

tioned by the untimely acts and things done by the old bench. For as "interstate" and "intrastate" have been alike judicial synonyms for laissez faire—the one being invoked when the validity of state legislation is being questioned and the other when the challenge is directed to a federal statute—so it is that the validity of theories may well derive from impinging circumstance. As against members of the New Court the Four Horsemen now stand out as possessed of one outstanding merit. Van Devanter, McReynolds, Sutherland and Butler, JJ., were willing to entertain questions of public policy and to give answers. They never, even when confronted by a stubborn problem, called for a bowl and water to wash their hands of all responsibility. There have in almost every age been great jurists upon the Court. Many of them as staunch individuals or as minority groups maintained a fighting faith. But if some editor of this *Review* does the History of the Supreme Court for which we are all looking, I am sure that his subtitle cannot be "An Institution in a Heroic Role." In the meantime, judicial reform goes its appointed way. President after president has been certain that he, by his appointments, could improve the performance of the Court, and for better or for worse, president after president has demonstrated that he was not fully acquainted with the qualities of the man he was appointing. It is not to be forgotten that it was Wilson who appointed McReynolds, and Coolidge who elevated Stone to the bench. Thus, the effort to make the law the instrument of justice is everlasting, and of the reform of the Supreme Court there can be no end.

For the immediate future at least there is not likely to be a return engagement of the play called "Belling the Cat." Instead, so far as the vista opens ahead, judicial reform is to be left to the finite span of human life, the measure of wisdom in the selection of jurists, the luck which appends the rightful choice of gods, and the erosion of time.

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Taxation in the United States. By Randolph E. Paul. Boston: Little, Brown and Company, 1954. Pp. 774. \$15.00.

In a remarkably timely volume, Randolph E. Paul, tax attorney and war-time government official, traces the development and growth of the revenue system from the beginning of our government down to the present time. This review of the past is appropriately timed as we commence to meet the problems of adjustment accompanying the most comprehensive revision of the revenue laws which our country has ever seen. The Internal Revenue Code

of 1954, finally approved by the President August 16, 1954, is a complete recodification of all of the federal revenue legislation; in addition to an entire rearrangement of all the tax provisions and a complete rewording of numerous sections in an attempt to achieve greater clarity and certainty, many important substantive changes have been incorporated in the new Code. In appraising the merits of such changes, and in formulating our tax policies for the future, nothing could be more valuable than a page (in this case, a volume of over seven hundred pages) of history. As Mr. Paul expresses it, "history and the precedents provide perspective. . . . We can know better where we are going if we know the places from which we have come, and how answers in the past have fared in the test of experience."¹ And for this purpose (and it is not a limited one), the book will prove of real value to all who care to understand, administer or appraise our present system.

Yet, Mr. Paul's objective in writing this detailed and documented history was much more than to furnish a guidebook for the use of tax practitioners and others who may need to know, for practical reasons, the historical or legislative background of our present network of tax statutes. His thesis is that the "national defense is of paramount significance" at the present time.² With the financial cost of defense running into astronomical figures, the issues of taxation and fiscal policy to support such cost become equally important. Should we reach the wrong conclusions on these issues, either through ignorance or cowardice, we can be defeated just as decisively and conclusively as in actual combat. He visualizes that the Russians hope, and expect, that we will lose "the political intelligence and the moral endurance" which have preserved our freedom in the past and through inflationary pressures or deflationary panic permit our whole structure to cave and crumble.³ In our highly complicated modern civilization, Mr. Paul doubts that we can muddle through as we have in the past when the issues were not so confused. To survive, the American people must acquire an "understanding of the basic issues involved in tax and fiscal policy";⁴ otherwise, the effort and sacrifice necessary to maintain a sound domestic economy while so much of the nation's wealth is being poured into a massive military machine for national security would be insupportable by our people.

It was for this larger purpose, to contribute to the "process of citizen education in the complex subject of taxation and fiscal policy,"⁵ that a busy tax practitioner, such as Mr. Paul, has been willing to find the time to write this volume. And it was not education for education's sake, but education for national defense and security. The American people have been, and will continue to be, tempted by false prophets and agents of the Kremlin to rest from

¹ P. 768.

² P. 765.

³ *Ibid.*

⁴ P. 767.

⁵ P. 771.

the everlasting task of preparedness and to cease the perpetual effort necessary to meet the cost of security. In the complexities of our modern economy, false prophets are not recognized as readily for what they are as in the past; education of an effective majority of the people is the only answer.

A perfect historical example of the complete collapse of a regime due to the lack of a strong fiscal policy is the Southern Confederacy, 1861–1865. In Chapter I Mr. Paul describes the weak taxing measures of the Confederacy, finally culminating in the confession of defeat by its Treasury Department in a last “desperate call for donations”⁶ by the people. He concludes, as to the plight of the southern states in their heroic effort to maintain their own economic way of life, “it is clear now in the illuminating light of subsequent events that a halting, floundering, and blundering fiscal policy was the greatest single weakness of the Confederacy.”⁷ This chapter is a convincing object lesson to all who question the relationship between national security and a strong fiscal policy.

