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Book Reviews

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BOOK REVIEWS

CONGRESS AND THE COURT. By Walter F. Murphy. Chicago: The University of Chicago Press, 1962. Pp. xi, 308. $6.95.

Conflict between the United States Supreme Court and the Congress was inevitable when John Marshall announced in *Marbury v. Madison* that "It is, emphatically, the province and duty of the judicial department, to say what the law is."[1] Congress is understandably jealous of its legislative prerogatives and the process of interpreting the law necessarily impinges to some extent upon that of making the law. Apart from judicial review, the Court also must exercise the judicial power on important policy issues in areas subject to congressional jurisdiction. A necessary result is a contribution to the formulation of public policy of the sort which many Congressmen regard as the exclusive prerogative of the legislative branch. Whenever any substantial number feel that a particular decision has infringed upon legislative authority, an open reaction against the Court can be expected in the Congress.

Although recent assaults upon the Court have come largely from conservative elements, Mr. Murphy's early chapters remind us that this has not always been the case. In 1821 Thomas Jefferson accused the federal judiciary of "advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the Government of all be consolidated into one." More than a hundred years later, it was another champion of the people, Senator Robert M. LaFollette, who charged that the courts had gradually usurped sovereignty until the Supreme Court had become "the actual ruler of the American people."

Mr. Murphy is concerned primarily with what he calls "the crisis of the Warren Court" in its relations with Congress in the 1950's, but he wisely places this episode in historical perspective by first briefly outlining the previous crises in the Court's history. He swiftly but thoroughly brings us through the Federalist-Jeffersonian conflict of the early days of the Nation, the embattled Taney Court's labors with the slavery question, the frustration of the Court's efforts to defend civil liberties during Reconstruction, and the Hughes Court's about-face on New Deal legislation. Murphy then develops the thesis that a clash of judicial and legislative power occurred in the 1950's which followed a "well-worn pattern." This is said to be a three-step course consisting of emergence of judicial power upon im-

1. 5 U.S. (1 Cranch) 87, at 111 (1803).

portant controversial issues, followed by severe criticism of the Court coupled with threats of remedial or retaliatory legislative action, and usually concluded by a tactical judicial retreat.

Congress and the Court is a good combination of broad historical perspective and detailed behind-the-scenes legislative drama. After stating the historical background, the author dwells in considerable detail upon a series of Supreme Court decisions of the mid-fifties and the congressional reaction which resulted. In retrospect, it is seen that from 1954 to 1957 the Court handed down an unusually large number of controversial decisions which had significant effects in shaping public policy. Most of them favored the rights of the individual against governmental power and they were generally applauded by civil libertarians. The Court acted boldly in the vital and sensitive areas of race relations, loyalty and security programs, the conduct of congressional investigations, prosecution of subversion, and admission to law practice. Close procedural and constitutional reins were placed upon the exercise of governmental power against the individual. The result was often an unpopular one susceptible to such characterization from critics of the Court as "opening FBI files to Communists," which was charged after the *Jencks* case.[2]

Murphy deals principally with the explosive congressional reaction which followed. By 1958, several anti-Court bills had passed the House and were pending in the Senate. They varied from broadside limitations upon the appellate jurisdiction of the Court to dictating to the Court rules of statutory construction and bills merely aimed at reversing specific decisions. The behind-the-scenes activities on these bills is described vividly with the suspense of a mystery novel.

Perhaps the most exciting drama is the 41-40 vote by which the Senate actually reversed itself within a 24-hour period and defeated H.R. 3, a bill aimed at *Pennsylvania v. Nelson*,[3] the case which upheld a Pennsylvania decision that the Smith Act had pre-empted the sedition field so that subversion against the United States could not be prosecuted under state laws. (Unfortunately, this bill did not merely amend the Smith Act to allow state laws to operate, but instead prescribed a general anti-pre-emption rule applicable to all future legislation.) Another is the after-midnight point of order by Senator Carroll which caused the death of the conference report on a bill aimed at the *Mallory* decision[4] in the final moments of the 85th Congress.

2. Jencks v. United States, 353 U.S. 657 (1957).

3. 350 U.S. 497 (1956).

4. Mallory v. United States, 354 U.S. 449 (1957), holding inadmissible a confession obtained by District of Columbia police during a period of detention for questioning which violated the requirement of the Federal Rules of Criminal Procedure that arrested persons be arraigned "without unnecessary delay."

Mr. Murphy based much of his research upon personal interviews with participants in the legislative struggles which he describes. His account of the conferences and negotiations which led up to revisions and compromises on particular measures has the ring of authenticity. He is particularly to be commended for the emphasis he places upon the work of members of Senate staffs who are often neglected by political analyists in studying the legislative process. The work of various lobbies and pressure groups who attempt to influence legislation is also examined extensively and realistically.

Although generally sympathetic to judicial power, Murphy is no apologist. His pen moves with the keen impartiality of a surgeon's knife. He does not gloss over the personal bickering which at times marred the Court's work and damaged its standing with the public. He is critical at several points of the Court's technical skill and judicial craftsmanship in certain cases. Examples of miscitation and vague reasoning are freely pointed out.

