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## Let Them be Judged: The Judicial Integration of the Deep South / Federal Taxation of Trusts, Grantors and Beneficiaries/

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# BOOK REVIEWS

LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH.  
By Frank T. Read and Lucy S. McGough. Metuchen, N.J. and  
London: The Scarecrow Press, Inc., 1978. Pp. xiv, 658. \$22.50.

*Reviewed by Steven F. Lawson\**

In the 1970s the goals of Black Americans have engendered a "Bakke-lash," whipping up bitter animosities among former allies within the civil rights movement. This phenomenon and the hard feelings accompanying it threaten to divert public attention from an appreciation of the remarkable changes in race relations that have occurred in the South during the last quarter of a century. Had a modern day Rip Van Winkle fallen asleep when Harry Truman became president in 1945 and awakened today, he would be surprised to find that Jimmy Carter of Georgia occupied the White House and that southern Black voters played an important part in sending him there.

Following World War II, the southern region of the United States experienced a "Second Reconstruction" that has lasted longer than the first one, which was initiated at the close of the Civil War and lasted roughly until 1877. The rigid racial separation once mandated by law no longer exists, and Black Americans have hurdled many of the legal barriers that once impeded the road toward first class citizenship. Whereas in 1945 no Blacks in the South attended schools with Whites, currently racial integration is common practice throughout public education in Dixie. Furthermore, while in 1945 approximately five percent of southern Blacks had managed to qualify to vote, presently a majority of eligible Blacks are enrolled and have cast their ballots to elect over 2,000 Negro officials. In addition to entering schoolhouses and polling booths, Blacks have received admission to public accommodations and jury boxes. Although Black Americans still endure powerful handicaps preventing attainment of genuine equality of opportunity, particularly in the area of earning a decent living, Blacks have nevertheless succeeded in building a legal and political foundation sturdy enough to support continued strides toward freedom in the future.

The victories won in the past have resulted from a variety of forces. A "New Negro," who emerged from World War II excited by the rhetoric of antifascist ideology heard while combating overseas

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enemies, intended to prod the nation into spreading its democratic promises at home. Demands for freedom within the United States received an increasingly sensitive hearing from Cold War era leaders rallying the country to wage a global fight against a totalitarian enemy in the Soviet Union. A domestic situation that sanctioned racial discrimination conflicted with the needs of foreign policy spokesmen who condemned a world that was supposedly growing half slave and half free. The biased treatment of Blacks residing below the "Dixie Curtain" appeared out of place in a nation calling for the liberation of people held in bondage behind the "Iron Curtain." As the Cold War turned hot and Blacks fought in integrated units in Korea and Vietnam, they expected to transport home the lessons of equality they learned on foreign battlegrounds. A double standard of racial justice had no more appeal for Black Americans than it did for nonwhite Africans breaking the chains of colonial rule and winning their freedom to choose allies from the competing Cold War blocs.<sup>1</sup>

Political realities helped transform these ideological and diplomatic considerations into practical achievements. In search of wartime and postwar jobs, southern Blacks migrated to the North where they flocked to urban ghettos. Harry Truman owed much of his stunning upset in the 1948 presidential contest to the support of northern Black voters holding a balance of power in populous states rich in electoral ballots. Since that time, presidential hopefuls in pursuit of winning margins have recognized the advantages of endorsing Black demands for an extension of civil rights. It seems more than fortuitous that since 1956 the passage of five civil rights bills has coincided with or immediately followed the quadrennial quest for the Presidency.<sup>2</sup> Between elections southern Blacks, most of whom had been denied the right to vote until the mid-1960s, applied the strongest type of power available to them. In order to topple Jim Crow, civil rights demonstrators sat-in, stood-in, knelt-in, waded-in, boycotted and marched. Irked by these nonviolent confrontations, hostile law enforcement officers turned them into bloody ordeals. Although the victims did not convert their oppressors' hearts and minds through passive displays of suffering, they did arouse sufficient moral indignation outside the South to con-

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1. R. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953* (1969).

2. J. ANDERSON, *EISENHOWER, BROWNELL, AND THE CONGRESS: THE TANGLED ORIGINS OF THE CIVIL RIGHTS BILL OF 1956-1957* (1964); J. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* (1968); Sitkoff, *Harry Truman and the Election of 1948: The Coming of Age of Civil Rights in American Politics*, 37 *J. S. HIST.* 597 (1971).

vince the federal government to exercise considerable power for their cause.<sup>3</sup>

Before persuading Washington to join their side, civil rights activists had to overcome some serious institutional obstacles. A conservative coalition in Congress dominated by powerful southern lawmakers blocked the route of reform measures as they snaked their way slowly through the legislative halls. Legislation that escaped the clutches of unfriendly committee chairmen encountered antagonistic filibusterers who delayed proceedings on the Senate floor. Important civil rights bills passed eventually, but their enactment did not guarantee swift enforcement. Officials in the nation's capital held traditional views concerning the permissible distribution of powers between state and federal governments. They hesitated to diminish local responsibility in such areas of vital concern to civil rights advocates as law enforcement, voting, and education. Presidential administrations preferred not to revive exaggerated memories of Reconstruction after the Civil War by increasing federal authority over the South in matters relating to race.<sup>4</sup> Gary Orfield, who carefully studied the implementation of Title VI of the Civil Rights Act of 1964, concluded that "the institutions of American federalism and the popular beliefs associated with them make long-term national intervention in local race relations possible only under the most extraordinary conditions."<sup>5</sup> Recognizing this basic premise of conventional political wisdom, civil rights proponents realistically adopted militant tactics to provoke crises. The resulting tensions often compelled Washington to authorize national intervention to remove the sources of Black grievances. As a consequence, state control over race relations narrowed.

