BARRY CUSHMAN:  

A Revisionist View of Constitutional History  

Barry Cushman's appreciation for the subtle interconnections among constitutional doctrines and his commitment to take legal ideas seriously as a causal force have made him one of the country's most prominent young legal historians. This is not to say, however, that he planned it that way. Cushman studied philosophy as an undergraduate. Only as graduation approached did he realize that he was less interested in solving philosophical problems than in understanding the history of others' efforts to do so. This recognition resulted in a decision to study the history of ideas, or intellectual history, at the graduate level.

At Virginia, it was easy for Cushman to combine his interests in the study of history and law. The University of Virginia was (and is) among the country's best in both fields. Cushman came to Virginia planning to pursue a J.D. and an M.A. By the time he graduated from the Law School,
however, he had decided to complete the doctorate in history and to pursue an academic career as a legal historian.

Cushman's dissertation topic, selected with the advice and encouragement of his advisor, Charles McCurdy, associate professor of history and law, was the development of constitutional thought and culture during the 1920s. The original idea was to show how the contours of contemporary thought concerning the commerce power, the spending power, and substantive due process on the eve of the depression decade set the stage for the Supreme Court's constitutional innovations during the New Deal. The project, however, became much more sweeping as Cushman began to recognize that the "revolution" in constitutional law during the New Deal took on a different aspect when one better understood the evolution of commerce and due process doctrine in the late nineteenth and early twentieth centuries.

The result was a series of articles that culminated in a book, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998). The book is a major challenge to the received New Deal legal history. It has garnered substantial attention as well as the American History Association's 1998 Littleton-Griswold Prize, the most prestigious book prize in legal history. The book also led to an invitation to give a lecture on the Hughes Court to the Supreme Court Historical Society, a remarkable honor for a young scholar.

We can appreciate the scope of Cushman's achievement only by first reminding ourselves what we, as lawyers, think we know about the constitutional revolution of the 1930s. Prior to the 1930s, according to the traditional story, American constitutional law was mired in the Lochner Era. *Lochner v. New York* has become a symbol of a politically inspired rear-guard action by judges who used substantive due process and federalism doctrines to block progressive policies such as wage and hour restrictions, child labor laws, and health and safety regulation. The 1932 election marked a sea change in public attitudes toward these reactionary readings of the Constitution—a "constitutional moment," to use a phrase coined by Yale Law School professor Bruce Ackerman.

The New Deal took decisive action to bring the progressive program to fruition, only to see early efforts thwarted by the Supreme Court. The anti-New Deal charge was led by the Four Horsemen—arch-conservative Justices Van Devanter, McReynolds, Sutherland, and Butler. The Four Horsemen were joined in opposition to the New Deal by the Court's pro-business center, Chief Justice Hughes and Justice Roberts. The Court's liberal wing (Justices Brandeis, Stone, and Cardozo) was too small to save progressive legislation from judicial veto.

Roosevelt believed that his landslide re-election in 1936 provided a mandate to get the Court out of the way of the New Deal. His court-packing plan was a tactical error—Congress and public opinion recoiled at the thought of tampering with the Supreme Court—but a strategic victory. Faced with the prospect of forced irrelevance, Justice Roberts abruptly departed from his earlier opposition to economic regulation and voted to uphold a minimum wage law in *West Coast Hotel v. Parrish*. Decided in early 1937, *West Coast Hotel* was promptly followed by cases upholding collective bargaining and Social Security legislation. This "switch in time that saved nine" was a decisive moment in American constitutional history, simultaneously assuring that the Supreme Court would not undergo significant structural change and that it would no longer use an outdated reading of the Constitution to hamstring the government's attempts to deal with the complex regulatory issues created by a modern industrial economy.

As this conventional narrative makes clear, both political and legal historians typically describe the relationship between the New Deal and the Supreme Court in exclusively political terms. Judges interpreted the Constitution as they did because they were ideologically opposed to government interference in markets, especially the labor market. The Court backed down only because of political pressure generated by the 1936 election and the Court-packing plan. Entirely absent from the debate is a sensitive reading of the Court's prior commerce and due process jurisprudence. Indeed, for most early-twentieth-century constitutional historians, such a reading would be evidence of naivété.

The central argument of Rethinking the New Deal Court, by contrast, is that we can best understand the "constitutional revolution" of 1937 as an episode in the history of ideas. Cushman shows that the Court's pronouncements of that year were not a sudden, discontinuous shift, but rather predictable steps in an evolving line of constitutional thought. The Court, after all, had long recognized the
authority of the federal and state governments to regulate business. The Court's substantive due process jurisprudence sought to limit this authority to legislation that was public-regarding, as opposed to that benefiting only a particular interest group. The doctrinal tool the Court used for this purpose was the public/private distinction. For half a century, the Court upheld dozens of stringent regulatory statutes, but only when the target businesses were "affected with a public interest," such as railroads and utilities. Outside this area, similar regulatory statutes were thought to be invalid attempts to further private interests.

