THE HUGHES-ROBERTS VISIT REVISITED

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IN THESE PAGES, Barry Cushman critically examined the principal source for what has become, since William Leuchtenburg discussed it in 2005, an oft-repeated tale in the constitutional history of the 1930s.[1] Leuchtenburg wrote that shortly after the Supreme Court's voided New York's minimum wage law for women in its controversial *Tipaldo* decision of June 1, 1936, Chief Justice Charles Evans Hughes (who voted to uphold the law) and Justice Owen Roberts (who voted with four conservative justices to strike it down) had "a meaningful get together" at Roberts's farm in Pennsylvania. Hughes had, in effect, solicited an invitation by telephoning to say that he and his wife hoped to see the farm on their way to a favorite retreat in the northern part of the state. During the ensuing overnight visit, the chief and associate justices conversed intensely for hours, albeit out of earshot of their wives, neither of whom could say what the two discussed.[2]

Leuchtenburg's source was an oral history of Frances Perkins, Franklin D. Roosevelt's Secretary of Labor and a college chum of

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[1] Barry Cushman, "The Hughes-Roberts Visit," *Green Bag 2d* 15 (2012): 125-37.

[2] William E. Leuchtenburg, "Charles Evans Hughes: The Center Holds, *North Carolina Law Review* 83 (2005): 1198-1200; Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

Owen Roberts's wife, conducted by the Columbia University Oral History Office between 1951 and 1954. The transcript of the interview does not clearly date the Hughes-Roberts visit to 1936; in fact, as Professor Cushman argued, it could be plausibly read as placing the visit in 1935.

The paragraph with which Perkins prefaced her account of the visit commences: "In the summer of '35, following a good deal of denunciation of the Supreme Court . . . , something happened. The court adjourned as usual." There follow a few sentences on Mrs. Owen Roberts (née Betty Rodgers) and her friendship with Perkins. Then a new paragraph begins, "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." At that point, Perkins launches into her account of the visit.[3]

Thus far, Perkins's interview points to the summer of 1935, after Hughes had massed his court against the New Deal, for the visit, not 1936, when, as Justice Louis Brandeis reported to Felix Frankfurter, Hughes was "deeply unhappy" and had "no control over the Court."[4] Relying primarily on these paragraphs, but also Perkins's later, seeming reference to *United States v. Butler*, Professor Cushman argues that from the available evidence "it appears that that meeting . . . took place *before* the *Tipaldo* uproar, in the summer of 1935."[5]

But, as Professor Cushman acknowledges, Perkins's next paragraphs muddy the waters. "The court convened in October," she recalled.

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[3] The Reminiscences of Frances Perkins, 5:71-74, Columbia University Oral History Collection, Columbia University, New York, NY. Columbia has now posted the interview online, with an introduction. www.columbia.edu/cu/lweb/digital/collections/nny/perkinsf/index.html.

[4] Felix Frankfurter, Memorandum of Conversation with Brandeis, May 20, 1936, in Richard D. Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," *University of Pennsylvania Law Review* 142 (1994): 1962-63.

[5] Cushman, "Hughes-Roberts Visit," 137; United States v. Butler, 297 U.S. 1 (1936).

U.S. Secretary of Labor Frances Perkins (center) with Sen. Hugo Black (left) and Rep. William P. Connery, Jr. (right) during a 1937 visit to the Capitol to testify in favor of a wage and hour bill introduced by the two legislators.

> Within a few months there was another case that went up to them that autumn, which involved a particular child labor matter. It was a case that we had not realized was coming up. It came up from one of the states. The court sustained it by a 5-4 decision in favor of it. I'm not sure that it wasn't 6-3. Mr. Chief Justice Hughes and Mr. Justice Roberts had voted aye. I was so delighted that Owen had voted aye, because he had been voting no on everything, that I rushed out that afternoon at the close of the day, between five and six, to see them.

Perkins then recreates a dialogue with Roberts in which she congratulates the justice for changing his mind and Roberts replies that he had only distinguished the day's decision from earlier cases. Neither Professor Cushman nor anyone else has found a case involving child labor on the Supreme Court's docket in the 1935 or 1936 Terms.[6]

[6] Cushman, "Hughes-Roberts Visit," 132 n.24.

Before Professor Cushman published his essay, I had also encountered the inconsistencies in Perkins's oral history and resolved them as Leuchtenburg had. Although Professor Cushman thinks it unlikely that "the Secretary of Labor 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," I have found that interviewees commonly telescope, transpose, and conflate events in oral histories. Perkins began the chapter in which she tells of the Hughes-Roberts visit with the remark that the Supreme Court's voiding of the National Industrial Recovery Act in the *Schechter* decision threatened the campaign to abolish child labor.[7] I was not surprised when the septuagenarian Perkins continued to think "child labor" throughout the ensuing discussion.

