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CABINING THE CONSTITUTIONAL HISTORY OF THE NEW DEAL IN TIME

G. Edward White*

THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT. By *William E. Leuchtenburg*. New York: Oxford University Press. 1995. Pp. ix, 350. \$30.

The constitutional history of the New Deal period, which can roughly be defined as spanning the years from the early 1930s through the Second World War, appears to be moving closer to the forefront of our contemporary consciousness. It is now not uncommon for commentators on current constitutional law issues to enlist "the New Deal" as a symbol, either of the bright and shining "moment" in which the American constitutional system adapted to modernity¹ or of the willful and misguided creation of that alleged source of many of our present ills, the welfare state.²

When a period from the past begins to take on a particular resonance with the present, a "new history" of that period almost invariably emerges. I suspect that a new history of the New Deal is in the process of being formed, and I believe that an important focal point of that history will be the series of Supreme Court constitutional law decisions that William Leuchtenburg³ characterizes as a "constitutional revolution" during which the Court experienced a "rebirth." One might surmise from the title and subtitle of Leuchtenburg's book, in fact, that it is part of that new history.

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1. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105 (1991); Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 422 (1987). Following Dorothy Ross, by "modernity" I mean "the actual world brought into existence by democracy, capitalism, social differentiation, and scientific technology." Dorothy Ross, *Modernist Reconsidered*, in *MODERNIST IMPULSES IN THE HUMAN SCIENCES: 1870-1930*, at 1, 8 (Dorothy Ross ed., 1994) [hereinafter *MODERNIST IMPULSES*]. The supporters of New Deal policies took for granted the modernity of the world, and they saw New Deal policies as responsive to and constitutive of the salient elements of modernity.

2. See, e.g., RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 280-81 (1985); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

3. William Rand Kenan Professor of History, University of North Carolina; Visiting Professor of Legal History, Duke Law School.

I have concluded, however, for reasons that will occupy me for the bulk of this review, that Leuchtenburg has done something quite different in *The Supreme Court Reborn*. Rather than offering a new constitutional history of the New Deal period, he offers a conventional, traditionalist view, one that arguably fails even to attempt, let alone to accomplish, the task of any new history, that of cabining a historical era in time. The most interesting and perhaps telling feature of Leuchtenburg's account of the "constitutional revolution" of the 1930s is one of his implicit starting assumptions. He assumes that in order for us to appreciate the magnitude of that revolution, he need only *describe* it, not *explain* it. He assumes, in other words, that we will grasp his interpretation of the constitutional history of the New Deal merely from being exposed to the details he provides.

To understand why Leuchtenburg — widely viewed as an experienced and skilled practitioner of archival narrative history and as an unimpeachably credentialed "expert" on the subjects he discusses in *The Supreme Court Reborn*⁴ — felt that his readers would grasp the meaning of the New Deal constitutional revolution from such details, it is necessary to take two excursions away from those details, one into the realm of writing history generally and the other, at greater length, into what I call the inferential structure of Leuchtenburg's historical narrative in *The Supreme Court Reborn*. I conclude by summarizing the ways in which I find Leuchtenburg's history conventional and at the same time unsatisfying, and by proposing some lines of questioning that need to be undertaken before the constitutional developments of the New Deal period can adequately be cabined in time.

I. THE IMPULSE TO "DO HISTORY"

In the late nineteenth and twentieth centuries there have been periods in which the American legal profession has treated the historical analysis of legal subjects and issues as an important mission of legal scholarship, and periods in which it has treated such analy-

4. In his preface to *The Supreme Court Reborn*, Leuchtenburg notes that since 1962 he has been studying the "Court-packing Crisis" of 1937 and the developments in constitutional law that preceded and succeeded it. He also informs us that his synthetic histories span every period in American history from 1914 until the present. Finally, he mentions that he is currently working on a two-volume history of "the constitutional crisis of the 1930s." See pp. vii-ix, 26.

Leuchtenburg's previous work on the New Deal period has been well received. One reviewer of *The Supreme Court Reborn* describes him as "perhaps the preeminent New Deal historian." Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 239 (1996) (book review). Leuchtenburg also seems prominent among and respected by his peers. He has served as president of the American Historical Association and the Organization of American Historians, and he has won both the George Bancroft and Francis Parkman Prizes, coveted honors within the profession of Americanist historians.

sis as distinctly marginal to the enterprise. One might compare the years from 1870 through the early 1920s with the years between the 1930s and the 1960s. During the former period, Harvard's Christopher Columbus Langdell, whose model of a law faculty was eventually to dominate the profession, assembled a faculty of "expounders, systematizers, and historians."⁵ During the latter period, by contrast, only a handful of law schools had legal historians on their faculties, relatively few pieces of historical scholarship appeared in law reviews, and many in the profession regarded "doing history" as an antiquarian or obscurantist exercise.⁶

One could, in fact, trace a connection over the course of the twentieth century between the legal academy's enthusiasm for contemporary issues of law and policy and its lack of interest in doing history. When legal academics were engaged by and saw themselves as important contributors to issues of public policy — during the periods of administrative regulation in the 1930s and 1940s and constitutional reform in the 1950s and 1960s, for example — legal history appeared to them less meaningful and consequently more obscurantist. Alternatively, when legal academics found themselves disaffected with the orientation of contemporary policymaking, systemic and theoretical approaches to law and policy came into vogue. This occurred in the 1970s and 1980s⁷ and also, to a degree, in the years between World War I and the decade of the 1930s. In the 1920s, for example, several members of elite law school faculties became invested in the American Law Institute's (ALI) efforts to systematize the principles of common law in its Restatement of the Law project, and those participants were united

5. See CHARLES W. ELIOT, REPORT OF THE NINTH ANNUAL MEETING, IN ESPECIAL HONOR OF CHRISTOPHER COLUMBUS LANGDELL 70 (1895), quoted in ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 184 n.28 (1967).

6. American law reviews of the 1940s or 1950s had a relatively ahistorical orientation as compared with the 1920s or the 1970s. According to the *Index to Legal Periodicals*, legal journals published fewer than 254 "legal history" articles in the entire decade of the 1950s, while 333 such articles appeared in the three-year period from September 1976 to August 1979. See 9 INDEX TO LEGAL PERIODICALS 390-91 (1952) (covering August, 1949 to July, 1952); 10 INDEX TO LEGAL PERIODICALS 371 (1955) (covering August, 1952 to July, 1955); 11 INDEX TO LEGAL PERIODICALS 356-57 (1958) (covering August, 1955 to July, 1958); 12 INDEX TO LEGAL PERIODICALS 399-400 (1961) (covering August, 1958 to August, 1961); 18 INDEX TO LEGAL PERIODICALS 872-77 (1979) (covering September, 1976 to August, 1979). Even allowing for the increase in law review scholarship and indexed law journals between 1960 and 1976, the comparison appears striking.

For additional evidence of the general tendency of the legal academy, for at least three decades beginning in the 1930s, to treat scholarly projects in legal history as marginal or uninspiring, I might offer the testimony of those of us who began teaching law in the early 1970s with a shared interest in legal history and a shared enthusiasm for the scholarly opportunities in the area. Only one or two of us, in job interviews, were encouraged to pursue legal history as a scholarly field, and a number were actively discouraged. After garnering initial reactions, many of us decided to identify ourselves with other more "mainstream" subjects.

7. See, e.g., Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

in their confidence that they could do a far better job of "law reform" than official policymakers, such as state legislators.⁸

History, which offers explanations for why the currently dominant attitudes and practices of policymaking remain in place even when they seem dysfunctional, can be seen as a systemic scholarly methodology. It also can be seen as a subversive enterprise. A sense of disquiet about the orientation of contemporary policymaking can spur historical research, and the findings can contribute to that disquiet. Through temporal comparison, historical studies frequently suggest that governing assumptions about "the way things are," which lead us to endorse certain practices or policies, are not universal, but rather time bound, contingent, and even fortuitous. The New Deal as a historical subject furnishes a suggestive example.

The New Deal arguably ended, in the sense of its political, economic, and legal upheavals, over fifty years ago. It left in place, however, a governmental apparatus, at both the federal and state levels, of hitherto unprecedented magnitude in American life. Over the course of the past fifty years changes in the political and economic climate of American society — renewed prosperity and the realignment of the party affiliations of various constituent groups being only two examples — have altered the context of New Deal practices and policies. Moreover, after the Second World War both the doctrinal orientation of constitutional law and the Court's self-fashioned role as an overseer of at least a significant component of legislative activity — activity affecting civil rights and civil liberties — have represented discernible changes from the New Deal period. Finally, on the level of popular culture, a succession of political slogans designed to identify the Democratic party with a legacy from the 1930s — Fair Deal, New Frontier, Great Society — also can be seen as signifying the implicit assignment of the "New Deal" to a particular period in time.

