suggested amendment is enacted, there is thus little doubt that the courts will sustain it.

In International Refugee Organization v. Republic Steamship Corp., 92 F. Supp. 674 (N.D. Cal. 1950), see note 10 supra, Judge Coleman held merely that Congress had not intended the International Organizations Immunities Act to permit international organizations to sue in federal court, not that Congress could not have made such a grant had it intended to do so.
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"The Bar is in a peculiarly strategic position to provide leadership in solving the problem of reconciling our security measures with the essentials of our heritage of freedom. Its tradition of leadership in public affairs and devotion to civil liberties, together with its understanding of the importance of fair procedure in the maintenance of liberties, place special responsibilities upon it."

This challenge is from an eloquent letter addressed to a section of the American Bar Association at its 1951 convention by a well-known layman, Harry S. Truman. The section meeting, like the book here under review, was concerned with "The Protection of Individual Rights and Government Security in Times of Stress." If the meeting had done nothing more than convene, read the President's letter, and adjourn, it would have been worthwhile. For some listeners might have been stirred to take on their special responsibilities. They might, as the President suggested, give "searching scrutiny" to such activities as the security and loyalty programs of his administration. They might, as he urged with respect to the current sedition prosecutions, even revive "the notable tradition of willingness to protect the rights of the accused" to "adequate representation by competent counsel."

For these manful undertakings Professor Lasswell's essay would offer little direct guidance. Its concern is not, primarily, with outrages of the moment, like teachers' and lawyers' loyalty oaths, persecution by Congressional committees, and McCarthyism in general. Alan Barth's The Loyalty of Free Men, recently reviewed in these pages, is a better guide to these dark corners of American life. Lasswell's objective is farther reaching. He recognizes, and in an opening chapter boldly sketches, the intensity and continuing character of the threat to national security posed by Russian communism. Our reaction to one danger creates another one: the risk that we will ourselves fashion a garrison-police state. The outlines of such a state Lasswell was one of the first to foresee; indeed, the term "garrison state" was his coinage. It is marked by a decline in information and an increase in suspicion and intolerance, by a decline in civilian authority and the ascendance of the military. Some of its aspects, such as the diversion of resources to armaments, are unavoidable. The problem that Lasswell poses is how to create an effective garrison without repressing individual freedom. He proposes that every national security measure should be critically examined,

1. N.Y. Times, Sept. 19, 1951, p. 10, col. 2. I hope that Bar Association Journals will give this letter the attention it deserves by reprinting it in full.
2. 60 Yale L.J. 744 (1951).
with a view to minimizing whatever danger it holds for four essentials of freedom: civilian supremacy in government, freedom of information, individual civil liberties, and a free rather than a controlled economy.

Subsequent chapters advance a great variety of proposals to be carried out by or on behalf of the Presidency, the Congress, and the Courts. The flavor of the mixture will perhaps best be conveyed to the legal reader by the chapter on the courts, though it should be said that the patent resistance of the legal system to innovation rather curbs the author's spirited inventiveness. Nevertheless, with the acknowledged help of a legal advisor, Lasswell is able to review in a few pages the prospects for continued vitality of individual protection based on due process and the Bill of Rights, and the less encouraging record of the Supreme Court in the face of abusive martial law or military government. About the only affirmative recommendation in this chapter—and this makes it not at all typical of the rest of the book—is for a strengthening of the Public Defender institution. The hope is that cases involving invasions of freedom will get to court sooner and in better shape than when insignificant victims of autocracy have to fight their own battles. The shortcomings of the adversary process in public issues of this sort are illustrated by the Hawaiian martial law cases in which, though able counsel were involved, the decision that the civilian courts had been wrongly closed the day after Pearl Harbor was not reached until the war was over.

The final chapter is a barrage of suggestions about what the public can do in the way of councils, committees, inquiries and general concern toward achieving the desired balance between security and freedom.

I do not propose to embark on a critical analysis of the proposals. To do so would be unbecoming, not to say imprudent, in view of my association with the author. The book bears the imprimatur of the Committee for Economic Development, which means that the author, though he had complete freedom of expression, had the benefit of criticisms from a competent staff and from an advisory committee, composed mostly of the alert businessmen who spark the CED. I would prefer to emphasize the significance of my colleague's essay for readers of this Journal, and especially for Yale men in law.

The lawyer's special responsibilities in this field are most readily awakened by instances of individual oppression. What constitutes oppression, and what on the contrary is an endurable sacrifice for security, is determined partly by standards of decency that lawyers consider immutable, and partly by the way in which government institutions are regarded. To illustrate, some lawyers may consider eligibility for government employment of little consequence to the employee or to the rest of us. Accordingly, they may be indifferent to abuses of due process in government employees' loyalty cases that they would not tolerate for a moment in an action to abate a client's pigpen. Lasswell, as I have indicated, says little about loyalty checks; and by putting problems of individual freedom in a matrix of government-as-a-whole, he makes it clear to us that we should not think about the issues solely in terms of beating down
the menacing state. Efficiency and imagination in government are helpful in fostering freedom as well as security. Thus, the lawyer needs to be professionally concerned with the organization of Congress. In addition, it is familiar flattery to remind the lawyer of his power and prestige as a citizen. As Lasswell remarks, it is more than a joke to say we have a government of lawyers, not of men. His book is a concise reminder of some of the things we should be concerned (for example) about as citizens.