Before the civil rights movement attracted the executive and legislative branches to its position, Blacks had slowly but successfully presented their arguments before the United States Supreme Court. The formation of the National Association for the Advancement of Colored People (NAACP) in 1909 furnished the legal talent to devise innovative strategies for overturning racial restrictions imposed by the South and upheld previously by the judiciary. From 1915 to 1954, NAACP attorneys won lawsuits extending the princi-

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3. On the effects of nonviolent provocation, see D. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* (1978).

4. B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964). For criticisms of the traditional view, see H. ZINN, *THE SOUTHERN MYSTIQUE* 147-213 (1972); Wasserstrom, *Federalism and Civil Rights*, 33 U. CHI. L. REV. 406 (1966).

5. G. ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* viii (1969).

ples of equality in voting, housing, transportation, and education.<sup>6</sup> Despite these courtroom victories, by the middle of the 1950s a majority of southern Blacks remained disenfranchised and segregated in inferior schools and housing. The Supreme Court responded favorably to Black complaints, but the case-by-case approach by which it rendered decisions proved inadequate to remedy the claims of the appellants. While decades of adjudication brought significant triumphs for the NAACP, resourceful southern politicians continued concocting alternate schemes of bias untested in prior court challenges. Running out of time and money, civil rights advocates finally prevailed upon Presidents and legislators to decree executive orders and pass measures to speed up the process stalled in the judiciary.

The lower federal courts had played a crucial role in slowing down the pace of racial equality. Judges sitting on district and appellate benches in the South served on the front lines of civil rights skirmishes. First to preside over the lawsuits stemming from racial confrontations, they bore the responsibility of applying relevant Supreme Court mandates in resolving these cases. Caught in a crossfire between egalitarian rulings from above and hostile racist sentiments from below, federal jurists in the South performed cautiously. Their prudent behavior was reinforced by background and temperament. Born and reared mainly in the South, and usually trained at Dixie law schools, they generally shared the segregationist outlook of their neighbors. Although a lifetime appointment to the bench might be expected to shield judges from local pressures, they did not function in a social vacuum. As Jack Peltason noted, a judge "must eventually leave his chambers and when he does he attends a Rotary lunch or stops off at the club to drink with men outraged by what they consider 'judicial tyranny.'"<sup>7</sup> Furthermore, the practice of senatorial courtesy dictated that individuals chosen for judicial posts in the South mirrored the values of their representatives elected to the upper chamber of Congress. Mindful of these limitations, a former assistant attorney general in the Justice Department commented that southern jurists "want to do as little as possible to disturb the patterns of life and politics in their . . . community."<sup>8</sup>

Nevertheless, countervailing forces reduced the tendency of

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6. R. KLUGER, *SIMPLE JUSTICE* (1976); S. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH* (1976); C. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959).

7. J. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 9 (1961).

8. B. MARSHALL, *supra* note 4, at 31.

federal judges to codify their personal biases into law. They had a constitutional responsibility to follow the orders of the Supreme Court, and their professional conduct was measured by the frequency with which higher courts sustained or reversed their rulings. Occasionally men of great courage risked their lives to defy traditional southern racial mores. During the late 1940s, United States District Judge J. Waties Waring of South Carolina bravely struck down his state's white primary and as a result became an outcast from Charleston society. Since the 1950s, Waring's fearlessness has been matched by that of Frank Johnson, an Alabamian who withstood the enmity of Governor George C. Wallace in order to advance racial equality on several judicial fronts.<sup>9</sup> District court judges, however, were less likely to exhibit bravery than their brethren sitting on appellate benches. Subject to the same inhibiting factors related to background, training, and methods of selection, justices of the United States Courts of Appeals nevertheless tended to possess a wider frame of reference and did not feel the full impact of local sentiments that were partially cushioned from below by the district courts.

The manner in which federal judges in the South both retarded and promoted first-class citizenship rights for Black Americans is the topic of Frank Read's and Lucy McGough's 1978 work *Let Them Be Judged: The Judicial Integration of the Deep South*. The authors, law professors at the University of Tulsa and Emory University respectively, review in great detail the operation of the United States Court of Appeals for the Fifth Circuit in adjudicating the rapidly increasing volume of civil rights litigation after the *Brown v. Board of Education*<sup>10</sup> decision in 1954. Their work joins an impressive body of literature concerning federal judges in the South. It lacks the conceptual skills of Charles Hamilton's *The Bench and the Ballot* and Jack Peltason's *Fifty-Eight Lonely Men*, and it does not portray the human dimension of the struggle nearly as vividly as Richard Kluger's *Simple Justice*; but overall, *Let Them Be Judged* compares favorably with these books in describing judicial triumph and travail in the Deep South.<sup>11</sup>

The authors focus on the federal circuit where many of the toughest legal battles of the civil rights struggle were fought. Comprising Georgia, Florida, Alabama, Mississippi, Louisiana and

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9. On Waring, see R. KLUGER, *supra* note 6, at 295-305. On Johnson, see R. KENNEDY, JR., *JUDGE FRANK M. JOHNSON, JR.: A BIOGRAPHY* (1978).

10. 347 U.S. 483 (1954).

11. C. HAMILTON, *THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS* (1973); R. KLUGER, *supra* note 6; J. PELTASON, *supra* note 7.