Thus in one sense the New Deal unmistakably has receded into the past. But it also has retained a continuity with the present in at least one major respect. The significant political, economic, and legal changes of the past fifty years have not been paralleled by a comparable change in the arguably "revolutionary" relationship between the "public" and "private" spheres of American life that the New Deal established. Prior to the 1930s government had, by any account, a minimalist presence, a reflection of its meager regulatory and distributive capacities. Since the New Deal, government at

8. For an argument that the formation of the ALI and the Restatement project can be seen as intuitive efforts on the part of elite sectors of the legal profession to come to grips with the perceived "uncertainty" and "complexity" of modernity, see G. Edward White, *The American Law Institute and the Emergence of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* (forthcoming 1997).

both the state and federal levels has become an increasingly prominent and ubiquitous force.

The increased presence of government in American life has arguably been less revolutionary than the accompanying change in conceptions about what government represents and about what portions of American society are appropriate subjects of governmental action. Prior to the New Deal, theories of governance assumed the existence of a substantial "private" sphere of American life, a vast, general domain that government could invade only for specially conferred "public" purposes. Since the New Deal, we take the government to have general regulatory powers limited only by special freedoms conferred on individuals or groups. The New Deal thus represents a sea change in conceptions of the appropriate boundaries for the "public" and "private" sectors of American life, and that change in conceptions remains with us still.

This change in the conception of government and of the relationship between governmental powers and private freedoms has had, in my judgment, a decisive effect on the overwhelming majority of historians who have chosen to write on the New Deal. Whatever historical subjects the members of this group of historians have chosen to address, two common messages — one explicit and the other implicit — have emanated from their accounts. They have argued explicitly, in monograph after monograph and in Leuchtenburg's synthetic works, that the governing apparatus of American society ushered in by the New Deal bore no resemblance to any governing apparatus that had existed previously.⁹ In addition, they have argued implicitly, indeed taken for granted, that the New Deal governing apparatus is still our apparatus; that the world of affirmative government created in the New Deal is still our world. Thus the conventional history of the New Deal has created an unmistakable inference: as contemporary Americans we remain "connected" to the New Deal and to the events and ideas that made affirmative government necessary and desirable in America.

I find that this inference imposes a limitation on our ability to fashion a history of the New Deal that satisfies a central requirement of any work of historical scholarship that aspires to professional stature and a decent shelf life. The requirement is that the history confine its subject to a distinctive period in time, a period that is separate from the one in which the history is being written. If we are to accept the inference of our continuing connection to the New Deal, it would appear that we cannot fashion a truly systemic or truly subversive historical account of that period. The assumed connections between the revolutionary New Deal theories of

9. See, e.g., WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 326-48 (1963).

governance and our current theories suggest that we are not yet in a position to entertain seriously alternatives to those theories of governance and thus to see the conceptual changes of the New Deal as time-bound and contingent. As long as we instinctively embrace pervasive affirmative government, we cannot fully contemplate either the world that preceded the New Deal, in which affirmative government was exceptional rather than usual, or imagine a future in which affirmative government might be significantly reduced or new boundaries between the public and private spheres of American life fashioned. Until then we cannot cabin the New Deal in time.

Such assumptions about the relationship between New Deal theories of governance and current theories inform Leuchtenburg's constitutional history of the New Deal. To him, we remain participants in the revolutionary governmental innovations of that time. He believes that when we look back at the political or economic dislocations of the New Deal era and at the legal responses to those dislocations, our instinctive reactions replicate those of the New Dealers.

Therefore, for Leuchtenburg, the history of the constitutional revolution is a history of how our current world of governance came into being. He begins by exposing us to the unprecedented social and economic problems of the 1930s and by making us recognize the inability of the "Old Court"¹⁰ to deal with those problems or to understand the solutions proposed by the New Deal Congresses and the Roosevelt administrations. He goes on to demonstrate the capacity of the "New Court"¹¹ to embrace those solutions quickly and flexibly. Finally, he invites us to consider how the increased presence of government in the New Deal fostered "[t]he birth of America's second bill of rights" (p. 237). Leuchtenburg suggests that the eventual application of many of the provisions of the Bill of Rights to the states through their incorporation in the Due Process Clause of the Fourteenth Amendment evolved from a consciousness, originating in the New Deal years, that although legislative bodies properly regulate the obsolescent economic "liberties" of what Justice James McReynolds referred to as "the former order,"¹² they also pose a threat to noneconomic liberties.

10. Leuchtenburg defines the "Old Court" as "the Supreme Court of the pre-1937 era," which originally resisted and then embraced New Deal legislation. P. 226. For Leuchtenburg the year 1937 amounts to a watershed in American constitutional history. See *infra* text accompanying notes 39-40.

11. By the "New Court" Leuchtenburg means the Court that "[b]eginning in 1937 . . . upheld every New Deal statute that came before it." P. 225. Because there were no personnel changes on the Court until after the 1937 Term, Leuchtenburg obviously intends "Old" and "New" to signify changes in attitudes more than changes in personnel.

12. See p. 155 (quoting a letter from James McReynolds to Dr. Robert F. McReynolds (Oct. 30, 1937) (on file with the University of Virginia)). The context of McReynolds's re-

In the construction of history, Leuchtenburg fails to address an issue that arguably forms an elemental part of any project of historical scholarship, and his failure is shared by most participants in the conventional historiography of the New Deal. The issue can be simply put: *Why* did those actors, in the New Deal period, who decided to reinterpret the Constitution to permit a much greater governmental regulatory presence, act as they did? They acted, to be sure; their legislative proposals and constitutional decisions "revolutionized" the power and the presence of government in America. Why did they assume that the particular set of social and economic conditions they faced in the 1930s required so profound a response?

Why, in sum, did the legal actors of the New Deal period decide to supplant one conception of government — one which took a general realm of private activity, presumptively untouched by the state, as the norm, and required special justification for state intrusions into that realm — with another conception, which took the general regulatory powers of government as the norm and treated individual freedoms against the state as being specially conferred? Why did they abandon one longstanding theory of the relationship of the public and private spheres in America in favor of its virtual opposite?

As was apparent to their contemporaries, those who proposed or sustained the legislative mandate of the New Deal had associated themselves with a revolutionary conception of government in America. For evidence of that perception, one only need look at opinions in which Supreme Court majorities or dissenters declare various pieces of New Deal legislation unconstitutional. Leuchtenburg outlines the New Deal legislative agenda and discusses many of those opinions, yet he never offers an explanation of the intellectual bases of the conceptual shift or, for that matter, of the intellectual bases of constitutional opinions resisting that shift.

The message that follows from this seems somewhat unsettling. Leuchtenburg's readers apparently are supposed to conclude that the conceptual shift in the meaning of government that took place during the New Deal was necessary and inevitable, given the times, and that resistance to it demonstrated a lack of awareness of the "realities" of modernity. Leuchtenburg assumes that if he presents all the details of the change, his readers, themselves still situated within the New Deal universe of affirmative government, instinctively will understand the theoretical basis of that change. As such, the defining element of the New Deal — its revolutionary theory of

mark was the opening of the Supreme Court's 1937 Term. "The Court starts off much as I expected," he wrote his brother. "There is not much to be expected of it by sensible people of the former order." *Id.*

the role of government in America — remains essentially unexamined in Leuchtenburg's history.

II. THE INFERENTIAL STRUCTURE OF LEUCHTENBURG'S NARRATIVE

I have been arguing that Leuchtenburg believes that the revolutionary quality of the New Deal era can be conveyed through a catalog of details, the meaning of which will be obvious to contemporary readers still "connected" to that period of history. One could argue that this reading, even if accurate, does not limit the value of Leuchtenburg's work. *The Supreme Court Reborn*, such an argument might suggest, is in the genre of narrative history, in which the author weaves a variety of inaccessible information, much of it from archival sources, into an unintrusive and readable "story." From this point of view, Leuchtenburg wants the details of his narrative "to speak for themselves" and does not want to intrude upon them with undue analysis or speculation so that their impact becomes more dramatic and more powerful.

At first blush this relatively modest view of historical analysis, in which the historian subordinates himself to the story, appears to be consistent with the narrative structure of *The Supreme Court Reborn*.¹³ Leuchtenburg begins the book, for example, with a chapter on Justice Oliver Wendell Holmes's opinion for the Court in *Buck v. Bell*¹⁴ and relates the poignant tale of Carrie Buck's involuntary sterilization. Leuchtenburg explains that the Court's decision rested on a false ground — that Buck was a "moron" — and that it actually reflected the enthusiasm of both the Virginia legislature and Holmes for the eugenics movement. The chapter presents no new information on either Carrie Buck or the case in general.¹⁵ Nonetheless, it is a masterful and compelling narrative synthesis, ending sixty-one years after the event, with the discovery by Carrie's sister Doris that Carrie's "appendectomy" in the Lynchburg,

13. One reviewer concludes that Leuchtenburg has "serve[d] up a series of integrally interconnected essays . . . without explaining how they speak to each other" and that "[i]n large measure, this is intentional": Leuchtenburg "leaves the reader alone to draw ultimate conclusions about the Roosevelt Revolution." Devins, *supra* note 4, at 239.

