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Ralph F. Fuchs

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Because they believe the problem with which they deal "will present a pivotal issue during the next decade," two economists have produced this study of "government control of business activity." Taking the view that such control is a means of securing the adequate functioning of the business system, they seek to appraise and discover the future possibilities of this means. Their concern is with three alternative regulatory devices: the antitrust laws, whose purpose is to preserve the benefits of competition in business; direct regulation, which operates by requiring a certain minimum performance on the part of the businesses to which it is applied; and public ownership, whereby the public seeks to get what it wants for itself and at the same time to apply the spur of an alien competition to private enterprise.

The possibilities and limitations which the authors seek to discover in the foregoing devices are not those that have appeared in their operation. It is, rather, the power or lack of power of legislatures in the United States to apply them and the consequent availability of each as a means of control which the authors seek to ascertain. The book they have written, consequently, is primarily a study of judicial decisions. Therein lies both its strength and its weakness.

Such a book was called for. The field that it covers, logical though its boundaries appear when they have been laid out, is one which a lawyer, trained simply in the traditional legal categories, would not have been likely to select. The authors' penetrating analysis of the results of various series of decisions and the inevitable conclusion that the effectiveness of at least the first two of the devices for government control has been seriously impaired by the Supreme Court, must give pause to anyone who is concerned about the operation of our system of government. It will be especially wholesome for lawyers to read the authors' castigations, express or implied, of the courts' treatment of mergers under the Sherman Act (pp. 49-50), resale price fixing (p. 58 et seq.), price fixing through legislation (p. 108 et seq.), and valuation of public utilities (p. 157 et seq.). What has been done in connection with these and other matters is sufficiently chargeable to judges' and lawyers' methods of thought to call for a thorough overhauling by the bar of the legal machine which it operates. Attention cannot be called too often or too forcibly to this situation, whether by lawyers or by laymen.

In their conclusions regarding the future, however, the authors seem to have surrendered too completely to a sense of futility of resorting in this country to legislation, which must run the gauntlet of judicial decision either in interpretation or in constitutional litigation. The writers would be quite justified in arguing that the present system of lawsuits to arrive at determinations of governmental power is cumbersome, wasteful, unrealistic, and inconsistent in its operation. One could sympathize, too, with a demand on their part that it be swept out and replaced with another system. But they enter neither an express indictment nor a prayer for relief. Instead they choose to be bound by the present system. Since they anticipate no change in its operation they come to the conclusion that the roads to effective public control of
business are largely blocked unless public ownership can be made successful. Not wishing to be revolutionary, they have become, rather, fatalistic. It may be doubted whether they have chosen the only possible alternative, for change may be more likely than they think.

The authors' conclusion is a natural product of their search for a general picture of the status of public control and of their belief that such a picture is to be found, if anywhere, in recorded judicial decisions. Their search and their belief are both natural, since lawyers themselves have traditionally sought to form general pictures of fields of law and have assumed that previous decisions, given effect by the doctrine of stare decisis, furnish dependable data upon which to rely. But less orthodox lawyers, with whom, presumably, the authors have much in common, have ceased to believe that broad fields of law constitute useful classifications for many purposes. When it comes to estimating the future, specific problems or situations are more useful centers of attention. The relevant data, too, include far more than mere past decisions, whose effect is recognized as limited by the facts with reference to which and the purposes for which they were handed down. Had the authors proceeded upon these assumptions they would have been forced to content themselves with a less inclusive picture of the possibilities of public control, but the result would perhaps have been more accurate and more helpful. They could, for example, have chosen to study a series of specific problems, one of which, by way of illustration, might have been the possibility of thoroughgoing regulation of the coal or oil industry. Here the series of decisions dealing with the distinction between interstate and intrastate commerce, which in the book (p. 200 et seq.) is simply a source of perplexity, together with the Future Trading and Grain Futures cases (p. 144 et seq.), might have provided suggestions which when coupled with the facts of the industry under consideration would have indicated a solution of the problem. Whether there is a "logical economic pattern" (p. 205) in the mind of the courts is interesting, but is, after all, of secondary importance for the purpose in hand. Or the problem of railroad valuation might have been surveyed with reference to the fate of a possible Congressional prescription of the prudent investment basis. There is room for a shrewd estimate of the effect upon the Supreme Court of such a legislative declaration following upon the decline in the price level and the criticism to which the O'Fallon decision has been subjected. Some ground for hope surely is present.

Clearly the aid of economics is necessary if the existing governmental machine is to be rendered even remotely adequate to modern conditions. Clearly, also, informed criticism of what courts and lawyers do will continue to be of the greatest benefit. But if law and the other social sciences are to be united in the service of the commonwealth it will have to be primarily by means of a concerted attack upon specific issues as they arise. Properly estimated, nothing in the existing legal system presents insuperable obstacles to the securing of fruitful results from such collaboration. To such an endeavor the present volume contributes a preliminary clearing of the atmosphere—a critical survey which discloses the errors of thought and suggests the errors in methods of attack to which we have been subject. If it can be followed by an
effort to devise a technique for securing a more adequate, realistic decision of the issues which arise out of public control, the authors' purpose, presumably, will have been fulfilled.

Ralph F. Fuchs.

Washington University School of Law.


This is the first of a series of American Trials in contemplation by the editors and the publisher, the series to be selected apparently with a view to color, pathos, humor, drama, and human interest, rather than for any social, political, economic, or jurisprudential significance that may attach to the decisions. Among other cases to be covered in later numbers, to quote the editorial foreword, "the Molineux Case," the "unsolved sensational poisoning mystery of thirty years ago. Then...the case of the Chicago Anarchists...the case of Sacco and Vanzetti; Laidlaw against Sage, the melodrama in which Joseph Choate, to the popular delight, plagued Russell Sage; the Leo Frank case, Georgia's epic of mob violence; two old American piracy trials."

In the Milligan case, honored in its selection for first place in the series, the United States Supreme Court, in a unanimous decision, held that the President had no power to provide for trial by a military commission of persons not in the military service on charges of crime committed in territory where the civil courts were undisturbed in the normal exercise of their proper jurisdiction. Five of the judges, a bare majority of the Court, went further and by way dictum denied that even Congress itself had such power, though the remainder of the Court were unwilling to commit themselves to the limitation on Congress. On neither point is the case of any great importance, partly because of the improbable recurrence of conditions in which the government might be inclined to resort to such power, and partly because if the case had come before the Court while the war was yet in progress, the decision might very well have been the other way.

Besides the majority and dissenting opinions of the Court, the book contains a 62-page introduction by the editor to give a background and setting to the case, a digest of the arguments of Henry Stanberry, James Speed, and Benjamin F. Butler, who appeared for the government, the arguments of James A. Garfield, Jeremiah S. Black, and David Dudley Field, who appeared for the defense, Mr. Butler's reply for the government, and two appendices, one of 200 pages giving a transcript of the proceedings before the Military Commission and the other giving the opinion of Mr. Chief Justice Taney in Ex parte Merryman. The last is included presumably as an object lesson that in time of war a decision like that in the Milligan case would probably amount to no more than a despairing gesture.

Lacking practical significance as a legal precedent, the case is to be read, as the editors have published it, for its human interest. But there are many persons to whom a judicial opinion, however able the judge, or a formal legal argument, however distinguished the lawyer, is an effective disguise for the drama and the human interest that must be found between the lines, so to speak, or in the background of the case.