THE HUGHES COURT

The Hughes Court: From Progressivism to Pluralism, 1930–1941 describes the closing of one era in constitutional jurisprudence and the opening of another. This comprehensive study of the Supreme Court from 1930 to 1941 – when Charles Evans Hughes was chief justice – shows how nearly all justices, even the most conservative, accepted the broad premises of a Progressive theory of government and the Constitution. The Progressive view gradually increased its hold throughout the decade, but at its end, interest-group pluralism began to influence the law. By 1941, constitutional and public law was discernibly different from what it had been in 1930, but there was no sharp or instantaneous Constitutional Revolution in 1937 despite claims to the contrary. This study supports its conclusions by examining the Court's work in constitutional law, administrative law, the law of justiciability, civil rights and civil liberties, and statutory interpretation.

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The Hughes Court

From Progressivism to Pluralism, 1930–1941

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Mark Tushnet
February 6, 2021

Preface

I made many choices in writing this volume. This is a history of the Supreme Court during Chief Justice Hughes's tenure. The New Deal raised many constitutional questions that were mooted within the executive branch and Congress, but that did not get to the Supreme Court before Hughes's retirement (and sometimes not after that either). For example, the treatment of African Americans in various New Deal programs raises important constitutional questions, some of which were noted at the time. Racial matters also affected the structure of important New Deal statutes in ways that might raise constitutional concerns today. But, because the questions did not reach the Supreme Court, I do not discuss them here. An obvious exception to my focus on what happened at the Supreme Court is my discussion of the Court-packing plan – its origins and its fate in Congress. Even there, though, I do not offer a comprehensive account of all the political maneuvering associated with the plan. A slew of good secondary works lays out the day-by-day events, and I do not intend to replicate in detail what is known about how the plan developed and foundered.[1]

In addition, the Supreme Court is something of a "lagging indicator" for legal theory. It takes time for novel theoretical approaches to work their way into the legal culture to the point where they become available to Supreme Court justices. The Progressive theory of administrative law was well developed by 1930, and the Court's administrative law decisions rested in part upon that theory. In contrast, theories of political pluralism had begun to flourish in political science departments but had not deeply penetrated law schools, much less the Supreme Court, by 1941, and only hints of those theories can be found in the cases. Perhaps even more dramatic, the jurisprudence known as American Legal Realism, given that name only in the 1930s, floated in the background, available only in headline to judges trained well before its advent. And, because it was critical of standard modes of legal thinking, it was likely to be resisted at least implicitly by most of the justices.

[1] Here too there are some exceptions, as in my discussion of the historiographical controversy about when Chief Justice Hughes visited Justice Owen Roberts (Chapter 13).

Preface

The Supreme Court's work is not done by the justices alone. As Jeremy Bentham put it, in a critical tone, the law is made by "judge and company" – that is, by the judges and the lawyers who appear before them. The lawyering before the Court has received some attention in the literature on the events of 1936–37, as Chapter 13 explains. Broadening that focus to the Court's work as a whole, I have devoted reasonably systematic attention to the briefs upon which the justices necessarily relied in shaping their opinions.

In contrast, I do not often discuss the evolution of opinions within a justice's chambers. Justice Hugo Black's papers, for example, contain many pages of initial and revised drafts of his opinions, illustrating how he drafted, then modified, them before circulating them to his colleagues. This evolution can be a matter of great interest to biographers of individual justices, but it would distract from the story of the Court taken as a whole. And, given that intra-chambers material of this sort is available for some but not all the justices, including much of it would distort the picture we have of the Court itself.

The availability of inter-chambers material varies as well. For much of the decade Justice Harlan Fiske Stone's papers are substantially more complete than those of other justices, those of Justice Willis Van Devanter consist almost entirely of personal correspondence, and those of Justices Pierce Butler and Owen Roberts simply do not exist. I have tried to be attentive to the possibility that our understanding of the interactions among the justices might be distorted by the idiosyncrasies of the papers that are available – for example, the relative formality of the papers Hughes retained and the personal interests that shaped and are reflected in Stone's and Frankfurter's papers.

I discuss a rather large number of relatively small cases in some detail. Sometimes the cases fill in details of a picture sketched in the Court's major decisions, and seeing the picture can change the way we see the sketch. In addition, one of the book's themes, sometimes stated explicitly, is that the work of the Supreme Court is, well, work. The justices' experience was shaped by everything they did, not only by the cases that got the headlines. To capture that experience we must look at as much of the Court's work as feasible.

