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REVIEWS

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REVIEWS


The virtues and the defects of Mr. Sunderland's little book are all summed up in its title; this is a very brief history, and though it is exceedingly good so far as it goes, it of necessity ignores or gives scant treatment to many things which should be thoroughly discussed.

It is an astonishing feat which Mr. Sunderland has performed in writing a history at all adequate in such a short compass. This reorganization lasted twelve years and the printed record alone—which is conspicuous mostly for its omissions—runs to 14,000 pages. Mr. Sunderland, who was counsel for the large Insurance Group of bondholders and later for the reorganization committee, has crowded into his 81 pages of text not only all the important facts of the reorganization but also a bit of the color and even some penetrating comments on the future legal significance of some of the decisions which these proceedings provoked.

Where Sunderland is particularly good is in his account of the long process by which a plan of reorganization was finally created and consummated, to which he devotes some fifty-six of his pages. The arguments of each of the innumerable parties before the ICC examiner, the Commission itself, and the District Court are rehearsed, and by giving us these arguments and developing the background to each of the decisions by the ICC and Judge Hincks on phases of the plan, Sunderland makes it possible to gauge more accurately which factors were most influential in the various decisions. And he gives a good explanation of the segregation and severance formulae on which railroad reorganization plans must be based. These formulae attempt to measure the value to a railroad system of various of its branches. Only in this way is it possible to tell how valuable an underlying mortgage, covering only a part of the system, may be, or whether a particular leased line is worth its rent. The segregation formula is merely a mathematical means of apportioning the system receipts and system expenses among the various divisions of the railroad. The severance formula assumes that a particular division is not part of the system but has gone on its own as an independent railroad, and determines how profitable it then would be and how much its loss would cut down the profits of the balance of the system. These formulae are basic to railroad reorganization, but almost no information on them is accessible to lawyers. Sunderland does a good job of telling what they are, and how they were used in the reorganization, even though one might wish for more detail as to the peculiar features of the formulae for the New Haven,

1. The only discussion of these formulae generally available seems to be Meck & Masten, Railroad Leases and Reorganization: I, 49 Yale L.J. 626 (1940), and Meck, Railroad Leases and Reorganization: II, 49 Yale L.J. 1401 (1940).
and may well question Sunderland's statement that severance formulae are based on an unrealistic assumption and are of dubious value.²

Another very valuable feature of this book is its explanation as to the political pressures that were at work toward the end of reorganization. As Congress moved toward passage of legislation for a simpler procedure of reorganization, the New Haven's reorganizers got quite scared, for fear all their labors of so many years would be undone. (It does not require much reading between the lines to guess that their fears were also based on the possibility that the dominant stockholder, the Pennsylvania Railroad, whose interest had been wiped out by the plan of reorganization, might be able to get back its interest in the New Haven by virtue of the legislation.) Thus one can almost hear Sunderland sighing with relief as he tells how President Truman exercised his pocket veto power on the bill. It now is becoming almost a commonplace for the courts to have to share with the politicians the burdens of reorganizing a railroad,³ and it is instructive to see the effect of political pressures in one concrete case.

Against the background of such accomplishment it smacks of caviling to call attention to the sins of omission which I think have been committed. But actually to point to these omissions is not to criticize Sunderland's book, but rather to indicate the need for a longer and fuller history of this interesting reorganization.

A more complete history is necessary because a thorough understanding of what was done to the New Haven is essential for anyone who intends to reorganize a railroad under Section 77 of the Bankruptcy Act. As Sunderland says, these proceedings "presented virtually every difficulty which can arise in the course of the rehabilitation of an enormously complex railroad organization." ⁴ The fourteen appeals to the Court of Appeals for the Second Circuit and the six appeals to the Supreme Court brought forth important answers to many of the most perplexing legal questions which Section 77 had created. And study of the technique developed to cope with the difficulties of the New Haven may save future reorganizers the long years of trial and error which were needed here.

Of course a requiem for Section 77 has already been sung.⁵ But con-

². P. 15.
³. A prime example is the reorganization of the Missouri Pacific, in which the Allegheny Corporation has frequently resorted to political pressures to try to keep their stock interest, even though the ICC and the courts have repeatedly found no equity for the common stockholders. The latest canto in this seventeen-year-old saga involves hearings scheduled by the Senate Commerce Committee for April, 1950 on a resolution introduced by twenty Senators complaining because the Commission's plan will wipe out the stockholders. Wall Street Journal, March 29, 1950, p. 2, col. 3. And the Baltimore & Ohio Railroad twice persuaded Congress to add a chapter to the Bankruptcy Act to authorize a "voluntary adjustment" of its obligations.
⁴. P. iii.
institutional doubts have cast a heavy shadow across the Railroad Readjustment Act, which had been thought to replace Old 77, and until the corpse of the older Act has been safely interred the New Haven reorganization is available as the case study par excellence of Section 77.

