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BOOK REVIEWS

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THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-1861. By Kermit L. Hall. Lincoln, Neb.: University of Nebraska Press, 1979. Pp. xvii, 268. $19.50

*Reviewed by Lawrence M. Friedman**

In *The Politics of Justice,* Kermit L. Hall, a history professor at Wayne State University, takes a look at the way Presidents from Jackson through Buchanan picked judges for the federal district courts and for the territories. There were 240 such appointments during the period studied.

Each of the eight Presidents had his own style of proceeding, and each was swayed by different factors. At all times Presidents were keenly, painfully aware of the country's troubles and their own, politically speaking, and tried to appoint men who would help out one or the other, or both. Van Buren, for example, tried to "place on the federal courts of the South candidates with a firm attachment to the Union."[1] Polk looked for original Democrats and strict constructionists.[2] Some Presidents were in vigorous control of the process (Polk carefully sifted potential candidates himself); others drifted or let others take the lead. Zachary Taylor (not one of the great Presidents, to put it mildly) let his Secretary of State, John Clayton, dictate selection of judges, along with the Senators from the Whig party.[3] The constant, nagging, never-ending question of slavery complicated appointments, particularly such sensitive ones as those in the Kansas Territory. When Utah was organized as a territory, the Mormon question poisoned and confused the process. Hall takes up each administration in somewhat bewildering detail. It seems as if each case is different, each comes out of a unique background, each reflects a unique chemistry of factors—the President, his character, his party, where the district was, who the candidates were, the state of the nation, and so on. Clearly, it is difficult to dredge general conclusions out of silt so complex and contradictory.

Still, Hall has a thesis. His book covers the period of the so-

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* Marion Rice Kirkwood Professor of Law, Stanford University. J.D., University of Chicago, 1951; M.LL., University of Chicago, 1953; LL.D., University of Puget Sound School of Law, 1977.

1. K. HALL, THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-1861, at 36 (1979).

2. *Id.* at 62.

3. *Id.* at 86.

called second party system; his thesis is that the judicial selection process was in transition to "political modernization" during the period.[4] It would be fairer to call this a hypothesis rather than a thesis. He finds some support for the proposition, but he has to admit that "vestiges" of traditional political order remained throughout the period.[5]

The reader will naturally ask, since supposedly we are in transition to it, what we mean by "modern" political culture anyway. Hall tells us right off: "In a modernizing political culture, critical political activities become institutionalized—that is, the decision-making process tends to become formal, impersonal, automatic and bureaucratic—nominees for appointment to public office are usually selected on the basis of special training and experience."[6] Now, if that is what we mean by political modernization, we do not have to read much further to guess whether Hall will find it happening or not. After all, we know a little bit about selection as it is today; it is certainly not "formal, impersonal, automatic and bureaucratic." We have apparently not yet reached the modern stage. Only those with very, very childlike faiths would believe that recent Presidents have picked their judges chiefly because they were outstanding in training and experience. In fact, it is hard to see much difference between the process Hall describes and what goes on today (at least judging from the newspapers). It is the same witches' brew of politics, policy, and expediency. At the end of his book, Hall tries to sum up what his study shows: "[I]n the selection of lower federal court judges, the political culture of the era moved gradually, incrementally, unevenly, and incompletely toward political modernity."[7] This is, in a way, a rather odd statement, since it is hard to see what exactly in his story supports it. Moreover, at least by implication, he seens to be contrasting selection in his period with the way judges were chosen before Andrew Jackson, and the way they were later chosen by Presidents Lincoln, McKinley, Franklin Roosevelt, or Carter. But since he gives us no data about this selection process before or after Jackson, we do not know what to make of the "movement" he thinks he detects. There is some "movement," to be sure, within the period but (to me at least) not very much, and not on the whole the sort of process Hall is talking about.

I suspect that the concept of "modern" political culture is a

4. *Id.* at xv.
5. *Id.* at xvii.
6. *Id.* at xv.
7. *Id.* at 174.

straw man, and that by dragging in the idea of bureaucratic selection Hall muddies the issues. These definitions of what is "modern," if they are valid at all, apply to the civil service, to the lower order of bureaucrats. Presidents do not, and cannot, be "modern" when they choose White House aides, running mates, Supreme Court judges, and, yes, lower court judges. The hallmark of "premodern" political behavior is selection based on patronage, on ties of kinship or friendship. This behavior persisted (to no great surprise) in the period studied. Many judges owed their jobs to whom they knew, or married, or shared an ancestor with, rather than to what they knew. President Tyler, for example, appointed his own brother-in-law, John B. Christian, to a vacancy in the Eastern District of Virginia. In this case, the Senate rejected the nomination.[8] Tyler was unpopular, and this nomination was controversial on many grounds. "Traditional patronage practices predicated on kinship"[9] did not usually fail; the "kinship" was typically congressional, not presidential. Van Buren appointed Isaac S. Pennybacker of Virginia on the urging of Congressman Greene B. Samuels, his brother-in-law. Even in the cautious and high-minded Polk administration, one-quarter of the nominees had "family ties to principal mediators."[10] The appointment of relatives is always a bit touchy, but we have plenty of recent examples. President Kennedy, after all, made his brother Attorney General; a cousin of President Carter is on the White House staff.

