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1999

### Taking Decisions Seriously

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#### Recommended Citation

Friedman, Richard D. "Taking Decisions Seriously." Review of Rethinking the New Deal Court: The Structure of a Constitutional Revolution, by B. Cushman. J. Sup. Ct. Hist. 24, no. 3 (1999): 314-24.

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# Taking Decisions Seriously: A Review of *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*

RICHARD D. FRIEDMAN

The New Deal era is one of the great turning points of American constitutional history. The receptivity of the Supreme Court to regulation by state and federal governments increased dramatically during that period. The constitutionalism that prevailed before Charles Evans Hughes became Chief Justice in 1930 was similar in most respects to that of the beginning of the twentieth century. The constitutionalism that prevailed by the time Hughes' successor Harlan Fiske Stone died in 1946 is far more related to that of the end of the century.

How this transformation occurred is a crucial and enduring issue in constitutional history. How we perceive both the Supreme Court and the process by which its members are selected depends significantly on how we view the process by which the Court develops and changes constitutional doctrine. To what extent are the Justices' decisions shaped by the doctrines enunciated in the prior decisions of the Court, to what extent by their own personal ideologies, and to what extent by external events and conditions, including political pressure exerted in one direction or another?

The story often told about the constitutional transformation of the New Deal era is that political pressure on the Court was critical, Franklin D. Roosevelt's landslide re-election victory in 1936 and his campaign for Court-packing the next year having induced a conservative Court to change directions. Advocates of this view—and indeed anyone who

is interested in the history of the Court during this era—will now have to contend with the arguments presented with enormous skill by Barry Cushman in his stimulating and meticulous new book, ***Rethinking the New Deal Court: The Structure of a Constitutional Revolution***.

Professor Cushman does not deny that

“dramatic changes in constitutional jurisprudence” occurred during the New Deal era; no sensible observer could do so. Rather, he attempts “to recharacterize both the jurisprudence that changed and the mechanics by which it changed, approaching the phenomenon examined as a chapter in the history of ideas rather than as an episode in the history of politics.”<sup>1</sup> Cushman’s account of constitutional transformation is therefore “internal” in the sense that he emphasizes the interplay of precedent and of the Justices’ own ideologies rather than the influence of external political pressures. Broadly, he contends that the doctrinal context in which the Justices operate has a great deal to do with their jurisprudence, as do the political, economic, social, cultural, and intellectual contexts:

Judges are participants not merely in a political system, but in an intellectual tradition in which they have been trained and immersed, a tradition that has provided them with the conceptual equipment through which they understand legal disputes. To reduce constitutional jurisprudence to a political football, to relegate law to the status of dependent variable, is to deny that judges deciding cases experience legal ideas as constraints on their own political preferences.<sup>2</sup>

Thus, Cushman refuses to treat the Justices’ opinions as shams, merely as tools to give a veneer of legitimacy to results reached on other grounds. Treating the opinions seriously, rather than as counters to be placed either on the left side or on the right side of a grand political divide, entails a great deal of hard work. Cushman has not shied away from it, and he has done it very well.

More specifically, Cushman argues that an integrated web of thought that had dominated constitutional jurisprudence since the Civil War collapsed before 1937; Cushman identifies *Nebbia v. New York*,<sup>3</sup> the 1934 decision upholding a New York statute regulating the price

of milk, as “occup[ying] center stage” in the Court’s abandonment of the old framework.<sup>4</sup> He argues that the reach of *Nebbia* extended far beyond its immediate doctrinal context. This point he illustrates well with an extended discussion of the Court’s jurisprudence concerning yellow-dog contracts. The majority’s ultimate grant of constitutional approval of laws prohibiting these contracts, and thus removing one of the great obstacles to the organization of labor, reflected *Nebbia*’s expansion of the domain of activities deemed to invoke the public interest. “Thus,” he concludes pointedly, though perhaps with some slight overstatement, “the fundamental issues that would divide the Justices in the seminal labor cases of modern American constitutional law were decided not in response to the political pressures of 1937, but in a 1934 dispute over the price of milk in upstate New York.”<sup>5</sup> Conservative-seeming decisions of 1935 and 1936 represented no backsliding from *Nebbia*, Cushman contends, and in the climactic liberal decisions of the spring of 1937 the Court’s swing members, Hughes and Owen Roberts, did not retreat from positions they had taken earlier or recoil in the face of political pressure. Rather, these Justices built on the advances they had made in *Nebbia*. Change continued at a rapid pace, but continued changes were attributable to the influence of the Justices appointed by Roosevelt, beginning with Hugo L. Black in the fall of 1937.

