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Book Review: Taming the Giant Corporation (1976)

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BOOK REVIEWS

Taming the Giant Corporation. By Ralph Nader,[1] Mark Green,[2] and Joel Seligman,[3] New York: W. W. Norton & Co., Inc., 1976; Toronto, Canada: George J. McCleod Limited, 1976. Pp. 312.

Reviewed by Larry E. Blount[4]

Taming the Giant Corporation by Ralph Nader, Mark Green and Joel Seligman is a forceful presentation of the case for federal chartering of large American corporations. Such chartering is indicated, according to the authors, by the occurrence of two related developments: the massive growth of the Corporation to a point of dominance in our society,[5] and the death of state corporate law as an adequate medium for control of corporate behavior.[6]

Historically, the corporation was conceived to be a creature of the state, performing a public function for the welfare of our society—the delivery of goods and services—through small and efficient units in a very competitive environment.[7] Today, the corporation is the creature of a relatively small cadre of professional managers, performing a private function—wealth aggregation—through huge units with multistructural compartments and multinational bases of operation. Today the corporation is bigger than anything and anyone else in our society.[8]

Taming the Giant Corporation traces this historical development and graphically describes the corporate impact on our society, painting the giant corporation as an unrestricted, insensitive, greedy entity whose only duty is to develop and exploit its power to the benefit of its professional managers. To the authors the social benefits provided by the modern corporation do not justify its privileged position of social dominance. Indeed, to them its present status frustrates the very purpose for which it was

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[1] Consumer advocate Ralph Nader has authored or co-authored a number of other books, including UNSAFE AT ANY SPEED, WHAT TO DO WITH YOUR BAD CAR, WHISTLE BLOWING, CORPORATE POWER IN AMERICA, and YOU AND YOUR PENSION.

[2] Other books by Mark Green include WITH JUSTICE FOR SOME, THE CLOSED ENTERPRISE SYSTEM, WHO RUNS CONGRESS?, THE MONOPOLY MAKERS, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS, and VERDICTS ON LAWYERS.

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[5] R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 16-32 (1976) [hereinafter cited as TAMING THE GIANT CORPORATION].

[6] *Id.* at 33-61.

[7] *Id.* at 33.

[8] *Id.* at 65.

originally conceived,[9] and the costs incurred by society to maintain the status of the modern corporation—industrial pollution, the emission of toxic substances into our environment, discrimination, unchecked political power, violations of individual human rights, undue influence on governments, indifference to employee and consumer safety, business crime, and the maldistribution of wealth and income—are too high.[10]

Paralleling the rise of the modern corporation to a position of unchecked power and dominance, according to the authors, is the fall of state corporation law as a viable regulator of corporate behavior.[11] In the so-called "race for the bottom,"[12] state after state has courted the giant corporation and its socially harmful promiscuity by enacting permissive general corporate enabling legislation. As the states jockey for position to receive greater shares of corporate franchise tax revenue and more business within their boundaries, they eschew important components of effective corporate regulatory schemes. Their incorporation statutes, which offer an increasing number of carrots but few sticks, permit professional managers to engage in antisocial conduct without even informing shareholders, employees or consumers and without fear of state-imposed sanction, and they rarely impose fiduciary duties that offer broad protection to the other constituencies of the corporation or to our society.[13] The resulting self regulation indicates the impact of the modern corporation and its professional managers on the state legislature (and indirectly on the state judiciary),[14] an impact reflected in a case reported by the authors where the legislative drafting function was delegated to lawyers for giant corporations.[15] This is self regulation in the most literal sense; it is, in essence, no regulation at all.

Taming the Giant Corporation states its case for federal chartering in a most provocative fashion. It reeks of documentation and overwhelms the reader with a feeling of immense thoroughness. It reads well and delivers a profound message. It misses no major illustration of the adverse corporate impact on society or of the emptiness of state corporate law. The book is the product of obvious toil and commitment, a fact which impresses the reader page by page. And after reading chapters one, two, and three, the reader is likely to query: What can be done about this?

Taming the Giant Corporation provides an answer in chapters four through seven: federal chartering. The solution begins with a structural overhaul of corporate governance. At present the modern corporation is

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[9] *Id.* at 62-65.

[10] *Id.* at 17-32.

[11] *Id.* at 33-61.

[12] *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974).

[13] *See* TAMING THE GIANT CORPORATION at 61.

[14] *Id.* at 60.

