

2017

## The Missing Justice in Coleman v. Miller

Barry Cushman

*Notre Dame Law School*, [bcushman@nd.edu](mailto:bcushman@nd.edu)

Follow this and additional works at: [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Judges Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Cushman, Barry, "The Missing Justice in Coleman v. Miller" (2017). *Journal Articles*. 1275.  
[http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1275](http://scholarship.law.nd.edu/law_faculty_scholarship/1275)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# The Missing Justice in *Coleman v. Miller*

BARRY CUSHMAN

A mystery has surrounded the 1939 case of *Coleman v. Miller*.<sup>1</sup> The case concerned the status of the proposed Child Labor Amendment, which Congress had passed in 1924 but which had yet to be ratified by the requisite number of states. In January 1925, the Kansas state legislature had adopted a resolution rejecting the proposed amendment. In January 1937, however, the state senate had divided evenly on a resolution to ratify the amendment, and the state's Lieutenant Governor had cast the deciding vote in favor of ratification. The lower house then adopted a resolution of ratification. Members of the legislature, claiming that the Lieutenant Governor had no right to vote on the senate resolution, brought an action in mandamus seeking to restrain various state officers from taking steps to certify that the legislature had ratified the amendment. The petition also contended that the proposed amendment was stale and no longer subject to ratification because it had not been ratified within a reasonable time. The state supreme court found that the Lieutenant Governor had been

entitled to vote on the resolution, that the proposed amendment remained vital and subject to ratification, and that the legislature had ratified the amendment. That court therefore denied the writ of mandamus.<sup>2</sup>

The threshold question before the Supreme Court of the United States was whether the Court had jurisdiction over the controversy. More particularly, the issue was whether the members of the state legislature who had brought the action had standing to seek a writ of *certiorari*. In the published opinion, the Court split on this issue 5-4, with Justices Owen J. Roberts, Hugo L. Black, and William O. Douglas joining Felix Frankfurter's opinion maintaining that the Court lacked jurisdiction because the petitioners lacked standing.<sup>3</sup> The numerical vote had been the same when the Justices met in Conference to deliberate on April 22, 1939, but the line-up had been different. On that occasion, Justice James C. McReynolds had taken the view that the Court lacked jurisdiction, while Roberts had voted to recognize jurisdiction. These two Justices switched places between the date

of the Conference and the announcement of the Court's decision.<sup>4</sup>

The second question was whether to affirm the judgment of the state court on the merits. Here the vote in the published decision was 7-2. Chief Justice Charles Evans Hughes's opinion for the Court held that the question of whether the ratification of the amendment was effective in view of its earlier rejection by the state legislature was a political question to be determined by Congress.<sup>5</sup> Hughes further opined that the question of whether the amendment had lost its vitality through lapse of time was similarly non-justiciable.<sup>6</sup> Roberts, Frankfurter, and Douglas joined Black's concurring opinion, which underscored their view that Congress alone held exclusive power over the political process of constitutional amendment, and that the courts had no business pronouncing upon that process.<sup>7</sup> McReynolds joined Justice Pierce Butler's dissent, which maintained that the proposed amendment was no longer subject to ratification because it had not been ratified within a reasonable time. Butler's opinion did not speak to the issue of the legislature's previous rejection of the proposed amendment.<sup>8</sup> Here again, however, the ultimate vote was at variance with the Conference tally. At the Conference, McReynolds had not voted on the merits, passing because of his view that the Court did not have jurisdiction of the case. Justices Harlan Fiske Stone and Roberts had been with Butler in dissent, though it appears from the question marks that Stone placed next to his and Roberts's votes in his record of the Conference that their votes to reverse had been tentative.<sup>9</sup> Stone ultimately joined Hughes on the merits, and Roberts ultimately joined Black. The deserted Butler had to be consoled by McReynolds's election to join him in dissent.

