Book Reviews

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INDEX DIGEST OF STATE CONSTITUTIONS. Prepared by The Legislative Drafting Research Fund of Columbia University. New York: Oceana Press, 1959. $20.00.

This is a revision of the first edition of *Index Digest of State Constitution* prepared in 1915 for the use of the New York State Constitutional Convention of that year. Both the first and the present second edition were prepared by the Legislative Drafting Research Fund of Columbia University. The editor of the present volume was Richard A. Edwards, who worked with the aid of associate editors James L. Blawie and Marilyn B. Blawie.

Over forty years have passed since the first *Index Digest* appeared. This has been a period of some rewriting of state constitutions, considerable amending, and the addition of two new ones. The urge to constitutional change has not abated, and this volume will be useful for further rewriting of the basic documents.

The arrangement of this digest is the normal one. Constitutional provisions are cataloged under approximately five hundred major titles, with subtitles appropriate to the subject dealt with. The titles themselves disclose the familiar mixture in state constitutions of the sublime and the ridiculous. Two items away from the title, "The Congress of the United States," is an entry for "Concealed Weapons"; and "Gas Companies" rest, fortuitously, next to "Government, Theory of." But the titles themselves appear well and carefully chosen. Verbatim excerpts from the constitutions are not given, for reasons of space, but passages are summarized with care. Case annotations are beyond the scope of the project.

There can be no doubt that this will be a standard reference work. No library useful for the study of American constitutional law can afford to be without it.

LEE S. GREENE*

PENSION FUNDS AND ECONOMIC POWER. By Paul Harbrecht. New York: The Twentieth Century Fund, 1959. Pp. 319. $5.00.

Whenever man's culture has been urban he has concerned himself with the large question of personal economic security, in particular the prospect of his condition under the burdens of disability, age, and death. Indeed, it is this concern that has so often caused the city-dweller to consider enviously the situation of his otherwise despised country cousin. The latter generally has a certain anticipation of food,

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of shelter, and of care at each stage of his life, partly because of the economic structure incident to agrarian life and partly because of the expansive family organization normal in agricultural society. Unfortunately, the very factors that compel the creation of the city render the level of living and aspiration enjoyed by rustics distasteful to those accustomed to other, more varied if not higher, levels.

In order to cope with this problem in the city environment of nuclear families and of utter dependence upon money incomes, city dwellers have devised several sorts of relief. One of the oldest is the gratuity dispensed by the state either for patriotic services or for reasons of general public welfare. From the time of the Gracchi until today, this has been a popular method of providing a guise of security in a place where the illusion of security normally is not. Another ancient form of care lies in the religious institutions that dispense alms to the indigent who periodically apply for them. Unfortunately for both of these, there has always been, and there is today, an air of generosity-lavished-upon-ingratitude inherent in too many of these programs for them to apply to more than a trifling segment of the population. The average person has never considered with equanimity the chance that he might someday reside in the county farm for the aged poor, or receive township pauper relief, or take charity at the bread-and-milk bursary of some conventual order.[1]

Because of this, other means have been developed to handle the problem. Of these means, less redolent of charity, were the funds of the guilds for the maintenance of aged and infirm members and for the support of their survivors. With the decline of the guild economy, coupled with the confiscatory measures of the English reformation, the place of these funds was taken by the provident society and the fraternal order. Humble at first, with a concern solely that the member be respectably buried, they eventually branched out to operate life insurance, health insurance, and general relief programs for their members or their members' families.[2] The value of these schemes was limited by their dependence upon a common craft, as in the case of most provident and friendly societies, or upon common religious beliefs or a similar socio-economic background, as in the case of fraternal orders. They did not provide protection for the bulk of the population, in any case, and in the nineteenth century, which saw their fastest expansion, other methods were tried to supplement them.

1. Clarke, *Widows', Orphans', and Old Age Pensions*, in SOCIAL SECURITY 168 (3rd ed. Robson 1948).

2. For the importance of these organizations today in the role of securers of security, see Clarke, *Social Security Housekeeping*, *id.* at 380. For their medieval origins, see COULTON, MEDIEVAL PANORAMA 290 (1938), on social-religious guilds.