The "premodern" selection process is still, I believe, very much with us. Ties of kinship or friendship with senators, congressmen, and other politicians are very important to any aspiring judge—not that merit and training are irrelevant. It is hard for someone to win nomination or to be confirmed if he is believed to be substandard. The Senate rejected two of Nixon's choices for the Supreme Court, Haynsworth and Carswell, on this ground (although it is questionable whether or not their belief was sincere).[11] Judges must be lawyers, and the American Bar Association and other organized bodies have been insisting, with more and more success, that nobody should be appointed to high judicial office without measuring up to the strictest standards. Trial experience is essential, and judicial experience very much preferred. The screening process *is* becoming

8. *Id.* at 57.
9. *Id.* at 33.
10. *Id.* at 62.
11. *See* Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927 (1979) (arguing that what leads Senators to vote "no" is dissatisfaction with the policy or ideology of nominees). But competence (or lack of it) provides a good excuse for a vote, if nothing else.

more formal, more institutional. The organized bar plays a crucial role,[12] which of course it did not in the nineteenth century (there was no organized bar to speak of before 1870). Still, everyone knows that the appointment of a judge is not at all like the appointment of a lower civil servant. Judges are almost always political people. They are almost always appointed for some reason that goes beyond the simple desire to have somebody good on the bench. In this regard, very little has changed since Andrew Jackson's time.

These other motives for choosing a particular nominee are, of course, very varied. Sometimes the President wants to make sure his policies are carried out. Andrew Jackson, according to Hall, wanted to "place his imprint upon the lower federal judiciary"; he wanted judges "whose views paralleled his own," and he even conducted personal interviews to make sure his men were right thinkers.[13] As the country lurched and staggered toward the Civil War, a succession of Presidents tried vainly to avoid North-South rupture. Many issues were wrapped up in the slavery question, and federal and territorial courts often had to deal with them. Presidents thus tried to preserve some kind of balance by choosing the right kind of judge—someone who would not inflame the issue or someone who would tilt to one side or the other, when this seemed best or most expedient. Buchanan's Attorney General, Jeremiah Sullivan Black, wanted men who would uphold the "rule of law" and thus enforce the Fugitive Slave Act, the neutrality laws, and the ban against the slave trade.[14] Hall's book is particularly useful in documenting the selection process. He weaves a rich fabric of detail. No prior book, I believe, has shown us so clearly the political process at work in judicial selection and tied this process so tightly to the general course of American history. Along the way, we see how the focus of selection shifted from the President himself to the Secretary of State and then to the Attorney General, and we learn a lot about the rise of senatorial courtesy, a custom still with us today.

There is also the interesting story of the idea of rotation in office and the case of the territorial judges. Ordinary federal judges had life tenure; the Constitution gave it to them. But what about territorial judges? This was a debatable question, and the law was hardly clear on this point. Presidents from Jackson on felt they *could* remove territorial judges.[15] But Millard Fillmore was the first

12. *See, e.g.*, J. GROSSMAN, LAWYERS AND JUDGES (1965).

13. K. HALL, *supra* note 1, at 26.

14. *Id.* at 133.

15. This was because of *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). This case did not directly affect the removal power. It did hold, however, that territorial courts

who actually fired a territorial judge. He almost had to. He was beset with crises and scandals in Minnesota, Utah, New Mexico, and Oregon. The controversy over Aaron Goodrich, Chief Justice of the Minnesota Territory, was especially virulent. He was a drunken adulterer, people said; far worse, he was a biased judge. Goodrich had business connections with a certain fur company, and favored his own interests in cases about trapping rights and land claims. At least so his opponents said. Fillmore moved cautiously, but, armored with an opinion from his Attorney General, ultimately got rid of Goodrich.[16] Franklin Pierce was the first President to use his power over territorial judges *systematically,* that is, to make as clean a sweep as he could. He refused to renew expired commissions and simply threw out the rest of the territorial judges. The Senate sustained his actions.[17]

All very good, and very informative. The conceptual apparatus, however, strikes me as somewhat strained. Hall wants to tie senatorial courtesy and the "rotation" of territorial judges into his scheme. He calls them "significant, if somewhat belated, modernizing developments" that "institutionalize . . . the selection process by integrating the needs of the executive and legislative wings of the party and by regularizing the method of selection and removal."[18] I fail to see what he means by all this. It is as if, having determined that his book is about "modernization," he is bound and determined to sniff it out everywhere, by hook or by crook. Senatorial courtesy is neither modern nor nonmodern. If it means, as logically it might, that senators, not the President, really choose judges, then the question is: on what basis do senators choose? If they choose on the basis of kinship or patronage, then we are as premodern as we ever were. The same thing could be said about rotation in office. The question is not whether judges "rotated," but who set them spinning, and why?

There is something of a literature on the selection process,[19] although Hall's book does fill a rather glaring hole. The tale Hall

were not "constitutional courts" (which would tie them to life tenure) but "legislative courts," created by "virtue of the general right of sovereignty which exists in the government," or by virtue of Congress' power over the territories. *Id.* at 546.

16. K. HALL, *supra* note 1, at 107. Goodrich fought back, in United States *ex rel.* Goodrich v. Guthrie, 58 U.S. 284 (1855). The President, he said, had no power to remove him and he demanded his salary. The Supreme Court dodged the issue on technical grounds. Justice McLean dissented, arguing that the court should have reached the merits, and that a President could not remove a territorial judge, appointed for a definite term, before that term expired.

17. K. HALL, *supra* note 1, at 115.

18. *Id.* at 129.

19. *See, e.g., id.* at xv.

tells rings true if we ignore a few overripe conclusions. It is one of the virtues of the book that he gives us the selection process unvarnished. The Presidents and their men are not cynical, not villainous; they are simply politicians. They are constantly balancing considerations of patronage and local political debts against notions of policy. Most writers about selection today agree that politics plays an important, even an overwhelming role. On the other hand, there is the plain, inescapable fact that federal judgeships (putting territorial judges to one side) carry life tenure. There was some brief flirtation with impeachment at the beginning of the nineteenth century. As a way to clean out the bench, politically, this idea was pretty much abandoned by the end of the Jefferson administration, and a pattern was set which has remained more or less to this day: impeachment is reserved for gross crime or corruption.[20] Hence, even when Presidents fill vacancies in such a way as to promote their policies, they have no control over the way judges act in the future. This has been shown over and over again in the history of the Supreme Court. The President is constantly betrayed by the men he appoints. This probably began as early as Joseph Story. In our day, Earl Warren was another egregious example. The four men Nixon appointed bit the hand that fed them, too, by voting against him in *United States v. Nixon,*[21] the famous case of the Nixon tapes.

