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BOOK REVIEWS

Douglas Carlisle

R. B. Herbert Jr.

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BOOK REVIEWS

JUSTICE WILLIAM JOHNSON THE FIRST DISSENTER. By Donald G. Morgan. University of South Carolina Press, 1954. Pp. 326.

This volume portrays the career of a South Carolinian who was the son of a blacksmith, was educated at Princeton, studied law under Charles Cotesworth Pinckney, was a member of the State Legislature, was speaker of the House of Representatives, a State Judge and for over thirty years Associate Justice of the Supreme Court of the United States.

William Johnson was the first Republican appointed on the Court by President Jefferson. At the time of his nomination March 22, 1804, Johnson was the youngest man ever appointed on the Court, being but a little over thirty-two years of age.

As the representative of Jeffersonian democracy, Johnson faced formidable obstacles on the Supreme Court. He was but one against five. His youth was another liability. The other five Judges were his seniors. The Court in 1805 included in addition to Johnson, William Cushing, seventy-two, Samuel Chase, sixty-three, William Patterson, fifty-nine, John Marshall, forty-nine, and Bushrod Washington, forty-two.

Johnson possessed talent, versatility, an inquiring mind and indefatigable industry. Princeton lit a spark which was never put out. Yet he never quite shook off the combativeness of the advocate and the great James L. Petigru thought he lacked the judicial temperament of a great judge.

Over the long stretch of thirty years what impact did William Johnson make on the Supreme Court? It is clear that Marshall and the Federalist tradition exerted a profound influence on him. "Few could match the Chief Justice for geniality or intellectual acumen. For three decades the two worked at close hand; yet Johnson, so far as our records show, uttered scarcely a whisper of criticism of the presiding judge. Indeed, it may have been Marshall's integrity of character that led Johnson to assert that the 'pure' men of both the parties were in basic agreement on fundamentals."

Johnson, then, embraced Marshall's esteem for nationalism and in general concurred in Marshall's great decisions that imparted life to the Constitution.

Johnson's decision in *Gilchrist v. Collector*¹ strikingly illustrates

1. 10 Fed. Cas. 355, No. 5420 (1808).

his judicial independence. It was a matter of astonishment and resentment to Jefferson that this, the first judicial act of interference with his Embargo Laws, should come from his own appointee to the Court, the young Judge, William Johnson, and from the strong Republican State of South Carolina. This case arose in the United States Circuit Court for the District of South Carolina. Under the Embargo Act collectors of customs were required to detain any vessel ostensibly bound with cargo to United States ports, whenever in their opinion the intention was to evade the Embargo. In the enforcement of this law, Jefferson had directed the Secretary of the Treasury to instruct collectors to detain all vessels loaded with provisions and such a letter was sent out, in spite of the fact that the statute expressly vested the collectors with the right of determination as to detention. A test of its legality was at once made when a vessel owner in Charleston petitioned for a mandamus to require the collector to grant a clearance of a vessel bound for Baltimore and loaded with rice, clearance of which had been refused by the collector, acting under the Presidential instructions. Judge Johnson heard the case in Charleston, announced his decision, granting the mandamus and holding Jefferson's instructions to the collector to have been illegal and void, as unwarranted by the statute. Johnson was then only thirty-six years of age and this decision was rendered only four years after his appointment on the Supreme bench by a Republican President.

Virginia and South Carolina had enacted statutes directed against the entrance of free Negroes into the State, and providing for their detention in custody until the vessel in which they arrived should leave port. By these statutes the South attempted to protect itself against the possibility of insurrectionary movements being stirred up amongst the slave population by the presence of free Negroes from Northern States. In the fall of 1823, however, eight months before the decision by the Supreme Court in *Gibbons v. Ogden*,² Judge Johnson had met the issue in a case in the Circuit Court for the District of South Carolina, and he held the South Carolina statute unconstitutional, stating that the right of the Federal Government to regulate commerce between the states was "a paramount and exclusive right".³

This decision was bitterly resented by South Carolina, Johnson's native State. However, the officials and Courts of South Carolina

2. 22 U. S. 1 (1824).

3. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 84 (1922).

continued for over twenty-five years to disregard Judge Johnson's opinion. The episode is a striking illustration of Johnson's judicial independence and of his concurrence with Marshall's view as to the scope of the Commerce Clause of the Constitution, although the Supreme Court did not pass upon the particular issue decided by Johnson in the case referred to.