Certain voluntary plans for pensions relating to certain workers in particular industries were set up, of which the Russian miners' pension scheme is typical. Created in 1881, it made up the fund for the payment of pension benefits out of wage deductions of 2 to 3 per cent of payroll matched by equal contributions from the employer.[3] In addition to this kind of experiment, certain continental countries after 1850, notably France, Belgium, Italy and Spain, set up voluntary savings plans that amounted to almost straight government annuities. For instance, under the subsidized plan in Belgium, a deposit of 18 francs within three years gave the depositor the right to a life pension of 65 francs.[4] At the same time that the Latin countries tried this approach, other countries, led by Germany (1889), set up state-operated compulsory contributory pension plans,[5] while others, led by Denmark (1891), set up state-operated compulsory non-contributory pension plans,[6] both types with the same purpose of rewarding the worthy worker with honorable care in his old age. From these experiments, initiated in the last half of the nineteenth century, have come the institutions with which the worker today is concerned.[7]

The growth of such institutions, originally intended to assure a kind of security for a difficult period in most men's lives, has occurred in a slow manner; and it has produced results not to have been anticipated by the early formulators of these programs. But the changes are enormous and inexorable. In 1925 in the United States there were fewer than two hundred purely private pension systems and these made a very meager contribution to the economy. A prime example was the pension scheme of the Baltimore and Ohio Railroad which in thirty-five years paid pensions to only 2,759 persons.[8] By 1959, over 25 per cent of the country's working population was covered by all types of private pension plans with assets of $33 billion, growing at the rate of over $4 billion per year.[9] Much progress has been made in this guise of "assuring to the worker a reward so liberal that it will overcome his normal reluctance to work"[10] by freeing

3. KOVALEVSKY, LA RUSSIE A LA FIN DE 19 SIECLE 568 (1900).
4. RUBINOW, SOCIAL INSURANCE 342 (1913).
5. *Id.* at 345.
6. APPROACHES TO SOCIAL SECURITY, International Labour Office, Series M at 6 (No. 18 1942).
7. Murphy, *Financing Old Age and Survivors' Insurance: Description of a Controversy,* 6 J. PUB. L. 55, 71-78 (1957).
8. BLUM, LABOR ECONOMICS 163 (1925). For different figures see HARBRECHT at 6, a difference probably accounted for by Blum's exclusion of Massachusetts and Wisconsin pension funds as subsidized funds.
9. HARBRECHT at 3.
10. BOGART & LANDON, MODERN INDUSTRY 97 (2d ed., 1939). Interestingly enough, this text, first published in 1927, does not consider pensions as matters of concern to the psychology of the worker or to a full utilization of human resources, thus indicating how rapidly attitudes can change. Today, no writer would feel he had covered the subject if he neglected to mention pensions.

him from the pressing worry of becoming a cast off of the industry in which he has spent his life.

From the inception of pensions, employers have insisted that pensions are exclusively under their control to "serve a special purpose in industrial betterment work"[11] and, as compared to profit-sharing schemes, that pensions represent "largess from the company to its recipient workers."[12] In the past, even employee representatives have regarded the management of the pensions of a company as one of the functions of management to which workers might aspire but to which their admission represented a great concession of power by the owners.[13] As one writer in the field put it as late as 1947, "companies prefer to support the plan themselves because control of the plan rests in their hands alone. Otherwise, the employees want to share in the administration of the plan and are more demanding because of the contributions they have made."[14] The practice of both employer and employee sharing the cost of old-age and disability pensions, so early established in the case of the costs of health insurance and never permitted in the case of workmen's compensation insurance costs, has been a long time coming, if it is here yet;[15] and a sharing of the control of the pension program with the workers remains the uncommon practice.