I would further commend this book to Yale men in law as an introduction to Harold Lasswell. His presence on our faculty for five years, preceded by lectureships for another five, has doubtless aroused the curiosity even of those who accept with equanimity the notion that a non-lawyer is good tonic for a law school. If their curiosity has carried them to the point of examining some others of Lasswell's recent writings, they may have been repelled. Lasswell's first training was in political science, and he still carries his card and holds forth at their meetings. Then he studied psychiatry seriously enough to be accepted as a peer in respectable psychiatric circles. Some of his books are the product of this union. A pioneering interest in propaganda and later in the whole area of communication got him on close speaking terms with psychology, anthropology, and sociology. He can also understand economists, though they do not always understand him. The point of this recital is that all these disciplines, just like law, have their own jargon. Lasswell habitually talks and writes—in academic circles—a mixture of two of these private languages, with a generous lacing of about four others. The result, especially since it usually deals with pretty weighty concepts, is sometimes a little difficult even for academic colleagues, if they speak only law and colloquial English. But some of us have made the effort, and find him an invaluable colleague.

First, Lasswell is a walking Encyclopedia of Social Science, a useful attribute in a school that professes to view law as a social study. Of more importance, he has a catalytic effect in the fields in which he collaborates in teaching. They turn out to be no more bizarre—fancy catalog titles aside—than Criminal Law and Administration, Jurisprudence, International Law and Organization, and Press and Radio Law.

To these enterprises—and to many other far-flung projects—Lasswell brings an urgent set of convictions about the need for understanding and meeting the world crisis by understanding and strengthening our own democratic institutions. His recent book is a set of practical propositions, almost a handbook, for that job. I almost neglected to say why, for Yale lawyers, it is a good introduction to Lasswell. It is in English.

Ralph S. Brown, Jr.†

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3. Partly because, characteristically, he read and reviewed each volume of the Encyclopedia of the Social Sciences as it appeared.

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Professor Frey’s present revision of his 1935 case-book on Business Associations has resulted in the publication of a single volume compilation of materials which is both thoroughly competent and outstandingly comprehensive. Its very comprehensiveness is somewhat disconcerting, at least to the instructor who is familiar with and perhaps restricted to the teaching of the traditional three or four semester hour course in Corporation Law. Nevertheless, the author’s arrangement of his materials seems to permit numerous and substantial omissions when necessary without a resultant distortion in presentation in those areas in corporation or partnership law which must be subjected to brief treatment in the classroom under a limited curriculum. This susceptibility to selection and omission results in a flexibility which is one of the publication’s chief assets as a teaching tool. Particular mention should also be made of the author’s excellent presentation in the expanding field of public law within the last two decades by the inclusion of both statutory and regulatory materials on the corporate activities of the Securities and Exchange Commission as well as the careful utilization of the many recent cases which have been decided during this period.

Before undertaking a detailed analysis of this edition, a few general observations regarding the materials offered and their manner of presentation appear to be appropriate. Within approximately 1400 pages the author has managed to include 280 principal cases for consideration in addition to extensive statutory and regulatory materials which still remain indispensable to an understanding of bare judicial determination. This is no mean accomplishment and is the result of only the most careful and thorough telescoping of both facts and opinion in the many cases reported. Another outstanding feature of this edition is the author’s frequent but restrained use of “pin point” law review references—a practice of which I heartily approve. It is my belief that many—if not most—law students are either intimidated or thoroughly annoyed by the prevalent practice of mass law review references following a principal case in many of the more recent case-books. All too frequently these mass references are only remotely connected with the subject under consideration in the principal case and more often tend to obscure rather than clarify the issues. Occasionally, Professor Frey utilizes stimulating notes and extended references to the periodicals on “fringe” or collateral issues; but more frequently he employs the refreshing and more persuasive technique of exciting the student’s interest by a direct reference to a note or comment on the principal case. For example, following the presentation of the opinion in the leading case of Clark v. Dodge et al. (p. 459) the author narrows his reference material to the following citation: “This case is noted in 36 Col. L. Rev. 836 (1936), 21 Minn. L. Rev. 103 (1936), 13 N.Y.U.L.Q. 585 (1936).” I am firmly convinced that the use of such “pin point” references will prove to be more effective in terms of teaching
method and classroom discussion than the orthodox practice of mass reference in foot-notes to all and sundry periodical materials bearing on the subject.

Similarly, the author achieves a neat balance for comparative study by the use of his statutory materials which are quoted appropriately throughout the volume. Despite the fact that we have many thousands of judicial opinions in this field, corporation law still remains basically statutory and the student should never lose sight of this fundamental fact. Professor Frey draws most heavily from the statutory law of Delaware, with isolated references to the statutes of Pennsylvania, Ohio and New York. Against this hodge-podge of legislative opportunism and patch-work correction of isolated judicial decision, there are presented appropriate sections of the more carefully considered California Corporation Code as well as the various Uniform Acts in selected fields. Out of this welter of comparative legislative policies, the student should gain a fairly accurate and realistic view of existing corporate law in those states which serve as the home for the vast majority of our corporations as well as the modern trend in those jurisdictions which have undertaken a thorough and judicious revision of their legislative policies with respect to corporate activities. The federal regulatory aspects of corporation law are admirably handled by the author in his excellent sections on the activities of the Securities and Exchange Commission.