These facts do not mean that the selection process is not important to the President or to whoever does the selecting. But the importance probably lies less in the judge's future influence on policy than on his past and on the meaning of the selection process itself. The President, precisely *because* he has so little influence over what judges will do in the future, is tempted to downplay this future role, and use selection for other purposes—to reward cronies, to kick upstairs cabinet and staff who have outlived their usefulness, to reward party faithful, to placate certain members of Congress, in short, to solve current political or administrative problems. This means that judgeships are (and were) handed out a little bit like embassies, although not in quite so blatant a manner. Tradition, the bar, and public opinion set certain real limits. Anybody can be an ambassador, but only a certain kind of lawyer can make a judge.

A question immediately presents itself. Practically speaking, once a federal judge gets past the Senate, the judge can sit as long as he or she wants. Judges are, therefore, immune to the winds of

20. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 113-16 (1978).
21. 418 U.S. 683 (1974).

politics—to political weather, although certainly not to political climate. Yet the process has always been intensely political. Is it any more or less political than the process in the states? We have to remember that, by the middle of the nineteenth century, state judges (with some exceptions) were elected rather than appointed.

Did this difference in tenure evoke differences in the selection process? The case of the territorial judges might suggest something of an answer. After all, the President could, if he wished, remove territorial judges. At least judging from Hall's material, the process of picking these men seemed, in essence, much the same as the process of picking other federal judges. There are no glaring differences; hence we cannot say that Presidents approached the task of appointing judges for the territories less cautiously.

There were differences, however, in the two sets of judges. Some past writers have claimed most nineteenth century territorial judges were hacks or worse. Hall does not buy this line. But these men were clearly a cut below district judges in morality and ability. We read, for example, about William W. Drummond, appointed to the bench in Utah by Franklin Pierce, who set off for his post with a prostitute from the District of Columbia, passing her off as his sister.[22] This was, of course, an extreme case. But the quality of the territorial bench is not something Hall leaves to conjecture. He tries to measure and compare systematically the backgrounds of the two groups of judges. It turns out the two were "similar in social origins and academic and legal educations."[23] But nominees for territorial courts were less prestigious, less well known. Some had "no legal reputation or were known only in the immediate communities they served."[24] Less than a third had ever presided over a court, while more than half of the district judges had judicial experience.[25] They were also significantly younger than district court nominees. These differences, as Hall points out, are easy to explain. The territories were far off. The pay was poor; the work conditions bad. Such a job attracted young, unknown lawyers, anxious to start their way up the ladder of success. A district court judgeship, on the other hand, crowned or rounded off a career. It was less likely to be filled with carpetbaggers. So, although

22. K. HALL, *supra* note 1, at 120. In office, he lived up (or down) to expectations. He was prejudiced, incompetent, and often left his post to look after business affairs in California. After he and his slave were involved in an assault on a horse trader, Drummond was indicted for attempted murder by a Mormon grand jury. Later he fled the territory and resigned before Buchanan could remove him. *Id.* at 134-35.

23. *Id.* at 157.

24. *Id.* at 160.

25. *Id.* at 160-61.

there were real differences between the two sets of judges, the differences did not touch the process of selection.

Does the process explain *anything*? This remains unknown. Is there some facet in the behavior of judges which we can reliably attribute to tenure differences (election vs. appointment) or to differences in political or social background? Hall makes no attempt to answer this question. Perhaps he would be foolish to try. There is no easy or obvious way to measure performance in office. For anyone minded to make the study, Hall has given us data on the social class background of his group of judges. What he finds is interesting, although not unexpected. Most nominees came from "either elite or prominent social origins."[26] Only twenty-four percent came from "modest" backgrounds. This was true of men nominated by Whigs and Democrats alike despite the "rhetorical commitment" of the Democrats to the common man.[27] As expected, moreover, judges were far more educated than the common man; no surprises here. Most Americans of the age were farmers, plain and simple; the judges were lawyers, and lawyers who stuck out even from the crowd of lawyers in *some* way, even if that way was the fact of blood relation to a congressman.

After presenting his data on background, Hall describes his judges as "neither a traditional functional elite that served out of a sense of social responsibility" (whatever that might mean) nor a "modern technical elite that commanded selection as a consequence of judicial experience and professional prestige."[28] This is certainly true. It is still true. The process he describes, and the men he describes, are simply not captured in either of the two quoted phrases. In a word, they were politicians. Their party background was and is all-important. Hall's book begins with Andrew Jackson. If he implies that Jackson represented some kind of break with the past, I suspect he is wrong. Nonetheless, it is true that "[t]he judicial selection process confirmed the legitimacy in the political culture of party activism."[29] That, it seems to me, is the major point, and one worth stressing. Method of selection, in the formal sense, seems secondary. What is and has been crucial, for at least 180 years, is that judgeship in the United States is a reward for

26. *Id.* at 153.

27. *Id.* at 153-55. Hall, in one of the few places that deals explicitly with earlier periods, shows that the percentage of nominees with "modest" origins increased about 10% during the period covered, compared to prior periods. This means an increase from about 14% to 24%. The numbers are small, and the data rough. I doubt very much whether this difference is significant, statistically or otherwise.