The most important deficiency of Sunderland's book is that the significant issues which were not directly connected with the author's main love, development of a plan, are considered in much too summary a manner to be very helpful. In a ten page chapter labelled "Some Significant Decisions In The New Haven Case" he tosses off the five big issues which are likely to be of most interest to reorganizers of other railroads. The first of these, the Connecticut Railway & Lighting Company litigation, involved whether or not damages for breach of a 999 year lease are provable as a claim under Section 77, and if so, what the measure of damages is. This issue went to the Supreme Court twice, and both of these decisions were severely attacked in the law reviews. Sunderland, though, does little more than describe the holdings in each of the seven court opinions and orders, without even attempting to describe or analyze the reasoning involved.

The so-called 88 Stations Case, another of those treated very briefly by Sunderland, caused a Supreme Court decision which stands as a landmark on the interrelationships of the Interstate Commerce Commission, the reorganization court, and the states during Section 77 proceedings. The Old Colony Railroad, a leased line of the New Haven operating around Boston, had been shown to be quite unprofitable. The trustees, hoping to cut down their losses there, asked the Massachusetts Department of Public Utilities to allow them to close 88 stations of the Old Colony. When that body failed to decide very promptly, the trustees went to the reorganization judge, who authorized the proposed curtailments. On appeal Justice Frankfurter wrote a quite scholarly opinion showing how not even the ICC has power over the intrastate activities of a carrier, except as part of a complete plan of reorganization for an insolvent road, and traced the positions of the Commission and the court to demonstrate that the function of a court in railroad reorganization is integrated with that of the Commission and that its powers cannot rise above that of the ICC. Thus he held that Judge Hincks had exceeded his powers here. Important considerations of policy, as well as


8. The earlier decision is criticized in case notes at 52 Harv. L. Rev. 682, 39 Col. L. Rev. 302, and 6 U. of Chi. L. Rev. 695 (1939), while the later decision is discussed at 26 Cornell L.Q. 702 and 41 Col. L. Rev. 750 (1941).

law, were resolved in Frankfurter's decision, but one will not find these in the account in this book. 10

Another important issue which Sunderland slights is the treatment of claims of banks which held notes secured by collateral. By Order No. 1 of the reorganization, holders of collateral pledged by the New Haven were enjoined from disposing of it, in line with the rule of the Rock Island case. 11 The collateral held by these banks, largely stock of lines leased by the New Haven, more than covered the outstanding notes at the time of Order No. 1, but when the leases in question were rejected it took a drastic fall. The second circuit held when that the value of the collateral was less than the amount of the notes, the injunction must be dissolved, since the New Haven no longer had any equity in the collateral. 12 And in a later decision, the appellate court said that the banks were entitled to damages for the loss they suffered by not being able to sell their collateral earlier, on the theory that the loss should be borne by the parties for whose benefit the injunction was issued. 13 Here again Sunderland tells us what happened, but without explaining why, or considering whether it was wise or unwise. And he makes no effort to decide what course of action future reorganizers should take to avoid these perils.

The same things may be said of the other two large issues which Sunderland considers only briefly. One involved the reorganization of the Boston & Providence Railroad, whose lines were leased by the Old Colony. After the leases were disaffirmed, the New Haven operated both the Old Colony and the B & P for their accounts, in accordance with Section 77(c)(6) of the Bankruptcy Act. Yet when the losses which the New Haven suffered for the B & P's account were held by Judge Hincks to be a prior lien against that railroad, its trustees appealed on the ground that the B & P was in reorganization in Massachusetts, and that the Massachusetts court had exclusive jurisdiction over all matters concerning it. This issue, too, produced a Supreme Court opinion of much importance, the Court holding against the

10. One does find them in Meck & Masten, supra note 1, at 657, and in the following case notes: 28 Geo. L.J. 369 (1939); 8 Geo. Wash. L. Rev. 988 (1940); 35 Ill. L. Rev. 105 (1940); 14 Temp. L.Q. 274 (1941). A quite lively account of the fight by the people in the area affected to keep their railroad service is Rood, Protecting the User Interest in Railroad Reorganization, 7 Law & Contemp. Probs. 495 (1940). Although it does not touch directly on the problem presented by this case, Cherington, The Regulation of Railroad Abandonments (1948), is a good source for a broad policy orientation into this matter. New England, in particular, is discussed at 107.


