Vanderbilt Law Review

Volume 6
Issue 4 *Issue 4 - June 1953*

Article 5

6-1953

Book Reviews

Irving Dilliard

Stanley D. Rose

Walter P. Armstrong Jr.

Reginald Parker

BOOK REVIEWS

THE STATES AND SUBVERSION. Walter Gellhorn, Ed. Ithaca: Cornell University Press, 1952. Pp. vii, 454. $5.00.

There is a widely-held belief that no one was doing anything about investigating Communism and Communistic activities in this country until Senator Joseph R. McCarthy took up the crusader's torch in 1950. This is a most ungenerous view and one that does a serious slight to the long hours of hard work by callous-handed laborers in the vineyard of alleged subversive agitation — all before the Junior Senator from Wisconsin undertook to reap the harvest. Among the many values of this excellent volume is that it in effect gives credit where credit is due — to the local pioneers who were toiling away before the lawmaker and former judge with a flair for headlines took over the national field. To read this book is to realize what a Joey-Come-Lately he is!

"The States and Subversion" is an informed, careful report on state efforts at tracking down subversion in New York, Maryland, Michigan, Illinois, California and Washington State. The book is one of a series made possible by a grant from the Rockefeller Foundation to Cornell University whose distinguished professor of government, Robert E. Cushman, has directed the studies of a group of scholars on "the impact upon our civil liberties of current governmental programs designed to ensure internal security and to expose and control disloyal or subversive conduct."

Professor Walter Gellhorn of the Columbia University School of Law, who produced the first study in this series, "Security, Loyalty and Science" (1950), is the editor of the present volume. He also contributes a summary, which he calls "A General View," with references to Massachusetts, Mississippi, Oklahoma, New Hampshire, Alabama, Pennsylvania, Florida, Arizona, New Jersey and other states. It is in Professor Gellhorn's summary that Senator McCarthy gets his only mention (p. 372), and a brief one it is. That short paragraph of some 80 words only points up the fact that it would be possible to produce a multi-volume work of this sort and never once mention the name of the newspapers' No. 1 Communist Hunter.

Three of the reports on states — those on New York, California and Washington — are summaries of volumes which have already come from the Cornell University Press in this series. Thus Professor Edward L. Barrett, Jr., of the University of California School of Law, digests his book, "The Tenney Committee" (1951), which described the continuous operation of the California "Fact Finding Committee on Un-American Activities," under the chairmanship of State Senator

Jack B. Tenney, from 1941 to 1949. Similarly Dean Lawrence H. Chamberlain of Columbia College compresses his book, "Loyalty and Legislative Action" (1951), which told the story of New York's legislative investigations of subversive activity commencing with the 1919-20 committee that took its name from State Senator Clayton R. Lusk. The third book summarized is "Un-American Activities in the State of Washington: The Work of the Canwell Committee" (1951), by Vern Countryman, associate professor of law in Yale University. This chapter, condensed by the author of the more comprehensive work, recounts the investigation identified with Washington State Representative Albert F. Canwell, beginning in 1945.

The other three chapters are accounts of the 1947-49 Broyles Commission in Illinois, sponsored by State Senator Paul W. Broyles, as set down by E. Houston Harsha, formerly assistant professor in the University of Chicago Law School, and more recently trial attorney with the Anti-Trust Division, United States Department of Justice; of the operation of Maryland's Anti-Communist Law, proposed by Frank B. Ober, chairman of the Free States 1948 commission to prepare a program of anti-Communist legislation, as reported by William Prendergast, assistant professor of government in the United States Naval Academy; and of more than thirty years of "state and local attack on subversion" in Michigan, as told by Robert J. Mowitz, assistant professor of public administration in Wayne University, Detroit, with the research help of Josephine Sclafani, William Monat and Henry Morin.

Since the reviewer is a native, as well as a resident, of Illinois he will take the liberty of indulging state pride to the extent of calling particular attention to the chapter on the Broyles Commission. Another reason for emphasizing the pre-McCarthy labors of Senator Broyles is the fact that the Illinois legislator is still hard at work in 1953. As this is written, he has proposed legislation pending in the House of Representatives at Springfield, after passage by the Senate, to outlaw the Communist party, to require test oaths, and to charge the Attorney General of the State with extraordinary vigilance over subversive activities. The Broyles legislation died in the 1949 session of the Illinois Legislature. It was reintroduced in the 1951 session and passed — and vetoed, as certain to do more harm than good, by Adlai E. Stevenson, then Governor.[1]

But long before Broyles there was the bizarre Walgreen investigation by the Illinois Senate, touched off by the charges of Charles Walgreen, chain drugstore owner, that his niece had been indoctrinated with Communistic ideologies at the University of Chicago. Lengthy public hearings were held in 1935 by a committee of five State Senators. The result was that the committee concluded there were no

1. On July 1, 1953, Governor Stratton vetoed the Broyles Bill for the reason that it was too broad a piece of legislation.