The result of this history has been the location of a considerable amount of economic power in the hands of management with the advent of pensions and other benefits regarded as a "fringe" to the pay-packet. Despite loose talk of a new "people's capitalism", the workers, who are the beneficiaries of these programs, are at a remote remove from the exercise of control over any part of the programs either directly, through individual initiative expressed in law suits, or indirectly, through union representation on a pension management board. Of course, in an organized concern, where pensions are a part of the general labor-management contract, there are real, if peripheral, pressures which can be brought upon management; but there is rarely any direct exercise of power. In addition to this point, which might be dismissed as cavilling at the bad teeth in a gift horse's mouth, is the reduced social mobility of all workers and the job fixation impressed upon all workers in the age bracket 45 to 65 by the pension program. Even young workers have proven reluctant to leave

11. Dennis, *Helping Employees to Save,* in HANDLING MEN 191 (1917).
12. Farrell, *Profit Sharing: When? Why? How?, id.* at 161.
13. SELEKMAN, SHARING MANAGEMENT WITH THE WORKERS 20, 77 (1924).
14. JUCIUS, PERSONNEL MANAGEMENT 602 (1951). This author still favored employee contributions, however, because: (1) "The employees take a personal interest in the pension plan and, hence, tend to appreciate such plans the more," and (2) "since the costs are shared, the expense to the company is lower."
15. FALK, SECURITY AGAINST SICKNESS 44 (1936).

their employment where a security program is in effect, while workers over 45 have found it impossible to do so, unless they are willing to go into uncovered employment. Perhaps the federal social security program ought to have taken up the difference, and it may even have been intended to do so, but the effect of the inflation over the last generation has effectively prevented it from serving as such a buffer.[16]

Unfortunately, however, the problem of worker immobility under the employee security programs is a much larger one than mere talk about federal deficiency or supplementary security projects would indicate. The book reviewed here expresses the primary concern of its author, Father Harbrecht of the Jesuit Institute of Social Order at St. Louis, with this critical situation. So long as ours is a system of private, separately constituted entrepreneurs, the private security programs will be marked in the future, as they have been in the past,[17] with unclassifiable variety. Even if all private industry should set up employee security programs, there would still be substantial differences between programs. In addition, these programs will continue to be separately funded (even if their separateness should be on an industry-wide basis) and for actuarial purposes the fund or account managers will continue to want to protect the fund from the poor health risk, if the fund covers sickness insurance, or from the hiring of older persons, if it is a retirement fund. Indeed, the bitter experience of the early teachers' and ministers' retirement funds in the United States has drilled into actuaries the value of "safeguarding" reserves from the eleemosynary influence.[18] At the same time, this results in the exercise of a greater influence on the part of established workers in a plant vis-a-vis younger or newer employees, with all of the consequences for friction and fossilization thereby risked.[19] It can also be anticipated that areas of the country that are able to resist or postpone the expansion of the employee security programs will be in an advantageous position to attract fleeing industry. This would be so especially in the case of the South where high birth rates and a normally high migration level have produced a popula-

16. Blum, *Taxation and the Economy*, 5 Univ. of Chi. L. School Rec. 21 (No. 3, 1956). Otto Gerisch observed as early as 1904 that German trades unions had imposed stability upon their memberships through benefit programs and he argued that, if such programs were extended to the political arena, they would give a powerful advantage to those managing the new prudential. Michels, Political Parties 117-18 (Eden and Cedar Paul Transl. 1915).

17. Falk, *op. cit. supra* note 15, at 45.

18. Parker, Social Security Reserves 106-12 (1942), for the sad experience with teachers' funds and 91-92 for the experience with ministers' funds. See also Graves, Uniform State Action 156-57 (1934), for the early operation of teachers' retirement funds.