trustees. This opinion deserves careful analysis, particularly since it is almost the only opinion in all these long proceedings which seems to have been approved by legal scholars. The last issue which Sunderland includes in his chapter on significant litigation is somewhat similar: it involves the question of whether Judge Hincks abused his discretion in permitting the Old Colony trustees to bring a suit, of great importance to the reorganization, in a Massachusetts state court, rather than in his court. This well exemplifies the danger of "brief histories"; the result of this litigation is given us in twenty-five words without any statement of the reasoning involved.

There are many other important things one wants to know about the New Haven reorganization which this book does not tell, but even to state the issues with the detail they deserve would make this review longer than the brief-history. One omission which particularly disturbed me was the lack of a history as to why the New Haven went broke. These circumstances have been well catalogued elsewhere, but at least a summary of their highlights would be very valuable here. Thus, to understand the difficulties which the leased lines caused in this reorganization, a reader should know that these lines often were not justified economically, and were only leased by the New Haven as part of a sordid drive for monopoly power. A sound reorganization would have required that these lines be relentlessly pruned from the New Haven, but without the historical background, the reader is likely to think that they must have had some importance as part of the New Haven, and merely needed their rentals scaled down.

The aftermath of the reorganization should also have been examined, although of course Sunderland’s book was too early to detect the trends which are now so painfully apparent. The most devastating criticism of this reorganization cannot be made by a legal scholar, but it is apparent from a glance at the quotation of New Haven securities on the stock exchange. The ICC and judges can talk as long as they like in their efforts to harmonize the distribution of securities with the absolute priority standard to which they are required to adhere. The fact remains that more than two years after the reorganization was consummated, a period which should have allowed at least moderate seasoning of the new securities, a holder of one of the old First and Refunding $1000 bonds has a package of new securities which the

14. The decision is Warren v. Palmer, 310 U.S. 132 (1940). It held that § 77(c)(6) displays a congressional intent to give the lessee's court full powers to carry out effectively its duty of continuing operation of the leased line, and that the fixing of a prior lien against the assets of the lessor is one of these needed powers. Meck, supra note 1, calls this decision "eminently justified both on grounds of precedent and for purely practical reasons."

15. P. 37: "the District Court did not have exclusive jurisdiction of the issues nor had he abused his discretion in refusing to enjoin the state court action." The case is Banhers Trust Co. v. Palmer, 109 F.2d 136 (2d Cir. 1940). West’s headnotes are not much less informative.

market regards as worth less than $450. The old First and Refundings were the principal senior security; junior lienholders should not have been allowed any interest until the First and Refundings received full compensation. Metaphysical notions of what is fair and equitable are little solace to the old bondholder who must take a 55% loss should he care to liquidate his holdings.\(^{17}\)

And the aftermath of the reorganization is interesting in spotlighting the need for safeguards against an allocation which makes it ludicrously easy for control of a railroad to be captured by new interests for a tiny investment.\(^{18}\) Apparently this failing will be enough to undo all the arduous work of the reorganizers. The new management, paying about as serious attention to the best interests of the New Haven as if it were a grandchild’s Lionel train, seem to have the road on a one way track back to the bankruptcy court.\(^{19}\)

Even on the development of the plan, which Sunderland treats most fully, I think something should have been said about the method, too involved to go into here, of allocating securities among the various classes of secured creditors which caused the New Haven plan to be hailed as “the closest approach to a ‘scientific’ method of distribution.”\(^{20}\) If this method was good, it deserves to be copied. If not, its inadequacies should be exposed.