Communists on the faculty at the University of Chicago, that the faculty made no effort to indoctrinate students with Communism and that Illinois' sedition laws were adequate to restrain advocacy of violent overthrow of the government. What started out as a breach between Capitalist Walgreen and the University of Chicago brought them much closer together in the end. About two years after the investigation which he precipitated, Mr. Walgreen made a gift of $550,000 to the educational institution he had so recently denounced as destructive of patriotic morals.

Mr. Harsha quotes generously from the Broyles Commission's hearings and from its report. He could hardly overdo in extracting from the report's confused thinking and confused statement. To quote from it is to wonder whether Senator Broyles was not a victim of sabotage in his own commission:

> Item — ". . . un-American attitudes are not solely of the teachers, but everyone is hampered by the books that they use, and it said that *a Liberal in current American society is a political thinker or actor whose feelings, thought, and actions are in favor of the Kremlin, not without friendly criticism.*" (italics supplied) (p. 20 of Report)
>
> Item — " . . . in the Public Library are complete reference books on the subject of Communism, dealing with this subject at great length. . . ." (p. 19 of Report)
>
> Item — "The Communistic movement seizes upon all types of welfare programs or sudden catastrophies and thereby ingratiate themselves with the unfortunate victims of situations that result from the general misfortunes of persons either through natural destruction by the Hand of God or *dissilitory* reactions of the unthinking citizens." (italics supplied) (p. 19 of Report)
>
> Item — "It was unanimously asserted by the leading educators of Illinois who testified before our Commission that the subject of Americanism and American History should be given emphasis in the curriculum, of the grades, high schools, and the colleges, both private and public, with a thorough treatment of the establishment and subsequent development of our Nation and its heroes in the *histrionic* sense." (italics supplied) (p. 17 of Report)
>
> Item — "Communist criminals are least entitled to refuge under our laws, than any other criminal who holds all moral, spiritualistic and patriotic concepts in contempt.
>
> "May we further state that this Commission fearlessly and without any pretence of dealing with the subject matter of its investigation; without docility, are anxious to advocate legislation to absolutely curb their operations because of their violation of the basic principles of the very constitution which they seek to destroy, and so this Commission, strongly advocates the passing of nihilitory legislation so needed to treat them as the mongrel class of citizenry." (this entire passage should be italics!) (p. 22 of Report)

The upshot of it all was that the Broyles Commission conducted in-

vestigations of the University of Chicago and Roosevelt College and turned up no subversion at all. But the hearings did produce some rare humor, as witness this exchange between the commission investigator, J. B. Matthews, and Robert M. Hutchins, then Chancellor of the University of Chicago: (pp. 103-04)

> ". . . *Mr. Matthews*: I notice on the American Sponsoring Committee [for the World Congress of Peace, Paris, April 20-23, 1949] the name of a Dr. Maude Slye. Is Dr. Maude Slye on the faculty of the University of Chicago? Is she listed in the current directory?
>
> "*Chancellor Hutchins*: You recall, I think, that she is listed as 'Emeritus.'
>
> "*Mr. Matthews*: That is correct.
>
> "*Chancellor Hutchins*: Dr. Slye retired many years ago after confining her attention for a considerable number of years exclusively to mice. [Laughter.]
>
> "*Mr. Matthews*: Dr. Maude Slye was an Associate Professor Emeritus — this is the latest obtainable directory.
>
> "*Chancellor Hutchins: 'Emeritus'* means retired.
>
> "*Mr. Matthews*: She is retired on pension?
>
> "*Chancellor Hutchins*: Oh, yes.
>
> "*Mr. Matthews*: And has at least the prestige of the University of Chicago to some degree associated with her name, inasmuch as she is carried in the directory of the University?
>
> "*Chancellor Hutchins*: I don't see how we can deny the fact that she has been all her life a member of the faculty of the University. She was one of the most distinguished specialists in cancer we have seen in our time.
>
> "*Mr. Matthews*: Is it the policy of the University to ignore such affiliations on the part of members of its faculty? . . .
>
> "*Chancellor Hutchins*: As I indicated, Dr. Slye's associations were confined on our campus to mice. She could not, I think, have done any particular harm to any of our students even if she had been so minded. To answer your direct question, however, I am not aware that Dr. Slye has ever joined any club that advocated the overthrow of the government by violence.
>
> "*Mr. Matthews*: May I ask if in your educational theory there is not such a thing as indoctrination by example?
>
> "*Chancellor Hutchins:* Of mice? [Laughter.]"