There is nothing particularly mysterious about any of these events. But there was a third merits issue in *Coleman*, which was not disaggregated in the tallies recorded at the

April 22 Conference but that was given brief, separate treatment in Hughes's opinion. The petitioners claimed that the Lieutenant Governor was not a part of the "legislature" under the Kansas constitution as it had been construed by the state's highest court, and therefore he was not eligible under Article V of the federal Constitution to cast the deciding vote on ratification. And herein lies the mystery. For Hughes's published opinion reported that "[w]hether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point."<sup>10</sup>

Scholars understandably have been puzzled by how a decision in which all nine of the Justices participated could have been "equally divided" on this issue. Shortly after the decision was handed down, the *Yale Law Journal* published an anonymous Note, which Bennett Boskey later attributed to Yale Law Professor Harry Shulman,<sup>11</sup> entitled "Sawing a Justice in Half."<sup>12</sup> "Opinions of the Supreme Court delivered in the last weeks of this Term," the author wrote, "exhibit a capacity in that Court for division sufficient to confound prophets and critics of all schools—legalistic, metaphysical, psychological and economic. But the division in *Coleman v. Miller*, recorded June 5th, should astonish even a Yogi magician."<sup>13</sup> After surveying the various possibilities, the author concluded that

[o]nly Justices McReynolds and Butler could properly refuse to consider the question; for they voted for the petitioners on other grounds and therefore could have found it unnecessary to pass upon additional reasons supporting the same conclusion. Yet, failing to carry a majority on those grounds, they were under some duty to see whether they could



James C. McReynolds missed the Court's final Conference on June 3, 1939 to return to his hometown of Elkton, Kentucky (pictured is his childhood home) to attend "a family reunion and celebration." The Court had announced on May 1 that it would adjourn for the summer on May 29, and McReynolds stuck by his commitment to attend the Elkton festivities.

find a majority for their result on any of the other grounds urged.<sup>14</sup>

The still-perplexed author was left with a series of questions: "What really did happen? Did a Justice refuse to vote on this issue? And if he did, was it because he could not make up his mind? Or is it possible to saw a Justice vertically in half during a conference and have him walk away whole?"<sup>15</sup>

It would be more than half a century before an answer to these questions would find its way into print. In a conversation published in 2007, Boskey related that:

I later found out through Felix Frankfurter what had really happened in that case. Justice McReynolds, who

was a very ornery Justice, used to go off a little bit early before the end of the Term on vacation. And in this particular case, the point involved was a new point that came up after Justice McReynolds had gone off on vacation. And nobody was going to try and call him back—he would have told them, frankly, "Go to hell." He wouldn't have come back. So Hughes just said, "On this issue, the Court is evenly divided."<sup>16</sup>

This Frankfurter/Boskey account never has been contradicted, but neither has it been corroborated. As I shall demonstrate, the Justices' papers and contemporary news

reports make it possible to determine with a high degree of confidence that McReynolds was indeed absent from the final meeting during which the Justices met to deliberate on the case. Yet those sources also cast doubt on some aspects of the Frankfurter/Boskey account.

*Coleman* was delivered on the final opinion day of the Term, June 5, 1939. On May 30, Chief Justice Hughes wrote to his colleagues that “[f]our opinions have been circulated” in *Coleman*—those written by Hughes, Black, Frankfurter, and Butler—“and, in view of the shortness of time, it seems to me desirable that we should have a conference as soon as possible in order to determine whether an opinion can be written for the Court and, if so, what it shall decide. Accordingly, I ask that the brethren meet in conference tomorrow, Wednesday, at noon.”<sup>17</sup> We know that McReynolds was absent from the Court’s final session on June 5,<sup>18</sup> and the docket books of his colleagues reveal that he also did not attend the Court’s final Conference on June 3.<sup>19</sup> McReynolds’s premature departure, though hardly commendable, may not, however, have been quite as irresponsible as the Frankfurter/Boskey account would suggest. The Court had announced on May 1 that it would adjourn for the summer on May 29,<sup>20</sup> and McReynolds, who was traveling to his birthplace for “a family reunion and celebration,”<sup>21</sup> appears to have relied upon that announcement in making his plans.