This episode also is a striking illustration of the fact that, throughout the years when the question of the extent of the Federal power over commerce was being tested in the Court, that question was, in the minds of Southerners, generally coincident with the question of the extent of the Federal power over slavery.

Mr. Associate Justice Johnson not only stood consistently for broad powers in Congress, but openly resisted nullification by South Carolina, thereby becoming very unpopular in his beloved native State.

But if Johnson shared much of Marshall's nationalism and some of his devotion to the security of property, he broke with the great Chief Justice on other issues, particularly with respect to the role of the judiciary in our Constitutional system.

Professor Morgan devotes considerable space to Jefferson's effort to procure *seriatim* opinions by the judges on the Supreme Court and to Johnson's emphasis on the value of dissenting opinions. Particularly during the last ten years of his service on the Supreme Court he dissented in a considerable number of cases. However, as this reviewer reads the opinions of the Court, Johnson was not strictly speaking the first dissenter. Prior to the advent of Marshall to the Chief Justiceship many of the judges wrote separate opinions, expressing their individual convictions. Marshall wrote most of the great decisions involving constitutional questions and most of those decisions were unanimous. What of it? The fact of unanimity undoubtedly added prestige to the Court and made for national unity. There is a time to dissent and a time not to dissent. Johnson began to dissent on certain issues at the appropriate time.

During the last ten years of his service on the Court, if a hard and fast line can be drawn, Johnson's dissenting opinions indicated that his nationalism "had at its core the dominance of Congress. Marshall sought to elevate judicial power; Johnson, the power of the national legislature. Not that he denied the existence of a power to review national statutes. Where constitutional provisions were explicit, he would have intervened even against Congress, for the Constitution he deemed positive law of the highest order. It was rather that he left to the representative body control of a large meas-

ure of the Court's jurisdiction and the initiation and implementation of national improvements and regulations." (p. 295)

Johnson, then, particularly during the last ten years of his service on the Supreme Court frequently disagreed with the decisions of Marshall's Court and with the extreme doctrine of States Rights in his native State.

This volume, based on an enormous amount of research, is not only the biography of a great personality whose constitutional philosophy was grounded largely in the experiences of his father, a patriot leader during the Revolution, but is also a portrayal of the development of our Constitution from its early origin to its modern interpretation.

That we have survived as a nation; that we are the oldest Republic, the oldest federal system with the oldest written Constitution; that we have avoided a violent revolution from the Right or the Left; that we are still striving as did Marshall and Johnson to strike a fair balance between the powers of the central government and those of the States — all of these prodigious achievements accrue from the judicial philosophy of judges like Marshall and Johnson, to the extent at least that our judicial process under a written Constitution plays a noble part in the making of a nation.

CHARLES B. ELLIOTT.*

*Former Professor of Law, University of South Carolina School of Law.

THE TWENTIETH CENTURY CAPITALIST REVOLUTION. By Adolf A. Berle, Jr. New York: Harcourt, Brace & Company. 1954. Pp. 192. \$3.00.

Adolf Berle's absorbing interest in economics and politics is not new to economists or to lawyers. His acute mind operates not at the extreme technical level but at the more humane and broader level where the implications of economic science cross over into economic, social, and political practice.

Mr. Berle and Gardner C. Means produced *The Modern Corporation and Private Property* in 1932. Including the present volume Mr. Berle has authored five books and been co-author of three. He has contributed many articles and book reviews to various publications. Throughout his written work and in his vocations as lawyer, professor, politician, government administrator, and diplomat one finds an active, honest, and agile mind applied with clarity of language to the major problems of contemporary business life. Indeed, the scope of Mr. Berle's activities and unusually successful attainments in several different and difficult fields — he is only 59 — is phenomenal.

Mr. Berle is representative of the uncommon liberal in American life; the kind of man who does not cast a vote against business because it is big, or, who is not for labor because people must work. He is concerned with the aspirations of individual people as well as groups of people. He is chary of stereotypes. It is important to specify these aspects of Mr. Berle's character, for they place him among the small but vibrant group of creative liberals in American life.

