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Barry Cushman. *Rethinking the New Deal Court: The Structure of a Constitutional Revolution.* New York: Oxford University Press, 1998. ix + 320 pp. $120.00 (cloth), ISBN 978-0-19-511532-1.

Reviewed by Thomas Hilbink (Institute for Law & Society, New York University)
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A New Antidote for the Nine Old Men

I. Taking on Externalist History

Rethinking the New Deal Court possesses a characteristic that any historian would like his or her book to have: After you finish reading it, you find it hard to imagine the story being any other way. Barry Cushman, who teaches at the University of Virginia Law School, reframes the story of the "switch in time that saved nine" – "One of the great morality plays of American civics," Cushman calls it (p. 3) – so convincingly that I wonder how the dominant "bedtime story"[1] version of events – that the political threat of President Franklin D. Roosevelt's ill-fated Court-packing plan was the cause of the Court's 180-degree jurisprudential turn – will survive. Not surprisingly, the book has received a great deal of attention from legal scholars and legal historians alike. Before he published this book, Cushman previewed his argument in law reviews,[2] giving others a chance to digest, comment on, and critique his new take on the history of the New Deal.[3] As a result, this review travels well-trodden ground and does not attempt a daring new reading of the Cushman thesis.[4] Rather, it discusses Cushman's main argument and comments on Cushman's direction as it fits in with recent legal historiography.

The dominant view of the "switch" story, in place since the event itself, is best represented by the work of political historian William Leuchtenburg.[5] Leuchtenburg explains the "switch in time" by pointing to political forces and concerns – namely the Court-packing plan – as an explanation for the Supreme Court's "change of heart."

> [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.[6]

Leuchtenburg presents a far richer account than Cushman allows in his critique, though Cushman's shorthand retelling gets the basic parameters correct.[7]

Considering the wide acceptance of the political forces theory as an explanation for the switch, Cushman is bold to take it on so aggressively, but he goes further by questioning whether there was even a jurisprudential switch at all. He summarizes his twofold challenge:

> [F]irst, that the Supreme Court suddenly and substantially reversed its position in the cases decided in the spring of 1937; and second, that this reversal was a political response to such external political pressures as the 1936 election and the Court-packing plan. (p. 5)

Cushman looks to the second matter first. This choice makes sense, considering that generations of people have accepted it as obviously true. As he sees it, the story's logic is flawed, based on post hoc, ergo propter hoc ("after this, therefore because of this") reasoning. By closely analyzing the dates on which oral arguments, discussions in conference, and rendering of decisions took place, Cushman reveals that the cases characterized as marking the "switch" most likely were not influenced by Roosevelt's plan. The "switch" decisions were decided (though not necessarily released) either before the plan

was announced or after it became obvious that the plan would fail. Why, Cushman asks, would the Court capitulate to Roosevelt when the challenge had dissipated?

Cushman also challenges the back-up theory that the Justices were reacting to Roosevelt's 1936 landslide electoral victory, that the Court saw that election as a referendum of sorts on the Social Security Act (SSA) and realized their decisions on that issue were out of the mainstream. Cushman demonstrates the flaws of this explanation as well. In 1936, the SSA was not a major issue (whereas it was in 1932 and 1934, when Roosevelt and the Democrats won by a landslide). Furthermore, Alf Landon, Roosevelt's opponent in 1936, shared Roosevelt's position on the SSA.[8] True, these facts could be interpreted to show that if both candidates took the same position on the SSA, then the Court was far out of the mainstream, but it is hardly conclusive on that matter. Although Cushman does not deal a knock-out blow to the dominant theory, he certainly weakens it enough with his left that he is able to knock it out with his right. As G. Edward White points out in his review of Leuchtenburg's book, Leuchtenburg's response to Cushman's argument indicates the extent to which the switch theory is threatened:

When Leuchtenburg discusses his critics... 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."[9]

Where Cushman's book shines is in his analysis of the law in the decades leading up to the New Deal. In his major argument, he contends:

[T]he highly integrated body of jurisprudence referred to as laissez-faire constitutionalism was an interwoven fabric of constitutional doctrine. Within that body the distinction between public and private enterprise performed a critical integrative function. When the Court abandoned the old public/private distinction in *Nebbia*, then, it pulled a particularly important thread from that fabric. (p. 7)

