Reviews


Some years ago I sat with Mr. Mark DeWolfe Howe, together with a dozen other men of diverse backgrounds, in a seminar on religion in American society, sponsored by the Center for the Study of Democratic Institutions. The seminar went on for a year or more, and a good bit of the discussion concerned constitutional issues. Over the months all of us came to admire Howe's qualities as a thinker and as a man—the openness of his intelligence, his historical and legal scholarship, his faculty of nicely temperate judgment, his articulateness, urbanity, and wit. All of these qualities are revealed in his last book, whose title was chosen with fine insight—Roger Williams' famous image of the two realms of reality, the church and the world.

Fortunately, one need not be a lawyer, as I am not, in order to find the book enlightening. The intelligent citizen today, who is aware of historical developments in America, will likewise be aware of the "gap" to which Howe points in his first chapter, "between current social reality and current constitutional law" (p. 11) with regard to the separation of church and state. The gap, as it exists on the state level, has become the subject of public argument in the New York State Constitutional Convention with respect to the so-called "Blaine Amendment" (Section XI, article 3), which forbids all manner of public aid, direct or indirect, to religiously affiliated schools. Current realities in New York State—legal, social, educational, and religious—are vastly different in 1967 from what they were in 1894, when this article became state constitutional law. And a major question before the Convention is whether the law is not today an anachronism—or in more technical language, an archaism. Howe does not argue this particular question; and I am not sure that he would follow me in my affirmative answer to it. However, this is only to say, with a manner of honest impudence, that his treatment of the constitutional issue of the relations between government and religion-in-education is not as searching as one might have wished. The issue is of recent growth and urgency; it is distinct from the origi-
nal issue with which the Founding Fathers dealt—the relation of government to religion as such.

Howe's initial concern is to illustrate how, on the Federal level, the gap in question has been created by a failure to respect the realities of history in formulating rules of constitutional law. Howe is severe. The Court's interpretations of the past, he says, have been "superficial and purposive"; the Court "has too often pretended that the dictates of the nation's history, rather than the mandates of its own will, compelled a particular decision" (p. 4). In order to follow Howe on to this ground, one need only be, as I am, the Macauley's schoolboy who knows a bit about the different historical traditions upon which Roger Williams and Thomas Jefferson respectively drew. The error of the Court, in Howe's view, lay in its will to maintain that "the only theory of separation known in American constitutional history is the Jeffersonian or rationalistic" (p. 11). There were in fact two theories; there was also the Williamsian and evangelical theory. Conceived within each of them, the principle of separation carries quite different overtones of conviction.

Jefferson's principle was informed by the bias of the Enlightenment—a bias in favor of religious skepticism and against organized religion, fashioned out of the fear (in one of Howe's many felicitously ironic phrases) "lest impious clerks tighten their grip upon the purses and the minds of men" (p. 7). Separation then becomes a political principle, designed to protect secular society from the encroachments of religion. In contrast, Williams' principle derived from a tradition altogether different in its temper and intention. Williams' concern was for the faith and for the church. His fear was lest the wilderness and its corruptions invade the garden and its sanctities, to the destruction of the latter. Separation was for him a theological principle, rooted in a radical distinction between two distinct areas of life on earth. The distinction was established by divine design, and its requirement was that the garden of the Church, as Williams said, "must of necessity be walled in peculiarly unto Himself [God] from the world."

I might note here that the tradition to which Williams was tributary was already ancient when Jefferson and the Enlightenment were still very young. Howe does not carry his historical argument into the long reaches opened by this last statement, which is mine, not his. I have elsewhere tried to show that Master Roger's theology of the "wall" goes back to the very origins of Western constitutionalism, essential to which had always been the distinction between church and state (to use the word "state" anachronistically). His own proper theology of the
wall was, of course, colored by his own proper ecclesiology, which was
not that of the older tradition. In any event, Williams had much more
history behind him than Jefferson—and the U. S. Supreme Court. In
another context, the point might be pursued; it is not irrelevant, I
think, to the contemporary problem of the gap to which I referred.
Howe did not pursue it, perhaps for the reason that it was not necessary
for his argument.

His argument is that, “if the First Amendment codified a figure of
speech, it embraced the believing affirmations of Roger Williams and
his heirs no less firmly than it did the questioning doubts of Thomas
Jefferson and the Enlightenment” (p. 9). The function of separation is
therefore also to protect the integrity of the religious experience. This
explains the inclusion of the free-exercise clause in the First Amend-
ment and illustrates its intrinsic nexus with the no-establishment clause.
Moreover, the evangelical principle of separation has long been, and
still is, part of the total American social reality, which includes forces
that demand governmental recognition of the religious realities in
human life. This recognition, often accorded, has given rise to what
Howe calls “a de facto establishment of religion.”

