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Book Review: Reviewing Robert C. Clark, Corporate Law (1986)

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CORPORATE LAW, by Robert C. Clark. Little, Brown and Company, 1986. 837 pages.

*Reviewed by Norwood P. Beveridge, Jr.**

This book by Professor Clark, now Dean of the Harvard Law School, is a break from tradition. He presents a "distinctive vision" and a "fresh and unified understanding"[1] for the beginning student of corporate law, as well as the non-legal business person, economist or academic seeking a non-technical presentation of the major corporate law issues. Certainly, the expository portions of the book are outstanding. Dean Clark has a knack for explaining things, and he has adopted a classroom manner even to the extent of using hypothetical fact patterns in the text.

He has deliberately eschewed an encyclopedic approach for a selective one, and the student is rewarded with a refreshing clarity and leanness of exposition. For a beginning law student, this book is an excellent Baedeker for subjects such as Section 5 of the Securities Act of 1933[2] or the insider trading side of Rule 10b-5 under the Securities Exchange Act of 1934.[3] Of course, as to the latter, and to other issues in the book, it is a drawback that at a time when statutory, regulatory and case law changes are being made with great rapidity, the text is not updated by a pocket supplement. The reader will have to allow for these things.

The book has a decidedly intentional law-and-economics approach. In fact, it is generally more interdisciplinary than most law texts, with substantial doses of economics, accounting,[4] taxes,[5] and sociology.[6] How one feels about all this may depend on whether or not one feels that the corporate law professor is more properly a student than a teacher of such subjects as economics and sociology. In any event, the accounting material is welcome, but the tax information is probably more detailed than required and, as already mentioned, has a short useful life.

Dean Clark has deliberately omitted some traditional subjects, and since he has solicited comment[7] on this subject, I could have wished that

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1. R.C. CLARK, CORPORATE LAW xxi (1986).
2. *Id.* at ch. 17.
3. *Id.* at ch. 8.
4. Purchase versus pooling treatment for business combinations, *see* Chapter 10.
5. Executive compensation, *see* Chapter 6.
6. Hierarchical structure, *see* Appendix A.
7. *Id.* at xxiv.

he had brought his analytical gift to things like the *de facto* incorporation doctrine, which after being denounced as "legal conceptualism at its worst"[8] more than thirty-five years ago, still manages to perplex not only the courts but also the experts in the A.B.A. Section of Business Law.[9] The same might be said for the conflict of laws and the internal affairs doctrine, but the omission of these matters does not substantially detract from the work since it is designed as an introduction to corporate law, not an exhaustive treatment.

While the layout of the book is pleasing to the eye, the extensive marginalia is perhaps more distracting than useful. The number of typographical errors is not remarkable; however, it is unfortunate that the equation for cumulative voting calculation is given erroneously[10] in such a way as to addle anyone trying to elect more than one director, viz.:

CLARK:	HENN & ALEXANDER:[11]
$X = \frac{Y + N' + 1}{N + 1}$	$X = \frac{Y \times N'}{N + 1} + 1$

X = Number of Shares Needed; Y = Total Number of Shares Voting (not outstanding, as Dean Clark says); N = Total Number of Directors to be Elected; N′ = Number of Directors It Is Desired to Elect.

As to things that one wishes were different, there is a good deal of philosophizing in this book, and although Dean Clark says it is easy to spot and ignore,[12] I am not so sure. The sort of "socially relevant" discourse in, for instance, Chapter 16, *The Meaning of Corporate Personality*, I think works better in the classroom than it does in an introductory text. Again, what is one to make of Dean Clark's proposed total ban on self-dealing transactions by corporate directors, unless the Securities and Exchange Commission (no less) were to grant an exemption.[13] Such a proposal surely requires more of a justification than is given in this text because it would bring a federal regulatory agency into the management of a private corporation in quite an unprecedented way. One could have wished that this demonstrated willingness to experiment with new ideas could have been more evident elsewhere, such as in the discussion on sale of corporate control.[14] More than thirty years after *Perlman v. Feld-*

8. Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1180 (1952).
9. *See* REVISED MODEL BUSINESS CORPORATION ACT § 2.04 and the Official Comment (1985).
10. R.C. CLARK, *supra* note 1, at 363.
11. HENN & ALEXANDER, LAWS OF CORPORATIONS 495 n.11 (3d ed. 1983).
12. R.C. CLARK, *supra* note 1, at xxii.
13. *Id.* at 188.
14. *Id.* at ch. 11, § 11.4.

mann,[15] I believe it is really too late to spend several pages on presentation of the theories of Professors Adolph Berle and William Andrews on sharing the control premium and equal opportunity in sale of control, without acknowledging that these theories have been substantially rejected by every state and federal court in the country which has considered the issue.[16]

One of Dean Clark's major premises[17] is that for many reasons, corporation cases involving publicly held corporations have gravitated to the federal courts and the federal securities laws while cases in the state courts have involved mostly close corporations.[18] He states that this has resulted in the adoption of state law rules for corporate conduct that "make good sense for close corporations but that are suboptimal for public corporations."[19] While he says that this development has generally gone unrecognized, it appears to me that the premise itself is simply wrong. Certainly it requires considerable documentation, and especially since it is repeated several times,[20] we need more than a reference to an unpublished manuscript[21] to help us. The complaint up until 1960, say, was to the contrary that the close corporation was being improperly confined by doctrines developed by courts for public corporations. That is, that the incorporated partnership was being forced onto the Procrustean bed of inflexible corporate statutes. This eventually led to the development of special doctrines (and special "close corporation" statutes) for close corporations, which are treated in Chapter 18, *Close Corporations*, of Dean Clark's book. The development of corporate law by the Delaware Supreme Court, to take the most notable example, has been dominated in recent decades by cases involving publicly held corporations. Also, it seems to me that the United States Supreme Court has turned doctrinally against subsuming state corporate law fiduciary duties in the federal securities laws (over the opposition of the S.E.C.).[22] The Supreme Court has also reminded the federal courts that they should use the procedure of certifying questions of state corporate law to the state courts where that procedure is available.[23]

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15. 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

16. *See* Beveridge, *Sale of Control at a Premium: Time for Some Changes*, 15 W. ST. U.L. REV. 61 (1987); Hamilton, *Private Sale of Control Transactions: Where We Stand Today*, 36 CASE W. RES. 248 (1985).

17. "my own thesis," R.C. CLARK, *supra* note 1, at 29.

18. "an overwhelming majority," *Id.*

19. *Id.*

20. *See, e.g., id.* at 262.

21. *Id.* at 165 n.11.

22. *See, e.g.*, Santa Fe Indus. v. Green, 430 U.S. 462 (1977).

23. Lehman Bros. v. Schein, 416 U.S. 386 (1974).

None of these reservations should be taken to detract substantially from my admiration of Dean Clark for producing a superior work.