14. 274 U.S. 200 (1927).

15. For sources that do provide further information on Carrie Buck or *Buck v. Bell*, see J. DAVID SMITH & K. RAY NELSON, *THE STERILIZATION OF CARRIE BUCK* (1989); Walter Berns, *Buck v. Bell: Due Process of Law?*, 6 W. POL. Q. 772 (1953); Robert J. Cynkar, *Buck v. Bell: 'Felt Necessities v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 855-59 (1986); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985), all of which Leuchtenburg cites. For evidence of Holmes's obvious pleasure in reaching the result in *Buck v. Bell*, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES* 408 (1993).

Virginia, State Colony for Epileptics and Feeble-Minded had been a salpingectomy.¹⁶

Leuchtenburg draws no connection between his account of *Buck v. Bell* and the chapters that follow, and this episodic pattern tends to characterize his book throughout. In a thirty-two page chapter on Hugo Black's appointment to the Supreme Court, for example, only the last two pages mention Black's role in the constitutional revolution, which Leuchtenburg believes followed the 1936 Term. In like manner, Leuchtenburg's last chapter, a history of the application of the Bill of Rights to the states, ranges from the years after the Civil War to the late 1960s and devotes only three of twenty-one pages to the New Deal period.¹⁷ Leuchtenburg does not attempt at any point to integrate his chapters or to suggest their historiographic implications. One might well conclude that he simply wants to engage the reader with some vignettes from twentieth-century constitutional history.

Nevertheless, a closer look at Leuchtenburg's chapters reveals not only that they fit with one another, but that their topical and chronological arrangement creates a series of interconnected inferences that give meaning to his narrative history. That meaning might be described as follows: The New Deal and the constitutional revolution that accompanied it demonstrated that certain established presuppositions about American life — reflected in the system of unregulated capitalism, relatively rigid definitions of the respective powers of the branches of government, and the relative unconcern among policymakers for the welfare of socially and economically disadvantaged persons — had suddenly grown "old" and were unresponsive to the altered conditions of modern America. The New Deal encompasses the moment in time in which policymakers confronted the senescence of those presuppositions and abandoned them for "new" ones.

This meaning may not seem startling. A number of significant policy changes occurred around the time of the New Deal, and the Roosevelt administration defended its efforts to "pack" the Supreme Court in 1937, the pivotal episode of Leuchtenburg's narrative, by arguing that the Justices who had resisted the first wave of New Deal legislation had done so because they were "too old." The Court-packing plan itself dealt directly with age, providing for the appointment of an additional Justice when a sitting Justice declined to retire at the age of seventy. One could conclude that Leuchtenburg successfully introduces a fair amount of contempo-

16. See p. 25. "My husband and me wanted children desperate," Doris Buck Figgins told a *Washington Post* reporter a year after discovering that she had been sterilized. "I never knew what they'd done to me." P. 25 (quoting WASH. POST, Feb. 23, 1980).

17. See pp. 249-52 (discussing First Amendment cases from 1937 through 1941).

rary sources equating age and obsolescent attitudes with opposition to the New Deal.

When one emphasizes the assumed connectedness between the New Deal and our contemporary universe, however, Leuchtenburg's characterizations of New Deal policies as new, and of resistance to those policies as old, take on an expanded meaning. "New" becomes equated with "currently treated as natural and appropriate," and "old" with "alien and obsolescent." As a result *The Supreme Court Reborn* becomes a version of "winner's history," in which readers are taken as assuming that modern attitudes and theories about economic regulation, separation of powers, the socially and economically disadvantaged, and above all the role of government originated in the New Deal. The "losing" attitudes towards those issues, on the other hand, are not taken seriously, but dismissed as old and as representative of a "former order." Consequently, the magnitude of the conceptual shift about the role of government during the New Deal is taken for granted, but never explained. Indeed, Leuchtenburg proceeds as if he need not explain it because its starting assumptions, being our own, already have been vindicated.

Let us now consider Leuchtenburg's narrative presentation with this inferential message in mind. The message seems consistent with a division of his narrative into three sections: Chapters One through Three, where he describes and criticizes the attitudes of the "former order"; Chapters Four through Six, where he shows how the message of those attitudes' obsolescence was internalized, thus becoming an explicit dimension of twentieth-century constitutional history; and Chapters Seven through Nine, where he demonstrates how the new attitudes identified with the New Deal were put into place and a constitutional revolution occurred. Throughout this narration Leuchtenburg conveys his message implicitly, through evocative language, rather than through explicit interpretive arguments.

In Chapter One, on *Buck v. Bell*, Leuchtenburg attempts to show the callousness of pre-New Deal elite policymakers to the plight of disadvantaged persons. He describes the eugenics movement as having a "transparent class bias" and as embodying a "heartlessness toward the handicapped" (p. 6). In his mind, "[e]lite groups . . . had an economic motivation for endorsing eugenics. . . . [T]hey thought the country was being taxed excessively to support a burgeoning class of morons" (p. 8). He also contends that eugenics was declining in scientific stature by the late 1920s. It had "run into a cross fire of criticism." He notes that "by 1927 only the most sheltered Justice could have failed to know that eugenics had increasingly come into dispute" (pp. 20-21). Unfortunately, Holmes

was just such a sheltered Justice. He was eighty-six at the time he wrote the opinion in *Buck*, and the opinion "shows . . . his allegiance to elite attitudes" and his "insensitivity to the position of women in a sexist society and to the class prejudice inherent in the legislation" (p. 21). Leuchtenburg concludes that Holmes's opinion in *Buck* "shows the revered 'Yankee from Olympus' at his worst" (p. 19). However, the "*decision* may well have been inevitable" (p. 23): Louis Brandeis and Harlan Fiske Stone joined Holmes's opinion. Indeed, "1927 was too soon," in Leuchtenburg's view, "for the Court to reverse Virginia's highest court in a case such as *Buck*."¹⁸

From *Buck* Leuchtenburg turns in Chapter Two to the 1935 Supreme Court case of *Railroad Retirement Board v. Alton Railroad Co.*,¹⁹ in which the Court reviewed the Railroad Retirement Act of 1934. He characterizes *Alton* as a decision that "gravely affected the future prospects of [the Roosevelt administration's] program, created deep fissures between the executive branch and the . . . Court[,] and left two million railroad workers, past and present, embittered and bereft" (p. 27). He prepares the reader for the *Alton* case by noting that

[t]he eight years separating *Buck* from [that] case saw . . . drastic change in the circumstances in which the Court operated. . . . The Wall Street crash of 1929 and the ensuing Great Depression had led to emergency legislation . . . by Franklin D. Roosevelt and the New Deal that raised stark challenges to the constitutional orthodoxy expounded in the 1920s. [p. 26]

In his view, *Alton* tested "the attitude of the Court toward the New Deal" (p. 26) and demonstrated that the Court had a lack of sympathy to Roosevelt's domestic agenda. Justice Roberts, for a 5-4 majority, invalidated the Act on due process and commerce power grounds. Leuchtenburg's narrative emphasizes two features of the *Alton* case: the close connection between the legislation and the economic circumstances under which it was drafted, and the utter indifference of the Roberts majority to those circumstances, which included the plight of discharged railroad workers. This emphasis relegates the constitutional basis of the decision to relative insignificance. In fact, Leuchtenburg directs much more attention to criti-

18. P. 23. By referring to the Supreme Court of Virginia, Leuchtenburg means to suggest that the Court was not inclined at the time "to strike down any state law on the grounds that the liberties protected by the Bill of Rights against federal enforcement also are safeguarded from violation by state governments through incorporation in the Fourteenth Amendment." P. 23. This is a curious statement, because incorporation would not have been necessary. Four years earlier, in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the Court held that "liberty" in the Fourteenth Amendment's Due Process Clause encompassed the right "to marry . . . and bring up children." Leuchtenburg himself points this out. See p. 23. Moreover, the legacy of the Court's substantive due process jurisprudence already encouraged aggressive review of state legislation when "liberties" were at stake. See *Adkins v. Children's Hospital*, 261 U.S. 525, 546 (1923).

19. 295 U.S. 330 (1935).

ques of Roberts's reasoning than to explanations of it.²⁰ These critiques, piled one upon another, demonstrate how the decision infuriated its opponents, and how this fury spilled over into the Court itself. As Leuchtenburg concludes:

The rail pension ruling indeed had been a turning point If the thinking that Roberts revealed . . . prevailed, the Welfare State would be stillborn. From that day forward, neither Roosevelt nor his aides would rest until they had found a way to overcome the obstacle to their plans presented by the Court. [p. 51]

One can easily grasp the inferential messages of Leuchtenburg's narrative on the *Alton* case from its descriptive language. Consider the following examples. The day that the decision was handed down, May 6, 1935, was "one of the most fateful days in the constitutional crisis of the Great Depression." The Depression "dealt savagely with the railroad industry," and the railroad "fired more than two out of every five railway workers" between 1929 and 1933, so that "[b]y the late summer of 1932 more than 760,000 railroad workers had lost their jobs." Given "a rigid seniority rule" in the railroad industry, "the massive layoffs after 1929 drove hundreds of thousands of the youngest men into the ranks of the unemployed." Carriers had established private pension plans, "but they were highly unsatisfactory. The amounts of the pensions were small, only a limited number of railroaders at a very advanced age were eligible, and the carriers could abolish the programs at their whim" (pp. 28, 29, 31).

