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Book Reviews

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Though the validity of the reasoning in the above minority cases might be unquestioned, the view in the majority of jurisdictions is otherwise, the courts taking the view that if new rights are to be created, it is the province of the legislature and not of the courts. *See, e. g., Drabbels v. Skelly Oil Co., supra,* 50 N. W. (2d) at 231.

The instant case aligns itself with a distinct minority and conforms to the modern trend. Once viability is proved, the minority will look beyond the ancient precedents and bring the common law into the framework of justice.

Robert C. Enburg

BOOK REVIEWS

PHILOSOPHY OF DEMOCRATIC GOVERNMENT. By Yves R. Simon.[1] Chicago: The University of Chicago Press, 1951. Pp. ix, 324. $3.50.— This book, written from the postulates of scholastic philosophy by a professor of social thought at the University of Chicago, is the second in the series of volumes issued by the Walgreen Foundation, "setting forth the basic principles on which democracy rests." [2] In this volume, Professor Simon, author of several important works on philosophy and politics, and for ten years a professor of philosophy at the University of Notre Dame, has stated in the abstract language of the philosopher, moral solutions of problems which have been historically precipitated in the spheres of the political, sociological and physical sciences. In so doing, he has drawn freely from the works of the great philosophers, such as Aristotle, Aquinas, Suarez, Bellarmine and Maritain, who have stood for the existence of an objective natural law, and all which that implies, including respect for the intrinsic worth and dignity of the individual and the obligation of obedience to the will of a Personal Lawgiver. Their theories of the State and its proper sphere have been brilliantly expounded and adapted to the distinctive problems of contemporary technological society.

Professor Simon has presented his material in five chapters: General Theory of Government, Democratic Freedom, Sovereignty in Democracy, Democratic Equality, and Democracy and Technology. He has consolidated the contents of each chapter by the effective technique of short summaries, which are of considerable aid to the reader. He has included a concise and helpful index.

In the first chapter the author has shown the permanent necessity of civil authority for the adequate organization of society, for the

1 Professor of Philosophy of Social Thought, University of Chicago.
2 Text at vii.

selection of the proper objectives of its common good, and for the use of those means which will best effectuate these objectives. It is true, he has explained, that certain functions of civil authority, for instance, the paternal, should be only temporary, since they flow not from that which is permanent in human nature, but only from deficiencies, similar to those found in an immature people who are under justifiable colonial rule. The paternal function is only substitutional, since it is exercised in the absence of a certain capacity in the persons involved. But the essential function would be necessary, even in a community of ideally constituted persons.

In the second chapter Professor Simon has demonstrated that there can be no political system unless there are available institutions by which the people may resist "bad" government. A political system is not necessarily democratic. It becomes democratic only if the people have, in addition to negative controls, an opportunity for the positive assertion of their views and thus participate in the governing process. The power exercised in a political system which is not democratic is not necessarily evil. But experience shows the danger of potential dictatorship when the people do not positively participate in the government.

The principle of universal suffrage evolved only slowly over the centuries. It has become so embedded in the conscience of the 20th century, however, that even dictators have hesitated to reject it. Rather, they have paid lip service to it by holding farcical elections. In the final analysis, this principle should not be regarded either with extreme optimism or undue pessimism. No intrinsic wisdom or virtue attaches to any particular part of the population. Each part is susceptible to error of its own distinctive kind. In ordinary circumstances, the practice of allowing each person only one vote, despite intellectual or moral superiority, is desirable, since the common man can be adequately protected in his right only by the allocation of power in his favor, which results from following the equalitarian principle.

Democracy cannot exist with only one political party. The two party system of the United States has proved to be the best in practice. The multiple party system found in the countries on the Continent and justified by the idea of proportional representation, is weak. Political parties must be responsive to public opinion and must remain fluid.

As long as propaganda is free from unreasonable coercion, it is legitimate. But coercion is justifiable only when persuasion fails. The problem is rendered difficult because at times the line between coercion and persuasion may not be accurately drawn. The State has coercive authority, which is its most obvious role, insofar as it punishes evildoers. Nevertheless, democracy prefers persuasion to coercion, and endeavors to promote the domain of government by persuasion.

In the third chapter Professor Simon has explained the "coach driver theory" of sovereignty, advocated by Courier, and exposed its limitations. This theory, which greatly influenced French but not American political thinking, employs the analogy by which the leaders of the State are likened to a coach driver, and the passengers to the people. Such a theory would deny any real authority to these leaders and invite anarchy. Even though civil authority need not be vested in any distinct governing personnel, it must be in somebody.