28. *Id.* at 166.

29. *Id.*

service to party. Judges are party men, doers, pragmatics; in other words, people who dirty their hands in the give and take of politics at some point in their careers. The territorial bench was, as Hall describes it, a place for young men on the make. No doubt most of them never expected to spend a lifetime as territorial judges. District court judgeships were more the place for extinct volcanoes. What tied them together was politics, in the most basic, fundamental sense.

The natural question to ask is whether all this is good or bad for the bench, the law, or the country. There are systems where judgeship really *is* "bureaucratic." Judges in civil law countries, on the whole, really *are* civil servants; they really are out of partisan politics, in the crude sense in which American judges are *in* partisan politics. In civil law countries the judge's image is that of "the operator of a machine designed and built by legislatures,"[30] a kind of "expert clerk."[31] Of course, these judges are political too, in a subtle and insidious sense. The question, although highly interesting, is, I believe, ultimately meaningless. In my view, a dessicated, bureaucratic, "modern" judiciary would be a disaster in the United States, and it is absurd to think of exporting the American style of judging to France. In any case, no such exchange will ever take place. There is an intimate connection between law and society, between styles of judging and society. We have activist courts in the United States; courts that for better or for worse (in my view, for the better) work at the cutting edge of policy. Alexis de Tocqueville noticed this in the nineteenth century,[32] and the process has accelerated over the years. If courts have to decide (as our federal courts do) issues of environmental policy, issues of constitutional right, issues that cut as close to the bone as abortion, race relations, prisoners' rights, and Indian land claims, they had better be politically aware and had better be attuned to social needs and social consequences. "Law" is not enough, and all insiders (certainly all judges) know this. The process of decision is not "modern" in the sense Hall uses this word. It never was, in key cases. This dirty little secret has been out for decades; we did not need a book like *The Brethren*[33] to tell it. Arguably, it is the glory, not the shame, of our court system. At their best, our courts are sensitive to human values, capable of give and take, and open to social and political fact.

30. J. MERRYMAN, THE CIVIL LAW TRADITION 38 (1969).
31. *Id.* at 37.
32. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 98-103 (1951).
33. *See generally* R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

We have activist courts, and an intensely political way of choosing judges. These two aspects of American law are certainly not unrelated. They fit each other like hand and glove. Through a long, intricate historical dance of fate, they have become totally intertwined, and are now inseparable. How this came about and grew is an important part of our history, and *The Politics of Justice* makes a definite contribution to the telling.

MUST CORPORATE INCOME BE TAXED TWICE?, By Charles E. McLure, Jr. Washington, D.C.: The Brookings Institution, 1979. Pp. xvii, 262. $11.95 cloth; $4.95 paper.

*Reviewed by Allaire Urban Karzon**

This study by Charles E. McLure, Jr.[1] originated from a 1977 conference at the Brookings Institution,[2] which focused on the technical and administrative problems that would be encountered if this country were to integrate in any form the corporate and individual income taxes. *Must Corporate Income Be Taxed Twice?* is a feasibility study of integration in practice, not a policy evaluation of the social desirability of integration.

McLure first recommends the introduction of standard terminology to eliminate some of the confusion that clouds this area. He notes that "integration" means different things to different people and that the phrase "partial integration" is misleading.[3] His point is more than a matter of semantics and warrants elaboration. Under our present classical system, income earned by a corporation is taxed to the corporation and, when distributed in the form of dividends, is taxed as ordinary income at the stockholders' marginal rates. Under McLure's definition of full "integration," the corporation is treated as a nontaxpaying conduit (like a partnership), and all corporate income is currently taxed to the stockholders whether or not the income is in fact retained by the corporation or distributed.[4] As to

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1. McLure, currently Vice President of the National Bureau of Economic Research, is Allyn R. and Gladys M. Cline Professor of Economics and Finance at Rice University.

2. The forty participants included several of the most prominent scholars of federal tax law, such as Stanley S. Surrey of Harvard Law School and Alvin C. Warren, Jr., of the University of Pennsylvania Law School.

3. C. MCLURE, MUST CORPORATE INCOME BE TAXED TWICE? 4-5, 14 (1979).

4. *Id.* at 2-3.

those systems of reform that only reduce the double taxation of income if that income is distributed as dividends, which others call "partial integration," McLure suggests the term "dividend relief,"[5] a term he uses with no pejorative connotation.[6]

Dividend relief takes the form of the credit method or the dividend deduction method.[7] Under the former, the stockholder receives a credit against his tax for all (or a part) of the income tax paid by the corporation on the earnings from which the dividends are deemed paid. The stockholder reports on his return the actual dividend plus ("grossed-up" by) the amount of the corporate tax which he receives as a tax credit.[8] Under the dividend deduction method, the corporation takes a deduction for all (or a part) of the dividends paid, similar to the deduction for interest, and the stockholder is fully taxable on the dividend. Dividend relief also includes, according to McLure's definition, the "split-rate" method[9] by which earnings distributed as dividends are still taxed to the corporation but at a lower rate than retained earnings.[10]

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5. *Id.* at 3.

6. *Id.* at 5 n.8, 215 n.1.

7. *Id.* at 2-3.

8. The "gross-up" mechanism is similar to that employed in the computation of the indirect foreign tax credit for dividends received by eligible domestic corporations from certain foreign corporations. *See* I.R.C. §§ 78, 902(a).

9. C. MCLURE, *supra* note 3, at 3.

10. The contrasting operation of the personal and corporate tax systems can be illustrated as follows (leaving aside the $100 exclusion for dividend income under § 116 of the Internal Revenue Code). Assume a corporation with all of its income taxable at a 50% rate, with only one stockholder, taxable income of $1,000, tax liability of $500 and a dividend paid of $100. Under our present classical system, the stockholder would pay a tax on his $100 dividend depending on his marginal bracket—his tax liability could be as low as zero or as high as $70. The amount of the corporate tax is separate and has no effect on the stockholder's personal tax.

