1882, 2d ed. 1886) [hereinafter MORAWETZ, TREATISE, *supra* note 2 ([edition number] [year])] in notes 127, 143, 144, and 145; two references to

Cook's writings on trusts, on industrial concentration, and on railroads grew out of his law practice, which began in New York City in 1882, shortly after his law school graduation, in the employment of Frederic B. Coudert.³ Through the Coudert office Cook met John W. Mackay,⁴ who had made a fortune in Nevada's Comstock lode and moved to New York in 1883⁵ — the same year in which Cook was admitted to the New York bar.⁶ In 1884, Mackay co-founded the Commercial Cable Company, which laid a transatlantic cable from New York to London and the Continent.⁷ When Western Union refused to relay Commercial Cable's messages in the United States, Mackay established the Postal Telegraph Company, and it proceeded to wage a price war with Western Union.⁸

Cook became Mackay's personal counsel,⁹ and this association gave him the opportunity to make investments that were eventually worth millions of dollars.¹⁰ Cook's philippic against monopolies and trusts¹¹ appeared at the time when Mackay was struggling to break the monopoly power of Western Union.¹² Coincidentally, the principal owner of Western Union was Jay Gould,¹³ one of the

HENRY O. TAYLOR, *A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK* (1884) in notes 146 and 148; and one reference to GEORGE W. FIELD, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* (1st ed. 1877) [hereinafter FIELD, *TREATISE*, *supra* note 2 ([edition number] [year])] in note 211. Arthur Machen, Jr., a professor at the University of Chicago and the author of a two volume treatise, *see infra* notes 61, was cited only for a law review article in Horwitz's note 235 (citing Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 261-62 (1911)).

3. Walter Hulme Sawyer, *William W. Cook, University Benefactor*, 36 MICH. ALUMNUS 643, 643 (1930).

4. *Id.*

5. See OSCAR LEWIS, *SILVER KINGS: THE LIVES AND TIMES OF MACKAY, FAIR, FLOOD, AND O'BRIEN, LORDS OF THE NEVADA COMSTOCK LODGE* 105 (1947); *John W. Mackay, ENGINEERING & MINING J.*, Jan. 1989, at 112C. These sources say that Mackay sold his Comstock interests in 1883, but an obituary in 1902 reported that he still owned controlling interests in several of the Comstock mines at the time of his death. *John W. Mackay Dies in London*, N.Y. TIMES, July 21, 1902, at 1.

6. Allen Schoenfield, *W.W. Cook Dies: 'M' Benefactor*, DETROIT NEWS, June 5, 1930, at 6.

7. LEWIS, *supra* note 5, at 106; *John W. Mackay Dies in London*, *supra* note 5, at 1.

8. LEWIS, *supra* note 5, at 106; *John W. Mackay Dies in London*, *supra* note 5, at 1.

9. Hardon, *supra* note 1, at 366.

10. Schoenfield, *supra* note 6, at 6.

11. WILLIAM W. COOK, "TRUSTS": THE RECENT COMBINATIONS IN TRADE: THEIR CHARACTER, LEGALITY, AND MODE OF ORGANIZATION, AND THE RIGHTS, DUTIES AND LIABILITIES OF THEIR MANAGERS AND CERTIFICATE-HOLDERS (2d ed. 1888) [hereinafter, COOK, TRUSTS]. This work consists of 63 small pages of text and 50 pages of appendices. I have found no record of the first edition but presume that it was published in the same year, because the only copyright date is 1888, and the preface is dated February 23, 1888. The second edition may have been issued only to include the appendices, consisting of a report of a New York Senate committee and accompanying documents, which were completed on February 29, 1888.

12. LEWIS, *supra* note 5, at 105-08.

13. *Id.* at 106.

notorious perpetrators of stock frauds¹⁴ of the kind that Cook denounced in his treatise (pp. 23, 667).¹⁵

Mackay eventually linked Commercial Cable, Postal Telegraph, and other companies in the Mackay Companies, which owned the "entire capital stock of the Commercial Cable Co., and a majority of all of the capital stocks of a large number of telegraph, telephone, and cable companies in the United States, Canada and Europe, including the land line system known as the Postal Telegraph-Cable Co."¹⁶ For many years prior to his retirement in 1921, Cook was general counsel for the Commercial Cable and Postal Telegraph Companies and for the Mackay Companies.¹⁷

COOK ON CORPORATIONS

Cook's major innovation in corporation theory was to recognize the corporate investor as a central figure of legal concern. He captured this view in the title of the first three editions of his treatise, which he called not *Corporations*, but *Stock and Stockholders*.¹⁸ Before Cook, most authors treated private corporations less as associations of shareholders than as instruments of the state with their rights and liabilities defined by their charters.