Mr. Sunderland has been unusually successful in taking an objective view of these proceedings, rather than being influenced by the position which he represented throughout. The only place where a bit of prejudice seems to creep through is where he dismisses as “strained”\(^ {21}\) the renowned “woosh-woosh” dissent of Judge Jerome Frank in the court of appeals decision which finally cleared the way for the reorganization plan to be consummated.\(^ {22}\) Judge Frank criticized the Commission and the district court for

17. This failure to meet the absolute priority standard as realistically interpreted is not confined to the New Haven reorganization. Thus in the reorganization of the Milwaukee road the “Gary bonds,” a first mortgage on a small division which was earning about 75% of its fixed charges even on the basis of the patently inadequate segregation and severance formulae employed, were paid off 75% in preferred stock and 25% in common stock. *In re Chicago, M., St. P. & P. R.R.,* 36 F. Supp. 193, 213 (N.D. Ill. 1940), aff’d *sub nom.* Group of Institutional Investors v. Chicago, M., St. P. & P. R.R., 318 U.S. 523, 572-3 (1943). Claims junior to these bonds were allowed to participate in the reorganization. Yet the stock awarded in exchange for a $1000 bond has a market value (as of April 15, 1950) of only $245; and of course the holders are in a much poorer position with regard to income and liquidation than when they held bonds.

18. An interesting, if uncritical, account of how control was obtained by a Boston group is *Capture of the New Haven*, Fortune, April, 1949, p. 86.


21. P. 73.

having first accepted a compromise of the parties on a particular issue, rather than using their independent judgment as to what the parties should get, and then disobeying an explicit mandate of the court of appeals 23 by coming back after reconsideration with exactly the same figure and a mass of doubletalk to try and make it appear to be an independent valuation. Mr. Sunderland was a member of the committee which worked out the compromise in question, so that his distaste for Judge Frank's opinion is understandable. Yet the issue involved is fundamental enough as to require a more complete statement of the case than Sunderland makes before dismissing the dissent so cavalierly.

There is much else that could be mentioned, that one would like to see studied and said about the New Haven reorganization. But despite all that is unsaid, it is sure that no one fortunate enough to have access to Sunderland's book will ever again try to understand the New Haven proceedings without it.

Charles Alan Wright†


Though modestly regarded as primarily for students, Mr. Fifoot's book doubtless will be read quite as often, at least in the United States, by teachers, particularly teachers of contracts, torts and procedure. It presents the cases and materials out of which tort and contract history must be written, divided of necessity into sections dictated by the forms of action, each prefaced by a short but illuminating commentary that serves both as a context for the sources and as a synthesis of them. Thus the actions of debt, covenant, account and assumpsit make up the contract portion of the book; nuisance, detinue, trespass, case, trover, conversion and defamation comprise that devoted to tort. The old veterans of the Year Books and the black-letter reports, whose names have long been familiar, make their expected appearances, though not always in their expected places nor always in support of the propositions for which they usually are cited. Mr. Fifoot's learning has turned them all, with marked success, into English, a boon to the reader unable or unwilling to cope with the language of the unedited Year Books, and he has added to them some new cases hitherto overlooked and others from sources that have only recently become available. The cases are well chosen, the materials apt, but it is primarily the narratives, which range far beyond the sources printed, that give the book its value and make it an unusually impressive and most useful work.


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It may be said at once that Mr. Fifoot does not shrink from breaking a lance with foemen of substantial stature. The views of Ames and Holdsworth on the connection between Westminster II, ca. 24, and trespass on the case are examined and rejected. Ames’s characterization of detinue as a contractual action is recognized only to be put aside. Professor Woodbine’s attempt to find the origins of the action of trespass in the assize of novel disseisin is subjected to pointed criticism and Holmes’s view of the strict liability of the bailee, though approved by Holdsworth, is substantially modified. Mr. Fifoot’s disagreements are not undertaken lightly. The views of his predecessors are examined with care and fairly summarized, the difficulties set out succinctly, and his own views stated as clearly as the sources permit. These are not always new, for a book that must follow paths so well worn, over which so many have already trodden, must very often merely confirm conclusions reached earlier. In particular, Professor Plucknett’s findings receive striking corroboration. But they are, on the whole, the most plausible explanations yet advanced on admittedly vexed questions. As such, though there may be some disagreement in detail, they cannot fail to find a warm welcome.

My own objection to Mr. Fifoot’s book arises out of his treatment of contract, though it is only fair to say that his view is widely, though in my opinion incorrectly, held. The slow emergence of contract from tort and the haltingly painful development of assumpsit in the sixteenth and seventeenth centuries pose questions of importance for both the historian and the sociological jurist. There is no problem, of course, if one assumes that medieval England was economically backward and Tudor commercial activity confined to the dealings of petty traders purchasing twenty quarters of barley or extracting promises to pay a £5 debt. But if the existence of a well-advanced and sophisticated commercial society is recognized, as it must be, the rudimentary nature of contract, long after Strangeborough v. Warner and Slade’s Case, is an awkward stumbling block to the acceptance of any theory of roughly concomitant social and legal change. The lag is even more serious when it is remembered that in the next century Blackstone’s treatment of the subject did not quite fill one chapter and Lord Mansfield had to draw heavily on Pothier, chancery practices, mercantile usage and natural law.