Under full integration, the $500 tax paid by the corporation would be considered as equivalent to a withholding tax paid on behalf of the stockholder. The stockholder would be currently taxed on his personal return on the entire $1,000 of corporate income (although he actually received only $100), would receive credit against his personal tax liability for the $500 of tax paid by the corporation, and would have the basis of his shares increased by $400 (the amount of corporate earnings retained by the corporation in excess of the $500 tax and $100 dividend).

Under the stockholder credit form of dividend relief, assuming a system granting the stockholder full credit, the shareholder receiving the $100 dividend out of the $500 after-tax corporate income would be deemed to have paid one-fifth of the corporate tax. The stockholder thus would report a total of $200 on his personal return (the actual dividend of $100 grossed-up by the full corporate tax credit of $100) and would have a tax credit of $100 against his personal tax liability. With a fnll credit, the dividend would thus cause the stockholder to pay additional personal taxes only to the extent that his top marginal bracket exceeded the corporate marginal bracket of 50%.

Under the dividend-paid deduction method of dividend relief, assuming a full deduction, the corporation's taxable income would be $900 ($1,000 minus the $100 dividend) and

McLure's suggestions for clarification of terminology are appropriate. The term "partial integration" may be misleading[11] by implying that it is part of a continuous spectrum with full integration. In fact, while the objectives and consequences of full integration and "partial integration" may overlap, they are far from identical, and the advocates of one system are often antagonistic to the other.[12] McLure's further comment, that his term "dividend relief" has no pejorative connotation, is welcome. It adds a tone of neutrality to a field scarred by controversy and enables him to cover both concepts in a factual, detached manner.[13]

Although his purpose is not to re-debate the policy aspects of the two systems of tax reform, McLure includes an excellent chapter summarizing the basic philosophical arguments for and against each method in order to compare the administrative problems inherent in implementing each. While the author admits that he has been an "advocate of full integration and, with less enthusiasm, of dividend relief,"[14] he nevertheless describes the views of the supporters and opponents of each method with meticulous even-handed objectivity.

The theoretical premise on which the case for integration rests (which has been expounded most impressively by McLure himself in his earlier writings)[15] is that a corporation is simply the aggregate of its owners, has no taxpaying ability independent of its

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the stockholder would have $100 of income. A variant of this method is the "split rate" system in which the corporation is allowed to deduct only a portion of the dividends paid. Thus, if the corporation could deduct only 50% of dividends paid, this would result in a lower tax rate of 25% on the corporation for income paid out as dividends and a higher tax rate of 50% on income the corporation retained.

For tables comparing the classical system, the fully integrated system, and the credit system with varying degrees of gross-up, see C. MCLURE, *supra* note 3, at 6, 16.

11. McLure refers to instances of "partial partial" integration or "partial total" integration. *Id.* at 4. *See also* Ault, *International Issues in Corporate Tax Integration*, 10 LAW & POL'Y INT'L BUS. 461, 463 n.12 (1978) (reference to "complete partial integration" (as opposed to "partial partial integration")).

12. McLure observes that Professor Surrey has made the same substantive point (although Surrey is among those who use "partial integration" to refer to dividend relief). C. MCLURE, *supra* note 3, at 30. Thus Professor Surrey states that "integration . . . is a slippery word" because the economists use it in terms of "full integration," while "the business groups pushing integration are talking in terms of 'partial integration,' which in simple terms means tax relief for dividends. Each is thus seeking a different goal." Surrey, *Reflections on "Integration" of Corporation and Individual Income Taxes*, 28 NAT'L TAX J. 335, 335 (1975).

13. C. MCLURE, *supra* note 3, at 19 n.1.

14. *Id.*

15. *See* McLure, *Integration of the Personal and Corporate Income Taxes: The Missing Element in Recent Tax Reform Proposals*, 88 HARV. L. REV. 532 (1975); McLure, *Integration of the Income Taxes: Why and How*, 2 J. CORP. TAX. 429 (1976).

shareholders, and exists only as a conduit. If the conduit nature of the corporation is accepted as a first premise, then the present unintegrated tax system is seen as grossly inequitable, conflicting with the "vertical equity and ability-to-pay principles of taxation."[16] According to this view, distributed corporate income is taxed more heavily than ordinary income, retained undistributed corporate income is taxed inadequately, and the "overtaxation" of dividends falls most heavily on low-bracket taxpayers and most lightly on high-bracket taxpayers.[17] Integrationists complete their attack on the present system by alleging that it also produces inefficiencies and distortions in the economy, including misallocation of resources between the corporate and noncorporate sectors, a preference for debt financing over equity, and a negative effect on capital formation.[18]

With remarkable detachment, the chapter then presents the two major charges made by the foes of integration, led by Professor Stanley Surrey.[19] First, Surrey, backed by his school of economists,[20] asserts that McLure's perception of the corporation as a conduit belongs in the realm of "tax theology" and that it is equally sound, as a first premise, to treat the corporation as a separate entity. Surrey states:

> I do not propose to pursue this tax theology further, since it suffices to indicate there are two tax theological doctrines and a legislator need not feel obligated to consider himself a tax sinner if he resists any drive for integration. He will have respectable tax theological support for his attitude.[21]

Apart from his theoretical dispute with the integrationists over their first premise, Surrey dismisses "the economists' dream" of full integration as "only a dream"[22] that will not work.[23] He charges

16. McLure, *Integration of the Personal and Corporate Income Taxes: The Missing Element in Recent Tax Reform Proposals*, 88 HARV. L. REV. 532, 535 (1975).