Though we disagree in some significant details, I agree with much of Cushman’s account. Like him, I believe there is no persuasive evidence that the 1936 election or the Court-packing plan produced the celebrated decisions of the spring of 1937, and like him I believe that changes in the personnel of the Court were the principal cause of the constitutional transformation. The latter point is one that Cushman makes with delicious irony. Though Hughes and Roberts did not always join the liberal wing of the Court, they were far more likely to do so than the Justices they replaced in 1930—William Howard Taft and

Edward T. Sanford, respectively—and until the 1937 Term their votes were essential for liberal victories. And so Cushman ends his book with this striking statement: “The presidential author of ‘the Constitutional Revolution of 1937,’ then, was not the man the people had overwhelmingly returned to office the preceding November. It was, instead, the man the electorate had repudiated in Roosevelt’s favor in 1932: Herbert Hoover.”<sup>6</sup>

Part I of Cushman’s book directly challenges the proposition that the decisions of the spring of 1937 were a response to pressures created by the Court-packing plan or Roosevelt’s re-election. His aim here, he says, is to “create sufficient intellectual space” to allow for the plausible development of “an alternative internal account.”<sup>7</sup> Cushman argues in some depth that the plan was doomed from the start, and so “[t]he justices had ample reason to be confident that constitutional capitulation was not necessary to avert the Court-packing threat. Certainly they had reason to doubt that immediate, total, and unconditional surrender was required.”<sup>8</sup>

The first, stronger part of this conclusion seems somewhat dubious to me. Although Cushman is clearly correct that the plan faced formidable obstacles from the start, a contemporary observer would have had to give due weight to the tremendous strength with which Roosevelt began the battle and the possibility that he could compromise and secure the addition of a smaller number of extra Justices than the six he had sought.<sup>9</sup> But the weaker conclusion, that the Justices had reason to believe that total and immediate surrender was not necessary, seems quite correct to me. For example, upholding the National Labor Relations Act on its face and as applied to large employers would have severely undercut the Administration’s argument that the Court was trying to destroy the New Deal; to make this point, the Court did not have to give the Administration the extraordinarily sweeping victory that it did in the companion cases to *United States v. Jones & Laughlin Corp.*<sup>10</sup>



In *Rethinking the New Deal Court*, Barry Cushman argues that the Court’s thinking changed before the 1937 Court-packing episode, and that its abandonment of the old framework was evident as early as 1934 in *Nebbia v. New York*. That decision upheld a New York statute regulating the price of milk, which had been challenged by Leo Nebbia (pictured), a grocer from Rochester, New York. Many were surprised that the Court upheld the minimum price law that had been passed to protect the New York milk industry from suffering from damaging price wars.

Cushman also argues powerfully that the 1936 election did not account for the Court’s decisions of 1937. The Court had felt no compunction about striking down New Deal legislation after the 1934 Democratic landslide, he points out; why would the 1936 election, in which the Republican opposition took a much more moderate stance, have appeared so clearly to be a constitutional referendum—and why would the devastating Democratic losses of 1938 not have appeared to be a constitutional referendum with the opposite response? Cushman is correct that there is an element of *post hoc, ergo propter hoc* (“after this, therefore because of this”) in the arguments of those

who emphasize the 1936 election.<sup>11</sup> The 1934 midterm Democratic landslide, he points out, did not cause a flood of liberal decisions; quite the contrary, it was after that election that the Court issued most of its decisions striking down New Deal legislation. And the rightward-swinging midterm election of 1938 did not cause Hughes and Roberts to take more conservative positions. If one is committed to the idea that *some* external political development *must* have caused the pattern of the Court's decisions, then the 1936 election is the obvious candidate, by process of elimination. Absent that commitment, though, there is no good basis for concluding that the 1936 election must have altered the course of decisions.

