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 "Democat," 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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The first lecture or chapter entitled "Development of Federal Powers Prior to 1933" is devoted almost entirely to the commerce clause. The second entitled "The Expansion of Federal Powers Since 1933" is also concentrated largely on the shift of power over commerce from the states to the federal government, treading the familiar ground of *Schechter* (1935),[1] *Jones & Laughlin* (1937),[2] *Mulford v. Smith* (1939),[3] *Darby* (1941),[4] *Wickard v. Filburn* (1942),[5] *South-Eastern Underwriters* (1944)[6] and *American Power & Light Company v. Securities and Exchange Commission* (1946).[7] It is pointed out that the commerce power has become "the most important instrument for centralizing control over the national economy in the federal government;"[8] that "it will be futile hereafter to frame an argument in terms of 'direct' or 'indirect' effect of local activities upon interstate commerce. The decisive factor is whether they bear a substantial relation to that commerce or to a policy which Congress may adopt with respect thereto."[9] The "commerce power was expanded by redefining the major concepts developed in prior decisions to determine its scope, and by rejecting theories that had limited its extent by reference to the reserved powers of the states."[10] And the taxing and spending powers also came to the aid of Congress in control of the social and economic order in the social security case of *C. C. Steward Machine Company v. Davis* (1937)[11] which "involves the possibility of federal control over state policy far more extensive than that possible under the Estate Tax Act."[12]

If one were hastily to assume that because federal power has been expanded in recent years there has been a corresponding diminution in the sum total of state powers, he would be mistaken. For in Chapter Three entitled "The Expansion of State Powers since 1933" Professor Rottschaefer points out states "may impose some taxes that the commerce clause as construed prior to 1933 prevented them from levying,"[13] and that since 1933 the general trend of decisions "has been towards an expansion of state powers by freeing them of some of the restraints based upon . . . the commerce clause."[14] Professor Rottschaefer points out also, however, certain ex-

1. 295 U. S. 495 (1935).
2. 301 U. S. 1 (1937).
3. 307 U. S. 38 (1939).
4. 312 U. S. 100 (1941).
5. 317 U. S. 111 (1942).
6. 322 U. S. 533 (1944).
7. 329 U. S. 90 (1946).
8. P. 82.
9. P. 80.
10. P. 94.
11. 301 U. S. 548 (1937).
12. P. 89.
13. P. 127.
14. P. 134.

pressions of judicial opinion which might make the commerce power "a most serious potential threat to the states."[15] State power has increased because of decisions permitting multiple taxation.[16]

"The Protection of Personal and Property Rights" is discussed in Chapter Four. Here are the familiar cases establishing the fact that the due process clause may protect personal liberties but offers little protection to rights in property. "The Court has accepted the position of Justice Brandeis . . . that the due process clause protects personal liberty more extensively than rights of property. It has also been intimated by the Court that the presumption of constitutionality may have a 'narrower scope' of operation 'when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments' than when applied to that 'affecting ordinary commercial transactions.'"[17] "The Court has practically accepted as conclusive of the constitutional issue the legislative judgment that a classification made in legislation for the control of business is reasonable. This gives the legislature a wide power to affect the competitive situation by relieving a favored group from burdensome controls imposed on others in the same field of economic activity."[18] By the Nebbia case "The definition of the phrase 'affected with a public interest' is revised out of existence."[19] "It is questionable whether the due process clauses of the Fifth and Fourteenth Amendments today interpose any obstacle to legislative price-fixing."[20] Of course "the procedural protection" of the due process clause "is of no avail when the legislature itself fixes rates or alters prices" and "there is a definite trend on the part of the courts to accept the fact findings of administrative agencies and to hold their orders supported by the record."[21] The gold clause cases[22] deprived investors "of a reliable method for guarding themselves against inflation" and "these decisions and those dealing with the validity of state moratory legislation[23] have reduced the constitutional protection of contractual rights. Whether they have in actuality reduced the motive to accumulate capital can probably not be definitely determined."[24]

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15. P. 134 citing Northern Airlines, Inc. v. Minnesota 322 U. S. 292 at pp. 303, 304 (1944).

16. See for example State Tax Commission of Utah v. Aldrich 316 U. S. 174 (1942); Graves v. Schmidlapp 315 U. S. 657 (1942); International Harvester Company v. Wisconsin Department of Taxation 322 U. S. 435 (1944).

17. P. 200.

18. P. 155.

19. P. 159. Nebbia v. People of State of New York 291 U. S. 502 (1934).

20. P. 161.

21. P. 169.

22. Norman v. Baltimore & Ohio R. Co. 294 U. S. 240 (1935); Perry v. United States 294 U. S. 330 (1935).

23. Home Building & Loan Assn. v. Blaisdell 290 U. S. 398 (1934).

24. P. 199.

The title of this book, especially if one thought it was written by a political scientist rather than a lawyer, might lead one at first to be somewhat disappointed at a legalistic discussion of the cases with little if any reference to the social, economic, political and philosophical forces affecting the Court's opinions and determining the trends set forth.[25] But the political scientist who warns his students not to assume that the only changes made in the Constitution have been by formal amendment, who calls their attention to changes arising out of custom and the party system, for example, and by judicial interpretation, may well refer his more mature students to this book. So also the lawyer whose obligation it is to predict the trend of future decision, however hazardous in the present era of dissent and reversal, will profit from a reading of these lectures. Particularly is this true of the last chapter or lecture, "Some Implications of Recent Trends."