Murphy's conclusion that by 1959 the Court had made a tactical withdrawal in most of the controversial areas is documented by discussion of the later cases and citation of other legal experts. How much this was due to the activities in Congress is speculative, but it is difficult to reject Murphy's thesis that there was some direct cause-and-effect relationship, despite the fact that only one measure which originated as an "anti-Court" bill actually became law.[5]

Some readers may quarrel with Murphy's adherence to an institutional analysis of the Court's course during the period in question. It is questionable that shifts or changes in emphasis or direction should be attributed to "the Warren Court" as an institution when the particular decisions involved resulted from shifts by only one or two of the nine Justices and the Court continued to be sharply divided in its opinions.

Nonetheless, treatment of the Court as an institution is both common and significant, even in the Congress. Some legislators are inclined to join new attacks upon the Court because of animosity caused by past decisions with which they disagree. Others feel constrained to defend the Court's work against almost any legislative correction because they wish to maintain the Court's prestige and strongly support controversial past rulings. This book quotes Senate debate to the effect that a bill aimed at Supreme Court decisions cannot be considered "in isolation" and appealing for votes against particular bills because of "the symbolic effect" of supporting the Court, apart from the substantive legislative questions involved.

I strongly believe that legislators, as well as lawyers, should be cognizant of the lawyer's first canon of ethics: "Judges, not being

5. Jencks Act, 18 U.S.C. § 3500 (1958).

wholly free to defend themselves, are peculiarly entitled to the support of the Bar against unjust criticism and clamor."[6] Both judges as individuals and the Court as an institution should receive the benefit of this admonition, but this does not mean that judicial decisions should become insulated from good faith examination and criticism. This is particularly true of court decisions which interpret and apply congressional legislation. A statute does not cease to be an act of Congress merely because a court has construed it, and we have a continuing responsibility to examine the application of federal statutes. If a law has been interpreted and is being applied in a manner which does not reflect the intention of Congress (which admittedly may have been poorly expressed), then all members should be able to approach with an open mind the question of whether the statute should be amended.

This thinking led me to support legislation to change the result of the *Nelson* case[7] to allow state statutes to apply in the subversion field. The same approach led me to vote for the bill which clarified the rule of criminal procedure laid down by the Court in the *Jencks* case.[8] This was the single piece of legislation which finally resulted from the anti-Court reaction described by Mr. Murphy, and the Senate Judiciary Committee report emphasized that the bill reaffirmed the Supreme Court's holding in *Jencks* that a criminal defendant is entitled to see statements made to the FBI by a prosecution witness. The decision virtually invited Congress to amend the Federal Code of Criminal Procedure. In my opinion, it would have been an abdication of legislative responsibility if Congress had failed to codify this decision and specify a uniform procedure to be followed by the district courts in according to accused persons the right recognized by *Jencks*. Such legislation is not "anti-Court" but represents a mutual accommodation by the legislative and judicial branches in the continuing processes of government.

This book is a valuable addition to the literature of a vital and fascinating subject. Both Congress and the Court should welcome this type of fine scholarship in the study of their relationships.

SENATOR ESTES KEFAUVER*

6. ABA CANONS OF PROFESSIONAL ETHICS, Canon 1 (1908).
7. Pennsylvania v. Nelson, 350 U.S. 497 (1956).
8. 353 U.S. 657 (1957).

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INTERSTATE APPORTIONMENT OF BUSINESS INCOME FOR STATE INCOME TAX PURPOSES. By Charles E. Ratliff, Jr. Chapel Hill: The University of North Carolina Press, 1962. Pp. xi, 132. $4.00.

A little more than four years ago the United States Supreme Court, in an opinion that had been foreshadowed for more than twenty years, upheld taxation of an apportioned share of the net income of a foreign corporation engaging only in interstate commerce within the taxing state. Two states, Georgia and Minnesota, had imposed the taxes, and two corporations, one domiciled in Alabama, the other in Iowa, were the taxpayers. Because of the similarity of the issues, the Court made its ruling in a single decision, *Williams v. Stockham Valves & Fittings, Inc.*; *Northwestern States Portland Cement Co. v. Minnesota.*[1]

In each instance the taxpayer was maintaining a sales office within the jurisdiction asserting the right to tax part of the net income from the unitary business. This was regarded as supplying sufficient "nexus" between the corporation and the state to meet the requirements of due process. The apportionment formula seemed to be designed to assign to the state for tax purposes no more than a fair share of the total net income. Accordingly, if one subscribes to the maxim that "interstate commerce should pay its way," there was no impingement upon the commerce clause.