Mr. Fifoot, if I understand him correctly, is inclined to see the lag eliminated by 1600, if not earlier. But surely this makes too much of the progress that had been made and disregards the long road and the many difficulties that still lay ahead. One may say that by 1550 “the modern conception of a contract had in essence been formulated,” but that date, associated with the emergence of assumpsit as a non-delictual remedy, marks only the end of a chapter and Mr. Kahn-Freund must be nearer the truth when he speaks of the sixteenth, seventeenth and eighteenth century evolution of assumpsit into a law of contracts for the modern age. Mr. Fifoot’s view, with its minimization of subsequent developments, is colored, it seems to me, by a wish...
to reconcile the stage to which contract theory had reached by 1600 with the undoubted business and commercial activity of sixteenth century England. A similar reconciliation may be reached by recognizing the deficiencies of the common law of contract and emphasizing the extent to which the needs of commerce were served in local courts. Both views have their advocates, but neither is particularly helpful, for sixteenth-century contract law is no direct index to the expanding commercial activity of the age nor need the development of assumpsit be correlated with that expansion.

It can hardly be denied that the large-scale economic life of the century is not reflected in the unsophisticated cases that together comprise the history of contracts at common law. Their names are not those of the prominent traders, the London capitalists and financiers of Elizabethan and Jacobean days, nor are the transactions described those of the experienced dealer or the substantial business man. City men and their numerous smaller colleagues used the bond, the recognisance, or the statute merchant or staple, with which their predecessors had been provided long ago. So did lawyers and judges, many of whom were actively engaged in a variety of business enterprises. There was no advantage in securing, in return for a lease, A's promise to rebuild a tenement, barn and watermill, if one might have A's bond in the sum of £100 defeasible on such rebuilding. Similarly, agreements executory on both sides were effected by the exchange of bonds defeasible on the performance of acts, or by the recognition of reciprocal recognisances, statutes merchant or staple similarly defeasible. Such transactions already were appearing on the statute merchant rolls as early as 1400.

An accurate index to the commercial activity of the sixteenth century is afforded, not by the relatively few contract cases reported in the books, but by the overwhelmingly large number of actions of debt on an obligation entered on the plea-rolls. The ubiquitous bond, though its form is the inherited, largely self-executing form of the Middle Ages, disguised agreements of all kinds; nor did this form soon change. Long after the liberating principle "a promise against a promise will maintain an action on the case" had been enunciated, a chancery reporter observed that if relief on forfeited bonds could not be obtained in chancery "men would do that by covenant which now they do by bond." Defences to bonds at common law being few, commercial contract cases flowed naturally to chancery, leaving only a thin and erratic stream of highly miscellaneous cases to the common law courts. It is not surprising, therefore, that progress was slow or that their arrangement into a coherent whole should still be awaited in the middle eighteenth century. Professor Plucknett has remarked that the backwardness of the common law was due to the absence of a sufficiently large and related mass of data, and if that is so, we may dispose of that vaguest of vague explanations that finds common law judges reluctant to expand the domain of enforceable contract and sees them, "obsessed by the ever present fear of dynastic change and intimately acquainted with the weakness of the central government," shrinking from any final and decisive step.
Unlike the history of real property, the history of contracts is a product of the nineteenth century and bears still the unmistakable marks of its origin. The "mystery of consideration" which so absorbed Victorian lawyers and their efforts to find a precise formula in the old cases throws rather more light on their interests and on the questions asked in their age than it does on the problems faced by judges in Elizabeth's reign. Similarly, the identification of contracts and commerce reflects the conditions of the nineteenth century, not those of the sixteenth. The correlation of these largely unconnected developments has taxed the ingenuity of countless teachers and has stood as an unexpressed major premise back of most writings on contract history. The recognition of their independence will do much to loosen the frame on which the history of contracts has been distorted.

