Law Quadrangle (formerly Law Quad Notes)

Volume 39 | Number 1 Article 8

Spring 1996

Telling the Story of the Hughes Court

Richard Friedman
University of Michigan Law School

Bottom row, left to right: Louis D. Brandeis, Willis Van Devanter, Charles Evans Hughes, James Clark McReynolds, George Sutherland. Top row, left to right: Owen J. Roberts, Pierce Butler, Harlan Fiske Stone, Benjamin N. Cardozo.

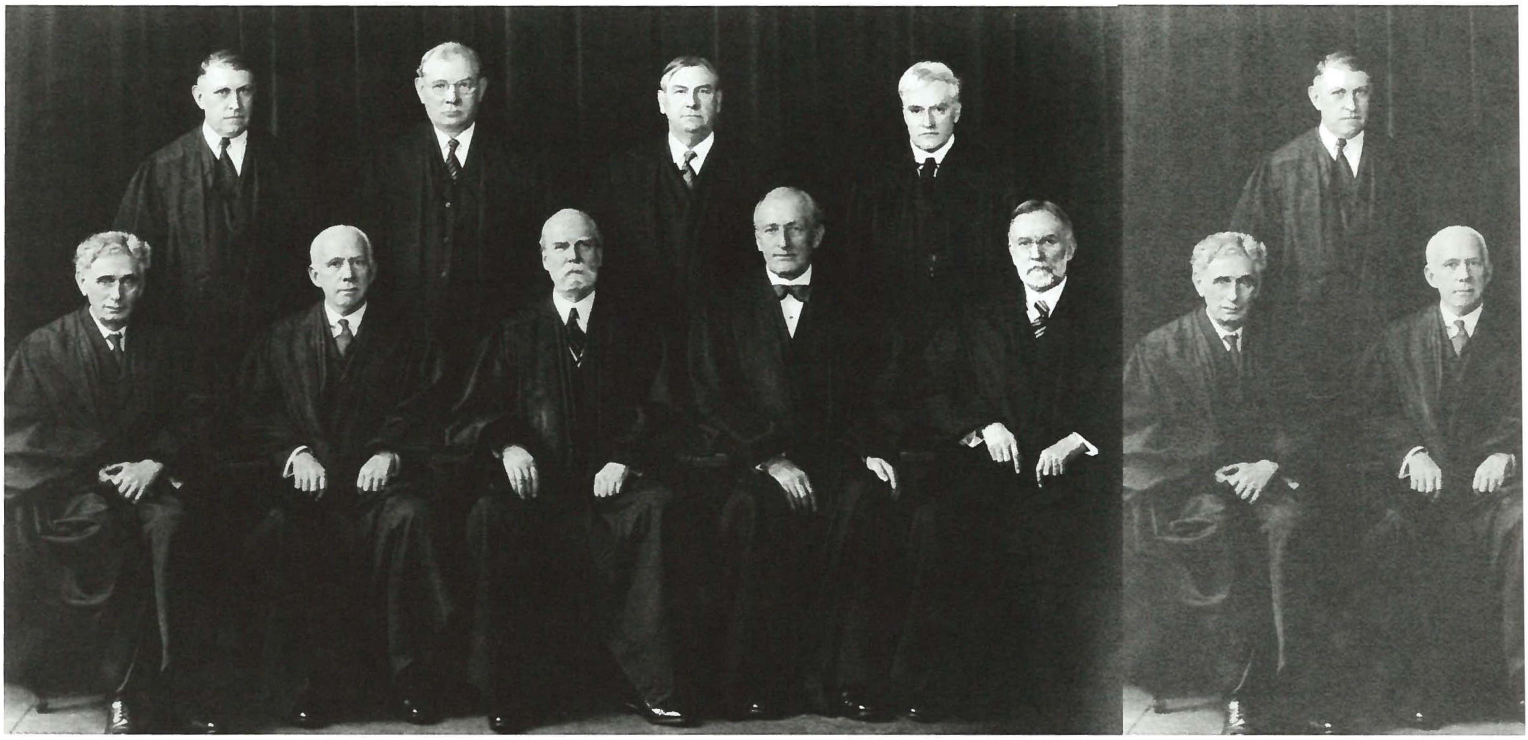
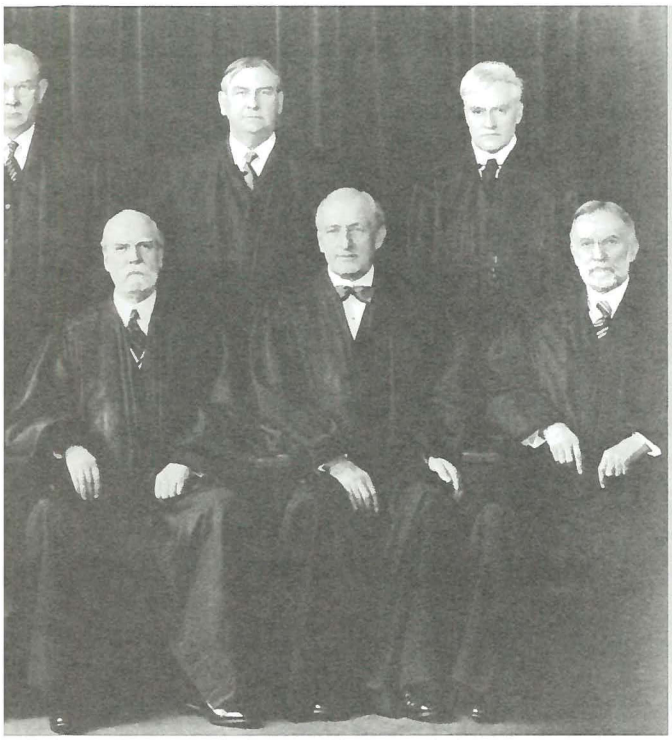


