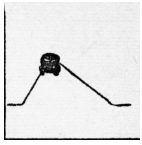

TO THE BAG

MISJOINDER AND THE MYSTERIOUS OPINION

To the *Bag*:

Following publication of our article on the journalist Merlo J. Pusey's interview with Justice Owen J. Roberts in 1946,[1] we received a kind note from Professor Jerry Goldman of IIT Chicago-Kent College of Law and the OYEZ Project. Professor Goldman pointed out that we erroneously stated Chief Justice Charles Evans Hughes had "joined an opinion" in *Carter v. Carter Coal Co*.[2] Professor Goldman is correct, of course, that Chief Justice Hughes did not actually join the opinion of the Court, which was written by Justice George Sutherland. Instead, Hughes filed what he called a "separate opinion," which sided with the majority's conclusion that certain labor provisions in the Bituminous Coal Conservation Act of 1935 were unconstitutional,[3] but, unlike the majority, would have found that other provisions in the statute addressing marketing were severable and apparently constitutional.[4]

Hughes' opinion in *Carter* has been called "mysterious" and "cryptic."[5] In his *Autobiographical Notes*, Hughes declared that his opinion

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[1] Edward L. Carter and Edward E. Adams, *Justice Owen J. Roberts on 1937*, 15 GREEN BAG 2D 375 (2012).

[2] 298 U.S. 239 (1936).

[3] *Id*. at 318-19.

[4] *Id*. at 323-24.

[5] Richard D. Friedman, *The Sometimes-Bumpy Stream of Commerce Clause Doctrine*, 55 ARK. L. REV. 981, 994-95 (2003).

upholding the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[6] was "in no sense a departure from the views I had long held and expressed."[7] But Hughes did not discuss his opinion in *Carter*. Pusey's notes do not indicate that Hughes shed any additional light on *Carter* during their interviews, but Pusey's biography ultimately characterized Hughes as considering "the labor provisions . . . invalid chiefly because of the broad delegation of legislative power."[8]

When speaking with Pusey about the Commerce Clause more generally, Hughes repeatedly emphasized the distinction between direct and substantial effects on interstate commerce, on the one hand, and indirect and remote effects, on the other hand. For example, on December 3, 1946, Hughes told Pusey that the direct-indirect distinction was "essential to preserve balance of st[ate] and national powers."[9] Further, Hughes said, "If Cong[ress] were to take control of all activity having only remote and indirect effects on interst[ate] commerce[,] [Congress] could control whole economy. . . ."[10] The former Chief Justice did, however, give Pusey one unique insight in that interview, which Pusey apparently confined to his notes: "Bet[ween] us, he thinks present [Court] has gone much too far in expanding int[erstate] commerce clause to control where effect on commerce only remote."[11]

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[6] 301 U.S. 1 (1937).

[7] *See* CHARLES EVANS HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 312 (1973) (David J. Danelski & Joseph S. Tulchin, eds.).

[8] MERLO J. PUSEY, 2 CHARLES EVANS HUGHES 746 (1951).

[9] MSS 1532, Box 13, Merlo J. Pusey Papers, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah (notes of Merlo J. Pusey interview with Charles Evans Hughes in Pusey Notebook II).

[10] *Id.* at 97.

[11] *Id.*