Of late, members of the Court—for instance, Mr. Justice Douglas in
Engel v. Vitale—have been captured by the theory of those who regard
this factual establishment as an anomaly at law and would do away
with it. But it is an anomaly only on the assumption—or in Howe's
term, the pretension—that the First Amendment incorporated only the
Jeffersonian principle of separation. It is this pretension that has led
the Court toward the outlawing even of those aids to religion which do
not affect religious liberties. This, Howe says, is “an exercise in scholas-
tic dogmatism—a venture in the acrobatics of logic which cannot for
very long have an important effect on the actualities of American life”
(p. 12). I hope he is right in this prognosis, but I am not so sure. Today
the Enlightenment is indeed dead, but somewhat after the fashion in
which God is dead. A great many people have somehow failed to note
its passing. American society still includes some small but organized
forces which strongly support the Court's exercise in dogmatism.

The historical fact that the First Amendment had theological as well
as political roots does not lead to the conclusion that government is
bound to become the promoter and supporter of religion. Howe dis-
allows the conclusion on two grounds. First, the rights guaranteed in
the Bill of Rights are not claims upon government but assurances
against government. They define immunities, not empowerments.
Second, the premise of the Bill of Rights was the philosophy of federal-
ism, which made national disability the rule and national power the exception. Both of these aspects of the matter reflect the political theory of limited government—a theory which is concerned sharply to define the incompetence of government in certain areas of human life, notably the area of religion.

It might be interesting to note here that the Vatican II Declaration on Religious Freedom embodies both of these ideas. The content or object of the right to religious freedom is simply an immunity from coercion; and to it there corresponds a limitation set to the power of government, and to other social powers as well. I may quote here what I have elsewhere written: “This is good juridical philosophy. It is proper to a juridical formula—such as the constitutional formulas of freedom of speech, press, religion, assembly and civic protest—that it should define the outside limits of a sphere of human activity and guarantee the integrity of this sphere against coercive intrusion from without, but that it should not enter, as it were, into the sphere itself, there to pass moral or theological judgments on the beliefs expressed or on the actions performed within the sphere. Such judgments are ‘unconstitutional,’ beyond the competence of purely juridical authority. In our case, the juridical formula, ‘the free exercise of religion,’ contains no positive evaluation of the religious phenomenon in any of its manifestations. It simply defines the immunity of these manifestations from interference, as long as they remain within the outside limits of lawful freedom. Therefore the only matters of juridical relevance are, first, the definition of the limits beyond which the exercise of freedom is socially unacceptable and unlawful [the Council defined these limits in terms of the concept of public order and its threefold component], and second, the duty of others, including government, to respect the integrity of action that goes on within these limits.”

If one could be content to define the relations of government and religion simply in terms of religious freedom as an immunity from coercion, and in this sense to define the essential meaning of separation of church and state, the whole matter would be quite simple. Howe says much the same thing against the background of American constitutional history: “Had the effort of Mr. Justice Roberts to make the prohibition of establishment a mere assurance of religious liberty and the effort of Justice Jackson to reduce that assurance to a guarantee of free speech been successful, the problems that perplex us today would not, I think, be as intensely bewildering as they are” (pp. 116-17). In particular, as he notes, the famous School Question would not continue to be a thorn in our constitutional and legislative flesh. In Mr. Justice
Roberts' narrow interpretation of the no-establishment clause, certain manners of governmental aid of the religiously affiliated school, which raise no issue of religious freedom, would not seem to fall under constitutional ban. However, as Howe points out, the case is altogether different when the broader Jeffersonian concept of non-establishment is adopted. Since the decision in the second flag-salute case in 1943, that adoption has occurred. It has been strongly confirmed by the Court's reasoning in the prayer cases. (Incidentally, I do not quarrel with these decisions themselves, only with the reasoning.)

Was the adoption necessary on a historical view of American constitutionalism? I should not wish to force Howe's thought, but he seems clearly to be saying that it was not. Another road was open to the Court, indicated by the evangelical principle of separation, which is deeply rooted in our history. At that, the more important question is, whether the exclusive adoption of Jefferson's theory is today what a rule of law should be—protective and creative of social values, directive of American society toward the fulfillment of its original inspiration. Howe does not clearly speak to this question. It is, I think, the actual question. It is, for instance, central to the contemporary controversy over the Blaine Amendment. This famous legal doctrine, which failed of adoption on the Federal level, only to gain it in more than thirty states, is pure Jeffersonianism. This, say its opponents, is the source of its archaism.

