THE CONSTITUTION

AND THE NEW DEAL

G. EDWARD WHITE

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Also by G. Edward White

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For Alexandra Valre White

Preface

I have been indebted in producing this book not only to the kindness of people who have read and commented on earlier drafts but to a number of scholars, whose work is identified in the notes, who have been engaged in revisionist work on topics in late nineteenth- and early twentieth-century American constitutional history.

In acknowledging the contributions of others to this book I want to start with a group of my colleagues at the University of Virginia School of Law, who for several years have had a common interest in undertaking revisionist forays into late nineteenth- and twentieth-century constitutional history. The contributions of Charles W. McCurdy to that enterprise go back to the 1970s, when he began revising conventional wisdom in his studies of the jurisprudential context of Justice Stephen Field's decisions. Barry Cushman, John C. Harrison, and Michael J. Klarman have each been involved in revisionist projects of their own, some of which have had a direct connection to this book. All of those persons have set high standards of scholarly originality and collegiality, and it has been a pleasure to be in their company.

The next group of contributors I want to single out are a group of twentieth-century political historians who read earlier drafts of the book. I expected those individuals to resist my interpretive conclusions, but I felt their reactions might improve the end product. My first expectation was met, and I hope those readers will find some accommodations to their criticisms in this version. It was a pleasure to be able to exchange views with John Morton Blum, one of my mentors in graduate school; David Kennedy, one of my graduate school contemporaries; and Laura Kalman, whose regular comments on my work have always been helpful. If they subsequently regret missing an opportunity to jump on the revisionist bandwagon, I can at least feel that I offered them that chance.

In addition to the above persons I am grateful to Barry Friedman, Alfred S. Konefsky, L. A. Powe, Eric Segall, and William M. Wiecek for their comments on earlier drafts of the book, and to Reuel Schiller for his comments on Chapter 4 and Howard Gillman for his comments on Chapter 7. Thanks also

to the two anonymous readers for Harvard University Press, who made helpful suggestions for revision, and to Cathleen Curran, Anna Riggle, Dean Romhilt, and Wendy Wrosch, who provided valuable research assistance. Aïda Donald of Harvard University Press and Richard Audet have been a pleasure to work with in the editorial and production process. Portions of the book were delivered as the 1995 Rosenthal Lectures at Northwestern University Law School and as the 1997 inaugural Jerome B. Hall Lecture at the Hastings College of Law, University of California. Research for the book was supported by the University of Virginia Law Foundation and by the E. James Kelly and Class of 1963 Research Professorships of Law at the University of Virginia School of Law. Thanks to the reference staff at the University of Virginia Law Library, who assiduously unearthed the location of some obscure historical sources.

Portions of chapters in the book were previously published as "The Canonization of Holmes and Brandeis," 70 *New York University Law Review* 576 (1995); "The First Amendment Comes of Age," 95 *Michigan Law Review* 299 (1996); "The American Law Institute and the Triumph of Modernist Jurisprudence," 15 *Law and History Review* 1 (1997); "Revisiting Substantive Due Process and Holmes's *Lochner* Dissent," 63 *Brooklyn Law Review* 87 (1997); "The Constitutional Revolution as a Crisis in Adaptivity," 48 *Hastings Law Journal* 867 (1997); and "The Transformation of the Constitutional Regime of Foreign Relations," 85 *Virginia Law Review* 1 (1999). These articles contain considerably more documentation than the chapters on which they have been based, so specialists might prefer to consult them. Portions of the book were presented in faculty workshops at Brooklyn Law School, the University of Chicago, New York University Law School, Texas Law School, and the University of Virginia School of Law.

This book is dedicated to my elder daughter, Alexandra Valre White, who has always had the special gift of making others feel appreciated. I hope that the dedication will be one of a continuing series of gestures of reciprocal appreciation to Alexandra. I also hope that my younger daughter, Elisabeth McCafferty Davis White, will be able to make the kind of painless transition from college to the working world that she has made from one sport to another. As for Susan Davis White, I hope she stays just as she is.

A final retrospective thanks to Frances McCafferty White. She had the pleasure of knowing that her son had eventually settled down to doing things he found consistently fun and fulfilling and that were neither illegal nor unremunerated. I am hard-pressed to think of a better aspirational example.

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Introduction

This book has two related purposes. One is to complicate what I am calling the conventional account of early twentieth-century constitutional history, a collection of narratives about constitutional law and jurisprudence in the first three decades of the twentieth century that invariably culminate in a "constitutional revolution," inspired by the New Deal and precipitated by the Roosevelt administration's 1937 effort to "pack" the Supreme Court.[1] The other is to historicize that account: to show that its durability has been a function of the shared starting premises of its narrators rather than the historical accuracy of its conclusions.

