

liberty advanced throughout the volume. Minor caveats aside this is a valuable book which invites readers to brush aside "the political fables of the New Deal" (p. 4) and to take a new look at constitutional doctrine from the vantage point of natural law. It deserves a wide audience among those interested in constitutional history and interpretation.

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WILLIAM E. LEUCHTENBURG, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. New York: Oxford University Press, 1995. ix, 350 pp. \$30.00.

The famous Court-packing controversy of 1937 lies at the heart of this collection of essays by distinguished historian William E. Leuchtenburg. Confronted by a Supreme Court bent on striking down New Deal legislation, President Franklin D. Roosevelt proposed a bill, thinly disguised as federal judicial reform, which would have permitted him to appoint six new justices. In the Court's history, Leuchtenburg says, "no event has had more momentous consequences" (p. 162). The public rallied behind the judiciary, and within a matter of months, FDR's proposal was dead, but so too was the obstructionist Court. A timely shift in the Court's center, coupled with the retirements of the most conservative justices over the next few years, paved the way for a vastly changed tribunal—the Roosevelt Court.

A two-part constitutional revolution followed. First, the new majority adopted a deferential approach to economic legislation. With that, the Court "upheld every New Deal statute that came before it," and, more broadly, "legitimated" the activist welfare state which emerged (pp. 220, 236). Second, the justices took an increasingly hands-on approach to the protection of noneconomic rights like free speech. Leuchtenburg links this new-found "civil liberation bent" to the Court-packing episode and the turnover in personnel (pp. 227-28).

Leuchtenburg's essays, written and published over a period of years and revised for this volume, trace the contours of this constitutional revolution mainly through vignettes of selected cases and political developments. The difference in constitutional worlds is dramatically illustrated by Leuchtenburg's superb discussion of *Buck v. Bell* (1927), which upheld the forcible sterilization of "feeble-minded" women with Justice Oliver Wendell Holmes' notorious parting shot that "[t]hree generations of imbeciles are enough."¹ Besides the understudied *Rail Pension Case* (1935), which invalidated a government-mandated pension plan for railroad employees,² Leuchtenburg examines the Court's approval of state minimum wage regulations in *West Coast Hotel v. Parrish* (1937),³ the decision which prompted the "switch in time saved nine" remark. Along with other political events, Leuchtenburg provides a finely detailed account, updated from its original publication with new archival research, of the decision-making process in the White House leading to the Court-packing plan.

One of the strengths of *The Supreme Court Reborn* is its underlying theme of the relationship between law and politics. Unfortunately, Leuchtenburg misses the

1. 274 U.S. 200, 207 (1927).

2. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935).

3. 300 U.S. 379 (1937).

opportunity to round out his discussion by examining the revolution in legal thought which accompanied the Court-packing struggle. The Court's actions exposed the fallacy in previously held intellectual assumptions that neutral judges objectively discover, rather than make, law. As Felix Frankfurter said, "now . . . even a blind man ought to see that the Court is in politics."⁴ This conceptual shift, following the legal realist movement, formed a critical part of the constitutional revolution of 1937. The realization that judicial decision-making is based on personal values called into question the formalistic categories which the Court had invoked to limit Congress's power to regulate interstate commerce. Gone were the days when justices would evaluate business activities for their "direct" or "indirect" effects on interstate commerce, thereby second-guessing Congress's practical judgment and hampering the federal government's ability to address national economic problems in manufacturing, agricultural production, and labor relations.

Leuchtenburg makes no claim of comprehensiveness. However, in this volume dedicated to unravelling how and why the Supreme Court was reborn, the reader would have benefitted from his insights into one particularly significant effort by the justices to redefine their role. How did the Court justify its disparate treatment of economic and noneconomic rights? In 1938, Justice Harlan Fiske Stone outlined a compelling answer in *Carolene Products*,⁵ which Leuchtenburg notes only in passing. Essentially, Stone suggested that political freedoms stand on a different footing than economic rights and that the judiciary has a special responsibility to scrutinize legislation which restricts the political process or which is directed against "discrete and insular" minorities. The *Carolene* philosophy provides an analytic framework for the constitutional revolution which Leuchtenburg describes, and Stone's analysis merits further attention.

Finally, Leuchtenburg's argument raises a question about the basic character of "constitutional revolution." In his focus on the revolutionary effects of the Court-packing episode, Leuchtenburg tends to diminish continuities with earlier constitutional developments. Downplaying the connection between post-1937 jurisprudence and that of Chief Justice John Marshall, Leuchtenburg says that the "world of twentieth-century America differs too much from the simpler society of Marshall's day to make comparisons profitable" (p. 232). Even so, there are significant parallels in constitutional doctrine: broad implied powers in Congress over the economy; the electoral process, rather than judicial review, serving as the fundamental check on legislatures; supplemented by judicial review to protect individual rights. That the Roosevelt Court adapted Marshall's constitutional philosophy does not mean there was no revolution. That there was a revolution does not mean there were no continuities with the past.

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WILLIAM M. OFFUTT, JR., *Of "Good Laws" and "Good Men": Law and Society in the Delaware Valley, 1680-1710*. Urbana and Chicago: University of Illinois Press, 1995. xi, 340 pp. \$39.95.

This work goes beyond the time span and region of the author's research.

4. Max Freedman, ed., *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* (Boston, 1967), p. 392.

5. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).