PHOTO COURTESY OF HARRIS AND EWING, COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

Telling the Story of the Hughes Court

This article is based on a paper delivered at the annual meeting of the American Society for Legal History in Houston in October 1995. For a copy of the complete version, with footntoes, please contact LQN or Professor Friedman at (313) 747-1078, rdfrdman@umich.edu

BY RICHARD D. FRIEDMAN



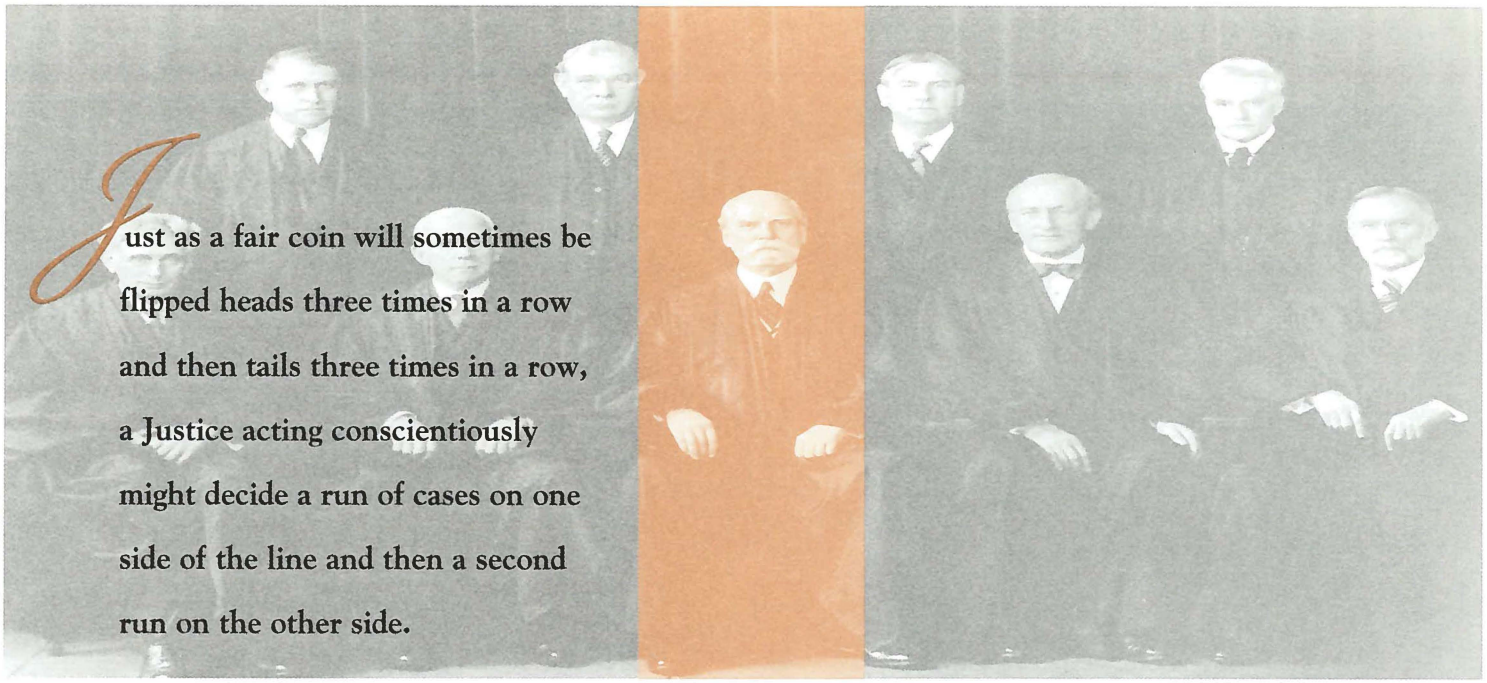
For the Court, as for society at large, this was an era of enormous turmoil and transformation. Indeed, I believe it was "The Crucible of the Modern Constitution."