Despite these considerations, acute apprehension was expressed by elements in the business community that the doctrine enunciated by the Supreme Court would result in disastrous burdens upon those engaged in trade across state lines.[2]

So vocal were these critics of the decision that Congress was galvanized into action.[3] Within a few months, it passed the first federal statute limiting the power of the states to tax those engaged in interstate business.[4] Since then that law has been amended to provide that a congressional committee "shall make full and complete studies of all matters pertaining to the taxation of interstate commerce by the states."[5]

Little wonder, then, that Professor Ratliff begins the preface to his book with this observation: "Interest in the problem of apportioning business income for state income tax purposes has existed ever since the levy of the first successful state corporate income tax in 1911, but never before has it been so intense as today." As one reads what

1. 358 U.S. 450 (1959).
2. Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21, 44 (1959).
3. *Id.* at 45.
4. Title I, § 101, 73 Stat. 555 (1959).
5. 75 Stat. 41 (1961), 15 U.S.C. § 381 (Supp. III, 1961).

he has to say about the apportionment of income it becomes increasingly apparent, however, that his views on the subject are based almost exclusively upon a study of the effects of a 1957 change in North Carolina law. One is struck by the appropriateness of the book's subtitle, "With Specific Reference to North Carolina."

If the study had comprehended a wide range of the business done by the thousands of corporations that make returns to that state with respect to their net income, the narrowness of its scope would not be so pronounced. The author reveals that only 393 corporations were selected for the study and that 23 were eliminated at the outset because they were neither mercantile nor manufacturing firms or were out of business. Of the remainder, only 123 supplied data and 51 refused to do so. Despite the paucity of the sample, the lack of any evidence of its selection on random basis, and the bias that could result from the failure to secure data from two-thirds of those remaining in the sample, the author expresses the belief that "the sample contacted is representative of the total population." A reader familiar with the field may find it difficult to accept this conclusion without serious reservations.

Following an introductory chapter in which Professor Ratliff tells of the scope of his study, he devotes a chapter to the historical background of apportionment of income of multistate enterprises. First he reviews briefly legal considerations in state taxation of such businesses, and then continues with a longer discussion of the economic aspects of these revenue measures. Conceding that the trend in apportionment formulae has been toward a three-factor formula comprised of property, payroll, and sales, the author expresses a preference for a two-factor formula confined to property and payroll. Apparently, he is unaware of any vexatious problems encountered in the use of property and payroll data but is convinced that "consideration of the sales factor in a formula opens Pandora's box, indeed."

The next two chapters, which account for almost half of the pages of text, are devoted to what the author describes as "The North Carolina Case." In these he describes the apportionment formulae used since 1921, when the state began taxation of corporations on the basis of their net income. Professor Ratliff concludes that "North Carolina's pre-1957 tax structure, because of the method of apportioning income, was relatively harsh on multistate business."

Domestic corporations were not allowed to apportion their income by formula. Only when their income was taxed by another state could any exclusion be made from the North Carolina tax base. The formula generally applicable to foreign corporations until 1931 was comprised of only one factor—property. From 1931 to 1957 two factors were used, but these varied depending upon the principal

activity of the corporation within the state. If the taxpayer was so engaged primarily in manufacturing, the factors were property and manufacturing costs. If its North Carolina business was primarily selling, then the factors were property and sales.

This unusual apportionment procedure was the object of so much criticism that a Tax Study Commission was appointed by the Governor with legislative direction to make recommendations for revising the Revenue Act. In a 1956 report this group urged that domestic and foreign corporations be taxed according to the same rules, and only on income reasonably attributable to North Carolina. This was to be done by apportioning unitary income through use of a three-factor formula (property, payroll, and sales) for manufacturing and selling firms. These recommendations were enacted into law.[6]

The next, and fourth, chapter of Professor Ratliff's book is devoted to a discussion of the effects of this change, with this conclusion:

> The apparent harshness of the North Carolina tax structure as it applied to industry was largely removed. This was accomplished, not by the particular apportionment formula adopted, but by giving equal treatment to domestic and foreign corporations, by applying the same formula to multistate businesses irrespective of their principal business within the state, and by separately allocating nonunitary income.[7]

He also reveals that the revenue loss occasioned by the revision was about half that anticipated by proponents of the change, explaining that the principal reason for this is that the effect of the destination sales factor in the new formula had been underestimated.

Two of the remaining three chapters of the volume are concerned with economic analysis. The first relates to apportionment, the second to uniformity. The final chapter, entitled "Conclusion," is largely a summation of what has gone before since each of the three preceding chapters contains its own conclusion with respect to its specific subject matter. It is in these four last chapters that Professor Ratliff arrives at judgments for which convincing support is lacking. In his chapter pertaining to the economic analysis of apportionment, he discusses briefly the theories of business taxation and of apportionment, expressing the view that theory of taxation of business may be questioned upon theoretical grounds, but recognizing that the raising of public revenue by taxing corporate net income is an accepted practice. He closes this portion of his analysis with these pronouncements: "Inclusion of a sales factor, whatever the definition or basis of sales, cannot be economically justified under the contribution-to-

6. N.C. GEN. STAT. § 105-42 (1958).

7. RATLIFF, INTERSTATE APPORTIONMENT OF BUSINESS INCOME FOR STATE INCOME TAX PURPOSES 79-80 (1962).

income approach. A destination sales factor may be justified under the burden-of-tax approach, but justification of the approach is tenuous."