19. Jaques, The Changing Culture of a Factory 145-46 (1952), wherein the problem of avoiding the unfortunate results of senior influence is dealt with on the union-employee level.

tion considerably younger than the national average.[20]

All of this adds up to a mass of complex problems growing more complicated by the year—and doing so without much notice from the students of law or the social sciences. But it is not upon any of the above that Father Harbrecht has chosen to dwell in his study. It is true that he has briefly outlined the history of the pension movement. He has also set forth the chief legal problems faced by the courts in determining the nature of a pension trust, so-called. He also considers the effect the employee security movement has had, and must continue to have, upon the individual worker in his job relationship. But beyond all this, Father Harbrecht has chosen to stress the impact of the accumulation of wealth by the pension movement upon the entire economy. At first, in the presence of the importance of the other problems first enumerated in this review, this seems strange; and yet, given the facts as set forth in his theory of the paraproprietal society, it is fully understandable. Perhaps a quote from Hannah Arendt best expresses the reason why: "The development of the modern age and the rise of society, where the most private of all human activities, laboring, has become public and been permitted to establish its own common realm, may make it doubtful whether the very existence of property as a privately held place within the world can withstand the relentless process of growing wealth."[21]

It is the thesis of Father Harbrecht, perhaps as the result of his studying with A. A. Berle, that the split between ownership and management first noted by Berle in 1928, has been steadily widening with the rise in the importance of the institutional holder of corporate securities.[22] Today, there exist the various employee security funds, investment trusts, and trust accounts, all free to invest in corporate securities on a scale forbidden to insurance companies and banks, and all accumulating investment resources at a great rate. In addition, the management of these monies has been increasingly absorbed by a trifling number of trust companies and trust officers concentrated in New York City. What the federal old-age and survivors' insurance fund has always been forbidden to do, is now done by private pension funds on a most influential scale.[23]

It is with the effect of this that Father Harbrecht deals at length, both those that might be considered good and those that most would

20. HOOVER & RATCHFORD, ECONOMIC RESOURCES AND POLICIES OF THE SOUTH 27 (1951).

21. ARENDT, THE HUMAN CONDITION 97 (1958). This does not imply that Father Harbrecht shares the neo-Augustinian excesses of Professor Arendt.

22. BERLE, STUDIES IN THE LAW OF CORPORATION FINANCE (1928), as well as more recent writers mentioned in HARBRECHT at 24 n. 25.

23. For the reasons why the federal fund's managers cannot acquire corporate securities or the bonds of foreign governments, see Myers, *Actuarial Aspects of Financing Old Age and Survivors' Insurance*, 16 SOCIAL SECURITY BULL. 3-5 (No. 6, 1953).

consider bad in their economic results. Among those that could be considered good is the increased stability in the stock market which the steady purchases of the pensions systems entail. In addition, the old deficiencies of individual grants of stock to employees are obviated by the consolidation of small single amounts into large aggregates which can earn far more than lesser sums and which can be more intelligently invested by a trust officer than by the average inexperienced worker.[24] The negative aspect of this is the steady inflation in the price of "blue-chips" produced by the preference of institutional investors for them, coupled with the danger of the dumping of such securities by hard-pressed funds during a prolonged period of economic depression.

These problems, however, seem insignificant alongside the question —to what purpose do the trust officers controlling the financial aspect of institutional investment exercise that power in the national corporate structure? Although most employee security funds are administered by the employer, it is the rare situation in which he invests the assets of the fund, while the labor leaders in charge of union-controlled funds are even more reluctant to participate in planning the particular investments of the funds. The result is a dual administration in which on one side the employer (or the union or a joint board of employer, union, or employee representatives) administers the operation of the benefit aspects of the program, while on the other side a corporate fiduciary manages the investment of the program's reserves. This practice is strengthened by a growing belief in legislatures and courts that there is something improper in the merger of the two functions. So strong has this attitude become, that in 1958 the Sears Roebuck fund, despite over four decades of success under a highly merged form of operation, adopted a division of responsibility for management and investment purposes, as a direct result of congressional criticism.[25] In addition, the regulations of the United States' Internal Revenue Service have made the position of a non-insured pension fund with an independent trust investment fiduciary a popular and assured one.[26]

The consequence is that corporate fiduciaries in the persons of their trust officers have in their control the power of investment of huge sums of money to which legal title is held by an assortment of unincorporated associations, common law, business, express statutory, or pension trusts (of which many are merely constructive or resulting), charitable or educational or religious institutions, and a wide variety