After a passage like that it seems anticlimactic to speak of the 50 pages of appendices which present, first, a description of the types of state statutes relating to "subversive activities," as of January 1, 1951, and second, statutes in force in each state, as of the same date. These appendices, which cover some 17 different kinds of state laws, range all the way from the high crime of treason down to "statutes excluding persons from incidental benefits." They were prepared in the main by William H. Rockwell of the New York bar. To many readers they will be a most valuable part of the book.

Some states have these laws pretty much on a soup to nuts basis. Your reviewer, if he may now indulge his pride in the state in which

he spends most of his waking hours, is pleased to note that only two laws are charged up against Missouri, and these deal not with red flags and oaths and masks and disguises and such minor matters, but nothing less than treason and rebellion.

IRVING DILLIARD*

FREEDOM THROUGH LAW. By Robert L. Hale. New York: Columbia University Press, 1952. Pp. xvi, 591. $7.50.

THE GROUP BASIS OF POLITICS — A STUDY IN BASING-POINT LEGISLATION. By Earl Latham. New York: Cornell University Press, 1952. Pp. ix, 244. $3.75.

In his great work on jurisprudence, Julius Stone[1] discussed the contentions of the modern opponents of extended legal control who insist "that society should rely as much as possible on spontaneous forces and as little as possible on coercion."[2] To this argument he replied:

> "The issue is scarcely a clean cut one between legal intervention and non-intervention, for even at the height of *laissez faire* the role of the law is not passive and colourless. The law even then, especially the law of property, crimes and contracts, provides an essential framework of compulsion reinforcing the economic bargaining power of the parties, and preventing intrusion contrary to law."[3]

For this particular statement, his sole reference is to an article by Robert Hale.[4] It is the full statement of this theory of law as the activating principle of our economy that Professor Hale here presents in this new volume.

For years, decades even, a series of articles has made it certain that Robert Hale was moving towards an impressive synthesis. Ten years ago he was talking about this book. Thirty years ago he was developing the ideas to be found in the volume.[5] He says that he began thinking about the problems back in 1909 after he graduated from Harvard Law School. The result is a thoroughly considered piece of work which merits a wide circulation among those interested in the place of law in economic life.

The theme is economic freedom and how the law protects and pre-

* Editor of the editorial page, *St. Louis Post-Dispatch.*

1. STONE, THE PROVINCE AND FUNCTION OF LAW (1950).
2. *Id.* at 780.
3. *Id.* at 781.
4. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COL. L. REV. 603 (1943).
5. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 28 POL. SCI. Q. 470 (1923).

serves it. Starting at a given point in society we find individuals in varying states of inequality insofar as economic power is concerned. This inequality in what Hale calls "coercive bargaining power" produces inequalities in wealth and is perpetuated by the law, that is, the system of legal rights and duties as defined by the courts. This law preserves each man's bargaining power and protects it from the coercive power of others. Economic liberty is the right to use your bargaining power, whatever it may be. There is no intention that everyone's power shall be identical in content and extent. A lawyer's bargaining power is as different from a bricklayer's as it is from that of the General Motors Corporation.

The obvious problem in such a theory is that of accounting for movement in a system of bargaining powers. Most of the book is devoted to analyzing how the courts maintain a stable society while they are adjusting conflicts in the exercise of the economic liberties of two or more individuals.

Professor Hale first discusses the growth of the common law in creating and declaring the legal rights and duties that are the starting point in measuring everyone's economic liberty. Next is discussed the Constitution and the part it plays in granting and withholding economic liberty. This portion of the book is a course in constitutional law but with the difference that this course has a central theme which gives meaning to each of a host of cases.