The author has shown the error of the theory of the divine right of kings stubbornly maintained by James I. According to this theory God selects a specific person to be king and immediately confers civil authority upon him. This never happens in political society. It occurred only once in the ecclesiastical sphere when Christ chose Peter as the first Pope and conferred power upon him. But in the instances of succeeding Popes, there is human designation of the particular person who is to exercise papal authority.

The transmission theory postulates the transfer of civil authority from the people, in whom God had reserved it, to the leader whom the people have chosen. A unified expression of this theory has been given by Cajetan, Bellarmine and Suarez. Professor Simon states: [3]

> The only point that might cause difficulty is whether the people have the right not to transfer sovereignty to a distinct personnel. . . . the theory that the people would always be under obligation to place powers in the hands of a distinct personnel seems to be born of a misreading of Bellarmine. . . . Of the three, Suarez alone voices the theory that democracy comes into existence by *nature* as opposed to monarchy and aristocracy, which cannot come into existence except by positive disposition.

The expression, "government by the consent of the governed," may be variously interpreted. It is indeed true if it means that political association is an act of reason and will. But it is erroneous if it connotes that the consent of individual persons is essential for the binding effect of just law, for a law if just, binds the consciences of all in the community, whether they assent to it or not.

In the fourth chapter the author has discussed various aspects of equality. The principle that all men are equal means that all persons enjoy an equality of right insofar as they belong to the human race. But it does not imply that all persons are equal in ability or that they are entitled, for example, to an equality of education or wealth. The legal order must reflect the essential preciousness of each human being.

The democratic revolution eliminated the servitude and serfdom which prevailed in the period of feudalism when ruling orders, such as the nobility, were in the ascendancy. Slavery had meant the complete alienation of the work of slaves, who received only that which was

3 *Id.* at 175.

necessary for the preservation of life, apart from the nature of the work performed. The status of the workers was transformed into a condition of contract. Bourgeois liberalism was sometimes guilty of injustice in reference to the alienation of the services of the workers by tolerating inequality of exchange as to work done and value received. The State must reduce inequalities implicit in the succeeding contractual situation by encouraging collective bargaining and by insuring the workers a just return for their services.

In the fifth chapter Professor Simon has stated that technology is desirable insofar as it makes possible man's domination of the physical universe in accordance with the Biblical exhortation that man should subdue the earth.[4] Technological development cannot be halted. Technology will inevitably go forward. But the use of technology and the perfection of the machine have introduced new problems in contemporary society. These must be properly solved if democracy is to survive and if the danger of Communism is to be avoided. Communism is exploiting the grievances of the proletariat, particularly in the large industrial centers, and promoting the proletarian revolution in the interests of the totalitarian State.

Technology leads to a minute division of labor and industrial activity. It derogates from the integration of personality which proceeds best in a rural environment. It weakens family life. It causes a spirit of isolation and loneliness. It creates a situation favorable to the dictator who promises to correct it, if only the worker will surrender his freedom. It behooves the people, therefore, to elect to office persons of prudence and capacity in government, who will communicate a sense of social integration and participation to the workers, without the requirement of popular abdication of democratic rights and sovereignty.

The effect of Professor Simon's book is panoramic since it has compressed within a relatively short compass a great diversity of concepts. This has necessitated the sacrifice of sustained exposition and leisurely coherence. This may tend to restrict the popularity of the work beyond the sphere of teachers of political philosophy and formal students of that subject.

It may be that jurists would have preferred a chapter on the relation of democracy to the legal order. The social sciences of politics and economics have been ably explored from the points of view of history and philosophy, but only incidental reference has been made to the social science of the positive legal order. Yet, it is that order which makes possible the successful operation of those institutional resistants which protect democracy from the encroachments of dictators. Without a well informed and well intentioned legislature to guide the legal order constructively toward the goals of society envisaged by the book, and

4 *Id.* at 273, citing *Genesis* 1:28.

without a strong, honest and independent judiciary to circumscribe legislative action by the inhibiting controls of objective natural law, the most effective guarantee of continued implementation of the Founding Fathers' democratic philosophy would disappear.