The leading American treatise on corporation law before Cook was that of Joseph Angell and Samuel Ames, which had gone through eleven editions from 1832 to 1882.¹⁹ Its plan of organization was very similar to that of a 1793 treatise published in London by Stewart Kyd.²⁰ Although Kyd purported to include joint stock companies, most of his text and citations related to nonprofit corporations that had neither stock nor stockholders. These nonprofit

14. MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861-1901*, at 122-23, 158-59 (1934).

15. All parenthetical references are to COOK, *TREATISE*, *supra* note 1 (1st ed. 1887).

16. 3 MOODY'S ANALYSES OF INVESTMENTS AND SECURITY RATING BOOKS: PUBLIC UTILITY INVESTMENTS 203 (1921).

17. The title page of Cook's *A SOLUTION OF THE RAILROAD PROBLEM IN SIGHT* (1919) [hereinafter COOK, *SOLUTION*] identified the author as "General Counsel of The Mackay Companies, Postal Telegraph-Cable Company, Commercial Cable Company, and author of 'Cook on Corporations.'" A reporter identified him as "general counsel for the Mackay Companies" in *W.W. Cook Dies: Was Noted Lawyer*, N.Y. TIMES, June 5, 1930, at 27. According to *Some Graduates of the Department of Law of the University*, 14 MICH. ALUMNUS 251, 258 (1907-1908), Cook was "general counsel for the leading telegraph companies" of New York City in 1908.

18. See COOK, *TREATISE*, *supra* note 1 (1st ed. 1887, 2d ed. 1889, 3d ed. 1894).

19. ANGELL & AMES, *TREATISE*, *supra* note 2 (1st ed. 1832, 2d ed. 1843, 3d ed. 1846, 4th ed. 1852, 5th ed. 1855, 6th ed. 1858, 7th ed. 1861, 8th ed. 1866, 9th ed. 1871, 10th ed. 1875, 11th ed. 1882).

20. STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* (1793). Kyd's was the first English-language treatise on the subject according to Angell and Ames. ANGELL & AMES, *TREATISE*, *supra* note 2, at vi (1st ed. 1832).

corporations had supplied most of the corporate litigation up to Kyd's time.

Angell and Ames's principal subjects of discussion were churches, charities, and universities, as Kyd's had been.²¹ Later editions recognized that the rapid increase of "joint-stock corporations" called for separate attention,²² but these editions included no distinct treatment of the joint stock corporation's attributes. Angell and Ames focused their attention on topics critical to religious and eleemosynary corporations such as means of creation — prescription, common law, and legislative acts,²³ corporate capacity to acquire and alienate property,²⁴ and the necessity of a corporate seal to bind a corporation to a contract.²⁵ In these areas, the law was concerned with the relation between the corporation, viewed as a unit, and the state or outsiders with whom the corporation might deal. Angell and Ames paid scarcely any attention to the conflicting interests of a corporation's internal constituents — its members and its managers.

Angell and Ames's text, even in the 1882 edition, remained singularly silent on the financial outrages that had occurred in railroad financing during the 1850s, 1860s, and 1870s.²⁶ Thousands of shares had been forged, thousands issued in violation of court orders, and thousands issued for face values far in excess of what was paid for them.²⁷ Angell and Ames's treatise made no mention of "stock watering," which had caused insolvencies and had probably accentuated the panics of 1857 and 1873. Their treatise gave a few pages to the rights of "members" to sue their corporations for payment of debts or dividends,²⁸ and to enjoin actions that are beyond the corporation's charter powers,²⁹ but Angell and Ames's text made no

21. See *id.* at 21-31.

22. See, e.g., ANGELL & AMES, TREATISE, *supra* note 2, at 33 (11th ed. 1882). The first edition of this treatise had noted that "civil corporations" were "by far the most numerous in the United States," but the category was not characterized by stockholding, and it included universities. ANGELL & AMES, TREATISE, *supra* note 2, at 25-26 (1st ed. 1832).

23. ANGELL & AMES, TREATISE, *supra* note 2, at 53-78 (11th ed. 1882).

24. *Id.* at 120-80.

25. *Id.* at 197-212.

26. John Lathrop edited the seventh to eleventh editions of Angell and Ames's work. ANGELL & AMES, TREATISE, *supra* note 2, at iii-iv (11th ed. 1882). Ames supervised the preparation of the seventh edition. In all subsequent editions, which were published after both authors' deaths, Lathrop preserved without change the text of prior editions, adding only new footnotes, which were separated from the footnotes of earlier editions. *Id.* at iv.