The discussion of constitutional questions tends to become historical. Hale is leisurely as he wanders along a line of cases. He is at his best when he shows how for so long the courts were adamant in holding that legislation could not vary existing bargaining power. He says:

> "Liberty of the strong, it was once thought, could not be restricted by legislation for the mere purpose of protecting the liberty of the weak from that of the strong. It could only be restricted for the promotion of such things as safety, health, or morals." (pp. 380-81)

This liberty of the strong when so protected by the courts is described by Hale as "the private coercive power against which the Constitution furnishes no guaranty." And it has only been in the last twenty years that this coercive power has been weakened. The weakening of one coercive power and the strengthening of another is based upon the choice:

> ". . . between different principles for determining how the wealth of the community should be distributed. But by leaving present inequalities undisturbed, government would be making a choice, too; for these inequalities are dependent upon governmental intervention in the relations between different individuals." (p. 541)

Today Professor Hale's theme is not new. In a sense it is dated by

the examples he uses to show the government's power to shift bargaining power from one class to another. He turns to wage and price regulation concerning which there is now no debate. He hardly mentions World War II and the absolute power that was evident then and now in times of national peril. I, for one, would like to have had Hale discuss the effect of the Sherman Antitrust Act in shifting coercive power. Such a discussion by him would not have been influenced by arguments about the uncertainties of businessmen nor by the shadow of continuing concentration of economic power. He would simply have told of the change in power intended by the courts as each case came up. But he never discusses this matter at all and there is really no cause for complaint.

Economic bargaining power can be changed, as we have seen, by the slow process of judicial interpretation or, more hurriedly, by legislation. Politics must be, at least in part, the process of shifting bargaining power and that is the theme of *The Group Basis of Politics.*

Earl Latham's book is a study of politics "as the struggle of groups to write in their favor the rules by which the community is governed." (p. 209). The nature of politics along these lines is discussed at length in chapter one and the remainder of the book, five more chapters, is devoted to illustrating this theory in action by a close study of "the struggle in the Eightieth and Eighty-first Congresses to enact legislation dealing with the basing-point system of quoting delivered prices." (p. vii).

The author is a professor of political science at Amherst College. Like any good teacher, he has tried to universalize his subject. He finds that the world moves through the actions and in interactions of individuals formed into groups. Individuals divide their loyalties among many groups, such as, church, local community, political party, service clubs and business. The state is only one group among many. These groups have many similarities. They are all "structures of power." The author says that "The state and other group forms represent power in different packages." (p. 12). Evidently, the subject matter of politics is power.

Having set forth his thesis that groups are the basic elements of society, the author then discusses the natural history of groups. Each group has its natural enemy, *e.g.,* farmers versus business enterprise. The turmoil of politics arises because "there is a ceaseless struggle on the part of groups to dominate, neutralize, or conciliate that part of their environment that presses in upon them most closely." (p. 31).

In our mature form of government, the struggle for advantage "tends . . . to concentrate upon the writing of . . . rules to the advantage of the parties-in-interest. These rules take the form of statutes, administrative orders and decrees, rules and interpretations, and court judg-

ments." (*id.*). It is the apparatus of the state which "maintains a system of instrumentalities for the writing and enforcement of the formal rules by which society is governed." The battleground over which these groups struggle is to be found mainly within this state apparatus. Complete victory obviously only comes with a particular group's dominion over all three branches of our government. This is seldom achieved because these three branches represent independent groups with divergent and sometimes mutually exclusive power objectives.

A splendid demonstration of this view of politics is to be found in the efforts of certain business groups to "clarify" the law governing pricing policies following the decision of the Supreme Court in *Cement Institute* case in 1948.[6] The author first gives a detailed description of the Cement Institute itself as a group. The implications of the Court's decision for this group are then quickly related and then attention is placed directly upon Congress where we watch attack and counterattack in the struggle for "clarification."

The proponents of the bills to legalize freight absorption are identified and their activities rather cynically exposed. It is clear that Senator Capehart of Indiana was a great ally of the business groups who saw the Supreme Court and the regulatory bodies slowly moving towards outlawing all industry-wide systems of basing-point pricing. It wasn't "clarification" these groups wanted; it was the reversal of that judicial trend. And they were doing well until suddenly the champions of law and order gallop onto the stage—Senators Douglas, Kefauver and Long. The motivations of these three are never made clear. Another knight, Senator O'Mahoney, fell by the wayside. A lifelong agitator for the antitrust laws, he had some constituents who needed freight absorption. The author is kind to the Senator who had such problems.

The narrative part of the volume demonstrates that the theory is an excellent pedagogical device. The position and purpose of each player can be discussed, within the limits of available material. But it's all too easy. Professor Latham talks of the liberals—Senators Douglas, Kefauver, Long and Humphrey, and Patman in the House (p. 220). And they were together on this one issue. But no inference about their respective views on competition can be drawn from the fact that Paul Douglas and Wright Patman were both opposed to this freight absorption bill. There must have been some sort of an alliance of groups here. But that part of the story is not told. The narrative is not full enough to prove the necessary truth of the theory and the theory isn't detailed enough to show you what's missing.

6. Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 68 Sup. Ct. 793, 92 L. Ed. 1010 (1948). See Note, *The Cement Decision and Basing-Point Pricing Systems*, 2 VAND. L. REV. 63 (1948).

This is no place to discuss the merits of a theory of political pluralism. We evidently subscribe to it for domestic purposes but feel called upon for something more unified in international matters. We seem to be pressing our European allies to forget about their group interests. For the present, it suffices to say that Robert Hale's splendid volume shows the place of law in such a theory and that Professor Latham's book spotlights the stage with one group warring against another (or maybe more than one) in an effort to tip the balance in favor of the bargaining power of one group over another. Both books advance theories and give illustrations that should be fruitful in thinking and useful in argument.

STANLEY D. ROSE*

RICHARDS ON INSURANCE, Fifth Edition. By Warren Freedman. New York: Baker, Voorhis & Co., Inc. 1952. Pp. xxvii, 2692. $50.00.

Not long ago I attended a meeting of lawyers who devote all or the major part of their time to work for insurance companies. Many of them were so-called "house counsel"; the remainder, like myself, represented various companies with more or less frequency and exclusiveness in the defense of suits brought against them or their assureds in the territories in which the attorneys practiced. The conversation, quite naturally, turned upon various aspects of insurance and its legal implications. Of course it is not surprising that any group of lawyers should talk shop; but what is surprising is that the terms in which they thought and spoke, the point of view which they adopted in common, were as specialized in their way as would be those of tax or patent attorneys. One of the uninitiate wandering into this group by mistake might even have some difficulty in understanding what they were talking about. For it must be recognized that in these days when everyone has his own particular field, that of the insurance lawyer is as carefully delineated and as rigidly bounded as any.

Mr. George Richards recognized this fact fifty-five years ago when he produced the first and still the best treatise dealing with insurance law as a separate and independent subject. Mr. Warren Freedman has now re-emphasized it by revising and expanding Mr. Richards' original work for the fifth time, the first in a score of years. "It should be evident that the Fifth Revision represents a thorough reorganization of material, an arduous editorial effort, and the addition of choice, new material to give the four-volume treatise a sense of practicality and of recentness," he writes in his preface. Certainly such an overall revision was necessary, for the growth of insurance during the

* Attorney, Civil Division, Justice Department.

period since the last edition has been tremendous. In 1951, the last year for which figures are available, there was more than 253 billion dollars of life insurance in effect, as compared with slightly more than 106 billion in 1930; and during the later year fire losses, most of which were covered by insurance, amounted to more than 731 million dollars, while in 1930 they were only a little more than 501 million. Mr. Freedman opens his text with the statement that "the largest accumulation of private capital in the history of the world is today found in the history of one insurance company, the Metropolitan Life Insurance Company. This power is held for its policyholders who number one-fifth of the population of the United States and Canada." Insurance is indeed big business.

Nor has the law failed to keep pace with the financial development in the field. The impact of *Erie v. Tompkins*[1] upon a business based upon the execution of contracts in one state the vast majority of which are to be performed in another was profound. Hardly less so was that of the decision in *United States v. South-Eastern Underwriters Association*,[2] in which for the first time the industry was held to be subject to federal regulation. Both of these cases arose, as Mr. Freedman notes, subsequent to the publication of the last preceding edition of *Richards on Insurance;* and there have been similar, although not so dramatic, developments in connection with insurable interests, concealment, multiple risks, rights of beneficiaries, group insurance, and even such modern innovations as television service contracts and liability for damage due to atomic weapons and radioactive force. Not least in importance among recent innovations is the almost universal[3] adoption of the 1943 New York Standard Fire Insurance Policy,[4] to a line-by-line discussion of which Mr. Freedman devotes some 340 pages.