The primary themes of the book evolved in a slow and roundabout fashion. In the mid-1980s I concluded that the role of legal elites in the New Deal was ripe for reexamination, and that two characteristics of elite legal policymakers in the 1930s appeared to have significant cultural ramifications. One was their shared sense of operating in a new world of governance in which they were no longer bound by the policies or theories of their predecessors. They saw themselves as a new generation of "modern" policymakers, engaging in hitherto untried experiments in government—writing laws on a clean slate. I wondered why the generation of New Deal lawyers had approached their policymaking tasks with this distinctive attitude and where the grounds for that attitude had originated.

The other characteristic of legal elites in the New Deal period that I found suggestive was a common tendency, in at least some of their members, to treat their experiences as governmental policymakers in the 1930s as a particularly heady set of adventures in the exercise of power, experiences that gave them a feeling of being an especially fortunate, perhaps gifted, group of persons. This tendency surfaced in two quite different ways in the later careers of New Deal lawyers. Some, such as Thomas Corcoran, Abe Fortas, Alger Hiss, James Landis, and Edward Pritchard, found themselves in legal or ethical

difficulties. Their predicaments could fairly be traced to their common belief that either ordinary legal rules did not apply to them, or their great skills as government lawyers and policymakers would enable them to avoid legal or ethical censure. Other New Deal lawyers, such as many of the subjects interviewed by Katie Louchheim in her 1984 collection, *The Making of the New Deal: The Insiders Speak,*[2] emphasized the excitement they had felt as pioneers in modern governance, as participants in the drafting and administration of government programs that were destined to make fundamental changes in the state of American society.

After publishing some essays on New Deal lawyers that began a historical exploration of those tendencies,[3] I put aside that project to write two other books. When I returned to the New Deal period, the context of my inquiry had changed. In the early 1980s developments in American politics, symbolized by the election of Ronald Reagan to the presidency, had suggested that the model of expanding government initiated by the New Deal had passed from unquestioned orthodoxy to a more contested status. By the mid-1990s politicians in the center of both of the major political parties had disassociated themselves from the reflexive invocation of government as a basis for solving social and economic problems. The New Deal model of government had seemingly evolved from instructive example to historical phenomenon.

At the same time I became aware of two scholarly developments in the fields of twentieth-century constitutional law and constitutional history that seemed to bear on my New Deal project. One was that despite the altered memory of the New Deal in the 1990s, a line of commentary on early twentieth-century constitutional law continued to ascribe a particularly significant status to the New Deal period as a moment in which a "constitutional revolution" initiated by the Supreme Court had laid the groundwork for an expansive, regulatory, modern state. Further, this group of commentators conveyed an implicit excitement about the "revolutionary" constitutional character of the New Deal years. Their sense of being energized, even inspired, by an exposure to New Deal constitutional history seemed comparable to the explicit excitement that had been conveyed in the reminiscences of New Deal lawyers.

The other development that I observed was the beginning of a line of scholarship in late nineteenth- and early twentieth-century constitutional history that revised conventional characterizations of some of the dominant doctrinal tendencies of those periods. A common message of the revisionist studies was that mid and late twentieth-century scholars had imposed anachronistic analytical categories on early twentieth-century constitutional opinions and commentary, and their anachronistic readings had served to prevent an adequate understanding of the world of late nineteenth- and early twentieth-century constitutional jurisprudence.

I hypothesized that the anachronistic readings of early twentieth-century constitutional jurisprudence that revisionist scholarship had exposed were related to the sense of excitement late twentieth-century scholars had found in the New Deal as the source of a constitutional revolution. I decided to reassess the meaning of that "revolution" through a series of studies of topics in early twentieth-century constitutional law. I first included the standard areas singled out by commentators: the jurisprudence of due process, Contracts Clause, Commerce Clause, and free speech cases, as well as those raising issues related to the constitutional status of federal administrative agencies. Eventually I added areas that I found to be more closely connected to the relationship of the Constitution to the New Deal than I had first thought, such as the jurisprudence of constitutional foreign affairs cases and the jurisprudential debate over the nature and interpretation of common law sources precipitated by the American Law Institute's 1923 commissioning of "Restatements" of legal subjects.

As this work began to take shape, I realized that although revisionist work had made significant inroads into conventional narratives in some areas, the durability of these conventional approaches, despite their frequently inaccurate and anachronistic portraits of early twentieth-century constitutional history, was extraordinary.[4] It became clear to me that the influence of the conventional approaches came from their interpretive resonance. Their characterizations of early twentieth-century constitutional cases and commentary, however oversimplified or distorted, were still seen as instinctively sound. I concluded that one could not engage in a full-scale reassessment of the relationship of the New Deal to early twentieth-century constitutional law without exploring the meaning of this resonance. At that point my study became an exercise in mid and late twentieth-century historiography as well as in early twentieth-century constitutional history.

