



THE HUGHES-ROBERTS VISIT

Barry Cushman

THE BEHAVIOR OF JUSTICE OWEN ROBERTS in the minimum wage cases that came before the Supreme Court of the United States in 1936 and 1937 has long been the subject of scholarly interest and debate. In *Morehead v. New York ex rel. Tipaldo*, decided in June of 1936, Justice Roberts joined the Four Horsemen in striking down New York's minimum wage statute for women.¹ The following term, however, Justice Roberts supplied the crucial fifth vote to uphold the Washington State minimum wage law in *West Coast Hotel v. Parrish*.² The question that has long preoccupied scholars is, of course, what accounts for this "switch"?

In an article published in the *North Carolina Law Review* in 2005, Professor William Leuchtenburg observed that several explanations for Roberts' conduct in the minimum wage cases have been offered, "with one of the most abiding that at some point [Chief Justice Charles Evans] Hughes must have taken Roberts aside and told him that, for the sake of the Court as an institution, he had to abandon the Four Horsemen."³ Professor Leuchtenburg further reported that "At a symposium on the Court-packing crisis in which I participated

Barry Cushman is the James Monroe Distinguished Professor of Law, David H. Ibbeken '71 Research Professor, and Professor of History, University of Virginia, and Forbes Visiting Fellow, James Madison Program, Princeton University. Copyright © 2012 Barry Cushman.

¹ 298 U.S. 587 (1936).

² 300 U.S. 379 (1937).

³ William E. Leuchtenburg, "Charles Evans Hughes: The Center Holds," 83 N.C. L. Rev. 1187, 1198 (2005).

Barry Cushman



Chief Justice Charles Evans Hughes (left) and Justice Owen J. Roberts (right).

with Justice William O. Douglas in the 1960s, Fred Rodell of Yale Law School remarked, ‘It was generally understood at the time that Hughes gave Roberts a third degree of the sort that would not be tolerated today.’⁴ Professor Leuchtenburg continued, “We have no

⁴ Id., quoting Fred Rodell, Remarks at the Marist College Symposium on the Court-Packing Plan (Oct. 14, 1967).

The Hughes-Roberts Visit

documentation of such an episode, though it is unlikely that we would have, but we do know that Hughes and Roberts had what may very well have been a meaningful get-together in the summer of 1936 following the *Tipaldo* uproar.”⁵ Professor Leuchtenburg then related that “[i]n her oral history memoir, Secretary of Labor Frances Perkins reports what her girlhood chum, Mrs. Roberts, relayed to her. The Hugheses, her ‘very close friend’ confided, phoned the Robertses that summer to say that they were planning to visit Pennsylvania and were eager to see the picturesque farming country where the Robertses had a home – a palpable bid for an invitation to spend the night, which quickly came. After lunch the first day, Hughes and Roberts went off for a walk. Perkins continues:

Says Mrs. Roberts to me, “All I know is that they walked up and down that terrace for hours. I said to myself, ‘Owen is no walker. His feet will drop off. What in the world is the Chief Justice talking to him about so much? Why don’t they stop this?’ Twice I called them to come in and have tea, but they said, ‘Just a minute,’ and kept right on talking and talking, and walking up and down on that terrace, which is far enough from the house to be completely out of earshot, and yet it isn’t actually down in the pasture where the cattle are.”

They had a pleasant dinner. Right after dinner Mr. Justice Roberts said to the Chief Justice, “I want to show you some old Pennsylvania court records that I’ve got” So he took him into his library which was at the end of the house, a long way from the drawing room and living room. . . . Mrs. Roberts said:

They were in there all evening. Much use we had of them. Much conversation we had out of those men. Mrs. Hughes and I talked to each other about the children, the servants, gardens, the weather, Washington gossip. We got to the end of our rope, but those two men still stayed in there. They came out finally and we had a little chat. The next morning the Chief Justice and Owen went in and talked again in the library.

⁵ Id.



Supreme Court spouses: Antoinette Hughes (second from left) and Elizabeth Roberts (far right), with Winifred Reed (far left) and Agnes Stone (second from right), at a breakfast for Eleanor Roosevelt.