I may here advert once again to the Vatican Declaration on Religious Freedom. It did not lie within the scope of the document to deal with the full range of issues included under the rubric of the relations between church and state, or better, between religion and government. At that, it states two principles in conjunction, namely, that "government, whose proper purpose is the care of the common temporal good, ought indeed to recognize and favor the religious life of the citizenry; but it must be said to exceed its own limits if it presumes to take control of, or to impede, religious acts." The second principle is clear enough. It bears on the issue of the intrinsic incompetence of government to exert coercion in the sphere of religion, from which it is barred by the barrier of the human and civil right to religious freedom. The first principle, however, is stated with studied and deliberate vagueness. It bears on quite a different issue—the positive duties of government towards religion in society. The Council implicitly recognized that the solution to this question will vary greatly according to historical and social circumstances of one sort or another. Therefore it refused to
dogmatize in an area where the relativities of history are determinative of particular solutions.

On the other hand, the Council explicitly intended to proscribe the Continental laicist concept of separation of church and state. It proscribed, if you will, the extreme Jeffersonian concept of non-establishment. It affirmed two duties on the part of government, each derivative from a different source. One duty derives from the status of religious freedom as a human and civil right. It is the consequent duty of government to refrain from infringement of the inviolable zone of freedom which surrounds the human person and the religious community. The other duty derives from the notion of the common temporal good, which includes the values of the religious experience, personal and communal. These values are not simply transcendental; they also affect the substance and quality of human life in the civil community. The duty of government to the common good in the fullness of its realization necessarily includes a duty to religion in society—the duty of “recognition” and “favor.” No legal transcription of this duty is suggested; only the principle itself is affirmed. The principle, I think, bears much the same sense that Howe found in the evangelical principle of separation of church and state, whose earlier operation in American constitutional history has presently met frustration.

I have not done justice to the multiplicity of insights in Howe’s book. I shall simply say that he has succeeded in his effort, which was “to bring into the light some elements and tendencies in American social and intellectual history which courts have too often overlooked and which should be taken into account in any effort to write an accurate story or construct an adequate theory of church and state in the United States” (p. 5). His success makes one regret the more that he is not here to follow the story as it further unfolds and to contribute to the theory as it reaches for the adequacy which is missing at the moment.

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The past seven or eight years have been a period of intense activity for politician and scholar in the field of federal taxation. It is difficult to specify a point of beginning, and despite an apparent loss of forward movement and acute interest, the era may not be over.

Chairman Wilbur D. Mills of the House Ways and Means Committee was an important catalyst in bringing the tax scholar and his political counterpart together. His successful call for scholarly papers in the field of federal tax policy and their publication in 1959 in the Tax Revision Compendium1 provided impetus and focus for a good bit of the subsequent activity. Much of the data and many of the ideas brought to public attention through the Compendium have been central to the further development of tax thought, to programs for tax reform, and to the continuing dialogue.2

Two unrelated events in 1960 were significant in carrying forward both the scholarship and the political drive for tax reform which Mills had stimulated the year before: the Brookings Institution appointed Joseph A. Pechman head of its Studies of Government Finance, and the people elected John F. Kennedy President.

With Pechman as the creative, driving force, Brookings sponsored a number of important empirical and analytical studies of tax and fiscal policy. The results of most of these studies have now been published,3

2. Papers submitted at the behest of congressional committees on other occasions in the 1950's did not have the overall breadth or the impact of those published in the Compendium in 1959, although a number of them were significant. See Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code Before the House Comm. on Ways and Means, 83d Cong., 1st Sess. (1953); Hearings on Federal Tax Policy for Economic Growth and Stability Before the Subcomm. on Tax Policy of the Joint Comm. on the Economic Report, 84th Cong., 1st Sess. (1956). See also House Comm. on Ways and Means, 86th Cong., 1st Sess., Income Tax Revision: Panel Discussion Before the Committee (Comm. Print 1960); Hearings on Topics Pertaining to the General Revision of the Internal Revenue Code Before the House Comm. on Ways and Means, 85th Cong., 2d Sess. (1958).
and they provide some of the base reference points for evaluating many of the current proposals for change in our tax structure.

President Kennedy's election brought the appointment of Stanley S. Surrey as Assistant Secretary of the Treasury for Tax Policy, a man with talents too rarely common to one in that position. As a law professor, Surrey had written extensively in the tax field. His writing showed both his capacity for analysis and his eagerness for tax reform. His appointment has permitted him thus far to launch and direct two major efforts to bring about a degree of reform. For the most part, those efforts had the understanding and backing of a great Secretary, Douglas Dillon.4

The long-run measure of the Brookings contribution under Pechman is yet to be taken. It may prove substantial. Surrey's legislative programs for structural tax reform met with some political success in 1962 and 1964, but it was not enough when viewed against the backdrop of demonstrated needs, including needs made clear by some of the Brookings studies and by the data and analysis which the Treasury produced in support of its proposals.