In conclusion this book is scholarly, mature, and conveys a most important message. It is well written, compact and scholastic. It does not mention natural law often, but its scholastic character is recognizable in its sense of balance and in its emphasis upon the social side of man. It avoids the pitfalls of those post-Reformation political philosophies which stress the natural rights of the individual at the expense of his social duties, and inflate the importance of the common man, either individually or socially, so as to make him the ultimate judge of right and wrong, good and evil. This work will take its place among the other great books on the "eternal" subject of democratic government.

*Brendan F. Brown**

UNDERMINING THE CONSTITUTION. By Thomas James Norton.[1] New York City: The Devin-Adair Company, 1950. Pp. xiv, 351. $3.00. — This book raises two very important questions which should be seriously considered by all Americans. They are: what is the future of our constitutional system of checks and balances, and what is the future of our state governments?

This book takes what seems to be an extreme position under present conditions and, no doubt, a majority of our people (judging by election returns) will not now agree with it, just as the United States Supreme Court has now taken opposite views. Nevertheless, it probably states views of most lawyers of forty years ago and theories of constitutional law generally taught in the law schools prior to the First World War. The publication of this book at this time serves a purpose similar to that of dissenting opinions in our courts. It emphasizes the trend and direction of our Federal Government and puts up warning signs which may help to limit and control the present tendency toward centralization.

The sub-title of this book is A History of Lawless Government. Its theme is that many acts and policies of our National Government have been in violation of its constitutional powers and jurisdiction. The author says in his preface: "During the last three decades nearly

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1 Member of the Bars of the Supreme Court of the United States, United States Circuit Courts of Appeals for the 7th, 8th & 9th Circuits, and of the supreme courts of several states.

every restraint upon the man in power has been broken. Worse than that, lawlessness provokes no reasoning objection." [2] He says: "The writing of this book was impelled by the very manifest indifference of the people of the United States to the constitutional doctrines of their country." [3] The author makes a strong plea for citizens to learn more about the Constitution and to insist on its study in the schools. He contends that by failing to indoctrinate each new generation with a knowledge of the superior philosophy of the American system of government, "we thereby left the people weakened to attack. Hence, so many of them are taken with the false promises of Communism." [4] He commends a recent law of the State of Missouri, enacted in 1947,[5] requiring the teaching of the Constitution in all schools from the seventh grade up, and in colleges, as a requirement for graduation.

The author does not limit his criticism to the administrations of the last twenty years. He finds the first great departure from constitutional principles by the Federal Government to be the graduated income tax law of 1913. He argues that the Sixteenth Amendment does not authorize such a graduated tax and shows that it was one of the measures advocated by Karl Marx and the Socialist Party. According to the author, "Plain lawlessness in taxation and a brutal attitude toward the taxpayer were among the conditions that compelled the writing of this book." [6] His view is that this tax has drained the states of their resources and subjected them to bureaucratic domination and that the Federal Government has been enabled to engage in many unconstitutional activities by limitless use of funds gathered by a confiscatory income tax. He advocates that: [7]

> The States, by proposal in Congress or by action of their legislatures under Article V, should amend the Constitution again by repealing the Sixteenth Amendment and resuming police jurisdiction of the wealth of their people, as they repealed the Eighteenth Amendment after becoming convinced that they had made a mistake in giving to the Nation a burden of police which it was not and could not be organized to carry. . . . The States must return to the Constitution and resume control of their Union, their property, and their prerogatives.

The next departures discussed are the Packers and Stockyards Act of 1921 [8] and the Reconstruction Finance Corporation Act of 1932.[9] The author argues that the Packers and Stockyards Act authorized federal regulation of local industry and that the opinion of the Supreme

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2 Preface at xii.

3 *Id.* at xi.

4 *Id.* at xiv.

5 Mo. Rev. Stat. c. 163, § 210 (1949).

6 Preface at xii.

7 Text at 75-6.

8 42 Stat. 159 (1921), 7 U.S.C. § 181 *et seq.* (1946).

9 47 Stat. 5 (1932), as amended, 15 U.S.C. § 601 *et seq.* (1946).

Court [10] upholding it as an exercise of the power to regulate interstate commerce was contrary to previous decisions holding that such commerce ends upon delivery to the consignee. He says this was the beginning of encroachment upon the jurisdiction reserved to the states by the Tenth Amendment and was the precedent for greater encroachment by the National Labor Relations Act.[11] He also argues that the Reconstruction Finance Corporation "was unconstitutionally created and it has pursued an unconstitutional course," [12] in local activities beyond the proper sphere of the Federal Government. He says it has been followed by creating the Tennessee Valley Authority, "a string of home loan banks and credit corporations and many other corporations having not the remotest relation to the constitutional functioning of the Government of the United States." [13] He maintains that the functions of these corporations are not governmental, that they usurp the police power of the states, compete with private business and encroach upon the rights of citizens.

