

1-1-2006

## Corporate Power and Its Discontents

Gerald Berk  
*University of Oregon*

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### Recommended Citation

Gerald Berk, *Corporate Power and Its Discontents*, 53 Buff. L. Rev. 1419 (2006).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol53/iss5/3>

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## COMMENTARIES

### Corporate Power and its Discontents

GERALD BERK†

In *Planet of the APs*, Professor Galanter draws a distinction between artificial and natural persons, organizations and individuals, corporations and primordial associations; then he shows how artificial persons have come to dominate the legal system. Exploiting their vast organizational resources, artificial persons systematically overpower associations and individuals in head-to-head contests of litigation. But their influence does not stop at the bench. Artificial persons have reshaped the legal profession: prestige goes to those who represent corporate, not individual, clients. Perhaps most devastating for the rule of law is that artificial persons have learned to reshape legal doctrine to their advantage by litigating rules, rather than discrete rights. In a word, corporate persons have become hegemonic. They shape the rules of the game, professional norms, and legal outcomes.

Although the distinction between artificial and natural persons illuminates inequality, I believe it obscures our understanding of the causes of corporate power, the nature of opposition, and the options available to tame it. My comments will tell a different narrative about the origins and development of corporate power, which will make three points. First, I will show how the organizational power of corporations has roots in the law, where a *natural*, not artificial, theory of the corporate person has reigned.

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† Department of Political Science, University of Oregon.

Second, I will show how those who have contested corporate power are not well understood as natural persons or primordial associations. They have also been constituted legally and, more often than not, in relation to the business corporation. Finally, I will show how intellectuals and associations, who have sought to redress inequality, have taken very different positions on the status of the corporation. One group, which I shall call the critical reifiers, has embraced the natural corporate person because it legitimates the natural status of oppositional associations. Another group, which I shall call the critical denaturalizers, has opposed efforts to naturalize the corporate person because it creates unassailable privileges. By reconfiguring Professor Galanter's categories into a different story about corporate power and its discontents, I hope to deepen our understanding of the relationship between the corporation and the law, and broaden our sense of how Americans have responded to corporate power.

Once upon a time, corporations were artificial constructs created by the state or the individuals who owned them. As Morton Horwitz shows, in antebellum America states issued corporate charters for public purposes with specific rights and obligations. When a plaintiff challenged corporate behavior, judges asked whether the defendant had acted *ultra vires*, or beyond its public charter. In the 1830s, Jacksonians attacked the special corporate charter as "class legislation," which created privilege and corrupted the state's obligation to act in the public interest. Instead of doing away with the corporate instrument altogether, Jacksonians opened the charter to all through general incorporation laws. As a result, incorporation became the favored instrument for entrepreneurs attempting to raise large amounts of capital. When a plaintiff challenged corporate behavior at law, judges were just as likely to look at the network of contracts through which the corporation was formed as to its public charter. In what Horwitz calls the "private artificial entity" theory, courts began to think of the corporation as a "trust fund" for its owners.<sup>1</sup>

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1. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 65-107 (1992).

All this changed after the Civil War, when railroad receivership cases undermined the trust fund theory and regulatory cases undermined the public theory of the corporation. In both areas of the law, legal professionals reconceptualized the corporation as a natural person with rights prior to the state or owners. Consider receivership law. Between 1870 and 1900, over half the railroad mileage in the United States went bankrupt. Since there was no uniform national bankruptcy law, failed railroads landed in federal courts, where receivers were appointed to reorganize property. Before the 1880s, when railroad corporations defaulted on bonds, their creditors took them to court where they asked judges to appoint temporary receivers to oust incumbent managers, reorganize the property, and devise an equitable payment plan. In 1884, managers for Jay Gould's Wabash Railway entered a federal district court in St. Louis and asked the judge to place their corporation in receivership *prior* to default and appoint them as receivers. The railway corporation, counsel argued, was a natural entity whose value derived from its perpetual life and systemic integrity. If the court were to grant rights to creditors, they would gut the system. Only by protecting the corporate person would the courts preserve value to owners, workers, shippers, and the state. The court complied. In a series of "friendly receiverships," which reorganized the American railway net over the next two decades, the Wabash departure became standard practice, and the natural entity theory of the corporation displaced the private artificial theory.<sup>2</sup>

The reconstitution of the corporation through railroad receivership opened the door to other industries. As economic sociologist William Roy demonstrates, the success of corporate attorneys and investment bankers in securing perpetual life for railroad corporations emboldened them to challenge statutory restrictions on intercorporate shareholding. If railroads could be treated as natural persons, they reasoned, then all industrial corporations