[15] *Id.* at 54-58.

controlled by a small cadre of professional managers operating unrestricted by the board of directors, shareholders, employees, consumers, or state corporate law. This cadre controls the productive assets of our society and writes the laws which purportedly regulate them. It calls all the shots, within and without the corporation. Antisocial conduct—white collar crime—engaged in by these managers goes without sanction; the victims of these wrongs—ordinary citizens—are left without a remedy. And should they by some fluke, get caught, their insurance companies indemify the costs of their conviction.[16] Under the authors' approach, the board of directors would be overhauled and restored to its historical role as the internal auditor of the corporation, responsible for restraining managerial violation of law and breach of fiduciary duty; shareholders would be injected into the governance process; and other constituencies—consumers, citizens, and employees—would be able to petition the corporation, via referenda, when its conduct presented a health hazard.[17]

This new corporate democracy would function with the benefit of information that the corporation would be obliged to disclose. Chapter five reports the social cost of corporate secrecy and outlines the spectrum of information which corporations should be required to disclose, including pollution levels, occupational safety and health data, employment discrimination information, corporate advertising costs, lobbying practices, etc. Additionally, substantial financial disclosure would be made—corporate ownership and control, corporate relations to government, security holder disclosure, management income, financial statements with product-line reporting, corporate management, accountant relations, and multinational operations.

Chapter six provides details of another basic component of the proposed federal chartering scheme—an employee bill of rights. Its objective is to "constitutionalize" the corporation by guaranteeing rights of free speech, press, privacy, and equal protection of the laws. It would create a new federal cause of action to protect these rights and to preclude employer reprisal against employees who exercise them.

The federal chartering scheme would "cut corporations down to size" in some cases where their bigness causes injury. Chapter seven of the book, which outlines the authors' proposed system of industry deconcentration and responds to arguments against it, describes the costs of concentration—higher prices and profits, inflation and unemployment, maldistribution of income and wealth, inefficiencies of bigness, chilling effects on innovation, goliath influence in social and political arenas, loss of potential competition, firm entrenchment, corporate secrecy, and governmenal impotency. Further anti-competitive concentration would be discouraged

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[16] *Id.* at 107-08.
[17] *Id.* at 118-31.
[18] *Id.* at 233.

via acquisitions, and existing concentration would be undone by mandating deconcentration of any industry where four or fewer firms control fifty percent or more of the relevant market—without proof of monopoly intent (a "no-fault" provisions).[18]

A federal chartering act would be enforced in the federal courts by the Securities Exchange Commission, with deconcentration provisions enforced by the Justice Department's Antitrust Division. As outlined in chapter eight, the chartering scheme would require all industrial, retail, and transportation corporations which sold over $250,000,000 in goods or services or employed more than 10,000 persons in any one of the previous three years to obtain a federal charter—in addition to any state charter held.[19] In addition to the various constituencies expressly protected by the act, taxpayers, generally, would be able to sue to compel the Securities and Exchange Commission and the Justice Department to enforce provisions of the act and to be reimbursed for their expenses[20] and could also institute direct actions against corporations who contract with the federal government.[21]

Penalties for violation of the proposed law would be based on two assumptions: first, the inadequacy of existing sanctions and, second, the fact that, since businessmen act premeditatively rather than compulsively, serious penalties can successfully deter illegality.[22] Specifically the proposal provides that corporate officers convicted of willful violations would be disqualified from serving as a corporate officer or director in any American corporation or partnership for five years after a conviction, guilty plea, or *nolo contendere* plea. Fines would be imposed according to the size of the firm and the "size" of the violation, and in no instance would a corporation be allowed to indemnify any executive or director against any civil or criminal liability. Lastly, corporate conflicts of interest would be removed from the discretion of the boardroom and made subject to designated civil sanctions in federal district courts. The authors point out that "business illegality has its own cost curve" and that if it becomes too expensive to yield a profit, it will cease to occur.[23]

After eight chapters of first rate advocacy, the case *against* federal chartering, outlined in chapter nine of the book, becomes a shadow of its former self. The authors rebut the criticisms summarily: A federal chartering act would protect shareholders, employees, consumers, taxpayers, and neighboring communities; it would not be just more big government and more regulation, nor would it unduly burden business or destroy private property rights; moreover, corporate social responsibility will never come

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[19] *Id.* at 240.
[20] *Id.* at 245.
[21] *Id.* at 248.
[22] *Id.* at 249.
[23] *Id.* at 249-51.

without new law—at the federal level—that addresses the causes, not just the symptoms, of bad business conduct; finally, federal chartering leads away from, not toward, socialism or federal takeover of business.

Taming the Giant Corporation presents the most persuasive case for federal chartering this writer has read. It is provocative, well documented, difficult to rebut. It is not diatribe. Those who favored this movement before reading this book will be convinced of its necessity after reading it. Those who were without opinion on the subject before will be compelled to formulate one afterwards. Those who advocate maintainance of the status quo will experience increasing consternation as they read each page. Those whose job it is to develop an affirmative defense to the charges made in *Taming the Giant Corporation* will have a monumental task to perform.

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[21] For other discussions of the concept of federal chartering, see Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101 (1974); Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991 (1976); Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976); and Watkins, *Federalization of Corporations*), 13 TENN. L. REV. 89 (1935). For recent legislative deliberations, see *Hearings on Corporate Rights and Responsibilities Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 94-95 (1976).