On June 16, McReynolds’s clerk for that Term, Milton Musser, wrote to his mother that “[t]he Justice returned to Washington after having been away for two weeks visiting his old home in Kentucky.”<sup>22</sup> Musser’s letter does not supply specific dates of travel, but the *Washington Post* reported on June 12 that McReynolds had left his boyhood home in Elkton the preceding day in order to attend the funeral of Judge Charles H. Robb on Tuesday, June 13.<sup>23</sup> An absence of two weeks would place McReynolds’s departure

from Washington on May 30 or May 31. On June 2, 1939, the *Paducah Sun-Democrat* ran a story with the headline “Justice McReynolds Picks Elkton Visit over Fete for King.” With a dateline from Elkton on June 2, the story related that McReynolds had declined an invitation to meet the King and Queen of Great Britain at a June 8 garden party held at the British embassy in Washington “because,” as he told his interviewer in Elkton, “I simply preferred to be here.”<sup>24</sup>

This evidence alone would suggest that McReynolds probably had left Washington by the time that the Justices convened on May 31. The journey from Washington to Elkton is one of approximately 725 miles. McReynolds allocated two days for his return trip from Elkton to Washington for Judge Robb’s funeral, so he probably would have allocated the same amount of time for his transit from Washington to Elkton. McReynolds liked to travel in his 1929 six-cylinder Buick couple convertible, and he may well have journeyed by car to Elkton that year. Though he was reportedly an aggressively fast driver, he would not have covered the distance from Washington to Elkton on the roads of 1939 in a single day. On a 1936 drive from Washington to West Point, for example, a journey of under 300 miles, McReynolds allocated two days for transit, stopping for the first night at Delaware Water Gap, approximately 240 miles from Washington.<sup>25</sup> A journey from Washington to Elkton by train likewise would have consumed more than a single day. Even in 1947, the trip from Washington to Cincinnati on the Baltimore & Ohio Railroad was one of eleven and one-half hours.<sup>26</sup> The connecting train on the Louisville & Nashville Railroad to Guthrie, Kentucky, which might have required an overnight stay in Cincinnati, would as late as 1958 still have consumed another six and one-half hours.<sup>27</sup> McReynolds would then have faced a ten-mile journey to Elkton on the Guthrie & Elkton Railroad or possibly transportation by



In leaving town early, McReynolds declined an invitation to attend a garden party reception at the British Embassy for King George VI and Queen Elizabeth. Pictured are the King, President Franklin D. Roosevelt, General Edwin M. Watson, Eleanor Roosevelt, and the Queen posing outside Union Station on June 8.

automobile. Whether he traveled by car or by train, if McReynolds was in Elkton early enough on June 2 to grant an interview that would be published in Paducah's evening newspaper, then he probably would have departed Washington no later than May 31.

Any remaining doubt about McReynolds's presence at the May 31 Conference is removed, however, by the June 3 dateline edition of Drew Pearson and Robert S. Allen's *Washington Merry-Go-Round* column. Two days before the even division in *Coleman* was announced, the authors reported that McReynolds would not be present with his hardworking colleagues for the Court's June 5 session because he would be "taking things easy" in Elkton. "The Court originally had fixed its adjournment date for May 29," Pearson and Allen noted, but "under the pressure of an extra heavy docket, Chief Justice Hughes added another week to

the term in order to clean up unfinished cases. Meanwhile McReynolds had arranged a reunion in Elkton and refused to change his plans notwithstanding the uncompleted calendar. He sat with the court on May 29, but the next day packed his bag and started on his vacation while his colleagues remained at their desks."<sup>28</sup>

It appears clear, therefore, that McReynolds was in fact the missing Justice in *Coleman*. Nevertheless, elements of the Frankfurter/Boskey report appear to be misleading. First, though McReynolds certainly was eminently capable of being "very ornery" or worse, the intimation that it was his custom to leave for vacation before the conclusion of the Court's Term appears to be an embellishment. He did so in 1939, to be sure, but an examination of the docket books from 1922 to 1940 reveals only one other instance in which McReynolds was absent

from the final Conference.<sup>29</sup> And as mentioned above, the 1939 instance was one in which the Court previously had announced plans to adjourn a week earlier. Surely it was at the very least “ornery” to depart prior to the actual conclusion of the Term, but McReynolds may have been honoring commitments that he had made in reliance on the Court’s earlier announcement.