The conventional account of early twentieth-century constitutional history begins by identifying the New Deal as the source of a new era of constitutional law and constitutional interpretation, in which the Constitution was adapted to facilitate a new realm of American governance. That realm featured an affirmative role for the states, and especially for the federal government, as regulators of the economy and distributors of economic benefits throughout the population. It also featured a phalanx of federal administrative agencies as mechanisms of affirmative, regulatory government. It posited as well an aggressive, creative role for the executive branch in the formation of foreign policy, with little congressional, Senatorial, or judicial scrutiny of discretionary executive decisions.

Finally, the new realm of American governance anticipated an altered role for judges as constitutional interpreters, one in which judges would assume a scrutiny of the decisions of other branches of government that was, depend-

ing on the issues raised in a case, either deferential or aggressive. On the one hand, judges would conclude that the Constitution permitted a great deal of legislative and administrative authority to regulate the economy and redistribute economic benefits, and a great deal of discretionary power in the executive branch to make foreign policy. They would defer to Congress, the states, and the executive when laws or policies affecting those areas were challenged on constitutional grounds. On the other hand, judges would insist that the Constitution required significant judicial scrutiny of laws or policies infringing on certain specified civil rights and liberties, those deemed foundational to a modern democratic society.

In performing those dual functions judges abandoned their traditional posture in constitutional interpretation as guardians and appliers of a realm of prepolitical, essentialist constitutional principles. Instead of serving as general overseers of the constitutional line between permissible public regulations and impermissible encroachments into the private sphere of life, judges separated laws and policies they reviewed on constitutional grounds into two groups, one requiring only a relaxed scrutiny and the other demanding heightened scrutiny. (I will be representing the traditional posture and that which replaced it by the terms *guardian review* and *bifurcated review.*) This general change in judicial attitudes toward constitutional review helped facilitate transformations in specific areas of constitutional law, producing a "constitutional revolution."

None of the conventional account's conclusions withstand close historical analysis. Doctrinal changes in constitutional law did occur over the course of the twentieth century, but their causal relationship to the New Deal was far more complicated, and attenuated, than existing scholarship has suggested. In some areas changes were well under way before the New Deal was launched. In other areas doctrinal developments have been given anachronistic and misleading labels that serve to overemphasize their novelty. In still others the time sequence of change has been framed too narrowly, lending too much causal weight to political events in the late 1930s. Nor did a change in the Supreme Court's constitutional review posture occur as dramatically, or over as short a time span, as the conventional account suggests. The continuing authoritativeness of the conventional account in the face of its deficiencies presents an interesting historiographical problem.

I have concluded that the continued resonance of the conventional account has been intimately related to a general perception of the New Deal as a symbolic historical episode. Commentators have taken the New Deal to have been an inevitable and archetypal response to a crisis of governance in modern America and have invested in that response. From that starting point it has been easy to see changes in constitutional law as satellites of the New

Deal's formative gravitational pull. I have sought to understand why the New Deal as a symbol of twentieth-century governance has had this powerful and distorting historiographical effect.

In the course of probing the New Deal's powerful cultural resonance I have asked two general questions. Why has the immediate social context of the New Deal—as distinguished, say, from that of the 1920s or 1950s—been seen as so fundamental and transformative by twentieth-century constitutional historians? And why has the New Deal's vast, if selective, expansion of the regulatory and redistributive powers of government been taken by those scholars as both historically inevitable and normatively unproblematic? Those questions have invited me to investigate the intellectual process by which twentieth-century Americans have sought to make sense of their immediate past. In that investigation two terms employed by intellectual historians have been useful. The terms are *modernity* and *modernism*.

The fundamental cultural problem for twentieth-century Americans, whether they have been actors in the area of constitutional governance or elsewhere, has been confronting and making sense of modernity. I am using the term modernity, following Dorothy Ross and others, to mean the actual world brought about by a combination of advanced industrial capitalism, increased participatory democracy, the weakening of a hierarchical class-based social order, and the emergence of science as an authoritative method of intellectual inquiry. Modernity, in its American version, was only partially established by the opening of the twentieth century; its full flowering would take place in the next four decades.