Despite the limited success of the reform proposals in Congress, Surrey's and Pechman's energy and optimism seem limitless. Neither of them is likely to be deterred even by the 1966 tax legislation which, for the most part, was a giant step backward toward the crazy-quilt patterns of the late forties and fifties into which statutory provisions benefiting the well-to-do had quietly woven their way. The high level of Surrey's threshold of frustration will be apparent when the Treasury unveils its 1967 legislative program for tax reform in the face of the most hostile political forces it has had to face in recent years.5 In writing Federal Tax Policy Pechman has shown his own determination to bring some of the current issues in taxation to more people and to bring to the politically responsible some bases for more enlightened and rational policymaking.

Brookings has published Pechman's book "[t]o help meet the general reader's need for factual and analytical information" about our federal

4. President Kennedy's other major appointment with impact on tax policy was Walter W. Heller as Chairman of the Council of Economic Advisers. He and Surrey worked effectively and cooperatively to implant the theses of the "new economics" in the 1964 and 1965 tax reductions. Cf. W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1965).

5. The Treasury has presented to the House Ways and Means Committee its 1967 program for modification of the income tax treatment of the aged, Hearings on H.R. 5710 Before the House Comm. on Ways and Means, 90th Cong., 1st Sess., pt. 1, at 73-77, 195-217, but it has not yet unwrapped the rest of its package.
According to the book, its purpose “is to explain the major issues” that affect the “use of taxation as a policy instrument,” a use which “remains highly controversial,” “so that the interested citizen may better understand, and contribute to, the public discussion.” The author’s obvious hope is for a significant increase in the number of informed laymen, both in and out of government, who will participate in the continuing political-economic dialogue and in the processes of policymaking.

This book is concise, well organized, and readable. It is not a ground-breaker or a first report of new discoveries or insights, but rather a survey of the field. It describes the role of our federal tax system in both historical and current perspectives, it examines the tax legislative process, and it evaluates the major federal taxes in the context of their economic impacts. In analyzing some of the current problems requiring political resolution, it relates a number of the issues of state and local taxation to those of federal taxation. I know of no other book that has so succinctly and lucidly performed this service.

At every turn the book provides statistical information, charts and graphs to help narrow the choices which confront the reader. When the author questions the validity of a going solution to a current problem, he does so with concrete, quantified data that are relevant and meaningful. He relieves the reader from dependency on the author’s or his own attitudes, or on doctrine, instinct or logic alone. Since the publisher’s purpose is to reach the general reader, experts may avoid the book. If they will overcome their pride enough to read the book, however, even they will find much that is conveniently compiled and useful.

Chapter 1 is a brief introduction to the major features of our federal tax system. It describes the kinds of taxes on which we depend, the sums they raise, the burdens they create. It also establishes the author’s premise, that taxation, as “a major instrument of social and economic policy,” has two goals: the equitable distribution of the costs of government and the promotion of economic growth, stability, and efficiency.

In Chapter 2 Pechman explains the multiplier effect of a change in tax rates or federal expenditures and the difference to be expected from one or the other. The author's careful, clear exposition should carry the general reader over whatever barrier may have prevented him from understanding how the fiscal actions of the federal government—ffecting changes in taxes and expenditures—make their measured, almost pre-determinable impact on the general level of economic activity and the rate of economic growth. The reader will see how the 1964 income tax and 1965 excise tax reductions provided a test for the theorists of the "new economics" and how their theories were confirmed.10

Pechman suggests a number of criteria for rational choice between varying taxes or expenditures. He also develops the quantitative differential impact of a change in federal taxes vis-à-vis a change in federal expenditures, but he evaluates the alternatives only in terms of his stated objectives for fiscal policy: to stabilize the economy at full employment, to maintain price stability, and to promote economic growth and efficiency. Despite the larger multiplier effects to be expected from expenditure changes, he leans toward tax change (reduction in 1964) for purposes of short-run cyclical stabilization. His "controlling principle" is that "government outlays should not exceed the point where the benefit of an additional dollar of expenditures to the nation's citizens is the same in public and private use."11 He doubts that this point would shift sharply in one direction or the other during short periods of business contraction.

I am not sure that the author has given adequate weight to the difficulty of reversing tax cuts. By his standards, tax reduction in 1964 was preferable to an increase in expenditures when full employment was the immediate goal. But a tax increase to halt inflation in 1966 or to maintain a desired expenditure level in 1967 does not occur automatically in a political environment upon a mere restatement of the economic principles that justified the 1964 cut. The politically influential business community seems to accept as currency only one side of the Keynesian coin.

Despite Pechman's reluctance to see expenditure programs triggered by stabilization needs, it does not seem to me inappropriate to seize upon recession periods as convenient times to begin expenditure pro-

grams to satisfy our substantial deficit in public resources. It is not obvious that a cutback in non-defense expenditures would be more difficult than a tax increase when and if cutting back appears desirable. And if the public sector has been starved, as economists like Galbraith insist, an over-correction in terms of the quantitative imbalance of the short-run may be justified by the long-run benefits to be derived from a needed commitment in the public sector.