Cushman methodically (though not dryly) lays out the changes in jurisprudence that took place as a result of changing ideas about law and society in the late nineteenth and early twentieth centuries. Countering the dominant historiography, which he characterizes as "externalist" in its approach, Cushman argues that the Court was driven by considerations and concerns internal to its work and jurisprudence as well as an increasing awareness of socio-economic changes in the outside world (namely worker-employer relations and the interconnectedness of production and commerce). Moving away from facile "conservative versus liberal" descriptions of the Court's members, Cushman identifies three dominant strands of jurisprudential thinking that emerged after the Civil War. The first was rooted in republican fear of centralized authority; the second stemmed from the bifurcation of law into public and private realms intended to protect private interests from legislative corruption that sought limits on governmental authority to infringe on "vested rights"; and the third emerged from a tradition of Lockean property rights and freedom of contract. Woven together, these three strands of thinking formed a powerful fabric; once one strand began to weaken, however, the fabric fell apart. It is this unravelling that Cushman traces back decades before the conventional wisdom's "switch" to make his case that the death of the public/private distinction was the key to the New Deal's constitutional revolution.

If it occured at all, Cushman's argument goes, the Court's fabled "switch" occurred not following the 1936 elections or the 1937 Court-packing scheme, but in 1934 with the Court's decision in *Nebbia v. New York*.[10] Cushman looks at the gradual evolution of thinking about the bifurcation of public and private realms under law, shifting understandings of economics and commerce, the leadership and judging styles of Chief Justice Charles Evans Hughes and the various Associate Justices who composed the Hughes Court, and the Supreme Court's internal decision-making processes as they existed in the early twentieth century. Assumptions that shaped the law in the nineteenth century were slowly abandoned over the course of thirty years thanks to decisions (first) by Justice Oliver Wendell Holmes, Jr., followed by Justices Louis D. Brandeis and Benjamin Nathan Cardozo, and further developed by the new generation of jurists whom Roosevelt named to the Court at the end of the 1930s.

In *Wilson v. New* (1917),[11] the Court established a class of businesses "affected with a public interest" subject to state regulation. Still, the Justices recognized an inner core of activity that they held to be immune from government regulation. *Adkins v. Children's Hospital* (1923) affirmed the protection for that inner core in 1923, striking down the District of Columbia's minimum wage law on liberty of contract grounds.[12] However, over the next eleven years, the Court gradually expanded the scope of the "affected with a public interest" doctrine. Fi-

nally, in *Nebbia*, the Justices held that New York State's Milk Control Act of 1933 (a law that set maximum price controls for milk) was constitutional; in the process, Justice Owen J. Roberts's opinion for the Court finally abandoned the "affected with the public interest" doctrine. All business can be construed to have some impact on the public interest, the Court declared, and is thus regulable under state police powers. Although historians point to the Court's 1937 decision in *West Coast Hotel v. Parrish*[13] as the marker of the "switch," Cushman maintains that *West Coast Hotel* did little that *Nebbia* had not already done. It was significant not for jurisprudential reasons but for procedural reasons (the parameters of certiorari) and political reasons (Hughes's style as Chief Justice) that were internal to the court. Roberts, the one who "made the switch," did

not vote to override *Adkins* altogether before 1937 because the earlier case was not subject to reconsideration before then. Roberts really made the crucial switch in 1934, with his opinion in *Nebbia*, but, due to the constraints of the Court's operations, he had to wait until 1937 to say so in the U.S. Reports.

Cushman's jurisprudential analysis makes his point most vigorously. Although some commentators challenge Cushman's reading of the case law[14], at the very least Cushman's account calls into serious question the dominant historical account of the New Deal's constitutional history – so long as Leuchtenburg and others do not look closely at the changes in the Supreme Court and its decisions in the years preceeding 1937. This does not mean, however, that Cushman has come up with the definitive version of events, merely the most persuasive thus far.[15] The "real" story will quite surely be found in a synthesis of these versions, recognizing that while the Court's decisions are shaped and constrained by internal factors, they are also influenced by external forces, be they micro-forces (i.e. the Court-packing plan) or macro-forces (i.e. changes in political thinking and socio-economic power).