This view is not shared by the vast majority of state tax administrators, nor has it won acceptance among taxpayers or in legislative halls. Rejecting this approach, Professor Jerome R. Hellerstein of New York University Law School, has said:

> This position, which is grounded in a theoretical economic analysis of factors going into the production of wealth, is not relevant to the determination of the factors going into the production of income, or to the factors that warrant state taxation of income. . . .
>
> Finally, the destination test commends itself on a pragmatic basis. The states in which manufacturing and warehousing take place, the states in which executive, accounting and administrative personnel carry on their functions obtain a heavy weighing in most multifactor apportionment formulas, and therefore there is apportioned to such states a substantial part of existing tax measures.
>
> If the market state is to share to any significant extent in the tax revenues, the sales factor and the destination test afford a workable means to achieve that result. Moreover that test sets up a standard not easily avoided under a properly drafted formula—a fact of no little significance in this business.[8]

Certainly there should be general agreement with the thesis of Professor Ratliff that there is need for uniformity in the way in which states define the net income from business and apportion it for their tax purposes. Nor would many of his readers be inclined to dissent from his conclusion that it seems unlikely that the states will ever voluntarily agree to the same method. Thus if uniformity is to be achieved it will be by congressional action under the commerce clause. There is, however, substantial disagreement with his conclusion that "the formula that would go farthest in rectifying the situation is a two-factor property-payroll formula."

Those experienced in the field of taxation of multistate business must be acutely aware of the fact that the property and payroll factors are not as readily ascertained as Professor Ratliff would have us believe. Obviously the only practical way to measure the property factor is in terms of value. Ideally, current appraisals would best fulfill this need but, in practice, book value is most commonly utilized since the other data are not readily obtainable. Yet book value is often a treacherous guide in the sound application of the factor.

Moreover, in instances which are becoming more and more frequent, corporations utilize much property under lease in the conduct of their business. This property as well as that which is owned out-

8. PROCEEDINGS, 1960 NATIONAL TAX CONFERENCE 216 (1960).

right contributes to the earning of net income. Yet in most instances no provision is made to take the leased property into account in applying the property factor. Professor Ratliff makes no mention of these complications but ranks his two-factor formula high "on such criteria as symplicity, certainty, administrative and compliance costs."

Any use of formulae in arriving at the basis for apportioning income from a unitary business is, at best, a rough estimate. Apparently in recognition of this, most states taxing unitary income have concluded that the best way in which to promote the accuracy of the estimate is to employ three factors, property, payroll, and sales. The reason for including the sales factor has been expressed succinctly by Professor Paul J. Hartman of Vanderbilt Law School in this question:

> Should not the exploitation of a state's markets for the capture of profits be enough for that state to demand something in return, thus satisfying the requisites of the due process clause?[9]

As Professor Hartman has pointed out, improved means of transportation and of communication, together with the development of mass production have wrought major changes in the economy. It is now feasible for an out-of-state corporation to exploit the market within a state extensively without having there any property or payroll. Yet without these sales the entire unitary business would be far less profitable.

Professor Ratliff apparently has convinced himself from his rather limited analysis of tax returns in a single state, North Carolina, that there would be no significant difference between using the two-factor property-payroll formula and the three-factor property, payroll, sales formula. The validity of this conclusion is subject to serious question. The doubt is not resolved by his analysis of the situation. His study is interesting for what it has to say with specific reference to North Carolina and anyone concerned with interstate apportionment of business income for state income tax purposes will find his book thought-provoking.

DIXWELL L. PIERCE*

THE SUPREME COURT: PALLADIUM OF FREEDOM. By Alpheus Thomas Mason. Ann Arbor: University of Michigan Press, 1962. Pp. 207. $4.95.

Alpheus Mason has for years been writing on historical problems that have arisen with respect to the Supreme Court. He has now

9. Hartman, *supra* note 2, at 43.

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gathered together his authorities in this expansion of a series of lectures and has plunged into the middle of a debate that is currently being waged with considerable bitterness.

He begins by recounting the arguments at the Constitutional Convention over the nature of the proposed new Government. The result achieved was a national government but with significant concessions being made to the supporters of a confederacy of states. However, no line was clearly drawn between the two forms of government. Internal contradictions are pointed to in *The Federalist* to support the idea that some of the early statesmen, such as Madison, straddled the fence and later were able to support the states against the national government.

In any event, concessions had been necessary to protect the states and the individual citizens against the Leviathan. It was understood that there were three buttresses of freedom: the preservation of the right of revolution, the Bill of Rights, and judicial review.

The nature of judicial review is the theme of this work, and in particular, the manner in which that problem has been a major issue of politics at times in our history. Professor Mason argues that, in the first decades of the new nation, judicial review as exercised today was understood to be a necessary part of our form of government. As exercised today, it is as stated by Chief Justice Marshall in 1803 in *Marbury v. Madison.*[1]

The author admits that there is much contrary modern opinion, for example, that of Learned Hand and Professor William Crosskey of the University of Chicago. But, from the evidence that Mason cites, he feels that those who oppose him have misread history. Critics such as these have confused the two concepts of judicial review and judicial supremacy. Judicial supremacy is the objective when necessary social advances are blocked. But such efforts ouly brought harm to the Court. Judicial review, on the contrary, was and is a needed adjunct to democracy in America.