Leuchtenburg explains that railroad workers had powerful unions — railway "brotherhoods" — that had some "political clout" in Congress. These brotherhoods induced Senator Robert Wagner of New York, a known friend of the labor movement, to introduce a bill in 1932 that would impose a pension system, to which both carriers and employees would contribute, for the railroad industry. Supporters contended that the system would promote operational efficiency and safety in interstate commerce by creating incentives for "older and less alert people" to retire. The bill made railroad workers eligible for pensions at age 65, after 30 years of service, or after being disabled on the job. It made no provisions for government contributions to the pension system, and its benefits extended to both former and current workers (pp. 31-32).

After President Roosevelt signed the Railroad Retirement Act in 1934, the railroads immediately challenged it on constitutional grounds. In October of that year the Supreme Court of the District of Columbia found it to violate the Fifth Amendment's Due Pro-

20. Leuchtenburg devotes six pages to describing Roberts's opinion, only about half of which discuss his actual arguments. At the same time, he devotes twelve pages to the criticism of it by the dissenting Justices and others. See pp. 34-51.

cess Clause and the Commerce Clause. That court concluded that the Act unfairly took money from the carriers and gave it to workers, many of whom were no longer their employees and no longer engaged in interstate commerce. Roberts invoked those very grounds in invalidating the statute on appeal. Nonetheless Leuchtenburg characterizes Roberts's opinion as "often hard to distinguish . . . from the brief for the railroads" (p. 35).

Leuchtenburg's description of the *Alton* case suggests that Roberts quickly dismissed the arguments in support of the Act. Roberts "brushed . . . aside" the justification for including workers no longer employed by the railroads, which was "to safeguard those who had been laid off temporarily from having their long years of past service expunged, and to make certain that carriers did not refuse to rehire them in order to escape the burden of pension obligations" (p. 35). In like manner, Roberts "scoffed at the claim" that the legislation "improved the morale of employees who would know that they would lose their pension rights if they were discharged" (p. 36). Roberts "made little effort to conceal his contempt both for the legislators who had created this monstrosity and for the attorneys who sought to persuade the Court that it was a legitimate exercise of the powers of Congress" (p. 37). Roberts's response to the Railroad Retirement Act, for Leuchtenburg, demonstrated that "his conception of the relation of employer and employee . . . was almost medieval in nature" (p. 39; internal quotation marks omitted):

He thought of workers as owing fealty and "gratitude" to management. Any benefits they received resulted from the generosity of businessmen who dispensed "largess" or "gratuities" or "bounty" to local hands. They were not social rights to which one was entitled in an industrial society. . . . The actual hard lot of the railroad men — more than half of whom had been dismissed in only three years because of the exigencies of the Great Depression — could not penetrate such a frame of mind. [p. 38]

The emotive theme of Leuchtenburg's chapter on the *Alton* case thus centers on a juxtaposition of the plight of discharged railroad workers in a depressed economy and the "medieval frame of mind" of Justice Roberts. Because Roberts cannot sympathize with the "actual hard lot of the railroad men," he cannot conceive of pensions as "social rights to which one was entitled in an industrial society" (p. 39). One might point out that there was a good deal more contained in Roberts's attitude toward the Railroad Retirement Act challenged in *Alton*. He also saw it as a "naked appropriation of private property"; a violation of the traditional prohibition in American constitutional jurisprudence against a legislature's "taking the property of one and bestowing it on another"; an unprecedented restructuring of the boundaries between government and

the private sector; and an effort "to substitute legislative largess for private bounty and thus [to] transfer the drive for pensions to the halls of Congress and [to] transmute loyalty to employer into gratitude to the legislature."²¹

Leuchtenburg takes no interest, however, in exploring these dimensions of Roberts's opinion in the *Alton* case. His emphasis is solely on demonstrating how the patent insensitivity of the opinion, given its failure to grasp "the exigencies of the Great Depression," made it especially provocative to supporters of the New Deal. Indeed it was the *Alton* decision, Leuchtenburg suggests, that set in motion the forces that would eventually lead to the Court-packing proposal. "Though there had been some muttering about the need to curb the powers of the Supreme Court before," he states, "the rail pension case galvanized organized labor, liberal Congressmen, and the Roosevelt administration to take the first serious efforts in that direction" (p. 49).

Having demonstrated the elitist and outmoded conceptions of modern life that made Court majorities in both *Buck* and *Alton* insensitive to the lot of the underclasses and to the casualties of the Depression, Leuchtenburg next seeks to generate momentum for the centerpiece of his narrative, the Court-packing plan. In order to do so, he devotes a chapter to the Court's decision in *Humphrey's Executor v. United States*.²² *Humphrey* unanimously curbed the President's power to discharge a commissioner of the Federal Trade Commission (FTC) without cause on separation of powers grounds. Although it distinguished out of existence an earlier Supreme Court case allowing the President to remove a federal Postmaster,²³ *Humphrey* did not generate the outcry that *Alton* had, primarily because it was seen as an affirmation of the independent, nonpartisan ideal of federal administrative agencies (p. 75).

21. *Alton*, 295 U.S. at 330, 350-51. Recent scholarship in legal and constitutional history has emphasized the degree to which, over the period stretching from at least the 1830s through the 1930s, the power of government to remedy inequalities in the market, or in the private sector generally, traditionally was limited to responses that served a legitimate "public purpose" and that benefited and burdened all actors in that sector equally, as distinguished from responses that favored the interests of some classes at the expense of others. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993). Although that tradition, which saw social and economic inequalities as either "natural" or market-driven rather than as endemic to an industrial capitalist society, was arguably on the defensive from the early twentieth century on, see *id.* at 132-59, it was still in place at the time of the *Alton* case. See *id.* at 189-90. One of the cornerstone principles of that constitutional tradition was that "a law that takes property from A. and gives it to B. . . . is against all reason and justice." *Id.* at 127 (citations omitted).

22. 295 U.S. 602 (1935).

23. See *Myers v. United States*, 272 U.S. 52 (1926). In *Myers* Chief Justice Taft, hoping to extend the impact of the decision, added language suggesting that Presidential removal power extended to independent regulatory commissions. The Court in *Humphrey* specifically rejected that language. See 295 U.S. at 626.

Leuchtenburg, however, sees *Humphrey* as important because it infuriated Roosevelt. Roosevelt expected to be able to remove William Humphrey at his pleasure, and he had been advised, on the basis of the earlier precedent, that he would be able to do so (pp. 68-69). Leuchtenburg suggests that Roosevelt took the decision personally, as Justice Sutherland's opinion for the Court gave no signal that the Roosevelt administration could have fairly relied on the precedent, which was nine years old, and because Roosevelt very much wanted to "shape . . . economic policy" through the FTC. Leuchtenburg concludes the chapter by asserting that "in February 1937, [when] Roosevelt precipitated the historic controversy over his endeavor to 'pack' the Supreme Court, a number of his opponents traced the conflict back to *Humphrey*" (p. 80).

Humphrey is important to Leuchtenburg in another respect. He suggests that Roosevelt wanted significantly to increase the role of the FTC as an activist, watchdog agency by noting that two early New Deal statutes — the National Industrial Recovery Act of 1933 and the Securities Act of that same year — anticipated FTC supervision of trade-practices litigation and FTC enforcement of securities regulations. Roosevelt wanted to ensure that he had maximum control over the FTC and other independent regulatory agencies so that his administration could implement economic reform measures unobstructed by partisan opposition. The politicization of the FTC thus made up one part of Roosevelt's "new" activist approach to the economic crisis that had swept him into office, and the Court's refusal to allow him to control FTC personnel symbolized, in his mind, its opposition to his approach. Leuchtenburg argues that *Humphrey* confirmed for Roosevelt that the Court was "old" and "out of touch" in its response to the issues he was facing.

Thus when Leuchtenburg turns in the next three chapters to the Court-packing crisis and to *West Coast Hotel v. Parrish*,²⁴ a case decided in the midst of that crisis, he already has established the inferential context in which the reader is to consider those developments. The Court appears as, and to an important degree is, a group of old men: old not only chronologically but, more important, ideologically. It seems an otherworldly and insensitive institution, prevented by its intellectual rigidity and its elitism from responding to the unprecedented problems faced by the Roosevelt administrations and, in particular, from recognizing their innovative responses to those problems. For just as the Court was "old," the framers of the New Deal were "new," both in their humanitarian consciousness and their theories of governance.