The emergence of modernity in the twentieth century contributed to the formation of a distinctive consciousness that has shaped the responses of Americans to their encounters with modern life. This consciousness has manifested itself in an attitude that elevates human agency, as distinguished from potent external forces, to a position of causal primacy in the universe, and thus takes for granted that humans are capable of controlling their environment and shaping their collective destinies. I am calling that consciousness modernist and will occasionally use that term, or the term modernism, to characterize the attitudes of judges, legal scholars, or historians exhibiting it.[5]

My limited definition of modernism and my chronological location of both modernity and a modernist consciousness are at variance with a number of other scholarly formulations[6] and thus require some justification at this point.

This work can be seen as connected to a historiographical tradition, most prominently identified with the work of J. G. A. Pocock and Dorothy Ross,

which has emphasized connections between republican theory and distinctively American conceptions of governance and law, but stops short of equating eighteenth-century American republicanism with modernism. It also emphasizes the dominance, in late eighteenth- and nineteenth-century America, of distinctive conceptions of the course of ideas and institutions over time and across space. In this tradition "premodern" and "prehistoricist" conceptions of cultural change and of causal agency so decisively affected the democratization of American constitutional jurisprudence in the nineteenth century as to strip the term "democratization" of much value as a historical construct applied to that time frame.[7]

In this work, which focuses primarily on twentieth-century developments, I stress the delayed impact of both modernity and modernist theories of causal agency in America, at least with respect to the areas of constitutional law and jurisprudence. I have, however, made some modifications that neither Pocock nor Ross might accept. First, I have not employed the labels historicist and prehistoricist to describe the attitudes of constitutional commentators and judges, preferring to proceed on ground more familiar to them, that of theories of constitutional interpretation. For me the label modernist presupposes a historicist theory of change over time, which is itself closely related to a human-centered theory of causal agency. Second, I have pushed the chronological origins of modernism, as an orthodoxy in American constitutional jurisprudence, back further in time than Ross might accept, to the late 1930s and early 1940s. I recognize that both these modifications may be regarded as controversial. Indeed, Pocock and Ross, on discovering my stated affinity with their work, may want to get out of town or start a more exclusive tradition.

The New Deal can be seen as twentieth-century America's first effort in governance where policy responses to cultural tensions accentuated by modernity were unqualifiedly modernist in their assumptions about the power of humans as causal agents. As a cultural symbol, it serves as a testament to the belief that Americans can themselves alter the course of their future by changing the shape of their government and changing the meaning of their Constitution. The New Deal can also be seen as America's first twentieth-century effort to respond definitively to some parallel and long-standing crises in social relations, politics, economics, and intellectual inquiry that stretched from at least the 1880s through the 1930s.

The focus of this book is on constitutional law and jurisprudence, so I will be treating those crises only as backdrops to the issues that are its central con-

cern. But a brief overview of the impact of modernity on America seems warranted at this point. The period between the 1880s and the 1940s witnessed the replacement of one dominant model of social relations, politics, economics, and intellectual inquiry with another. At the outset of that period the dominant model of social relations was class; that of politics republican democracy, by which I mean the theory and practice of popular sovereignty channeled through elite representation; that of economics hierarchical industrial freedom, personified by self-regulating industrial capitalism; and that of intellectual inquiry natural science.[8]

During this period a large influx of European immigrants and the introduction into America of collectivist models of social organization helped initiate a process that would result in the emergence of an alternative model of social relations to that of class. By the 1940s a class-based model of American social relations was being threatened by a model that stressed the importance of group identities and "interests" as the most salient badges of social identity.[9]

In the realm of political theory and practice, the Progressive movement of the early twentieth century can be seen as simultaneously preserving an elite-directed model of political reform and contributing to the broadening of popular participation. By the 1928 election elite reformers had been displaced by nonpartisan "experts," and coalition politics, emphasizing bloc voting by groups with defined interests or identities, was in competition with electioneering managed by traditional elites. Harry S. Truman's defeat of Thomas E. Dewey in 1948 confirmed the reconfiguration of republican democracy along lines emphasizing wider appeals to the diverse groups that composed the American electorate.[10]

Accentuating the early twentieth-century crisis of participatory governance in modern America was the perceived failure of a self-regulating model of the American economy, emphasizing the power and autonomy of elite capitalist enterprises. Late nineteenth-century economists had suggested that modern, self-regulating industrial economies tended to spawn economic interdependence and massive inequalities of wealth; by the early twentieth century experiments with expanded state intervention to regulate the conduct of private economic actors and to redistribute economic benefits had begun to be implemented on a modest scale. Initially these experiments were lightning rods of controversy, but by the early 1930s a self-regulating, hierarchical model of political economy, featuring a modernized version of late nineteenth-century industrial capitalism, seemed on the verge of collapse. The New Deal, in contrast, appeared to be an experiment with comparatively massive federal intervention in the service of a government-managed, welfare-oriented model.[11] Of all the crises of this time period, that in political