Not being so committed, Cushman seeks to explain the Court's decisions in terms of evolving constitutional doctrine. In great detail, he works through the cases of the early twentieth century dealing with price regulation, culminating with *Nebbia*. Earlier cases had adhered to the doctrine that the state and federal governments could constitutionally regulate only those industries that were "affected with a public interest." But Justice Roberts' opinion for a bare majority of the Court in *Nebbia* discarded this limitation. There is, he wrote, "no closed class or category of businesses affected with a public interest." That phrase meant "no more than that an industry, for adequate reason, is subject to control for the public good." There was nothing "peculiarly sacrosanct about the price one may charge for what he makes or sells"; prices, like any other aspect of a business's operations, could be constitutionally regulated by reasonable legislation when the public welfare demanded it.<sup>12</sup>

As Cushman contends, *Nebbia* was a case of enormous importance, because it signaled a greater receptivity to price regulation<sup>13</sup> and, more broadly, an integrated view that due process demanded of economic regulations only that they "have a reasonable relation to a proper legislative purpose, and [be] neither arbitrary nor discriminatory."<sup>14</sup> I am hesitant to apply Cushman's label of "revolutionary" only be-

cause I do not believe the case called for results that would have been implausible under prior doctrine. Indeed, Justice Roberts was able to cite a large number of precedents supporting an expansive view of legislative power. Of course, there were cases going the other way, but the doctrine invalidating price regulation unless the industry fit within an amorphous category of "affected with a public interest" was already anomalous and unpredictable. In refusing to accept this standard for measuring constitutionality, Roberts smoothened and advanced constitutional law, but I am not so sure that he fundamentally transformed it. As Cushman readily acknowledges, *Nebbia* did not suggest that the Court was yet willing to abandon any substantive due process constraints at all on economic regulation. Roberts and, to a lesser extent, Hughes continued to support such constraints throughout their tenure, well after the drama of 1937.

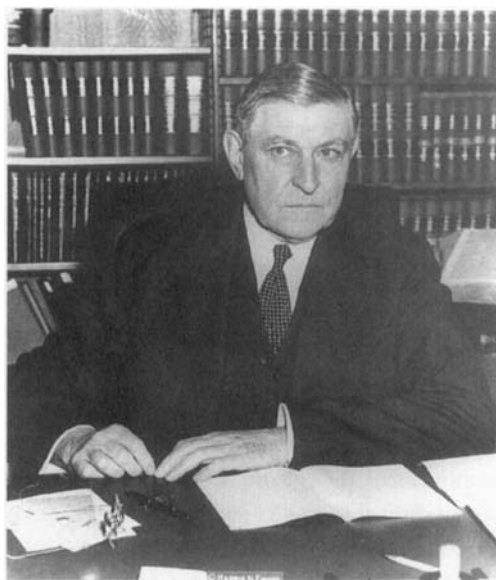
Because *Nebbia* knocked out the theoretical underpinnings for constitutional challenges to price regulations, one would expect the five Justices forming the *Nebbia* majority to support the constitutionality of minimum wage laws, which are, and were conceived of being, a form of price regulation. And so the five did, in *West Coast Hotel v. Parrish*.<sup>15</sup> But the mystery is why the year before, in *Morehead v. New York ex rel. Tipaldo*,<sup>16</sup> Roberts joined the four conservatives to invalidate a minimum wage law. Cushman has an intriguing theory, though one that I ultimately find unpersuasive.

In *Tipaldo*, the state did not squarely ask the Court to overrule *Adkins v. Children's Hospital*,<sup>17</sup> in which the Court had invalidated a federal minimum wage law. Justice Butler's opinion for the Court noted this fact, and focused at first on the question of whether the statute involved in *Tipaldo* was distinguishable from the one involved in *Adkins*. As Cushman says, "The only possible reason for Butler to rest the majority opinion on such a narrow ground is that Roberts insisted on it as the price of his vote."<sup>18</sup> According to Roberts' later recollection,

I stated to [Butler] that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case.<sup>19</sup>

After Justice Stone circulated a dissent contending that *Adkins* should be overruled, however, Justice Butler added another section to his own opinion, declaring the continued validity of *Adkins*. To his later regret, Roberts did not remonstrate.

Why did Roberts go along with this addition to Butler's opinion? His reluctance to write separate concurrences, the fact that the additional material was in effect *dicta*, and the press of business at the close of Term might help answer this question. The deeper mystery is why he joined with the conservatives in the first place. Cushman offers, somewhat tentatively, a surprising theory. Roberts, he suggests, would have voted to overrule *Adkins*, but only



Professor Cushman makes the point that although Chief Justice Hughes (pictured below with his wife) and Justice Roberts did not always join the liberal wing of the Court, they were far more likely to do so than the Justices they replaced in 1930—William Howard Taft and Edward T. Sanford, respectively. He believes that their joining the Court, not the threat of Court-packing, was responsible for the so-called Constitutional Revolution of 1937.

if there was a majority for doing so. Chief Justice Hughes, who dissented on the grounds that *Adkins* was distinguishable, did not state willingness to overrule *Adkins*, and absent a fifth vote Roberts was not willing to join the three liberals in supporting that result.