When Justice Oliver Wendell Holmes, Jr., died in 1935, he left the bulk of his estate to the United States Government. This gift, known as the Oliver Wendell Holmes Devise, sat in the Treasury for about twenty years, until Congress set up a Presidential Commission to determine what to do with it. The principal use of the money has been to fund a multi-volume History of the United States Supreme Court. The history of the project itself has not always been a happy one, for some of the authors have been unable to complete their volumes. Among them was one of my teachers, the late Paul Freund, who was the first general editor of the project and also planned to write the volume on the period in which Charles Evans Hughes was Chief Justice, from 1930 to 1941. I have had the good fortune to receive the succeeding assignment to write this volume.

I feel fortunate to be part of the Devise History not only because it places me in a wonderful neighborhood of authors, but also because it is a tremendously important project; its period of gestation has been very long, but so will be its shelf-life. And I feel particularly fortunate to have the Hughes Court assignment not only because I have already spent considerable time studying the Hughes Court — in what seems like a prior life, I wrote a dissertation on Hughes as Chief Justice — but also because of the importance of the period. For the Court, as for society at large, this was an era of enormous turmoil and transformation. Indeed, I believe it was "The Crucible of the Modern Constitution." That, at any rate, will be the subtitle of my volume. The period began with what has been called the old constitutionalism still apparently dominant, continued through the crisis that culminated in the struggle over Franklin Roosevelt's plan to pack the Court in 1937, and ended as the Justices appointed by Roosevelt consolidated their hold on the Court and on the dramatically new constitutionalism that still prevails.

So I have a story to tell and a mystery to solve. The story is of how this transformation was achieved. And at the heart of the story lies this mystery: In the spring of 1937, shortly after Roosevelt's landslide re-election victory and during the height of the Court-packing battle, the Court seemed suddenly to become more liberal. To what extent, if any, did these political factors account for this apparent switch? But implicit in this question, as I have phrased it, is another: To what extent was there actually a switch?

At the broadest level, of course there was: Constitutional law was far different in 1941 from what it was in 1930. Indeed, the old constitutionalism was effectively dead as soon as Roosevelt's appointees began to replace the conservative Four Horsemen in the fall of 1937. Liberal decisions resulting from these personnel changes do not represent a response by the Court to political pressure; the new Justices were part of the victorious side of 1936, not its cowered foes. But because these person-



Just as a fair coin will sometimes be flipped heads three times in a row and then tails three times in a row, a Justice acting conscientiously might decide a run of cases on one side of the line and then a second run on the other side.

nel changes occurred so soon after the Court-packing battle concluded, they may make it harder to discern what the Court's reaction to political pressure was.