Texas, the Fifth Circuit handled some of the thorniest disputes over desegregation and disfranchisement. *Let Them Be Judged* concentrates on problems in public education, but it does not ignore cases involving public accommodation, jury selection, and suffrage. For the twenty-year period under investigation, Read and McGough conclude that the Fifth Circuit "[m]ore than any other single force or institution . . . was responsible for the actual integration of the public schools of the Deep South."<sup>12</sup>

In arriving at this conclusion, they highlight the accomplishments of the appellate judges. Although a few district judges like Frank Johnson consistently handed down egalitarian opinions, the major rulings tearing apart barriers of racial bias were penned by judges on the appeals bench. Indeed, these jurists spent a good deal of time reversing such lower court members as William Harold Cox, who relentlessly attempted to hamper Black advancement.<sup>13</sup> The appellate court not only reversed Cox-type rulings, but eventually adopted streamlined procedures designed to expedite lawsuits that were bogged down in the hands of unsympathetic district court personnel. To this end, appellate judges issued writs of mandamus to force resistant brethren seated below to carry out their edicts. As one commentator remarked in the early 1960s, these special decrees

have served to prevent judges from flouting explicit orders, to break through the flimsy screen of state statutes to their actual operation in thwarting the constitutional rights of Negroes, to prevent the year-by-year perpetuation of segregation through judicial delay, and to save the time lost by civil rights lawyers, and the courts, in interminable litigation.<sup>14</sup>

The Fifth Circuit also made a notable contribution by prescribing innovative remedies through case law. For example, before Congress enacted the Voting Rights Act in 1965, Fifth Circuit decisions had already suspended literacy requirements for suffrage registration. In determining the basis for relief, the judges looked closely at statistical evidence of racial discrimination, a standard of proof later adopted by Congress in fashioning the Voting Rights Act.<sup>15</sup>

Although Read and McGough credit the Fifth Circuit with playing the chief role in achieving integration, their account suggests the limits of their conclusion. Because *Brown* left the pace of

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12. F. READ & L. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 596 (1978).

13. G. Stern, *Judge William Harold Cox and the Right to Vote in Clarke County, Mississippi*, in *SOUTHERN JUSTICE* 165 (L. Friedman ed. 1965).

14. S. Fingerhood, *The Fifth Circuit Court of Appeals*, in *id.* at 224.

15. *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964); *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962); see Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051 (1965).

desegregation to be determined by lower federal judges, these judges functioned at the eye of racial storms. Without much guidance from the Supreme Court, Congress, or the President until the middle 1960s, the judiciary permitted only token integration in the Deep South. The jurists accepted the holding of a district court in the neighboring Fourth Circuit that school boards were not obligated to abolish dual educational systems, but were required merely to prevent racial bias in assigning children to schools.<sup>16</sup> In carrying out this principle of desegregation rather than integration, judges approved freedom of choice and pupil placement schemes designed by White southern leaders to perpetuate as much racial separation as legally defensible.

Stationed at the front lines, lower federal judges did chart new legal ground, but they would not have advanced very far without reinforcement from Washington. The judicial deadlock began to loosen when Congress in the 1964 Civil Rights Act provided the executive branch with powerful measures for promoting integration, and when later in the decade the Supreme Court called for an acceleration of the desegregation process.<sup>17</sup> School desegregation guidelines drawn up by the Department of Health, Education and Welfare (HEW) and backed by a threatened curtailment of federal funds for states refusing to comply accomplished more in a year than had been achieved by a decade of lower court decrees. Without a potent civil rights statute that was vigorously implemented, the considerable efforts in the Fifth Circuit could not shatter southern White resistance. Recognizing that the long round of litigation after 1954 produced few gains a disappointed appellate judge bemoaned "the utter impracticability of a continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual . . . compliance with . . . Brown."<sup>18</sup> In 1966, the jurists acted on this premise by sanctioning HEW-sponsored standards for unitary school systems, thus willingly lifting some of the enforcement burdens from their shoulders.<sup>19</sup>

In focusing on the drama of integration, Read and McGough place the judges at center stage. They divide the twenty-year era under study into three periods corresponding with the chief judge-ships of Joseph C. Hutcheson and Richard Rives (1954-1960), Elbert

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16. *Boson v. Rippey*, 285 F.2d 43, 48 (5th Cir. 1960) (citing *Briggs v. Elliott*, 132 F. Supp. 778 (E.D.S.C. 1955)).

17. *Green v. County School Board*, 391 U.S. 430 (1968).

18. F. READ & L. MCGOUGH, *supra* note 12 at 428 (quoting Judge Tuttle's opinion in *Davis v. Board of School Comm'rs*, 364 F.2d 896, 898 (5th Cir. 1966)).

19. *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966).

Tuttle (1960-1967), and John R. Brown (1967-1973). The authors provide capsule profiles of every judge who sat on the appellate bench during those regimes. The Eisenhower appointees, Tuttle, Brown, and John Minor Wisdom, along with Rives, a Truman selection, became the most liberal on racial issues. This situation resulted less from Eisenhower's racial perspective, which was cautious and conservative, than from the circumstance that the usual etiquette of the appointment process did not apply to the Republican President and Democratic senators. Nevertheless, the nomination procedure in the hands of the GOP chief executive did not lead to perfect harmony on the bench. Eisenhower also chose Ben Cameron of Mississippi, who consistently attacked opinions favorable to civil rights in stinging dissents which denounced his liberal brethren. The authors distinguish between the activists, gradualists, and resisters among the judges, but they refrain from analyzing the most important variables shaping judicial decisionmaking. Read and McGough present data related to the background of each judge, but they do not draw in any systematic fashion new insights to explain judicial behavior.<sup>20</sup>

The authors are more successful in describing the internal affairs of the Fifth Circuit. Based on extensive interviews with the appellate judges, they recreate the tensions that nearly tore the court apart. James Meredith's matriculation at the University of Mississippi triggered a riot in William Faulkner's Oxford, and it also touched off explosions inside the judiciary. Before Meredith finally succeeded in obtaining a decree ordering his enrollment, Judge Cameron on four occasions vacated injunctions issued by his colleagues against state officials who interfered with the Black undergraduate's admission. Reversed by the Supreme Court, Cameron recoiled in anger against the liberals who sat beside him. In 1963 he accused Chief Judge Tuttle of staffing appellate panels in favor of civil rights plaintiffs. This charge fueled the wrath of Mississippi Senator James Eastland, chairman of the Senate Judiciary Committee and an ardent foe of civil rights.