S. E. Thorne


Two years ago, in his Public Organization of Electric Power, Dr. Bauer presented the case for public ownership, which he favors. Now, with even-handed justice, he states, or rather re-states, the conditions under which regulated private utilities can effectively serve the community. The present work, to be sure, is not limited to electric utilities, but its emphasis is on them. This comes about because the proposals made are workable only where they can be brought to bear separately on the rates and returns of each company under regulation, with respect to its local or regional operations. Interregional means of communication or transportation, especially those like the railroads which encounter competition both within and without the industry, present different problems. For example, it is not feasible to set varying rates for the several airlines running between New York and Chicago; and it also happens that the interregional utilities include the unprofitable ones, especially telegraphs and railroads. Dr. Bauer's program requires a continuing profit potential, such as is usually found in the local monopolies of electricity, gas, water, and telephone service. Urban transportation, another local monopoly, is currently the puny member of the family; Dr. Bauer promises us a separate monograph on its problems. After making these classifications and exceptions we wind up, after all, with most of the book concentrated on the electric utilities.

The requirements for effective regulation are certainly worth restating at this time, because only in the past decade have decisions of the United States Supreme Court removed a whole covey of constitutional albatrosses from around the regulators' necks. The promise of the Hope case, however, is far from fulfillment. Even though "fair return on fair value" is no longer

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a part of the Federal Constitution, state agencies must all be given a new gospel of state power. It is the purpose of this book to bring the evangelical to the heathen: to the state courts, still contemplating the navel of due process though the cord to the mother court has withered; to the legislatures, presumably satisfied with things as they are; and to the commissions, sunk in routine and ineptitude.

Dr. Bauer's program has the merit of stark simplicity. He would fix, once and for all, a prudent investment rate base for each company, building on the fairly integrated units the Public Utility Holding Company Act has given us. Rates would then be set to yield a return just adequate to compensate present investors, as their equities emerged from the rate-base calculations, and to attract new money when needed. For the profitable utilities that he is concerned with, payments at this rate would be substantially guaranteed.

With such a near-guarantee, how high would the return have to be?

Little if any more, we are told, than current returns on the fixed obligations, bonds and preferred stock, that make up the bulk of public utility financing. These obligations have been protected, of course, by a cushion of common which bore the risks of uncertainty. But under precise regulation, the author maintains, there need be no speculative element at all in public utility investment. The chief risk the investor has borne in the recent past has been the risk of imprecise regulation. Most of the time common stockholders have been able to earn handsome returns on their (unwatered) investment, because of the difficulties and delays attending rate reductions. At other times, however, the same factors that have impeded reductions have made rate increases almost equally uncertain and delayed. There has existed, consequently, a real risk for equity money.

It has been an easy risk to take because the gains have far outweighed the losses, and the net, even though it exceeded "a fair return on a fair value" has belonged to the stockholders, not to the ratepayers. Dr. Bauer would put an end to all that. Emphasizing the public character of utility enterprises, he would have done with analogies to private business, and would segregate any earnings in excess of the guaranteed return in a "rate equalization account." In fact, regulation would aim to build up such a fund for the sake of smoothing out dividend payments without frequent rate adjustments. The important change in legal theory would be that the sometime surplus, now the "rate equalization account," would be under commission, not management, control.

The logic of a fixed return to all investors obliterates any meaningful distinction between bonds, preferred stock, and common. If existing capitalizations are not to be drastically revised, some differences in rates of return might still be recognized—say 3% to bonds, 4% to preferred, and 5% to common. This would compensate the stockholders for bearing the brunt of any long-term decline in earning capacity, such as might occur if atomic energy becomes a competitor instead of an energy source for the electric
power industry. There is no important reason, however, why this ultimate
risk of decay should not be borne equally by all future investors. It would
be the one remaining element of uncertainty, reflected in permissible earnings
so as to make them somewhat higher than yields on long-term governments.
The one future class of securities might consist entirely of common stock, or,
if our tax laws persist in favoring debt by treating interest payments as
expense, it might just as well consist entirely of bonds.¹

In any case the investor would be entitled to a fixed return and only a
fixed return, while depreciation and related accounts would be firmly ruled
to prevent the investor's equity from exceeding his original investment.

To make such an orderly elysium possible in a disorderly world, many
other improvements of public control would be necessary. First among them
would be revitalized commissions. These administrators would have to
direct far more energy and power than they now exhibit in policing consol-
idations, security issues, construction programs, accounting, significant
operating decisions, executive salaries, wages, discriminatory rates, and
service standards. Some of these may be fields the commissions have always
tried to till. If so, they have yielded little fruit, and in fact statutory horse-
power has often been lacking even if there was a willing hand at the plough.