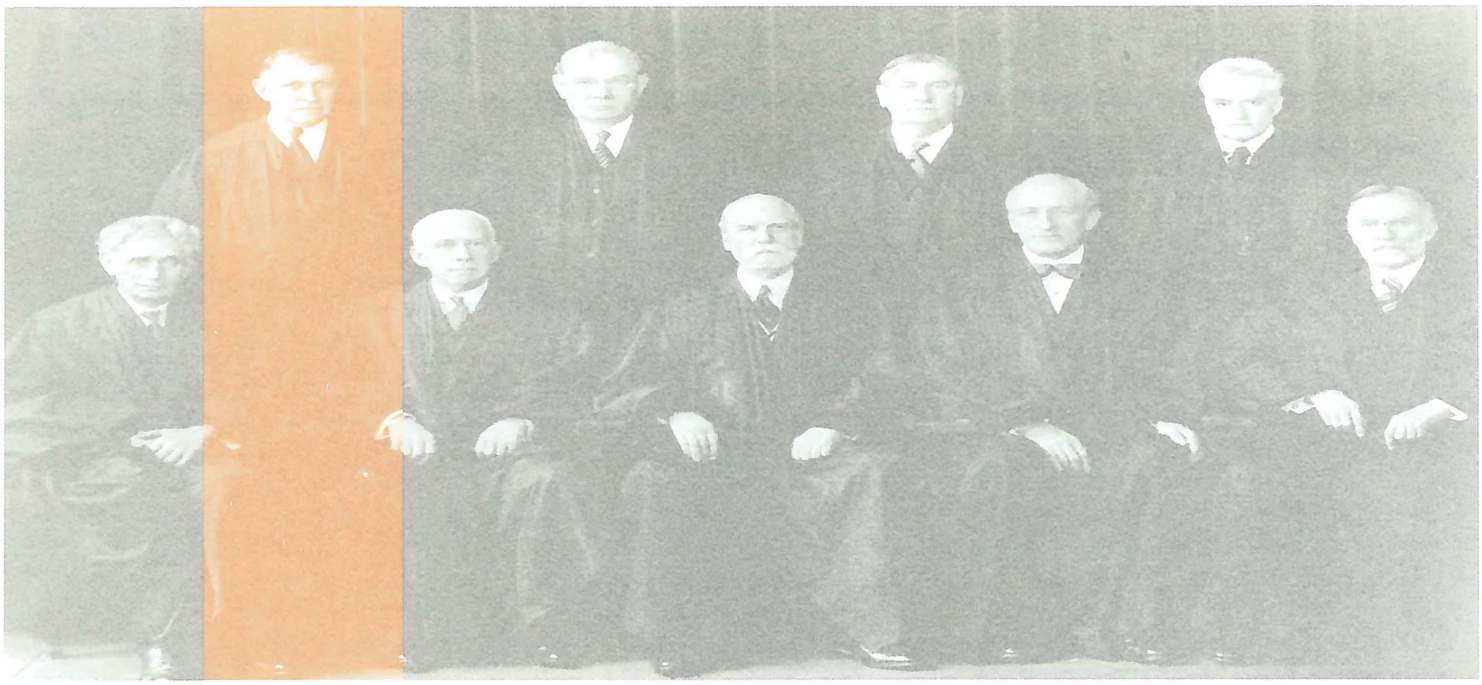
Certainly, in the spring of 1937, while the battle was hot, the Court issued a flurry of significant decisions reaching liberal results, far different from the results of an earlier flurry of significant decisions in 1936. The most important cases break down into three sets, which we may refer to as the minimum wage, general welfare, and commerce clause cases. In 1936, in *Morehead v. New York ex rel. Tipaldo*, the Court held a state minimum wage law invalid, but the next year, in *West Coast Hotel Co. v. Parrish*, the Court upheld such a law in overturning the precedent on which Morehead was based. In 1936, in *United States v. Butler*, the Court held that the Agricultural Adjustment Act had exceeded the federal government's power to tax and spend, but in the *Social Security Cases* of 1937 the Court upheld the exercise of those powers in the Social Security Act. In 1936, in *Carter v. Carter Coal Co.*, the Court held invalid a Congressional attempt under the commerce clause to regulate labor relations in a basic productive industry, but in 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld a far more sweeping regulation of labor relations, also under the commerce power.

These developments were dramatic, but we must be cautious in concluding whether, or to what extent, the 1937 decisions represented a sudden adoption of a new ideology. I believe that to answer these questions requires a great deal of attention to the grubby details of individual Justices and individual cases.

It is tempting to think of the Court organically, as an institution that moves and makes strategic decisions like an army. Perhaps this model is an appropriate portrayal of the Court when John Marshall dominated it. But it does not come close to reflecting the Court of early 1937. Obviously, the Court as a whole, acting in conference, could not have been a strategic decisionmaker; it was too badly divided. There were blocs on the court, four Justices on the right and three on the left, that held informal caucuses at which they presumably discussed tactics for conference. But even assuming each bloc remained cohesive (which was not always so) neither could prevail in any case without support from the middle; the conservative Four Horsemen needed the vote of either Chief Justice Hughes or Owen Roberts, and the liberals needed both their votes.

If there was a strategic decisionmaker, therefore, it would have had to be one of these two Justices. Some have thought that this was a role played by Hughes. He was, after all, the Chief Justice, he was a commanding figure, and he stood ideologically near the center of the Court. But there is no basis for concluding that he had strategic control over the Court, and there is sound reason for concluding that he did not. Indeed, Justice Brandeis told Felix Frankurter at a crucial moment that Hughes was depressed because he had no control over the Court. Before the crisis, Hughes was in the dissent in too many cases of political significance to suppose that he had any real measure of control. Hughes did not solicit his colleagues for votes, and he seems to have taken an austere view of his role and the decisionmaking process of the Court: The Justices each had their say in conference, they voted, and they moved on to the next case.

Then how about Justice Roberts? He was not in strategic control of the Court; he controlled no one's vote but his own, and he does not seem to have had significant persuasive power over his colleagues. But certainly Roberts had a



great degree of control over the Court's decisions, because on many significant issues he was the man in the middle, the Justice most likely to join the conservative four to make a majority.