As Cushman describes it, the public/private distinction was consistently problematic and the Court struggled greatly to delineate its boundaries throughout the first three decades of the twentieth century. In the 1934 case Nebbia v. New York, the Court decided that the effort was no longer worthwhile. It abandoned the public/private distinction while upholding regulations designed to support the price of milk in New York state. If there was a revolution in due process jurisprudence, Cushman contends, it occurred in 1934, not 1937. But even Nebbia is an acknowledgment of analytical failure rather than a political shift.

On nearly all counts, Cushman's reinterpretation fits the detailed facts of the New Deal Court's actions better than the traditional political histories. This can be seen in small ways—such as the fact that the vote on West Coast Hotel was taken before anyone on the Court could plausibly have known about the Court-packing plan. But it is true in larger ways as well. Cushman accounts not merely for the central tendency of the case law—relatively more statutes were struck down before 1937 than afterward—but for its variability as well. Many regulatory statutes survived constitutional scrutiny before the New Deal, and the modern contours of commerce clause jurisprudence took shape only after massive personnel changes on the Court.

Cushman presents in his book and in a subsequent article, "Lost Fidelities," 41 William & Mary Law Review 95 (1999), a tale of gradual change, continuity, and jurisprudential integrity. He examines the erosion of constitutional restraints on economic regulation before 1937 that brought much of the New Deal within the realm of constitutional possibility, as well as the persistence of some such restraints in the jurisprudence of Chief Justice Hughes and Justice Roberts even after the landmark decisions of that year.

Perhaps most significantly, in Cushman's evaluation of the events of 1933–42, the structures of constitutional thought inform and discipline the deliberations and decisions of Supreme Court justices. They also shape and channel both the drafting strategies of members of the legislative and executive branches and the litigation strategies of govern-
ment lawyers defending those reforms from constitutional challenge. Cushman thereby enables us to see the justices, congressional draftsmen, and government and private lawyers engaged in a genuine professional and analytical exercise rather than an elaborate and cynical charade.

Indeed, part of the difference between the fate of many of the initiatives of 1933–34 and those of 1935 and later can be attributed to superior lawyering in the latter period, a theme Cushman expands on in “The Hughes Court and Constitutional Consultation,” 1998 Journal of Supreme Court History 79. The article reveals how members of the Supreme Court, both through formal judicial opinions and occasionally through informal behind-the-scenes consultation, successfully “coached” the Congress and the Roosevelt administration on how to frame regulatory schemes that would both attain their objectives and pass constitutional muster. At the same time, the Roosevelt administration relied less on ideologues and more on legal craftsmen to write and defend the programs of the “Second” New Deal. Once again, Cushman’s reinterpretation is consistent with contemporary criticisms of the sloppy lawyering of the “First” New Deal and the accolades given to the legal giants of the second.

Cushman believes attempts to explain judicial behavior solely in the conventional vocabulary of political discourse will necessarily overlook and obscure important dimensions of the intellectual enterprise. He elaborates on this idea in “The Secret Lives of the Four Horsemen,” 83 Virginia Law Review 559 (1997), while displaying the ironic wit his students and colleagues prize. The article is a satirical *reductio ad absurdum* that takes an entrenched historiographical posture and derives from its methodological prescriptions conclusions at war with its descriptive claims. The Four Horsemen are conventionally portrayed as reactionary apostles of Social Darwinism and laissez-faire who constructed a jurisprudential theory in service of their ideological agendas. This claim is perfectly plausible if one looks only at the handful of cases that conventional treatments marshal in support of it. Cushman points out, however, that if one surveys all of the cases in which these justices participated, one can just as easily construct a portrait of them as closet Warren Court liberals, surreptitiously nurturing the emergence of a vast taxing and spending regulatory apparatus and quietly championing the rights of convicted criminals, aliens, and political dissenters.

Surely, the unspoken message reads, it is more plausible to conclude that legal ideas actually matter—that they operate as mediating forces between political impulses and judicial behavior. Law is not merely a dependent variable determined by social and political forces, but is itself constitutive of political and judicial ideology.

Another recurrent theme of Cushman’s work is structuralism. He contends that constitutional doctrine must be approached not as a series of independent lines, but an interconnected web. Consequently, one can understand the meaning of one constitutional doctrine only if one understands the context of related doctrines in which the doctrine operates and by which its scope is defined. This integration renders disparate areas of constitutional doctrine developmentally interdependent—change in one area invariably has ripple effects in structurally related domains. The usual technique of teaching and writing about constitutional law—following a particular area of doctrine through the process of evolution—can thus produce misinterpretation of important developments by failing to see these larger structures of doctrinal coordination whole. Cushman expands on the deep connection between commerce and due process jurisprudence in a forthcoming article “Formalism and Realism in Commerce Clause Jurisprudence,” 67 University of Chicago Law Review (forthcoming 2000).