The author re-argues the views rejected by the United States Supreme Court in upholding the National Labor Relations Act of 1935,[14] the Social Security Act of 1935,[15] the reduction of the gold content of the dollar, the Bituminous Coal Act of 1935,[16] the Housing Act of 1937,[17] and the Fair Labor Standards Act of 1938.[18] His position is that: [19]

> The most common disregard by Congress and the President of the Tenth Amendment, forbidding the Nation to usurp powers not granted to it, and especially to stay away from the governmental field of the States, has been in its persistent attempts, under the cloak of the Commerce Clause and of the General Welfare Clause, to invade the police field of the States — for the protection and care of the health, safety, morals, education, and general well-being of the people — and take jurisdiction of the liberties and living of men.

He agrees with Madison and Jefferson that the power of Congress under the General Welfare Clause is limited to the eighteen clauses of enumerated powers in Section 8, Article I of the Constitution. The author's conclusion is that: [20]

> We have suffered a constitutional revolution without use of amendments in accordance with Article V. That has come about through what

10 Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922).

11 49 STAT. 449 (1935), 29 U.S.C. § 151 *et seq.* (1946).

12 Text at 103.

13 *Id.* at 108.

14 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

15 49 STAT. 620 (1935), as amended, 42 U.S.C. § 301 *et seq.* (1946).

16 49 STAT. 991 (1935).

17 50 STAT. 888 (1937), as amended, 42 U.S.C. § 1401 *et seq.* (1946).

18 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201 *et seq.* (1946).

19 Text at 161.

20 *Id.* at 193.

> Senator Thomas H. Benton of Missouri used to call "latitudinarian construction." That form of construction has been applied to the Commerce Clause and the General Welfare Clause. No other clause in the Constitution, even with the gross twisting which the ardent "progressists" employ, could be used by them in the framing of a bill for flouting the Tenth Amendment, the great bulwark of the States.

He also contends that for over sixteen years, the White House has been permitted to usurp direction and policy,[21] and that this has prevented the operation of the constitutional system of checks and balances intended by the framers of the Constitution. He blames the states for being more interested in "Federal aid," than in retaining their constitutional position and authority. He also blames the Supreme Court for the increasing centralization of power in the Federal Government because of its application of the Fourteenth Amendment permitting it to interfere in the internal affairs of the states.

The author has an interesting chapter discussing a change in the method of selecting the president. He maintains that the electors appointed by the states should be replaced by political party nominating conventions dominated by members of Congress and other office holders prohibited by the Constitution from being electors. He believes that such domination by office holders and patronage seekers, together with the system of popular vote for electors, causes misuse of money in elections and encourages corrupt practices in elections and in government. According to the author: [22]

> The tyranny of the Executive which Jefferson said would come "at a remote period" is here. By the power of patronage, chiefly, and money he has overcome the Legislative Department and reduced the Judicial Department below respect.

His remedy is to go back to the methods of the early days of the republic when electors were appointed by state legislatures recently elected by the people. He thinks this would result in the selection of a president and vice-president with highest qualifications who would give the country a non-partisan administration.

In stating his views, the author does not mention and apparently does not consider the change in our nation from a pioneer agricultural economy to an urban industrial economy. Nor does he mention or consider garrison conditions brought about by world wars and the menace of a great communistic dictatorship controlling much of the earth's surface and population. With such great changes and new conditions, our laws and our Government cannot be as unchanging as the laws of the Medes and the Persians. Nevertheless, the author is certainly right in his position that fundamental constitutional changes should be made by amendment in the manner provided by the Con-

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21 *Id.* at 179.

22 *Id.* at 284.

stitution itself; and he is justified in designating intentional disregard of constitutional limitations as "Lawless Government." Whether or not one agrees with all of the author's views (and there is another side to some of these questions), he has emphasized the grave problems facing us from big government, a monstrous organism which tends to become more and more removed from the people and their elected representatives, yet seeks to control and run everything from the National Capitol.

