

any accepted doctrine that his mind worked. The obvious comparison is with Socrates, who founded no school himself, but gave the impetus to Academics and Peripatetics to Megarians and Cynics. Indeed, Cohen's method of instruction was eminently Socratic, often to the intense irritation of students and disputants whom he forced to render an account of what they maintained as beliefs.

I venture to think that his mind lacked suavity as his style lacked urbanity. If any one had denied him sophistication, he would doubtless have replied that it was a quality to which he attached little value. It is perhaps more serious that he apparently lacked contact with the fine arts, for which his published work indicates little sympathy or feeling. It is quite possible that his moral earnestness and his penetrating intellect were the stronger by compensation.

My association with him was in brief meetings, separated by long intervals. I never left him except with a renewal of the profound respect and strong personal affection which he had inspired in me at the beginning of our acquaintance, more than half a century ago. The reading of the book has a nostalgic quality for me which it must have for all who knew him.

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CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC.  
By David Loth. New York: W. W. Norton & Company, 1949. Pp. 395. \$5.00.

Although brevity may be the soul of wit, it is the essence of superficiality in history. Three hundred and eighty-two pages is entirely too short a space to tell adequately the story of John Marshall's eighty years. From Valley Forge to Jackson's Bank War, Marshall was an active participant and an ardent partisan in each successive development in American political and legal history. In his long term on the supreme bench he heard 1,215 cases, and personally wrote the court's opinions on 519. He was a leader of the Virginia bar, member of Virginia's ratifying convention, one of the nation's largest land speculators, commissioner to France, Secretary of State, biographer of George Washington, and member of Virginia's constitutional convention of 1829-30. Such a career can hardly be mentioned in 130,000 words—the length of a summer novel.

Mr. Loth's slight sketch makes no pretense of profundity. It is a simple narrative, devoid of analysis and accepting the conventional interpretations. It contains no fresh insight and presents no new material on the career of John Marshall. Its merit—if it be merit—lies in the author's cavalier capacity for condensation. *Marbury v. Madison* gets—case, decision, and reaction—less than 2,000 words; *United States v. Peters* about 750, and *Fletcher v. Peck* 400. The index lists 25 cases, many of which are not identified by name in

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the text. Obviously, such condensation gives rise to dubious generalizations or outright errors. Thus the author asserts that *Marbury v. Madison* answered "forever" the question which agency of the government had final decision in interpreting the Constitution. He finds only "coincidence" in *Fletcher v. Peck* and Marshall's interest in the Fairfax lands. He thinks Van Buren "stage-managed" Jackson from the beginning, and introduced the spoils system. Clearly, this is not a book for ready reference on a lawyer's shelf or a reliable guide to the first half-century of United States history.

But all of this merely serves to call attention to the crying need for new and more penetrating studies into the life and times of John Marshall. Since Senator Beveridge's monumental biography no fresh study of Marshall has been attempted. Corwin's useful synthesis in the *Yale Chronicles*, and such legal studies as Frankfurter's on the commerce clause have added to legal lore without contributing any new insight on John Marshall.

Yet there are several problems in Marshall's career which deserve fresh investigation. One of them involves Virginia's singularly integrated politico-judicial system. John Marshall was clearly no believer in the unrealistic theory of the separation of powers; he believed in judicial supremacy. And the system from which he sprung placed the courts in a key position in the commonwealth. At the base of that system, the county courts, comprised of justices of the peace, performed all legislative and judicial functions, and passed around the enriching office of sheriff among the courts' members. The governor appointed the justices for life (or "good behavior"—whichever ended first) from nominees made by the county court. As politicians the county justices constituted a political caucus, selecting candidates for the assembly which elected the governor and his council—chief of whom was the life-appointed, assembly-chosen chief justice of the court of appeals.

It was a tight-knit system in which the chief justice could, if he wished, be the dominant figure. Its actual operation, however, has never been studied. Beveridge described it, and Douglas S. Freeman gives it attention, but the biographers of Jefferson have chosen to ignore it. The "Great Lama of the Mountain"—as Marshall called Jefferson—talked about dividing counties into townships and dreamed of a pyramid of governmental institutions which rested on "county republics" and "ward republics," but when he was in power in Virginia, he devoted his attention to other reforms. It is reasonable to speculate that the county-court system may have been the political machine which Jefferson used as a steam-roller to crush his political enemies.

Both Jefferson and Marshall came out of the Virginia political system, and their common background may have explained their attitudes on the Judiciary Act of 1800. Marshall helped write the Act, and, enroute to the Supreme Court, helped select the men to fill the new places the Act created.