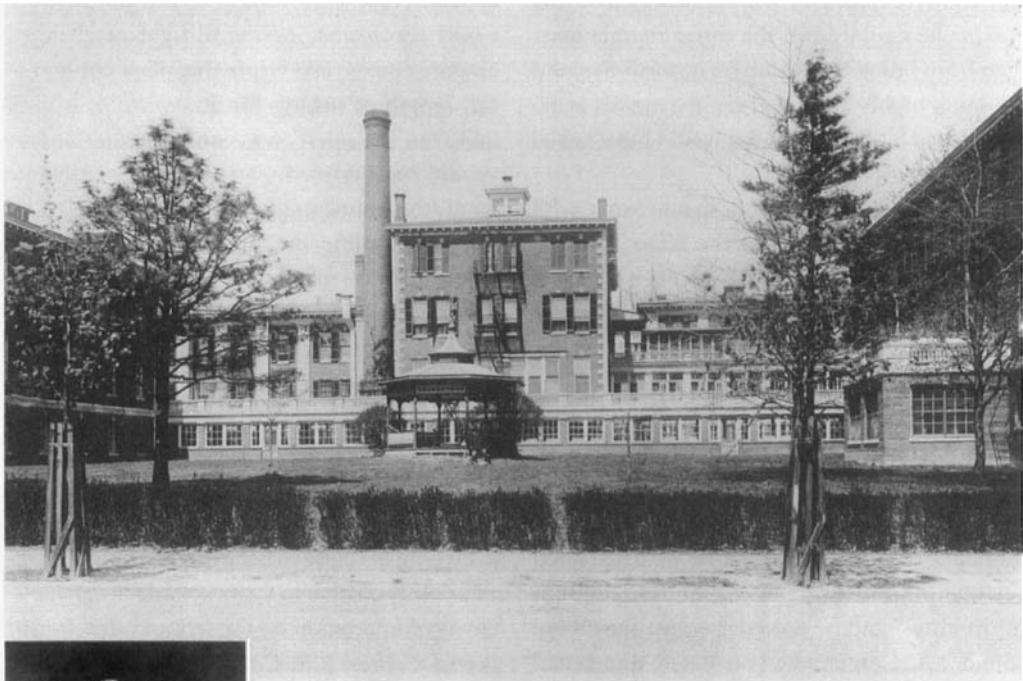
The theory might seem immediately implausible, as Cushman recognizes, because Hughes did, after all, write the opinion overruling *Adkins* just one year later. It seems unlikely, therefore, that his procedural resistance to overruling *Adkins* in *Tipaldo* would be so great that he would refuse to join with Roberts and the three liberals in doing so if he realized that in this way he could achieve the result—upholding the statute—that he strongly favored in *Tipaldo*. Cushman suggests that there was a massive failure to communicate, Roberts never letting Hughes know that a square overrule was the price of getting his vote. And Cushman properly points to two aspects of Hughes' style as Chief Justice—tautly run Conferences, without open-ended conversations, and a refusal

to lobby his Brethren outside the Conference<sup>20</sup>—that make such a failure conceivable.

Intriguing as Cushman's speculation is, I ultimately find it unpersuasive, for several reasons. First, Hughes' antipathy to *Adkins* was clear. His *Tipaldo* dissent did not merely distinguish *Adkins*; it discarded the case. *Adkins*, wrote Hughes,<sup>21</sup> had been a "closely divided" case, following an equal division of the Court in another minimum wage case, *Stettler v. O'Hara*,<sup>22</sup> a few years before. Given the fact that *Adkins* was not "a precise authority" for the statute before the Court in *Tipaldo*, and the "grave importance" of the question posed by *Tipaldo*, he wrote that the Court "should deal with that question upon its merits," without being bound by *Adkins*—and then he presented six pages of analysis citing *Nebbia* and other liberal precedents, but *Adkins* not at all.

