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Review of "Wisconsin Business Corporation," By George J. Kuehnl

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ponents have been far less worthy of serious consideration than he. Much that he says is wise and much profound, both to the normatively inclined and to the political scientists who regard values primarily as data. His plea that political scientists work on problems relevant to the real issues of the day is appropriate provided one reserves the right to disagree with Morgenthau's canons of relevance. This is a book which a young social scientist should surely read as a part of his training. But he should then move on, for Professor Morgenthau has not provided the theoretical framework for viable political analysis.

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THE WISCONSIN BUSINESS CORPORATION. By George J. Kuehnl. Madison, Wisconsin: University of Wisconsin Press, 1959. Pp. xi, 284. \$6.50.

In 1840 the population of Wisconsin territory was 31,000. By 1870 it had passed a million and was still growing rapidly. During these years of rapid growth Wisconsin, and indeed all America, underwent a social transformation that was little short of revolutionary. In that change the modern business corporation played a key role. Prior to 1800 there had been but 335 private business incorporations in the whole of American history. The Wisconsin legislature alone ground out three times that many special charters in the period from 1848 to 1871. Indeed, in one busy year, 1866, it turned out 177 special charters. The evolution of the business corporation during that period is complicated, and no one investigator can tell more than a small portion of it. Added to the similar work of Dodd, Davis, Handlin, Hartz and others, this illuminating essay helps to provide insight into the relations between the law and the economy in the formative years of our industrial society. But the surface has only been scratched, as yet. An enormous amount and variety of work remains to be done before the full story can be told.

This kind of historical research is in its infancy. Some is being done by lawyers, like Kuehnl, who may lack expertise in historiography, but who have their own special contribution to make to the understanding of the institutional arrangements of the past. The most significant work of this kind now being done is incorporated in the Wisconsin legal history project conceived and supervised by Willard Hurst. The present book is one of at least four to be published from that project within little more than a year. These four, supplemented by other books yet to come out of the project and capped by Professor Hurst's own work on Wisconsin law, will provide an incomplete but

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many-dimensional and impressive picture of the way in which the law has implemented the social needs in the history of one interesting state.

Kuehnl has told part of his story in a chronological and descriptive way. He deals first with the fumbling beginnings of the territorial period, then with the special concern for corporate problems in the constitutional conventions of 1846 and 1848. In 1846 a controversy over banking policy dominated the convention, and an extreme hard-money constitutional provision adopted by the convention on the vehement urging of future Chief Justice Edward G. Ryan was fatal to the final adoption of the constitution by the people. In 1848 the redoubtable Mr. Ryan was not in the convention and the more moderate resulting document became the basic law of the state. After the constitutional conventions, Kuehnl shifts to a rather loosely conceived analytical organization. He discusses first the promotion of economic development, and then the growth of regulatory activity. In both he is especially interested in the roles of the various legal agencies. In the former he also treats at length one of the interesting problems of this period: why was there for so long a dual system of incorporation, partly by general act and partly by special charter? Even more striking, why did corporations continue to be formed almost exclusively by special chartering, even when fairly adequate general laws were available? In the second part of his analytical survey, Kuehnl talks of the regulation of the economy; he notes especially a shift from regulation by the legislature to control by the courts. The administrative agency as a means of public control over the economy came later.

Kuehnl's organization exhibits many provocative relationships and much information that will be useful to those who seek to understand the growth of American law or of the American economy. However, it is a striking characteristic of this kind of investigation that the facts are numerous and complex, and have many stories to tell. Another investigator, working with the same materials, could organize them differently and provide many different and equally valuable insights. This is not to assert that another organization would be better, but rather that much still remains to be said about the rise of the corporation, even in Wisconsin. For one illustration, Kuehnl mentions in at least fifteen brief passages the pervasive limitation on the acquisition of land by corporations. Thus the general incorporation law of 1798 (for the Northwest Territory), limited corporations to acquisition of land the income of which did not exceed \$1500 annually. Later, banks and insurance companies were severely restricted to land necessary for the operation of the business, plus land acquired in the bona fide enforcement of rights against debtors. The latter had to be disposed of within five or six years after acquisition. One special in-