Another departure from orthodox approach is the author’s effort to break away from the usual treatment of the traditional corporate legal concepts and relationships. Professor Frey in his preface states that his materials “are not focused either about legal concepts such as ‘de facto’, ‘ultra vires’, ‘authority’, ‘powers’, ‘estoppel’, or about relationships such as ‘director’, ‘shareholder’, or ‘creditor’”.

It is suggested that preoccupation with such concepts not only fails to stress the significance of the primary facts of the legal controversies “but also render it extremely difficult to develop the economic or social background of the problems since the successive cases, in such classifications, are factually isolated and have only a verbal or conceptual connecting link.” The author then states that the present volume utilizes the types of corporate transactions which may occur during the life history of any corporation as the principal basis for the classification of the materials and cases employed. Only time and experience with the volume in the classroom will reveal whether this new approach is a more effective one to an understanding of these admittedly basic corporate concepts. I am inclined to believe that Professor Frey’s transaction approach will prove to be a successful one. It has logic which is certain to appeal to the student and offers a challenge to the professor who is constantly searching for new and more effective methods of presentation.

1. Unfortunately, the Delaware Legislature undertook a substantial revision of its statutes relating to corporate activity after this volume went to press. Lawyer’s Weekly Report, § 3—Corporation News, July 23, 1951.
2. P. v.
3. Ibid.
To my mind the inclusion of partnership cases and materials in the present volume is a matter of some concern. Apparently the author's experience with the earlier edition has convinced him that the pairing of partnership law with corporations is a wise one. While I agree with Professor Frey that the law of partnerships does not warrant a separate course in the average law school curriculum, it by no means follows that it should be combined with the course in corporation law. This seems to be neither the time nor place to debate the issue; the merits and disadvantages of the combinations which grow out of the agency-partnership-corporation courses have been adequately considered elsewhere.

I have always felt that a combination of agency and partnership in one course offered the best opportunity for comparative analysis of similar concepts as well as an introduction to the more intricate representative relationship—the modern corporation. Professor Frey devotes 17 percent of his principal cases to partnership problems which are not segregated in a separate section or chapter. The partnership cases are scattered throughout the volume in order to develop a parallel consideration of the many legal problems of business associations which the author believes to be *sui generis*. In my opinion, the volume accomplishes its objective in this respect—the similarities between corporate problems and partnership concepts are skillfully developed. But I believe that Professor Frey has proved my point—much of the basic partnership law is omitted or lost in his adherence to a corporate parallel consideration. The student is expected to master these partnership concepts and coordinate them into the general scheme of representative relationships through his knowledge of agency problems. It would seem to be the better part of wisdom to recognize from the outset the real fundamental similarities which exist in the agency-partnership field and to avoid the crowding of unnecessary materials in a course which is even now so vast that many law schools feel compelled to add additional hours to their curricula in order to adequately cover its growing complexities.

As I have pointed out, Professor Frey's classification of materials is based upon a chronological-transaction concept. Commencing with the launching of the enterprise in the first chapter and concluding with solvent and insolvent dissolution in the final chapters, the author attempts to present cases and statutory materials governing the basic transactions with which any corporation might be involved during this life-death span of existence.

Chapter One dealing with the launching of the enterprise contains much of the traditional materials found in this area of corporate law. The author first undertakes an analysis of the attributes of the various types of business associations which lack one or more of the elements of corporateness. He then presents his statutory and case materials on the formation of the cor-

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4. P. vi.
poration, including a brief discussion of the "de facto" doctrine and the establishment of the initial management of the organization. The note and chart on the analysis of cases concerning defectively formed corporations with its resultant individual liability is very helpful in presenting the confusion of decision which has always existed in this area. Next there is a consideration of the association (whether corporate or otherwise) as an entity. I am inclined to believe that this section suffers from a too close adherence to the tradition of the corporate fiction which is gradually losing its utility, and often tends to confusion in other areas of corporate litigation such as minority control and federal jurisdiction. One also would expect to find in this section some slight recognition of the many tax problems which arise from relationships existing between parent and subsidiary corporations, as well as a more adequate consideration of the "Deep Rock doctrine".

Consideration is then given to the problems of partnership formation, including adequate references to the Uniform Partnership Act and the theory of "unintended" partnerships. The final sections of this chapter are devoted to a consideration of the effect of transactions prior to formation, including the liability of corporations for promoter contracts, the personal liability of the corporate promoter, the pre-incorporation subscription agreement and further references to similar partnership problems. The materials here presented are among the best in the entire volume—the selection of cases is excellent and the references to the Uniform Business Corporation Act and the Restatement of Business Associations provide challenging material for class discussion.

Chapter Two deals with problems relating to the issuance and transfer of corporate shares. After a short note on the incidents of the various classes of securities, the author then presents statutory and case materials on the liability of shareholders on post-incorporation subscriptions; the activities and authority of the Securities and Exchange Commission with respect to the public offering of securities; and finally, problems dealing with the transfer of shares. Within this area, the first section dealing with post-incorporation subscriptions is perhaps the least satisfactory. The selection of both statutory and case materials appears to fall short of an acceptable cross-section. While the pertinent sections of the Delaware statutes are quoted at some length and the opinions in Handley v. Stutz. Clinton Mining