The Meredith imbroglio demonstrated the vulnerability of the judiciary to political pressures. Eastland proposed legislation dividing the Fifth Circuit in half, carving out a separate circuit for Louisiana and Texas. As a result, the liberal bloc stood to lose two of its staunchest members, Brown and Wisdom. In an attempt to avoid this possibility, Judge Tuttle began assigning to civil rights tribunals judges with more diverse views than those who had parti-

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20. For an interesting discussion contrasting Kennedy's appointments to Eisenhower's, see V. NAVASKY, *KENNEDY JUSTICE* 243-76 (1971).

culated prior to the Meredith controversy. This solution did restore a measure of unity to the court, particularly after Cameron died in 1964, but it also produced an unsteady effect on civil rights. With a variety of judges ruling in racial cases, the progress of desegregation fluctuated with the changing composition of appellate panels. The circuit remained intact, but Cameron's accusations and Eastland's threats hampered civil rights advocates.

This history of the Fifth Circuit demonstrates the fragile nature of the judiciary as a force for social change in the South. On the positive side, jurists in Dixie who ruled in favor of racial equality conferred legitimacy on the goals of the civil rights movement. Although their plodding case-by-case deliberation prolonged the transformation of race relations, federal judges inside the region interpreted pronouncements from Washington in accents that White southerners could understand. Their opinions, however unpopular at times, received wider acceptance than did edicts promulgated in the nation's capital. Nevertheless, jurists made unlikely allies in a struggle of revolutionary dimensions. For legal craftsmen, as Read and McGough recognize, the law's "perfection is never absolute, but always relative to specific facts, specific places and specific times."<sup>21</sup> Hence judges characteristically shunned sweeping decisions, and they demonstrated an abiding faith in the powers of reasonable persuasion to win acceptance of their rulings from state officials. Taking advantage of this emphasis on good faith, recalcitrant officials such as George Wallace and Ross Barnett displayed contempt for the lawyerly process. They mocked the spirit as well as the letter of the law, but escaped punishment for their transgressions, thereby encouraging a belief in a double standard of justice. Fifth Circuit jurists acted cautiously for fear of upsetting the delicate balance of powers in the federal system and converting demagogues into martyrs.<sup>22</sup>

The courts needed collaboration from other federal agencies to advance civil rights. Read and McGough show that Blacks took their biggest strides forward when the executive, legislative, and judicial branches of the national government united behind their demands. The appellate judges in the Fifth Circuit appeared to take their cue from officials in Washington. Desegregation started off slowly in the 1950s when the occupant of the White House chose not

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21. F. READ & L. MCGOUGH, *supra* note 12, at 109.

22. Presidents also acted cautiously when confronted with recalcitrant state governors. For a discussion of the Kennedy-Barnett conflict, see C. BRAUER, *JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION* 181-204 (1977). The confrontation between Lyndon Johnson and George Wallace over the Selma-Montgomery voting rights march is described in E. GOLDMAN, *THE TRAGEDY OF LYNDON JOHNSON* 312-15 (1969).

to throw his moral weight in support of the civil rights movement. The *Brown* decision went virtually unenforced until the President, the nation's lawmakers, and the justices of the Supreme Court joined to provide substantial authorization for demolishing Jim Crow with less deliberation and more speed. Since the end of the Johnson Administration, the national consensus in favor of expanding racial equality has cracked. Most of the legal gains won during the 1960s, however, remain firmly written in the law books and have survived the retreat from extending equal opportunity through affirmative action. In the years ahead, *Bakke* and busing will test the endurance of the triumphs scored during the Second Reconstruction.

Read and McGough offer a valuable suggestion to historians interested in measuring the magnitude of those past victories. Although scholars have studied such aspects of the civil rights struggle as school desegregation, suffrage expansion, and equal housing and employment opportunities, generally they have not evaluated the "cumulative effect which the movement had on a single state or city."<sup>23</sup> Most works neglect the impact of federal policies and case law on actual behavior in southern communities. Researchers have emphasized decisionmaking in Washington, virtually ignoring the dynamic interplay of sectional and national forces which shaped acceptance or rejection of Black demands at the grass roots level. An investigation of a broad range of southern cities will reveal a diversity of responses to racial conflicts. This approach can uncover the various roles played by Black organizations, government officials, and community leaders in directing the outcome of racial confrontations. From such case studies we will learn more about the conditions that encouraged extremist or moderate reactions to protest for social change.

The history of the civil rights movement remains to be chronicled from the bottom up. Read and McGough have taken preliminary steps in that direction. This well-written and extensively researched volume provides lay people and legal experts alike with a view of the intersection at which federal courts in the South encountered the combatants of racial disputes. The results of those clashes depended on many considerations, one of which was the determination of a majority of appellate judges in the Fifth Circuit to construct a legal framework advancing racial equality. In judging the

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23. F. READ & L. MCGOUGH, *supra* note 12, at 371. An exception is W. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR EQUALITY (1980). An excellent compendium of personal remembrances by participants in the civil rights struggle is H. RAINES, MY SOUL IS RESTED (1977).

judges, readers will most likely agree with the authors' basic proposition that despite blemishes on their records, federal appeals judges in the Deep South deserve surprisingly high marks for their performance in extending first-class citizenship to Black Americans.

FEDERAL TAXATION OF TRUSTS, GRANTORS AND BENEFICIARIES. By John L. Peschel and Edward D. Spurgeon. Boston: Warren, Gorham & Lamont, 1978. Looseleaf. \$47.50.