The Court-packing crisis and the relationship of that crisis to the constitutional revolution have been Leuchtenburg's particular area

24. 379 U.S. 379 (1937).

of scholarly focus over the past several years. As such, his two chapters on the origins, defeat, and consequences of the plan are the most richly detailed and extensively supported in his book, with ample attention to contemporary archival sources.²⁵ I concern myself primarily with the three central arguments that Leuchtenburg advances in those chapters. First, he argues that the plan symbolized the Roosevelt administration's perception that the Court's opposition to the New Deal was intractable: The old Court would never fully be able to identify with the new governmental policies proposed by Roosevelt and his supporters. Second, he claims that the introduction of the Court-packing plan directly affected the Court's short-term response to New Deal legislation. Finally, he asserts that "[t]he Court struggle speeded the acceptance of a substantial change in the role of government and in the reordering of property rights and also had the probably unanticipated result of the appointment of Justices much more solicitous of civil liberties and civil rights" (p. 162). It is "not surprising," Leuchtenburg states as a conclusion to this last argument, "that historians speak of 'the Constitutional Revolution of 1937,' for in the long history of the Supreme Court, no event has had more momentous consequences than Franklin Roosevelt's message of February 1937" (p. 162).

Pursuing each of those arguments in detail would vastly expand the scope of this review and would require extensive exploration of the lines of historical questioning that I address primarily in the review's next section. Here I want merely to give my impressionistic reactions to the arguments. The reactions reflect some exposure to the sources Leuchtenburg consults and to the work of other scholars.²⁶

25. These chapters rely heavily on quotations from contemporary sources to contrast the old Court and the new policies of the Roosevelt administration. Leuchtenburg's use of the quotations in his narrative is extremely effective: The quotations strongly support his argument that Roosevelt's attempt to tie the Court-packing plan to the age of the Justices was not primarily an effort to articulate some purportedly neutral, nonpolitical criterion for replacing members of the Court, but was instead a conscious attempt to draw on the perceived public sentiment that the Court was old and out of touch. The only concern Leuchtenburg's use of such sources raises for me is that the quotations may well not represent most responses to the Court-packing plan. My own research suggests that the plan engendered a wide variety of responses from persons who were politically loyal to Roosevelt.

26. Despite Leuchtenburg's longstanding investment in the Court-packing crisis and its relationship to constitutional history in the New Deal period, he is not the only scholar concerned with those issues. Some recent work has proposed alternative accounts of the significance of the Court-packing episode. See, e.g., Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994); Eben Moglen, *Toward a New Deal Legal History*, 80 VA. L. REV. 263 (1994); Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267 (1988); Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277 (1994); Devins, *supra* note 4. This scholarship, taken together, suggests that we should view the crisis as part of a long, uneven, and complicated progression of developments in twentieth-century American constitutional jurisprudence and, more fundamentally, as a demonstration of the appearance of an altered theory of constitutional government in America. This alternate theory conceived the appropriate role

I believe that the first argument — that New Deal supporters viewed the Court as old, both chronologically and ideologically — provides an important clue to the historical character of the New Deal period. It goes far to explain the major shift in thinking about the role of government that Congress, the Executive branch, and eventually the Court underwent during that period. That very perception on the part of New Deal supporters, however, coupled with the pervasiveness and endurance of the accompanying conceptual shift in attitudes toward governance, actually have obscured the distinctiveness of the New Deal and prevented its being readily cabined in time. I amplify this reaction in the review's concluding section.

My initial reaction to the second argument is that, although Leuchtenburg seems significantly invested in the importance of the Court-packing proposal, and although he firmly establishes its importance to Roosevelt and his aides who conceived it, his hypothesis of a direct connection between the introduction of the Court-packing plan and the Court's short-run accommodation to New Deal legislation in the 1936 Term is not adequately supported by his own evidence.

Under an alternative, more credible hypothesis, the Court-packing plan had only an indirect effect on the Court's eventual embrace of New Deal regulatory legislation. This hypothesis emphasizes the following historical facts. The introduction of the plan precipitated Congressional action to increase the retirement benefits for Justices over seventy²⁷ within three years. Three justices inclined to find New Deal legislation constitutionally dubious responded to these new incentives and retired. Three strong supporters of Roosevelt's policies replaced them and the Court now had a decisive majority sympathetic to the New Deal's legislative agenda. Assuming that sympathy precipitated the constitutional revolution of the late 1930s and 1940s, one could argue that the revolution was set in motion by the creation of incentives for Justices to retire by a Congress sympathetic to Roosevelt.

Of course that hypothesis risks proving too much. Between 1937 and 1941 Roosevelt had not merely three, but eight appointments to the Supreme Court. All of his appointees, including Harlan Fiske Stone, whom he promoted from Associate Justice to

of the Supreme Court not so much as a guardian of the boundaries between the "public" and "private" spheres but as an active participant, at least with respect to issues involving governmental regulation of the economy, in dissolving those boundaries and extending the reach of affirmative government. It characterizes the Court-packing episode not as a cause of change but as a symptom of change.

27. See Act of March 1, 1937, ch. 21, 50 Stat. 24. For a discussion of the Act's history between 1935 and its eventual adoption shortly after the Court-packing proposal first appeared, see Cushman, *supra* note 26, at 214-15.

Chief Justice, were directly connected to the Roosevelt administration as appointed officials, were indirectly connected as advisors, or were known to sympathize with the policy agenda of the New Deal.²⁸ This raises the possibility that the constitutional revolution primarily resulted from actuarially driven fortuities in the appointments process. But Leuchtenburg, although mentioning that when Roosevelt introduced the Court-packing plan he was aware of Justice Willis Van Devanter's prospective retirement, argues that Roosevelt did not regard any one vacancy as decisive, partly because he was uncertain about the commitment of several Justices to the New Deal's agenda and partly because he had promised the next vacancy on the Court to Senator Joseph Robinson of Arkansas, a "65-year old conservative" who was the floor manager of the Court-packing plan (pp. 144-45). Leuchtenburg also contemptuously dismisses actuarially oriented explanations of the constitutional revolution.²⁹

With respect to Leuchtenburg's third argument, I believe that the Court-packing plan itself, as distinguished from the changes in personnel to which it may have indirectly contributed, had almost nothing to do with the "speed[ing of] the acceptance of a substantial change in the role of government" (p. 162) and nothing to do with the appointment of Justices who were more solicitous of civil liberties or, for that matter, with the developments that Leuchtenburg associates in his last chapter with the "birth of America's second bill of rights" (p. 237).

The role of government did change substantially during the New Deal, as I previously have suggested, but that change was already underway before the Court-packing plan appeared. Indeed, the plan can be seen as a direct response to the Court's resistance to that change, and that resistance continued until at least the early 1940s. By then the Court-packing plan was long since moribund,

28. The appointees in that time period were Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Harlan Fiske Stone (moving from Associate Justice to Chief Justice), James Byrnes, and Robert Jackson. At the time of their appointments Reed, Douglas, Murphy, Byrnes, and Jackson held various positions in the federal government to which they had been appointed by Roosevelt. Black was a pro-New Deal U.S. Senator and Frankfurter a close unofficial advisor to Roosevelt on a variety of issues. Only Stone, who was a Calvin Coolidge appointee, could be said to be other than a New Deal Democrat, but he had been one of the most consistent supporters of New Deal policies on the Court between 1933 and his appointment to the Chief Justiceship in 1941.

29. In 1977 a political historian used probability theory to argue that given the age of the Justices on the Court after the 1936 election, Roosevelt would have had at least one vacancy in his second term. See R.J. Morrison, *Franklin D. Roosevelt and the Supreme Court: An Example of the Use of Probability Theory in Political History*, 16 *HIST. & THEORY* 137 (1977). Citing a methodological critique of Morrison and a comment by a retired Circuit Court judge that "[j]udges and other pensioners rarely die seasonably," Leuchtenburg concludes that Morrison's article relied "on assumptions so fallacious that it must have set back quantitative history for a generation." P. 281 n.92.

and the new Roosevelt appointees were in place. Other sectors of American society may have implicitly accepted the change as early as 1936 when Roosevelt was overwhelmingly reelected, but that election took place before the introduction of the plan.³⁰

Leuchtenburg also associates the plan with the emergence of Justices who were inclined to be supportive of civil liberties, but there is no evidence that a concern for civil liberties played any part in Roosevelt's decision to introduce the plan, or, for that matter, in his calculus for appointing Supreme Court Justices. The Court and New Deal legislators clashed over issues of economic regulation. Civil liberties issues, on the other hand, only sporadically appeared on the Court's agenda during Roosevelt's first two terms.³¹ Of the Justices Roosevelt appointed to the Court, some did end up being prominent supporters of civil liberties later in their judicial careers, but between 1937 and 1941 the Roosevelt appointees were openly divided on those civil liberties cases — primarily First Amendment cases — that the Court entertained.³² Furthermore, Roosevelt's appointments of Hugo Black, a former member of the Ku Klux Klan, Stanley Reed, a native of Kentucky, and James Byrnes, a resident of South Carolina and an opponent of desegregation, hardly would have been encouraging to those interested in promoting the civil rights of blacks. In short, it seems accurate to say that the Court, in the two decades beginning in 1937, heard and decided far more noneconomic civil liberties cases than it had in the past two decades, a fact that is itself historically significant. To suggest that the Court did so because its New Deal appointees were themselves "civil libertarians," however, seems an oversimplification, and not even Leuchtenburg is prepared to suggest a direct connection between the Court-packing plan and a heightened interest in civil liberties issues (p. 162).