Pechman is right in saying that “the level of economic activity depends on the ratio of taxes to expenditures.” He is also right in concluding that “[t]he appropriate action at any particular time depends upon the relative need for private and public expenditures.” But the decision in 1964 was not necessarily right in its entirety. Recognition then of the continuing, unsatisfied public needs might have brought about less tax cutting and more spending. A tax cut of smaller proportions coupled with increased spending would have had its impact on unemployment, and the greater public spending effort might have gotten at a few of the roots of our unemployment conditions, moved us ahead in housing and education, and made deeper inroads into our problems of urban transportation.

Although Pechman regards the tax legislative process as in need of reform, he concludes in Chapter 3 that its “achievements . . . have been impressive on balance.” His statement that “erosion of the tax base has been halted in recent years, and some steps have been made to reverse it” was written before last fall when the Senate, in the dying days of the 89th Congress, added a series of “eroding” riders to an unrelated tax bill that had passed the House under Administration sponsorship. Despite the fact that his writing antedated last fall’s events, the case for process reform—even the one Pechman made out—calls for a concluding note more likely to interfere with the general reader’s state of repose than this: “Imperfect as it is, the tax legislative process has produced a tax system that contributes to the nation’s welfare.”

Since “Congress has not given . . . serious consideration” to suggestions for reform, the author’s relative contentment is surprising.

12. Id. at 29.
13. Id.
14. Id. at 49.
15. Id.
17. FEDERAL TAX POLICY 49.
18. Id. at 48.
Although he would like to see better representation of the public interest before the congressional committees, more attention to overall fiscal policy by the appropriations and tax committees, and faster congressional response to the need for temporary tax changes required by short-run cyclical conditions, he does not impart any sense that there is a battle that must be fought—either now or ever.

To grapple effectively with the substantive provisions of the tax laws one must be expert, but the non-expert, the “interested citizen,” can come to see that the problems of legislative process are his. He will not see this, nor will he appreciate his stake in process reform, until the effects of the deficiencies are described concretely and until experts like the author show him by substance and tone that the need for reform is acute.\(^\text{19}\)

No doubt, as the author suggests, the public interest would be enhanced if special subcommittees were used more frequently to study and present reports on the broader questions of taxation before a particular issue is on the legislative calendar. And no doubt there should be some modification of the committees’ public hearing format to make it more useful. But what of more basic change? Might there be a helpful analogue in the British or Canadian technique of the Royal Commission? Would a change in the current style of legislative drafting make it more difficult for the dollar-laden “special interest” provision to pass public scrutiny in the guise of just another technical amendment? The statute might be less vulnerable to the quiet lobbyist if it sought to recapture general principles and an organic structure and if it abandoned the unsuccessful attempt to state every conceivable fact situation and to follow each with a particularized consequence. Adherence to such a tax statute might compel the lobbyist to give up a measure of his cover and to seek his financial goals by the relatively visible appropriation route instead of the relatively obscure tax route. It is likely, too, that such a statute would encourage administration and interpretation that are both responsible and schematic.\(^\text{20}\)

19. The silence of the political scientists is striking. They are not in the fray of substantive tax reform, and this may be understandable. Their failure to have the tax legislative process under scrutiny is not understandable. One might assume this would be an area in which they would be interested in making—and perhaps could make—a significant contribution.

In any reform of the legislative process, a way ought to be found to induce the House of Representatives to transmit revenue bills to the Senate well before adjournment. The House's tendency in recent years to hold the bills until quite late has contributed to the atmosphere of rush in which the Senate often seems to act. And the Senate should consider procedures to make certain that riders unrelated to the particular subject of an underlying revenue bill will not pass without publicity and an opportunity for the public's study and comment. The constitutional requirement that revenue bills originate in the House is a fleshless skeleton in the absence of a principle of germaneness to guide the Senate in the exercise of its power to "propose . . . Amendments [to revenue measures] as on other Bills,"21 but if the Senate denies that principle—and clearly it does in practice22—it becomes all the more important that it give full public exposure to its unrelated riders and that it pass them in sufficient time to permit unrushed consideration by the Conference Committee and the House.

