Plus ça Change

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Camden Hutchison, *Progressive Era Conception of the Corporation and the Failure of the Federal Chartering Movement*, **Colum. Bus. L. Rev** (forthcoming, 2017), available at SSRN.

Good history, including good legal history, sheds light on our own times. Well-written history, peopled with recognizable figures and marked by a strong narrative arc, also makes for good reading. In a new article, Camden Hutchison brings a precise historical eye and an engaging storytelling style to the understudied area of corporate legal history. His topic is Progressive Era corporate law reform, and particularly the question of why the United States failed to develop a federal corporate law regime in that period (and, of course, since).

Hutchison investigates how it could be that "in an era marked by ambitious efforts to reform the national economy, the [federal] chartering movement would distinguish itself, both in the breadth of its political appeal and the decisiveness of its failure". His conclusions are illuminating and relevant. Once again, in the current era of populist discontent and economic inequality, we find ourselves confronting fundamental questions about the corporate form, the relationship between private wealth and the public interest, and about what a "progressive" corporate law regime might actually seek to accomplish.

Hutchison's rich, thoroughly researched article is one product of a doctoral degree in history combined with several years of corporate practice with a global law firm. He draws on extensive primary sources to tell the story of US corporate law from state corporate chartermongering in New Jersey in the latter 1800s, through failed federalization efforts during the Roosevelt and Taft Administrations, and beyond. Federal chartering was a national political issue in the Progressive Era. Following the dramatic growth of industrial corporations during the "great merger movement" of 1895-1904 and through to the Federal Trade Commission's establishment in 1914, the federal corporate chartering and antitrust movements were politically interconnected. Hutchison is a careful historian who does not overclaim about his story's contemporary relevance, but his account nevertheless raises some provocative possibilities.

For example, Progressive Era reformers understood corporate law in a broader, more political economy-informed sense than the field tends to permit today. Corporations were not just neutral legal vehicles for achieving corporate aims or, more pointedly, for maximizing shareholder wealth. Rather, Progressive Era policymakers saw corporations as "quasi-public instruments of the state, whose legal privileges were contingent upon provision of a public benefit". Note that we are still decades before Karl Polanyi published *The Great Transformation* (1944). Polanyi's notion – it is a critique – of the market economy as a sphere of competitive capitalist human activity free of public or moral claims does not seem to inhibit Progressives' enthusiasm for reform. These many decades later, after living through some remarkable extremes in thinking about what efficient markets can be expected to achieve on their own, we could do worse than to revisit these Progressive Era assumptions. In insisting that corporations assume public obligations in exchange for the benefits of incorporation, some Progressive Era reformers share a starting point with scholars such as Anna Gelpern and Erik Gerding, and Bob Hockett and Saule Omarova, who scrutinize the deep structures of finance and financial regulation in the service of a more contemporary progressive politics.

This is not to say that Progressive Era reformers had a particularly well developed or accurate understanding of how corporations and their constituent parts operated. We are pre-Berle and Means' *The Modern Corporation and Private Property* (1932) here too. Progressive Era reformers tended not to distinguish between investors and managers, ownership and control; it was "corporations" versus the "public". Many of the reformers' ostensibly public-oriented priorities, like concerns over "watered" stock or corporate disclosure, would be understood as investor protection mechanisms today. Then, they were understood as weapons against inflated dividends and monopolistic pricing. Some Progressives' thinking was fuzzy, if not downright mistaken, about how certain initiatives aimed at the public interest (e.g., automatic bankruptcy proceedings for overcapitalized corporations) would adversely affect not only corporate interests but shareholders' and other stakeholders' too. But considering the public interest as distinct from some "corporate" corporate one reminds us of the conceptual vice in which Berle and Means have held corporate law theory. Especially given the ways in which financial and legal innovations have shattered the atoms of the corporation, and the share, we may even wonder whether the separation of ownership from control is still the most salient or interesting divide around which corporate law should orient itself. Perhaps, understanding why Progressives framed the conversation in terms of public interest and concentrated economic power has the potential to inject fresh life into corporate law theory generally.

For scholars of policy change, the failure of federal chartering also offers a cautionary tale. Logistical details and labels were not fatal – when a movement has momentum, people in favour of "federal chartering" can also get behind "federal licensing", and vice versa. But superficial consensus can mask deep ideological disagreement. Corporatist and anti-corporate forces were aligned around the high level objective of federal chartering, but for divergent reasons. Anti-corporate advocates like William Jennings Bryan saw federal chartering as a means of supplanting overly permissive state acts. Corporatist progressives were a somewhat varied bunch (and not always "progressive" as we might use the term), but included some who saw federal corporate licensing as a bulwark against federal antitrust enforcement! Once it came to hammering out the details, then, the scope for agreement turned out to be exceedingly – indeed, impossibly – narrow. The failure of the Hepburn Bill in 1909, which foundered on small businesses' opposition to exempting labor unions and agricultural collectives from the Sherman Act, is one of several fascinating narratives in Hutchison's article. And yet, as he observes, there is more than one way to skin a cat. Corporate federalization may have failed, but for better and for worse at least some of its less controversial objectives, including mandatory corporate disclosure, were eventually achieved through other federal

legislative regimes.

Social and intellectual memory can be in scarce supply in times of upheaval and uncertainty. In this article, Camden Hutchison makes a welcome contribution in helping us see the trajectory and priorities of corporate law thinking across a broader historical time frame.

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