These are significant distinctions, for this new book does not contain quantitative documentation as did *The Modern Corporation*; rather it is a kaleidoscopic analysis of what the corporation is and what it must become if democratic capitalism as practiced in the United States is to prevail; grow; and prosper.

The Twentieth Century Capitalist Revolution concerns the place that giant corporations have assumed in American life. In this sense the book represents an epilogue to *The Modern Corporation and Private Property*. *The Modern Corporation* examined the quantitative aspects of big business while *The Twentieth Century Capitalist Revolution* considers the qualitative effects that big business has upon the life and environment of the *whole* community. "Their (corporations) importance in the American state is obvious, whether considered as means of production, instruments of distribution, sources of occupation, or agents of economic progress." (p. 17) Or in somewhat

broader terms, "The mid-twentieth century American capitalist system depends on and revolves around the operations of a relatively few very large corporations." (p. 28) The corporation as an institution reaches down into the lives of people throughout the nation. Its influence is beneficial to some, detrimental to some, and both to still others. It is this that causes Mr. Berle to remark, "It is, in fact, an institution at a cross road in history, capable of becoming one of the master tools of society—capable also of surprising abuse; worthy of the attention of the community as well as of scholars." (p. 22)

Berle is cognizant that the "most notable achievements of the twentieth century corporations have been their ability to concentrate economic power in themselves and their ability to increase production and distribution." (p. 25)

Economists and the public are aware of the "concentrates"—a few large firms which dominate activity in various industry groups. But economists, particularly those well versed in static theory, have appeared skeptical about the extent to which such concentration can be taken. All would-be economists are submitted to repeated if not always intellectually satisfying explanations of the law of variable proportions or as it is sometimes phrased the law of diminishing returns. This principle is quite satisfactory for measuring the point of optimum production under static conditions. The only difficulty is that we do not find static conditions in American manufacturing or agriculture. A new idea, a new process, a new invention "pops out" of Schumpeter's entrepreneur or from the research activities of corporations and other agencies of our nation. Such unsettling events push up the point of optimum output and enable producers to enlarge the size of their operations.

J. A. Schumpeter thought that the death of the entrepreneur might mean the end of capitalism. In his book, *Capitalism, Socialism, and Democracy* he ponders, "Can capitalism survive? No. I do not think it can." He assumed, of course, that no new conditions would intrude upon the system which would change the basis upon which his conclusion was drawn. It was the entrepreneur—innovator and promotor—who caused the constant revolutionizing of the means of production in the capitalist state. And this individual *has* all but disappeared from capitalist life in America. But, has something else taken the place of the entrepreneur? It would seem that this question must be answered before the nation is committed (academically, at least) to another "ism". For, perhaps, the passing of

the entrepreneur is merely the result of capitalism's vitality. Maybe, after all, we are embarking upon a new era of dynamic capitalism.

Schumpeter's entrepreneur was (this reviewer agrees) the vital element in the nineteenth century individually competitive economy. Out of that economic setting grew up the oligopolies of the twentieth century. It is Mr. Berle's belief that corporate management today, "has been given the power and the means of more or less planned economy, in which decisions are or at least can be taken in the light of their probable effect on the whole community." (p. 35) Within the vast circumference of this belief the corporation comes to life. No longer can it be merely a "legal person". It must now acquire blood, tissue, viscera, and brains. Its directors must be statesmen and reformers, for their usefulness is not confined solely to the organization they represent, but to the community. That the great power of modern corporations should be used to further the growth and development not only of business but of education, political science, and ethics is a concept that outmodes previous generalizations framed against the background of "economic man".

It is Mr. Berle's thesis that this power, carefully yet valiantly used, might be the savior of capitalism. Corporate weaknesses are weighed against corporate strengths and Mr. Berle finds that capitalism in partnership with the modern corporation can achieve great economic and social results. He does not believe that corporations can build any "City of God", but rather that they can protect and maintain them.

Is Berle overly optimistic about the willingness or capacity of corporate management to assume the role of chief benefactor of free educational institutions without imposing restrictions upon the objectivity of research and teaching functions within their walls? This reviewer cannot say. Certainly Berle believes the corporation *must* come to the aid of our institutions of higher learning without impairing the responsible independence of mind which is the heart and soul of any educational effort worthy of the name. He sees the corporation bearing the fruit of an independent educational system in the form of trained men and women who graduate and move into the corporate life of our nation, and in the social and natural science research projects that form the basis for product development and management improvement in industry. He assumes that corporate management will be intelligent enough to put its money to work in support of long-run advantages rather than corrupt education by short

sighted attempts to gain 100 per cent ideological conformity for the going business philosophy.