Jefferson came into the presidency determined to repeal it. There was a ruthlessness about Jefferson's treatment of his opponents that belied the conciliatory words of his inaugural, but the miserable handful of Federalists whom Marshall and John Adams appointed to judgeships scarcely warranted the intensity with which Jefferson and his Republicans attacked the law. The Act itself provided salutary reforms in the courts which a rational man could accept. Nor did the innocuous position of the federal judiciary at the moment justify Jefferson's major assault upon it. While it was true that Samuel Chase was both vulgar and partisan, and the other justices, riding their circuits, had shared his zeal in enforcing the Sedition Act, the court system had not yet obtained power or prestige in the land. Under the ineffable ineptitude of John Jay, who had displayed his monumental incapacity in a succession of high posts, the courts had been operating with incoherence and without imagination. In the light of the court's prestige, and the clear need for reform, the Republican attack on the judiciary appears an irrational tilting at windmills, and Jefferson's zeal only malicious spite.

Historians who have dealt with the succession of events from the Judiciary Act of 1800, through its repeal, the Chase impeachment, and *Marbury v. Madison* have pictured the court as Marshall made it rather than the court that John Jay left. In consequence, they have not been moved to wonder whether both Marshall and Jefferson, with conflicting emotions, saw the Act of 1800 as the opening move which would eventually establish the Virginia political system on a national scale. "Lama" though he might have been, and star-gazer casting persuasive political horoscopes as he undoubtedly was, Jefferson's only knowledge of a potent judiciary came from the Virginia system. Historians, however, have ignored this situation. They have been so bemused by the partisan oratory of Chase and Randolph, or by the ingenious intricacies of Marshall's *Marbury Obiter*, that they have neglected to inquire into the reality that lay behind the words. They haven't asked why Marshall didn't disqualify himself in the *Marbury* case, or whether Jefferson would have spoken differently had Spencer Roane been Chief Justice of the United States.

Spencer Roane, chief justice of Virginia's court of appeals, would have been Jefferson's selection for Marshall's place. Better trained than Marshall in the law, more widely read in literature, and possessed of an equally clear and vigorous style, Roane was ever alert to Marshall's insidious efforts to usurp power for the federal courts. As decision after decision came from John Marshall, dissenting opinions followed regularly from Roane. In cases arising in Marshall's circuit, the two jurists were frequently in direct conflict. Roane's court flatly refused to execute the orders of Marshall's court in the Fairfax case. The story of John Marshall is, in large part, the story of his

rivalry with Spencer Roane. A careful biography of Roane—whom hero-worshipping Beveridge treats unfairly—might cast much needed light into dark corners of Marshall's career.

So, too, might a conscientious probing of the Fairfax lands uncover some of the motivations of John Marshall. Historians and biographers have glossed over Marshall's activities as a land speculator. They have ignored the implications for Marshall of the *Fletcher v. Peck* decision, and the far-reaching consequences of the decision's condonation of corruption.

Finally, Marshall's influence in the Virginia Constitutional Convention of 1829-30 warrants, perhaps, further study. The center of dramatic interest in that Convention, whose members were as distinguished as Philadelphia's fifty-five, featured a sectional conflict between an allegedly "democratic" West and a "conservative" tidewater, and involved the emotion-laden issue of slavery. Marshall, along with many a Jeffersonian and Jacksonian "Democrat," voted with the tidewater. Moreover, the Chief Justice headed the committee on the judiciary—and the new constitution perpetuated the county court system of the old days! A fresh investigation of this Convention might, conceivably, reveal that the slavery issue was as phony then as it frequently was in later years. Perhaps, indeed, Marshall and Jefferson and Roane had all along been only shadow-boxing with the wordy theories of government and the real issue involved a struggle for power over a court-centered political machine.

Whether or not fresh investigations would substantiate these speculations, the existing gaps in the evidence indicate clearly that the story of John Marshall is not yet ready for the popularizer's facile hand. If Mr. Loth's book, by its very inadequacies, can call attention to the lacunae and send new researchers into the documents, it might perform a real service.

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THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE. By Henry Rottschaefer. Ann Arbor: University of Michigan Press, 1948. Pp. xvi, 253. \$3.50.

These are the five Thomas M. Cooley lectures delivered at the University of Michigan in March, 1943 by the well-known professor of constitutional law at the University of Minnesota, author of the text on that subject in the Hornbook series and accompanying casebook.

The author's stated purpose is to "consider the response of the Supreme Court to the opportunity presented it when confronted with the constitutional issues raised by the depression legislation" of the thirties. That purpose has been well achieved in lawyer-like fashion.

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