I now want to turn back to Leuchtenburg's second argument, because it is the inferential centerpiece of his narrative. I have sug-

30. The plan was introduced in a special message by Roosevelt on February 5, 1937. See p. 133.

31. See Michael Klarman, *Constitutional Fact/Constitutional Fiction*, 44 STAN. L. REV. 759, 791 (1992) (expressing skepticism about the connection between the New Deal validation of activist government and the emergence of popular support for civil liberties). Responding to Klarman's article, Leuchtenburg notes that although no evidence exists that "the Court in 1937 was prepared to go as far in the realm of civil rights as it would subsequently," the "more expansive reading of the commerce clause by the Roosevelt Court opened the way for the civil rights decisions of the Warren Court." P. 299 n.96. He asserts that the Court-packing crisis "had the probably unanticipated result of the appointment of Justices much more solicitous of civil liberties and civil rights." P. 162. Only two of Roosevelt's appointees, however, Black and Douglas, were prominent civil libertarians on the Warren Court. Reed, Frankfurter, and Jackson could not be described as such.

32. For an illustration, see Harry Hirsch's discussion of the tensions within the Stone Court over the flag-salute cases and other civil liberties cases between 1939 and 1942, H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 147-76 (1981).

gested that Chapters One through Three create the emotive theme of a juxtaposition of the insensitivity of "old" men on the Court and the plight of the economically disadvantaged in Depression-ridden industrial America.³³ Chapters Seven through Nine create an emotive theme as well, the coming of the "new order," exemplified by the appointment of Hugo Black to the Court, the constitutional revolution of 1937, and the "second birth of the Bill of Rights" after 1937.³⁴

In between, Chapters Four through Six discuss the Court-packing plan and its allegedly direct connection to the constitutional revolution. Chapters Four and Five pick up the earlier emotive theme, emphasizing the obsolescence of the Old Court, Roosevelt's perception that the Court's chronological and ideological age would prevent it from ever accommodating itself to the New Deal, the reinforcement of that perception by his advisors and members of the public, and Roosevelt's willingness to press the Court-packing plan on Congress, even though he knew it was extremely controversial and even though he had secured a nomination to the Court with Justice Van Devanter's May 1937 retirement. Roosevelt, Leuchtenburg suggests, wanted not just to replace one "old" Justice but to rejuvenate the entire Court (pp. 81-162).

33. Leuchtenburg describes William Humphrey in much the same way that he described Justice Holmes in chapter 1 and Justice Roberts in chapter 2. He quotes the "Progressive" Senator George Norris of Nebraska, who called Humphrey "the greatest reactionary in the country," indifferent to "the toiling millions of . . . honest, common people [who need to be] protected in their rights as against big business." P. 54.

34. Leuchtenburg's chapter on Black's appointment particularly advances this emotive theme. Leuchtenburg states that Roosevelt probably knew about Black's Ku Klux Klan affiliations, and that there is "no evidence . . . that awareness of this past caused Roosevelt to think twice about appointing Black." P. 208. He also concedes that "it is improbable, given the temper of the times, that civil liberties considerations loomed large in his mind in deciding upon a nominee." P. 208. Nonetheless, he chooses to emphasize that Black's reputation as a judge principally rested on his status as "a dissenter [who urged] the Court to break new ground on civil liberties." P. 203. With that image of Black in place, Leuchtenburg then sketches the following symbolic portrait of Black:

The President's trust in Black's liberal proclivities proved well founded. So faithful was Justice Black to the tenets of the New Deal that it was even rumored that Tommy Corcoran wrote his opinions. "Although Black's appointment did not mark the precise chronological point from which the Court's philosophy began its deviation from its previous path," one of his biographers . . . remarked, "it was this event which made it plain beyond all doubt that the Court was about to be reconstituted in the image of the New Deal." . . .

Black's appointment turned out to be only the first of many for the President, and in nominating this outspoken liberal, he set the pattern that most of the other selections for "the Roosevelt Court" would follow. To the Supreme Court would go progressives . . . who shared Black's enthusiasm for the New Deal. The typical appointee would, like Black, be several years younger than President William Howard Taft's representative choice.

Pp. 211-12 (citations omitted).

Black thus emerges as a prototypical representative of the New Court that fostered the constitutional revolution, and his image as a civil libertarian serves to associate that proclivity with both the Roosevelt Court and the revolution itself.

Those chapters also contain Leuchtenburg's claim that "[t]he threat of Court-packing . . . may well have affected [Justice] Roberts's vote in later cases" (p. 143). He advances that claim in the following paragraphs:

On March 29, [1937,] by 5-4 in the *Parrish* case with Justice Roberts joining the majority, the Court upheld a minimum wage statute from the state of Washington that to most people seemed identical to the New York law it had wiped out in *Tipaldo* less than a year before. Two weeks later, Roberts joined in a series of 5-4 decisions finding the National Labor Relations Act constitutional. On May 24, the Court validated the Social Security law. These rulings marked a historic change in constitutional doctrine. The Court was now stating that local and national governments had a whole range of powers that this same tribunal had been saying for the past two years these governments did not have.

The crucial development was the switch of Justice Roberts, which converted a 5-4 division against New Deal legislation to 5-4 in favor.

....

Since 1937 the Court has not struck down a single piece of Congressional legislation constraining business. Although before 1937 legal realism influenced only a few Justices, thereafter the old doctrines of constitutional fundamentalism lost out. Whereas the beneficiaries of the Court before 1937 had been businessmen and other propertied interests, after 1937 they became less advantaged groups. As early as the first week in June 1937, *Business Week* was complaining: "The cold fact is that, for all practical purposes, the reorganization of the Court, sought by legislative process, has been accomplished by the ordinary process of court decision." [pp. 142, 154-55]

The characterization of history in the above paragraphs is intended to provide support for Leuchtenburg's argument about the connection between the plan and the constitutional revolution. Several scholars, however, have found it to be overly simple. They have pointed out that decisions of the Court prior to the New Deal made even greater departures from previous constitutional jurisprudence, and that they thereby demonstrate the Court's readiness to accept significantly altered conceptions of the scope of governmental power to regulate the economy.³⁵ They have noted, in addition, that the Old Court, including the Justices who dissented in *Parrish*, supported several pieces of New Deal legislation;³⁶ that Justice Roberts himself convincingly denied "switching" his vote in the *Tipaldo* and *Parrish* cases;³⁷ and that the initial resistance of the

35. See, e.g., Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Decisions from Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992).

36. See, e.g., Cushman, *supra* note 26, at 246; Devins, *supra* note 4, at 252-53.

37. See Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 *U. PA. L. REV.* 1891, 1949-53 (1994).

Court to New Deal legislation may have been a response to the vague and clumsy language of some of the statutes passed by Congress in 1933.³⁸

Although Leuchtenburg is aware of much of this scholarship, he discounts its importance. The manner in which he does so is suggestive. His most extended discussion of the scholarship critiquing his causal connection theory comes in a passage in which he addresses the issue of whether there was "a Constitutional Revolution" at all. That seems odd, because none of the critics deny that a considerable shift in constitutional jurisprudence took place in the late 1930s and early 1940s. They merely disagree with Leuchtenburg's assertion that the Court-packing plan caused that shift. When Leuchtenburg discusses his critics, however, he seems to act as if they threaten the whole of his historical enterprise — his effort to show that the Supreme Court was "reborn" in the New Deal period — if they place the origins of the constitutional revolution other than "in the pivotal year of 1937."³⁹

Why should Leuchtenburg regard the pinpointing of the origins of the constitutional revolution at the Court's response to Roosevelt's introduction of the Court-packing plan in 1937 as so necessary to his whole enterprise in *The Supreme Court Reborn*? The plan, as he points out, failed, but the constitutional revolution occurred anyway: from 1937 through 1946 the Court reversed thirty-two of its earlier decisions, eight of which had been unanimous (p. 233). Thus, when Leuchtenburg concludes his chapter on the constitutional revolution with the statement that "[i]n 1937 the Supreme Court began a revolution in jurisprudence that ended, apparently forever, the reign of laissez-faire and legitimated the arrival of the Leviathan State" (p. 236), one might not find the statement particularly controversial. Yet that statement, it seems to me, captures better than any other sentence in *The Supreme Court*

38. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 10-13 (1982); Nelson, *supra* note 26, at 289; Devins, *supra* note 4, at 251, 264-65.

