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Book Review

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

This volume contains Professor Rottschaefer's lectures at the University of Michigan, the first of the series honoring the memory of a great lawyer, Thomas M. Cooley. In a foreword, Dean Stason observes that Judge Cooley recognized that the Constitution "must and does possess a realistic flexibility" (this being based upon a conversation quoted by James Bryce) but at the same time cites¹ the following from Judge Cooley's *Constitutional Limitations*:

"A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments . . . The meaning of the constitution is fixed when it is adopted, and is no different at any subsequent time when a court has occasion to pass upon it."

However Judge Cooley might have regarded the constitutional impasse in which the New Deal found itself in 1936, it is certain that he would have been intensely interested in the matters dealt with by Professor Rottschaefer. No observer of constitutional government could fail to be. Here is an analysis—acute, lucidly written, and in the main dispassionate—of the constitutional revision in the crisis induced by the Depression. The extent of the revision already made is perhaps greater than most of us remember, but Professor Rottschaefer considers it quite likely that "the changes discussed will prove to define only the minimum scope of constitutional revision that will occur before the process of adaptation achieves a recognizable degree of stable equilibrium." The end of the reconstruction period is not yet in sight.

Professor Rottschaefer first traces the development of federal powers prior to 1933. In the lines of authority so developed the Supreme Court found the major tools available for the task of revision which commenced in 1937. He then deals with the expansion of federal powers since 1933 (a gigantic spectacle which most of us can now regard with more equanimity than we could ten years ago), and demonstrates that "the greater part of recent changes" was effected not so much by the express overruling of prior decisions as by adapting accepted principles to changed conditions in which new factors demanded recognition. A "congeries of principles"

1. At pp. xi-xii.

relating to federal powers, whose ultimate implications were not wholly consistent, had been developed prior to 1933 and there was nothing to compel the selection of some of these principles, rather than others, as major premises in the new situation. With the clarity resulting from a distinguished style Professor Rottschaefer traces the historical background for the decisions upholding the National Labor Relations Act,² the power of Congress to fix prices for interstate sales under the Agricultural Marketing Agreement Act,³ the Fair Labor Standards Act,⁴ the Public Utility Holding Company Act,⁵ the Agricultural Marketing Act,⁶ the Agricultural Adjustment Act,⁷ the TVA and Federal Power Commission Acts,⁸ and the Social Security Act.⁹ These decisions, which have brought about the greater part of the expansion of the federal commerce power and the federal taxing power, reveal, Professor Rottschaefer says,¹⁰

"the processes by which the Constitution has been adapted to changes in political, social and economic philosophies, and to the progressive integration of the national economy. The Court had a certain body of principles with which to work. It could use, modify, or discard any or all of them, or choose from among them those it deemed best fitted for what it conceived to be its task. In fact, it employed all these methods."

Professor Rottschaefer next deals with the expansion of state powers since 1933 and undertakes to explain the apparent paradox that these powers should have expanded even though, when they collide with expanded federal powers, it is the latter which are supreme. This is perhaps the least valuable section of an admirable book. While Professor Rottschaefer apparently agrees that the chief expansion has been in the states' taxing powers, he implies that there has been substantial expansion of their regulatory powers also. To this observer the expansion of state powers seems, with rare and economically insubstantial exceptions, to have been limited to the taxing powers, and to have been motivated by the same principle which motivates Congressional grants-in-aid to the states, now expanded to astronomical figures. The advance of federal power into fields which formerly belonged to the states, but from which they are now excluded,¹¹ seems to have

2. *N.L.R.B. v. Jones & Laughlin Steel Corp.* 301 U. S. 1 (1937); *Associated Press v. N.L.R.B.*, 301 U. S. 103 (1937); *Polish National Alliance v. N.L.R.B.*, 322 U. S. 643 (1944), and others.

3. *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939).

4. *United States v. Darby*, 312 U. S. 100 (1941).

5. *Electric Bond & Share Co. v. S.E.C.*, 303 U. S. 419 (1938); *North American Co. v. S.E.C.*, 327 U. S. 686 (1946); and *American Power & Light Co. v. S.E.C.*, 329 U. S. 90 (1946).