27. A variety of stock frauds in this era are recounted by, among others, CLIFFORD BROWDER, THE MONEY GAME IN OLD NEW YORK: DANIEL DREW AND HIS TIMES 83, 143-65 (1986); JOSEPHSON, *supra* note 14; EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY 1860-1897 (1961); ROBERT SOBEL, THE BIG BOARD: A HISTORY OF THE NEW YORK STOCK MARKET 59 (1965).

28. ANGELL & AMES, TREATISE, *supra* note 2, at 436-37 (11th ed. 1882).

29. *Id.* at 439-40.

suggestion that a shareholder could sue on the corporation's behalf for officers' or directors' frauds or neglects.³⁰

Some authors who preceded Cook made minor additions to the analyses of Kyd and of Angell and Ames.³¹ George W. Field in 1877 introduced an exposition of the powers of directors;³² Angell and Ames had mingled directors with other "agents" in their last edition.³³ Victor Morawetz in 1882 prophetically attacked the doctrine of *ultra vires*.³⁴ Although Cook's predecessors cited cases that arose out of the scandals of the 1850s, 1860s, and 1870s, their texts paid scant attention to the abusive practices that gave rise to the scandals.³⁵ Platt Potter captured the prevailing spirit of treatise writers of the age in the preface of his 1881 treatise when he wrote:

In the performance of this task, it may be needless to remark that no change in the established general principles of the law of corporations has been attempted; these principles, as found laid down in the elementary works of Blackstone and Kent, are unchanged, and will forever remain the same; they are expressed by those authors in the most simple language, and yet with classic elegance which no time will improve.³⁶

30. Angell and Ames cited the right of a shareholder to sue an outsider on behalf of the corporation — established by *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855) — only to sustain the right of a shareholder to sue to enjoin *ultra vires* acts. ANGELL & AMES, TREATISE, *supra* note 2, at 437 (11th ed. 1882).

31. See BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A GENERAL DIGEST OF THE LAW OF CORPORATIONS (1869) (containing a collection of case summaries without separate analysis); CHARLES T. BOONE, A MANUAL OF THE LAW APPLICABLE TO CORPORATIONS GENERALLY (1887) [hereinafter BOONE, MANUAL] (presenting a condensed pocket-size text); FIELD, TREATISE, *supra* note 2 (1st ed. 1877, 2d ed. 1883); MORAWETZ, TREATISE, *supra* note 2 (1st ed. 1882, 2d ed. 1886); PLATT POTTER, TREATISE ON THE LAW OF CORPORATIONS (1881) [hereinafter POTTER, TREATISE].

32. FIELD, TREATISE, *supra* note 2, at 163-200 (1st ed. 1877).

33. ANGELL & AMES, TREATISE, *supra* note 2, at 284-364 (11th ed. 1882).

34. MORAWETZ, TREATISE, *supra* note 2, at iv (1st ed. 1882); MORAWETZ, TREATISE, *supra* note 2, at iv, 666-76 (2d ed. 1886). By the middle of the twentieth century, the doctrine was in general disrepute. See HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 240-69 (rev. ed. 1946). Morawetz also rejected the entity conception of the corporation. MORAWETZ, TREATISE, *supra* note 2, at iii (2d ed. 1886).

35. See BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A GENERAL DIGEST OF THE LAW OF CORPORATIONS 653-55 (Supp. 1879) (briefing a few cases of shares issued below par and of shareholders' derivative suits, but containing no exposition of the principles involved); BOONE, MANUAL *supra* note 31; FIELD, TREATISE, *supra* note 2, at 159-62, 188 (1st ed. 1877) (offering a brief exposition of overissued and watered stock and of directors' liability for fraud); FIELD, TREATISE, *supra* note 2, at 206-09, 246-47 (2d ed. 1883) (same); POTTER, TREATISE *supra* note 31.

36. POTTER, TREATISE *supra* note 31, at v. Potter was, however, very conscious of the tremendous expansion of corporations, about which, he noted with evident misgivings: "It seems to have been, and is, the growing policy of the state to give countenance and encouragement . . ." *Id.* at iii. But he disavowed any evaluation of the phenomenon in his treatise, explaining: "We do not intend — it is not our purpose — in our treatment of this subject, to be regarded as pronouncing this policy to be a sound one, or this condition of things to be the most wise; those considerations are not legitimately within the scope of this work." *Id.* at iv.