24. For problems in individual grants of stock see FARRELL, *op. cit. supra* note 12, at 160-62. For a statement of the workers' indifference to the sources of their return from work, see Russell, THE RIGHT TO BE HAPPY 117-20 (1927).
25. HARBRECHT at 89, quoting company publications.
26. *Id.* at 124-25, 159-61.

of other forms of organization not excluding personal and estate trust accounts. Many of those holding legal title in turn merely hold it for the equitable benefit and title of other natural and legal entities. The result is a peculiar premium upon paralysis strikingly similar to the declarations of a man previously non-political in his life's actions who, having been drawn into running for public office, announces in his campaign literature that he is "above" politics since he is not a "politician." The trust officers and their employers, the corporate fiduciaries,[27] boast that they are "neutral" in the affairs of any company in which they hold blocks of stock and that they would never vote the stock held by them on behalf of others in a "partisan" way. In actuality, if the Montgomery Ward proxy fight is indicative, these corporate fiduciaries do vote the stock controlled by them in order to sustain incumbent management.[28] The resulting irony is exquisite when one considers how "labor money" has thereby been used to protect capitalists whose outspoken opposition to organized labor has been as well known as that of Mr. Sewell Avery. Yet, the protestations of innocence must be taken seriously as general declarations of policy to be subject only to exception in affairs as extraordinary as that of the proxy battle at Montgomery Ward.

The effect of such a policy is to release a block of stock in some of the most economically significant corporations from any concern in the affairs of the corporation issuing it. The divorce of ownership and control is carried to a still further degree thereby and the very least that can result is a need for fewer shares to effectively control a corporation under normal conditions. But this does not state the whole problem. It seems to this reviewer that Father Harbrecht, in concentrating on the economic effect of corporate securities held by such institutional investors as pension funds, has not examined sufficiently into the causes for the choice of neutrality. Although, on the legal level of formal capacity, the corporate fiduciary has huge powers over corporate securities invested by him, his actual ability to effectively exercise this power is sharply orbited by many factors. It is probably on the level of administration that these limits lie, but they are very real all the same.

As C. Northcote Parkinson has told us, it has often happened in past history that a functionary in whose office is concentrated great power or wealth may be taught by his culture for its own protection to internalize certain sets of controls which confine him in a narrower

27. Although corporate fiduciary applies only to trust companies with the power to purchase and manage corporate securities as opposed to banks and insurance companies which often are forbidden from so doing, what is said herein about the influence of such diverted funds has the widest application.

28. HARBRECHT at 116. Probably, the Fairbanks Morse proxy fight, if closely studied, would support this statement.

scope than would otherwise be the case.[29] It appears that this has happened in our culture in the case of the institutional investors. Already in the case of employee security funds, an established custom has grown up separating the administration of benefits from the investment of reserves. Along with this, there is no reason to believe that the administrators of corporate fiduciaries are not as bound down in decision-making by the bureaucratic technology of our culture as any other administrative group. The case of common trust funds are pertinent on this point. Banks were first permitted to set these up after 1933 in order to invest collectively the assets of smaller trusts. By 1958 there were 325 common trust funds, composed of 104,000 participating accounts, with total assets of over $2½ billion. These have not kept pace in growth with the mutual investment funds which since 1938 have increased from 460,000 shareholder accounts totaling $500 million to 4,500,000 accounts totaling $15,750,000,000. Although performing very similar functions, the former are sharply limited in the manner of their operation because of the prejudice existing at the time of their organization that opposed the involvement of savings banks in the general investment business. For reasons that seem exclusively the product of administrative reluctance to incur the risks of change, this difference is still maintained;[30] and it is intimately connected with a similar conservatism affecting the flexibility of investment operations of the pension funds. A reluctance to change by one type of institution engaging in similar work has a deadening effect upon the whole field of operations within that area.[31]

It may be concluded, therefore, that the decision, abdicating the power inherently their's by reason of their holdings, made by the corporate fiduciaries, may be an irreversible one. The momentum of administrative machinery is in its own right nothing to lightly disregard. If such is the case, the situation is much more serious than that visualized by Father Harbrecht. Far from there having been created potentially dominant entities capable of undermining the democratic methods of our political system by the extent of their operations, there has been, instead, a development of aggregations of paralyzed wealth. The workers who are the beneficiaries of the accumulation are too far removed in their equitable position to understand or effectively influence the operation of their security funds' investment, or the manipulation of that investment for the control of the corporations in which the investments are made. The em-

29. PARKINSON, THE EVOLUTION OF POLITICAL THOUGHT 58-73 (1958).

30. N. Y. Times, Feb. 10, 1960, p. 52, quoting a speech to the American Bankers Association by Charles G. Young, senior trust officer, City National Bank and Trust Company, Kansas City, Mo.