17. *See id.* at 535-536, 539.

18. C. MCLURE, *supra* note 3, at 22-27. *See also* McLure, *supra* note 16, at 540-42. Economists other than McLure have also expressed these concerns. *See* G. BREAK & J. PECHMAN, FEDERAL TAX REFORM 92-95 (1975).

19. C. MCLURE, *supra* note 3, at 28-38. For a summary of Surrey's views, see Surrey, *supra* note 12. Surrey personally identifies McLure with the concept of the corporation as a conduit. *Id.* at 335.

20. Surrey claims the support of economists such as Richard B. Goode. Surrey, *supra* note 12, at 335 n.2. *See* R. GOODE, THE CORPORATION INCOME TAX (1951).

21. Surrey, *supra* note 12, at 335.

22. Surrey repeatedly chides the economists for their "dream" of integration. *Id.* at 335, 337-38.

23. Surrey emphasizes the cash squeeze that would face stockholders if they were taxed currently on undistributed corporate earnings, commenting that the economists' only solution is to make the top corporate and individual rates similar. Either rate similarity

further that economists are endangering tax reform, because they "are being used"[24] by business interests to make integration sound respectable. Once before Congress, Surrey warns, there will be a "fast shuffle"[25] by these business interests, who will then switch from endorsement of full integration to support for "partial integration" (McLure's "dividend relief"). Here Surrey disagrees sharply with McLure. For while McLure throughout the book presents an open mind about dividend relief as an acceptable alternative to full integration[26] and methodically examines each topic from the standpoint of both full integration and dividend relief, Surrey decries all forms of dividend relief as a "revenue bonanza" to upper-bracket shareholders which if enacted would mean "a real decline in tax fairness."[27] Surrey, therefore, admonishes the economists to drop their talk of integration lest in the name of equity they do a real disservice to the cause of equity by facilitating the passage of dividend relief.[28]

Against this background, McLure addresses the operational difficulties that would confront efforts to introduce full integration into our existing tax structure. He explores, among other matters, the enormous data processing and timing problems every corporation would encounter in reporting, sufficiently soon after the close of the corporate year, the prorata share of the company's annual earnings that each person owning its stock during any part of the year would be required to include in his current return;[29] the requirement that each individual stockholder would be responsible for adjusting each year the basis, for capital gain and loss purposes, of each share he owned to reflect the proper portion of each corpo-

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means raising the corporate rates to 70%—which, he notes, would deplete corporate capital by leaving management with only 30% of profits for reinvestment—or rate similarity means lowering the top individual marginal rate to the corporate level (then 48%). The latter alternative, according to Surrey, would produce a severe consequent loss of revenue which would be offset, according to some economists, by tax reforms such as taxing all capital gains currently as ordinary income. Surrey expresses his skepticism that as to either proposal business or Congress would follow the economists as "Pied Pipers." *Id.* at 336-38.

24. *Id.* at 335.

25. *Id.*

26. *E.g.*, C. MCLURE, *supra* note 3, at 5 n.8, 43, 215 n.1.

27. Surrey, *supra* note 12, at 339.

28. *Id.* It is interesting that McLure and Surrey are in accord on one point. Each believes that the result of Congressional consideration of integration is so unpredictable that it is questionable whether any of the interested parties, be they business groups or tax reformers, may "want to push integration into the legislative arena and risk the roll of the legislative dice." *See* McLure & Surrey, *Integration of Income Taxes: Issues for Debate*, 55 HARV. BUS. REV. 169, 181 (Sept.-Oct. 1977).

29. C. MCLURE, *supra* note 3, at 156, 216.

ration's undistributed earnings taxed to him;[30] the difficulty of allocating corporate income and tax preferences on a timely basis among various classes of stock;[31] the "hopelessly complicated" situation that would occur if thousands of individual stockholders that currently report their share of corporate income on their returns were required to reopen those returns in later years as a result of subsequent audit adjustments or amended returns of the corporation;[32] the "impossible" situation that could arise if after lengthy tax litigation adjustments should occur in corporate income that would involve commensurate adjustments to the basis of shares sold by the stockholders during the interval consumed by the litigation;[33] the inability to determine a satisfactory date for the allocation of corporate losses to stockholders;[34] the "unacceptable burden" that would be placed on millions of stockholders if the benefit of preferences, such as the investment tax credit and foreign tax credit, were passed through to them individually and each stockholder was then required to calculate his own investment and foreign tax credits based on information supplied by the corporation but with statutory limitations imposed by law at the stockholder level;[35] and, finally, the cash squeeze that could occur for stockholders in marginal rate brackets (potentially as high as seventy percent) exceeding the top corporate rate (presently forty-six percent) if they were taxed currently on income in fact retained for reinvestment by the corporation.[36] McLure thus concedes: "In short, the pure partnership method [full integration] would be difficult to administer if it suffered from only one of the problems outlined above. Since it could be afflicted with all of them, it does not seem to be a viable alternative."[37]

One might wish that the author's treatment of this subject had ended with this unequivocal conclusion. The clarity of his conclusion on the infeasibility of integration, however, is somewhat ob-

30. *Id.*

31. *Id.* at 216. Goode has concluded that big corporations with large numbers of stockholders and complex capital structures could not be included in a full integration system. R. GOODE, POSTWAR CORPORATION TAX STRUCTURE 20-21 (1948). McLure aptly replied that, if large firms with complicated capital structures were excluded, it would "make integration a shell not worth the effort." *See* C. MCLURE, *supra* note 3, at 157.

32. C. MCLURE, *supra* note 3, at 157, 216.

33. *Id.* at 158.