Mr. Berle has again produced a volume that should do much to enlighten and stimulate economists and lawyers. He has done more than this because *The Twentieth Century Capitalist Revolution* is a book that can be and should be read by lawyers, economists, educators, and the general public.

ROBERT W. PATERSON.*

*Associate Professor of Economics and Associate Director, Bureau of Business and Economic Research, University of South Carolina, Columbia, S. C.

COGITATIONS ON TORTS. By Warren A. Seavey. Roscoe Pound Lectureship Series, University of Nebraska Press, 1954. Pp. 72.

To one who has studied or taught the law of torts from Professor Seavey's casebook,¹ reading these lectures is like a visit with an old friend. Mr. Seavey, Bussey Professor of Law at the Harvard Law School retires from that position this year after 49 years as a law teacher, beginning in 1906 in China. This little book distills some of the wisdom and learning accumulated in those years.

The principles of the law of torts are largely of very recent discovery and development. Prior to the abolition of the forms of action,² there could be no theory of torts. There was only a theory of trespass, or of trespass on the case, or of trover. In 1870, Oliver Wendell Holmes perhaps could provoke no great dispute with his statement that torts was not a worthy subject for study in law schools.³ But by 1894 Wigmore⁴ and others were seeking broad principles underlying all the cases. Since that time, the courts and scholars have gone far to create a consistent body of law in this subject, and Professor Seavey has himself contributed greatly to that effort.⁵ Now he sums up his philosophy of torts in these brief sentences:⁶

... I hope [these essays] will be sufficient to remind you that the law of Torts is based on the principle that one who harms another has a duty of compensation whenever it is just that he should pay; that the question of justice involves not only jus-

1. SEAVEY, KEETON & THURSTON, *CASES ON TORTS* (1950).

2. In New York, by the N. Y. CODE OF PROCEDURE (1848) § 62; in England, by the JUDICATURE ACT of 1873, 36 & 37 VICT. c. 66, § 74; in South Carolina, by the CODE of 1870 (14) § 92.

3. JUSTICE OLIVER WENDELL HOLMES, *HIS BOOK NOTES AND UNCOLLECTED PAPERS* 45 (1936); cited, SEAVEY, *COGITATIONS ON TORTS* 3 (1954).

4. John H. Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894); see also, *A Summary of the Principles of Torts*, in WIGMORE, *SELECT CASES ON THE LAW OF TORTS* (1912), Appendix A.

5. Professor Seavey was reporter for the RESTATEMENT OF AGENCY (1933); reporter with Professor Austin W. Scott of Harvard for the RESTATEMENT OF RESTITUTION (1937); and advised and assisted the preparation of the RESTATEMENT OF TORTS (1934). A distinguished Massachusetts judge once told me that he did not know there was a branch of the law that could be called "Restitution" until he saw the RESTATEMENT. This is reminiscent of Justice Holmes' statement above. One might hope that Mr. Seavey will follow this volume with his cogitations on the law of restitution, a field in which he is equally expert and one even more in need of the insight his wisdom can offer. Some other influential writings of Professor Seavey are the following: *Rationale of Agency*, 29 YALE L. J. 859 (1920); *Negligence, Subjective or Objective?*, 41 HARV. L. REV. 6 (1927); cited in Judge Cardozo's opinion in the *Palsgraf* case; *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 39 COL. L. REV. 20, 48 YALE L. J. 390 (1939); *Restitution*, (together with A. W. Scott) 54 LAW Q. REV. 29 (1938); and *Principles of Torts*, 22 NEB. L. REV. 177 (1943).

6. P. 3.

tice to the persons involved but also to the state; that although justice may be colored by expediency, it always involves current ideas of economics and morality; that the specific rules are but crystallizations resulting from the meeting of competing principles in a given economic and social situation.