7. "Furthermore, a realistic approach toward law is tending to substitute for the ancient theory that a fictitious person exists apart from the members the theory that the members themselves have a dual legal personality." Stevens on Corporations 49 (1949).
8. See for example, Stevens and Larson, Cases and Materials on the Law of Corporations (1947) which I believe has too much taxation materials at various points.
10. P. 190.
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& Mineral Co. v. Jamison,11 and Bodell et al. v. General Gas & Electric Corporation12 are adequately reported, the historical growth of the shareholder's liability for stated par value is at least partially lost by the lack of any reference to the decisions in Wood v. Dunn13, Courney v. Georger,14 Hospes v. Northwestern Mfg. Co.,15 DuPont et al. v. Ball et al.,16 as well as the wholly irreconcilable Stone v. Young17 and Brockett et al. v. Winkle Terra Cotta Co.18 Similarly, the materials on no par stock issuance and liability seem to be unnecessarily meagre at certain points. On the other hand, the second section dealing with the activities of the Securities and Exchange Commission is documented with excellent materials and organized in the most effective manner. My only suggestion here would be a condensation or summation of the many pages of statutory references which the author quotes verbatim, from both the Securities Act of 1933 and the Securities Exchange Act of 1934.19 There are few case books in the corporation law field which can boast of such effective treatment of this aspect of public regulation, which, it must be admitted, is becoming of increasing significance. The final section in this chapter, devoted to the transfer of shares, is likewise the result of careful selection and comprehensive treatment with adequate reference to the Uniform Stock Transfer Act in the case materials and in Appendix C.20 On the whole, both professor and student should find this chapter reasonably adequate and well integrated.

The control and selection of management is dealt with in Chapter Three. The order of presentation is familiar and the materials are for the most part well selected. First, the author considers the devices and transactions which affect control of the corporation, including non-voting shares, cumulative voting, shareholder's voting agreements, pooling agreements, voting trusts and various restrictions on the transfer of shares. Then there follow appropriate statutory and textual materials on the exercise of this control over the corporate enterprise with special emphasis on the regulations of the Securities and Exchange Commission regarding the solicitation of proxies. Only three decisions are utilized by the author in this latter section. Throughout this chapter I was impressed with the sparseness of the case materials employed. The interest generated in the public press and in professional circles generally within recent years would certainly seem to warrant a more adequate treatment of the problem of managerial control. In spite of the

11. P. 206.
12. P. 270.
14. 228 Fed. 859 (2d Cir. 1915).
15. 49 Minn. 197, 50 N.W. 1117 (1892).
17. 210 App. Div. 303, 206 N.Y.S. 95 (4th Dep't 1924).
18. 81 F.2d 949 (8th Cir. 1936).
author's excellent beginning in utilizing an extended quotation from Berle and Means, *The Modern Corporation and Private Property*, the existing limitations on minority control in the close corporation or family partnership and the legal consequences of the growing widespread ownership of corporate shares are almost ignored in the selection of case materials which follow. The inclusion of a few cases such as *State ex rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co.*, 21 and *Benintendi et al. v. Kenton Hotel, Inc.*, 22 would be very helpful in this regard. After completing this chapter of Professor Frey's present edition, I doubt if the student will grasp the true economic significance of the present trend in judicial decisions which is widening the ever-present gap between ownership and management. 23

It is in connection with Chapter Four, entitled "The Going Concern", that the author makes full utilization of his fundamental classification of materials in terms of corporate transactions. And it is also in regard to this chapter that the reader tends to become confused or doubtful as to the real utility of the transaction as a basic classification. Within this one chapter there are included such diverse topics as instituting and defending suits, short-term credit transactions, acquisition or disposition of property and records and accounts. Once one becomes accustomed to this unique grouping of relatively dissimilar corporate activities, the materials employed seem to fit in place quite effectively. In the section devoted to the institution and defense of suits, the author considers necessary or proper parties in corporate and partnership litigation, shareholders' representatives or derivative suits and problems concerning the authority of persons to represent such enterprises. Despite the 111 pages devoted to the presentation of these materials, in the sub-section devoted to a consideration of the requirement of security for expenses in stockholders' suits, the author quotes from the New York statutes and presents a single case for examination which is followed by a short note on collateral legal references. 24 The references to legal articles make no mention of the highly informative Wood Report which led to the enactment of the New York statute. 25 No mention is made of the recent decision of the United States Supreme Court upholding a similar New Jersey act as applied to federal litigation—*Cohen v. Beneficial Industrial Loan Corp.* 26 Nor does the author mention the more recent judicial doctrines extending control over the private settlement of shareholders' derivative suits. 27 Perhaps these

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22. 294 N.Y. 112, 60 N.E.2d 829 (1945).
25. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS PREPARED FOR THE SPECIAL COMMITTEE ON CORPORATE LITIGATION, CHAMBER OF COMMERCE OF THE STATE OF NEW YORK (1944).
27. See, e.g., Young v. Higbee Co., 324 U.S. 204 (1945), and Certain Teed Products Corp. v. Topping, 171 F.2d 241 (2d Cir. 1948).
deficiencies only serve to demonstrate the undesirability of attempting a presentation of brief materials involving complex problems of civil procedure in a volume which should be primarily devoted to corporation law. This is one field in which cursory treatment of decisional law can only serve to be misleading. The next two sections—involving short term credit transactions and the acquisition and disposition of property—are handled with considerable skill as an aspect of the ultra vires doctrine. Statutory, textual and case materials are blended into a smooth presentation of the current status of the doctrine as a legal defense in corporation and partnership litigation. At the same time, the author is careful to avoid an over-emphasis of a doctrine which is gradually losing its importance as a principle of corporation law.