No such deference to earlier authors infected the writing of William W. Cook. After recognizing that others had adequately developed some parts of the law of corporations, he observed:

As regards the important subject of Stock and Stockholders, however, there has been a singular deficiency in the text-books It was found that many of the most important and practical principles governing stocks had never been investigated and presented by law writers. [p. v]

Cook made it clear that it was his own analyses and his own opinions that entered into his treatise. He explained: "The plan of the work is original, and this volume is the result of a long and conscientious study of the sources of authority — the cases themselves. . . . [The writer] has not hesitated to express his opinion when the occasion seemed to warrant it" (p. vi).

Cook's innovation was to focus on the rights of investors and on the abuse of investors by corporate promoters and managers. His novel title, *Stock and Stockholders*, signaled the change. The outrages that had been committed in railroad financing just before and after the Civil War made evident the need for a systematic approach to the rights of investors. By directing attention to the interests of investors, Cook initiated the orientation of corporation law toward the demands of capitalism.

In a radical departure from earlier literature, Cook opened his analysis of stock issuance with a vivid description of offensive practices, declaring:

It is no unusual thing for a newly organized railroad corporation to issue to a construction company, bonds and stock whose par value is many times the value of the construction work done. . . . Soon, however, default is made in the payment of the interest on the bonds, and this is followed by corporate insolvency, foreclosure, receivership, and reorganization. The issue of fictitiously paid up stock is the favorite device of corporate promoters, organizers, and manipulators, in carrying out their plans of realizing enormous gains from small investments, and in accumulating great fortunes at the expense of the public. [p. 23]

After this spirited introduction, Cook expounded the case law of stock issuance in prose as dull as any other legal writer's, but he introduced a new rationale for shareholders' liability. Unlike his predecessors, who had treated "capital stock" as merely the sum of shareholders' interests in the company,³⁷ Cook defined "capital stock" as "the sum fixed by the corporate charter as the amount

37. Although Angell and Ames captioned one chapter "Of the Nature and Transfer of Stock in Joint-Stock Incorporated Companies," they offered no definition of "stock" beyond what might be implied by the statement: "By the term 'joint-stock' corporation, we would be understood to mean such a corporation as has for its object a division of profits among its stockholders." ANGELL & AMES, *TREATISE*, *supra* note 2, at 589 (11th ed. 1882).

paid in or to be paid in by the stockholders . . ." (p. 3), thus supplying a link between stockholding and liability. Cook's recognition of capital as a fixed sum enabled him to give a lucid explanation of "watered or fictitious stock" and the liabilities of its holders.³⁸

In this and other chapters, Cook devoted 250-odd pages to liabilities of shareholders for corporate debts.³⁹ He also explained "overissue," the issuance of more shares than authorized by corporate charters (pp. 300-06), which had escaped the attention of Angell and Ames.

In addition to exposing the evils of stock watering, Cook opened a new branch of doctrine under the title of his thirty-ninth chapter, "Fraudulent Acts of Directors, Majority of Stockholders, and Third Persons" (p. 666). As he had done in his chapter on shareholder liability, Cook began by describing the abuses that he saw in the marketplace. He declared:

Corporations, with their vast capital stock, their great income, their rapidly changing personal property, and their large purchases and sales, have proved to be a temptation which corporate officers are too often unable to withstand. These companies have been found to be efficient instruments of fraud, speculation, plunder, and illegal gain. In these latter days the robbery and spoliation of corporations and stockholders by the corporate directors and managers have been systematized into well-known methods of proceeding, and the carrying out of such plans has become a profession and an accomplishment. The skill, audacity, experience, and talent of the highest order of administrative ability have reduced to a certainty the methods of diverting profits, capital, and even the existence of the corporation itself, to the enrichment of the corporate managers and their co-conspirators. Corporations become insolvent and stockholders lose their investments, while individuals become millionaires. Illegitimate gains are secured and enormous fortunes are amassed by the few at the expense of the defrauded, but generally helpless, stockholders. [p. 667]

Cook pursued his exposure of directors' misdeeds with an exposition of the theory and justification of "stockholders' suits" (pp. 669-73), which would become a central concern of corporation lawyers, writers, and teachers in the twentieth century as "shareholders' derivative suits."⁴⁰

Another area in which Cook recognized the inadequacy of existing law was the transfer of stock. In 1887, shares of stock were

38. Pp. 11 (defining the terms), 22-46 (expanding liabilities). Watered and fictitious stock escaped mention by Angell and Ames. See *supra* notes 26-30 and accompanying text.

39. Pp. 11-267. Angell and Ames treated shareholders' liabilities without distinguishing between liability on subscriptions and liability on shares issued for deficient consideration. ANGELL & AMES, *TREATISE*, *supra* note 2, at 630-76 (11th ed. 1882).