*Reviewed by John H. Martin\**

The separate study in law school of income, estate, and gift taxation is a natural result of the need to package the curriculum. The artificiality of this practice is quickly apparent to the practitioner whose clients are walking examples of multifaceted problems. Nevertheless, academic compartmentalization has for many years carried over into the publication and organization of treatises in the estate planning field. There are works that cover fiduciary income taxation,<sup>1</sup> others that describe the scheme of federal estate and gift taxation,<sup>2</sup> and a few that explain both income and transfer taxes albeit in *seriatim* fashion.<sup>3</sup>

Until now there has not been a book that uses an integrated, transactional approach to guide the practitioner through the estate planning tax maze. John L. Peschel and Edward D. Spurgeon have supplied just such a work.<sup>4</sup> Interestingly, this new treatise follows Professor Peschel's public prescription for better integration of these tax laws in a single law school course.<sup>5</sup>

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1. *E.g.*, M. FERGUSON, J. FREELAND, & R. STEPHENS, FEDERAL INCOME TAXATION OF ESTATES AND BENEFICIARIES (1970); J. HUFFAKER, C. STUTSMAN, JR., L. ANGVIRE, & T. WIENER, TAX PROBLEMS OF FIDUCIARIES (2d ed. 1977); A. MICHAELSON & J. BLATTMACHR, INCOME TAXATION OF ESTATES AND TRUSTS (10th ed. 1978).

2. *E.g.*, C. LOWNDES, R. KRAMER, & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES (3d ed. 1974); R. STEPHENS, G. MAXFIELD, & S. LIND, FEDERAL ESTATE AND GIFT TAXATION (4th ed. 1978).

3. *E.g.*, D. KAHN & E. COLSON, FEDERAL TAXATION OF ESTATES, GIFTS, AND TRUSTS (2d ed. 1975 & M. FELLOWS, Supp. 1977); J. RABKIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION (1979).

4. The authors combine academic and professional backgrounds. Peschel is Professor of Law at New York University, while Spurgeon is a partner in the Los Angeles law firm of Paul, Hastings, Janofsky & Walker.

5. See Peschel, Book Review, 76 MICH. L. REV. 557 (1978).

## I. INCONSISTENT TAX SCHEMES

A functional, integrated approach to income and transfer taxes is important not only to illustrate optimal results under all tax schemes but also to facilitate and assure attainment of those results. This twofold goal is not easily attained because there are substantial inconsistencies and misalignments in the bases for taxation under the several laws that demand the planner's most careful attention.

One area where major differences exist is taxation of transferred property on account of retained authority and benefits. For income tax purposes the rules key on both the identity of the trustee and the extent of the power.<sup>6</sup> The ability held by anyone to alter beneficial enjoyment of trust property will cause the grantor to be taxed on the trust income unless the discretion is exercisable by or subject to the approval of an adverse party.<sup>7</sup> Excepted from that broad rule are certain limited powers held by any person as trustee, even the grantor;<sup>8</sup> powers held by so-called independent trustees;<sup>9</sup> and certain powers held by any trustee other than the grantor or his spouse.<sup>10</sup> The latter two exceptions permit broad discretion in trustees who, in fact, may be subject to influence and control by the grantor.<sup>11</sup> In contrast, the estate tax asks *inter alia* whether the decedent-transferor retained benefits of property, powers to regain the property, or the ability to shift enjoyment.<sup>12</sup> Possession of control by others, even nonadverse parties, is irrelevant.<sup>13</sup> In similar fashion, the test for a completed transfer for gift tax purposes is whether the donor himself relinquished all dominion and control.<sup>14</sup>

Certain fiduciary distributive and administrative powers also receive disparate treatment for income and transfer tax purposes. Where a trustee who is a nonadverse party has absolute discretion to pay or withhold income to the donor or his spouse or to pay life insurance premiums on policies insuring the donor or his spouse, the trust's income (or a portion of it) is taxed to the donor.<sup>15</sup> There can be a completed transfer under the gift tax, however, even if another

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6. I.R.C. § 674.

7. *Id.* § 674(a).

8. *Id.* § 674(b).

9. *Id.* § 674(c).

10. *Id.* § 674(d).

11. Certain close relatives who are not adverse parties, as defined in I.R.C. § 672(a), are presumed to be dominated by the grantor. I.R.C. § 672(c). Other persons, however, are not so viewed no matter what their actual relationship with the grantor may be.

12. I.R.C. §§ 2036-2038.

13. Treas. Reg. §§ 20.2036-1(b)(3), .2038-1(a).

14. *Id.* § 25.2511-2(b).

15. I.R.C. § 677(a).

as trustee holds such discretionary powers.<sup>16</sup> Moreover, if those powers exist in another at the donor's death, no transfer tax results.

Administrative powers such as the ability to direct or veto investments or to vote stock will cause adverse income tax consequences for the trust settlor when the absolute power is held by anyone in a nonfiduciary capacity and when the assets are stock or securities of companies in which voting control of the settlor and the trust is significant.<sup>17</sup> This differs markedly from the estate tax scheme. Familiar case law asserts that "no aggregation of purely administrative powers can . . . be equated with ownership."<sup>18</sup> This sweeping statement is modified only in part by the Congressional response to *United States v. Byrum*,<sup>19</sup> amending section 2036 to equate retention of voting power over controlled stock with retained enjoyment.<sup>20</sup>

The amendment to section 2036 could, of course, signal Congress' willingness to re-examine the practical content of some retained benefits that circumvent estate taxation. A thorough review might well spill over to the income tax and provide an opportunity to harmonize the cacophonous clash of present rules. Alternatively, the judiciary might construe the recent amendment as a signal to change its interpretations of Internal Revenue Code provisions dealing with retained powers and benefits. The historical roller-coaster construction of the estate tax law provides a clear precedent for such a development.<sup>21</sup> Judicially engrafted exceptions for retained powers held by the transferor subject to ascertainable standards could be in jeopardy,<sup>22</sup> as well as the tendency to read statutory language narrowly and literally as in *Byrum*, when the court defined "right" to mean a legally enforceable right only.<sup>23</sup>

The wait for Congressional or judicial response to the vagaries of multiple taxing statutes could be a long one. A call for such action was made nearly forty years ago by Erwin Griswold.<sup>24</sup> Thus, for the

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16. Treas. Reg. § 25.2511-2(b).