The demarcation between these two concepts cannot be drawn in general terms. Time and place are decisive and then, frequently, only in retrospect. Jefferson's abuse of John Marshall is well known, but the author does not agree with those, like Justice Frankfurter, who place Jefferson as an implacable foe of judicial review. Jefferson's opposition to the Court is dated from the last years of his life. In any event, Mason concludes by quoting Holmes that "time has been on Marshall's side."[2]

Professor Mason's more current interests are exhibited in a long chapter on the struggle over the role of the Court in the 1930's. As

1. 5 U.S. (1 Cranch) 87 (1803).
2. HOLMES, COLLECTED LEGAL PAPERS 270 (1920).

the biographer of Brandeis and Stone, he is familiar with and tells a story of overreaching by the Court and the political repercussions that led to the Court's reversal of its own course. The author is evidently not enamoured with Chief Justice Hughes and leaves the impression of a very wily but equivocal character. He reiterates that Hughes was a man "of unquestioned integrity," but what that means when the story is told is open to question.

The last chapter considers the current work of the Court on civil rights. Justice Stone's suggestion that cases involving certain personal rights might be subjected to a "more searching judicial inquiry" is discussed as it blossomed into the claim of a preferred position for such rights. Stone is described as vindicated in the flag salute cases, in the first of which he dissented[3] and in the second carried the majority of the Court with him.[4] But the frequency of 5-4 decisions in these cases concerns the author. The decisions and the accompanying opinions reflect dissension among the justices on the appropriate role and place of the Court in the life of the nation.

Professor Mason does not argue that there are or are not absolutes in the Bill of Rights. He suggests, as an alternative, that "the notion that the Court has special responsibility toward certain rights, not because they are inherently superior, or the subject of specific constitutional guarantees, but because no other agency is available to protect them."[5] And the example most current is discussed, *Baker v. Carr*.[6]

Because of the qualifications of the author, this volume is an important contribution to the literature on a controversial but vital area of the law.

STANLEY D. ROSE*

EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. By F. Hodge O'Neal and Jordan Derwin. Durham, N.C.: Duke University Press, 1961. Pp. vii, 263. $10.00.

This book is the product of one phase of studies being conducted under the Management and Research Grant Program of the Small Business Administration. Professor O'Neal, who was Project Director,

3. Minersville School District v. Gobitis, 310 U.S. 586 (1940).
4. Jones v. Opelika, 316 U.S. 584 (1942).
5. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 173 (1962).
6. Baker v. Carr, 369 U.S. 186 (1962).

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is the foremost authority on the close corporation. The co-author was research associate on the project.

In several respects this is a unique work. First, it is compactly written. Despite its relatively small number of pages, it contains much valuable material. It is a combination treatise, casebook, and practitioner's handbook, although it would not fall into the orthodox category of any of these. It is a treatise in the sense that it summarizes the causes of squeeze-outs and the techniques involved. It is a casebook in its summary of leading cases illustrative of the points involved in the text material; the appendix also contains some selected squeeze-out cases. It is a practitioner's handbook in its description of arrangements which can be used to avoid squeeze-outs.

The subject matter covered in this book is an area which is often lightly considered at the time the business is organized. When clients appear in the attorney's office to have him counsel them in the organization of a business, they are enthusiastic and display the best of good will toward each other. To approach this person or these persons with regard to the possibility of a later squeeze being put on them should the business prosper or should some personal difficulties and differences arise among them is a delicate task. Ordinarily, they want no thoughts of possible internal difficulties later. But, just as the attorney in preparing a will must discuss with his client not only the client's death but events involving the death of other loved ones—an unpleasant topic of discussion—so must the attorney, in counseling his clients in a business association matter, apprise them of possible pitfalls and then work to eliminate or minimize them.

In this work, the authors draw on the experience of leading lawyers. As they acknowledge in the text, such a study cannot possibly cover every situation. The techniques are limited only by man's ingenuity. They have covered the basic patterns clearly and concisely. The table of contents constitutes a helpful checklist for the practitioner who is concerned about future squeeze plays and wants to protect against them.

While Chapter 6 covers squeeze-outs in partnerships, the authors recognize that this area is not as troublesome as the corporate sphere. Many techniques discussed in Chapters 3, 4, and 5, involving the corporate form of business, have no relevance or applicability in the partnership cases. Most efforts at squeeze-out in partnerships are rather bold frontal attacks, making them easily discernible and hence subject to direct counterattack. The more complex form of association, the more detailed statutory regulation, and the more opportunities for setting up a squeeze-out under the guise of a legitimate action, make the corporate structure a much more fertile source for the squeeze-out problem.

