

## Exceptions and Baselines in American Political and Legal History

**Author :** Christopher Schmidt

**Date :** March 6, 2017

Jefferson Cowie, [The Great Exception: The New Deal and the Limits of American Politics](#) (2016).

In *The Great Exception: The New Deal and the Limits of American Politics*, Jefferson Cowie has written a slim, brisk work of historical synthesis in which he seeks to reframe how we understand twentieth-century American political history. In this essay, I describe Cowie's insightful and provocative revisionist account of the New Deal and its place in American history. At the end of the essay, I consider some questions the book raises for legal historians.

Cowie's target in *The Great Exception* is the idea that the New Deal was a definitive turning point in American political history. Most historical accounts describe the New Deal as the period when, after decades of struggle, liberals pushed back laissez-faire ideology, installed the American version of the social welfare state, and transformed the nation's political culture along more egalitarian and pluralistic lines. Today liberals praise the New Deal, conservatives criticize it, but all sides generally agree it marked a significant and lasting shift in the relationship between the American people and their government.

According to Cowie, this interpretation exaggerates the achievements of the New Deal and underplays the durability of American conservatism. The New Deal, he argues, was "less the linear triumph of the welfare state than the product of very specific, and short-lived, historical circumstances." (P. 9.) Rather than a turning point, the New Deal was an aberration. The nation's most severe economic crisis arrived at just the moment when social and political developments lowered barriers that had stood in the way of large-scale social welfare reform. Out of this this brief window of historical fortuity came the New Deal, a "burst of economic experimentation" (P. 227) aimed toward empowering working-class people.

Cowie dedicates much of his book to examining the "historic fault lines of American political culture" (P. 7) that the New Dealers had to overcome, which he identifies as ideological commitments to individualism and anti-statism along with religious, racial, and ethnic identity. Together, these fault lines functioned as barriers to the kind of broad, working-class coalitions that might lead to national-level redistributive social welfare policies. Only when these "core themes" of American history "underwent an incomplete suspension, a mitigation" (P. 13) between the 1930s and the 1960s could a different sort of politics reign, Cowie argues. Immigration restriction in the 1920s lessened ethnic divisions; a secularist trend in the first half of the twentieth century reduced religion's divisive role in public life; generations of reform agitation and labor organizing combined with the demands brought about by economic disaster to loosen the allure of individualism and anti-statism.

These trends could not last. The fall of the New Deal order and the ascendance of the New Right in the 1970s and 1980s, according to Cowie, was a reestablishment of the American political norm. It was "a return to a sharply more conservative, individualistic reading of constitutional rights and liberties; a return to economic policies in which the state looks after the corporation; and a return to a working class fragmented by race, religion, immigration, and culture." Ronald Reagan's conservative "restoration" was "axiomatic," even "inevitable." (P. 29.)

Cowie's argument about America's ideological baseline provides the foundation for his second major claim: that the New Deal, while a dramatic rupture of American political tradition, was compromised and qualified from inception. The political alliances on which it was built were "truncated," "brittle," "precarious." Federal recognition of collective economic rights, which Cowie identifies as the New Deal's signature innovation, was always an "experiment," and an "unstable" one at that. Indeed, according to Cowie, the policymaking innovations began and ended during just "a few

charmed years” (P. 89) in the late 1930s. For most of the roughly four-decade period of the New Deal order, New Deal liberals struggled to maintain fracturing alliances and defend past achievements.

In the book’s conclusion, Cowie explains how his revisionist history illuminates our current political situation. An appreciation of the durable conservatism of U.S. political culture and the exceptional nature of the New Deal should give pause to those on the left who call for a new New Deal today, he argues. The “freewheeling historical analogies based on an extraordinarily unique period in American history” that New Deal revivalists rely on amount to little more than “chasing ghosts.” (P. 229.) If liberals are searching American history for inspiration, perhaps, Cowie suggests, they should turn to the Progressive Era. Unlike the New Deal, and like today, this was a period when liberal reformers squarely faced the obstacles of American conservatism. They pioneered diffuse and localized reform efforts, and they found ways to channel dominant conservative tendencies for their own causes. Something along these lines, Cowie concludes, might better capture the best hope for progressive politics today. The election of Donald Trump only further reinforces Cowie’s portrait of post-New-Deal American politics, as well as his strategic recommendations for today’s liberals.