Second, as Hughes surely knew when he sent out his May 30 letters to his colleagues calling for a Conference on *Coleman* on May 31, McReynolds had just departed on a journey that would consume at least two days. If Hughes knew by May 29 that he would call a special Conference on *Coleman*, he could have communicated (and perhaps did

communicate) that to McReynolds prior to the latter’s departure. But if Hughes did not know this until May 30, the earliest that he could have reached McReynolds would have been upon the Justice’s arrival at his hotel on the evening of May 30, and perhaps not until his arrival in Elkton on May 31. Hughes clearly thought it necessary to resolve the remaining issues in *Coleman* before the Court’s regular Conference on June 3. Even had McReynolds returned to Washington as soon as he had heard from Hughes, he could not have been present for a Conference before June 1 if he had been reached in transit on May 30, or June 3 if reached in Elkton on May 31. It is not as if McReynolds already was settled at a nearby vacation destination



Chief Justice Charles Evans Hughes (left) felt compelled to add another week to the Term to clean up unfinished cases, including the *Coleman v. Miller* case that centered on whether the Lieutenant Governor of Kansas had the right to vote to break a tie in the state senate on a resolution to ratify the Child Labor Amendment. Above are Hughes and McReynolds in May 1938 leaving Holy Trinity Church after attending the funeral of Frank Key Green, who had served as the Marshal of the Supreme Court for twenty-three years.

and could return to participate in the discussion within what Hughes regarded as the necessary time frame. Hughes might have been able to contact McReynolds when he was either halfway to or had arrived in Elkton and asked him to return to discuss the question on which the Justices were evenly divided. And though McReynolds held Hughes in high regard,<sup>30</sup> one cannot be certain that, under such circumstances, McReynolds would not have told the Chief Justice to “go to hell.”<sup>31</sup> But that is probably not why Hughes did not reach out to his departed colleague.

Because the question of whether the Lieutenant Governor was eligible to vote had been briefed and argued by the parties,<sup>32</sup> and because the original draft of Hughes’s opinion had contained over five pages of text deciding the issue on the merits in favor of the officer’s eligibility,<sup>33</sup> that issue cannot have been “a new point that came up” so late in the deliberations. Instead, it appears that the precise issue of whether the Lieutenant Governor’s eligibility to vote presented a non-justiciable political question, which the parties had neither briefed nor argued, was “a new point” raised by one of the Justices late in the production of the opinions.

That Justice appears to have been Black, who wrote in the margin of his copy of Hughes’s draft opinion that the issue of the Lieutenant Governor’s eligibility presented “a political question for Congress,”<sup>34</sup> and scribbled “by Congress though” next to Hughes’s assertion that the issue presented “a federal question to be determined in deciding whether the ‘legislature’ has acted as required by Article V.”<sup>35</sup> In his concurring opinion, which was joined by Roberts, Frankfurter, and Douglas, Black asserted that “whether submission, *intervening procedure* or Congressional determination of ratification conforms to the command of the Constitution, calls for decisions by a ‘political department’ of questions of a type which this Court has frequently designated ‘political.’”<sup>36</sup> Black

went on to disapprove of “judicial review of or pronouncements . . . as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification” as “judicial interference” in “matters that we believe were intrusted [sic] by the Constitution solely to the political branch of government.”<sup>37</sup> The Amendment process, Black insisted, was “‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point.”<sup>38</sup>