39. P. 231. Consider these features of Leuchtenburg's response. First, he asserts that "some commentators . . . deny that there was a Constitutional Revolution in 1937 or . . . insist that the conception be severely qualified." P. 230. He then cites two constitutional historians, Alfred H. Kelly and Winfred A. Harbison, for the proposition that "[t]he 'revolution' of 1937 did not break the continuity of American constitutional development in any decisive respect. In that sense it was not a revolution at all." P. 230.

He then says, in a footnote, "In 1994 a historian contemptuously dismissed the conclusion of two generations of scholars that 1937 was a watershed as a 'bedtime story.'" P. 318 n.95. His reference is to Cushman, *supra* note 26, but Cushman's article is not an attempt to deny that a constitutional revolution occurred. Instead, Cushman argues that the revolution cannot be said to have taken place within the limited timespan of the 1937 Term, nor to have had a significant causal connection to the introduction of the Court-packing plan. See Cushman, *supra* note 26, at 206-07. Leuchtenburg, however, apparently takes Cushman's arguments as directed at the entire constitutional revolution thesis. He includes Cushman in the category of "some commentators" quoted above, placing the footnote reference to Cushman immediately after "not a revolution at all." See p. 230.

Reborn the inferential message that Leuchtenburg wants to convey to his readers.

Leuchtenburg's message is that at the heart of the cultural crisis of the New Deal was a crisis in *constitutional law*, and at the heart of that crisis was the question of whether the *Supreme Court* would "legitimate the arrival of the Leviathan State" (p. 236). When the Court initially declined to do so, an overwhelmingly popular Executive sought to transform its institutional composition, to secure that legitimation by "packing" the Court with "new" Justices. Despite Roosevelt's popularity, which signaled that the American people had accepted his conception of "the Leviathan State," his plan to pack the Court failed. The failure of the Court-packing plan, Leuchtenburg concludes, had massive potential ramifications, because it broke the momentum of Roosevelt's legislative partnership with Congress. In Leuchtenburg's words, the Court-packing failure "blunt[ed] the most important drive for social reform in American history and squandered the advantage of Roosevelt's triumph in 1936" (p. 157). This could have been a tragic episode.

Instead, the Court-packing crisis was a watershed, a great triumph, the beginnings of "our" world. The arrival of the Leviathan State came into being through *judicial* decisions. A potential political revolution derailed, but in its place came judicial legitimation of the radical transformation of the role of government in America that the New Deal legislation represented. The Leviathan State came into being through a series of Court decisions that transformed the meaning of the Constitution. Furthermore, the socially and economically disadvantaged — the Carrie Bucks and the discharged railroad workers — became the beneficiaries of that constitutional revolution. The state gained the power to respond to the casualties of modern industrial capitalism, and the Court, in its revolutionary mission, began to extend the Constitution's protection of civil liberties. As Leuchtenburg puts it:

The Constitutional Revolution of 1937 altered fundamentally the character of the Court's business, the nature of its decisions, and the alignment of its friends and foes. From the Marshall Court to the Hughes Court, the judiciary had been largely concerned with questions of property rights. After 1937, the most significant matters on the docket were civil liberties and other personal rights. . . . For more than a century before 1937, the Court had been inclined to safeguard entrenched interests from reform-minded legislatures. But after the Constitutional Revolution . . . "[t]he businessman, so long the Court's darling, was shorn of his constitutional fleece." [p. 235]

At first this seems a breathtakingly inaccurate statement. As noted, civil rights and civil liberties cases, unlike cases involving state and federal regulation of the economy, occupied a small part of the Court's constitutional agenda until the mid 1950s.

Leuchtenburg, however, does not mean to equate "significant" with "numerous." He means instead that in the constitutional revolution the "entrenched interests" whose "property rights" had hitherto received such solicitude from the Court lost that solicitude to despised and disadvantaged minorities, the archetypal plaintiffs of civil liberties cases. In Leuchtenburg's history, the Court since the New Deal has taken pains not only to legitimate the role of the Leviathan State as the regulator of the businessman and the entrenched interests, but also to ensure that that government will not trample on the civil rights of the very sorts of persons harmed by the laissez-faire approach of the Old Court.

This meaning of the constitutional revolution is captured in Leuchtenburg's chapter on *Parrish*, the case that by legitimating many state minimum-wage laws and overruling a fifteen-year-old precedent to the contrary⁴⁰ "detonated" the revolution (p. 178). In that chapter Leuchtenburg creates a telling pictorial contrast between Elsie Parrish and Justice George Sutherland, a contrast designed to convey the inferential message of his history.

Parrish was a chambermaid in a Wenatchee, Washington, hotel who "worked irregularly . . . cleaning toilets and sweeping rugs for an hourly wage of twenty-two cents" (p. 164). When she was discharged in 1935 she asked for back pay in the amount of \$216.19. In arriving at this sum, she relied on a 1913 statute that set the minimum wage for chambermaids at \$14.50 a week. After the hotel offered to settle for a total of \$17.00, Parrish brought suit. The hotel defended itself by challenging the constitutionality of the minimum-wage statute (p. 164). In light of the Court's precedents,⁴¹ Parrish's chances of having the Washington statute sustained appeared virtually nonexistent, but "[s]he was determined to carry on her struggle" (p. 167).

When Parrish's claim eventually prevailed at the Court, with Justice Roberts joining the majority, she said, "I am happier over what it will mean to the working women of the state than over the money I will receive There have been thousands of girls and women working for whatever they could get in this state, and now they'll get a break" (p. 179). Parrish then "faded into the anonymity from which she had risen," but she could not obscure that "she had accomplished something of historic significance — less for herself than for the thousands of women scrubbing floors in hotels, toiling at laundry vats, and tending machines in factories who needed to know, however belatedly, they could summon the law to their side" (p. 179).

40. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

41. In the Term before *Parrish* the Court had reaffirmed and extended *Adkins* to state minimum-wage legislation in *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587 (1936).

According to Leuchtenburg, after Chief Justice Hughes announced the opinion in *Parrish*, he "nodded to Justice Sutherland seated to his left." With this nod Sutherland, who had produced a dissenting opinion for four justices in the case,

surveyed the chamber silently, almost diffidently, then picked up the sheaf of papers in front of him and began to read. Sensing his day had passed, Sutherland — who, with his pince-nez, high collar, goatee, and hair parted in middle, seemed never to have left the nineteenth century — appeared barely able to bring himself to carry out his futile assignment.

....

It was beyond dispute, he asserted, that the due process clause embraced freedom of contract, and Sutherland remained convinced, too, that women stood on an equal plane with men and that legislation denying them a right to contract for work was discriminatory. "Certainly a suggestion that the bargaining ability of the average woman is not equal to the average man would lack substance," he declared. "The ability to make a fair bargain, as everyone knows, does not depend on sex."

If anyone thought that those last sentences had a hint of jocularly, they quite misperceived Sutherland's mood. The *Parrish* decision blew taps for the nineteenth-century world, and Sutherland, born in England in 1862 and reared on the Utah frontier, knew it. Having had his say, he understood that there was no point in going on any longer . . . [H]e carefully laid his opinion on the dais and, stern-visaged, settled back in his chair. [pp. 173, 175]

The portraits of *Parrish* and Sutherland are of a piece with the inferential narrative structure of *The Supreme Court Reborn*. *Parish* — Leuchtenburg's pivotal case, the case that began the constitutional revolution, the case that ended "apparently forever" the laissez-faire regime and gave constitutional legitimacy to the Leviathan State — counterpoised two symbolic participants in that revolution, the Justices of the Old Court, and their former casualties, now the beneficiaries of the New Court. *Parrish* gives thanks that she and "the thousands of women scrubbing floors, toiling at laundry vats, and tending machines in factories" can now "summon the law to [our] side" (p. 179). Justice Sutherland, who seemed "never to have left the nineteenth century," knows that with *Parrish* the "revolution" has begun, "bl[owing] taps" for his "nineteenth-century world." Leuchtenburg expects the rest of us to recognize the scene as the beginnings of our own time. He expects us to see that the *Parrish* decision, prompted by the same conflict of forces that precipitated the Court-packing crisis, ended the regime of laissez-faire and ushered in the Welfare State, "apparently forever."

III. CONCLUSION: CABINING THE NEW DEAL IN TIME

Suppose one tried to make sense of the constitutional history of the New Deal not by accepting the inferential messages of Leuchtenburg's narrative but by treating them with skepticism. Suppose one were to assume that the consequences of the constitutional revolution — a Court-sponsored abandonment of *laissez-faire* and entrenchment of the Leviathan State — cannot fairly be treated as permanent features of American life. Suppose one were to point to current efforts to “downsize” government, to curtail programs of state and federal largesse, and to deregulate commercial and industrial enterprise as signals that the efficacy of a vast public sphere dominated by the presence of affirmative government might no longer be taken for granted.

