

G. Edward White. *The Constitution and the New Deal*. Cambridge, Mass.: Harvard University Press, 2000. 385 pages; \$47.50 £32.95 54.60 cloth (ISBN: 0-674-00341-1); \$19.95 £13.95 22.90 paper (ISBN: 0-674-00831-6).

Few political events in American history have had as large an influence as the New Deal had on the federal government. During FDR's first term in the White House, the efforts of Roosevelt's 'Brains Trust' and the legislative activity of the 73<sup>rd</sup> and 74<sup>th</sup> Congresses led to a significant expansion in the scope and role of the federal government. Changes in the size and responsibilities of the federal government altered the American political system and placed liberals and conservatives on often unbridgeable sides of a chasm. While liberals broadly welcomed the changes and supported the New Deal – and continued to support it and its progenies – conservatives opposed it and eventually, with the election of Ronald Reagan, began an ideological frontal assault on what might be called the New Deal government. Just as the 1960s shaped many of the cultural partitions between the Right and the Left in the United States today, so the 1930s shaped many of the political divisions. A number of those political divisions between conservatives and liberals could be traced to different interpretations of the United States Constitution, since any changes in the size or role of the federal government raised constitutional issues. Famously, a number of those issues were summarily resolved by the Supreme Court as it consistently ruled New Deal legislation unconstitutional until 1937, when the Court shifted suddenly, with its *West Coast Hotel v. Parrish* (1937) decision, and began upholding New Deal legislation.

Both during the 1930s and thereafter, similar canonical narratives of the changes that took place in the federal government and the role of the Court established themselves in scholarly law journals and books, in the popular press, and in Supreme Court opinions. According to what White calls the 'conventional account,' from Roosevelt's election in 1932 to his 'Court-packing' plan of 1937 and the subsequent judicial blessing of New Deal legislation in the wake of that unsuccessful scheme, a constitutional revolution took place as a majority of Justices abandoned the long-dominant classical understanding of law and developed a new approach to constitutional issues based on bifurcated review of economic legislation and rights claims. This revolution changed the role of the Supreme Court in the American political system as judicial review became an important aspect of what would become the rights revolution of the twentieth century.

White examines the legitimacy of this conventional narrative by looking at three specific areas: the powers of the executive in foreign relations, the emergence and expansion of the administrative state, and the budding freedom of expression jurisprudence that emerged prior to and during the New Deal era. White's goal is to revise the conventional account since that account, he argues, is largely based on anachronistic – and selective – readings of opinions (majority, concurring, and dissents) accompanying the Court's decisions in a small number of critical cases. Those readings have been unduly influenced, White believes, by later events and debates. This influence can be seen, for example, in the tendency to read pre-1937 opinions in light of the

'switch in time that saved nine' or to read Justice Harlan Fiske Stone's footnote 4 in *United States v. Carolene Products Corp.* (1938) through the prism of the later decisions by the Warren Court.<sup>2</sup> The net effect, White argues, has been to create a monolithic view of the New Deal that exaggerates both its constitutional significance and its internal coherence as a 'revolution' (310). White does not dispute the idea that a significant shift occurred in American constitutional jurisprudence during the first half of the twentieth century, but he would re-periodize it to stretch from the 1920s to the post-World War Two era.

To revise the history of the Supreme Court during the New Deal, White examines the works of legal scholars influential in establishing the conventional account (James Garner, James Landis, and others); accounts in the mainstream press, particularly the *New York Times*; contemporary treatises on foreign relations, administrative law, and freedom of speech; and Supreme Court opinions themselves. White juxtaposes readings of these four sources in relation to the opinions in a number of crucial decisions, including *United States v. Curtiss-Wright Export Co.* (1936), *United States v. Belmont* (1937), *Panama Refining Co. v. Ryan* (1935), *Whitney v. California* (1937), and *Palko v. Connecticut* (1937). As he works his way through the issues of executive discretion and enumerated powers and questions of federalism that shape foreign relations, or the evolution of administrative law and the creation of a bureaucracy of expertise that had roots in both the Progressive Era and the New Deal, White continually offers detailed interpretations of his sources to counter the conventional account of the part played by the New Deal in changing the role of courts in the American polity. Those readings are instructive in relation to how one might carry out revisionist history in the long shadow of the linguistic and interpretive turns of the late twentieth century. Rather than de-center or deconstruct his sources in this largely textual approach, White simply challenges the conventional readings with alternative readings and additional texts. Through numerous examples, he also demonstrates how easily historians and other scholars engage in a kind of reverse teleology, finding all manner of prophecies in opinions that conveniently foretell future developments – when due attention is not paid to their historical (and sometimes textual) context.

White's treatment of the development of freedom of speech jurisprudence works as a nice contrapuntal theme to the usual expansive state narrative that dominates New Deal histories. Whereas executive discretion in foreign relations and the growth of the administrative state, regardless of the magnitude of the role of the New Deal, clearly represent increases in the role and scope of the federal government, First

2. The "'switch' in time that saved nine" refers to the shift in the Supreme Court's treatment of New Deal-related cases between 1936 and 1937: where in 1935 the Court had rendered unconstitutional both the National Industrial Recovery Act and the Agricultural Adjustment Act, from early 1937 onwards it began endorsing the constitutionality of other New Deal laws such as the Social Security Act and the National Labor Relations Act. This 'switch,' it was argued, saved the nine Supreme Court justices by undermining President Roosevelt's proposal, then under consideration by Congress, to bring new justices onto the Court and encourage older ones to retire.

Amendment jurisprudence developed in a completely different direction: the realm of protected expression expanded while the power of the state to regulate expression was contracted by the Supreme Court. White traces this development from the pre-modern 'bad tendency' test, which had long dominated the American judiciary's approach to speech cases, to the contributions of Justices Holmes and Brandeis. White also carefully embeds the enlargement of protected speech with Holmes's 'marketplace of ideas' in its larger modernist sociocultural context.<sup>3</sup> Importantly, here, White again demonstrates how the expansive jurisprudence of freedom of expression was multifaceted, contracting at times, and shifting from individual to social bases.

White also examines the lionization or demonization of Justices whose opinions were said to hail or fulfill the New Deal or to retard it: Justices Holmes and Brandeis exemplifying the former, Justices McReynolds and Sutherland the latter. Alongside this positioning of the Justices has come the practice of labeling them 'liberal' or 'conservative' on the basis of their opinions on what White suggests is an unrepresentative sampling of their judicial output (285). (This normative labeling practice remains common today despite objections from the Justices on the Court.) Finally, White examines the traditional dichotomy of substantive versus procedural due process so crucial to post-*Lochner* bifurcated judicial review affecting redistributive regulations and rights and jurisprudence. This area of jurisprudence has been well mined in later years, a point White notes favorably, but the review in *The Constitution and the New Deal* makes an excellent introduction to this area of law.

What White hopes to achieve is a firmer demarcation in our understanding of the New Deal. So demarcated, the New Deal's role in the constitutional changes of the twentieth century would not be as overrated as White believes it now is. Besides offering a wealth of material readily accessible to non-jurists, White's book is a compelling read and his central point about the tendency of commentators to detach the New Deal from its relatively brief duration is instructive. On balance, White is successful in his effort 'to peel away the layers of normative investment in the New Deal' (310) that shaped the conventional account of the development of constitutional jurisprudence in the United States during the twentieth century.

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3. White traces the relationship of freedom of expression jurisprudence and modernism in greater detail in 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America,' in *Michigan Law Review*, 95, 2 (November 1996), 299-392.