insurance charter even enforced the disposal requirement by providing for escheat to the territory of any land acquired in the enforcement of rights against debtors and not disposed of after six years. Other charters and general incorporation acts contained similar restrictions. Nor was this pattern limited to Wisconsin. In Massachusetts, insurance company charters customarily limited real estate acquisitions to a fixed sum. In Pennsylvania it was more common to limit real estate by the annual income it produced. In New York the limit was the land "necessary" to the business. In one Virginia charter real estate acquisitions were limited to two acres. The ubiquity of the limitation on real estate acquisitions, geographically, temporally, and as to the kind of corporation involved, and the variety of techniques for setting the limit, suggest pervasive policy reasons that are independent of the kind of corporation and of the relative scarcity of land. One suggestion that has never been explored adequately is that this limitation represents the persistence of the ancient mortmain policy of English law, of keeping real property out of the "dead hand" of the medieval corporation. Kuehnl's organization tends to mask the very existence of a persistent policy, and certainly fails to seek an explanation for it. A more analytical approach to his material would have thrown such problems into sharper relief.

A defect that is not necessarily inherent in his organization, but which may bear some relationship to it, is the fact that Kuehnl has never felt it necessary to make quite clear what a corporation is and why it is so useful. We are so accustomed to thinking of limited liability as the reason for incorporation, if not as the defining characteristic of the corporate form, that it may come as a shock to some to learn that many corporations did not have limited liability in earlier days. Moreover, the limited partnership was already available as a way to limit liability. The sharp modern distinction between the corporation and the partnership misleads us; we forget the intermediate forms that were tried and found wanting. The corporation is, in a sense, the end product of an evolutionary process—it was the survivor! Why? Kuehnl makes some suggestions but never adequately answers the question why incorporation caught on—why it had advantage enough to achieve its present level of development. The answer would not be simple. One reason for its capacity to survive in the formative era may have been the stock note technique for semi-compulsory mobilization of scarce capital. Capital stock was sold for a cash down payment plus an assessable stock note. If additional capital was needed there was an assessment by the officers. An examination of insurance company charters and general acts in Wisconsin leads one to suspect that this technique for capital mobilization played a significant role, not only in encouraging the use of the corporation itself,

but also in continuing the use of the special charter long after a suitable general act was available. Though there was such a general insurance incorporation act in Wisconsin from 1850 on, by 1871 only two companies had been organized under it, while the legislature had ground out ninety special insurance charters. One apparent reason for continuance of special chartering and for failure of the dual system of incorporation in insurance, was the scarcity of capital in early Wisconsin. The general act required paid-in capital of \$100,000, while the special charters were satisfied by a limited payment in cash, coupled with the assessable stock note.

The critical paragraphs above are intended to suggest ways in which Kuehnl might have done some things he did not do with his material—not to suggest that he *should* have done them. This is such a complex story that it needs to be worked on by people with varying approaches. This book makes real and valuable contributions to our knowledge. Among its many contributions, it will help to bury the hydra-headed myth of the laissez-faire nineteenth century. No one can hold this false belief who spends some time in plowing through the state materials and sees the extent of government intervention in the economy at the state and local level. What needs more exploration now is the varying pattern of government intervention. For example, this book provides a nice contrast to Hartz' excellent book, "Economic Policy and Democratic Thought: Pennsylvania, 1776-1860." Hartz documents, among other things, the substantial public investment in enterprise, especially transportation, in Pennsylvania. Kuehnl tells of the reluctance to engage in the same kind of activity, which was even embedded in the Wisconsin Constitution of 1848. The two stories are related, for Wisconsin reluctance in the 1840's was in part a product of bad Pennsylvania (and other eastern) experience in earlier decades. Thus it becomes especially interesting to learn from Kuehnl of the legal techniques for evasion of the constitutional prohibition. The practical demands of the social life were difficult to oppose in the name of abstract principle, as any thoughtful practicing politician can tell you.

In short, though there are ways in which Kuehnl might have done different things, and perhaps some very important different things, through a different organization of his material, this may be merely to say that another person could have thrown the light of his own special insights on the material. In any case, this book seems to the reviewer to be a real contribution to the small but growing body of literature which seeks to understand in some depth the legal institutions of the past and their place in the making of modern America.

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