“What they said to one another over these many hours at a critical moment for the Court, subjected to savage condemnation for several of its decisions and with rumors brewing about reprisals Roosevelt was hatching,” Professor Leuchtenburg concedes, “we have no way of knowing. But if Hughes did win Roberts over, he may well be regarded as the architect of what has been called the Constitutional Revolution of 1937.”⁶

Professor Leuchtenburg reiterated this surmise in a contribution to a forum published in the *American Historical Review* later that year: “While the country was still raging about the 5-4 *Tipaldo* decision and before *West Coast Hotel* was considered, Hughes spent many

⁶ 83 N.C. L. Rev. at 1199-1200, quoting Frances Perkins, Columbia Oral History Interview 71-74.

The Hughes-Roberts Visit

hours as a guest at Roberts's Pennsylvania farm absorbed in talk – afternoon, evening, and morning – and it is conceivable that the chief justice was counseling his younger colleague that the Court as an institution was in jeopardy and needed to be responsive.”⁷

Relying on Professor Leuchtenburg, others have repeated this account. Those who follow Professor Leuchtenburg sometimes show less inclination to draw explicit inferences about the content of the conversations between the two justices, but the possibility that those discussions concerned the public reaction to the *Tipaldo* decision and the need to change the Court's direction are often left hanging.⁸

In his recently published book, *FDR and Chief Justice Hughes: The President, The Supreme Court, and the Epic Battle Over the New Deal*, Professor James Simon follows Professor Leuchtenburg in repeating this story. In visiting Justice Roberts on his farm in 1936, Professor Simon maintains, “[t]he Chief Justice almost surely had more in mind than simply enjoying the scenery and his colleague's hospitality. Roberts, who had earlier joined Hughes at the center of the polarized Court, appeared to have taken a sharp turn to the right. He had abandoned Hughes in all of the controversial conservative decisions at the end of the term, including *Tipaldo*, which was of the greatest concern to the Chief Justice.”⁹ “The Hugheses' visit to the Roberts farm lasted barely twenty-four hours, but the Chief Justice used several of those hours to engage his colleague in intense conversation. Roberts' wife, Elizabeth, watched her husband and the Chief Justice pace back and forth across the terrace, deep in conversation; they continued their talk after dinner in Roberts' library.”¹⁰ “So far as Mrs. Roberts knew, neither her husband nor the Chief Justice

⁷ William E. Leuchtenburg, “Comment on Laura Kalman's Article,” 110 *Am. Hist. Rev.* 1081, 1189-90 (2005).

⁸ See Laura Kalman, “The Constitution, the Supreme Court, and the New Deal,” 110 *Am. Hist. Rev.* 1052, 1077 (2005); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* 232-33 (2010).

⁹ James F. Simon, *FDR and Chief Justice Hughes: The President, The Supreme Court, and the Epic Battle Over the New Deal* 300 (2012).

¹⁰ *Id.*

ever shared the topic of their extended conversation with anyone. But critical agreement between the two justices in several important decisions during the next Court term suggests that their summer discussion covered more than the joys of vacation and the beauty of the Pennsylvania countryside.”¹¹

This story has considerable intuitive, human appeal, and even though it was introduced into the literature only in 2005, it quickly has become a staple in popular and scholarly efforts to explain the Court’s behavior in 1937. Yet this account of the Hughes-Roberts visit appears to suffer from a serious flaw. For the transcript of the Columbia Oral History Project interview with Frances Perkins, which is the lone source to which Professor Leuchtenburg cites in support of this story, seems clearly to place the visit and the conversations in question not in the summer of 1936, but rather during the summer of 1935.¹² Here is the continuous text of the relevant pages of the transcript cited by Professor Leuchtenburg:

*In that summer of '35 a historic event took place. With the rejection of the NRA it became more important to me, from my point of view, to find some way of introducing, or devising, legislation which would pass the test of the courts, and which would have at least a minimum effect with regard to wages and hours in the United States. Whether we had to go back to the compact between the states, or whether there was another way, we hadn't decided, but I began all over studying how to do it.*¹³

In the summer of '35, following a good deal of denunciation of the Supreme Court by newspapers, periodicals, members of Con-

¹¹ Id.