Chapter 7 enumerates arrangements which can be used to avoid the squeeze-out or minimize the likelihood of its occurring. This is of great assistance to the practitioner.

Were the study to have set out merely the causes and techniques for squeeze-outs and then offered suggested means of avoiding the problem, it would have been very worthwhile. No other work known to the reviewer has been directed at the squeeze-out area to this extent. However, the study produced an even more significant contribution to this area of jurisprudence. The authors, in the last chapter, Chapter 8, present their ideas for some changes in legal controls—both in judicial discrimination in the application of certain fundamental corporate principles and in statutory rules. The reviewer found this chapter extremely valuable. It is hoped that it will stir the profession to action on this problem.

The reviewer found many fascinating points in the book. It would be difficult to single out such items in a limited review. Further, it would not do justice to the book.

The book—small in size—packs a heavy punch. Every practitioner whose practice brings him into the realm of business organization should not only read this valuable study but use it as a ready reference. Even if the pitfall cannot be eliminated, it is very helpful to know where it is located and to advise the client of its presence.

W. EDWARD SELL*

THE IDEOLOGIES OF TAXATION. By Louis Eisenstein. New York: The Ronald Press Company: 1961. Pp. vii, 263. $5.00.

A lawyer would find it difficult to locate a more suitable book for his 1963 tax reading than the present volume. Mr. Eisenstein, a discerning tax lawyer with many years of experience, has written a delightful book, in which he theorizes, informs, and entertains. He theorizes by stating three basic ideologies in federal income taxation:[1] (1) "ability to pay"; (2) "barriers and deterrents"; and (3) "equity." He informs by tracing these ideologies from their earliest days through the Eisenhower administration, giving numerous illustrations of their use along the way. He entertains by his delightful style of

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1. I say "federal income taxation" rather than "taxation," since the author confines himself largely to the income tax field. Mr. Eisenstein is equally adept in his treatment of other taxes. See, *e.g.*, Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223 (1956).

writing. His urbanity makes the reader feel that Mr. Eisenstein would have no difficulty advancing any one of the ideologies persuasively, if this were his intent.

But rather than persuade, Mr. Eisenstein is more interested in exposition. He states that "the ability to pay" adherents favor graduated tax rates, with a minimum of deviations from the basic tax system. While this ideology may have reached its high-water mark under the New Deal, the New Frontier likewise houses such ideologists.[2]

"The ideology of barriers and deterrents is a doctrine steeped in gloom."[3] Starting with this statement, Mr. Eisenstein goes on to describe the ideology so often associated with the Republican Party.[4] Taxes must not place "barriers and deterrents" in front of economic development. Or, less negatively, the tax law should provide "incentives" for free enterprise.[5]

Lastly, the ideology of "equity" is used by each of the other groups to support various positions that they advance from time to time. "Equity," says Mr. Eisenstein, in an Orwellian vein, "consists largely of two principles. The first principle is that equity is a special dispensation for those who are differently situated . . . . The second principle is that equity is the privilege of paying as little tax as somebody else."[6] For example, in 1948, income splitting was introduced into the tax law to provide equity as between community property and common law jurisdictions. But this produced an *inequity* between the married and single person. Whereupon equity comes to the rescue again by providing partial relief for the head of household and surviving spouse. The factual situations in which equity may be used are myriad.

Mr. Eisenstein has not attempted to trace the use of these ideologies through congressional legislation. But, before the present session of Congress has adjourned, a vast amount of hearings, testimony, Committee reports, debates, and legislation itself will have been published reflecting these ideologies. Indeed, since the Administration is seeking both a tax cut and tax reform, the tax ideologists should have a field day in 1963. To keep abreast of these matters, a lawyer might

2. *E.g.*, Mr. Stanley S. Surrey, Assistant Secretary of the Treasury, favored the elimination of the exemptions for old age and blindness. Mr. Eisenstein cites this as an example of the disenchantment of the ability to pay ideologist with special exemptions. See EISENSTEIN, THE IDEOLOGIES OF TAXATION 38-43 (1961).

3. *Id.* at 57.

4. The Democrats are better ideologists. Says the author: "With few exceptions dispensations are beyond partisan politics. The Democrats are simply more adept in the use of such words as 'equity' and 'ability to pay.' The Republicans seem unable to produce the same moral overtones." *Id.* at 219.

5. See Chapter 5, "By Incentives Possessed." *Id.* at 89.

6. *Id.* at 176.

well familiarize himself with the spoken and unspoken premises that they will use.

HAROLD G. WREN*

CORPORATE LIQUIDATIONS FOR THE LAWYER AND THE ACCOUNTANT. By Howard A. Rumpf. Englewood Cliffs, N.J.: Prentice Hall, Inc.: 1962. Pp. 238. $17.50.