The author's essentials for preservation of constitutional government are stated as follows: [23]

> The three most important conclusions to be derived from this study are these: 1. A Government erected by deep scholarship upon a Fundamental Law must fail without sufficient scholarship in the people who choose its officers to sense instantly and resist courageously every proposal to depart from its principles; and to operate as inoculation against notions, foreign and domestic, for governmental paternalism. 2. The States, which insisted during the writing of the Constitution, and afterward by demanding a Bill of Rights, that their complete independence in all but international and strictly national affairs should be respected forever, must recover the constitutional position which, through the incompetence of their representatives in Congress, they have too much given over to Federal control. 3. As the Judiciary is the keystone of the American arch, only the most experienced and capable legal scholars should be appointed by the President to judicial seats; and it is the high constitutional duty of the Senate to refuse confirmation of appointments of any other kind.

Although the author argues for some views of constitutional construction not likely ever to be re-established; nevertheless, every thoughtful reader can join him in his final conclusion, stating Madison's warning as follows: [24]

> "In framing a government which is to be administered by men, over men, the great difficulty lies in this: you must enable the government to control the governed; and, in the next place, oblige it to control itself." That is the surpassing task confronting the American today — to compel his Government to control itself.

*Laurance M. Hyde**

JUSTICE ACCORDING TO LAW. By Roscoe Pound.[1] New Haven: Yale University Press, 1951. Pp. 98. $2.50. — This fine book consists of three lectures delivered by Dean Emeritus Roscoe Pound at Westminster College in 1950. The little volume is complete in ninety-one pages.

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23 *Id.* at 298-9.

24 *Id.* at 299.

* Chief Justice, Supreme Court of Missouri; Chairman, Conference of Chief Justices.

1 University Professor, Emeritus, Harvard University; Dean, School of Law, University of California at Los Angeles.

The question, What is Justice? is the title of Part I, the first lecture. The author decides that it is something more than morality or natural law. "For justice as we seek to administer it in the courts we must take account of more than is given us by morals or by natural law." [2] Justice is a regime of social control. It is the end or purpose of social control and so of law. Radbruch, called the foremost philosopher of law, is quoted as defining justice as " 'the ideal relation among men.' " [3] Dean Pound prefers "an" ideal relation rather than "the" ideal relation because *the* ideal has not yet been determined.

It is suggested that perhaps no more than a working idea of justice or an ideal relation can be arrived at. As Pound remarked,[4]

> Experience developed by reason and reason tested by experience have taught us how to go far toward achieving a practical task of enabling men to live together in politically organized communities in civilized society with the guidance of a working idea even if that working idea is not metaphysically or logically or ethically a convincing ideal.

This working idea is stated as follows: [5]

> What the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste.

This process is called by the author one of "social engineering." [6] In a brief statement in the concluding paragraph of the chapter, justice is defined as "an idea of a maximum satisfaction of human wants or expectations." [7]

The second lecture or Part II has for its theme, What is Law? The word "law" came to be used to describe the "specialized social control through the force of politically organized society." [8] Distinction is made between "law" and "a law." By the latter is meant "a precept set authoritatively by the law-making organ of the state." [9] It is pointed out that one of the persistent problems of the science of law is whether to emphasize *rule* or *discretion.*

It is said that there are three meanings given to the term "law" by jurists: (1) the legal order; (2) the body of authoritative guides or patterns of decision, whether judicial or administrative; and (3), the judicial process and today, the administrative process. By the first definition is meant a regime of social control; by the second, a body of precepts; and by the third, the determination of disputes and con-

2 Text at 14.
3 *Id.* at 19.
4 *Id.* at 29.
5 *Ibid.*
6 *Id.* at 30.
7 *Id.* at 31.
8 *Id.* at 40.
9 *Ibid.*

troversies. Combining the three ideas, we have "a regime which is a highly specialized form of social control, carried on in accordance with a body of authoritative precepts, applied in a judicial and in an administrative process." [10]

In the words of the author,[11]

> Law is more than an aggregate of laws. It is what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws; to restrict them by reason where the lawmaker exceeds his reason and to develop them to the full scope of the reason where the lawmaker falls short of it.

The author's final statement of his definition of law is as follows: [12] "We must ever bear in mind that in law we have a taught tradition of experience developed by reason and reason tested by experience." [12] This emphasizes law as made up of the three factors: taught tradition, experience and reason.