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2. See GERALD BERK, *ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865-1917*, at 47-72 (1994). On the role of the legal profession in reorganizing the corporation, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (Gerald L. Geison ed., 1988).

should have authority to buy and sell property at will. Drawing on the receivership precedent, attorneys for Standard Oil Corporation rewrote New Jersey law to allow corporations to hold property in other corporations. In doing so, they licensed the great merger wave from 1898 to 1904, which created many of the twentieth century's most dominant corporations.<sup>3</sup>

A similar fate befell the public theory of the corporation in railroad regulation. In 1877, the Supreme Court heard a challenge to state railroad rate regulation. The carriers charged Midwestern legislatures with confiscating corporate property, in violation of the Fifth and Fourteenth Amendments to the Constitution. The Court disagreed. Railroad corporations were common carriers. As such, they were affected with the public interest and legitimately subject to the Constitution's police power. Only Justice Field dissented. The affectation doctrine, he complained, opened the door to unlimited regulation. It was the Court's responsibility to draw a distinction between ordinary market transactions and those affected with the public interest. Ten years later, when Congress created a national commission to regulate railroad rates (the Interstate Commerce Commission (ICC)), the carriers protested again. In a series of cases in the 1890s, which severely restricted the ICC's control over rates, Field's dissent became doctrine. Though the Court ratified the ICC's authority to regulate rates, it drew a line at the market. Like natural persons, the railroad corporations had an inviolable right to respond to competition and changing market conditions. While the rate cases did not preclude regulation, they limited state power by naturalizing the market, the corporate person, and the right to contract.<sup>4</sup>

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3. WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* (1997); Rachel Parker-Gwin & William G. Roy, *Corporate Power and the Organization of Property in the United States: The Origin and Institutionalization of New Jersey Corporation Law, 1888-1903*, 24 *POL. & SOC'Y* 111 (1996).

4. See generally BERK, *supra* note 2, at 75-115. On the implications of Field's logic for antitrust, see RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW* (1996). On the effects of Field's logic and the rate cases on the *Lochner* Court, see HOWARD GILLMAN, *THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

The transformation of corporate status did not go unnoticed. Between 1870 and the First World War, social movements, interest groups, and political parties (re)fashioned themselves in its wake. However, they disagreed over what to do about corporate power. One faction, which I call the critical denaturalizers, condemned the corporate person as a cancer in the body politic. Drawing on classical republicanism, they worried it created unassailable privilege, corrupted democratic government, and locked the poor into permanent servitude. Corporate power was a political construct, insisted the denaturalizers; therefore, it could be reshaped to the republican ends of equality, virtuous citizenship, and a state devoted to the public good. From the National Labor Union and the Greenback-Labor Party in the 1870s, to the Knights of Labor and the Farmers' Alliance in the 1880s, to the Peoples' Party of the 1890s, critical denaturalizers organized politically to reinvigorate a public theory of the corporation in banking policy, railroad regulation and antitrust.<sup>5</sup>

Critical reifiers, by contrast, welcomed corporate naturalism because they believed it delegitimated the legal and cultural authority of nineteenth century individualism, which had become an obstacle to equality. Beginning in the 1870s, trade unionists argued that industrial concentration had lain to rest the myth that individual workers could bargain effectively with employers. Only collective action could equalize the power of labor and capital. But

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5. The distinction between critical denaturalizers and critical reifiers parallels Victoria Hattam's distinction between producers and workers in the late nineteenth century labor movement. See Victoria Hattam, *Economic Visions and Political Strategies: American Labor and the State, 1865-1896*, in 4 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 82 (Karen Orren & Stephen Skowronek eds., 1990). The literature on critical denaturalizers among late nineteenth century social movements is quite large. For some good examples, see BERK, *supra* note 2, at 75-115; LEON FINK, *WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* (1983); ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976); GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* (1997); NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (1982); Richard Oestreicher, *Terrence Powderly, The Knights of Labor, and Artisanal Republicanism*, in *LABOR LEADERS IN AMERICA* 30 (Melvyn Dubofsky & Warren Van Tine eds., 1987).

nineteenth century employers successfully challenged unions in the courts. Drawing an analogy to the artificial private theory of the corporation, they cast labor relations as a nexus of individual contracts. When unions engaged in collective action, they conspired to restrain trade and oppress both employers and workers. The New York Workingmen's Assembly, the Federation of Organized Trades and Labor Unions, and the American Federation of Labor (AFL) protested. Capital was organized; therefore, labor must be too. They applauded judges who naturalized corporate enterprise, because they undermined the foundations of the conspiracy doctrine and opened the door to legal naturalization for other groups. Should the courts apply the same logic to unions they applied to corporations, the labor movement could begin to redress organized business power through economic action. Unlike the critical denaturalizers, who hoped to alter corporate status through politics, the AFL naturalized the corporate person because it promised to legitimate countervailing power in trade unions. Thus, despite their differences, neither the Knights of Labor nor the AFL is well understood as a "primordial association." Both constituted themselves in relation to the business corporation and the state.<sup>6</sup>