Cushman’s current scholarly agenda includes tying these articles, along with other works in progress, into a collection of essays on early-twentieth-century constitutional development. Having firmly left his mark on early-twentieth-century legal history, however, Cushman also plans to turn his attention to the nineteenth century. We can expect to come away from that work with a new appreciation for the complex evolution of legal and constitutional doctrine in the century following the Constitution’s adoption.
Seeing the New Deal in a New Light

When Barry Cushman delivered a lecture in November 1997 to the Supreme Court Historical Society, he asked his audience to forget much of what they had learned about the Supreme Court of the United States under Chief Justice Charles Evans Hughes.
"Forget for a moment ... that the justices invalidated New Deal initiatives because they thought them unwise social policy; forget that they later upheld federal regulations only because the Court-packing plan put the fear of God into them; forget that they continued to do so only because they had seen the light. Forget that the Court's role under Hughes was entirely reactive: first obstructing, then surrendering to, the political branches." Acknowledging that all this forgetting might be disorienting to his listeners, Cushman suggested that it ultimately might enable them "to see the Hughes Court and its role in the New Deal saga in new light."

In early 1933, Cushman explained, President Roosevelt had sought to engage Chief Justice Hughes as a consultant to the New Deal. The president wanted the benefit of the Court's views on his plans for the federal government's response to the Great Depression. Hughes had declined this request for advisory opinions, informing the president that "the Supreme Court is an independent branch of government." The Hughes Court would in due course invalidate much of the first New Deal, and Roosevelt later related this story while defending his Court-packing plan to a doubtful senator. "You see," the president sighed, "he wouldn't cooperate."

There was, Cushman observed, "no little irony in this defense of the effort to pack the Court." For, as Cushman found, the justices went to considerable lengths to offer valuable counsel to the draftsmen of second-generation New Deal legislation. These suggestions, offered principally in Court opinions but also in occasional behind-the-scenes consultations, sought to channel the meliorative impulses of the second New Deal into prescribed forms that would comply with the requirements of the Constitution. The justices were not simply opposing the administration concerning the permissible ends of government; instead, they were in fact cooperating with Roosevelt and Congress in their efforts to formulate programs addressing the economic crisis of the 1930s through constitutionally permissible means. Rather than simply obstructing reform, the Court shaped it. "The Hughes Court," Cushman concluded, "offered the Roosevelt administration a distinctive form of consultative relationship."

Cushman's invitation to speak before the Supreme Court Historical Society is an honor rarely bestowed upon young scholars. The annual lecture series presented by the society features distinguished scholars from around the country who address a wide variety of topics relating to the history of the Supreme Court. The lectures, like the recent lecture series on the chief justiceship in which Cushman participated, are open to the public and to society members. Each year, the society presents a different lecture series. In addition to Cushman's lecture, the 1997 Chief Justiceships series included lectures about Chief Justices
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School professors invited recently to lecture before the Supreme Court Historical Society. In 1999 Lillian BeVier (featured on page 5) delivered a lecture on free expression in the Warren and Burger Courts (an excerpt appears on page 11) which will be published in a forthcoming issue of the Journal of Supreme Court History.
Rethinking the New Deal Court: The Structure of a Constitutional Revolution

by Barry Cushman

The story of the "switch-in-time" is among the most enduring chapters of our constitutional history. It is repeated every year in countless courses in government, history, and constitutional law in our nations' high schools, colleges, and law schools. One of the great morality plays of American civics, it is both celebratory and cautionary. A vast and remarkable homogenous literature built by legions of lawyers, historians, and political scientists recounts and reiterates the story with varying degrees of subtlety and sophistication. In truncated, composite, and only mildly caricatured form, it goes as follows:
Once upon a time in the dark days of the Great Depression, there was a great liberal president (Franklin Roosevelt) who fought valiantly against rich and powerful economic royalists in a noble effort to better the lot of the common man and save the country from economic ruin. His plan, which he called the New Deal, enjoyed widespread public support but was repeatedly rejected by the Supreme Court. The president was aided in this crusade by three wise and visionary liberal justices (Brandeis, Stone, and Cardozo), who generally supported his program and voted accordingly in the cases that came before the Court. Their efforts were frustrated, however, by four reactionary conservative justices (the “Four Horsemen”—Van Devanter, McReynolds, Sutherland, and Butler), whose jurisprudence was driven by their devotion to the anachronistic tenets of laissez-faire economics and their sympathetic subservience to the interests of rich and powerful people and institutions. The conservatives were too frequently aided in their obstructionist enterprise by two waffling moderates (Hughes and Roberts), whose business-class origins likewise disposed them against the New Deal. In the general election of 1936, however, the American people forcefully repudiated the jurisprudence of the Court’s majority and wholeheartedly embraced the constitutional theories of Franklin Roosevelt. Emboldened by his landslide victory, Roosevelt soon thereafter announced his plan to pack the Court. Fearing institutional evisceration, the moderates, in an act spurred by a mixture of cowardice, “statesmanship,” and newfound constitutional enlightenment, decided to switch rather than fight. Upholding the National Labor Relations Act, the Social Security Act, and the minimum wage, they pledged their allegiance to the liberal cause. Thus was a new constitutional order born.