40. See, e.g., *Reporter's Note*, 2 THE AM. LAW INST., *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* 9-17 (1994); Symposium, *Shareholder Litigation*, 48 L. & CONTEMP. PROB. 1 (1985).

emphatically nonnegotiable (pp. 417-18), and purchasers incurred a host of risks — that the shares were not fully paid for, or that they were subject to a lien, or that a fiduciary had transferred the shares in violation of the terms of a trust (pp. 422-31). Some of these problems would not be alleviated until the promulgation of the Uniform Stock Transfer Act in 1909,⁴¹ and others not until the promulgation of the revised Uniform Commercial Code in 1956.⁴² Cook foresaw the burgeoning importance of share transfers and the need for free transferability. He declared:

Beyond all question, the surplus wealth of the future will be invested in corporate bonds and stocks. It is well, then, in these days of the formative period of the law governing stock, that the principles governing the transfer of certificates should be formed for the protection and security of an investing public, against secret liens, attachments, claims, and negligence of both the corporation and third persons.⁴³

After publishing three editions of *Stock and Stockholders*, Cook changed the title of his treatise to *Corporations*⁴⁴ and added chapters on debt securities and on “quasi-public” corporations such as railroad, telegraph, telephone, gas, electric, and water companies. He also added a volume consisting of the texts of various statutory and constitutional provisions affecting corporations. But the first fifty-two chapters of *Corporations* retained the order and content of *Stock and Stockholders*, modified only by expansion.⁴⁵ The book had now grown to 2,660 pages, filling three volumes.

Cook opened some of his new topics, like some of his original chapters, with summaries of the business practices underlying the law. Cook, however, viewed the practices that he now described more sympathetically than he had viewed stock watering. Explaining the rise of corporate mortgages, he observed:

41. CHARLES THADDEUS TERRY, *UNIFORM STATE LAWS IN THE UNITED STATES FULLY ANNOTATED* 339-54 (1920). Terry lists the date of the Act as 1910. *Id.* at 341. The actual date of the Act, however, is 1909. *PROCEEDINGS OF THE NINETEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 33 (1909).

42. AM. LAW INST. & NATL. CONF. OF COMMRS. ON UNIFORM STATE LAWS, *1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE* (1957). The revised Code was considered promulgated with the publication of this document. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 114-15 (1956). See generally Francis T. Christy, *Responsibilities in the Transfer of Stock*, 53 *MICH. L. REV.* 701 (1955); Alfred F. Conard, *A New Deal for Fiduciaries' Stock Transfers*, 56 *MICH. L. REV.* 843 (1958).

43. P. 435. Angell and Ames, in contrast, devoted 36 pages to impediments to stock transfer without any suggestion that these impediments should be abated. *ANGELL & AMES, TREATISE, supra* note 2, at 594-629 (11th ed. 1882).

44. *COOK, TREATISE, supra* note 1 (4th ed. 1898).

45. Cook inserted new chapters to separate *intra vires* from *ultra vires* acts, 2 *id.* at 1382-1435, to separate stockholders' actions for directors' negligence from other stockholders' actions, 2 *id.* at 1436-45, and to introduce a new treatment of corporate agents' authority, 2 *id.* at 1446-1571.

Great captains of industry arose, such as Vanderbilt and Huntington, who had no capital, but had force and daring, coupled with a genius for building, consolidating, stocking, and bonding great systems of railroads. The power to mortgage gave them the power to raise money, and the power to raise money gave them the power to make America what it is today.⁴⁶

Four more editions of Cook's *Corporations* treatise followed without major change in design or emphasis. Although the number of volumes doubled from four in the fourth edition to eight in the eighth edition, much of the text remained unchanged; most of the expansion appeared in footnotes, which often contained significant analysis as well as case citations and summaries.⁴⁷

Before 1923, when Cook's last edition was published, a major change had taken place in the law affecting "watered stock," which Cook had denounced in earlier editions (p. 23). Many of the major commercial states had destroyed the basis of liability on watered stock by authorizing the issuance of stock without par value.⁴⁸

In response to these changes, Cook published in the *Michigan Law Review* an analysis of the consequences of eliminating par value.⁴⁹ Cook thought that issuing stock without par value was not a cure for watering; it, he said, merely "conceals the mystery of the 'water'."⁵⁰ Columbia University economist John Bonbright expressed a similar view some years later.⁵¹ Cook also claimed that "[t]he English way is better,"⁵² and endorsed the principle of "truth in securities," which would become the touchstone of American stock market reform in the 1930s.⁵³ He quoted with approval a British government publication that declared:

The trend of recent legislation in this country has been to endeavor to afford information concerning joint stock companies to all who may

46. 3 *id.* at 1782a. But earlier volumes retained remarks on financial abuses without change. See 1 *id.* at 84-85 (discussing watered stock); 2 *id.* at 1256 (discussing the frauds of directors and managers).