17. I.R.C. § 675.

18. *Old Colony Trust Co. v. United States*, 423 F.2d 601, 603 (1st Cir. 1970).

19. 408 U.S. 125 (1972).

20. See I.R.C. § 2036(b).

21. That the courts should so construe the Congressional signal is argued in Pedrick, *Grantor Powers and the Estate Tax: End of an Era?*, 71 Nw. U. L. Rev. 704 (1977). This article also traces the constructional vicissitudes to which the statute has been subjected.

22. See *Old Colony Trust Co. v. United States*, 423 F.2d 601 (1st Cir. 1970); *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947).

23. *United States v. Byrum*, 408 U.S. 125, 136-37 (1972).

24. Griswold, *A Plan for the Coordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337 (1942).

indefinite future, there will persist a need for the guidance now offered by Peschel and Spurgeon.

## II. A SYNOPTIC ACCOUNT

*Federal Taxation of Trusts, Grantors and Beneficiaries* is divided into five parts. The first contains a brief introduction to normal planning guidelines. While the book focuses primarily on the tax consequences of the creation, administration, and existence of trusts, the comments in this first part are broadly gauged observations on the usual goals and constraints of estate planning. The next major subdivision covers what the authors describe as "Basic Trusts." Here they explore the tax ramifications of the creation and existence of irrevocable trusts ("permanent trusts" in their terminology) as well as the new problem of asset sales shortly after transfer into trust. Within this part the authors also describe the basic rules of the fiduciary income taxation of simple, complex, and accumulation trusts.

Beginning in this second part and continuing throughout the volume, the authors' articulation of the tax rules is organized around examples of particular transfers and specific types of trusts. In almost all cases an illustrative situation is stated as the first item under a topical heading, and this is followed by an exploration of its treatment under the income, estate, and gift tax laws.

The book's third portion is entitled "Grantor Trusts." Predictably, it examines the tax picture that emerges from the grantor's retention of either control over some part of a trust or benefits from the trust. The separate discussion of retained benefits and retained control clearly reveals the authors' emphasis on an integrated and transactional approach. Moreover, for each type of trust there is a unified discussion of the impact of the three tax laws.

Part four focuses on trusts for particular classes of beneficiaries. Here the special situations include trusts for spouses (offering a discussion of the marital deduction and its qualification problems), trusts as part of divorce or separation, trusts for minors, trusts to skip generations (examining the new transfer tax enacted in 1976), and trusts for charitable activities. The fifth and concluding portion of the volume is like the fourth in that it examines specific problems. Its concern, however, is with problems unique to certain assets, such as life insurance, community property, installment obligations, and closely held stock. Again, the discussion is organized around hypothetical situations that are posed at the beginning of the topic.

At the end of the volume are a cumulative textual supplement,

tables of code sections, rulings, cases, and an index. The book's coverage does not encompass the various tax returns and their preparation. Likewise, there is no inclusion of or reference to forms of trust agreements that could implement planning suggestions contained in the text. The omission of forms and information about return preparation is not a defect; the book does not purport to offer that type of guidance and the information is available elsewhere.

### III. CRITIQUE AND COMMENTARY

The authors' integrated approach to tax planning and transactional analysis is a splendid concept. Its implementation, however, is blemished in a few particulars. A problem that permeates the book is an overly narrow focus that stems directly from the use of one principal example to introduce and illustrate each topic. In the main, the examples are good ones and illustrate the points well. The discussion, however, generally addresses only the facts of the example and answers only the issues it raises. As a consequence, a reader unfamiliar with the principles of trust taxation (as will be most readers) does not know whether statements apply solely to the corresponding example or whether they are more broadly applicable and, if the latter, to what extent and on which factual distinctions the tax consequences turn. The reader needs more perspective; he needs a better road map. The author's analysis, built as it is around a comprehensive example, is worthwhile and enlivens the discussion. In most cases, however, the example needs to be supplemented (and probably preceded) by a broader discussion of the principles that apply to the particular issues raised. In some cases, by adding minor variants of the example, the authors could emphasize the crucial, changeable facts of the problem.

The organization of the text may cause some difficulty in locating items when the reader knows the general topic but little else. To implement the transactional format, the titles and subheadings are phrased in terms of an event or a trust purpose. They are not labelled according to standard tax topics. Thus, a reader may know that income taxation of trusts sometimes utilizes the so-called tier system to allocate income to beneficiaries, but the tier system is not in the table of contents nor in the index. Absent also is any reference to income allocation among trust beneficiaries under other familiar index headings such as income, allocation of income, and beneficiaries. Indeed, not only is the tier system and the broader question of proper allocation of income among beneficiaries located under the heading "Illustration of Complex Trust Rules," but the relevant discussion is hidden in a paragraph that asks "What is the amount

of the trust's distribution deduction?"<sup>25</sup> To be sure, the proper allocation rules are stated here, but finding and extracting the information requires a providential search and an extremely close reading. The person unfamiliar with these matters will find the task difficult.<sup>26</sup>

Of greater significance is the authors' occasionally indistinct substantive discussion. For example, the authors discuss bequests payable in three or less installments and the separate share rule in the same breath, mixing trust terminology and estate nomenclature.<sup>27</sup> The result is confusion as to which rules apply to what situations and as to whether the rules are identical for both trusts and estates.<sup>28</sup> Similarly, in the midst of discussing whether a particular type of retained grantor control yields an income tax problem under section 674(b), there suddenly appears the statement, "Since *G* [Grantor] is the trustee, neither Section 674(c) nor 674(d) will prevent the application of Section 674(a)."<sup>29</sup> This is accurate. It causes confusion, however, because the reader has not been told that the trustee's identity has any significance for the application of section 674, nor that other subparts of section 674 contain alternative means of avoiding the principal rule. Indeed, nowhere by statement or citation is the rule of section 674(a) given. While there is no virtue in reproducing the Code itself, the discussion needs to be sharpened. As is, the going is difficult even for one familiar with these rules.