There are three lectures, one dealing with the historical background from the 13th to the 19th centuries, the second with the great creative achievement of the courts in developing the present rules, and the third presenting the author's views on some work that remains to be done, including the attitude he hopes the courts will take in solving their problems. In general he finds tort law to be sound in principle and satisfactory in providing justice to litigants in the myriad situations wherein tort problems arise. Specific rules he finds in need of judicial correction include those dealing with contribution between joint tort-feasor, contributory negligence, and the law dealing with defamation and misrepresentation. Always he urges the courts to reject the narrow rule when it denies justice and is inconsistent with some deeper underlying principle of tort law.

Professor Seavey presents again⁷ his position on the utility of the risk theory as a device for the just solution of problems of the extent of liability for negligence. To him, the Cardozo view in *Palsgraf v. Long Island R. R. Co.*⁸ is no more than a logical development, in the light of the greater insight given by a century of analysis and experience, of the theory that ordinarily a man is liable for harm which he has caused only when he is in some way at fault.⁹ The difference between the views of Judge Cardozo in the opinion of the court in that case, and Judge Andrews in dissent, is the difference between having and not having a theory of liability for negligence.

Central to his thesis is the recurring strain that the doctrine of *stare decisis* does not and should not have the same operative effect in the law of torts that it has in the law dealing with crimes or with commercial or property interests. In the latter fields, reliance upon the existing body of law is greater. In the field of torts, ordinarily the only cost of a change in the decisional law is the expense of litigating the case in which the new doctrine is announced. Seavey shows that despite some helpful legislation, tort law is largely judge-made. It has been re-made in many instances, to further the needs of justice in the light of new economic and social conditions.

7. See note 5 *supra*.

8. 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

9. *Brown v. Kendall*, 6 Cush. 292 (Mass. 1850) is the leading case.

Of the judges who have created this law Mr. Seavey has the highest regard. He reads with selectivity the writings of scholars of tort law. But for decades he has read, and pondered over, the decisions of the judges; every decision in every jurisdiction, English or American, dealing with tort and related law. With occasional exceptions he finds that the decisions are wise, that justice is being done, that the law is keeping abreast of the times.

To the judges who deal with tort cases, his book should be invaluable. Counsel will present the trees to the court's attention, but here is the forest in all its order and beauty. Here is pointed out the deadwood that should be removed, the promising growth that should be nurtured, the relation of the part to the whole. I think that what Mr. Seavey calls his "simple intellectual fare" will serve the law well for a generation to come.

CHARLES H. RANDALL, JR.*

*Associate Professor of Law, University of South Carolina.

THE AUTOBIOGRAPHY OF SIR PATRICK HASTINGS. Roy Publishers, New York, 1954. Pp. 302.

Sir Patrick Hastings, one of the leading English barristers, says that these recollections were written mainly to interest his family. But he has led an interesting and exciting life, and records it in a readable style. He rose by his own efforts from relative poverty to the head of the English bar, and he "held the briefs" in some of the great trials of the past half century. The American trial lawyer should enjoy his story, and there is no more profitable reading for the would-be advocate than the biographies of great figures, past and present, of bench and bar, and the accounts of famous trials.

Returning from service in the Boer War, Hastings soon decided on a legal career. He spent the required 3 years at the Middle Temple preparing for the bar, and it seems the hours which he could devote to law study were very few, since most of his time had to be spent in earning his living and saving the sum of 100 pounds sterling for his admission fee to join the bar. Apparently Hastings found this to be no disadvantage, for he notes that in the divided bar in England, the barristers themselves are divided into two types—advocates and lawyers. From the first, he aspired to become an advocate. His mastery was in dealing with human beings, in the examination of witnesses; not in the realm of technical legal theory.

His whole career shows a goal early chosen, an unflinching pursuit of it, a willingness and a capacity to seize every opportunity to advance himself. This is not to suggest a quality of ruthlessness; there is no indication of success achieved at the expense of another man. Rather the picture is one of a man dedicated to a career he loved, and always willing to accept greater responsibility and put forth greater efforts. For instance, in his first three months at the bar, he spent 8 hours a day in the various Royal Courts of Justice, studying the styles of the best advocates of the time. The rest of the day—Hastings' days often were a full 24 hours—he would earn his living in the Fleet, working for a newspaper.

Hastings recounts again some of the famous trials that made his reputation. There are the murder trials of Mrs. Barney and the "Polish Officer." There is the figure, familiar to the criminal lawyer, of Jean Pierre Vacquier, who with smug self-satisfaction talked himself to his death under the cross-examination of Hastings. Also, there is the "Case of the Hooded Man."