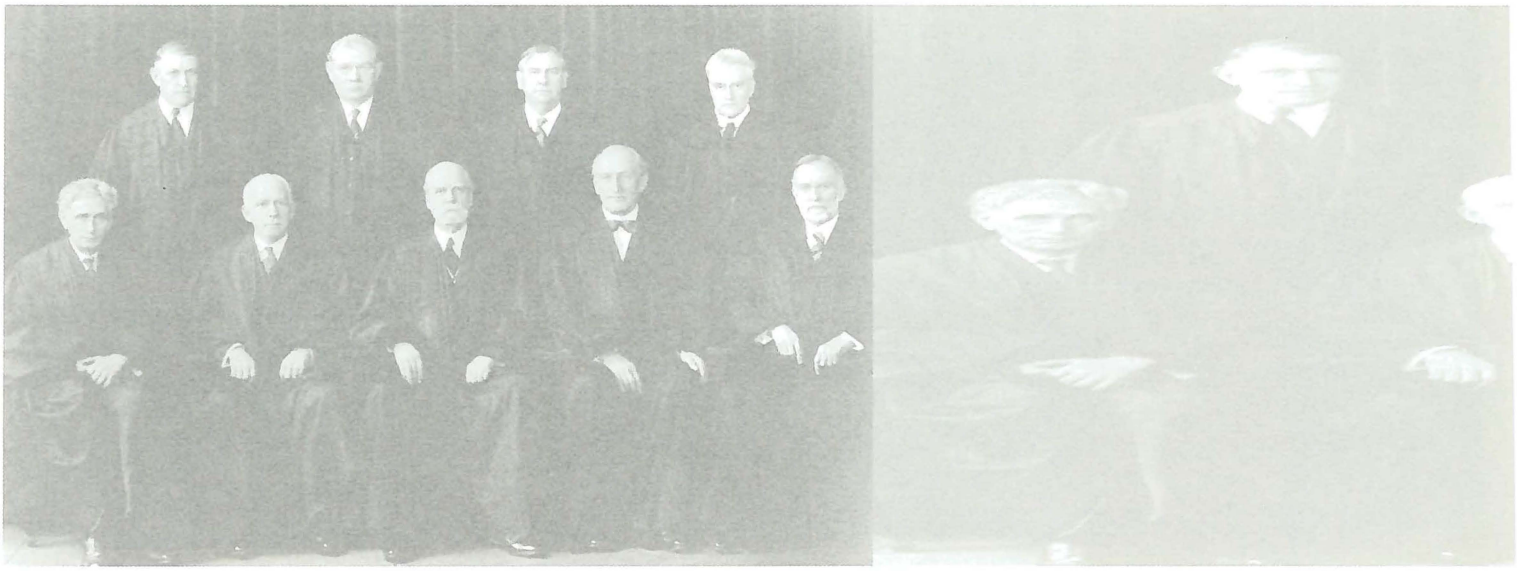
The question, then, should not be phrased as whether, or to what extent, the Court was affected by political pressure. The key question is whether Justice Roberts was affected by political pressure; a subsidiary question is whether Chief Justice Hughes, who also might be thought to have done some switching in 1937, was so affected. To adapt terms used by Graham Allison in his celebrated study, *Essence of Decision: Explaining the Cuban Missile Crisis*, if we want to understand the Court's course of decisions, we are better off dealing not within Model II, treating the Court as a monolithic entity, but within Model III, emphasizing the roles of the individual players.

I emphasize this point not just out of persnicketiness. It is important both for understanding what happened in 1937 and for assessing its significance. First, as to the assessment of significance: Suppose that what I shall call the political hypothesis — that political pressure explains the course of decisions — appears to be correct. It is probably far more difficult to draw historically interesting generalizations from the proposition that Roberts, or perhaps Hughes and Roberts, responded to political pressure than it would be to draw such generalizations from the proposition that the Court responded to such pressure.

In understanding what happened, phrasing the question in terms of the Court rather than of Justice Roberts and Chief Justice Hughes probably would make little difference if we could reliably think of decisions by the Court under this model: Any issue is represented by a point on a continuum running from left to right, and the Justices by fixed links in a rigid chain, running from left to right with Roberts in the middle. If the chain comes down with five or more links to the left of the critical point, then the liberals win, and otherwise the conservatives win.

Now, this model does have some explanatory power, because it rests implicitly on two premises that are usually true. First, judges tend to act consistently on a given issue. Thus, if Justice A is more conservative (whatever that may mean) than Justice B on issue 1 on one occasion, chances are strong that, absent something unusual happening, A will be more conservative than B on issue 1 on another occasion. Second, there is a substantial correlation between certain issues. That is, if we know that A is more conservative than B on issue 1, we may well be able to predict how they will stand in relation to one another on issue 2.

The trouble is that neither of these premises is inevitably true — or anywhere close. Each Justice is subject to his own set of influences, and they may differ, in a multivariate way, from one Justice to another. (The masculine gender, by the way, is appropriate for the Court of the 1930s.) This means that the Justices cannot be put on a simple continuum. The problem for analysis is in part, but not only, that a given Justice may be more liberal on some issues, relative to his colleagues, than on other issues. The more difficult aspect of the problem is that any Justice, even one who seems moderate on most issues, might be affected to a substantial extent by a given factor that seems far less important to his colleagues. If one nevertheless knew with confidence the full panoply of a given Justice's views on matters coming before the Court, then one could test whether his votes and opinions consistently reflected those views. But such confidence is, of course, difficult to attain. To a large extent, a Justice's views are revealed only through those votes and opinions themselves. And this creates at least three significant difficulties.