31. *Ibid.*, quoting Frank L. Griffin, who contended insurance companies managing pension programs "had lagged in making innovations."

ployers and the unions, even if the latter should succeed in getting representation in the management of fund benefits, are forbidden by law or custom from attempting to exercise effective power in the making of investments, or in directing the results flowing from the making of investments. The corporate fiduciaries are so orbited by their own concept of duty and by laws regulating their management of funds, which they handle for investment, that they cannot often employ the power normally inherent in the control over large blocks of corporate securities.

Beyond a doubt, what is set up here is a situation ideal for being used to advantage by men of action. On the economic level, corporate officers can be expected to calculate around huge blocks of neutralized stock or towards an occasional personally beneficial employment of such stock in particularly pressing cases. Politically, such sums of capital without effective management for all purposes call for an exercise of power by politicians in both the legislative and executive branches of the government. In either case, the divorce of ownership from control, described by Berle, and the divorce of wealth from property, mentioned by Arendt, are both fostered; and the base of a pluralistic, individualized, and democratic society is further weakened.[32] And, to compound the difficulty, the weakening comes in a way almost impossible to correct because it is of a nature so negative that the ordinary prohibitory statute cannot reach it.

The effect of Father Harbrecht's book on this reader was a more pessimistic one than even the author's own dour conclusions, in which he calls for the common man to realize his personality in spheres other than the purely economic from which he can expect to be increasingly excluded. This may be a solution so long as the "neutrally" controlled economy continues to provide a surplus, although the critics of mass culture would deny the likelihood, or even the possibility, of such a development.[33] But such a phrase as "neutral control" is a hopeless contradiction. One who believes that such a system simply waits for its controller ought not to be regarded as another Zephaniah, who saw the end of the world in the arrival of a few Scythian barbarians among the cultured places of his civilization. Certainly, the very least one can do is to join Father Harbrecht and others in urging the informed segment of our population to further educate itself in a bit of knowledge whose component elements are all about us.

Father Harbrecht's book makes a good beginning in this process of

32. HURST, LAW AND CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 23-29 (1956), states most strongly the property base of American democracy.
33. Rosenberg, *Mass Culture in America*, in ROSENBERG & WHITE, MASS CULTURE: THE POPULAR ARTS IN AMERICA 9 (1957).

self-learning. Parts of it do make tedious reading, since there is a certain quantity of factual material which must be driven into the reader's mind if he is to comprehend the existence of the problem. These sections do not make palatable reading, but it would be unfair to criticise the book's style from these. Certainly, in its summarizing parts, most notably the chapter on "Property in Transition" and the one on "The Parapropriеtal Society," the manner is most persuasive.[34] It is not possible to draw material together in a different synthesis, especially where the main argument is so dependent upon the conveyance of facts to serve as the base for the new position, without incurring the charge of difficult, dull, or destructive. But the world we live in is a complex one. The understanding of its complexities depends upon the mastery of a great deal of dull detail. And the failure to do so will certainly end in the destruction of everything the critic thinks significant. In the final sense, Father Harbrecht's book is important, which must serve as his ultimate justification. The reader who recognizes that will not be put off by the fact that the book is no easier than its subject matter.

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34. Others, at much earlier dates, have felt the accumulation of wealth and its concomitant isolation from individual control imposed by modern industrial society must adversely affect political democracy. See PARKINSON, *op. cit. supra* note 29, citing William Morris at 227, George Bernard Shaw at 230-231, Hilaire Belloc at 231-235, and Mahatma Gandhi at 196.