Mr. Paul’s history takes us from the poll tax, the faculty tax, and the property tax imposed by the New England colonies down to the beginnings of the 1954 Code. In accordance with the precept that “[t]hose who would understand the present, and who would be armed to deal with the future, must consult the past,”⁸ there is little in our past relating to taxation which is omitted, and much which is stressed.

Mr. Paul’s emphasis is on the birth, growth, toils and troubles of the income tax. We see that it was born in war (the Civil War, 1861 to be exact), and had its greatest development in wars (World Wars I and II, and the Korean crisis). May it now redeem itself by securing us from another war. But in Mr. Paul’s narration, we see that it was not really new in 1861; the faculty tax of the colonies imposed upon earnings and profits was a precursor of our income tax. Furthermore, the income tax had appeared and disappeared time and again throughout the history of man from centuries B.C. on down. Despite frequent newspaper accounts, it is not an invention of Karl Marx or the Russians for the subjugation of the common man or for the making of his lot on this earth a more miserable one.

Mr. Paul re-creates for us the thinking of the people and the whole atmosphere of the significant periods in the history of the income tax. We read with him the newspaper comments of the day on the 1894 Income Tax Act, the constitutionality of which was later tested in the Supreme Court.⁹ The arguments before the Supreme Court are summarized, together with contem-

⁶P. 22.

⁷Ibid.

⁸P. 768.

⁹P. 32 et seq. The 1894 Act was declared unconstitutional in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

porary comments pro and con the final decision. The opinions of the individual justices who participated in the five-four decision which placed the income tax on ice for almost twenty years are analyzed critically. "Logic, as well as history, went into the discard."¹⁰ He concludes not only that the Court was misled as to the reasons leading up to the insertion of the direct tax clause in the Constitution (the provision upon which the 1894 Act was wrecked), but also that the Court's logic and economics in holding that the income tax was a direct tax were equally fallacious.

In spite of the *Pollock* decision, the income tax was still far from dead. The issue was debated in the halls of Congress and in the public press, in terms and tones which we are accustomed to hear today in the course of the public consideration of our current revenue legislation: power to "mulct the wealthy," "confiscation and a wanton license of profligacy," "un-American in spirit," etc. As a matter of fact, Mr. Paul's practice throughout the book of quoting contemporaneous comments on the revenue legislation of the day and of taking excerpts from the more vivid remarks made by the leading political figures during the course of the congressional debates makes the volume an extraordinary source book for all the possible arguments, and even the language, applicable on either side of tax issues which still confront us. Within fifteen years, the sentiment of the people was sufficiently stirred to assure the adoption of the Sixteenth Amendment, removing the bar which the *Pollock* case had raised against the income tax. Thus, by 1913, the income tax was restored to the statute books and has remained with us ever since.

It was not long before this first modern income tax was exposed to the artificial stimulus of war; individual rates were graduated up to seventy-seven per cent, and corporations were subjected, for the first time, to what has now become one of the standard props for a wartime economy, the excess profits tax. Following through from a period of large surpluses and tax reduction into the collapse of the economy in 1929 and the deep depression of the 30's, Mr. Paul points out the tax issues as they arise and gives the then current opinion on the issues and his considered judgment as to the wisdom, or lack of wisdom, of the solution adopted. It is particularly during the period beginning with the Roosevelt regime and down to the present time that Mr. Paul goes into the utmost detail in his account of the problems, the issues, the proffered solutions, and the answers selected. It is the period in which Mr. Paul has personally been most active in tax matters. In the early 30's, he was a well-known practicing tax lawyer in New York City. From the late 30's to 1941 he was a special consultant to President Roosevelt on tax matters and special assistant and tax advisor to the Treasury Department. From 1942 to 1944, he was the general counsel to the Treasury, and as such was chiefly responsible for the revenue programs of the administration during the greater

¹⁰ P. 55.

part of the war. Since 1944, he has been engaged in private tax practice in Washington, but with a deep interest in the fiscal problems of the country and a willingness to devote time and effort to aid in the maintenance of a sound fiscal policy.

From this background, the discussion of the problems of taxation and fiscal policy during the latter years of the 30's and the entire World War II is invaluable. Not only are we given the facts which set the stage for a particular tax program adopted by the administrative branch of the government, such as the contemplated expenditures, the possible inflationary gap which cannot be controlled solely through wage and price regulation, the estimated receipts from existing legislation, etc., but we actually follow through the presentation of the program to the two taxing committees of the Congress, listening to the comments of the committee members of both parties. Finally, the program, now drafted into bill form, is brought before the House and Senate for debate, and no holds are barred. Every possible argument is mustered on one side or the other. While much is said on both sides which has been said many times before, the need for repetition is there, for the lesson rarely seems to be learned. That is democracy in action. It is particularly apparent in this analysis of wartime finance how greatly a tax program of the administrative branch is changed during its course through the two houses of Congress on its way to the White House for final approval. On one occasion the changes in the original program were so drastic that the President preferred no program at all to what was finally presented to him; he vetoed the bill. Dramatically, the Congress struck down this first veto of a major revenue bill, more out of concern for their prerogatives than on the merits (which seem now quite wanting) of the legislation itself.