Despite my hope to be reasonably comprehensive in coverage, I devote no attention to one major area, the law of federal income taxation. Congress adopted a major revision of the income tax system in 1924, and cases raising questions about the new statute's interpretation filtered up to the Supreme Court through the mid-1930s. The 1924 Act undoubtedly was an important element as the nation's fiscal capacity became increasingly centered in the income tax, and the Hughes Court grappled with some basic issues in defining "income" for tax purposes. I found no substantial historical treatments of the Hughes Court's role in developing such issues or in contributing to the growth of national fiscal capacity,[2] and without guidance from such accounts I felt unable to offer a useful perspective on the Court's tax cases.

[2] One modest exception is Thomas Brennan, Lee Epstein, and Nancy Staudt, "Economic Trends and Judicial Outcomes: A Macrotheory of the Court" (2009) 58 *Duke Law Journal*: 1191–230, which argues that the Court's members, viewing the Depression as the product of forces beyond the government's control, increased the rate at which they ruled in the government's favor in tax cases, compared to the prior decade in

Preface

I did my best to adhere to the methodological prescription that if it happened after 1941, when Hughes retired, it did not happen. Of course, as Justice David Souter wrote about one of the cases conventionally taken to indicate the triumph of the Constitutional Revolution of 1937, the majority opinion "did not reject [the previous standard] in so many words … . But we know what happened."[3] Still, I have tried to avoid interpreting what happened before 1941 in light of what happened afterward, in an effort to see things as the justices, who did not then know what would happen, saw them.[4]

Part I proceeds largely chronologically, describing the Court's jurisprudence in the first years of Hughes's tenure, then the "false dawn" of the Court's initial encounters with legislation responding to the economic crisis of the 1930s, before turning to the "crisis" of 1936–37. That discussion concludes with an examination of how much the Court's jurisprudence changed – and did not change – in the crisis's immediate aftermath.

Part II presents the material thematically overall, although within topics much of the presentation is chronological. When coupled with my aim to be reasonably comprehensive in my treatment of the Hughes Court's work, the thematic organization presents significant expository difficulties. I have tried to reduce them to the extent possible, in part by presenting the origins, unfolding, and resolution of the crisis of 1935–37 at the book's outset. But undoubtedly the organization leads to some repetition, at times because I have tried to make the work somewhat "modular," in the sense that a reader interested only in a single topic can read the discussion of that topic without having read the rest of the book.

Finally, though I did substantial archival work, where there are good secondary accounts – for example, with respect to much that happened in 1936 and 1937, and in connection with several specific cases throughout Hughes's tenure – I relied on those accounts for factual information unless my own archival research suggested some difficulties with the secondary treatments. Sometimes, in part to signal my appreciation of the authors' own archival work, I have cited *their* presentation of archival material rather than citing the archival material directly, and in the course of doing so I occasionally (quite rarely) corrected typographical and transcription errors in the secondary sources without specifically noting my alterations.

A note on sources: Many of the newspaper, magazine, and law review sources cited in this book are available online, but in general I have provided citations only to the works themselves without providing links to the online versions. Some archival material has become available online since I began my research for this book. I have not tried systematically to provide links to such material, but occasionally have done so, in particular when revising and editing draft chapters, I found online versions of material I had originally cited directly to the archives. And, for all cited online materials I have created and provided perma-links to guard against link

which temporarily adverse economic conditions could be attributed to an incompetent government, which should not be rewarded with victories in tax cases.

[3] United States v. Lopez, 514 US 549, 615 (1995) (Souter, J., dissenting).

[4] But see Chapter 41 (discussing the aftermath of Minersville Sch. Dist. v. Gobitis, 310 US 586 (1940), and Chapter 22 (discussing the path toward the adoption of the Administrative Procedure Act in 1946).

rot. Finally, I have done my best to verify all direct quotations as they appear in this volume, but constraints occasioned by the pandemic made it impossible to do so with respect to some sources, mostly the papers of Supreme Court justices. Librarians at Harvard Law School did a heroic job in finding sources not available online from which I quoted. More than a few errors of transcription as well as typographical errors in citations undoubtedly remain.

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