Second, Cushman's theory supposes an

odd combination of positions on the part of Roberts. Roberts would have had to believe that it was appropriate in the circumstances to overrule *Adkins*—notwithstanding the fact that the grant of *certiorari* did not raise that question and the state did not clearly raise it—but that if there was not a majority for that result then the outcome of the case should be changed and the statute be invalidated. In other words, Roberts' rank ordering of preferences must have been: (1) Uphold the statute by overruling *Adkins* by majority vote. (2) Invalidate the statute by joining the conservatives to hold that *Adkins* was indistinguishable, without reaffirming the continued validity of *Adkins*. (3) Uphold the statute by joining the liberals in forming a four-member plurality to hold that *Adkins* should be overruled, the fifth vote in the majority being that of Hughes, whose opinion would give no basis for believing that



Professor Cushman explains that Justice Pierce Butler (inset) rested the majority opinion in *Morehead v. New York in ex.rel. Tipaldo* (1936) on narrow ground because Justice Roberts insisted on it as price of his vote for overturning the minimum wage law in question. Above is Children's Hospital in Washington, D.C., where women workers were subject to an earlier minimum wage law set by Congress. The Court overturned that law in *Adkins v. Children's Hospital* (1923), before Hughes and Roberts joined the Court. Butler's opinion in *Tipaldo* contained language reaffirming *Adkins*.

*Adkins* retained any vitality. This ranking, it seems to me, would be bizarre. Option (2) should be either at the top of the heap or at the bottom, not in the middle.

Third Roberts, at the same time, must have been unwilling—either at the Conference or at any subsequent time—to say in effect, “Chief Justice, if you’ll go a little further and overrule *Adkins* I’m with you, but failing that I have to vote to hold this statute unconstitutional.” Hughes may have been intimidating at Conference, but he did not have a gag. The case was of sufficient importance that, if Roberts believed the proper result was to overrule *Adkins* and failure to do so would be outcome-determinative, it is hard to believe that he would not have articulated that view when the Court was deciding the case.

Fourth, on this account not only must Hughes have failed to pick up on the fact that merely by expressing willingness to overrule *Adkins* he could do it; the three liberals must also have failed to pick up on it, for if they did it seems highly likely, given the stakes at issue, that at least one of them would have raised the matter with Hughes.

Finally, this account is inconsistent with Roberts’ own rendition of the affair. Roberts did later recall that at the Conference in which the Court decided to grant the writ of *certiorari* in *Tipaldo* he said that he “saw no reason” to do so “unless the Court were prepared to re-examine and overrule the *Adkins* case.”<sup>23</sup> But, as he saw the case, the State did not, in petitioning for certiorari or in briefing or arguing the case, ask that *Adkins* be overruled. The arguments that *Adkins* could be distinguished seemed to him “to be disingenuous and born of timidity,” and he did not believe they were sound: “At Conference I so stated, and stated further that *I was for taking the State of New York at its word. The State had not asked that the Adkins case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground.*”<sup>24</sup> Roberts’ memorandum on this matter, I have said elsewhere, is “maddeningly incomplete, inaccurate, and

self-serving.”<sup>25</sup> But in this case, in part because on this matter his statement works *against* his interest, I am for taking Justice Roberts at his word: Given his perception that New York had not asked the Court to overrule *Adkins*, he did not think that it was appropriate to do so. It was not the absence of a pro-overruling majority that caused him to take this position.

The question remains why New York’s failure to ask squarely for overruling would have constrained Roberts, leading him to a result he did not favor. Viewed from a distance of sixty years, Hughes did enunciate some fairly clear distinctions that one might expect to be palatable to a Justice disposed not to follow *Adkins*. But it is not implausible that Roberts was unpersuaded. And perhaps his unwillingness to overrule *Adkins* in the absence of a clear request was also a matter of scruple. But the scruple does not have much self-evident appeal. New York did, after all, ask that the Court *reconsider Adkins* in light of changed circumstances, and while this does not go the full length of asking for an overrule, it goes quite far. If Roberts was confident that *Adkins* should be overruled, one might expect that he would be comfortable in reaching that result notwithstanding the limited nature of New York’s argument. And the mystery is compounded by the fact that, when he did vote to overrule *Adkins* in *West Coast Hotel*, he did so despite the fact that the state of Washington, like New York before it, had not asked for that result!<sup>26</sup>

I have previously suggested that Roberts’ own judicial timidity may have had something to do with his curious behavior. Cushman properly points out that in some notable instances—the *Nebbia* opinion on the left and *Retirement Board v. Alton R.R. Co.*,<sup>27</sup> “in which he bludgeoned the Railroad Retirement Act to death,”<sup>28</sup> on the right—Roberts was anything but timid. And yet at least part of Roberts’ behavior in *Tipaldo* seems unmistakably to reflect a sort of timidity: He failed to write separately, despite the fact that the majority opinion clearly adopted a position that he must have found



appalling (and in Cushman's account, he failed even to state his mind clearly in Conference). I continue to regard Roberts' behavior in these cases as mysterious.<sup>29</sup>