Mr. Freedman's treatise is of especial interest (although not always completely accurate[5]) at the points at which his general discussion impinges upon local state practices. Such an instance occurs as a result of the decision in the *South-Eastern Underwriters* case. Following that decision, Congress promptly enacted legislation[6] returning

1. 304 U.S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A.L.R. 1487 (1938).
2. 322 U.S. 533, 88 L. Ed. 1440, 64 Sup. Ct. 1162 (1944).
3. According to Mr. Freedman, 16 states have adopted this form expressly by statute, 6 inferentially by statute, 17 (including Tennessee) by regulation of the Commissioner of Insurance or other official, and 2 by prevalent usage, with 3 others well on the way to doing so, leaving only 4 which have definitely rejected it.
4. Which replaced the 1918 form in use when the preceding edition was published.
5. For example, in properly placing Tennessee among the states in which a so-called Valued Policy is authorized, he cites "Tenn. Code 1941, § 6174." The reference is of course to the *Code* of 1932, wherein the section is found under the number given. The error is apparently due to the fact that the section appears in a 1941 replacement volume of *Williams' Tennessee Code Annotated*.
6. 59 STAT. 33, 34 (1945); 15 U.S.C.A. §§ 1011-1015 (1948).

the insurance business to state control. This was necessary to avert what showed signs of becoming a crisis;[7] apparently Congress felt that state control was better than no control at all, which was the effect of declaring state restrictions invalid. Tennessee, along with most other states, exercised the authority granted it by enacting fair trade[8] and rate regulatory[9] legislation. Thus was the congressional purpose accomplished.

In the foregoing instance the acceptance of the congressional mandate was almost universal;[10] but in others the local practice may vary widely and in important respects. For example, upon the question as to whether a false statement in an application for insurance constitutes a breach of warranty, most states, including Tennessee,[11] have modified the common law rule by statute, but to varying degrees. Tennessee has adopted as a test that in order to avoid the policy the misrepresentation must either have been made with actual intent to deceive or have increased the risk of loss. Whether or not a particular misrepresentation is of such a nature as to increase the risk of loss has recently been held to be a question of law.[12] Other states have relied upon the determination as to whether the fact misrepresented actually contributed to the loss. A few have taken even more widely divergent views; and most, like Tennessee, have combined two or more in a single statute. It results that the interpretation of the exact effect of such a misrepresentation under the laws of a particular state may be a matter of considerable complexity.

7. The House Committee on the Judiciary noted that "Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the Southeastern Underwriters case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds." 1945 *U.S. Code Cong. Serv.* 671.

8. The congressional act provided that unless state legislation in this field was enacted within a fixed time, the Sherman Act [15 U.S.C.A. §§1-7 (1951)], the Clayton Act [15 U.S.C.A. §§ 12 *et seq.* (1951)], and the Robinson-Patman Act [15 U.S.C.A. §§ 13, 13a, 13b, 21a (1951)] would apply. The Tennessee act which Mr. Freedman cites [Tenn. Acts 1947, c. 202] has now been codified as Article XVIII [§§ 6459.45-6459.57] of the *Tennessee Code Supplement* (1950).

9. The acts which Mr. Freedman cites [Tenn. Acts 1945, c. 104, 142; Tenn. Acts 1949, c. 270, 279] have now been codified as Articles VIIIA and VIIIB [§§ 6356.1-6356.29] of the *Tennessee Code Supplement* (1950).

10. Mr. Freedman lists 26 states as having enacted fair trade laws, all modeled, as in the case of Tennessee, upon the National Association of Insurance Commissioners and All-Industry Committee standard form, and 2 others with somewhat different types of acts. Twenty-two states (not including Tennessee) have unfair competition laws; and every jurisdiction appears to have some type of regulatory act.

11. The acts which Mr. Freedman cites [Tenn. Acts 1895, c. 160, § 22; *Shannon's Code* § 3306 (1917)] are codified as § 6126 of the *Code of Tennessee* (1932). Sections 3348a-34 and 3349a-35 of *Shannon's Code* (1917), which he also cites, are not in point, as the former deals with an entirely different subject and there is no section in the 1917 *Code* under the latter number.

12. Little v. Washington Nat. Ins. Co., 34 Tenn. App. 593, 241 S.W.2d 838 (E.S. 1951).

This is only one of the problems which may be encountered in the field of insurance law. Mr. Freedman discusses many others, and in general his book provides an easy[13] and reliable guide to their solution. It will no doubt prove a welcome addition to any law library, and a frequently consulted source of information in a rapidly expanding and highly important field.

WALTER P. ARMSTRONG, JR.*

THE THEODOSIAN CODE AND NOVELS AND THE SIRMONDIAN CONSTITUTIONS: A TRANSLATION WITH COMMENTARY, GLOSSARY, AND BIBLIOGRAPHY. By Clyde Pharr* in collaboration with Theresa Sherrer Davidson** and Mary Brown Pharr.† Introduction by C. Dickerman Williams. Princeton: Princeton University Press, 1952. Pp. xxvi, 643. $20.00.