¹² Frances Perkins, Columbia Oral History Collection, Part VII: Politics, the Supreme Court, the National Labor Relations Board, and the Approach of War, 1936-1940, pp. 70-78, at www.columbia.edu/cu/lweb/digital/collections/nny/perkinsf/transcripts/perkinsf_7_1_70.html (hereinafter “Perkins Interview”). Through the courtesy of Nivea Miller at the Columbia Center for Oral History I have checked the online version of the relevant pages against the paper version of the transcript. This examination revealed that the online version is a faithful reproduction.

¹³ Id. at 71 (emphasis mine).

The Hughes-Roberts Visit

gress, odds and ends of people, the President and the Attorney General, for being archaic, stick-in-the-mud and all that kind of thing, something happened. The court adjourned as usual in June. I know this following story from Mrs. Owen Roberts, who is a very close friend of mine, a girlhood friend of mine. I have know [sic] her forever. She is completely unconcerned about politics, law, judicial decisions. “None of them make any sense to me. It’s just a lot of politics. That’s the way the game is played.” I’m fond of her, but there is no intellectual rapport between us particularly. We’re real friends and I used to see her a great deal when they were in Washington.¹⁴

During that summer Mr. Justice and Mrs. Hughes telephoned to Justice Roberts and said that they were taking a little motor trip to see the country. They were going to be in Pennsylvania. They wanted to see some of the lovely farming country. Of course at once Justice Roberts said, “Oh do come out to the farm and see us.” He has a very fine farm where he raises very fine cattle. It’s a good old Pennsylvania Dutch farm, a lovely place. The Hughes[es] accepted with alacrity. They would arrive on a certain day and would be delighted to spend the night. It was a natural thing. They’re all good friends within the court.¹⁵

“So the Hugheses called and they had lunch. Then Owen and the Chief Justice went off and took the work.”¹⁶ Then follow the passages quoted by Professor Leuchtenburg.¹⁷ Secretary Perkins then goes on to say that the Court convened again that October,¹⁸ and that during that term, “*the early part of the next year*, the court turned the government down on the Triple-A.”¹⁹ The reference here is to the decision in *United States v. Butler*, which was handed down in early January of 1936.²⁰ She then goes on to describe events that, accord-

¹⁴ Id. at 71-72 (emphasis mine).

¹⁵ Id. at 72 (emphasis mine).

¹⁶ Id. at 73.

¹⁷ Id. at 73-74.

¹⁸ Id. at 74.

¹⁹ Id. at 77 (emphasis mine).

²⁰ 297 U.S. 1 (1936).

ing to her account, occurred “quite early in ’36.”²¹

Admittedly, the transcript is not entirely unambiguous. Secretary Perkins’ account, tendered more than a decade after the event, is troubled by occasional defects in recollection. She recalls a decision handed down “late in ’35,”²² following the summer visit of the Chief Justice and Mrs. Hughes. It was “a case that we had not realized was coming up,” involving “a peculiar child labor matter” “from one of the states.”²³ There, Perkins reports, with Hughes and Roberts voting with the majority, the Court had sustained the regulation by a vote of 5-4 or 6-3.²⁴ Perkins reports that she rushed over to the Roberts home to congratulate the justice, who “had been voting no on everything,” for not being “afraid to change his mind.”²⁵ Perkins concluded that Roberts had “struggled with himself” and “come to the conclusion that the right direction” was “to support some of this legislation” when it was “not absolutely crazy.”²⁶ She reports that Roberts was “surprised” by her reaction, and told her that “it was very possible to differentiate between this case and some of the earlier cases. . . . They were not exactly the same.”²⁷ Moreover, in the wake of this decision, “[t]here were learned editorials on the learned Mr. Justice Roberts who was able to make these adjustments,” and “the idea was that the votes had changed.”²⁸

It is possible that Perkins was referring to the decision in *West Coast Hotel*, or perhaps to the Court’s decision upholding New York’s unemployment compensation statute in November of 1936.²⁹ But it does not seem likely that the Secretary of Labor

²¹ Perkins Interview at 78-83. She puts these events at the same point on the time line in her memoir. See Frances Perkins, *The Roosevelt I Knew* 251-55 (1946).