47. In the eighth edition, for example, 6 pages on watered stock contained 13 lines of text and 600 hundred lines of footnotes. 1 COOK, TREATISE, *supra* note 1, at 159-64 (8th ed. 1923).

48. Statutes authorizing no-par shares, beginning with New York's in 1912 and continuing through 1926, are listed and analyzed by CORNELIUS W. WICKERSHAM, A TREATISE ON STOCK WITHOUT PAR VALUE OF ORDINARY BUSINESS CORPORATIONS (1927).

49. See William W. Cook, "Watered Stock" — Commissions — "Blue Sky Laws" — Stock without Par Value, 19 MICH. L. REV. 583 (1921) [hereinafter Cook, *Watered Stock*].

50. *Id.* at 595.

51. See James C. Bonbright, *Preface* to DAVID L. DODD, STOCK WATERING vi (1930) (observing that "a good many recent writers . . . have already tolled the death knell of the anti-stock-watering laws Their optimism has little foundation."). Cf. BALLANTINE, *supra* note 34, at 373-74.

52. Cook, *Watered Stock*, *supra* note 49, at 595.

53. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 19, 20, 38 (1982).

seek it, on the ground that *publicity is the best protection* which can be devised for the benefit of creditors and of investors⁵⁴

In the same article, Cook applauded the requirement of prior approval of stock issues by the Federal Interstate Commerce Commission, by state public service commissions, and by state commissions under "blue sky" laws, the origins of which he traced to a Massachusetts law of 1875.⁵⁵ These laws, he concluded, "are based on the right principle."⁵⁶ Between the English system of full disclosure and the blue sky system of prior commission approval, Cook expressed no preference: "[T]he whole subject is still in the melting pot."⁵⁷

While omitting prior editions' denunciation of watered stock, the eighth edition of Cook's treatise retained most of his earlier comments on the frauds of directors⁵⁸ and added an observation that implied approval of shareholders' derivative suits:

The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.⁵⁹

Cook evidently viewed his eighth edition as the last of the series. Noting the unmanageable expansion of case law, he concluded that "[p]ractically the best future law books will have to emanate from law school professors."⁶⁰ His most serious competitor, however, was probably not a professor, but William Meade Fletcher, the author of an encyclopedic treatise whose first edition had appeared in 1917.⁶¹

54. Cook, *Watered Stock*, *supra* note 49, at 595-96 (citing a statement in "a blue book published by the English government in June, 1907").

55. *Id.* at 590.

56. *Id.* at 591.

57. *Id.* at 598.

58. It omitted the sentences on the systematization of robbery and spoliation and on the "talent of the highest order" devoted to diverting profits. 3 COOK, TREATISE, *supra* note 1, at 2406 (8th ed. 1923) (the page where the omitted sentences would have occurred); *see also supra* text accompanying notes 39-40.

59. 3 COOK, TREATISE, *supra*, note 1, at 2406 (8th ed. 1923).

60. 1 *id.*, at xi (referring to William W. Cook, *The Law Book of the Future*, 21 MICH. L. REV. 365, 371 (1923)).

61. WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1917). Since 1895, Cook's treatise had also had a serious competitor in THOMPSON, COMMENTARIES, *supra* note 2 (1st ed. 1894, 2d ed. 1908, 3d ed. 1927). A treatise of two volumes that is often cited by other authors, although not by Horwitz, *see supra* note 2, was published in 1908 by Arthur W. Machen, Jr., a professor at the University of Chicago. ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS WITH REFERENCE TO FORMATION AND OPERATION UNDER GENERAL LAWS (1908).

THE PRINCIPLES

Although Cook had predicted in 1923 that the best future law books would be written by professors,⁶² he took one more fling with his favorite subject, which he entitled *The Principles of Corporation Law*⁶³ and characterized it as “an experiment to condense, simplify and clarify the law, for the use of the lawyer, law student and layman.”⁶⁴ Reflecting on changes in the law since 1887, *Principles* rearranged and restated in a single volume most of the doctrine expounded in the treatise and made significant additions on trusts,⁶⁵ reorganization,⁶⁶ and constitutional law.⁶⁷