This book's principal worth is its clear presentation of the basic tax law affecting the liquidation of corporations. Consider, for example, the first paragraph of Chapter One:

> GENERAL RULE. A distribution by a corporation of its assets, whether in partial or complete liquidation, results in no recognized gain or loss to the corporation despite an appreciation or a decline in the value of the assets as compared with their costs or other basis since acquisition by the corporation. This is the general rule, regardless of which method of liquidation (as described in the following chapters) is selected.[1]

What could be clearer? There is no danger here that the reader will be lost in the gobbedygook of tax lawyers. The general practitioner will find this book desirable, if not essential, in planning a corporate liquidation. Throughout the work the author states the basic principles giving simple examples to drive home his points. Internal Revenue Service forms and corporate resolutions illustrate the various steps in a liquidation.

Mr. Rumpf first outlines the general rules of corporate liquidations and the problems of valuation and basis. He then leads the reader through the principal types of complete liquidations (sections 331, 333, and 337 of the Internal Revenue Code of 1954), giving specimen problems following the statement of the rules governing each type. Lastly, he discusses partial liquidations, stock redemptions, liquidations of subsidiaries, and the elections under sections 1361 and 1371.

If the book has any shortcoming, it is that what it says might have been said (and has been said)[2] in the pages commonly allocated to a well-written law journal article. By providing its extensive marketing facilities, Prentice-Hall makes it available to many more people than

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1. RUMPF, CORPORATE LIQUIDATIONS FOR THE LAWYER AND THE ACCOUNTANT 23 (1962).

2. Guess where published and the identity of the author.

would be possible for either a law journal or a small publisher.[3] The type is large, the margins wide, and the footnotes unobtrusive. The result, when combined with Mr. Rumpf's fine style, is a highly readable volume.

In a word, a lawyer would look elsewhere if he were making a detailed research of a particular point of law involving corporate liquidations, but for one who is seeking an overview of this area, this book should be of great value.

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ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND. Edited by Ralph A. Newman. Indianapolis: Bobbs-Merrill Co., 1962. Pp. xxiii, 670. $12.00.

This collection of essays was prepared in honor of Dean Roscoe Pound. He has been truly honored. The contributors, a distinguished group,[1] have obviously taken pains to insure the excellence of their work. An equally significant tribute is found in the multitude of citations to Pound's own work—a remarkable tribute indeed when one notes the scope and variety of subjects covered.

The editor has grouped the essays into three categories, whose titles are self-explanatory: "The Foundations of Law," "Concepts of Jurisprudence," and "The Impact of Jurisprudence on the Living Law." Except for this grouping no attempt has been made to "unify" the book. This is wise. There can be little reason to invite distinguished minds with varied convictions and interests to take part in such an effort only to encase them in an editorial straitjacket of neat subdivision and artificial unity. By avoiding that unpleasant temptation the editor has given us a collection doubly rewarding because of its diversity of subject and perspective.

This diversity is immediately apparent in the first section, "The Foundations of Law." History, tradition, custom, divine revelation,

3. The book was originally published as "Corporate Liquidations" by Har Publications, Inc., in 1960.

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1. I deeply regret that limits of time and space prohibit a discussion of the works of each contributor. A simple listing of their names, however, indicates the high level of work one can expect to find: Peter Stein, Wen-Yen Tsao, Haim Cohn, Jose Puig Brutau, Pierre Lepaulle, M. J. Sethna, Giorgio Del Vecchio, Karl Olivecrona, Luis Recaséns-Siches, Wolfgang G. Friedmann, Miguel Reale, Brendan F. Brown, Julius Stone, Hans Kelsen, Theodore F. T. Plucknett, Otto Kahn-Freund, Sheldon Glueck, Stefan A. Risenfeld, Edgar Bodenheimer, Adam Szpunar, W. J. Waguer, Federico Castejon, Haroldo Valladao, W. Müller-Freienfels, Karl H. Neumayer.

sociological need, and proclamation by an existing power structure are all treated. The last essay in the section, "On the Functions and Aims of the State," is particularly compelling. The writer, Giorgio Del Vecchio, wrestles with the development of a natural law theory of the state capable of utilizing at least some of the descriptive conclusions of pragmatist philosophy.[2] In one passage he states:

> [T]he State tends, because of its very nature, to concentrate in itself all juridical determinations, either individual or social, which take place within it, and so frame them into a coherent and organic system.
>
> Therefore, even the regulations which are elaborated in a spontaneous process by trade-unions or corporative associations must be accepted and included, as far as is possible, in the framework of the State, so long as they do not alter those fundamental principles which are the essential reasons for the existence of the State itself. . . .
>
> The life of the State is thus translated perforce into a continuous reaffirming and consolidating of its authority not only over individuals, but also, and mainly, over . . . specific social organizations . . . .[3]

The passage is striking in its pragmatic realism: the state tends ever to draw into itself more of the decision-making power of its citizens; it is striking also in its insistent idealism: the centralization of power must not alter those basic principles which are the "essential reasons" for the state's existence.

Earlier, Del Vecchio defines a "Legitimate State"—a suggestive term —as one "founded on the recognition of the essential rights of the human being."[4] What are such rights?