Pechman introduces his chapter on the individual income tax by characterizing it as our "fairest and most productive source of revenue,"23—responsible for roughly 40 per cent of federal receipts. The productivity of the tax is undisputed, and I share the author's bias as to its relative fairness. I regret, however, that he did not deal more fully with the expenditure tax alternative before rejecting it. I could rest more easily with my pro-income tax bias if I were sure that within our income tax system there were solutions to some of the nagging problems an expenditure tax purports to avoid.24 If the expenditure tax's claim to serious consideration were simply that it would discourage consumption when the economy called for a dampening of consumer demand, one could accept its easy dismissal because less radical alternatives were available. By taxing only consumption, however, the expenditure tax eliminates a host of tenacious inequities that plague us with a seeming intractability. The realization doctrine, for example, does not explain but only flaunts the inequity of deferring the taxation of accrued gains on marketable securities while taxing the unwithdrawn interest in a savings account. It is equally difficult to find equity in the deferred taxation of current earnings saved as part

23. FEDERAL TAX POLICY 50.
of a “qualified plan” for retirement when earnings saved for retirement on an employee’s own initiative are taxed currently. The exchanges that trigger recognition under the income tax as we know it may be little different in kind for many individuals from those which are tax free. Many taxable exchanges do not reflect a change in an individual’s economic position very different from the change that occurs in a shareholder’s position when his corporation has diversified without a shareholder-level exchange taking place. A graduated tax (or a proportional one) measured by consumption would tax savings by reference to a more uniform standard—the extent to which an individual has withdrawn assets from the community’s pool of productive resources. An expenditure tax would present enormous problems: problems of administration, economic impact and ideology.25 But before one can reject the idea because the price is too high, one must first have the data and analysis with which to weigh the benefits in equity and structural simplicity which that price may purchase.

Pechman identifies a number of the unsettled issues affecting major segments of the income tax: treatment of the family, the aged, personal deductions, tax-exempt interest, earned income, capital gains and losses, the tax free step-up in basis on death, and income-averaging. He explores their effect, reviews several of the well-known suggestions for reform, and opts for some of them. His judgment is probably right that “[e]ven in its present form . . . the individual income tax continues to be the best tax ever devised,”26 but it is sad that this is so.

As it becomes more and more a function of the federal government to allocate funds for purposes that traditionally had been left to the market and private arrangement, it would seem wise for Congress to keep a tighter rein than it can when it attempts to subsidize through the income tax system. Tax subsidies seem wise when Congress wants a somewhat permanent subsidy whose effect will not be subject to close scrutiny and when it prefers to allow unreviewed and perhaps undisclosed private judgments to determine particular allocations.27 It would

25. My strongest doubts about the expenditure tax raise questions like these: Have we not reached the point where it may be important for many people to believe it is at least as good to spend and consume as it is to save? Do we wish to “penalize” consumption and “favor” savings? At the practical level: Is it at all likely that an expenditure tax would be enacted with a rate structure that is sufficiently progressive; one taxing some expenditures at over 100%? Might it not be feasible for the legislatively powerful to “erode” the expenditure tax base just as easily as they can the income tax base? What percentage of expenditures might Congress exclude from the tax base for each dollar of sales income generated by a taxpayer who invests in oil and gas wells?

26. FEDERAL TAX POLICY 97.

be helpful if economists were to review the deductions and exclusions (implicit as well as explicit) under the income tax—those not justified on a "net income" theory—price them out, compare the cost and benefit of achieving the underlying objectives through direct federal expenditure, and then perhaps suggest relevant, quantifiable criteria to help Congress in its recurrent task of choosing between tax subsidy and direct expenditure.28

The book's discussion of the corporation income tax includes material on features common to both corporations' and individual businessmen's efforts to arrive at their taxable income. This chapter should help the general reader to an understanding of practices and procedures that he might have thought impenetrable because of the mystique that surrounds them. With perception and insight Pechman describes the history of the corporation income tax, its special features and rates, and the debates about its incidence.29 He also poses the traditional issues as to its continuing value to society, but he omits other issues, perhaps because they are more in the mind of the lawyer than the economist.

If we are to have a corporate income tax, we should know the economist's views on the rules that antedate, but are codified in, Sections 311 and 336, permitting the tax free distribution of appreciated assets. It would be useful to know what across-the-board corporate rate reduc-


tation might be possible without altering the present yield if the principles underlying Sections 311 and 336 were reversed. The gains in equity and in simplicity—the elimination of Section 341 and the problem of collapsibility, for one—make the change attractive even if substantial revenues are not involved; equity and relative simplicity are not values to be rejected even when they stand alone. Nevertheless, the economist's quantifying approach to the problem would add a useful dimension.

The economist should also look at the difficult problems of basis adjustments and tax free reorganizations and exchanges. The reorganization rules provide for corporate continuity of basis even though a transferee corporation delivers boot in part payment for assets, provided that the transferor does what is necessary to avoid recognition under section 361(b)(1)(A). Is that the right approach, or would a step-up to the extent of the boot make sense? The reorganization rules exact a corporate tax as the price of a step-up, yet the combination of Sections 337 and 334(b)(2) make it possible in the non-reorganization area to effect tax free step-ups. Does it make sense from the economist's point of view that these apparent inconsistencies in approach continue?