6. *Mulford v. Smith*, 307 U. S. 38 (1939).

7. *Wickard v. Filburn*, 317 U. S. 111 (1942).

8. *Ashwander v. T.V.A.*, 297 U. S. 288 (1936); *United States v. City & County of San Francisco*, 310 U. S. 16 (1940); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940); and *Oklahoma v. G. F. Atkinson Co.*, 313 U. S. 508 (1941), were the most important of these.

9. *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937).

10. At p. 94.

11. See, e.g., *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 520 (1942); *United States v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944). South-

made some financial compensation expedient. The need of the states for revenue has also, as Professor Rottschaefer points out,¹² much increased. While the commerce clause now invalidates vast areas of state regulation, it has lost some at least of its former vigor in invalidating state taxation. Professor Rottschaefer's careful analysis of the tax cases, in the light of the pre-1933 precedents, is instructive.

A separate section deals with protection of personal and property rights, a major part of the discussion being devoted to the changes relating to the regulation of economic activities, both of capital and labor. Professor Rottschaefer concludes that it is a fair interpretation of the decisions that the scope of the due process clauses since 1933 has been both expanded and contracted.

"They no longer afford the interest of property and business the protection they once did. On the other hand, the interests of labor are receiving greater protection, particularly those of its activities that may be viewed as exercises of the workers' personal liberty."¹³

The equal protection clause of the Fourteenth Amendment, which had never been so restrictively construed as the due process clause, also appears now to permit wider state action than formerly.¹⁴

Professor Rottschaefer concludes that since 1933 the 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." He considers it extremely unlikely that there will be any general retreat from these positions in the foreseeable future. The real question is how much further these trends are likely to be carried. Professor Rottschaefer points out that we have taken only the first steps toward government planning for the national economy, and there has thus far been no general threat to civil and political liberties, "other than the economic of one important economic group." Indeed, the period since 1933 has been marked by "vigorous judicial protection of other civil liberties and of political rights." And he rightly observes that the more that economic freedom is curtailed, the greater the value that freedom of speech and press and of religion acquire. He regards "the danger that modern liberalism may spawn a tyrannous totalitarianism" as real.

To this reviewer that danger, in the United States, seems neither clear nor present. But it is not necessary to regard it as immediately threatening in order to agree that the vast expansion of governmental power, which has brought within

ern Pacific Co. v. Arizona, 325 U. S. 761 (1945); Morgan v. Virginia, 328 U. S. 373 (1946); Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947).

See, also Note, *'Occupation of the Field' in Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946); and Green, *The Supreme Court, The Bill of Rights and the States*, 97 U. of PA. L. REV. 608, 614-615 (1949).

12. At p. 107.

13. At pp. 199-200.

14. Cf. Tigner v. Texas, 310 U. S. 141 (1940), with Connolly v. Union Sewer

its orbit almost every subject of concern to mankind, requires enforcement of the First Amendment freedoms (and also of the rights of the accused in criminal prosecutions) to the furthest extent compatible with public order. Legislation is the result of politics; and politics—like its extension, war—has tended to become total. Greater scope for these fundamental rights and freedoms seems to be a necessary corollary.¹⁵

It is really extraordinary that those who consider that the Fair Deal is murdering free enterprise should not at once perceive that they have a large stake in the maintenance of freedom of speech and of the press, of the free exercise of religion and of the rights of the accused. The truth is that we all have. And the stake becomes larger with each new advance of federal power, alike for those who regard the advance as necessary and for those who look upon it as socialistic tyranny. The liberty of each of us can be no greater than the rights of the Communists, of Gerald L. K. Smith and Arthur Terminiello, of Jehovah's Witnesses, of the doomed prisoner in *Betts v. Brady*.¹⁶ Our freedom stands or falls with theirs.

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Pipe Co., 184 U. S. 540 (1902). See also *Kotch v. Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

15. See Green, *op. cit. supra* n. 11, at 615-619, 634.

16. 316 U. S. 455 (1942).