Hastings' interests were not confined to the courtroom. "Every man should have two professions," he says. He was a Member of

Parliament, and was Attorney General in the Labor Government of Ramsey McDonald in 1923, but the second profession to which he alludes is that of playwright. He speaks with pleasure but not with pride of his plays, although they were good enough to star such performers as Godfrey Tearle and Tallulah Bankhead, and Ronald Coleman in a movie version.

Events of interest in his career include his clash with a French martial court in the French zone of occupation in the Ruhr, where he represented a German defendant, and his central role in the fall of the McDonald Government. He constantly interjects his personal views on all sorts of matters, law or politics, morality or war. He is firmly convinced that no lawyer should ever take notes during a trial, that the criminal lawyer, especially in capital cases, should never talk to the man he defends until he faces him on the witness stand. He vigorously supports the English view, also taken by many of our ablest members of bench and bar, that the excesses of the Press should be curbed where litigation is thereby likely to be seriously affected.

Of course, some of his advice is simply inapplicable to the system of organization of the courts in America, and some of his often caustic comments on legal personalities are of no interest here because we do not know the individuals whom he mentions. But on the whole, his book should make pleasant reading for the American lawyer or the law student.

CHARLES H. RANDALL, JR.*

*Associate Professor of Law, University of South Carolina.

ADVENTURES IN POLITICS. Richard L. Neuberger. Oxford University Press, New York, 1954. Pp. 210.

Mr. Richard L. Neuberger has just taken office as United States Senator, the first Democratic Senator to be elected from Oregon since 1914. Prior to his election in November 1954, he served in the Oregon House of Representatives for two years and in that state's Senate for six years. In 1950 Mrs. Neuberger was elected to the Oregon House of Representatives, and the re-election of this husband and wife team to the legislature in 1952 attracted national interest. They both ran ahead of General Eisenhower in their county. Together these two composed fifteen per cent of the Democratic minority in the state's legislature—a Democratic caucus that could be "held in bed".

Mr. Neuberger is an advocate of states rights. He believes that state governments have surrendered a great many of their rights to the federal government because of their weaknesses, and he sets out to describe what he thinks these maladies are. The contention is made that these weaknesses are so serious that state governments are unable to deal with many problems created by global war, paralyzing depression, and rocketing inflation. Certainly the states should have again some of their lost rights, but the author maintains that this can be done only by strengthening the state government.

It is true that there are many weaknesses in our state governmental system, and Mr. Neuberger's illustrations of them from his experiences in Oregon stirs one to a feeling of revolt against the flaws. Some of the criticism cannot be applied to South Carolina, but the problems and difficulties met by a progressive state's righter in Oregon will confront a person in any state. The legislators are poorly paid, and their activities are usually confined to a few months in each year. The costs of campaigns are excessive, and special interests often exert an unwholesome influence on legislators and other public officials. Oregon like many other states needs a new constitution. One of the greatest difficulties is that state offices are too frequently looked on as steps to greater things—usually in Washington. And most of those who have become accustomed to sharing the limelight with noted figures are unwilling to leave the company of the influential and return home to work for better state government. All of these weaknesses and more—many more—detract from the power and prestige of state governments and from the argument that state government can work more effectively and efficiently than the federal government.

There are numerous incidents related in which Mr. Neuberger shows that legislators are often torn between their political obligations and their sense of public duty, but this is no greater problem on the state level than on the federal plain. Already after a few weeks in the United States Senate the author may be willing to rewrite this as a weakness not confined to the states.

Mr. Neuberger has offered solutions to the problems that he describes although he has not suggested any new answers. He is anxious to see more intelligent and honest people go into politics, and he thinks that the best place for them to work is in the state legislature. He wants to see campaign costs decreased and feels that perhaps they should be carried by the state government. And he says that many states should rewrite and simplify their constitutions. However, most of the changes require a change in the attitude and insight of the voters as well as public officer holders.

The value of the book rests on the fact that Mr. Neuberger is a practicing and practical politician who is pointing out weaknesses in our state governments, and the solutions to the problems of state government coincide with the solutions proposed by non-practicing students of government, giving them needed and added weight.

DOUGLAS CARLISLE.*

*Political Science Department, University of South Carolina.