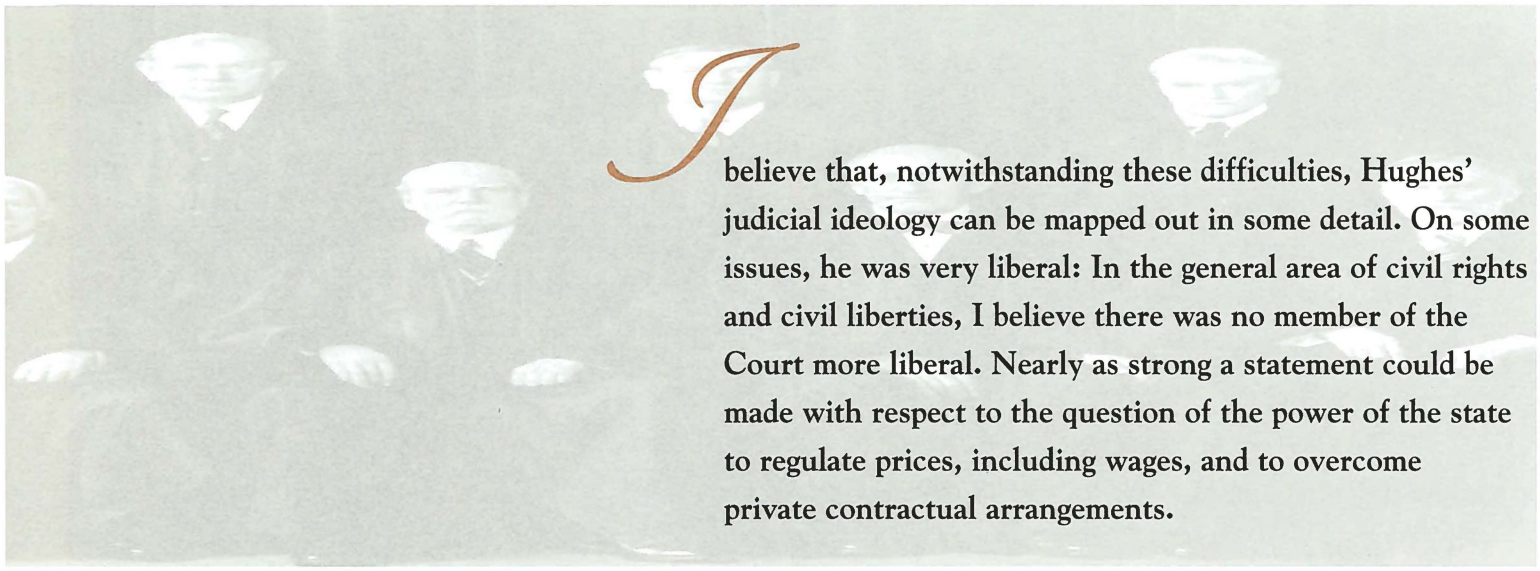


Most obvious perhaps is a large problem of circularity. Suppose that a Justice votes on the conservative side of Case 1 and on the liberal side of Case 2. This does not necessarily mean that anything strange happened, or that the Justice must have responded to political pressure between the two cases — even if it so happens that a political event that might be thought to have created leftward pressure occurred during that interval. It might be that there is a distinction between the two cases that made the liberal side appear more persuasive in Case 2 than in Case 1; to a large extent, the business of appellate judging, and the method by which judge-made law grows, consists of distinguishing cases, invoking a given doctrine in one case but not in another because of material differences between the cases. But if the political factor also provides a plausible explanation for the pair of votes, it may be difficult to know whether this substantive distinction between the two cases really was a significant factor motivating the Justice's conduct.

The same points apply to sets of cases. Suppose a Justice has a batch of conservative votes in one time period and a batch of liberal votes in a later time period. This might be because a political factor intervened, and some historians seem to regard this inference — that the Justice altered his ideological stance, at least temporarily — as inevitable. But it is not. Just as a fair coin will sometimes be flipped heads three times in a row and then tails three times in a row, a Justice acting conscientiously might decide a run of cases on one side of the line and then a second run on the other side.