II. The Strengths and Weaknesses of Internalist History

Aside from making a splash in the historiography of the New Deal, Cushman's book shares an approach adopted by other legal historians in recent works. It contrasts with what Peter Karsten called the "economic-determinist" school (that includes historians James Willard Hurst, Morton J. Horwitz, and many others).[16] Karsten argues that American legal history cannot be explained solely by pointing to economic considerations as the primary factor in judicial decision-making.[17] His thesis, along with those advanced by Cushman and by Howard Gillman, suggests the emergence of a larger trend in recent legal historiography – what political scientists have dubbed "the new institutionalism" and what others have called the "internalist" approach (in contrast to Leuchtenburg's "externalist" approach)[18]. This admittedly amorphous school of thought takes the view that analyses of law must look beyond political and economic influences on jurisprudence to structural and institutional factors that shape and constrain the judicial decision-making process. Law, in this view, is not a trojan-horse in which the upper-class hides its self-interest. It is a system that exists to a large extent in its own universe.

Certainly, looking at such considerations renders a more accurate history than a purely economic-determinist or hyper-realist approach. As Cushman notes, jurisprudence is more than a "political football" (p. 41), and any legal history that looks at internal constraints, professional codes and norms, personal relations among judges, and intellectual trends will render a more nuanced explanation of the past. But isn't it possible that, in addition to all the above-mentioned factors, law is also influenced by external politics and political considerations – if not directly, then in a larger and more general way than the predominant "switch in time" story claims? Progressive and Realist critiques of law, which arose in the first decades of the century and reached prominence in the 1930s and 1940s, powerfully compelled reconsideration of the shape of the law. Although the Progressive and Realist movements can be portrayed as new intellectual trends in legal thought, they are at least as accurately described as political movements within academia and the judiciary.[19]

Even more overtly political was the role of New Deal lawyers in shaping the law. To his credit, Cushman attributes a significant role to the work of lawyers (as both legislators and litigators) in helping move the law in a new direction (pp. 5, 162-168). Lawyering, bad and good, played a significant role in the rejection and later acceptance of Roosevelt's New Deal legislation.[20] But Cushman fails to acknowledge that the lawyers working in this field were political actors and strategists working through the courts to have their positions adopted and accepted as law.[21] True, government lawyers always have played a role in shaping the law, but a new politics in the nation and (increasingly) in the legal profession saw the federal government as the protector of the weak and a player in the nation's economic life at a time

when it was playing an increased role in American law and political life more generally. Thanks to the elections of 1932 and 1936, politicians seeking such a role for government took control of both executive and legislative branches, filling the executive departments and committee staffs with political lawyers. Government lawyers became powerful "repeat players" (to use Marc Galanter's term[22]) against corporate interests in litigation battles previously fought between corporations and weaker state governments, unions, or individual workers. Electoral victories – and nothing else – allowed them to do this.

Though not explicitly dismissing this interpretation of lawyers as political actors, Cushman minimizes the political aspects of the new thinking and the new lawyering. In his account (as in Karsten's interpretation of nineteenth-century judicial decision-making), Justices develop their ideas in a cloistered atmosphere. It is almost as if Holmes, Cardozo, Brandeis, Hughes, and others existed solely in a separate legal realm, disconnected from their roots, their eras, and the political battles they waged as lawyers before coming to the Court. This rarefied realm is also separate from the larger political world – a view of judging with many similarities to pre-realist descriptions of judicial law-making. This underemphasis on outside influences leads me to worry that Cushman, like Karsten, might have overstated his case in an effort to counter the dominant interpretation. In an effort to debunk the conventional wisdom, these two authors underestimate and thus downplay the influence of external politics and economics on the shape of the law. Their books are necessary correctives, but they may also require corrections themselves.

NOTES

[1]. Barry Cushman, "Rethinking the New Deal Court," *Virginia Law Review* 80 (1994): 201, 260-261.

[2]. Barry Cushman, "Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract," *1992 Supreme Court Review* 235 (1993); Barry Cushman, "A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*," 61 Fordham Law Review 61 (1992): 105; Barry Cushman, "Rethinking the New Deal Court," *Virginia Law Review* 80 (1994): 201.

[3]. Cushman's work was a major topic of a recent symposium on twentieth-century constitutional history – certainly not typical of a work of legal history. See generally "Symposium on Twentieth-Century Constitutional History," *Virginia Law Review* 80 (1994): 1ff. –especially Eben Moglen, "Toward a New Deal Legal History," *id.*, 263, and Edward A. Purcell, Jr., "Rethinking Constitutional Change," *id.*, 277.