It may be that the firestorm of criticism of *Tipaldo*—from Republicans as well as from Democrats—had some impact on Roberts; I suspect it made him more willing to reach the merits in *West Coast Hotel* than he might have been otherwise. It did not take the election returns of 1936 for Roberts to realize how unpopular *Tipaldo* was; all he had to do was read accounts of how, the week after the decision, the Republican convention and its prospective nominee, Alf Landon, took strong positions in favor of minimum wage legislation and its constitutionality. Moreover, it appears that Roberts signaled his vote in *West Coast Hotel* in October, when he voted to hear the case, rather than summarily reversing the judgment of the Washington Supreme Court upholding the statute or remanding the case for reconsideration in light of *Tipaldo*. And in any event it is now well understood that Roberts cast his vote in *West Coast Hotel* before Roosevelt announced his Court-packing plan.

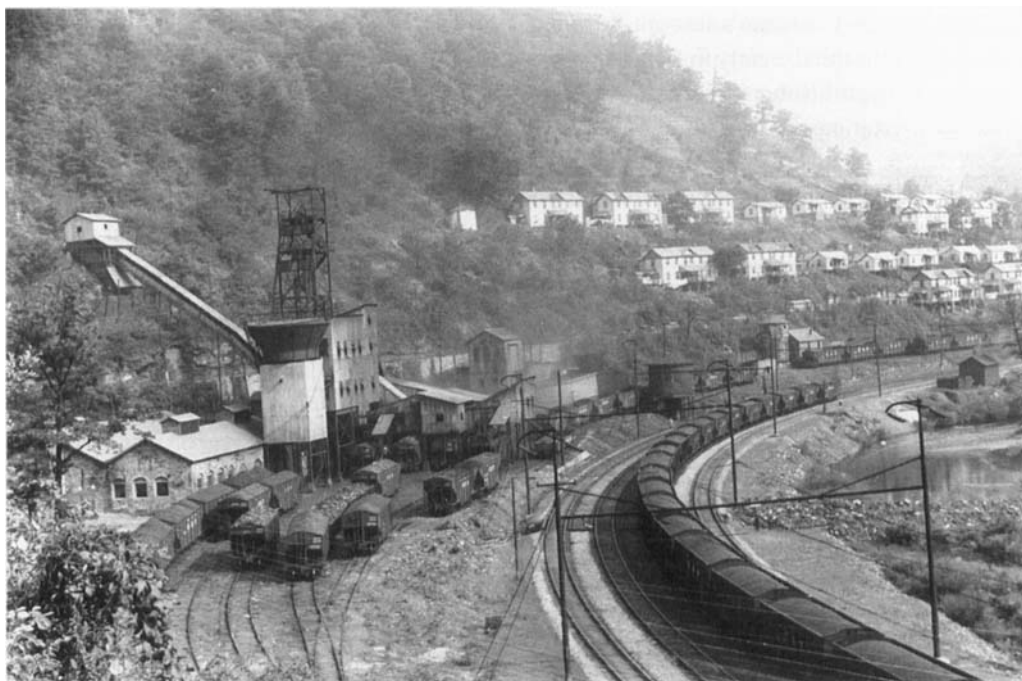
Like Cushman, therefore, I agree that the supposed "switch" of Roberts on the minimum wage provides no good basis for a political account of the Court's decision-making. Roberts' vote in *West Coast Hotel* is what one would expect from the author of *Nebbia*. His vote in *Tipaldo* is an anomaly that escapes easy explanation. The double-switch explanation that some "political story" advocates favor—that despite *Nebbia* Roberts conscientiously favored the merits of *Adkins* at the time of *Tipaldo* and then switched back, like an evasive halfback, in *West Coast Hotel* as a result of political pressure—seems quite implausible.

One of the other key cases on which the "political story" advocates have based their argument is *Jones & Laughlin*, which together with its companion cases not only upheld the Wagner Act—more formally, the National Labor Relations Act—but also seemed to signal a significantly broader view of the commerce

power than had previous decisions. To Cushman, however, the Wagner Act cases were nothing but a predictable, though then controversial, application of the prevailing commerce power doctrine of the time, as adjusted in light of *Nebbia*.

The Court had often enunciated the principle that productive industries—principally agriculture, manufacture, and mining—were not part of commerce, and, like intrastate transactions, were subject to state rather than federal control. But, beginning early in the twentieth century, the Court had also held that activities that were in the "stream" or "flow" or "current" of commerce, even if themselves not constituting interstate commerce, could be brought within the federal power. The reach of this latter doctrine, Cushman argues, was confined by the same "affected with a public interest" limitation that shaped substantive due process jurisprudence; Congress could regulate only businesses meeting that description. But when this limitation gave way in the due process context in *Nebbia*, the floodgates were also opened for an expansive application of the "stream of commerce" theory.