The availability of records and accounts of the corporate enterprise is given brief but adequate treatment in the final section of this chapter. Both the common law right of inspection by stockholders and its statutory enlargements within the purview of proper purposes are illustrated with materials which are both timely and carefully selected.

Few areas in the field of corporation law offer more difficulties in terms of student presentation than that contained in Chapter Five—Asset Distribution to Members. After a brief but adequate introduction to the complexities of legal accounting through the use of typical balance sheet and financial statements, Professor Frey begins with a consideration of the composition of the fund available for dividends. Within this section, there are well diversified materials dealing with operating expenses, asset valuation, paid-in "surplus", capital reduction "surplus", and wasting assets. While I believe that these materials are reasonably adequate for this section, it could be somewhat strengthened by the inclusion of the opinion in *Morris v. Standard Gas & Electric Co.*, recently decided by the Chancery Court of Delaware and by a more detailed presentation of the decisions in *Cintas v. American Car & Foundry Co.* and *Agnew v. American Ice Co.* which are presently relegated to the footnote material in a later section. The author then presents two brief sections—one on the declaration of dividends which deals with the formalities, discretion of directors and revocation and the other on the distribution of dividends including the problems of conflicting claims of shareholders, of transferors and transferees as well as creditors. The Chapter then concludes with a presentation of a superior grouping of materials on the distribution of "capital" through the purchase or redemption of shares and statutory capital reduction procedures. The use of the case materials in the subsection devoted to the distribution of dividends, particularly *Lich v. United States Rubber Co.* and the extensive footnote following, are typical

29. 131 N.J. Eq. 419 (1942).
30. 66 A.2d 330, reversing 61 A.2d 154 (N.J. Ch. 1948).
31. 39 F. Supp. 675 (D.C.N.J. 1941); at pp. 822, 831 fn. in this volume.
of the author’s comprehensive and thorough approach to this area of conflicting claims. Professor Frey has made a wise selection of his materials in this area and has presented them in a concise but effective manner with particular emphasis on the rich variety of problems raised in the case presentations. One yearns eternally for more and yet less complicated legal accounting materials, but inherent limitations in time and space apparently render such an objective relatively impossible of achievement.

Chapter Six involves a consideration of the many problems which cluster around the dual concept of the Benefits and Hazards of the Managers of the Enterprise. Both partnership and corporate matters are systematically integrated in this chapter. The materials on secret profits by the promoters are familiar and well chosen, ranging from the landmark cases involving the Old Dominion Copper Company\(^3\) to the more recent decisions in McCandless v. Furland et al.\(^3\) and Hays v. The Georgian, Inc.\(^\text{34}\) The section dealing with transactions between the managers and the enterprise is well documented with a variety of materials which give sufficient emphasis to the difficult questions of fiduciary responsibility but could possibly be improved by the inclusion of the recent cases passing upon the validity of the management contract between the Hilton-dominated Mayflower Hotel Board and the Hilton Hotel Corporation\(^3\) and the other current litigation in the Federal Courts questioning the activities of dominant directors in corporate affairs.\(^\text{36}\) The balance of the materials in this chapter relating to remuneration for official services, purchase of members’ interest, profits diverted from enterprise transactions and “mismanagement” by officers are carefully and wisely developed although in the absence of much helpful statutory references. However, the inclusion of cases under the Securities Exchange Act is most helpful in this area particularly in contrast to the more rigid common law doctrines. But again I would suggest the addition of materials of current interest particularly those concerning the validity of executive pensions and bonuses such as the opinions of the Ohio Courts in Holmes v. Republic Steel Corporation\(^3\) and the Federal Court in Fogelson v. American Woolen Company.\(^3\) The evolutionary developments in this field may assume profound significance in the not too distant future if

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\(^3\) Old Dominion Copper Co. v. Bigelow, 188 Mass. 315, 74 N.E. 653 (1905) and Old Dominion Copper Co. v. Lewisohn, 210 U.S. 206 (1907); at pp. 927-36 in this volume.
\(^3\) 296 U.S. 140 (1935); at p. 936 in this volume.
\(^3\) 280 Mass. 10, 181 N.E. 765 (1932); at p. 939 in this volume.
\(^3\) Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983 (9th Cir. 1949) and Truncale v. Universal Pictures Co., 76 F. Supp. 465 (S.D.N.Y. 1948).
\(^3\) 84 N.E.2d 508 (Ohio 1948), reversing 69 N.E.2d 396 (Ohio 1946). See also the discussion in O’Neal, Stockholder Attacks on Corporate Pension System, 2 Vand. L. Rev. 351 (1949).
\(^3\) 170 F.2d 660 (2d Cir. 1948).
executive and labor pensions become an accepted employment incentive throughout the national economy.

The materials on Reorganization of Solvent Enterprise contained in Chapter Seven are notably brief although carefully chosen and integrated. This sparseness of materials is certainly no accident nor is it the result of a lack of appreciation by the author of the importance of this area of corporation law. Professor Frey significantly observes in his preface that "the subject of Corporate Reorganization is especially appropriate for advanced study." Nevertheless, within the confines of approximately one hundred and fifty pages of materials the student is exposed to a severely limited cross section of the more basic principles of corporate reorganization. The effectiveness of this method of presentation is at least open to serious question; the subject matter is too broad in scope and the details too intricate to permit such cursory treatment without the loss of the fundamental pattern of judicial sanction in reorganization proceedings. The first two sections of this chapter involve a consideration of the problems relating to the sale of assets to another enterprise as well as merger and consolidation. Within these areas, the author is primarily concerned with the rights of dissenting members, on the one hand, and the rights of creditors on the other. There then follows a final section concerning alterations of the share structure by amendment to the Articles of Incorporation which includes materials on authorization of prior preference shares, modifications of redemption rights, alterations of voting power and the elimination of accrued dividends. It is my feeling that these issues present such a vast field for inquiry and examination that they can only be adequately treated in a separate course following the basic study of corporation law. To suggest that the student is only being "introduced" to these issues by such abbreviated materials is to accept a simplicity of judicial doctrine which is hardly realistic if not wholly misleading.