The third lecture deals with Judicial Justice and raises the question whether there can be a legal order according to law. Certain self-styled realists maintain in challenge that the doctrine of the separation of powers as set forth in the federal and state constitutions is outmoded and that it should give way to the exigencies of administration in the service state. But, the author avers, such realism, like that in art, is a cult of the ugly. Recent examples of totalitarian states show us the value of the separation of powers.

There should be *judicial* justice, administration of justice by judicial specialists, as distinct from *legislative* and *executive* justice. In the latter part of the nineteenth century, judicial justice was carried to the extreme of committing matters of administration to the courts.

A reaction has resulted in the rapid development in this century of administrative boards and agencies, so that the supposedly defunct executive justice has been revived. It is true that administrative agencies for promoting the general welfare have come to be a necessity and are here to stay. But as Pound stated: [13]

> . . . conceding this we do not concede the further changes often urged on behalf of administrative boards and agencies which would relieve them from effective judicial scrutiny of their action to see that they keep within their statutory powers, that they interpret and apply rightly the law governing their action in a particular case, that they in reality and not in pretence apply the standard committed to them, and that their actions and proceedings conform to due process of law. Nor can we concede that review when allowed for the purposes just set forth shall be committed solely to administrative superiors or administrative courts.

10 *Id.* at 49-50.

11 *Id.* at 60.

12 *Ibid.*

13 *Id.* at 78.

There may be a lack of checks in administrative justice. These agencies do not always have taught tradition of experience developed by reason.

Judicial justice has the possibilities of certainty and flexibility. The former arises because of training in precepts, the latter because of the correction of the precepts through reason based upon experience. There are certain checks upon judicial justice in the following of known principles: criticism, permanent records and judicial reviews. Finally, judicial justice has the advantage of independence of popular excitement and clamor.

In conclusion the real foe of absolutism is law. Law presupposes a judicial process based upon precepts, experience and reason.

As one would expect, the volume is replete with learning. Its profound thought is earnestly recommended to those interested in jurisprudence.

*Francis W. Johnston**

MR. JUSTICE SUTHERLAND. By Joel Francis Paschal.[1] Princeton, New Jersey: Princeton University Press, 1951. Pp. xii, 267. $4.00. — Author Paschal's contribution is a volume which calls for careful reading and thorough examination. This book, ostensibly a biography, contains but little biography. Behind the facade of a life history the main part of the book consists of thought-provoking discussions of two conflicting theories of government. Juridical questions related to those theories are presented by analyses and discussions of Supreme Court opinions authored by Justice Sutherland. In some instances dissenting opinions written by Justice Sutherland or other justices are also discussed.

These theories of government are: (a) that as little government as possible suffices — only enough to insure that internal order and external respect and recognition are maintained; and (b), that active and close supervision of the internal economy should be the policy, coupled with an interest in the welfare of the individual citizens and the inevitable concomitant of minute regulation. Proponents of the first theory object to intervention of the government in the economic activities of its citizens and oppose minute governmental regulation.

Embraced in the second theory are the attractive ideas that government should so control internal economy that the standard of living should be raised, the welfare of individual citizens being a matter of national concern, and, of necessity, that the activities of individuals

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* Chief Justice, Supreme Court of New Hampshire.

1 Member of the North Carolina Bar.

should be regulated in somewhat minute detail. The subject of this biography was an able proponent of the first theory.

During the period of transition from the national policy based in part on the first theory to the national policy carrying into effect the second theory, Justice Sutherland was an able defender of the idea that little government is the best. The author depicts him as deriving his views from the philosophy of Herbert Spencer. Notable supporters of that philosophy were Judges Cooley and Campbell, who were professors at the law school of the University of Michigan where the Justice received his legal training.

Following the great Depression of twenty-nine and the early thirties, the second theory was espoused and supported by a large segment of the population and, in a measure, it has displaced the ideas of Justice Sutherland and other like-minded persons. Approximately fifteen years have elapsed since the theory supported by Justice Sutherland was discarded. At this time we do not know the effect, the disadvantages or benefits of the present governmental policies. Nor can we accurately foretell their result or their impact on our life as a nation. It may be that this new policy will bring confusion and eventual catastrophe.

Notwithstanding the displacement of the idea that a small amount of governmental interference in the affairs of citizens is the best policy, it may be that the present attitude of our government will open the door to a better and more improved system of government for mankind. Only the lapse of time can answer that question and I venture no prophecy. Justice Sutherland, as disclosed by Paschal, strove mightily in judicial opinion against, what to him, were strange and unusual theories calling for unheard-of federal activities.