²² Perkins Interview at 74, 80.

²³ *Id.* at 74.

²⁴ *Id.* at 74-75. I have been unable to locate any case answering that description that the Court decided either in the fall of 1935 or in the fall of 1936.

²⁵ *Id.* at 75.

²⁶ *Id.*

²⁷ *Id.* at 75-76.

²⁸ *Id.* at 76.

²⁹ *Chamberlin v. Andrews*, 299 U.S. 515 (1936).

The Hughes-Roberts Visit



Secretary of Labor Frances Perkins (center) with New Deal supporters Senator Hugo L. Black of Alabama (left) and Representative William P. Connery, Jr. of Massachusetts (right).

would misplace such a decision in time by more than a year, badly mischaracterize the subject matter of the statute involved, and not have realized at the time that the case was before the Court.

Later in the transcript, in a passage not cited by Professor Leuchtenburg, Secretary Perkins states that “[t]he court itself was taking steps to remedy the situation,” and that “the court did change its

position.”³⁰ She reports that Justice Stone told her that “Hughes and Roberts had a talk,” and that “[t]hey believed that that would save the day.”³¹ She does not elaborate on the contents of that reported conversation, and the timing of both the conversation and the change in position referred to are not entirely clear. But it does appear from the discussion that both precedes and follows this passage that the change to which Perkins refers is placed before the announcement of the Court-packing plan on February 5, 1937, and thus before the announcement of either *West Coast Hotel* or the decisions in the Wagner Act and Social Security Cases. Indeed, the change in position to which she refers appears to be an allusion to the change she earlier reported as having occurred in late 1935. For she makes no reference here to any of the major decisions the Court handed down in the spring of 1937, and here again she refers to “the conversation between Hughes and Roberts at the Roberts farm.”³²

The sole document to which Professor Leuchtenburg cites in placing the visit in 1936 thus instead appears clearly to place the visit in 1935.³³ If the placement of the visit in 1935 is correct, then Hughes visited Roberts not in the wake of the closely divided deci-

³⁰ Perkins Interview at 114.

³¹ Id. So far as I am aware, this is the only source for the proposition that Stone ever said such a thing. It is reported neither in Perkins’ memoir nor in Alpheus Thomas Mason’s definitive biography, *Harlan Fiske Stone: Pillar of the Law* (1956). In view of what we know about Hughes’s views of propriety and his somewhat uneasy relationship with Stone, one might with reason wonder whether the two ever had a conversation in which the Chief Justice confided such a matter. See, e.g., Merlo J. Pusey, *Charles Evans Hughes 675-76* (1951); Barry Cushman, *Rethinking the New Deal Court 101-03* (1998); Simon, *FDR and Chief Justice Hughes*, at 244-45, 282.

³² Perkins Interview at 114.

³³ Hughes makes no mention of any visit to Roberts’ farm in his Autobiographical Notes, though he does relate that in the summer of 1935 he and Mrs. Hughes drove from Washington to New Hampshire’s White Mountains. David J. Danelski & Joseph L. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes 323* (1973); see also Simon, *FDR and Chief Justice Hughes*, at 270. It may be that the Chief Justice and Mrs. Hughes stopped at the Roberts’ Pennsylvania farm en route.

The Hughes-Roberts Visit

sion in *Tipaldo*, but instead in the wake of “Black Monday’s” unanimous decisions invalidating the National Industrial Recovery Act in *United States v. Schechter Poultry Corp.*,³⁴ striking down the Frazier-Lemke Farm Debt Relief Act in *Louisville Joint Stock Land Bank v. Radford*,³⁵ and rebuffing the President on the issue of his authority to remove a “Contentious Commissioner”³⁶ of the Federal Trade Commission in *Humphrey’s Executor v. United States*.³⁷ These conversations also would have taken place *before* Justice Roberts voted to strike down the New York minimum wage law in *Tipaldo*; *before* both Hughes and Roberts voted to invalidate the Agricultural Adjustment Act of 1933 in *United States v. Butler*; and *before* both Hughes and Roberts voted to invalidate provisions of the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.*³⁸ Were one tempted to draw inferences about the content of the discussions that Hughes and Roberts had during the visit, therefore, they would be quite different from those suggested by Professor Leuchtenburg and those who have relied upon him.