The result our author contemplates would be a sterilized, dedicated in-
dustry. In it the investors would be nothing more than monetary milch
cows, while management, freed of the importunities of the common, would
work in happy harmony with the commissions for the public weal. To those
who fear that the proposed degree of regulation would snuff out the flame
of free enterprise, Dr. Bauer replies briskly that the utilities are not free
enterprise anyhow, they are monopolies, and public callings to boot. To
those who suspect that the proposed degree of regulation amounts to nothing
less than a wasteful duplication of managerial energy—every move the
companies made the commission would try de novo—there is a silent nod in
the direction of government operation as an economy measure. To those
he does not have much love anyhow. The professionals of all sorts who keep
the dynamos turning and the street lights burning are spurred by an instinct
of workmanship, not by the dividend rate.

Leaving detailed criticism to the Edison Institute, I should like to enter
one major caveat to Dr. Bauer's proposals. They foresee and indeed require
a degree of stability which is not of this cyclical world. Even if one is sure
that government will never let us sink again into the valley of the 'thirties,
another depression of any magnitude may catch the electric power industry
in maturity, rather than still growing as it was in the last depression. In-
dustry income may in the future be more sensitive to declines in national

¹ Dr. Bauer's suggestion; the Internal Revenue probably would not go along with it.
income than it was in its youth. The accumulation of dividend reserves sufficient to level off net income into the remote future is a much more complex matter than is suggested by the two pages the book devotes to it.\footnote{2}

And, to take one legal look at what is subtitled "A Definite Administrative Program", I think Dr. Bauer underrates the obstacles which state courts might throw in the path of some of his proposals, even if a legislature enacted the model statute he includes as an appendix. If a court can breathe life into the Ben Avon rule of judicial trial de novo on issues of "confiscation," as the New York Court of Appeals did three years ago,\footnote{3} there are still enormous potentialities for judicial obstruction.

Now, having presented the book's main theses, I hope fairly, I am obliged to turn and rend it for being vague and repetitious. The vagueness lies in the lack of illustration and example. It was perhaps an unintended by-product of the author's desire to eschew documentation, an indulgence to which his long expert career entitles him. He apologizes for the repetition by saying that it is intended to help those for whom the book is written—nontechnical people. They will not read it. At least they will not read it through, unless they are remarkably patient, or have promised to write a review and have scruples. That the book is diffuse and thus dull in its impact is a pity. It is hard to stir up much excitement nowadays about regulation. If we are drifting into socialism, it may be because we are unaware that regulation (like competition) has never really been tried. The ideas in this book, familiar as most of them may be to experts, could have been organized into a systematic and at the same time a trenchant pamphlet. But without the cutting edge, no sparks fly.

Ralph S. Brown, Jr.†


For generations, it has been common practice to deplore the South but to make little attempt to know it. It has been imagined, rather than thought of, and the imaginings have been stereotypes, many of them mutually contradictory. There was for example, as Professor Key points out, the Southern statesman who was fond of the Constitution, a balanced budget and bourbon. He was kindly. Then there was the fiendishly reactionary Southerner who hated little people of all races and liked Northern financiers.

2. See, for example, the discussion in chapter 19 of Tract, Economics of Public Utilities (1947), an excellent textbook curiously omitted from the "Selected Bibliography" attached to the work under review.


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Each of these gentlemen has lived and lives today. But neither is "the Southern politician."

This doesn't mean that Key finds no theme or consistency in Southern politics. He emphatically does. But he finds it through careful study of the facts and figures, not by contemplation of his own memory, imagination and prejudices. His study is a masterful lesson in how to write a convincing, scholarly and witty survey of politics. And it is an invaluable handbook for anyone who wants to think, not emote, about the South.

As Key sees it, you can make one large generalization about the eleven Southern states: all of them have—depending on the way you look at it—a Negro problem or a White problem. This "problem," he makes clear, has shaped the South's destiny for a century. During that period, the counties with the highest Negro populations—40% Negro and higher—have dominated Southern politics. These counties led the South into the Civil War. They were largely, although not entirely, responsible for the disfranchisement of the Negroes. They have kept racial tension alive, and with it the South's fierce fight against outside attempts at solving the "problem." In this "sort of sublimated foreign war," the South has had to present a united front to the rest of the country, and that front has been the Democratic party, the "solid South."

But, Key finds, unity on racism is about as far as Southern uniformity goes. It produces a one-party system locally, and almost invariably sends men labelled "Democrats" to Washington. But Mississippi's politics are quite unlike those of Texas, and Senators Bilbo and "Cotton Ed" Smith voted differently on almost everything except civil rights legislation and resolutions endorsing Mother.