The book should be praised for its accuracy; outright errors are remarkably few considering it is an integration of three complex tax statutes. Some, however, do appear.<sup>30</sup> The breadth of coverage like-

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25. J. PESCHEL & E. SPURGEON, *FEDERAL TAXATION OF TRUSTS, GRANTORS AND BENEFICIARIES* ¶ 3.03[A], at 3-14 to 3-15 (1978).

26. This failure to index topics under familiar tax terms casts suspicion on the usefulness of this work as a quick reference to answer specific problems in trust taxation. The indexing problem is not alleviated by the table of contents since the latter's topical headings describe the transactional orientation of the discussion.

27. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 3.03[A], at 3-15 to 3-17.

28. The separate share rule applies to trusts only. Treas. Reg. § 1.663(c)-3(f). The rule of I.R.C. § 663(a)(1) pertaining to gifts and bequests payable in not more than three installments is available to both trusts and estates. See Treas. Reg. § 1.663(a)-1(b)(3), Ex. (3).

29. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 5.02[B][3], at 5-6.

30. Among the few errors is a minor but potentially crucial misreading of I.R.C. § 2036(a)(1). The text states that if the trustee has discretion over trust income and there is an implied understanding between the grantor and the trustee that the trustee will use the income for the grantor's benefit, "the 'right' requirement of § 2036(a)(1) would be satisfied." J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 4.06[A], at 4-22. An implied understanding is not likely to be binding, and the Supreme Court has decided that the term "right" in section 2036 must be legally enforceable. See text accompanying notes 21-22 *supra*. At the same time, an implied understanding could amount to retained "possession or enjoyment," a phrase in

wise is laudable. A one volume work cannot solve all problems; condensation and omission are necessary. The authors explicitly eschew detail in several places, principally the tax on generation skipping transfers and trusts with foreign based assets. Here a broad brush treatment works well and supplies adequate information. At other places, silence about the existence of important problems could mislead a reader into believing there is nothing to be added. Thus, it is troublesome to find tacit omissions in the analysis of trusts used in divorce and separation,<sup>31</sup> transfers to minors,<sup>32</sup> and section 303 stock redemptions.<sup>33</sup>

Planning advice is not faulty unless it fails to accomplish its objective or exposes the client to unnecessary expense or risk. Often such failure cannot be foreseen or even predicted at the outset. Thus, advance criticism of planning advice may be nothing more than expression of personal judgment. In that spirit, this reviewer offers a few observations to suggest that estate planners might disagree with the authors on some matters.

Standard counsel on whether to shift the burden of death taxes from the share designed to qualify for the marital deduction is that a tax apportionment clause placing the burden on the nonmarital portion is mandatory (unless the desired shift clearly is made by local law) to preserve the maximum marital deduction. While recognizing the need for a tax apportionment clause, the authors assert "no standard formula or recommendation in this area is safe,"<sup>34</sup> and follow with a discussion that seems incomplete.<sup>35</sup>

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§ 2036(a)(1) that is not qualified by language of "right." See *Estate of McNichol v. Commissioner*, 265 F.2d 667 (3d Cir. 1959).

31. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶¶ 8.01-.06. This passage does not cover the problem of gain or loss arising from non-pro rata property divisions, does not discuss the ten year rule of § 71(c) or the effect of contingencies on a stated principal sum, and omits several of the tax effects generated by transfers to a third person in exchange for the wife's release of her right to support.

32. *Id.* ¶ 9.03[B]. The coverage here is marred by the lack of any mention of uncertainties in the recently approved "Qualified Minors Trust" described in I.R.C. § 2057(d). For example, the meaning of pro rata and disproportionate distributions, and the time the trust must terminate if the youngest child should die before attaining age 23, are uncertain.

33. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 12.04[C].

34. *Id.* ¶ 7.02[B][5], at 7-12.

35. The advice given is difficult to extract. For instance, the authors state: "A substantial or complete shift of the federal estate taxes to the nonmarital share may be appropriate, since the surviving spouse's share should, if properly constructed, trigger a marital deduction for most or all of the value assigned to the spouse." *Id.* This seems to be an awkward manner of saying that normally the marital share is only that amount which obtains the maximum marital deduction, and that in order to preserve the maximum deduction, the draftsman should shift the burden of death taxes to the nonmarital portion. Omitted from the discussion is the fundamental point that a proper apportionment clause can be drafted only by reference to the local law of abatement for death taxes. Moreover, the text should, but does not,

The authors' examination of a general approach to marital deduction formula clauses might also precipitate disagreement among planners. They state, quite properly, that a smaller estate should first bequeath to or for the surviving spouse an amount equal to the exemption equivalent of the unified credit. The parenthetical expression "(not necessarily in qualified marital deduction form)" that appears in the sentence<sup>36</sup> containing this advice is misleading, however. Carving off an exemption-equivalent amount is done in order to by-pass the survivor's estate for tax purposes upon the survivor's death. To accomplish this the exemption equivalent *must* be in a form that does not qualify for a marital deduction in the decedent's estate.

