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REVIEWS

TAMING THE GIANT CORPORATION

By Ralph Nader, Mark Green and Joel Seligman

W. W. Norton and Company, Inc., New York, 1976. Pp. 312. \$10.50.

Reviewed by Larry D. Soderquist*

In this slightly changed version of a book published privately a year ago,¹ Nader, Green and Seligman take on the big corporation. They first briefly catalogue some perceived corporate evils – industrial pollution, discrimination, undue political power, poor product safety and so on. Then, after describing what they call the "collapse of state corporation law," the authors launch into a series of reform proposals built around the federal chartering of large corporations. It would actually be more accurate to say they cast their proposals amid two hundred pages of polemics on what is wrong in corporate America. Because of the book's organization, it takes a good bit of effort just to ferret out what the authors want.

What they propose is the federal incorporation of all industrial, retail and transportation corporations transacting more than \$250,000,000 of business annually or engaging more than 10,000 United States employees (p. 240). Under these criteria, about 700 corporations would be covered. The authors would require various changes in internal corporate management for federally-chartered corporations, most dedicated to increasing shareholders' power and changing the composition of boards of directors. Corporations having a federal charter would also be subjected to increased regulation with respect to the environment, labor relations, antitrust policing and other current social concerns.

The idea of using the federal chartering of corporations as a reform measure is a century-old idea that has come in and gone out of fashion several times. It has received a fair amount of scholarly comment in the last few years,² and deserves careful consideration. Its time may have come. Clearly, Delaware has led what Professor Cary has called the "race for the bottom"³ in making its corporation law as restriction-free as possible, and other states have followed the Delaware example in an effort to grab a share of the fees and taxes generated by incorporations. And there is little dispute that if one finds current state statutes

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1. R. Nader, M. Green and J. Seligman, *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations* (1976). This version was published by a Nader organization, The Corporate Accountability Research Group, and was not widely distributed. The major difference between the versions, other than the fact that the early version was not set in type and cost \$25, is that the original was heavily footnoted. The present version is not, but includes 32 pages of notes on sources.

2. See, e.g., Henning, *Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come*, 21 DePaul L. Rev. 915 (1972); Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 Geo. L.J. 71 (1972); Note, *Federal Chartering of Corporations: A Proposal*, 61 Geo. L.J. 89 (1972); Note, *Federal Chartering of Corporations: Constitutional Challenges*, 61 Geo. L.J. 123 (1972).

3. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 666 (1974).

objectionable, some federal remedy is necessary. Regrettably, though, this book does not advance the cause.

Although the book seems fairly well researched and is generally lucidly written, it lacks an acceptable measure of balance or fairness, even when viewed as a piece of advocacy. One of the corporate shortcomings the authors decry is the use of deceptive information (pp. 24-25), yet a certain looseness with the facts in the cause of corporation taming does not seem to bother them.

A random example: The authors conclude a discussion of the *Dartmouth College* case,⁴ contained in a chapter entitled "The Collapse of State Corporation Law," by saying: "Under that ruling, after granting a corporate chapter, a legislature could no longer repeal or revise it" (p.35). That is a correct, though oversimplified, statement about the holding in the case. But to fail also to mention that the states got around the problem a century and a half ago, and in fact can modify or repeal charters, changes the plain facts of history as surely as if the authors had lied outright.

Another example, one revealing the authors' essential bias: In a section discussing corporate invasions of the Constitutional right to privacy,⁵ they discuss industrial espionage:

For \$15,000, Dr. Robert S. Aries offers to sell to the "managements of the world's largest corporations" an *Industrial Espionage Encyclopedia* treating such topics as "How to fabricate fake memos for competitors' consumption" and "How to make your competitor's R&D [that is, Research and Development] work in the wrong direction."

Aries knows a market when he sees one. A survey in the November-December 1974 issue of the *Harvard Business Review* reported that 72 percent of the respondents felt their "company should have a more systematic method of gathering, processing, analyzing, and reporting information about competitors" (pp. 190-191).

The only surprising thing about the *Harvard Business Review* survey is that 28 percent of those responding evidently thought they knew enough about their competition. It hardly washes to imply that the survey respondents had espionage in mind – or even that they would be interested in it. Nor is it consistent with the authors' views to imply that wanting more information is improper. In fact, one of their major points is that corporations should make more information available to competitors and others. Fifty pages before the espionage discussion, after making suggestions for greater disclosure, they say: "This [suggested] dissemination process will ensure that . . . competitors . . . will have access to the kind of data they need to make intelligent . . . economic decisions" (pp. 139-140).

