

# Washington University Law Review

---

Volume 23 | Issue 2

---

January 1938

## Review of “Gvoernment Proprietary Corporations,” By John Thurston

Walter Freedman  
*Securities and Exchange Commission*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Law Commons](#)

---

### Recommended Citation

Walter Freedman, *Review of “Gvoernment Proprietary Corporations,” By John Thurston*, 23 WASH. U. L. Q. 293 (1938).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol23/iss2/3](https://openscholarship.wustl.edu/law_lawreview/vol23/iss2/3)

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

also treaties and other official documents, opinions, and authoritative commentaries. It has copious editor's notes, essentially after the manner of text-book commentaries. The arrangement of the material is the traditional one.

In general, this volume approaches very nearly to a combination of case-book and text-book, similar to the recent volumes by Dickinson, Fenwick, and, in a more limited way, Evans. There is a great deal more to be said in favor of the simultaneous use of cases and text-books in legal education than the enthusiasts of the case-book system are ready to concede; but it is seriously questionable whether it is the wisest economy to attempt to combine the text-book with the case-book in a single volume when more cases, more fully reported are so badly needed and when good text-books are so easily accessible.

Here are the results of two formidable undertakings, each executed in accordance with the principles of first class scholarship. The question is not which of the two is the better, but rather which type is preferable for each particular course.

ARNOLD J. LIEN.†

---

GOVERNMENT PROPRIETARY CORPORATIONS. By John Thurston. Cambridge, Massachusetts: Harvard University Press, 1937. Pp. xii, 294.

The lawyer who steps beyond the borders of judicial decision and statutory law finds himself too often in an unfamiliar realm. The lawyer is seldom tolerant of the theories of the political scientist. But when a political scientist explores a problem which falls within the gamut of the emprise of public law as well as that of public administration, the lawyer may hazard an expression on the result of the exploration.

Mr. Thurston's book is the first which makes a comparative survey of the government-owned corporations in the English-speaking world, and the first in a decade on American government-owned corporations.<sup>1</sup> The avalanche of literature on this topic, which has heretofore been confined to economic, political, and legal periodicals, attests to the paramount importance of the problems which it presents. With the New Deal serving as a catalyst, we have witnessed a mushroom growth of government-owned corporations which has furnished ammunition to the Congressional orator, columnist, politician, and student, all of whom talk glibly and volubly, few of whom speak knowingly.

The book is designed to supply much needed enlightenment on the structure of the organizations. The author is to be complimented. In approach-

---

† Professor of Political Science, Washington University.

1. The last book which surveyed the government-owned corporations was published in 1926. See Van Dorn, *Government Owned Corporations*. More recent books have dealt with individual corporations and were the result of studies made at the invitation of the Secretary of War. See Dimock, *Government-Owned Enterprises in the Panama Canal Zone* (1934); Dimock, *Developing America's Waterways: Administration of the Inland Waterways Corporation* (1935).

ing the problem he has stripped the mind of all partisan hysteria, assumed the asperity of a diplomat, and then proceeded to present an unemotional, objective and precise treatment of the question. Within a rather small compass and without sacrifice to careful analysis and profound criticism, the author has rather successfully attained his goal of discovering "principles to facilitate good and efficient management and at the same time provide for responsiveness to legitimate public demands but resistance to selfish misuse by groups or individuals."<sup>2</sup> The principles are deduced from a chapter study of the legal status, the financial structure, and the administrative organization of the corporations.

Of the three chapters, the least satisfactory is that dealing with the legal status. Too little attention is paid to the powers vested in the corporations. Analogies to foreign government-owned corporations are particularly unjustified here because of the disparity between the limits of our government and that of foreign countries. Only ten pages are devoted to the constitutional right of the federal government to establish the corporations. The problem itself is complex and uncertain enough to merit a more adequate treatment. Most of the statutes and executive orders under which the corporations have been created are tortured into forms which conceal the extent of the corporation's powers, and disguise the true purpose in preambles composed for the edification of the judiciary. *McCulloch v. Maryland*<sup>3</sup> and *Smith v. Kansas City Title and Trust Co.*,<sup>4</sup> have not announced a blanket power to exist in the federal government to create corporations for any and all purposes. The corporate form is only a means. The end must be legitimate. Unlike the war-time corporations, the present menagerie is not likely to find justification in the patriotic hearts of the judges—a true constitutional basis will have to be shown. To date the Supreme Court has upheld two of the recently organized corporations *sub silentio*.<sup>5</sup> The "general welfare" clause will be the only basis for the validation of many of the New Deal corporations. The fiscal power will be relied upon to justify some others. In the realm of substantive law the government-owned corporation is necessarily a legal hybrid. Its legal theories are dependent on two interdependent fields. If such corporations are to be utilized as permanent governmental institutions, rather than as an ephemeral governmental device, then a separate body of rules and principles, distinguishing them from privately-owned corporations, may grow up and surround their activities.

The chapter on the methods of financing gives evidence of painstaking study and sheds light on the befuddled capitalization methods of some of the corporations. The advisability of financial autonomy is adequately supported. The following chapter on management and administration reveals data of interest to the student of public administration. There is some

---

2. P. vii.

3. (1819) 4 Wheat. 316.