Should a corporation's cash purchase of the assets used in business by another corporation ever be a taxable event to the seller and should it ever provide the buyer with a "cost" basis? If so, why is a merger tax free and why in mergers is basis continued despite the fact that, at a later date, a cash redemption of the shares held by the former shareholders of the transferor corporation will not generate a corporate tax or a step-up in basis? The difficulty in answering some of these questions suggests some of the difficulties with any corporate income tax, but the economists might try their hand at narrowing some of the issues before reaching ultimate questions.

Pechman rejects proposals to treat corporations like partnerships, describing them as the most radical of the solutions frequently offered for the "double taxation" problem inherent in our separate corporate tax system. He is concerned that people of modest means might have insufficient funds to pay their tax if their taxable income included undistributed corporate earnings, and that they consequently might be reluctant to invest in stocks. It is thought equally bad, the author

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30. Lewis, A Proposed New Treatment for Corporate Distributions and Sales in Liquidation, 3 COMPENDIUM 1648.
31. For a general discussion of this problem, see Brown, An Approach to Subchapter C, 3 COMPENDIUM 1619, 1623-25.
tells us, to have a system which might compel greater corporate distributions to meet the tax burden, because corporate saving ought not to be reduced significantly. He also points to the administrative difficulties of the partnership method where there are large publicly-held corporations, frequent changes in ownership, and stockholders in the thousands or millions.

There are weighty considerations in favor of continuing the corporate tax. It is a dependable source of revenue. It provides a handy tool for effecting dramatic results in terms of fiscal policy. There are also weighty considerations—economic and equitable—in favor of its abandonment. I am not sure which is preferable, to continue or abandon, but I am not persuaded that the administrative difficulties of the preferred alternatives are a sufficient basis for continuation of the corporate tax. We have had experience with the pass-through taxation of regulated investment companies and we could perhaps learn something from this.

The anticipated financial burden on poor stockholders and the pressure on prosperous corporations to disgorge could be mitigated. A withholding tax could be imposed on corporations at the going corporate rate, with the shareholders required to "gross up" in their individual incomes their proportionate shares of their corporation’s income. They would be permitted to take credit against their individual tax for their proportionate share of the tax withheld by the corporation. This approach would reduce the economic impact at the corporate level of the change in tax structure; corporations would pay out in tax what they would have paid under the corporate tax. If the increase in individual rates necessary to compensate for loss of the corporate tax is not too great, the credit made available to the shareholders should minimize the added cash burden at the individual levels. In light of the credit, it is doubtful that corporations would have to increase their dividends substantially beyond the levels they would otherwise maintain. The withholding tax at the corporate level would have to be non-refundable in the case of tax exempt shareholders unless we wished to increase their income substantially and dramatically at taxpayer cost.

I have mentioned this approach to the partnership-type tax treatment of corporations only to indicate that alternatives are possible.\(^3\) I do not know whether the corporation tax ought to go. It has economic

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\(^3\) Pechman describes five possible methods for eliminating the corporate tax or integrating it with the individual income tax. *Federal Tax Policy* 134-38. The method I have briefed in the text is a sixth possibility, one offered to meet a number of Pechman’s objections to a partnership approach, but there are others equally worthy of exploration.
and structural advantages and disadvantages. Economists ought to quantify them, if they can. In doing so, they should not ignore the costs inherent in the complexities of the corporation-shareholder tax structure and in the tax planning it fosters. Although “[m]ost experts agree that it is not practical to extend the partnership method to large publicly held corporations,” I think the experts have not worked sufficiently at the problem to develop the mechanism or to say they cannot. The question is whether they should.

In the book’s short chapter on consumption taxes the reader will see in sharp relief the relative importance of consumption taxes and customs in countries other than the United States and their distinctly secondary role in this country. Equity and economic considerations lead Pechman to prefer a broad-based, general consumption tax to selective excises, but in general, he ranks all excises “low as automatic stabilizers,” and “low in terms of equity,” since they tend to be regressive in their overall impact. In this chapter, too, he briefly discusses the expenditure tax, primarily in terms that are not pragmatic. “If one considers income the better measure of ability to pay, the expenditure tax is inferior. If expenditures are considered the better measure, the income tax is inferior.” That, I submit, is not a very helpful point of departure. As I have indicated, an expenditure tax in theory may help to resolve some of our seemingly intractable problems under the income tax; it has its own problems and they must be evaluated. What cannot be accepted as definitive is the proposition that the administrative and compliance problems of an expenditure tax may be too formidable to handle.