A number of the authors' proposals involve giving shareholders more power. One, for example, would allow any shareholder or shareholder group owning one one-thousandth of the common stock of a corporation, or any group of at

4. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

5. The authors seem to find that corporations are subject to certain Constitutional mandates relating to governmental action, such as that they shall not infringe an employee's right to privacy, on the ground that "like the state and municipal governments it overshadows, the giant business corporation is a government" (p. 181). They offer little explanation of that rather curious idea.

least 100 public shareholders, to nominate up to three directors. The corporation would be required to submit these nominations, along with personal statements by the nominees, to all of its shareholders. All financial institutions and other "intermediaries" would be required to "pass through" to their beneficiaries the right to vote stock held by them. Cumulative voting would be required. (pp. 127-128.)

Another proposal would require a shareholder vote on a wide range of corporate transactions, including "all business decisions above a certain minimum size" (p.130). Six weeks notice would be necessary before the shareholder vote, and the board would be required to explain why it favors the transaction and why any board members voted against it. Any shareholder or group of shareholders holding one percent of a corporation's outstanding stock would be allowed, simultaneously with the board's notice of its proposal, to publish a dissenting view, presumably at corporate expense. (pp. 129-130.)

Some of these ideas are unworkable. How, for example, could a shareholder group publish, simultaneously with the board's notice of a proposal, a dissenting view with respect to that proposal? Presumably, shareholders would not hear about a proposal until the board gave notice. But the problem with the authors' approach is even more fundamental. If shareholders were given more power and a representative number of them were to exercise it, undoubtedly they would try to make profit-maximizing decisions – not decisions in favor of the environment, persons in the community or product quality and safety.⁶ In other words, it is almost certain they would wish to vote in opposition to the authors' desires.

Is there any way to account for this apparent oversight? The authors must have considered the ease with which anyone could, with one call to a broker and enough money to buy one share for each person in a group, form a group of 100 shareholders for the purpose of nominating directors. Do they hope that reformers would form such groups, nominate directors and then slip their nominees by the shareholders? In any case, these shareholder-power proposals are ill-conceived. Turning over corporate power either to profit-hungry shareholders or to self-appointed reformers, each of whom could be expected to have the interests of some special group in mind, would be equally inadvisable.

There are, to be sure, major problems with corporate power in America. But, contrary to what the authors think, giant corporations need redirection more than taming. Corporations are quite efficient at what they do now – basically making as much money as they can. What we need to do is keep that efficiency while changing the corporate job description to include, along with profit making, a concern for the interests of such groups as consumers, suppliers, employees, persons in the communities in which corporations operate and the public generally.

Even if corporations were operated for the right ends, too much corporate power, and too much concentration of that power, would continue to be unacceptable. We would still need restraints. It is regrettable that this book, which will have a wider distribution than most in the field and which could have helped precipitate needed reforms, is likely to be nearly useless for effecting either a change in corporate purposes or restraints on corporate power.

6. See, e.g., M. Eisenberg, *The Structure of the Corporation: A Legal Analysis*, at 19 (1976).

CALIFORNIA JOURNAL

The Monthly Analysis of State Government and Politics

Thomas R. Hoerber, President and Publisher; Ed Salzman, Editor

Published by the California Center for Research and Education in Government,
1617 10th Street, Sacramento, California 95814

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Libraries and Governmental Agencies, \$30; Corporations and Associations, \$50

After the 1974 California Democratic gubernatorial primary, Bob Moretti, who had been one of the mainline candidates, complained that, during the campaign, one television station ran one minute of an interview with him, and four minutes during the same newscast about "togs for dogs." On another occasion, he reported that a different station ran six minutes about a frog-jumping contest and only a few seconds on his campaign remarks.

In a June, 1976, *California Journal* article excerpted from her book, "The Hidden Campaign," Mary Ellen Leary documented how the broadcast media actually *creates* news by the questionable goal of profit by titillation. "Happy Talk" and "Action News" spew forth only the superficial, sacrificing explanation for the summary comment -- so much luck to one in search of keenness. According to Leary, this kind of exposure erodes the democratic process, deflecting the campaign away from more intelligent voter participation. To salt the wounds of those who are supposed to keep us informed, Leary argued that newspaper political reporting was heavily influenced by television.