If Cook had condensed the footnotes of *Principles* and reorganized them to match the book's text, he would have provided a useful handbook and a fresh foundation for a twentieth century treatise. But Cook was evidently too weary for this task. Instead of winnowing his references to a concise few, he recurrently cited sections of his eighth edition, in which voluminous references could be found.⁶⁸ A practitioner or student who wanted to use *Principles* as a research aid would have had to keep the six volumes of the eighth edition at hand for relevant citations. Nonlawyers, who might not have missed the citations, would have found the exposition of *Principles* too dense for easy comprehension. Unsurprisingly, the book was not commercially published.⁶⁹

COOK ON INDUSTRIAL CONCENTRATION

In 1888, when Cook had completed the first edition of *Stock and Stockholders*, “trusts” were igniting debates that would lead to the Sherman Antitrust Act of 1890.⁷⁰ Cook published a short tract on the evils of these concentrations of power.⁷¹ His earlier protests against the frauds of corporate organizers and officers were mild in comparison with his denunciation of the evils of trusts. After explaining how manufacturers had resorted to trusts in order to restrain competition and establish monopolies, Cook declared: “A

62. See *supra* note 60.

63. WILLIAM W. COOK, *THE PRINCIPLES OF CORPORATION LAW* (1931) [hereinafter COOK, *PRINCIPLES*] (copyright 1925).

64. *Id.* at iii.

65. *Id.* at 234-39.

66. *Id.* at 661-89.

67. *Id.* at 380-98.

68. See, e.g., *id.* at 32.

69. The only copy in the University of Michigan library shows the University of Michigan Lawyers' Club as the publisher and is dated 1931.

70. Sherman Antitrust Act, ch. 642, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993)).

71. COOK, *TRUSTS*, *supra* note 11.

monopoly has ever been unjust, oppressive, and a thing of hatred,"⁷² and "[t]here can be no compromise between a monopoly and an Anglo-Saxon people."⁷³ Cook's views were among those prominently noted six decades later in a leading history of antitrust law.⁷⁴

The wave of public opinion that led to the Sherman Antitrust Act was not directed narrowly at trusts, but at big companies in general. In reference to this hostility, Cook published, a year after the passage of the Sherman Act, a small book entitled *The Corporation Problem*.⁷⁵ Cook noted that after the Act's passage the former participants in trusts were reorganizing in giant corporations, with similar consequences.⁷⁶ These corporations were better than trusts, he thought, because their organization was not secret, and they were subject to explicit statutes and charters.⁷⁷ But he reserved judgment on their legitimacy, concluding:

The first campaign of the warfare with the trusts has been fought out. The victory has been with the people. The trusts have been routed and driven to a second line of defence. They are entrenching themselves under the cover of corporate charters. Whether they shall be driven from these remains to be seen. Certain it is that unless they justify their existence they will be annihilated by the courts, legislatures, and new competitors.⁷⁸

Cook went on to recount the sins of corporations with all the vigor of a populist politician. Focusing on railroads, he described practices of rate discrimination, favoritism, wastefully duplicated lines, stock gambling, frauds on investors, monopolies, and political corruption.⁷⁹ Furthermore, he observed: "Whatsoever is an aid to plutocracy is a danger to the republic. The corporation is the ally, the agent, the representative of plutocracy."⁸⁰

72. *Id.* at 54.

73. *Id.* at 62. "Anglo-Saxon" was probably Cook's way of referring to English-speaking people; he did not designate any non-Anglo Saxons to whom monopoly was more congenial. Thirty-nine years later, when he distinguished between "foreigners" and the descendants of pre-Revolutionary settlers, he called the latter "the American stock." WILLIAM W. COOK, *AMERICAN INSTITUTIONS AND THEIR PRESERVATION* iii, 267 (1927). He used "Anglo-Saxon" to identify the principal element, along with the Scotch-Irish, Dutch, Huguenot, German, Irish, and Scandinavian, in the composite American, *id.* at 40, and to designate a people that had been fused with the Normans to form the English, *id.* at 77.

74. See HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 130-31, 327 (1955).

75. WILLIAM W. COOK, *THE CORPORATION PROBLEM: THE PUBLIC PHASES OF CORPORATIONS, THEIR USES, ABUSES, BENEFITS, DANGERS, WEALTH, AND POWER, WITH A DISCUSSION OF THE SOCIAL, INDUSTRIAL, ECONOMIC, AND POLITICAL QUESTIONS TO WHICH THEY HAVE GIVEN RISE* (1891).

76. *Id.* at 243-44.

77. *Id.*

78. *Id.* at 245.

79. *Id.* at 11-119.

80. *Id.* at 249.