Pechman has performed a valuable service in presenting his chapter on payroll taxes. Too many of us—general readers and professionals alike—have failed to appreciate their full significance in terms of aggregate dollars and distribution of the tax burden. As the author reminds us, these taxes tend to be inflexible and, to a significant degree, regressive. They may contribute psychologically to the idea of social insurance, but I question whether this is a fact of undoubted value. The need is great for a deeper and more general understanding of some of the problems of welfare economics and equity which the payroll taxes present. Without recommending fundamental change—such as

33. Id. at 138.
34. Id. at 143.
35. Id. at 149.
36. Id. at 157
37. Supra text at n.24.
38. FEDERAL TAX POLICY 158.
the substitution of general revenue financing for payroll taxes—Pechman is persuasive in suggesting the direction which proposals for reform should take. As I see it, a program for major tax and fiscal reform would be inadequate if it failed to consider the economic effect of payroll taxes and their possible integration with the income tax.

In his brief discussion of the estate and gift taxes Pechman sides with the view he ascribes to most objective experts, that those taxes are theoretically "among the better taxes devised by man,"40 and so he expresses his disappointment over their low yield and the fact that they "make little change in the distribution of wealth."40 The existing estate tax has a schedule of high rates, but it is encrusted with hoary devices for avoidance. Pechman notes sadly the inability of tax theorists to persuade Congress to make estate and gift taxation more meaningful, and he places the blame on the public's failure to accept the theorists' views, its apathy, and its misunderstanding.

Some of the so-called avoidance devices—the marital deduction, inter vivos transfers, generation-skipping via settlements in trust, and particular uses of the charitable foundation—have been the subject of scholarly inquiry and dialogue for years. The American Law Institute is examining the problems they present as part of a project for the complete re-study and re-structure of the estate and gift taxes.41 It should be interesting to see whether the tax and estate planning bar will embrace the American Law Institute proposals. In the area of estate and gift taxation I suspect that the road to the public and Congress is through the bar. Experience suggests, however, that we ought not to take for granted the bar's support of a rational, integrated structure which will provide little premium for astute planning.42

The accessions tax has appeal to some who despair of reforming the estate and gift tax. It appeals to others because they feel it is more equitable to graduate a tax according to the recipient's accretion than to the aggregate wealth of the transmitter. This tax, little discussed in recent years, should receive renewed interest as a result of the American Law Institute's current study.

39. Id. at 199.
40. Id.
41. ALI, FED. ESTATE AND GIFT TAX PROJECT (Study Draft No. 2, 1966).
42. Blum, Tax Lawyers and Tax Policy, 39 TAXES 247 (1961). The Treasury's failure in 1963 to persuade the House Ways and Means Committee to approve a tax on asset appreciation at death as the price of the §1014 step-up in basis, or even to substitute a carryover basis provision, is probably attributable in significant measure to the opposition of members of the bar in and out of Congress.
I agree with Pechman that although an accessions tax is likely to foster more equal distributions of wealth, the distributions are likely to be more equal only within the family of the transmitter. It is not likely that transmission outside the family will result to any marked degree. As a result, the tax burden on less wealthy families may be greater than under an estate tax system.

In evaluating an accessions tax, it is important to consider why any transfer tax is to be imposed at death. It may be fairer to tax a recipient on his accretion if that is what we are after. On the other hand, if the social objective is to diminish large family accumulations, a graduated estate tax would seem better suited. One might well view the estate tax as a final supplement to the income tax. Perhaps the ultimate price for an income tax structurally tailored to allow large lifetime accumulations should be an effective, integrated, progressive estate and gift tax.

Pechman’s final chapter, on state and local taxes, is valuable for its presence in a book on federal tax policy as much as for its content. Most tax lawyers (the economists less so) have tended to slight questions of state and local tax policy and think of federal tax policy issues as though they were wholly independent of the state and local issues. It is their interdependence which Pechman vivifies and which I see as his most important message in this chapter. Today, he tells us, “[t]he state-local segment of the national revenue system is its most dynamic element.” The need for higher levels of expenditure by state and local governments is compelling, and these must be supported by higher taxes. The equity and economic issues in the choice of taxes are thus more poignant than ever before.

Pechman concludes the chapter with a discussion of federal assistance to the states: the customary grants-in-aid and the more recently proposed partial alternatives of federal tax reduction or relinquishment, federal tax sharing, and credits against federal taxes for state and local taxes. Although he does not argue for any particular device, his view is clear: even if the states succeed in raising more of the revenue on their own, it is essential to find effective, acceptable techniques for greater federal supplementation if the nation is to succeed in meeting the demands of education and welfare.

The issues of federal tax policy are more numerous than this book suggests; some are different from and deeper than those it describes.

43. Federal Tax Policy 201.
Some of the solutions offered are inadequate to the task; other possible solutions are not mentioned. Nevertheless, the general reader and the interested citizen will learn a great deal from this book, and the expert—to whom it is not directed—will find it very useful. Congressmen and their staffs should read this book for perspective and for insight into many of the questions they ought to consider before supporting or opposing new tax legislation.

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