34. *Id.* at 156, 216. The author and the conference participants noted that daily allocation of losses would not be administratively feasible, but allocation of losses to stockholders of record on the last day of the year would invite "trafficking" in losses. *Id.* at 216.

35. *Id.* at 159, 217.

36. *Id.* at 217.

37. *Id.* at 159.

scured by the structure of the book, which ends with a chapter summarizing the 1977 Brookings conference in the format of a long series of conflicting questions[38] raised by the participants and reflecting what McLure calls their "disquieting lack of agreement."[39] The reader is left somewhat perplexed since many of the questions on integration in that last chapter are a reiteration of issues previously raised and presumably disposed of in earlier chapters, with some finality, by the author. The definiteness of his conclusion that integration will not work is further clouded by a later statement that full integration "should not simply be dismissed as an academician's pipe dream" and by his call for "further analysis" and "more analysis" of this system.[40] Such statements, it is submitted, are unsubstantiated, because all of the solid documentation he has amassed in his study confirms his first conclusion.[41] His few departures on this one point from his customary objectivity are forgiveable, perhaps, if one realizes that even with academicians old loyalties, as well as old dogmas, can be expected to die hard.

Apart from the topic of integration and its feasibility, a somewhat separate theme, backed by good material, gradually evolves and grows in importance in McLure's study and consequently deserves attention. In reviewing the status of integration, McLure was led to re-examine the experience of France, the United Kingdom, West Germany, and Canada, all of which have recently revised their corporation-shareholder systems of taxation, adopting the shareholder credit form of dividend relief. In so doing, he notes, these foreign governments either disassociated their new systems from, or explictly rejected, the integrationists' concept of the corporation as a conduit. Thus, in enacting its law, the West German government stated:

> The government does not subscribe to the controversial view of public finance experts that the separate taxation of legal entities is unjustified. On the contrary, the government rejects this view. Within the framework of constitutional limitations, the political decision as to the extent to which the double tax of legal entities and their shareholders should be maintained, reduced or eliminated is strictly one of expediency.[42]

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38. *Id.* at 215-49.

39. *Id.* at 15.

40. *Id.* at 15, 166.

41. *See id.* at 146-66. He also notes that no country in the world has full integration. *Id.* at 4.

42. *Id.* at 44. *See also* Gourevitch, *Corporate Tax Integration: The European Experience*, 31 TAX LAW. 65 (1977). Gourevitch comments: "In this statement, the [West German] government came down on the side of the separate entity theory of corporate taxation, according to which a corporation is a taxpaying entity on its own entirely separate from its shareholders." *Id.* at 70.

Similarly, when Canada, France, and the United Kingdom revised their tax laws no reservations were expressed about "the separate economic reality of corporate entities."[43] The inference is clear from the European experience that the shareholder credit method is feasible and viable apart from the theory of integration to which it has been attached apparently by United States authors only.

McLure's examination of the operation of the European and Canadian systems is relevant for an understanding of these intricate foreigu systems, in and of themselves, and for guidance in answering the question whether any of their features could be successfully transplanted to the United States. His numerous tables illustrate how the four systems work in various hypothetical model situations, the differing objectives each country sought to attain with its new tax approach, and the policy compromises each was forced to accept.[44] He describes[45] the pragmatic rather than puristic origins of the several systems. Each country was prompted to reduce the tax drain on dividends in order to make the after-tax return on equities more attractive for national fiscal and political reasons. Thus, the French sought to strengthen the French stock market as a means of raising equity capital. West Germany's intent in adopting its first version of dividend relief was to stimulate its depressed stock market when the Allied occupation ended following World War II. Canada was bent on encouraging equity investments by Canadians in Canadian firms rather than in foreign enterprises.[46]

McLure's survey of foreigu practices leads him to observe that the implementation of a shareholder credit system in the United States, even without the handicaps of full integration, would face difficult threshold policy and administrative questions. What should the relationship be between the basic corporate income tax rate and the top marginal individual rate? Should all or only a portion of the corporate tax on the earnings distributed as dividends

43. Canada has rejected a specific proposal for full integration in adopting its shareholder credit system. Gourevitch, *supra* note 42, at 86. For a discussion of France and the United Kingdom, see C. MCLURE, *supra* note 3, at 45.

44. C. MCLURE, *supra* note 3, at 50-91. One table also adds to this group, for comparative purposes, the key features of the tax systems of the United States, the Netherlands, and Japan. *Id.* at 74-75.

45. *See id.* at 76.

46. For more details on the original objectives of the European countries in enacting the shareholder credit system, see Gourevitch, *supra* note 42, at 67-75; Hammer, *The Taxation of Income from Corporate Shareholders: Review of Present Systems in Canada, France, Germany, Japan and the U.K.*, 28 NAT'L TAX J. 315 (1975); Norr, *The French Reform of Dividend Taxation and Common Market Tax Harmonization*, 44 TAXES 320 (1966).

be offset by the shareholder credit?[47] Should the credit be fixed or variable?[48] Should excess credits be refundable to stockholders? Should the credits be available to tax-exempt charitable and educational institutions and to tax-exempt pension and profit-sharing trusts?[49] Should the credit be available to foreign investors (either portfolio owners or corporations owning United States subsidiaries)? McLure examines how each of these issues has been handled by the three model European countries and the precedent that they may have established for us. His analysis points up the fact that various objectives, such as tax fairness for individuals, tax neutrality in the treatment of income flowing across international boundaries, economic principles of national and international efficiency, minimization of revenue loss to the country in which the dividends originate, and feasibility of administration,[50] are competing and incompatible. Even the Europeans with their headstart on implementing a shareholder credit system have not devised a solution to encompass all of these objectives satisfactorily. One example, out of many McLure discusses, can illustrate the dilemma. If foreign stockholders are not permitted the benefit of the credit, this will contribute to achieving the objective of minimization of revenue loss. But denial of the credit to foreign stockholders can discourage foreign investment both inward and outward, violate treaty obligations, and contravene commitments to foster international trade.[51]

McLure's discussion of the European experience thus under-

47. For a discussion of how the French and United Kingdom systems have dealt with this question, see Hammer, *supra* note 46. For a discussion of the new German system, as well as the 1975 proposal for a uniform shareholder credit method within the European Economic Community (EEC), see Ault, *supra* note 11, at 466-71, 477-83.