> [S]pecially worthy of mention are the right to freedom of conscience, particularly with reference to religious faith; the right to the respect of physical and moral integrity (right to honor); the right to congregate and associate; the right to freedom of speech and press; the right to carry on a productive activity (right to work) and to enjoy the benefit thereof; the right to retain property legitimately acquired; the right to freedom of movement and emigration; the right of admittance to public office without exception or privileges and according to the sole criterion of personal merit.[5]

Since such rights cannot exist in a vacuum, it is the duty of the state to promote an environment in which initiative, ambition, and

2. I do not mean to intimate that this is the stated objective of the essay, or that the writer makes any formal analysis of, or reference to, pragmatist philosophy. Rather, this is simply a statement of my own conclusion—and I make no claim whatever to being a jurisprudent—that much of the extremely perceptive description of the life of the state in the essay shows a keen appreciation of the analytical work of writers usually referred to as pragmatists or realists.

3. ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 145 (Newman ed. 1962).

4. *Id.* at 143.

5. *Id.* at 147.

conscience can flourish. There must be, for instance, programs for the support of education and for the ameliorating of trade barriers.[6] In other words, while any existing state has the power to promulgate norms to order society, the legitimate state will promulgate norms so as to broaden the opportunity for participation by its citizens not only in the body politic but in the realms of culture, of the exercise of conscience and of economic development.

A similar frame of reference underlies an essay in the second portion of the volume: "Some Reflections on Status and Freedom" by Wolfgang G. Friedmann. Professor Friedmann focuses on the statement by Sir Henry Maine that "the movement of the progressive societies has hitherto been a movement from Status to Contract."[7] Maine's thesis was derived from his study of the Roman family, an institution whose later development was characterized by increasing intra-family independence and individual freedom to enter into contracts. Professor Friedmann tests the continuing validity of the thesis by setting it against recent developments in Western societies. In order to do so he adopts a broader contemporary definition of status as "the sum of capacities and incapacities flowing from membership of a group or class . . . ."[8] Status, in this sense, is a public law concept[9] particularly adapted to the study of the modern social state in which "class" legislation plays a significant role.

Friedmann concludes that, except in the area of family law, Maine's generalization is no longer valid. He points to the increasing number of situations in which parties are not allowed complete individual freedom of will to make their own law by contract, but must act within a framework of law already provided by statute for members of the parties' class. Thus, certain types of employees can no longer be paid less than a federally designated wage; the permissible range of clauses includible in insurance contracts is restricted by state statute. What, then, is the present relation between status and freedom of individual will in our society? The relation is a complex one in which the two are to some extent co-determinants of one another: One's status determines his freedom to alter his relations with others, while his freedom to move within the societal structure determines his ability to achieve status. Friedmann describes the results:

> Status . . . does indeed play a dominant part in contemporary law. But two major factors distinguish it from the status of the slave or the serf: first, the status restrictions are imposed on activities voluntarily chosen. That is true of the civil servant, of the manufacturer, of the lawyer or doctor . . . .

6. *Id.* at 148-50.
7. MAINE, ANCIENT LAW 141 (New Universal Library ed. 1905).
8. ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 224 (Newman ed. 1962).
9. See *id.* at 226-28.

> The soldier can become a civil servant, a manufacturer or an accountant. Even of the employee it can be said that the status restrictions are less and less imposed upon a class of people who have no choice of movement. The second major distinction between the new and the old status is that modern status conditions, while generally restricting the freedom of contract and other private-law transactions, enhances effective freedom of movement by reducing the degree of economic compulsion.[10]

The relevance of these discussions to the present world situation is apparent. The Communist world and the Western democracies are engaged in a bitter struggle for the allegiance of massive numbers of people. The Communist ideology is based on a concept of class warfare; its announced goal is the elimination of this struggle by the creation of a classless society. Del Vecchio and Friedmann certainly cannot be accused of attempting to be apologists for Western society. Yet if they are correct in their analysis of recent developments, as surely they are, they have coherently stated the democracies' answer to the Communist attack: mobility within a fluid class structure. They have, moreover, stated that answer in terms responsive to the class-oriented arguments of the Communists. True, the ideal they formulate is broad and amorphous and thus difficult to apply to concrete situations. True, also, the ideas presented are hardly novel; they are restatements in twentieth-century language of an ideal of equal opportunity long part of our ideological fabric. True, also, they offer no startling new justification for the formulation of such an ideal. But they do offer a lucid analysis capable of providing a common bond of basic purpose among democratic states. Could we but convince the leaders of our South American allies of the worth of such an analysis, the prospects of the Alliance for Progress would be immediately enhanced.

Not all the essays in this collection are pitched at this type of problem. But these two demonstrate vividly the continued importance of jurisprudential writing to society as well as to legal science. The material in his book is not easy reading; it disturbs rather than entertains. Most of the essays are as praiseworthy as the two discussed here. Some, for various personal reasons, the reader will find tedious, dull, and boring. A few seemed to this reviewer unimaginative, some are subject to criticism in matters of style. Yet it can be said of all these essays that this is essential writing—essential to the underlying purpose of the profession. Those who put their hand to it deserve our attention.

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10. *Id.* at 237.

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