Whether or not Leary's contention is true across the board, the facts remain that national magazines cannot be expected to delve regularly into the intimacies of state governments, and local newspapers cannot support a staff of people who think and write with clarity and depth on that same subject. The result, until a few years ago, was that state politics simply did not come under very close scrutiny by the press.

California Journal has become a refreshing exception to this sorry state of affairs. Billing itself as presenting a "non-ideological analysis of California government and politics," the *Journal* achieves this end by examining legislative trends, personalities within the legislative process, and crucial information that affects government as a whole. It has done this since 1970 in a style that is comprehensive and polished.

Leary's article was just a sample of the way the *Journal* investigates and explores movements within state government. More often than not, these analyses have not met the public's eye before appearing on CJ's pages. The March, 1976 feature on the "Deceptive Image of the State Legislature" reviewed how that body had changed in recent years from a down home collection of the "good ol' boys" to the present era where individual legislators command close to \$50,000 per year. In the face of an impression often put forth in press and broadcast media depicting California's legislators as drunkards "diddling instead of deliberating," this *Journal* investigation managed to convey a rather convincing argument that the present crop of legislators is well-qualified and hardworking.

Not always is the *California Journal* so generous. When the situation calls for it, the *Journal* holds few bars. A January, 1976 cover story, "Controller Cory and the Tangled Web," pulled together a vast and shady network of commercial and political interests and was nothing short of a major expose which should

leave those with similiar interests somewhat cautious in their dealings.

CJ's analysis of important legislative trends does not overlook the citizens groups, whose public interest work has emerged as one of the most potent of forces in the democratic process. In November, 1976, an article detailed how these groups have devised canvassing operations that in one instance netted a group \$300,000 in a single year, no small feat for those perennially short of cash.

The issues regularly carry pieces on some of the more visible personalities in state government, which unfortunately tend toward the chatty if not the submissive. They do, however, make for some interesting yet light reading, and on occasion are peppered with blood-boiling political realism. An example of the latter is a sketch of State Senator Leo McCarthy's visit with Congressman Wilbur Mills, who was then chairman of the powerful Ways and Means Committee. In the early 70's, McCarthy journeyed to Washington with a group of California politicians to discuss a family assistance bill. They were introduced to Mills by Rep. Philip Burton (D., Calif.) who described them as being "all right" and deserving an open ear. Not unusually, McCarthy had done his homework and was genuinely well-prepared, but in his gentlemanly manner was reluctant to engage in Mills' country boy chatter. "After twenty minutes of farm talk," wrote the author, "Mills said to leave the paper that had what they wanted and he would take care of it."

The personality features tend to be at their best when placed within a context of issue-oriented topics. For instance, Otto Bos of the *San Diego Union* wrote an article concerning the wild dream of Mayor Pete Wilson to defeat Governor Edmund G. Brown, Jr. in 1978 which touched off a number of similiar discussions elsewhere. This is typical of the *Journal's* insight; it possesses an enviable knack of uncovering the seeds of developments long before other publications become conscious of them. Way back in February of 1976, Leo Rennert, who covers Washington for the *Sacramento, Fresno, and Modesto Bees*, reported about the shaky position of then-Senator John Tunney; this was long before other publications seriously brought up the probability of his defeat. Ed Salzman's article about Ronald Reagan pinpointed qualities that would lead to the foreign policy gaffs that crippled the ex-governor's chances of defeating Gerald Ford.

While the *Journal's* treatment of Jerry Brown has been thorough in its reporting of regular governmental activities, it did not, during 1976, enter into any serious discussion of the ramifications of Jerry Brown's ideas about politics and cultural values. The pieces about Brown's record stress a review of his factual performance, but treat his philosophical politics with a light touch. One need hardly command a knowledge of 20th century politics to understand that Brown may offer the first major break with New Deal liberalism yet felt by the Democratic Party. Gone is the illusion that cultural woes can be swooped away by an act of agency creation. Gone too are the notions that continuous growth, bigness and profit maximization are the only courses for the ship of state. Brown has seriously called into question a gluttonous materialism and the vapid sense of values this has spawned. In so doing, he has rejected the traditional American direction expressed so well by Emerson, that "things are in the saddle and ride mankind." Since these ideas border on the immoderate if not the radical, one senses that Brown is not using them solely as attractive symbols, but rather that they are part of a plan to elevate politics as an activity which addresses the very terms upon which we live our lives.