Still, as Professor Cushman writes, "to speculate that her recollection was incorrect and that the visit actually took place in 1936" is unsatisfying without corroborating evidence. To paraphrase Professor Cushman, the revelation that Perkins's "recollection of events is not always reliable" provides "good reason not to place too great a reliance on her recollections in the first place." Edward A. Purcell, Jr., apparently took Professor Cushman's point when, in a recent article, he balked at including the visit in a list of times when Hughes spoke to justices about decisions outside of conference. "Questions have been raised whether the evidence underlying the claim ["that in the summer of 1936 Hughes tried to persuade Roberts to alter his views on pending cases"] actually supports it," Purcell wrote, with a citation to Professor Cushman's article.[8]

In fact, when Professor Cushman wrote, Burt Solomon had already found further evidence of the visit, although not its date, in a videotaped interview of the Roberts's daughter Elizabeth Hamilton, deposited in the library of the Owen J. Roberts High School in

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[7] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[8] Edward A. Purcell, Jr., "Understanding *Curtiss-Wright*," *Law and History Review* 31 (2013): 672-73 n.40.

A youthful Charles Wyzanski in Washington, DC, circa May 1937.

Pottstown, Pennsylvania.[9] Other evidence places the Robertses at their farm and the Hugheses in the vicinity in June 1936. Betty Roberts sent Perkins a letter from "my beloved farm" in Kimberton on June 4.[10] On June 7, 1936, the *Washington Post* reported that the Hugheses had closed their home and left for a motor trip to New England. On June 15, the *Post* noted that the couple had "been spending several days at the Skytop Club, Pa." A side trip to

[9] Burt Solomon, *FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy* (New York: Walker & Co., 2009), 211-12.

[10] Elizabeth Roberts to Frances Perkins, June 4, 1936, box 21, Frances Perkins Papers, Rare Book and Manuscript Library, Columbia University.

Kimberton would have required only a slight detour from the direct route from Washington to Skytop.[11]

Still more probative is a letter by Charles E. Wyzanski, Jr., in the Massachusetts Historical Society. Wyzanski had been Perkins's indispensable lieutenant as solicitor of the Labor Department. He left that post for the Solicitor General's office in 1935, but he remained on excellent terms with his old boss. On April 14, 1937, a few weeks after Roberts's so-called "switch in time" in the minimum-wage case *West Coast Hotel Co. v. Parrish*, Wyzanski reported to his mother that "Miss P told me yesterday that Hughes had been to visit Roberts in Pa. last summer; and that Mrs. R is desperately unhappy, wishes she could leave Washington forever, and turns down dinner invitations in order to avoid embarrassing or harassing questions."[12]

A second letter helps with Perkins's puzzling recollection of having rushed to the Roberts' home after the Supreme Court decided a "peculiar child labor matter" during the 1936 Term. On May 28, 1937, Wyzanski wrote to his mother that over lunch the previous day Perkins told him that she had called on the Robertses on May 24 and had a frank talk. May 24, 1937, was the day the Supreme Court announced its decision in *Helvering v. Davis*, which upheld the Social Security Act's program of old age pensions by a 7-2 vote.[13] Perkins cared deeply about the program; one can readily imagine that she had been moved to express her relief and gratitude to Roberts in person.

The May 28 letter does not completely account for the phantom "child labor matter," because *Helvering* did not come up from the

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[11] "Chief Justice Hughes Closes Home for Summer," *Washington Post*, June 7, 1936, M14; "Notes of Society: Official and Resident," ibid., June 15, 1936, 10.

[12] Charles E. Wyzanski, Jr., to Maude J. Wyzanski, April 14, 1937, box 22, Charles E. Wyzanski, Jr., Papers, Massachusetts Historical Society, Boston, MA; West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[13] Wyzanski to Maude J. Wyzanski, May 28, 1937, box 22,Wyzanski Papers; Helvering v. Davis, 301 U.S. 619 (1937). As Wyzanski had it from Perkins, Justice Roberts remarked, "'Say, the best thing the New Deal's done is bring this fellow Wyzanski down to Washington; he makes these statutes clear and reasonable.'" Wyzanski argued *Helvering* before the Court.

states and was not unexpected. I would resolve the remaining discrepancies by assuming that at this point in her oral history Perkins was thinking of *Parrish*. Thus, I believe that in her jumbled chronology, Perkins conflated two fervently sought reforms that were before the court in the 1936 term (old-age pensions and minimum-wage laws) with a third that was not (abolition of child labor).

Further evidence may yet be discovered. Because Mrs. Roberts was notoriously loose-lipped, she may well have mentioned the Hughes-Roberts visit to correspondents.[14] Even so, read with Perkins's oral history, Wyzanski's letters suffice, in my opinion, to date the Hughes-Roberts visit to the fortnight after the Supreme Court decided *Tipaldo*.

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[14] Drew Pearson and Robert S. Allen, *Washington Merry-Go-Round*, February 12, 1937, Special Collections, American University, Washington, DC. dspace.wrlc.org/doc/bitstream/2041/17605/b02f10-0212zdisplay.pdf#search=%27Mrs.%20owen%20roberts%27.