Second, even putting aside political factors, simply because creative lawyering can expose a potentially material distinction between two cases, it by no means follows that this is a difference that actually persuaded the individual Justice in question. I have suggested that some factor that might appear relatively unimportant to most Justices, or most observers, may appear critical to one Justice. If we are lucky, we may be able to discern these, but I do not think we always can. I find it very interesting that in 1946, when Merlo Pusey, in the course of preparing his prize-winning biography of Hughes, asked Roberts to account for his conduct in the minimum wage cases, Roberts' "initial, semifacetious reply", as Pusey characterized it, was: "Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it." And it may well be that, in the case of Roberts especially, no matter how deeply and accurately we may analyze the factors motivating a Justice's decisions, we will be left with a residue of apparent randomness — a degree to which, though some consistent set of factors might be at work, it will be essentially impossible for us to recognize what they are. There is a significant irony here, I think: To the extent that such factors as the Justice's breakfast help explain conduct that might otherwise appear inconsistent, a political explanation is not necessary.

Finally, because of the group nature of the Court's work, its opinions provide only a limited insight into the beliefs of a particular Justice. The Hughes Court was sharply divided, of course, but as compared to the modern Court it was much less fragmented; often there was a dissent, but in contrast to today cases in which there were more than two opinions were relatively rare. Ordinarily, a Justice would go along with an opinion that reached the result he favored, without feeling the need to write sepa-



I believe that, notwithstanding these difficulties, Hughes' judicial ideology can be mapped out in some detail. On some issues, he was very liberal: In the general area of civil rights and civil liberties, I believe there was no member of the Court more liberal. Nearly as strong a statement could be made with respect to the question of the power of the state to regulate prices, including wages, and to overcome private contractual arrangements.

rately simply because he did not agree with every statement contained in the opinion. Thus, to a large extent a Justice had two principal options in any given case — to join the majority or to dissent — and the Justice's vote does not in itself give more information than which of those two options he preferred; a Justice's concurrence in an opinion did not demonstrate that he agreed with it in its entirety. Of course, the Justice's own opinions are a better guide to his views, but at times the author might be willing to alter the text to make sure that he retained the concurrence of his colleagues.

I believe that, notwithstanding these difficulties, Hughes' judicial ideology can be mapped out in some detail. On some issues, he was very liberal: In the general area of civil rights and civil liberties, I believe there was no member of the Court more liberal. Nearly as strong a statement could be made with respect to the question of the power of the state to regulate prices, including wages, and to overcome private contractual arrangements. (I put aside the troublesome question of why judicial activism is generally considered liberal when what are deemed to be civil rights or civil liberties are at issue, but conservative when asserted rights against state economic power are at issue.) When the reach of the federal government's powers was at stake, he still tended to be liberal — that is, hospitable to such power — though more cautiously so. On many tax matters, however, he was far more conservative, sometimes voting to the right of Justice Roberts, and he was similarly conservative when he believed freedom of individual opportunity was at stake. And certain issues seemed to matter to him so much that they could make him appear, in some contexts, to be one of the most conservative members of the Court. More than any other Justice, it seems, he was willing to put weight on constitutional restrictions against delegation of legislative authority; Brandeis reported that he was "crazy" about confiscation; and he had a distinctive, highly judicialized view of proper administration.

Furthermore, I believe that, with an understanding of Hughes' views, we can state with a rather high degree of confidence that his votes were not affected by political factors, either the public reaction to the Court's decisions, or the Roosevelt landslide of 1936, or the Court-packing battle. I have presented a rather full argument elsewhere, in an article entitled *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891 (1994), and will summarize it briefly here.

Any case for a switch must be based primarily on the three sets of cases I have described above — the minimum wage, general welfare, and commerce clause cases. Hughes clearly did not switch in the minimum wage cases; he had been in the liberal minority in *Morehead* in 1936, and the views that he established as law in *West Coast Hotel* case in 1937 were ones that he had long espoused. Nor was there a substantive switch for Hughes in the "general welfare" cases. In *Butler* in 1936, he had voted against the particular exercise of the Government's taxing and

spending power there at issue, an aspect of the Agricultural Adjustment Act that appeared coercive to him. But he clearly favored the expansive general statement of the Government's power in Roberts' opinion for the majority; this, too, echoed a view that he had long held. Indeed, Roberts later told Felix Frankfurter that he had included that dictum "just to please the Chief." In the *Social Security Cases* of 1937, Hughes favored the exercise of the spending power — but these were much stronger cases for the Government, and so they appeared not only to Hughes and Roberts but also to two of the four conservative Justices, Van Devanter and Sutherland.