But Cook was confident of the republic's survival. He reflected: "The corporation holds its life subject to the will of the people. . . . Its powers may be changed, its duties increased, its charter may be repealed and its existence ended."⁸¹ Thanks to the power of the people, "The Corporation Problem' will be solved, and the solution, when it comes, will be satisfactory, thorough, and complete."⁸² Regrettably, Cook did not specify the means of solution.

Thirty-four years later, Cook returned to the problem of monopoly in *Principles*. He outlined two schools of thought on the subject, one of which favored more legislation, more prosecutions, and more jail sentences; the other, which Cook described more sympathetically, relied on free trade and foreign competition to keep prices down. "Meantime," he concluded, "the courts are working out the problem, aided by a healthy public sentiment, which realizes the saving by combination and yet the danger of misuse of power."⁸³

COOK ON RAILROADS

Before, during, and after World War I, Cook concerned himself with railroad problems.⁸⁴ In 1915, he proposed a plan for reorganizing the railroads, which he presented almost simultaneously in the Michigan and Yale law reviews.⁸⁵ In the Michigan article, he stressed deficiencies of service to customers and of returns to investors. In his view, railroads were ground between the millstones of the public's demands for reasonable rates and financiers' demands for profits.⁸⁶

In the Yale article, Cook attacked the faults of management and the vacuity of managers' proposed solutions. He recalled that one railroad executive, in testimony before the Interstate Commerce Commission, "solemnly asserted that the stockholders should take a more active part in corporate affairs."⁸⁷ Adumbrating the work of Adolf Berle and Gardiner Means,⁸⁸ Cook commented:

81. *Id.* at 252.

82. *Id.* at 253.

83. COOK, *PRINCIPLES*, *supra* note 63, at 236.

84. *See* COOK, *SOLUTION*, *supra* note 17, at 29-30 (stating that "the plan which has taken twelve years for me to work out, and which was first published in 1908, is now being endorsed generally"). I have been unable to find a copy of the 1908 publication.

85. William W. Cook, *A Bill for the Nationalization of Railroads*, 14 MICH. L. REV. 1 (1915) [hereinafter Cook, *Bill*]; William W. Cook, *A Plan for the Nationalization of Railroads*, 24 YALE L.J. 370 (1915) [hereinafter Cook, *Plan*].

86. Cook, *Bill*, *supra* note 85, at 3.

87. Cook, *Plan*, *supra* note 85, at 374.

88. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 277-87 (1932).

You might as well ask the clouds in the air to propel the railroad locomotives. The stockholders are multitudinous, widely scattered, many of them women and estates. They give their proxies to whomsoever is in control — blindly and automatically. . . . They are derelicts adrift on an unknown sea, without chart, compass, landmark or pilot.⁸⁹

Under Cook's plan, the federal government would own a corporation that held controlling shares in the operating companies. The public would continue to hold other shares. Cook embodied his plan in a bill that was introduced in Congress but not enacted.⁹⁰

In 1919, Cook published a further elaboration of his plan and compared its merits with those of his competitors. The first element of his revised plan was to consolidate the hundreds of railroad companies into a few trunk lines arranged so that they would compete with each other but would use common terminals.⁹¹ His second postulate was that government should either guarantee the railroads a reasonable return by payments from the public treasury or should set their rates at levels that would let them earn a fair return.⁹² Third, the government should regulate the railroads but should not own them.⁹³ Fourth, the major trunk lines should be federally incorporated — an idea as to which Cook declared "there is practically no dissent."⁹⁴

Although Cook's plan would have given a government agency voting control over railroad companies, he insisted that this was not government ownership,⁹⁵ the avoidance of which was his central purpose:

The danger is that the public, out of sheer disgust with present railroad rates and service, may abandon all real public control of the railroads, and allow the reactionaries to have their way. That way leads to still higher rates and ultimate Government ownership.⁹⁶

SUMMATION

Cook was a leader in redirecting corporation theory from a system of state-given powers and disabilities to a structure of investors' rights and liabilities. He was among the first to recognize and to denounce the exploitation of investors by promoters and managers, and to proclaim the impotence of individual shareholders in rela-

89. Cook, *Plan*, *supra* note 85, at 374.

90. COOK, *SOLUTION*, *supra* note 17, at 9.

91. *Id.* at 1-6.

92. *Id.* at 6.

93. *Id.* at 6-7.

94. *Id.* at 8.

95. *Id.* at 7.

96. *Id.* at 30.

tion to the powers of management. He recognized the need for government participation in the administration of railroads many decades before Conrail and Amtrak met that need. The vision of legal education that he endowed in the Law Quadrangle was a fitting capstone for the vision of better business corporations that he promoted in his professional publications.