The authors also state "the bequest geared to the exemption equivalent must make adequate provision for the spouse. In other words, it should not be drafted for the exclusive benefit of individuals other than the spouse."<sup>37</sup> There is nothing in tax law that requires such a bequest to provide for the spouse in any manner. Most clients, to be sure, will want to leave all of their assets in some form that will benefit the spouse. The choice, however, is the client's, and in some cases (*e.g.* second marriage, with adult children of the first marriage) the exemption equivalent may be an ideal amount to leave directly to other persons. The authors' contrary statement, with its implication that the spouse absolutely must benefit in some way from the exemption-equivalent amount, is an unfortunate insertion.

Continuing their marital deduction formula clause discussion, the authors hypothesize a formula calling for a bequest equal to the maximum marital deduction in an estate of \$1,000,000 at the time of planning that drops to \$300,000 on date of death. The reference in the will to the maximum marital deduction will, of course, generate a bequest and deduction of \$250,000. The authors' point is that this result may not comport with the decedent's desires in that eighty percent of the \$300,000 estate is given to the spouse. Moreover, they assert, this result may aggravate the tax burden for the surviving spouse, especially if there is substantial appreciation prior

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mention the Uniform Estate Tax Apportionment Act, now in effect in many jurisdictions as § 3-916 of the Uniform Probate Code, and the existence of apportionment rules in I.R.C. §§ 2206 and 2207.

Among the difficult problems the authors avoid are the variance of the state death taxes from the federal estate tax (which may demand paying from the marital share any state tax assessed against it) and the extent to which an apportionment clause in a will can bind a taker of nonprobate assets who is not a beneficiary under the will.

36. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 7.06[C], at 7-35.

37. *Id.*

to the spouse's death. The response to these worries is a suggestion that the draftsmen utilize for the marital bequest the alternative expression of fifty percent of the adjusted gross estate.<sup>38</sup> While the authors' worries are legitimate, their response seems inadequate.

Quite obviously, a planner must do the best he can using the facts that exist at the time of planning and anticipate as many contingencies as possible. Nevertheless, if the situation is typical, the maximum marital deduction will nearly always be attractive because the entire estate is to go to or to be held for the spouse in one form or another. A decision to take a marital deduction of less than the allowable maximum is made for such reasons as full utilization of the unified credit, equalization of spouses' estates,<sup>39</sup> and inclusion of persons who must benefit at decedent's death or face the prospect of elimination (*e.g.* second marriage, with adult children of the first marriage). In a typical \$300,000 estate, or even a \$1,000,000 estate where decrease in value is a significant worry, the major planning issue is not whether to reduce the size of the marital bequest because a \$250,000 transfer might grow to unacceptable levels before the survivor dies. The major issue—one that every draftsman should address—is whether to coordinate the marital bequest with the unified credit. In a smaller estate, as previously noted, the trust or will should carve off an exemption-equivalent amount *before* leaving the balance to the marital deduction share or trust. This certainly should be done in the authors' example of a \$300,000 estate. Thus, only \$125,000 would be put into the marital share, and the authors' worry about large increases in value would be substantially solved.

It seems clear that the routine estate plan, regardless of its value at the planning stage, should contain a self-adjusting clause that operates to give a marital share equal to the maximum allowable deduction (the greater of one-half the adjusted gross estate, or \$250,000) *subject* to a provision that reduces the bequest as necessary to absorb first any available unified credit. Such a clause will work well in a small or large estate, whether the value increases or decreases after execution of the basic documents and before death. This is a basic approach, and the planner can modify it when the special, atypical situation arises. This point the authors fail to artic-

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38. *Id.* ¶ 7.06[C], at 7-36.

39. Equalizing the estates of decedent and the surviving spouse may be wise when the survivor has a considerable estate. The greater amount of tax paid at the decedent's death, and hence loss of that money for investment during survivor's lifetime, may be offset by the lower tax bill at the survivor's death and by the fact that the survivor will not be able to consume or otherwise avoid tax on the added property that the maximum deduction would shift to the survivor. *See Estate of Smith*, 565 F.2d 455 (7th Cir. 1977).

ulate when they say "no standard response to the use of the \$250,000 maximum marital deduction in the marginal moderate to large estate range can be offered here."<sup>40</sup> In fairness, the authors include in a footnote a clause to coordinate the marital clause and the unified credit in an estate under \$425,000.<sup>41</sup> Unfortunately, that clause contains an interpretative difficulty that may jeopardize its objective.<sup>42</sup>

#### IV. CONCLUSION

The transactional approach to planning is this volume's strength. The motivating concept is excellent and the topical range of the text is reasonably broad. Interestingly and most importantly, the deficiencies noted in this review can be corrected or minimized. The looseleaf format permits revision and replacement of the original text as well as more limited back-of-the-book supplementation for current developments. Few authors have this privilege. No doubt this flexible format is a planned situation and the book will grow from its very good beginnings.

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40. J. PESCHEL & E. SPURGEON, *supra* note 25, ¶ 7.06[C], at 7-36.

41. *Id.* ¶ 7.06[C], at 7-36 n.123.

42. The provision bequeathes an amount equal to the maximum marital deduction, provided, however, that said amount shall be reduced, to the extent necessary, if any, to thereby increase my taxable estate for federal estate purposes so that, after taking into account § 2010 and all other relevant provisions of the Internal Revenue Code as amended, no federal estate tax is payable with respect to my estate.

*Id.* Applying this clause literally, no reduction in the marital gift may be necessary to avoid federal tax liability, because the maximum marital gift may result in no tax liability.

A more direct, unambiguous expression that yields the minimum marital deduction necessary to reduce tax liability to zero is as follows: the smallest amount which shall, when taken together with all other interests and property that qualify for the marital deduction and that pass or shall have passed to my spouse under other provisions of this will or otherwise, obtain for my estate a marital deduction for federal estate tax purposes which will result in the elimination of federal estate tax or in the lowest possible amount of federal estate tax payable in my estate, taking into account the effect of other deductions claimed and credits allowable.