For anyone who has followed recent trends in the study of American political history, none of the component parts of *The Great Exception*’s arguments will seem particularly new. Liberal critiques of the limits of New Deal policy are as old as the New Deal itself. A recent generation of historians has been urging a greater appreciation for the conservative forces of American history. Others have suggested the Progressives as a useful historical analogue for today’s progressives. Cowie fully recognizes his intellectual debts, filling his pages with appreciative references to the work of other historians. Yet even if one knows all the parts of the story, Cowie’s achievement is to piece them together in a way that feels fresh and urgent. The value of Cowie’s book is in his ability to synthesize the work of other historians in order to advance a sharp, provocative assessment of its larger significance. Cowie makes big, bold claims without abandoning the nuances and texture of the historical record. The result is a book that is challenging and rewarding.

*The Great Exception* made me wonder whether American constitutional history (a topic Cowie touches on only lightly) is ripe for an analogous synthetic revisionist account. We seem to be trending in a similar direction, with a number of books and articles questioning the durability and significance of the Warren Court, the New-Deal-like moment of modern American constitutional history. As the Warren Court recedes further into history, its version of legal liberalism seems more and more aberrant in the grand scheme of American constitutional history. The ideal of the Supreme Court’s using the Constitution as the bulwark of protection for the disempowered has faded in recent decades. Although some liberals continue to hope for the return of a Warren Court, the center of gravity for today’s legal liberalism revolves around a more chastened vision of the courts and the Constitution, one that celebrates the occasional breakthrough, while centering most of its energies on protecting precedents and blocking judicial challenges to existing policy.

Today, conservatives are the ones with the more ambitious visions for the courts. Whereas recent liberal judicial victories, such as the Supreme Court’s 2015 gay marriage decision, have tended to reaffirm and solidify larger policy shifts, conservative judicial victories—in areas such as gun rights, campaign finance, and religious freedom—have reshaped political debate. Just as liberal political commentators warn that conservative economic policy has brought a “New Gilded Age,” liberal legal commentators accuse the Court in recent years of returning to the constitutional libertarianism of the Lochner Era.

Perhaps a next turn in constitutional history will be to consolidate the past generation of revisionist scholarship into Cowie-style synthetic narratives that urge us to rethink what we treat as baselines of constitutional history and what we treat as exceptions. Such an analysis would highlight the long-term historical factors that have supported and encouraged judicial conservatism, some of which would track Cowie’s factors, some of which would focus on the distinctive world of lawyers and courts. It would also revisit the Warren Court era, offering new explanations of how this exceptional period in constitutional history took shape, what it accomplished, and the reasons legal liberalism ultimately proved so fragile. For liberals, a constitutional history in which the Court of Earl Warren is the great exception and the Courts of William Taft and John Roberts are the baselines may be, as Cowie describes his revisionist political history,

an “American tragedy.” (P. 32.) But it may also offer what Cowie hopefully describes as “a more thorough and realistic understanding of our recent past in the hope that it can provide a more stable intellectual foundation for discussions of past and future politics” (P. 228)—and, one might add, the past and future of constitutional law.

Cite as: Christopher Schmidt, *Exceptions and Baselines in American Political and Legal History*, JOTWELL (March 6, 2017) (reviewing Jefferson Cowie, **The Great Exception: The New Deal and the Limits of American Politics** (2016)), <http://legalhist.jotwell.com/exceptions-and-baselines-in-american-political-and-legal-history/>.