The staying power of this story is truly remarkable. Despite recent substantial and successful revisions of long-standing accounts of the Gilded Age and Lochner Era Courts, the conventional wisdom on the New Deal Court persists. Even as these exciting reappraisals of earlier Courts have been emerging, the constitutional history of the New Deal Court has remained almost moribund.

The dominance of the conventional wisdom is itself an historical artifact and is largely inertial. The “Constitutional Revolution of 1937”—the Court’s decisions in *West Coast Hotel v. Parrish*, the Wagner Act cases, and the Social Security cases—occurred at a point in American history when the field of constitutional commentary was dominated by scholars inclined to predominantly political explanations of judicial behavior. Their accounts of the revolution, written in its immediate wake, quickly erected a virtually monolithic externalist interpretation that persisted in the postwar era of New Deal consensus culture. New Left historians of the 1960s and 1970s offered extensive reappraisals of various aspects of the New Deal, but seldom focused their attention on its constitutional dimensions. A few commentators of a generation ago expressed some dissatisfaction with this conventional historical wisdom, but their critiques were neither adequately sustained nor sufficiently powerful analytically to blunt the withering counterattacks of their professional foes. As a consequence, the reign of the received account has now spanned more than two generations.

This conceptualization of the decisions of 1937 in externalist terms, as a political response to political pressures, has deflected scholars from inquiry into the plausibility of an internal—legal and intellectual—component to a more comprehensive explanation of the actions of the New Deal Court. Moreover, the externalist account has obscured interesting lines of development in constitutional thought and doctrine. The plausibility (indeed hegemony) of the externalist explanation rests on the assumption that no plausible internal account might be forthcoming. This view is crystallized in the image of a “switch” in time, suggesting a simple binary system of constitutional law. Before 1937, the Court was “anti-regulation” and opposed to “activist national government,” constructing a “doctrinal defense of laissez-faire capitalism”; from 1937 on, however, “the Court accept[ed] liberal nationalism,” and “began to build new constitutional foundations for activist national government.” Such abstract terms hardly begin to capture the complexity of the
positions taken by the justices on a wide variety of issues. Moreover, to think about constitutional issues in these terms is to substitute the language of political science for the legal language in which the justices discussed these issues in conference, in which they wrote about them in their opinions, and which, we may presume, played at least some role in the ways in which they actually thought about the cases that were brought before them. To embrace the thoroughgoing externalist account as the last word on the New Deal Court is to deny the constitutional jurisprudence of the period any status as a mode of intellectual discourse having its own internal dynamic. It is to dismiss the efforts of the lawyers defending the constitutionality of New Deal initiatives as irrelevant and redundant, to deprive Hughes and Roberts of a substantial measure of intellectual integrity and personal dignity, and to suggest that sophisticated legal thinkers casually discard a jurisprudential worldview formed over the course of a long lifetime simply because it becomes momentarily politically inconvenient.

The conventional wisdom is therefore long overdue for some serious scrutiny, for two reasons. First, there is good reason to doubt that it offers an accurate account. The nature of the external account and the evidence available preclude it from being conclusively disproved in its entirety. There is no utterly irrefutable smoking gun: both the conventional wisdom and its critique necessarily rest on circumstantial evidence. Nevertheless, there is ample evidence to suggest that the external account is not nearly as compelling as has conventionally been thought, that it certainly has been overstated, and that it may very well be just plain wrong. Second, the conventional account of the “revolution” requires reexamination because it is certainly not a complete account, insofar as it neglects serious exploration of the internal dimensions of the phenomenon. ...

The objective, however, is not to deny that the New Deal era witnessed dramatic changes in constitutional jurisprudence. It is instead to recharacterize both the jurisprudence that changed and the mechanics by which it changed, approaching the phenomenon examined as a chapter in the history of ideas rather than as an episode in the history of politics.

Excerpted from the introduction to Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998).
Publications of Barry Cushman


“Lost Fidelities,” 41 Wm. & Mary L. Rev. 95 (1999).

Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998).


“Rethinking the New Deal Court,” 80 Va. L. Rev. 201 (1994).