Cushman regards this theory as having played a fundamental role in *Jones & Laughlin* and its companion cases.<sup>30</sup> I am not fully persuaded. The Court had rather rigorously adhered to the distinction between commerce and production; as Cushman points out, shortly before the Labor Act decisions, a Senate committee, reporting out the Bituminous Coal Conservation Act of 1937, acknowledged that "[i]n light of the decisions of the Supreme Court, control of production is apparently beyond congressional power." True, some inputs for the businesses involved in the Labor Act decisions had come from out of state, but the manufacturing process had "materially changed" the "character, utility, and value" of those inputs.<sup>31</sup> It would have required a significant expansion of "stream of commerce" theory for the Court to apply it to these cases. The government gave the theory a very subsidiary position in its brief. And Chief Justice Hughes' opinion for the



Justice Roberts voted with the conservatives in *Carter v. Carter Coal Co.*, which invalidated the Bituminous Coal Conservation Act of 1935, but switched his vote the following year in the *Jones & Laughlin* case to support the government. The mining industry was hard hit in the Depression and the ensuing unemployment devastated rural mining communities. Above is a West Virginia coal mine photographed by Marion Post Wolcott in 1938.

majority expressly declined to conclude whether the facts of the *Jones & Laughlin* case fit the “stream of commerce” theory.<sup>32</sup>

Instead, Hughes relied on a broader theory, that Congress has authority to protect interstate commerce against burdens and obstructions from whatever source. The basic theory was well grounded; Hughes’ own opinion in the *Shreveport Rate Cases*<sup>33</sup> nearly a quarter-century before, when he was an Associate Justice, was one of its most important bulwarks. It made perfect sense for the theory to be applied to production, and so Hughes’ majestic opinion doing just that removed a doctrinal anomaly. Even this application had been foreshadowed by Hughes. “The interests of producers and consumers are interlinked,” he had written in *Appalachian Coals, Inc. v. United States*.<sup>34</sup> “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”

Roberts’ prior record gave no such indication that he would support the government in *Jones & Laughlin* and its companions. Indeed, his vote with the conservatives the prior year in *Carter v. Carter Coal Co.*,<sup>35</sup> which invalidated the Bituminous Coal Conservation Act of 1935, suggested that he would come out the other way. Cushman attempts to distinguish *Carter*, as did the government, but the distinctions appear rather thin to me. It is notable that Hughes’ opinion in *Jones & Laughlin*, which Roberts joined, made no attempt to distinguish *Carter*. Instead, Hughes simply said that “the [*Carter*] Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds”;<sup>36</sup> in other words, *Carter*’s commerce power discussion should not be taken seriously because the Court had relied on other grounds as well.

It seems to me that *Jones & Laughlin* does represent some movement on Roberts’ part. But that does not provide any strong basis for adopting a political explanation. The opinions of

individual judges, as well as doctrine, evolve. Modern day observers should recognize the phenomenon by considering the career of Justice Harry A. Blackmun—who did not need external political pressure to transform from one of the most conservative to one of the most liberal members of the Court. I do not go quite as far as Cushman does in reading *Nebbia* as forecasting Roberts' vote in *Jones & Laughlin*. But it cannot be altogether surprising that a judge who would reject a categorical doctrine limiting the class of industries of sufficient public interest to be regulated would similarly reject a doctrine refusing to treat production as sufficiently related to commerce to justify national regulation.

What is more, after the political trauma of 1937 was over, neither Hughes nor Roberts retreated from the commerce power ground they took in *Jones & Laughlin*; indeed, they joined the further advances in that power driven by the new members of the Court appointed by Roosevelt. And yet, as Cushman shows in depth, in areas where they had been conservative before, they remained conservative. In short, the evidence does not rebut the premise that these were judges, trying to shape the law and decide cases as they conscientiously thought best.