The last two chapters in this volume—Chapters Eight and Nine—deal with problems of the dissolution of corporate enterprise and partnership associations. The transactions here involved are those which occur during or at the legal death of the enterprise—the last stage in the chronological-transaction approach. The author considers and analyzes this problem from four basic sources: majority action, minority action, state action and expiration of the corporate charter. With this approach the author succeeds in giving adequate coverage in an area which is susceptible of relative brevity. The materials involving the dissolution of insolvent partnerships, which were prepared specially by Professor Noyes E. Leech, are brief but certainly adequate in every respect. But once again I cannot help but feel that this subject could and should be included in other courses of instruction, particularly Creditors' Rights and Security Transactions. The basic field of corporation law is so vast and requires such detailed treatment in the public policy areas that one is constantly puzzled by these attempts to expand its coverage to

39. P. vi.
areas of admitted similarity, such as partnerships, and then further into areas
of separate specialization which can certainly be set aside for later and more
thorough consideration.

Unfortunately, it has been necessary to write this review largely in vacuo
since I have not as yet had an opportunity to use the Frey revision in my
classes. A casebook, unlike a text, cannot be adequately appraised in such
isolation. Essentially the casebook performs no function other than as a
teaching tool around which a law course is constructed. My foregoing re-
marks and criticisms must therefore be taken as an analysis of this teaching
tool as I teach my course in corporation law; perhaps that course would be
different or even take on new meaning if I used Professor Frey's collection
of materials as they are now presented. There is no doubt in my mind that
this case book is a significant contribution to the excellent materials in the
field of corporation law which are now available. The author's use of the
corporate transaction as a classification for his materials is refreshing and
challenging to the teacher. The student should also find his efforts toward
simplicity and brevity a welcome approach in this area of growing corporate
complexities. As a comprehensive collection of well selected and integrated
materials this volume has few equals.

Robert M. Cooper†

The Nature and Tax Treatment of Capital Gains and Losses. By
Lawrence H. Seltzer with the assistance of Selma F. Goldsmith and M.

As long as the income tax remains a part of our tax system controversy
about the taxation of capital gains and the allowance for capital losses will
continue. In spite of frequent changes in the law, conflicting interests have not
been reconciled. The current provisions of the federal income tax, limiting the
maximum effective rate on capital gains realized after six months to twenty-
five percent and sharply restricting the allowance for capital losses, satisfy
no one and cannot be justified by any principle other than that of expediency.

The Nature and Tax Treatment of Capital Gains and Losses covers the
legal, economic and administrative aspects of the problem comprehensively
and with admirable objectivity. Of special interest is the complete analysis
of the basic data on capital gains and losses from federal income tax returns
filed by individuals and fiduciaries in 1917-1946. The results of this statistical
investigation are summarized in the text. But a full discussion of sources and
methods used and the complete tabulations made during the study are included

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in a 236-page appendix containing 97 tables. Only such an organization as the National Bureau of Economic Research could finance the preparation and publication of so elaborate an investigation.

This study should raise the level of discussion of the issue and it is hoped that improved legislation will result. Two factors weigh heavily against this hopeful conclusion. First, it is in the political realm that the legislation must be determined and the same powerful forces which have operated in the past can be expected to seek their advantage in the future. Second, the refusal of the author to make any policy recommendations lessens the impact of the findings of this volume and robs the advocates of reform of many of the advantages that such an authoritative analysis of the problem should give. One offsetting gain is that any objective student will find that the justification for the status quo or for further reducing the taxation of capital gains is pitifully weak in contrast to the opposite position.

Starting with a general discussion of the issues and their background, the volume traces the origins of the special legal status of capital gains and the economic nature of gains and losses. It then takes up the issue of the appropriateness of including capital gains as an element of taxable income. Four chapters are devoted to the measurement, in so far as possible, of gains and losses, their distribution from 1917-1946 and the effects of changing tax treatment of capital gains and losses on investors' behavior and upon federal revenues. The last three chapters discuss in detail the special problems of tax avoidance through capital gains, the taxation of capital gains and losses in other countries, and competing proposals for their tax treatment.

Limitations of the basic data are stressed and the methods employed to make the data for different years comparable are fully explained. The complications and pitfalls are well known to anyone who has ever attempted to work with the Statistics of Income, the basic source. Selma Goldsmith, who did this work, is to be congratulated.

The findings of the study confirm many of the views previously held by students of the problem. But the original statistical investigation and thorough theoretical analysis of the economic issues involved makes this a significant contribution to the field. This study clearly indicates that the special treatment of capital gains leaves a serious loophole in the tax law and one that violates the fundamental rule that taxpayers in similar circumstances should be treated equally.