It is disappointing that the *California Journal* confines its coverage of Jerry Brown to the mundane aspects of California government and ignores those aspects of Brown's philosophy which over the long run will certainly have a deeper affect on the American polity.

Toward an end of disseminating the most useful factual information, the *Journal* publishes voting records of both the Senate and Assembly, capsulizing in simple language the bills that were voted upon. It also lists selected governmental reports and specialized studies of government and law which otherwise might be missed. An example of the latter is the *Journal's* August, 1976 offering of The Southern California Law Review's issue (Vol. 49, No. 4, May, 1976) which featured six articles about the California Coastal Plan. Unlike most publications which attempt the substantial, the *Journal* orients the casual reader by frequently accompanying articles with basic fact statements such as the article on the Lake Tahoe basin which separately enumerated the morass of agencies in that area. Chip Neilson's analysis of the Development of Proposition Nine – the Political Reform Act of 1974 – was accompanied by a succinct summary of the changes. This was the controversial bill which assured lobbyists headaches, Jerry Brown a political career, and confusion for most of the public. But thanks to the *Journal's* effort to clarify the technical, the act and its developments were able to be understood by even the most untutored of readers.

CJ also periodically presents a review of the most significant decisions emanating from the California Supreme Court. It explains the controversies in clear English, a feat seldom achieved by the legal profession itself. Separate publications of the California Center for Research and Education in Government are from time to time included within its pages. One of these, "A Practical Guide to the State and National Campaign Reform Laws," explicated the necessities of the Political Reform Act and the Federal Election Campaign Act. Compiled by Lance Olsen, publisher of the *Campaign Law Reporter*, this work saves the uninitiated virtually scores of hours by simply spelling out the details. The *Journal's* "Roster and Guide" contains data about each legislator and executive officeholder in California, listings of the members of all legislative committees, the times and places of all regular meetings, and explanatory flow charts of the legislative process.

Enough said. For those who would be wise in the ways of state government and politics, the *California Journal* is a *sine qua non*; for others, it exemplifies the best of this emerging genre.

–Vincent M. Spohn

LAW, LEGISLATION AND LIBERTY
Volume 2: The Mirage of Social Justice
By Friedrich A. Hayek

Routledge & Kegan Paul Ltd. (London and Henley) 1976. Pp. xiv, 195.

The University of Chicago Press, 1976

With obvious intellectual resignation and an unmistakable aura of pessimism, Nobel prize-winner Friedrich A. Hayek has produced a thoughtful exposition of why "social justice" cannot – and indeed should not – be legislated in a free society.

The Mirage of Social Justice is the second in a three-volume work. In the first, *Rules and Order*,¹ Professor Hayek reviewed the historical and philosophical foundations of the "Open Society," the social order which he believes most conducive to individual freedom.² In the final volume, *The Political Order of a Free Society*, the author intends to present alternatives to liberal constitutionalism which might serve to insure that society's survival.

Central to Mr. Hayek's thesis is his distinction between two fundamental structures of social order. The first, a "teleocracy," is epitomized by the tribal society: it is an intentional organization, dominated by public law and comprised of individuals who share common goals known to all. It is therefore ends-directed, and the rules governing it serve particular (i.e., specific) purposes; these rules aim at achieving short-term results. By contrast, the "normocracy," or open society, is not an organization but a spontaneous order, dominated by private law and comprised of individuals who not only are not united in the pursuit of specific common goals, but are ignorant of the aspirations of others. Consequently, the "normocracy" must be means-directed, guided by rules serving unknown particular ends and aimed at the creation of those conditions which will, in the long term, be most beneficial to its members. Tribal society is also characterized by its defensive view of outsiders and its emotional approach to law and morals which attaches to concrete objects in particular situations. The open society, as the name implies, is theoretically global in extent and function, and evaluates legal and moral dilemmas rationally on the basis of abstract rules applicable to an infinite number of unforeseeable situations.

Aspiring to create "social justice" in an open society raises, in the author's view, two basic questions. First, does the concept itself have any meaning within such a market order? Second, can a market order be preserved while imposing upon it "some pattern of remuneration based on the assessment of the performance or needs of different individuals or groups by an authority possessing the power to enforce it"?