In some narratives, corporate naturalism was victorious by the turn of the nineteenth century. Legal change enabled the "corporate reconstruction of American capitalism" in the great merger wave, and the AFL displaced the Knights of Labor. The result was to set the United States on a pluralist path of group competition, which many political scientists, legal historians, and institutional economists associate with the post-New Deal polity.<sup>7</sup> By 1952,

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6. Hattam, *supra* note 5, at 88-106. For good examples of critical reifiers in the progressive movement and the New Deal, see HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (Archon Books 1963) (1909); CHARLES FORCEY, *THE CROSSROADS OF LIBERALISM*, CROLY, WEYL, LIPPMAN, AND *THE PROGRESSIVE ERA, 1900-1925* (1961); ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966). For a more general critique of "primordial associations," and an argument that all interest groups are institutionally created see ELIZABETH S. CLEMENS, *THE PEOPLE'S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890-1925* (1997); and THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003).

7. See, e.g., THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979); MARTIN J. SKLAR, *THE CORPORATE*

economist John Kenneth Galbraith declared the transformation of American capitalism complete. Where markets once disciplined business, corporate power necessitated “countervailing powers” in government, interest groups, and trade unions.<sup>8</sup>

A closer look, however, reveals ongoing debate. Corporate denaturalizers remained alive in the antitrust movement. From Louis Brandeis to Estes Kefauver, and from anti-chain store activists to the current movement to rein-in Wal-Mart, critics of the corporate person have advocated a more public theory of the corporation. More recently, environmentalists, frustrated by the failures of countervailing power in the Environmental Protection Agency, have begun to revisit the political ontology of the modern corporation. Many twentieth century critics of corporate power—from Brandeis to Thurmond Arnold to David Korten—have drawn evocatively from the nineteenth century critique of corporate naturalization. Some, like the environmentalist Richard Grossman, who co-founded the Program on Corporations, Law and Democracy in 1994, and political scientist Robert Dahl, return to the late nineteenth century contest over the legal status of corporations to demonstrate the contingent origins of corporate personhood and to recover lost alternatives. Others argue that, whatever its origins, the business corporation has become a political organization, and so its legal status must be rethought.<sup>9</sup> Either way, the opposition to corporate

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RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 (1988); Richard Hofstadter, *What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed*, in THE BUSINESS ESTABLISHMENT 113 (Earl F. Cheit ed., 1964); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Katherine Van Wenzel Stone, *The Postwar Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

8. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM, THE CONCEPT OF COUNTERVAILING POWER (1952).

9. See HAWLEY, *supra* note 6; DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984); Gerald Berk, *Neither Markets nor Administration: Brandeis and the Antitrust Reforms of 1914*, in 8 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 24 (Karen Orren & Stephen Skowronek eds., 1994); Robert Dahl, *On Removing Certain Impediments to Democracy in the United States*, 90 POL. SCI. Q. 1 (1977); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005); Richard Grossman, *Can Corporations be Accountable?* (pts.



naturalization pioneered by the Knights of Labor and the populists in the nineteenth century has survived, and the deeper debate over corporate status continues.

This brief history of corporate naturalization and its discontents has attempted to deepen Professor Galanter's account of the causes of corporate power and broaden his account of its adversaries. In doing so, I have argued that legal theory matters in three ways. First, the organizational power of business corporations originates in the law. The capacity of railroad and industrial corporations to legitimate their claims before the shareholders and the state depended upon the legal reconstruction of the corporation from an artificial entity to a natural person. Second, associations challenging corporate power are no less legal artifacts than the corporation itself. They have constituted themselves in relation to the corporate theory and the state. Third, discontent with corporate power has taken radically different forms. Critical reifiers have naturalized corporate personhood because they believe it legitimates countervailing power in groups and the state. Critical denaturalizers have opposed the corporate person because they believe it creates unassailable privilege. And, although the former gained more attention in the twentieth century, the debate rages on. For, as Professor Galanter shows, how we make sense of the modern corporation at law has important practical consequences.

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1 & 2), 609 RACHEL'S ENV'T & HEALTH WKLY. (July 30, 1998), 610 RACHEL'S ENV'T & HEALTH WKLY. (Aug. 6, 1998), available at <http://www.poclad.org/articles/grossman01.html>. On POCLAD, more generally, see <http://www.poclad.org> (last visited Oct. 11, 2005).