4. (1921) 255 U. S. 180.

5. *Baltimore National Bank v. State Tax Commission* (1936) 297 U. S. 209 (*Reconstruction Finance Corp.*); *Ashwander v. Tennessee Valley Authority* (1936) 297 U. S. 288 (*Tennessee Valley Authority*).

room to question the merit of having the management as independent of the government as Mr. Thurston advocates. The inclusion of an executive-appointed government official on the board of the corporations would serve the useful purpose of attaining greater consistency in policy formation. This official might successfully serve as a connecting link between the government and the corporation, thereby fostering government integration and public control. Integration is an indispensable factor in a policy designed to attain consistency with reference to social and economic doctrines, which in the absence of coordination becomes an insuperable barrier.

The fourth major division of the book deals with the aspect of public control. In discussing the relationship of the corporations to the government the author has presented numerous enigmas which are provocative of further study. The conflict between the General Accounting Office and the corporations, which is generously treated, is of particular interest since the struggle is still raging.<sup>6</sup>

The conclusions of the author are commendable. It is questionable though whether, in view of our limited experience with the corporations, we are justified in establishing criteria for future guidance. True, Mr. Thurston does not suggest any inexorable principles. But it is debatable whether even general principles should be set down. The corporations have been created for widely differing purposes and activities. They must of necessity be given dissimilar treatment. Government-owned corporations which are essentially commercial should be governed by principles differing from those guiding the essentially regulatory corporations.

The failure to carefully differentiate between the varying functions of the corporations is the greatest defect of the book. The constant reference to the commercial nature of the corporations seems unjustified. The labeling of the corporations as "proprietary" is unsatisfactory because it connotes a commercial functioning, and because it presupposes the conclusion. This adjective is probably more descriptive of the foreign corporations such as the British Broadcasting Company, Anglo-Iranian Oil Co., Canadian National Railway Co., South African Iron and Steel Industrial Corporation, etc. The American government-owned corporations are of an essentially different character and their creation was prompted by substantially different circumstances. There have been two periods in which the vast majority of our government-owned corporations have come into existence. Our corporations have been established in response to catastrophes: one diplomatic, the other economic. They were created in fulfillment of the need for a government agency which possessed the virtues of independence, administrative freedom, and flexibility. The foreign government-owned corporations were neither "war babies" nor "depression born." They were occasioned in the normal tide of government and formed to serve commercial functions. In spite of the multitude of government-owned corporations, the United States is still no entrepreneur.

It cannot be said that a function is not governmental merely because it is an activity which traditionally has been conducted under the auspices of

---

6. N. Y. Times, January 4, 1938, p. 1: 6.

private capital. The figure into which the modern state is cast is not molded within inexorable bounds. We have witnessed an expanding scope of governmental activity. The function of government, once thought best restricted to restraint and control, is now regarded as characterized by affirmative assistance and service. Among the government-owned corporations established under the present administration only one can be charged with having primarily a commercial aspect,<sup>7</sup> and of all the government-owned corporations existing in the United States today, only three additional corporations join the list.<sup>8</sup>

The corporations, which are playing such an important role in the New Deal program, were not created as a mere pretense veiling the purpose of a revolutionary assumption of power to be accomplished by a taking over of private business.<sup>9</sup> They were established predominantly as a means of providing federal relief for unemployment distress and financial rehabilitation. They served to smother the threatening flames which were evolving from the economic inferno. The maintenance of a continuously operating economic system is as much a governmental objective as the maintenance of law and order.

With the growth of government-owned corporations there will develop a field of administrative and substantive law challenging to the pioneering savant who chanced to explore its area. Mr. Thurston tackled a burdensome task; he has done a commendable job. He apparently was more concerned with precision and analysis than with prophecy or literary excellence. The sentences do not have propulsive force. The book will not be greeted with the theatrical enthusiastic shouts, "Author! Author!", but to the student who is wrestling with the problem it is an acceptable and appreciated contribution.

WALTER FREEDMAN.†

---

7. Tennessee Valley Authority. A three-judge district court has recently held that the commercial aspect of the Authority, i. e., the generation and sale of electric energy, was not the purpose for which the Authority was created but merely "incidental to the exercise of constitutional powers." *Tennessee Electric Power Co. v. Tennessee Valley Authority* (January 21, 1938) N. Y. Times (January 22) p. 6, 7. (D. C. E. D. N. D. Tenn.).

8. Panama Railroad Company, Inland Waterways Corporation, and Alaska Railroad. Even this classification is somewhat generous in view of the unanimous opinion of the Supreme Court in *New York ex rel. Rogers v. Graves* (1937) 299 U. S. 401, holding that a state may not impose an income tax upon the salaries paid to an employee of the Panama Railroad Company. Sutherland, J., at p. 408: "The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes [carrying private freight and passengers, operation of a hotel, etc.] affords no ground for objection."

9. This statement is made notwithstanding the warning of the late Senator Schall of the "corporate conspiracy." 79 Cong. Rec. 1656 (Feb. 6, 1935). At p. 1547: "Documentary evidence proves that Federal Corporations, chartered at various points in the United States, have been created in readiness to take the place of all business activities of the country."

† Sidney Thompson, Fairchilds Fellow, Harvard University Law School.