One of the most interesting findings made possible by the detailed statistical investigations is that the effects of the taxation of capital gains upon the investor, although of significance in the upper income brackets, is not the major influence affecting the sale of capital assets. The data suggest that at all times and despite very different treatment of capital gains, it is the extent of changes in prices and turnover of capital assets, notably common stocks, that has determined the character of trading in capital assets. This should dispose of the frequently made assertion that the taxation of capital gains
was responsible for both the speculative stock market boom of the late twenties and the subsequent collapse of the market in 1929-1933, and that it may cause a similar distortion in the stock market in the future.

The study also emphasizes that the taxation of capital gains, although the cause of many complex legal and administrative problems, does not complicate the law or its administration any more than would the complete exemption of capital gains and losses. This is an obvious but neglected point. The full exemption would give incentives for the realization of income in the form of capital gains and thus raise legal and administrative problems as complex as does the partial or even the complete inclusions of such income.

The chapters which cover the economic nature of capital gains, losses and the possibilities of tax avoidance by realization of capital gains are very well done and deserve special comment. The failure of the tax law to bring to account gains which have accrued but have not been realized at death stands out as a major weakness. It multiplies the inequities of the special treatment of capital gains by not only separating the individual who can realize income in the form of capital gains from others but also the decedent who can hold unrealized gains in his estate. Although policy recommendations are avoided, it is clear that some accounting for unrealized capital gains at death is the least that can be done to close this large loophole in the tax law.

The impossibility of clearly differentiating capital gains and losses from other income is emphasized in both the theoretical and administrative analysis. The author points out "that the concept of pure capital gains becomes considerably blurred when analyzed, and that much overlapping exists between capital gains and ordinary income, and most especially between capital gains and profits." The practical difficulties of equitable taxation of capital gains are fully discussed. In spite of the strong theoretical case for the taxation of gains as they accrue, the desirability of limiting taxation to realized gains is supported by the analysis. If the law is modified to bring unrealized gains to account upon the death of the owner the major inequity resulting from the realization provision would be removed.

This book supports the conclusion that there is little excuse for the exceedingly light taxation of gains and limitation of losses which has been the rule for many years. Unfortunately, however, one must agree with the author that the politics of the situation does not support the hope that current practices will be substantially changed in the near future. A cynical but realistic interpretation of the record tends to confirm the assertion that a Congressman likes to leave major loopholes in our tax laws so that he can appear to support the popular demand for equalization of income by progressive taxation and at the same time quietly assure wealthy constituents and campaign contributors that they will pay taxes at substantially lower rates than advertised in the public press. The large number of accountants and lawyers specializing in tax matters attests to the fact that the average voter will not fully appreciate the magnitude of the loopholes offered.
Few individuals at all interested in the field of taxation will read this book without wanting to act on the basis of the findings presented. The facts are there. The reviewer would like to suggest that two steps should be taken without delay. First, all capital gains and losses accrued but not realized should be brought to account on the death of the owner and a final income tax settlement made by the estate before computation of estate and inheritance taxes. Second, a practical method of averaging income should be put into effect immediately so that the bunching of receipts when capital gains are realized will not seriously distort the rates of taxation paid on capital gains. If both these steps were taken, it would then be desirable to tax gains in full and allow losses to be used in full to offset any form of income. Although many problems surround the development of a satisfactory averaging scheme a very crude system will destroy the greatest part of the inequity and remove the incentive to manipulate investments in an artificial manner. Failure to correct this inadequacy in the current law will be much more inequitable than the least refined of the schemes suggested.

The future taxation of capital gains and allowance for capital losses raises an important issue which far transcends the revenue that will be gained or lost as a result of modifications of the laws. The whole principle of equitable income taxation is at stake and failure to develop consistent principles in this area will jeopardize the entire income tax system. This is the time to act to correct the inequities in the law and to make the law conform to a reasonable concept of taxable income. The National Bureau and the authors should be commended for the important contribution they have made to resolution of this problem.

Paul Strayer†


Dr. Griffiths asks these questions: How deftly does Congress blend conflicting pressure-demands into "national" policy? After policy is formulated, how graciously does Congress delegate power to effectuate it, and how smooth is the legislative-executive cooperation needed to carry on a program once begun? Finally, what role does and should Congress play in forging U. S. foreign policy in today's complex of world events?

However, he answers the questions before he asks them. His introduction begins with "The Congress of the United States is the world's best hope of representative government," and ends, commenting on the task Congress faces today, with "It is responding well to the challenge." By itself this

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2. p. 3.
merits no criticism; but Dr. Griffiths then proceeds to justify the introduction's conclusions with selected descriptions, little analysis, and even littler evaluation—the last only to sing praises. No real effort is ever made to analyze critically present Congressional practice, despite the fact that the task of the book is "an analysis of Congress under the Constitution, of its place in the governmental setting, of the way in which it is responding to a changing age." Benignly one might say that the author has confused the is with the ought-to-be. And in the few places where the two don't fit, even in Dr. Griffiths' view, he buttresses the is with tailor-made judgments.

For example, in the chapter "Congress and International Policy," the author concludes, "These illustrations . . . document the mood of Congress . . . that it has an affirmative role to play and . . . indicate how much there is to be said for such a role." Now note the illustrations cited to back up this conclusion. " . . . Congress . . . saw the irreconcilable nature of the conflict of civilizations before it was seen—or at least before its logical consequences were acted upon—in the executive branch . . . Congress . . . forced the purges of the communists and fellow-travellers; [and] . . . analyzed correctly the nature of Chinese communism; . . . ."