"Since 1933 the Supreme Court has so construed the Constitution as to sustain a great expansion of federal powers, a relaxation of important limitations on state powers, an acceptance of a more extensive and intensive regulation of business, and an increase in the protection of personal liberty in areas other than business. It is extremely unlikely that there will be any general retreat from these positions within any period now foreseeable."[26]

The foundation has been laid for regulation of production by the subsidization of those who cooperate with the goverument in carrying out its policy, for price control, for the levy of certain kinds of taxes on interstate shipments, and for the fixing of quotas. "The commerce clause interposes no obstacle to federal legislation requiring that commodities produced in a given area be marketed in some other given market area. This could be used to build up the industries of one section of the country at the expense of competitors in other sections. . . The recent trend is to deny economic interests, other than those of labor, any protection whatever under the due process clause."[27] "There would now seem to be no obstacle to limiting production for the interstate market directly, and likewise production for the 'intrastate market.' "[28] "Congress could require federal incorporation of all corporations wishing to engage in interstate commerce."[29] Congress also could prohibit the interstate shipment of the products of new plants, could tax the undistributed profits of businesses whose expansion was to be limited or prevented and levy a discriminatory tax against new outside investments in such businesses. And "it has available several instruments for effectively influencing and controlling the direction of investment in support of any national economic

25. For example, C. HERMAN PRITCHETT, THE ROOSEVELT COURT, New York, 1948.
26. P. 202.
27. Pp. 206-208.
28. P. 210.
29. P. 225.

policy that it may validly adopt."[30] In addition to the commerce power the taxing and spending powers "have recently been most relied upon by Congress to achieve social and economic reforms. Both are important instruments for redistributing wealth and current and future national income."[31]

An indication of the helpfulness of this book to the practicing lawyer is to be found in the comment on *United States v. Lowden*.[32] Professor Rottschaefer says: "The decision itself would furnish a strong precedent for holding not violative of due process legislation requiring employers to compensate laid-off or discharged employees by some form of severance pay. It might even be extended to validate other compulsory payments by employers to their unorganized or organized employees. . . . This little-known decision may yet prove one of the most important in the recent line favorable to labor."

Not only the political scientist and the lawyer may profit from this book, but also the citizen who is concerned about what he calls "free enterprise" versus planned economy or "socialism" or even the liberal who sees the paradox of liberalism: That a movement designed to give social and economic as well as political freedom may eventuate in a totalitarianism the no less objectionable or dangerous because it is democratic rather than imposed by a minority or a fuehrer. As Professor Rottschaefer says, in concluding these lectures, "The danger that modern liberalism may spawn a tyrannous totalitarianism is neither an illusion nor the delusion of 'reactionary thinking.' "[33] The lack of a more sensational title, such as *Constitutional Revolution*[34] or even *The Growth of Constitutional Power in the United States*[35] and a sober jurisprudential style free from the rhetoric of explosive epithets should not deter the thoughtful student of our revolutionary era, lawyer or layman, from reading this book.

The supreme law that is to emerge from this revolutionary era inevitably will be profoundly affected if not determined by prevailing philosophical ideals. Those ideals involve inescapably such age-old questions as: What is man? What is the purpose of the state? What is the proper relation between the two? How may liberty and authority best be reconciled at any given time and place? These questions must be answered if mastery is to take the place of drift. These questions will not be answered if men are content to live from day to day by successive temporary expedients for the avoidance of social friction or of cerebral effort in working through to ultimates. They will

30. Pp. 212-213.
31. P. 176.
32. 308 U. S. 225 (1939).
33. P. 236.
34. EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, Ltd. Claremont, Calif., 1941.
35. CARL BRENT SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES, Chicago, 1946.

not be answered if men seek salvation in the exclusive worship of a popular present-day secular trinity: Purely informative education, tolerance and democracy.

Today many men and women have turned for anchorage in a time of stress from religion or devotion to the gods of science to public education. It is assumed that free education for all will give men common goals and a saving wisdom even though the goals of education are not agreed upon. It is assumed that if men accumulate enough facts somehow a sound philosophy will emerge from the pile like some genie from a bottle. Combine education with unlimited tolerance for any and all ideas however incompatible or false and with devotion to a vague something called democracy and everything will come out all right. Do not ask the deeper question, what are the wise and proper purposes of your democracy; do not suggest limitations on its power lest you be branded as an enemy of the people. The worship of this trio, education, tolerance and democracy, gives men the pleasing sense of having all the answers, or if not that somehow the answers will come through without too much trouble. This secular religion encourages drift under an illusion of progress. Let us hope that it will not be a drift towards totalitarianism, or better yet that men will realize the need of sound and long-term principles. Having found them, the climate of opinion in which the Supreme Court works will be philosophically helpful rather than evasive of fundamental issues or deleterious.

And whether or not the judiciary, as Jefferson charged, are miners and sappers of the Constitution, the fact that they work unobtrusively and without the dramatic gesticulations of spotlighted executive and legislature, should not blind us to the importance of their work. Nor does it free bench and bar, political scientists and all thoughtful Americans from the duty of constant scrutiny and constructive criticism of the Supreme Court of the United States whose members do so much to make the supreme law of the land.

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THE RATIONAL BASIS OF CONTRACTS AND RELATED PROBLEMS IN LEGAL ANALYSIS. By Merton Ferson.* Brooklyn: The Foundation Press, Inc., 1949. Pp. ix, 330. $4.00.

In this volume Dean Ferson has brought together a number of his essays on the legal analysis of consensual acts. The title of the book might well have been, "Legal Transactions and Juristic Acts," for those two conceptions provide the common denominator of the diverse legal problems which the author

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