The New York Times of March 8, 1953, estimated editorially that there may be no more than 600 people in the United States who can read the new Latin-language magazine, *Latinitas*. If this is the state of the union, as I am ready to believe as a result of my personal observation of our college students, then it is quite fitting that ours should be the first country to have a translation of the *Codex Theodosianus* into any language. If we cannot read classics in Latin, then let us do the second best — read them in English! Only, with the decay of western civilization in America, apparent from the lack of Latin and good theater (the two deficiencies are no doubt related to one another), who will translate those works when the Clyde Pharrs will have vanished? Fortunately, we need not yet worry about this, as the present tome demonstrates; moreover, there may always be an England.

What, then, is the Theodosian Code and why is it important to have it available to the general public? It is a compilation of imperial Roman decrees from the days of Constantine to the day of its issuance by Theodosius II in 438. With the *novellae*, or amendments, it goes as far as 468, *i.e.*, eight years prior to the end of West Rome. (Italy was later reconquered by Justinian but, with Gaul and Spain gone, the

13. The final volume is devoted entirely to appendices (consisting of examples of standard policy forms and other insurance documents in general use), index, and tables of cases and statutes, which greatly increase the utility of the text as a whole.

* Member of the firm of Armstrong, McCadden, Allen, Braden & Goodman, Memphis, Tennessee.

* Formerly Head of Department of Classics, Vanderbilt University; now Research Professor in Classics, University of Texas.

** LL.B., Ph.D., Vanderbilt University; formerly Instructor in Classics, Vanderbilt University.

† M.A., Vanderbilt University; formerly Assistant Professor of Classics, Converse College.

Western Empire was not revived. Rather, Italy remained an "exarchate" of East Rome — the Byzantine Empire — until the Langobards took most of it.) It is not a true codification because within each book the matters dealt with are arranged merely chronologically; yet there is some method in the arrangement of the books of the Code. The first book deals with the sources of the law and the jurisdiction of government officials, the second to fifth books cover certain matters pertaining to the civil law, intestate succession, imperial domains, exposure of children, and so forth. Books six and seven treat the rank order and the privileges of the officials of the empire and military matters. The eighth book continues with government officials and then jumps to gifts and domestic relations. Books nine, ten and eleven have criminal law, fiscal and tax matters, appellate procedure, witnesses and documents. The twelfth book regulates the office of *decurio* and related officials. The thirteenth and fourteenth books are concerned with the privileges and duties of various public corporations and with the police, while book fifteen handles public buildings, imperial images, theaters and the prohibition to carry arms. The sixteenth book, of great interest to canonists, is devoted to church law. To these sixteen books are customarily added an assorted number of *novellae*. The present translation carries these amendments as well as the running "Interpretation" which were added by later jurists notably those that prepared the *Lex Romana Wisigothorum*, often referred to as *Breviarium Alaricianum*. Thus the Theodosian Code is a loosely arranged compilation of, as we would say, statutory rather than common Roman law.[1]

As such it is important enough, however. A real codification, like Justinian's Digest or Institutes, contains mere statements of the law. The present collection of imperial decrees, on the other hand, has their complete texts, that is, it usually includes the often elaborate reasons and conditions that gave rise to the decree. They are set forth as a part of the decree in a fashion not dissimilar to some of our emergency laws and Presidential proclamations. This combination of law and motive has long furnished the historian with invaluable material — witness the many citations to the Code in such standard works as Gibbon's *Decline*. The Code shows how Christianity started to entrench itself firmly and with it, alas, intolerance toward other beliefs, such as agnosticism or Judaism, or even sects not in complete conformity with the Nicene Creed, whose earlier language and development can readily be found in the Code. Thus for secular as well as church history the Code has always been recognized as a primary source for those troubled two centuries. Likewise can much economic history, including autocratic attempts at planned economy, be gleaned

1. Since Diocletian there were no statutes other than by imperial decree.

from the Code and the present translation.