Then perhaps one might want to know more about some features of the constitutional history of the New Deal that Leuchtenburg's account virtually ignores. One might want to know more about the theoretical basis of the “Leviathan State” — that is, why government came to be thought of as a natural and necessary presence in American life, as a source of solutions to perceived social and economic problems, and as an apt compliment to the new world of modernity. In addition, one might want to know more about the alternative conceptions of government, and of the private and public spheres of a republican polity, that the constitutional revolution displaced.

Further, one might want to know why the period of the New Deal ended up being the moment when our government abandoned the traditional republican conception of the relationship between the liberties and powers of the individual citizen and the powers of and limitations on government. In that vein, one might want to explore the cultural status, in the decades leading up to the New Deal, of certain epistemological assumptions — assumptions about the nature of humankind, about the function of society, and about the place of human and external agents in the universe — that animated a conception of government as having only specially conferred, limited powers and of individual citizens as having general freedoms, subject only to special limitations. One also might want to discern how those epistemological assumptions came to erode around the time of the New Deal, so that government came to be conceived of as having general powers to regulate human activity, subject only to special limitations, and individual citizens came to be conceived of as having only special freedoms against government.

Finally, one also might want to know how the concepts of a “public purpose” or the “public interest,” traditionally limited to a few specific sets of activities, widened under the Leviathan State to

include virtually any realm of human endeavor. One might want to know, correspondingly, why the private realm of autonomous human activity, initially taken as vast and self-regulable, came to be narrowed to the point that a public-private distinction itself seemed conceptually incoherent.

The cases of the constitutional revolution implicate all of these issues. To get at such issues, however, we must stop categorizing the positions taken by the judges who resisted New Deal legislation as old, outmoded, or smacking of laissez-faire and attempt to understand how sensible persons could have adopted them. We must suspend judgment on the efficacy of their starting assumptions or, alternatively, consider the possibility that those assumptions might be treated as plausible or even cogent in a post-New Deal world. At the least, we should try to understand why such assumptions suddenly seemed wrongheaded, or old, in the early 1930s.

In short, we need to recreate the world of Sutherland's dissent in *Parrish*, not as a history in which the majority in that case won, but as a historical universe in which the premises of Sutherland's dissent seemed as natural and necessary as Leuchtenburg takes the premises of New Deal government to be. Having done so, we then can recreate the set of assumptions held by Sutherland's critics. Those critics felt that traditional conceptions of the role of government in America needed to be recast, despite the fact that constitutional jurisprudence at the time of Roosevelt's first election in 1932 supported Sutherland. Indeed, as traditionally interpreted, the Constitution anticipated and reinforced a world of limited government. A revolution needed to take place to usher in the Leviathan State. Why did it take place in the 1930s?

The materials are in place to pursue such questions. Consider, first, some salient characteristics of the period between the 1870s and the early 1930s in America. The external appearance of American society became discernibly more urban and industrial. This appearance reflected several underlying material changes. For example, the proportion of the population living in urban centers increased from about 16% to about 49%. The total value of manufactured products increased twentyfold. The miles of railroad track went from less than 40,000 to more than 260,000.⁴² At the same time, an established theory of causal attribution in the universe — one that located causes in phenomena independent of human actors, such as religion, nature, universalistic "laws" of political economy, a preordained status system, or the inevitably cyclical pattern of change over time — gradually was replaced as epistemological

42. See HARRY N. SCHEIBER ET AL., *AMERICAN ECONOMIC HISTORY* 222 fig. 15-1, 243 tbl. 16-1, 260 fig. 17-1, 335 tbl. 21-1 (9th ed. 1976).

orthodoxy by a theory that identified human consciousness and human will as the central causal agent.⁴³

If we assume that many Americans who experienced the economic dislocations of the late 1920s and early 1930s had a simultaneous sense of the massive external changes that had taken place in their recent history and the implications of an epistemology that assumed that humans not only had produced those changes but could alter their impact, policies expanding the role of government to alleviate the perceived costs of urbanization and industrialization can be seen as a culturally plausible response. If, however, we assume that other Americans in the same period, experiencing the same dislocations, would attribute them to forces over which humans had no significant control, we can imagine how proposals for affirmative governmental action to redirect the course of industrialization or urbanization would be regarded as heretical and futile.

Thus a promising framework for recreating competing theories of governance in the New Deal period might center on the following questions. To what extent were previous orthodox theories of governance, which stressed the limited range of public power and the public sphere, consistent with traditional theories of externally derived causal attribution? To what extent could such theories explain the dramatic external changes that had taken place in American life between the Civil War and the New Deal and suggest how government should respond to these changes? Alternatively, to what extent were the alternative theories of governance proposed by New Dealers consistent with human-centered theories of causal attribution? To what extent could those theories explain the social and economic dislocations of the late 1920s and early 1930s and propose governmental "solutions"?

Recent scholarship in late nineteenth- and early twentieth-century constitutional history has begun to explore the shift that took place in theories of governance, in the relationship between the private and public spheres of a republicanist polity, and in the constitutional status of governmental powers and individual liberties in Supreme Court cases and commentary from the 1870s through the 1920s.⁴⁴ Additional scholarship has begun to establish

43. See Ross, *supra* note 1, at 1-2 (associating the challenge with "modernism" and identifying as its central premise the belief that humans can shape experience to conform to their own perceptions).

44. See GILLMAN, *supra* note 21, at 102-90; MARK GRABER, *TRANSFORMING FREE SPEECH* 17-95 (1991); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 634-46 (1994). See generally Charles W. McCurdy, *The 'Liberty of Contract' Regime in American Law*, in *FREEDOM OF CONTRACT AND THE STATE* (Harry W. Scheiber ed., forthcoming 1997); Cushman, *supra* note 26; Cushman, *supra* note 35; Friedman, *supra* note 37.

the striking durability of "premodernist" theories of causal attribution in a late nineteenth- and early twentieth-century American environment that had come to assume the characteristics of modernity.⁴⁵ A final suggestive branch of work, by cultural historians, has begun to focus on the comparatively late emergence of the ideology of democracy, as distinguished from the ideology of republicanism, as a defining political philosophy for Americans.⁴⁶ Each of these lines of inquiry offers the promise of contributing to a "new history" of law and the New Deal, one in which constitutional and other developments would be seen as situated within a period of dramatic, rapid — and to contemporaries, bewildering as well as exciting — material dislocation and epistemological ferment.⁴⁷

Leuchtenburg undertakes virtually no exploration of such questions because he assumes that we either "know" the answers or the answers do not matter. We know that the old regime failed to protect Carrie Buck and Elsie Parrish and discharged laborers; we know that the new regime looks to government to support such persons and to the courts to protect us all from excessive government encroachments on our civil liberties. Moreover, Leuchtenburg suggests that it does not really matter why the New Deal generation effected a revolutionary conceptual shift about governance, because we are still in the midst of that shift and because we have a history that makes the alternatives look bleak. The political program of the New Deal metamorphosized into the judicial program of the Warren Court, and the legacy of both has come down to us.

But what if we would like to reexamine the costs and benefits of the Leviathan State, or at least to distinguish between a blithe acceptance of its assumptions and a knowledgeable understanding of how those assumptions came to be put into place? And what if we

45. See, e.g., Dorothy Ross, *Modernist Social Science in the Land of the New/Old*, in *MODERNIST IMPULSES*, *supra* note 1, at 171-89.

46. See, e.g., ROBERT WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 181-222 (1995).

47. For a preliminary analysis of the Court-packing crisis employing this framework, see G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489 (1988) (book review), which contains the following paragraph:

Another event confirming modernist perspectives was the "crisis" that produced the Court-packing episode of 1937. The recognition of a "crisis" has conventionally been described as a belief that an "old Court" was declaring constitutional doctrine that was "outmoded" because it failed to legitimate the legislative and administrative experiments of the New Deal. But the belief that a "crisis" existed reflected more than dissatisfaction with specific Court decisions. It also encompassed an intuitive rejection of the Court's reasoning that the New Deal legislation offended the Constitution. The Court's critics intuited that the Constitution must have been erroneously interpreted in the New Deal cases because their Constitution was a modernist document that could accommodate change and respond to political and economic chaos. If the Court failed to perceive the modernist nature of the Constitution, it was because its Justices were "outmoded" in their sensibility. They were trapped in a premodernist theory of Constitutional interpretation that stemmed from a premodernist conception of the document.

Id. at 516 (footnote omitted).

were to find during that reexamination that the starting premises of the New Deal generation, premises that so decisively altered the boundary between the public and private spheres of American life, were themselves as historically contingent as the traditional premises about governance that they supplanted? Then we might no longer have the inspiring example of the New Deal and its accompanying constitutional revolution to serve as a guide for the resolution of contemporary political and legal issues, but we also might have begun to cabin the New Deal in time. We might then learn something more about ourselves and how we currently want to govern and to be governed.