Some of the most instructive parts of the book deal with what Mr. Paul feels are the big issues of taxation. These issues have arisen many times in the past and will continue to arise periodically. For instance, to one of the oldest tax issues of all, proportional versus progressive taxation, Mr. Paul has devoted a full chapter. Lest one think that progressive taxation originated in modern times as a device to liquidate wealth, a quotation from the Indian philosopher, Manu, who lived some 3,000 years ago, is cited as expressing the thought that proportional taxation does not achieve equality of burden. We see in Mr. Paul's essay the positions taken by philosophers, economists, and political leaders on this unresolved issue. While Mr. Paul analyzes each of the numerous theories, severally developed over the years to support or dethrone the principle of progression in taxes, he finds that none seriously "wounds the case for progression."¹¹ Nor does he find any one theory which clearly establishes the validity of the principle. Yet, he feels progressive taxation is here to stay, and he doubts the wisdom or the possibility of departing

¹¹ P. 755.

from it. While he indicates that "the marginal rates may well be too high at the top," he is certain that some progression is necessary in our tax system.¹² The analysis which he has made of the whole issue is of immeasurable value in considering the merits of such current proposals to reduce the progressivity of our tax system as the much discussed constitutional amendment to limit income, estate and gift taxation to a maximum rate of twenty-five per cent.

Other illuminating discussions are on such controversial subjects as: the taxable capacity of the nation, which Mr. Paul finds not so limited as others would maintain; taxation for purposes beyond the revenue, to which he subscribes with the statement that revenue yield is "only part of a multiple design"; the Keynesian philosophy of alternative programs of government spending and increased taxation to check recessions and combat inflation. Moreover, when one gets particularly distraught by the complexities of the 1954 Code, which seems to have multiplied the problems of the old law rather than solved them, Mr. Paul's chapter on "Simplification and Equity" might well be prescribed as a pacifier. In that connection, an interesting remark comes from the Joint Committee on Internal Revenue Taxation which undertook in 1927 a study of how to simplify the income tax: "While a degree of simplification is possible, a simple income tax for complex business is not."¹³ And our economy has become more and more complex ever since.

This volume will be an invaluable reference work for everyone who has any responsibility for revenue legislation. The issues that constantly recur are analyzed thoroughly, and the solutions which were adopted in the past are looked at critically. In taxation, more than perhaps in other fields, the past has much to teach. Had this volume been thoroughly studied by those responsible for the 1954 Code, a number of important issues might have been differently handled. For example, the old section 102 tax, imposed upon unreasonable accumulations of surplus by corporations, might have been strengthened instead of weakened in the 1954 Code, had Mr. Paul's conclusion as to the ineffectiveness of the old section been accepted. Certainly, there appears no factual basis for softening the impact of this protective provision which has been a part of the income tax since the beginning. On yet another issue in the 1954 Code, the "double taxation" of dividends, the answer selected by the Congress is quite different from that which one would choose on the basis of conclusions found in Mr. Paul's book. The granting of a tax credit for dividends received against the income tax of the stockholder assumes the double taxation of such dividends; however, as Mr. Paul puts it: "The sad truth is that no one knows very much about the incidence of corporate taxation."¹⁴ Certainly, no one can correctly maintain that the full corporate tax is wholly borne by the stockholders. Whether the degree to which corporate earnings may be doubly taxed when distributed to stock-

¹² P. 759.

¹³ P. 388.

¹⁴ P. 428.

holders warrants a tax credit to the stockholders is speculative. On a much larger issue which arose in the 1954 legislation, and which will arise again, namely, whether the tax system should give greater encouragement to investment or consumption, the various considerations involved are analyzed in detail. After marshalling the arguments in the field, consumption would seem to have the stronger case. However, the choice made by the Congress in 1954 was to favor investment through the new dividends credit and a much liberalized provision for depreciation of new plant and equipment.

While, in my opinion, this history will make a significant contribution to the strengthening of our democratic system through education, its missionary work will be largely restricted to the specialists and technicians in the field of taxation. Perhaps that is all that could possibly be expected of a book on a subject so inherently lacking in popular appeal. However, it was Mr. Paul's express objective in writing this book to contribute to the education of an effective majority of our people on the complex subject of taxation. I do not see how this can be achieved directly by a book of this length, containing such a mass of technical detail and such a thorough analysis of tax theories and philosophies. It may well be that Mr. Paul is relying on the "trickle-down" theory, whereby the education which is directed at the specialists is eventually passed down to the rest of the people in manageable doses. This is the same "trickle-down" theory which the Democratic members of the Ways and Means Committee accused the Republicans of espousing in connection with the enactment of the 1954 Revenue Code. As applied to education, the theory may be more effective than the Democrats thought it would be in the new Internal Revenue Code.

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