As for the commerce clause cases, it appears to me that Hughes' opinion for a bare majority of the Court in *Jones & Laughlin* in 1937 is not genuinely consistent with the commerce aspect of his separate opinion the previous year in *Carter*, at least not according to any reasoning that commanded Hughes' conscientious adherence. But it is *Carter*, not *Jones & Laughlin*, that is the aberration. The discussion of the commerce power in *Jones & Laughlin* is written in Hughes' most magisterial and expansive style, and it is consistent with the entire sweep of his career, going back to his days as an Associate Justice. The commerce passage in Hughes' *Carter* opinion, by contrast, is brief, conclusory, and cryptic, and unnecessary given the way he would have resolved the case. I suspect it did not represent his genuine views, and that he inserted it for some political motive. His commerce discussion in *Carter* ended with what was in effect a plea to the public to get off the backs of the Court, amending the Constitution if the Court's interpretation of the commerce power seemed intolerable; this advertisement, I believe, may have provided the motivation for Hughes' skimpy substantive discussion, rather than vice versa. In any event, there is no basis for concluding that Hughes was pushed into *Jones & Laughlin* by political pressure.

As for Roberts, I can not speak with nearly so much confidence. This is in part because I have not spent as much time studying Roberts. But it is also, I suspect, because to a certain extent Roberts defies understanding. His views were not as well settled as Hughes', and they appear to have been considerably more idiosyncratic. Thus, his views seem to have changed over time, and even without a significant passage of time he acted in ways that would appear to most observers as inconsistent; inconsistency in the eyes of others, however, might mean simply that Roberts was motivated by factors that appeared more important to him than to others.

I do have some conclusions, which I have explored more fully in the *Switching Time* article, regarding Roberts and the political hypothesis. Roberts' conduct in the minimum wage cases was strange, and his later explanation of it does not fully hold up. He joined the conservatives in *Morehead* and the liberals in *West Coast Hotel*, and later asserted that he did so because in the latter case, but not the former, the question of whether to overrule the precedent that most strongly

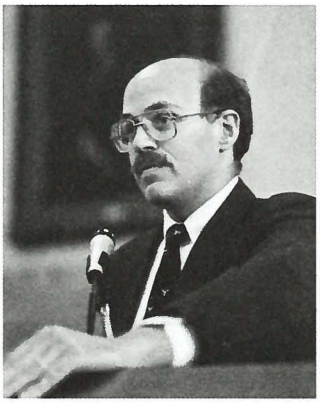
supported the conservatives was not presented. This is not so; at least arguably, that question was actually presented more clearly by counsel in *Morehead*. But I think that it is at least clear that Roberts' vote in *West Coast Hotel*, and not the one in *Morehead*, reflected his previously expressed substantive views. Why he was so much readier in *West Coast Hotel* to overcome any procedural scruples that had prevented him from joining the liberals in *Morehead* is not so clear. He may have decided that he was wrong on this matter, or that the conservatives had taken advantage of him. And he may have been shaken by the furious public reaction to *Morehead*. But the timing of the Court's actions in *West Coast Hotel*, among other factors, suggests that neither the 1936 election nor the Court-packing battle had anything to do with the matter.

Roberts' votes in the "general welfare" cases can probably be explained in the same way that Hughes', as well as those of Van Devanter and Sutherland, can — the *Social Security Cases* appeared to be stronger ones for the Government than *Butler* did. Roberts appears to have been significantly less enthused about the federal spending power than Hughes was, even at the time Roberts wrote broadly about it in *Butler*, and on the commerce clause his record on the Court before 1937 was far more conservative than Hughes'. The most notable, but not the only illustration of this is Roberts' concurrence with the majority in *Carter*.

I am inclined, therefore, to believe that Roberts' concurrence with the liberal side of the Court in *Jones & Laughlin* represented a break for him. But there is no reason to doubt its sincerity; Roberts was capable of changing his mind on short order, his *Butler* opinion suggests that he was then beginning to expand his views of national powers, and his later conduct showed no reservations about *Jones & Laughlin*. Apart from the timing, there is no reason to believe that the Court-packing plan influenced Roberts, and there is good reason to believe it did not: It was not immediately clear what the political impact of upholding the National Labor Relations Act would be, and the Government's victory was far more sweeping that one might expect if the decision was inconsistent with Roberts' conscientious beliefs but motivated by a manipulative desire to help defeat Court-packing. Perhaps the storm of sitdown strikes then compelling national attention made Roberts believe that a national solution to labor problems was necessary, but I do not believe it is possible to be sure.

I have said that I aim to tell a story, but I have not promised that it would be a simple, neat story. It will not satisfy those who wish to view the Court as an ordinary political institution, subject to ordinary political pressures. Nor will it gratify those who are committed to the view that no Justice could have been affected by such pressures. And it may discomfit those who would like to draw conclusions about the Court of the Hughes era without doing the hard work of examining the particulars of the cases it decided, and trying to do so with the mindset of the individuals who happened to constitute the Court. But I hope that it will yield us a fuller picture than we now have of how it happened that the Hughes Court transformed American constitutional law.

LQN



Professor Richard Friedman joined the faculty in 1988. His research focuses on evidence, antitrust, and Supreme Court history. He is general editor of The New Wigmore, *a multi-volume treatise on evidence now in preparation.*