Professor Hayek answers both questions in the negative. Of the first he says:

[t]his conception of 'social' justice is . . . a direct consequence of that anthropomorphism or personification by which naive thinking tries to account for all self-ordering processes. It is a sign of the immaturity of

1. F. Hayek, *Law, Legislation and Liberty - Volume 1: Rules and Order* (1973) (The University of Chicago Press, Chicago) (Routledge & Kegan Paul Ltd., London).

2. See: Review, *Law, Legislation and Liberty - Volume 1: Rules and Order*, 3 J. Legis. 62 (1976).

our minds that we . . . demand from an impersonal process . . . that it conform to the moral precepts men have evolved for the guidance of their individual actions.

Admittedly, he continues, the distribution of benefits and burdens in a market system would be unjust *if* it were the product of intentional human design. But, like nature, distribution by impersonal market forces in combination with accident cannot be unjust:

so long as the earnings of particular individuals or groups are not determined by the decision of some agency, no particular distribution of incomes can be meaningfully described as more just than another.

Professor Hayek is distressed by what he sees as the result of efforts to mesh this concept with the mechanics of the market. The opportunity for – and inevitability of – injustice would then be created, since social justice would necessitate a coercive agent (presumably the government) directing individuals to perform certain tasks for certain remuneration. This must be the logical result of these efforts since

no system of rules of individual just conduct, and therefore no free action of the individuals, could produce results satisfying any principle of distributive justice.

Notably, however, Professor Hayek is not adverse to such "social justice" programs as a guaranteed annual income. Since it would operate outside the market, is perhaps morally required, and may be in the common interest, such a program might well be implemented without sacrificing individual freedom or disturbing the market order.

What does concern the author is the appearance of innumerable interest groups pressuring government for subsidies, price supports, and similar assistance. Where the cry for social justice was originally raised as a moral appeal to alleviate Dickensian poverty, it

has in practice become simply the slogan used by all groups whose status tends to decline—by the farmer, the independent craftsman, the coal miner, the small shopkeeper, the clerical worker and a considerable part of the old 'middle class,' rather than the industrial workers on whose behalf it was first raised but who have in general been the beneficiaries of recent developments.

The danger lurks in the power of such "corrective measures" as precedents: "every single act of this kind will give rise to demands by others to be treated on the same principle; and these demands can be satisfied only if all incomes are thus allocated."

"Social justice" in this perspective has become a tool of organized interests which can only create divisiveness in society by pitting groups against one another. If these groups' demands are met, the collapse of both the market order and the individual's freedom of action is inevitable.

Professor Hayek has little faith in the ability of legislators to resist acceding to such demands, thinking submission to be implicit in the electoral process. In this he is probably correct; a legislator incurring the wrath of a sub-

stantial organized interest is assured a large bloc of voters opposing him and can expect scant support from those in whose interest he may have tried to act.

Perhaps because of this pessimism, there is little in this book of what the author conceives the role of the legislator to be, and this is unfortunate. This may be a presumptuous criticism, however, since the work does not purport to be a practical guide for legislators; in any case the thoughtful reader will draw his own conclusions. Still, it is tantalizing but unsatisfactory to read that:

the aim of legislation, in laying down rules for an unknown number of future instances, can therefore be only to increase the chances of unknown persons whose opportunities will chiefly depend on their individual knowledge and skill as well as on the particular conditions in which accident will place them.

An illustration might have been useful here and elsewhere, but then this is not an anecdotal book. Perhaps specifics will be more prominent in the final volume, in which the author promises to consider "the particular absurdities which arise when a democracy attempts to determine the distribution of incomes by majority vote."

There remain also questions which, accepting this as a theoretical work, have not been fully addressed. In particular, Professor Hayek recognizes the necessity of evolutionary change within a given system, but does not seek to explain why the advent and advances of interest groups (implicit in the dynamics of an electoral system) cannot be perceived as a symptom of such evolution without foreboding the system's destruction. Perhaps they cannot, and constitutionalism must -- to borrow an ominous phrase -- collapse amid the roar of its own contradictions. Again, readers must look to the final volume for Professor Hayek's prescriptions for our ailing social order.

Whatever its flaws, *The Mirage of Social Justice* is an intriguing and articulate reformulation of classical liberalism in the light of contemporary politics, and assuredly of interest to students of legal and political theory. Professor Hayek ranks among the preeminent scholars of our time, and *Law, Legislation, and Liberty* promises to be the finest of his works and a significant contribution to the literature of contemporary jurisprudence.

-- Thomas J. Quinn