The Justice's position is supported in a measure by the verdict of history. But it is believed that he failed to accept a progressive and benevolent view of the efforts of mankind to better their economic and social condition. In the past few years, everywhere, leaders have been thinking and acting to attain such result. Many governments now in existence are making efforts to perform social service. Fifty years ago no one would have thought that the Government of the United States would, or should, show any interest in the living standards and welfare of its individual citizens. Now this policy is accepted.

In the latter days of the Roman Republic and the first years of the Empire, that government performed similar services for its citizens as well as for denizens and clients residing in Italy. Some argue that this action of the Roman government was the genesis of its decline and eventual destruction. I offer no opinion on that subject. But history does show that a people enervated by luxury and misled by exaltation of gross materialism cannot maintain a dominant place in the affairs of mankind. An attitude of that kind is generally accompanied by one

calling for the maximum of physical comfort and gratification of the senses with minimum effort, which likewise hastens decline.

Justice Sutherland has been characterized as a great conservative. It may be that he saw with prophetic vision the gradual decay of the Government of this nation resulting from a similar process affecting its individual citizens.

With all of this we indulge in theory. It suffices to say that *Mr. Justice Sutherland* is an able discussion of the questions which have been and are now perplexing the people of this nation.

It would be remissness on my part to give the book unstinted praise, which I do not. It is to be observed that in many instances issues and questions are stated in somewhat obscure language. In other instances the argument lacks convincing force. But in view of the many other excellent qualities of the book, such faults can well be overlooked. I think that *Mr. Justice Sutherland* is a valuable contribution to the literature of the times and that it will aid in the solution of many current questions and problems pertaining to government and jurisprudence. At the risk of being somewhat repetitious I think that the benefit and full flavor of the book cannot be attained nor enjoyed by any person who reads it only once. It should be read carefully and thoughtfully. The reader by so doing will derive lasting benefit.

*W. T. Lovins**

THE LAW OF LABOR RELATIONS. By Benjamin Werne.[1] New York: Macmillan Company, 1951. Pp. xiv, 471. $5.75. — Brave is he who attempts to set down in print the law of labor relations. The conflicting decisions, the constant changes and rapid developments make the task a fearful one.

Mr. Werne not only accepts the challenge, but does so for a most commendable purpose — to indicate what is permitted, prohibited and desirable under the statutes and decisions interpreting them. His hope is that the book will be of practical use to those facing the intricate and perplexing problems in labor law.

To that end he has divided the volume systematically into four principal parts: Representation, Prevention of Unfair Labor Practices, Rights and Duties of Management and Labor, and Collective Contracts. However, an examination of the component parts indicates the

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* Chief Justice, Supreme Court of Appeals of West Virginia.

[1] Adjunct Professor of Industrial Relations, Graduate School of Business Administration, New York University. Member of the New York Bar.

author has failed to achieve his expressed objectives; in fact, he has deviated from them.

In his treatment of the legality of conduct prior to collective bargaining, the author has accumulated the summations of an infinite number of judicial and administrative decisions. But there is little or no effort to correlate the material into a comprehensive text.

In most instances he gives but a single sentence summary of a lone decision without attempting to explain or to criticize or to compare with interpretations of other tribunals. This digest method is of meager value to one feverishly seeking an answer to a pressing legal problem interwoven with economic and social implications. Possibly, its limited function is to give the searcher a hint which he may use to refer to a more complete and scholarly treatise.

His discussion of collective contracts is confined to what he considers to be the proper objectives for management in bargaining with a union. Methods are suggested as to how to attain these goals. He is careful to point out pitfalls employers should sedulously avoid. The superficial, uncritical approach is followed as in previous sections. There are more of the same brief, terse comments and opinions of the author. For example, a supervisory employee clause which the author presents in illustration is described as being unduly restrictive and inadequate to "afford management reasonable latitude with sufficient definiteness." [2] The reader is asked to find the basis for this cryptic comment in a second "preferable" clause which is given. Only by a word-for-word comparison of the two can the reader fathom the criticism.

In the opinion of the reviewer, the author might have attained his goal if he had been more objective in his treatment of the subject and if he had accumulated less and had analyzed more.

*Robert B. Vining**

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2 Text at 297.

* Associate Professor of Law, St. Louis University.

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