Let us examine the assumptions Dr. Griffiths never articulates, and the points of view he ignores or dismisses, in making these judgments.

First about Congress seeing "the irreconcilable conflict between civilizations before it was seen by the executive." Here it is difficult to determine what the author means. Before one can say who saw "what" first, one must know what the "what" is. Does the author mean by the "irreconcilable nature of the conflict between civilizations" that all-out war is inevitable? Or does he mean that Russia will expand until collective security makes clear that further aggression means all-out war? The two meanings are quite different. If he means the former, the author can't really claim the glory for Congress. Preventive war has been urged by a few irresponsibles in and out of Congress. If he means the latter, then Dr. Griffiths' conclusion is even more doubtful. For this principle with a few corollaries (that we arm ourselves and build up our allies to ensure peace and that the threat of the free world's force may itself halt aggression) has been the basis of State Department policy since 1948. This policy has been implemented by the Rio treaty, the Greek-Turkish Aid Program, the Marshall Plan, the North Atlantic Treaty and the Mutual Defense Assistance Program. Thus when Dr. Griffiths says Congress saw the threat first, he's assuming that these State Department actions don't indicate such an awareness, and further, that certain earlier unnamed actions by Congress do. These assumptions may or may not be valid. I can't say since I have no idea of the facts on which Dr. Griffiths founds his judgment. But I

3. p. v.
4. p. 93.
5. pp. 92-3.
can say that the author should bare the props for his conclusion, however shaky they may be, to public view.

The same goes for Dr. Griffiths' judgments about subversives in Government and our policy towards Communist China. Arguing over who first purged Government of Communists is reminiscent of the "chicken or the egg" riddle. When the author says "Congress forced purges of Communists," he ignores the fact that the entire loyalty procedure has been set up by Executive Order, not Congressional enactment. Also neglected was the very substantial body of opinion that Congressional efforts to "force purges of Communists and fellow travelers," without procedures to safeguard individual rights, do more harm than good to the cause of good government, and hence our country's welfare. As for "analyzing correctly the nature of Chinese communism," such neat wrapping of that complex issue in only six words makes any non-Congressman shudder.

In addition to answering questions before he asks them, the author also answers one he never asked. And it's his answer to this never-asked question: "Are responsible and integrated parties desirable today?" that merits comment. Dr. Griffiths agrees with most other political scientists that "Empathically we do not have integrated party government in this country now..." He disagrees with the prevailing current of academic thought, however, since he thinks lack of party responsibility helps, not hinders, effective representation.

The 1950 Report of the Committee on Political Parties of the American Political Science Association makes its primary recommendation an effective party system. The characteristics of an effective party system are "parties... able to bring forth programs to which they commit themselves, and... parties... [with]... sufficient internal cohesion to carry out these programs."9

Dr. Griffiths counters the well known arguments for responsible and integrated parties with one backhand slap, two arguments, and one horrible.

First the slap aimed at the "majority of our intellectuals... [of whom]... probably a disproportionate number of the more articulate belong to the liberal left... When they speak of 'program' in the sense of a party program," Dr. Griffiths says, "they normally mean further governmental intervention in behalf of the common man."10 The author hastens to add, however, "there is nothing reprehensible"11 about this.

11. Ibid.
Now for the two arguments. On the one hand, he contends that interests of Americans are so diverse that a majority couldn't get behind any one party program. This may be true—perhaps a majority couldn't be mustered to support a given group of amendments to Taft-Hartley or the wording of a particular FEPC bill. But party platforms could get considerably further apart then they are now and still have one of them command majority approval. On the other hand Dr. Griffiths argues: if parties were strong, individual representatives wouldn't be free to exercise their independent judgment—they would be forced to hew the party line. This argument could be countered with the thought that voting for a candidate whose convictions remain unknown until after election hardly expresses popular will. Candidates supposedly exercise their "independent judgment" in building the platform and voters no longer must buy a "surprise package" when—after election—candidates support the programs they ran on.

Finally, the author argues against integrated parties by raising the horrible of "class warfare." He says "insofar as party divisions come to be logical they would become nationally divisive instead of basically unifying as they tend to be today—and we would be a step nearer class cleavage if not class warfare."12 Here the author offers an emotional conclusion cloaked as the end result of rational argument.

Party division on economic issues does not inevitably produce the complete self-identification of any one person with either party. Within the last two decades labor has become politically articulate. Union members have come to realize that they have common interests that can be served, in part, by joint political action. However, organized labor in politics does not mean that all interests of every union member are the same. Union membership is only one basis of identification. Some others are social, ethnic, and religious affiliation.13 The complex of these interests determine a vote, and the party loyalties of some may conflict with others.14

Moreover the experience of democratic governments with parties divided primarily on economic issues should assuage Dr. Griffiths' fears. Such parties have not spelled class warfare in either Britain or France. A basic confidence in representative government's ability to meet human needs has made possible orderly development. In the words of Harold Laski, to realize the promise of our civilization "we require security; and a civilization . . . has

12. Ibid. For the suggestion that economic groupings are the ultimate basis of social grouping in a republic, see The Federalist, No. 10 (Madison).
14. An excellent study of voting habits in a typical county indicates that often group interests may not conflict in determining a vote. This study found a distinct correlation between party loyalty and socio-economic status ratings, Lazarsfeld, Berelson, & Gaudet, The People's Choice 18, 27 (1948).