\* \* \*

To a considerable extent, I have focused in this review on questions on which I disagree with Cushman, or at least where I am not yet persuaded by him. I have done this at least in part because it seems to me that doing so makes a review more interesting and more useful, and perhaps also in part because I am an ornery soul. But I do not want this orientation to cloud my admiration for this book, or for the magnitude of Cushman's achievement. By treating the work product of the Justices seriously, across a very broad sweep of time and substantive areas, he has shown how an integrated body of doctrine exerted an intellectual force of its own. Cushman is not naive; he does not suggest that the way this doctrine evolved was

independent of the ideologies and personalities of the Justices who implemented it. On the contrary, he quite properly gives this personal element great prominence. Those who believe that the constitutional transformation of the 1930s must have been the response to political pressure of a political body cannot responsibly ignore his account. And they cannot effectively respond to it unless, like him, they are willing to get their hands very dirty, delving very deeply into the details from which any sound understanding on the grand scale must emerge.

## ENDNOTES

<sup>1</sup>Pp. 5-6.

<sup>2</sup>P. 41.

<sup>3</sup>291 U.S. 502 (1934).

<sup>4</sup>P. 7.

<sup>5</sup>Pp. 137-38.

<sup>6</sup>P. 225.

<sup>7</sup>P. 5.

<sup>8</sup>P. 25.

<sup>9</sup>At one point, Joseph Robinson, the Senate majority leader, said, "[I]f the President wants to compromise I could get him a couple of extra justices tomorrow." Joseph Alsop & Turner Catledge, *The 168 Days* 152-53 (1938). It was apparently a deal that the leader of the Senate opposition to the plan, Burton K. Wheeler, would have accepted. 2 *The Secret Diary of Harold L. Ickes* 175 (1954).

<sup>10</sup>301 U.S. 1 (1937). This is an argument I have made before, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *U.Pa. L. Rev.* 1891, 1972 (1994), for which Cushman gives me credit.

<sup>11</sup>P. 32.

<sup>12</sup>291 U.S. at 532, 536.

<sup>13</sup>Some observers have contended that *Nebbia* was not so important after all, because some courts gave it a restrictive reading. See Laura Kalman, "Law, Politics, and the New Deal(s)," 108 *YALE L.J.* 2165, 2187 (1999); David A. Pepper, "Against Legalism: Rebutting an Anachronistic Account of 1937," 82 *Marq. L. Rev.* 63, 67, 101-02 (1998). Cushman has effectively responded to this argument in "Lost Fidelities," 41 *Wm. & Mary L.Q.* \_\_\_\_ (1999) (forthcoming). Most judges, members of Congress, and academics realized the full scope of the *Nebbia* decision.

<sup>14</sup>*Id.* at 537.

<sup>15</sup>300 U.S. 379 (1937).

<sup>16</sup>298 U.S. 587 (1936).

<sup>17</sup>261 U.S. 525 (1923).

<sup>18</sup>P. 95.

<sup>19</sup>From Roberts' memorandum of November 1945, reproduced in Felix Frankfurter, "Mr. Justice Roberts," 104 *U.Pa. L. Rev.* 311, 314 (1955).

<sup>20</sup>Pp. 101-02.

<sup>21</sup>298 U.S. at 624.

<sup>22</sup>243 U.S. 629 (1917).

<sup>23</sup>104 *U.Pa. L. Rev.* at 314.

<sup>24</sup>*Id.* (emphasis added).

<sup>25</sup>"A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger," 142 *U. Pa. L. Rev.* 1985, 1995 (1994).

<sup>26</sup>I discuss this matter in "Switching Time," 142 *U.Pa. L. Rev.* at 1950-51.

<sup>27</sup>295 U.S. 330 (1935).

<sup>28</sup>P. 263.

<sup>29</sup>One scholar has said that I "end . . . in a fog" in discussing Roberts' vote in *West Coast Hotel*. Pepper, *supra* note 13, at 77. Sometimes, though, the record leaves matters unclear, and an historian acts respon-

sibly by acknowledging that lack of clarity. In other words, blame Roberts, not me.

<sup>30</sup>Pp. 173-75.

<sup>31</sup>*Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 151 (1919), quoted in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In *Carter*, involving mining, the Court refused to apply the "stream of commerce" theory because commerce had not yet begun. But presumably much of the machinery and other inputs involved in mining had traveled from out of state.

<sup>32</sup>301 U.S. at 36.

<sup>33</sup>234 U.S. 342 (1914).

<sup>34</sup>288 U.S. 344, 372 (1932).

<sup>35</sup>298 U.S. 238 (1936). Hughes also voted to invalidate part of the statute involved in *Carter*. He did not join the majority opinion, however, and for various reasons I believe that this vote does not undermine the conclusion that *Jones & Laughlin* reflected his conscientious beliefs. See "Switching Time," 142 *U. Pa. L. Rev.* at 1962-67.

<sup>36</sup>301 U.S. at 41.