[4]. I am in the same position as Eben Moglen, who, in his critique of Cushman's *Virginia Law Review* article, said, "Fortunately for me, I am not presently working in New Deal history, and so this Commentary does not require me either to defend my own approaches against Cushman's trenchant criticisms or to enlist in his army of revision." Moglen, "Toward a New Deal Legal History," 264.

[5]. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *1966 Supreme Court Review* 347 (1966); William E. Leuchtenburg, "Franklin D. Roosevelt's Supreme Court Packing' Plan," in Harold M. Hollingsworth and William F. Holmes, eds., *Essays on the New Deal* (Austin: University of Texas Press, 1969), 94. For critiques of Leuchtenburg's book, *see* Neal Devins, "Book Review: Government Lawyers and the New Deal," *Columbia Law Review* 96 (1996): 237; G. Edward White, "Book Review: Courts and Constitution: Cabining the Constitutional History of the New Deal in Time," *Michigan Law Review* 94 (1996): 1392.

[6]. Leuchtenburg, *Supreme Court Reborn*, at 162.

[7]. But see, William E. Leuchtenburg, "Symposium: When the People Spoke, What Did They Say? : The Election of 1936 and the Ackerman Thesis," *Yale L.J.* 108 (1999): 2077 at 2092-2097.

[8]. Laura Kalman argues that things were far more complicated than Cushman (and Ackerman and others) allows. Laura Kalman, "Law, Politics and the New Deal(s)," 108 Yale L. J. 108 (1999): 2165. Also see Leuchtenburg's challenge to Cushman and Ackerman on this very issue, Leuchtenburg, "When the People Spoke, What Did They Say? ," 2092-2097.

[9]. White, "Courts and Constitution," 1413 (quoting Leuchtenburg, *Supreme Court Reborn*, 231).

[10]. *Nebbia v. New York*, 291 U.S. 502 (1934).

[11]. *Wilson v. New*, 243 U.S. 332 (1917).

[12]. *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923).

[13]. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[14]. *See* David A. Pepper, "Against Legalism: Rebutting an Anachronistic Account of 1937," *Marquette Law Review* 82 (1998): 63.

[15]. In his review of Cushman's book, Mark Tushnet raises an interesting point pertaining to this issue: "For the historiographer, the interesting question is not whether a good externalist account of doctrinal development is better than a good internalist one, but rather why externalist or internalist accounts are attractive to different people, or at different times." Mark Tushnet, "Book Review: The New Deal Constitutional Revolution: Law, Politics, or What? ," *University of Chicago Law Review* 66 (1999): 1061, at 1077.

[16]. Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997).

[17]. By contrast, Morton J. Horwitz argues that judges made a conscious effort to conform the law the needs of the emerging bourgeoisie in the eighteenth and nineteenth centuries. Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977). Christopher Tomlins makes the case that nineteenth-century judges worked within a capitalist structure that shaped and constrained their thinking about law and legal outcomes, though they were not consciously choosing one side (capital) over another (labor). Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, Eng., and New York: Cambridge University Press, 1993).

[18]. Howard Gillman, *The Constitution Beseiged: The Rise and Demise of Lochner-Era Policy Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993); Rogers M. Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 89; Tushnet, "Review."

[19]. Although it seems unnecessary to prove that realism and other schools of legal thought are political movements, note that Karl Llewellyn, considered by many to be the leader of the realists, was also a major figure in the National Lawyers Guild, an organization committed to melding politics and law. *See* N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997); Stuart Scheingold, "The Struggle to Politicize Legal Practice," in Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering* (New York: Oxford University Press, 1998), 118, 199; Ann Fagan Ginger and Eugene M. Tobin, eds., *The National Lawyers Guild: From Roosevelt through Reagan* (Philadelphia: Temple University Press, 1988); Jerrold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976). For the argument that the New Deal and Realism were "two interrelated forms of practice," *see* Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham, N.C.: Duke University Press, 1995), 213 n.18, which Laura Kalman cites approvingly. Kalman, "Law, Politics, and the New Deal(s)," 2165.

[20]. A strong endorsement of this position may be found in Devins, "Book Review." See also Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982).

[21]. *See, e.g.*, Auerbach, *Unequal Justice*; Irons, *New Deal Lawyers*; and Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990).

[22]. *See* Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," Law and Society Review 9 (1974): 95.

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