1919

Book Review: Position of Foreign Corporations in American Constitutional Law

Edwin Borchard
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/3667

This Book Review is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
single regime, but in fact it was subject to separate Austrian and Hungarian regulations. From the Iron Gates to Braila, the map would make it appear as if one regime existed, while in fact Serbia and Bulgaria each independent control of a share of the southern, Roumania of the northern, bank, the treaty of 1883 never having been put into effect. It was undoubtedly an error of printing that the Iron Gates—Cataract section was not extended into Serbia, beyond the Roumanian boundary, to cover the whole improved reach of the river. The map of the Congo basin indicating the railway around the fords and rapids to Stanley Pool and other breaks of navigation on the river system is a most useful addition to the work.

JOSEPH P. CHAMBERLAIN

New York, N. Y., February 11th, 1919


This is a most stimulating contribution to the literature of what has long been a nebulous branch of constitutional law. Few departments of the law exhibit more clearly the flexibility of the constitution, its adaptability to changing economic conditions and the resulting difficulty of forecasting constitutional decisions, than that of foreign corporations. But the greatest factor contributing to uncertainty and anomaly in this branch of the law has been the unfortunate confusion in the theory of the corporation. Curiously enough, by piling fiction upon fiction, some measure of justice has now been worked out by treating the corporation as a “person” or a “person within the jurisdiction” under the Fourteenth Amendment. Not even yet have the Supreme Court and the legal world generally accepted the view that incorporation is merely a device, a form or method adopted by real human beings for doing business and enjoying their property, just as a partnership is. The author clearly perceives the inaccuracy of the “fiction” and of the “real” theory of a corporation, into which we have been led principally by continental jurists. But his praiseworthy attempt to explain away the confusion (p. 165 ff.) would have derived much assistance from the able contribution to that end already made by the late Professor Hohfeld in (1909) 9 Columbia L. Rev., particularly at pp. 288-291. It is to be doubted whether “modern jurisprudence” has “generally rejected” the theory that “only persons can be subjects of rights and duties.” (p. 165). On the contrary, it seems to the reviewer that recognition of that fact shows the superfluity of the “fiction” and “real” theory and enables the corporation to be seen as a mere device covering the transactions of a group of individuals.

The author has devoted himself primarily to the task of tracing the evolution of our constitutional law of foreign corporations from the restrictive rule of Taney’s dicta in Bank of Augusta v. Earle (1839) to the liberal rule of almost compulsory recognition sanctioned in the Pullman and Western Union Cases against the State of Kansas (1910). The task has been performed with marked ability. Not only is his critical analysis of the decisions themselves a meritorious service, but his discussion of the economic background of the decisions throws much light upon the motives consciously or unconsciously actuating the court.

Taney’s refusal, because of the jealousies and provincial interests of agrarian communities, to extend the protection of the comity clause to corporations or to recognize their inherent privilege to exist and do business outside the state which created them, has impressed our constitutional law until very recent times. The resulting power to exclude, and therefore to admit on conditions, was finally driven to such an extreme application by Kansas in taxing the entire capital stock
of the Western Union and the Pullman Company (216 U. S.) that the Supreme Court was impelled to break down its logic and invoke the "due process" clause of the Fourteenth Amendment to save foreign corporations from extortionate conditions of admission. Holmes' dissenting opinion in the Western Union case attests his deference to logic and the virility of Taney's views, as fortified by such cases as Paul v. Virginia. But as the Western Union and Pullman cases also involved the commerce clause it can hardly be said that the court has fully sustained the author's view that the state no longer has an unlimited power to exclude foreign corporations from an independent local business. Possibly they will some time take that position, but in Baltic Mining Co. v. Massachusetts (1913) 231 U. S. 68, 34 Sup. Ct. 15, they had not yet reached it; and in the two very recent cases of Looney v. Crane Co. (1917) 245 U. S. 178, 38 Sup. Ct. 85, and International Paper Co. v. Massachusetts (1918) 246 U. S. 135, 38 Sup. Ct. 292, decided since Mr. Henderson's book went to press, the commerce and due process clauses jointly afforded protection against the state statute. What would have been the result had there been no assistance derived from the commerce clause is not certain. Again the restrictive principle has been greatly weakened by the so-called doctrine of unconstitutional conditions, which grew out of the attempt of various states to penalize or expel foreign corporations for the removal of suits from the state to the federal courts. Some sophistry is necessary to sustain the distinction between the exaction of an agreement not to remove, which was held unconstitutional, and the expulsion for actual removal without advance agreement, which has been sustained. Possibly Donald v. Philadelphia and Reading Coal Co. (1916) 241 U. S. 329, 36 Sup. Ct. 563, although also involving interstate commerce, justifies the view that all attempts to prevent or punish the privilege of removal will be enjoined as unconstitutional.

To the vexed problem of the "citizenship of a corporation" (Chap. IV) the author has made a useful contribution; our constitutional law in this matter has had little help from the voluminous continental literature on the subject. Arminjon (p. 188) was a Frenchman, not a Spaniard, although his monograph was translated for the Spanish Treaty Claims Commission. One of the best among the several excellent chapters in the book is Chapter X entitled "A critical re-examination" in which the author exhibits that understanding of the underlying economic conditions in a growing industrial country without which our constitutional law becomes a disconnected series of judicial reactions to unrelated facts. The work has decidedly enriched our legal literature and deserves hearty welcome from a profession but poorly endowed with scholarly contributions.

Edwin M. Borchard.

Yale University Law School.