To the benefits that social scientists may derive from the Code must be added invaluable material for the legal historian as well as the comparative lawyer. The Introduction states (p. xxii) that in view of the dissolution of the Western Empire soon after the promulgation of the Code, "the Theodosian Code and Novels did not long remain in effect in the Western Empire." Nothing could be farther from the truth! It is indeed true that there was no Western Empire soon after the Code,[2] yet the Code remained in force throughout the lands that used to be the Empire for many centuries. It continued to be law for the Roman population in Spain and Southern France under the Vandals; and when Alaric II codified the law for his Roman subjects in 506 he called what later became known as the *Lex Romana Wisigothorum "Leges atque species iuris de Theodosiano vel de diversis libris electae"!* This book of law in turn became the backbone of medieval Roman law prior to and even a long while after the re-discovery of Justinian's work, known to us as the *Corpus Iuris Civilis.* It was the immediate father of subsequent Spanish codifications, such as the *Siete Partidas* and the *Nueva Recopilacion;* and it was the *droit ecrit* of southern France (as distinguished from the *droit coutumière* of the middle and northern parts). The Frankish *Lex Salica Emendata* gives special credit to and much of it derives from Theodosian's Code, and the same is true of the Ostrogothic (Italian) *Edictum Theoderici* as well as quite a few other Germanic-Roman codes. Justinian's work, on the other hand, could not be promulgated in either Spain or France, for those parts were irretrievably lost to East Rome, and the extent of its influence in Italy, which the Byzantinians had reconquered for another troubled century, or in North Africa is doubtful and in any event spurious. The *Corpus Iuris* was too lofty, too complex, too exacting a work to be grasped outside of Constantinople and even there readers' digests were to appear soon. But the Theodosian Code, with its loose at times long-winded decrees and its moralizing reasons for the decrees, was something the early medieval jurisconsult could understand and use. Pharr's edition is carefully annotated referring the reader to the corresponding parts of later codifications.

Thus it happened that some present-day legal institutions derived their existence from Roman, *i.e.*, Theodosian, law although they were later rejected by Justinian's corpus. The holograph will for instance, unknown to classical Roman law, was introduced by a *novella* to the

2. Although the author of the Introduction somewhat overstates the matter by saying (p.xvii) that within a few years after the last of the edicts "the Empire had been shattered into a thousand fragments"—the fragments were but five or six and not at all small — and that "classic civilization was at an end" — the end, prepared though by the Church, came from the Arabs, not the Romanized barbarians.

Theodosian Code.[3] Justinian repealed it except for testaments made in favor of the testator's children,[4] yet from the Theodosian law, according to most scholars, it was received in southern France and Spain. A royal ordinance of the 18th Century made its use lawful for all of France and the French civil code adopted it in 1804. From France it came into the Louisiana civil code, and, having gained ground in America, the holograph will is now permissible in many states of the Union.[5]

The present work is a part of a major project — a translation of the whole body of Roman law including not only Justinian and Gaius but also the available inscriptional material and papyri as well as the more important legal statements from the nonlegal authors such as Cicero. The translation is incredibly well done. It is a *variorum* translation that gives other possible translations of a given passage in the footnotes. This mode covers up to an extent the one deficiency which the work, as it is, inherently must have: the lack of the original text to accompany the English translation. Many antique terms are simply not translatable[6] and no *variorum* translation can quite fill this gap. Now, in the case of the *Codex Theodosianus,* which is of value not so much for sharp legal interpretation as for historic and legal-historic research, the absence of the original text is of no great importance. When, however, the *Corpus Iuris* will be out in English, the presence of the original Latin (at times Greek) is indispensable. Here we have law in the tersest form — law that was in force in many parts of Germany until 1900 and is still in force in South Africa and Scotland, law that fathered many of the provisions of the codes of Europe, Louisiana, Quebec and South and Central America. A foreign-language law text may be looked up in a translation but it cannot be studied. I know that a bilingual edition is what the very learned translator and editor

---

3. By Valentian III. *Nov. Val.* 21, 2. It is certainly amusing to read how this important legal landmark came into being at the instigation of "the Illustrious Lady Micce."

4. *Nov.* 107.

5. See Parker, *History of the Holograph Testament in the Civil Law,* 3 THE JURIST 1 (1943).

6. The author is of course aware of this. See, *e.g.,* his discussion of the propriety of the translation of "divus" with "sainted." The only truly "saintly" one of the emperors of the Code was probably Julian the Apostate, who tried to revive tolerance — but he certainly was farthest removed from any claim of church-endorsed sainthood.

7. A future edition or the edition of future parts may emulate the bibliography, which contains minor inaccuracies. E.g., *Heumann-Seckel, Handlexikon,* has at least one if not more later editions than the Ninth (1907) which is listed; *Joers, Geschichte und System des roemischen Privatrechts* (1927), should now be cited as *Joers-Kunkel, Roemisches Privatrecht* (3d ed. 1949); *Sohm, Institutionen* (17th ed. 1926), ought to read *Sohn-Mitteis-Wenger, Institutionen* (17th ed. 1923) (volumes bearing later dates are mere reprints); *Burdick, The Principles of Roman Law* (1938), ought not to be omitted in view of the comparative paucity of American works on Roman law.