

Spring 1971

The Legitimacy of the Business Corporation, by James Willard Hurst

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Recommended Citation

Donnell, John D. (1971) "The Legitimacy of the Business Corporation, by James Willard Hurst," *Indiana Law Journal*: Vol. 46: Iss. 3, Article 10.

Available at: <http://www.repository.law.indiana.edu/ilj/vol46/iss3/10>

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THE LEGITIMACY OF THE BUSINESS CORPORATION. By James Willard Hurst, Charlottesville: The University of Virginia, 1970. Pp. 164. \$6.50.

One need not agree with the judgment of Nicholas Murray Butler, the redoubtable president of Columbia University, that the “. . . [L]imited liability corporation is the greatest single discovery of modern times,” to concede that the corporation as a form of business organization is one of the most important and pervasive features of our legal landscape; yet relatively little attention has been paid by legal scholars to the history of its development, and most of that has not been widely read. Law students pass through school, including the course in corporations, exposed only to the briefest sketch of it, if exposed at all. Here is a small book by an outstanding legal historian which identifies and traces the major currents and cross-currents in the development of the business corporation from 1780 to the present. Although the writing is not that of a popularizer, it is crisp and the phrases are well-turned, and it deserves a broad audience among lawyers.

The title is somewhat misleading. The book is in the form of three essays first presented as lectures at the University of Virginia in 1969, and only one of these is structured around the issue of legitimacy. However, Hurst believes—rightly, in the opinion of this reviewer—that legitimacy is the fundamental issue of corporation law, so it appears again and again throughout the three essays and the brief introduction, as well as in the conclusion, which discusses in broad terms the social impact of the corporation. As befits its genesis, each essay stands independently, but there is some repetition between them as he shifts his major focus from one lecture to the next.

The first essay is entitled, “From Special Privilege to General Utility.” In it Hurst discusses the concept of the corporation and the attitudes toward it held in the United States from 1780 to 1890. His title summarizes his findings. However, he suggests that the view that incorporation was available only to the politically powerful in the period when charters were obtainable solely through individual legislative enactment is at least an exaggeration, if not a misconception. He finds little evidence of large-scale legislative corruption or of frequent refusals of petitions for incorporation of sound and lawful businesses during this period. Until mid-eighteenth century there was little need for large aggregations of capital, with the centralized control made possible by the corporate form except for businesses especially clothed with the public

interest, such as banks and public utilities. Of the 317 corporations chartered by the state legislatures from 1780 to 1801, nearly two-thirds were organized to furnish transportation facilities, 20 percent were for banks and insurance companies, 10 percent for local public services such as water companies, and less than 4 percent were for general businesses such as manufacturing. Since there was no ongoing governmental supervision of their operation, the powers of such companies to collect tolls, to print money and to set rates for scarce and essential services were much criticized as a delegation of the power to levy private taxes.

There was, according to Hurst, a general tendency of the critics of these companies to attribute to the corporate form of organization per se the undesirable characteristics they found in businesses being operated in that form. Despite this confusion, however, the primary thrust of the Jacksonian outcry against corporations was the demand that the corporate form should be reasonably available to all businesses. In response to this outcry, the first of the general incorporation acts was passed in New York as early as 1811. The other result was for legislatures, as they granted charters, to impose more limitations than earlier—low maximums placed on capitalization, narrow statements of purpose, narrow definition of powers, and short terms of corporate life. However, the main current of policy, Hurst says, ran toward promotion rather than restriction, and in the 1840's and '50's many of the other states followed New York's lead in passing general incorporation statutes and later (1846 in New York, which was again the pace setter) prohibiting special legislative charters. As the attractiveness of the corporate form of organization for the large economic enterprises which were then proliferating became generally recognized, the rapidly increasing number of petitions for charters forced legislatures to stop the drain of individual charter grants on legislative time and energy. By 1890 the corporation had become the dominant form of organization for large manufacturing and commercial businesses.

The second essay deals primarily with the period from 1890 to 1970 and Hurst's theme is the quest for bases to legitimize the business corporation as a great economic and social power. He identifies two principal bases for or sub-issues with respect to legitimacy: utility and responsibility. He suggests that concern for utility rather than responsibility dominated public policy toward the business corporation from the late 1880's into the 1930's. Economic development was the primary goal of public policy during this period. Imbued with this goal and seeking revenue from the growing number of highly mobile interstate businesses, legislatures were responsive to demand by promoters and managers for greater freedom in designing the financial and control

structure of corporations. New Jersey led the way, beginning in 1888, with legislation permitting one corporation to hold stock in another, but Delaware proved to be the eventual winner in the race toward liberality. By the 1930's general business corporation acts in most of the states were little but enabling acts and the concept of freedom of contract held full sway in the field of incorporation. As Hurst says, utility became an end in itself.

There was during this time, however, concern also for responsibility. The burden of keeping corporations responsible, according to Hurst, was placed on the economic discipline of the market and the self-interest of shareholders through their power to elect the directors and the drive of the profit motive. Despite the antitrust laws the market was, of course, less than fully effective and shareholders, particularly as corporations became much larger, were unable to carry their share of the burden. Thus, in the period from the 1930's to the present, public policy has turned to administrative agencies to regulate the operation of business corporations in contrast to the 19th century approach of seeking to impose regulation on the corporation through limitations on corporate charters.

"Institutional Contributions to Policy" is the title of the third essay. Here Hurst focuses primarily on the processes of policy making and particularly on the relative part played in the development of corporation law by constitutions, the Congress, state legislatures and the courts. He concludes that until the 1930's state legislatures, as the primary successors to the English crown by which the first American corporations derived their powers, assumed the pre-eminent role. Even though judge-made law concerning business corporations grew rapidly after 1830, according to Hurst it was primarily in the traditional area of filling gaps and translating into operational terms the concepts formulated by the legislature. Two exceptions noted by Hurst are the development of the *de facto* corporation doctrine and the delineation of the quasi-fiduciary duties placed upon corporate directors and officers, the latter expanded after the 1930's by administrative agencies, particularly the SEC. Hurst summarizes the effect of judge-made law as follows: ". . . [L]aw made by adjudication was most distinctively law that qualified the use of corporate organization and powers by imposing equitable limitations on apparently unlimited authority."¹

Of the most recent trend toward reliance upon administrative agencies for imposing responsibility upon corporations, he says :

1. Hurst at 129.

We also ceased to build general social controls into corporate structure because the large business corporation grew to involve a wider range of interests than the corporation's own internal constitution could mediate; hence, the law moved into an expanding variety of specific subject matter regulations which, though not formally so limited, in fact mainly concerned adjustment of social interests affected by large corporate behavior.²

An author should not be faulted for not doing that which he did not intend and which is unnecessary to his chosen task. The reader who seeks declarations of the posture of the law itself at various moments in time will not find it here; Hurst in this book depicts legal history with broad strokes emphasizing only major conflicts of policy and major trends. Likewise, one might wish that he had extrapolated his trends into the future as a guide to conduct or to policy making. It would appear that today the issue of the legitimacy of the corporation is as vital as ever and perhaps more crucial because we are in a period when the utility of the corporations, or rather the utility of its products, is under increasing attack. There is need for a new perspective that does not deny the wisdom of the past. For that task a legal historian may be especially well equipped.

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2. *Id.* at 162.

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