None of this, of course, means that Hughes and Roberts did not at some point have the sort of conversation that Professor Leuchtenburg and others have suggested they may have had. In an unpublished 1954 dissertation, Stephen Early reported that a “source, whose desire for anonymity must be respected,” stated to Early “that to his positive knowledge the Chief Justice discussed with Justice Roberts the desirability of the latter’s taking a more liberal attitude toward legislation designed to ameliorate social and economic ills of the country, so as to overcome the conservative bloc and relieve the Court of the pressure of increasing outside criticism.”³⁹ On the other hand, there are reasons to doubt this story. Hughes’ ad-

³⁴ 295 U.S. 495 (1935).

³⁵ 295 U.S. 555 (1935).

³⁶ See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 52 (1995).

³⁷ 295 U.S. 602 (1935).

³⁸ 298 U.S. 238 (1936).

³⁹ Stephen Tyree Early, “James Clark McReynolds and the Judicial Process,” unpublished Ph.D. dissertation, University of Virginia, 1954, at 101-102.

miring biographer Merlo Pusey asserts that Hughes did not “high-pressure his brethren.” “Hughes recognized that the court was composed of judges of wide experience, deep learning, independent views, and profound convictions.” He therefore viewed it as “ridiculous to suppose that the brethren could be swayed from any settled habits of thinking by high-powered arguments or emotional appeals.” Consequently, Pusey maintains, Hughes “made no such appeals.” Rumors that “he issued dire warnings to his fellow judges” when presenting the *Labor Board Cases* to the conference, Pusey maintained, were “pure fiction.”⁴⁰

In an interview with Pusey, Hughes also dismissed “reports that he pleaded with Justice Roberts to save the NLRB.” As Pusey reports, Hughes made it a practice not to “solicit support for his views outside the conference.” “He had only contempt for the kind of chief who would take a judge aside and say, ‘Can’t you see the tight spot we’re in; you’ve got to help us out.’” “Undue pressure from the Chief Justice was scarcely less abhorrent to him than undue pressure from the President.”⁴¹ As Justice Roberts put it, Hughes “was a stickler for the proprieties.” He “preserved and respected the proprieties in all his dealings with his brethren.” He “neither leaned on anyone else for advice nor did he proffer advice or assistance to any of us, but left each of us to form his own conclusions.”⁴² So far as I am aware, none of Hughes’ colleagues ever contradicted either Hughes or Roberts on these points. In any event, as Professor Leuchtenburg himself concedes, if such a conversation between the two men did take place, “[w]e have no documentation of such an episode.”⁴³

⁴⁰ Pusey, Charles Evans Hughes, at 675-76, 768.

⁴¹ Id. at 676, 768.

⁴² Owen Roberts, Address before Joint Meeting in Memory of Charles Evans Hughes, The Association of the Bar of the City of New York and the New York County Lawyers’ Association, December 12, 1948, at 16-17, 19. These facts lead Burt Solomon to conclude that it is “unlikely” that Hughes “openly coerced his younger brother on the bench.” Burt Solomon, *FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy* 212 (2009).

⁴³ Leuchtenburg, “Charles Evans Hughes: The Center Holds,” 83 N.C. L. Rev. at

The Hughes-Roberts Visit

It may be that Secretary Perkins mis-remembered the dates of the visit. The transcript reveals that her recollection of events is not always reliable. Indeed, that fact alone provides good reason not to place too great a reliance on her recollections in the first place. But to speculate that her recollection was incorrect and that the visit actually took place in 1936, and then upon the basis of that conjecture to speculate concerning the subject matter of the conversation – about which we actually know nothing – would be to pile a weak inference upon a weaker one. Certainly the Perkins account does not provide an adequate foundation to claim with confidence that “we do know that Hughes and Roberts had what may very well have been a meaningful get-together in the summer of 1936 following the *Tipaldo* uproar.”⁴⁴ For from the available evidence it appears that that meeting, however meaningful, took place *before* the *Tipaldo* uproar, in the summer of 1935.



1198.

⁴⁴ Id.