48. The Tax Section of the New York State Bar Association in reviewing this entire area concluded that a credit system under which the rate would fluctuate annually and by corporation "would involve complexity . . . which is entirely unnecessary." COMMITTEE ON CORPORATIONS OF THE TAX SECTION OF THE NEW YORK STATE BAR ASSOCIATION, REPORT ON THE INTEGRATION OF CORPORATE AND INDIVIDUAL INCOME TAXES, *reprinted in* 31 TAX LAW. 37, 44-45 (1977) [hereinafter cited as NEW YORK BAR REPORT]. It recommended a fixed credit if this system were adopted. *Id.* at 44-45, 63.

The latest United States proposal for partial dividend relief, involving a shareholder credit system, was introduced by Chairman Al Ullman of the House Committee on Ways and Means in 1978. The Ullman proposal involved a mechanism to limit the amount of credit allowed shareholders to the amount of taxes actually paid by the corporation. *See* 124 CONG. REC. H640-42, H2337-39 (daily ed. Feb. 2, Mar. 22, 1978). McLure briefly discusses the Ullman proposal, see C. MCLURE, *supra* note 3, at 143-45, although McLure's study was essentially completed before the proposal became public. *Id.* at 1 n.1.

49. C. MCLURE, *supra* note 3, at 77.

50. *Id.* at 204-14.

51. For a discussion of European solutions of this problem, see Gourevitch, *supra* note 42, at 89-95, 104-07. *See also* Ault, *supra* note 11, at 470-71 (German treaty policy on foreign shareholders), 473-74 (French treaty policy on foreign shareholders), 476-77 (United Kingdom treaty policy on foreign shareholders).

lines the fact that a morass of unsettled problems still plagues the shareholder credit system, with some of the most complicated relating to international consequences. Because of the growth of multinational corporations, both in the United States and abroad, and the extent to which transnational businesses and investment have permeated the economies of the developed countries, no major revision in the taxation of corporations or stockholders can fail to have significant international ramifications. Yet prior studies, he notes, have tended to overlook the international factor inherent in such domestic reform.[52] McLure's review of the major questions that remain unanswered relating to the shareholder credit method, especially in the international context, leads to the inescapable inference that its adoption at this time would be premature.[53] There are too many pitfalls that an uninformed, precipitous legislative move could unwittingly create.

Before closing, some minor flaws in the book must be mentioned. Parts of its analysis are needlessly repetitive. McLure's style is not crisp. There is not sufficient recoguition of the criticism, expressed mainly by the legal profession, that the proposed tax reforms discussed by McLure would introduce great and perhaps unjustifled complexity to the Internal Revenue Code.[54] To some, reforms that are comprehensible only to technicians are not reforms. To some, simplification of the tax laws and certainty of consequences for taxpayers are objectives greatly to be desired.[55]

52. C. McLure, *supra* note 3, at 185. While United States tax experts generally have tended to ignore the international consequences of corporate-shareholder tax reform, McLure notes that the Europeans have been more aware of it. *Id.* at 87. He suggests that we might profit from more analysis of their experience. *Id.* at 50. *See also* Ault, *supra* note 11, at 461-62.

53. There has been a curious lack of in-depth studies of the operation of the European shareholder credit system. The New York State Bar Association analysis of the 1977 Treasury proposal for integration or dividend relief noted that there was no empirical evidence cited by the Treasury Department on the effectiveness of the shareholder credit system in the countries where it has been in operation. *See* New York Bar Report, *supra* note 48, at 39 n.13, 63 n.79. Gourevitch, in noting the lack of hard data, questions whether it is possible to measure the objectives of the European systems against results because of the constant presence of nontax economic and fiscal factors. *See* Gourevitch, *supra* note 42, at 77-78. Another commentator found no clear cut evidence that the shareholder credit system has been a fiscal stimulant. *See* Severiens, *Does a Dividend Tax Credit Work?*, 54 Taxes 17, 20-26 (1976). Neither of these articles examined the topic with the scholarly, methodical, and statistical approach that is McLure's special technique.

54. *See* New York Bar Report, *supra* note 48, at 46-47, 63.

55. It has been said: "The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe from the experience of all nations, is not near so great an evil as a very small degree of uncertainty." E. Griswold & M. Graetz, Federal Income Taxation 33 (1976) (quoting Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations 371 (1872)).

But such objectives do not seem to be accorded adequate weight in McLure's scales when balanced against the grand doctrines of tax equity.

Such minor criticism, however, cannot be allowed to detract from the substance of the book. McLure's study may well come to be regarded as a pioneering integrationist's definitive statement that marked the end of an era in which integration was explored as a realistic legislative route. Others may view the study as marking the emergence of an international consciousness long overdue among classical tax academicians. McLure's material, if not persuasive, at least seriously raises the proposition that any recommendations to modify our current system of taxation of corporations and shareholders can no longer be judged solely within the confines of a closed domestic economy, but must also be scrutinized for their inherent international tax repercussions. Whatever theme in the book ultimately prevails as having the greatest significance, McLure has produced a fundamental work.