Key carefully examines both the local and the national scenes. In roughly the first half of the book, he goes from state to state analyzing their politics. Aside from the fact that each state has but one major party, there are wide variations among the eleven systems. In Florida, for example, every man is for himself. No primary candidate supports a candidate for another office, for fear of losing those of his own supporters who despise the other man. In Virginia, by contrast, the Byrd machine regularly runs slates in the primaries, and the machine's enemies usually unite behind their own futile list. Notwithstanding the variations, all eleven systems—tested by the principle that the purpose of elections is having the voters make broad policy decisions—work badly.

According to the orthodox conception of the two-party system, Party One stays in power until its mistakes persuade enough of the people who voted for it to vote for Party Two, whereupon Party Two gets in and corrects Party One's mistakes. One of Party Two's major jobs, while it is "out," is to persuade people that Party One is making mistakes. Another job is to exist, so that when the variable voters wish to switch, there will be an organization available in which they can effectively unite to rectify Party One's errors. Merely having a two-party system does not guarantee
that these jobs will get done or that the voters will be able to understand and vote effectively on public issues. But the Southern one-party system makes it a cinch that the jobs will not be done. There is no regular criticism of the group in power, nor is there a political organization which the discontented can vote for in the belief that it understands and will alleviate their discontent. The result is that real policy issues can be formulated only with difficulty, and decision by the voters is almost impossible.

Making things worse is the fact that so many Southerners don't vote in either primaries or general elections. Calculated disfranchisement—poll taxes, literacy tests and the Ku Klux Klan—is not the entire answer. There is at least the additional explanation that Southern voters don't get the stimulus that the presidential carnival gives to the rest of the nation's voters every four years. In any event, the non-voting Southerner makes it even more likely that Southern politics will be devoid of real issues, for the non-voter is more often poor than prosperous, and when he consistently fails to vote, the politicians can ignore his normal wish for social legislation.

On the role of the South in national politics, Key limits himself to almost one problem: is it true what they say about a voting alliance between the Southern Democrats and the Republicans? Analyzing roll calls from seven sessions of the Senate and four sessions of the House between 1933 and 1945, he concludes that the Southern Democrats have been maligned: civil rights issues aside, they followed their national party leaders and voted against the majority of the Republicans pretty regularly. True, they tended to join the Republicans on farm votes and labor matters, but these figures only indicate, according to Key, that the real unity is not that of Southern Democrats and Republicans, but of Southern and Northern farm interests.

I have no data with which to challenge these conclusions. Quite possibly, I am falling back on a personal stereotype. But I suspect that Key's figures here may be misleading. First, he has examined a vast number of roll calls, without making any real attempt at discovering which were most important. Second, his roll calls are in each instance taken from the first session of a Congress. Considering the number of straight party-line decisions taken during a first, as opposed to a second session, this seems questionable procedure. Moreover, party discipline tends to be tighter during the session immediately following a presidential election, owing to the patronage which is waiting to be dispensed. Finally, I think this a situation in which figures, as figures, lie or at least conceal the truth. For the strength of the Southern bloc in Congress lies not alone in the votes it can muster but perhaps equally in the strength which seniority gives to Southerners in congressional committees. Key attempts no analysis of the extent to which this weapon has favored Southern-Democrat-Republican mutual desires.

The balance of the book is almost a handbook for the labor political action groups which are today working in the South. Key discusses in detail the way elections are conducted and financed, the mechanism of disfranchisement, the poll tax, literacy tests, the white primary. He nails conclusively
the old nonsense that the poll tax has disfranchised the Negro alone and then doubles back by pointing out that if all poll taxes were repealed it probably wouldn’t make a great difference in the size of the electorate—non-voting is a popular habit, and little party machinery exists to get out the vote.

As the last example indicates, this book is loaded with indirect blasts at the easy way out. When you get through reading Key’s careful analysis, his comprehensible statistics and the results of his on-the-spot interviews with hundreds of Southern political figures, you may begin to suspect that there is no such thing as an easy solution for the South’s political problems. Key offers none of his own, for he conceives his job to be the preliminary one of identifying the problems. As far as the record makes possible, he has done the job brilliantly. His performance is, in fact, so encyclopedic that it’s hard to pick out omissions. I should have liked some indication of the amount of Northern money—both management and union—in Southern elections. And while the book specifically spurns direct criticism of possible solutions, I should have appreciated an exception for discussion of the Lodge-Gossett Amendment. But these omissions are minor in light of the general excellence of the study.

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