Hughes’s draft opinion made clear that he disagreed with Black, Roberts, Frankfurter, and Douglas on the question of the justiciability of the issue of the Lieutenant Governor’s eligibility, and it appears that Stone and Justice Stanley Reed agreed with him. Justice Butler’s dissenting opinion closed by observing that the question of whether the issue of the proposed amendment’s vitality was non-justiciable “was not raised by the parties or by the United States appearing as *amicus curiae*.” Neither had that question been suggested by the Court when it ordered re-argument. It therefore would be inappropriate, Butler opined, “without hearing argument on the point,” to hold that the Court lacked power to decide the question of whether the amendment was no longer subject to ratification.<sup>39</sup> Though his opinion did not speak to the issue of the Lieutenant Governor’s eligibility, Butler may well have taken a similar view of the claim that the Court should declare that issue non-justiciable without appropriate briefing and argument. In any event, it appears that Butler joined Hughes, Stone, and Reed in opposing those who supported Black’s position, producing a 4-4 tie. It appears that McReynolds simply was not there to break the deadlock.

Even if McReynolds had been present, however, it is not certain that he would have cast a vote on the issue. Douglas noted in his docket book that, at the April 22 Conference, “McReynolds having voted to dismiss did not



vote on the merits.”<sup>40</sup> Even though he had lost on the jurisdictional issue, McReynolds nevertheless refused at Conference to engage the merits issues that his colleagues would of necessity address in view of the majority’s holding that the petitioners had standing. As is suggested by the *Yale Law Journal* Note, McReynolds “could properly refuse to consider the question” of the Lieutenant Governor’s eligibility to vote on the Amendment’s ratification in view of the fact that he had voted to rule in favor of the petitioners on other grounds. Even if he was, as the Note author doubtfully intimated, “under some duty” to “find a majority for [his] result on any of the other grounds urged,”<sup>41</sup> he may have agreed with Hughes’s draft opinion that the Lieutenant Governor was in fact eligible to vote on ratification, and taking that position would not have changed the outcome of the case. In short, it may be that the irascible Justice, who had declined to vote on any of the merits issues at the original Conference, would similarly have refused to vote on the issue of the Lieutenant Governor’s eligibility had he been present for the later special Conference. McReynolds ultimately backed his friend Butler on the question of the proposed amendment’s vitality, and for this it was necessary that he change his Conference position—probably quite reluctantly, in light of what we know of his jurisdictional views<sup>42</sup>—on the threshold question of standing. But having thus disposed of the merits on the ground that the proposed amendment was no longer subject to ratification, McReynolds might not have thought it necessary or proper to reach the issue of the Lieutenant Governor’s eligibility. Indeed, the fact that Butler’s dissenting opinion also did not speak to the issue of the Kansas legislature’s previous rejection of the proposed amendment may have been a concession made to conciliate McReynolds. McReynolds may have determined not to reach the merits of either of these issues before departing on May 30, and he may have made that determination known

before his departure. If so, Hughes would have been fully aware of the futility of recalling McReynolds for the special Conference. Thus, it may not have mattered that McReynolds was in fact the missing Justice in *Coleman v. Miller*.

*Author’s Note:* Thanks to Matthew Hofstedt, Kent Olson, and Janet Rose for excellent research assistance, and to John Harrison for helpful conversation.

## ENDNOTES

<sup>1</sup> 307 U.S. 433 (1939).

<sup>2</sup> *Id.* at 435-37.

<sup>3</sup> *Id.* at 460-70 (separate opinion of Frankfurter, J.).

<sup>4</sup> Harlan Fiske Stone OT 1938 Docket Book (hereafter “Stone OT 1938 Docket Book”), Office of the Curator of the Supreme Court of the United States (hereafter “OCSCOTUS”); Pierce Butler OT 1938 Docket Book (hereafter “Butler OT 1938 Docket Book”), OCSCOTUS; Owen J. Roberts OT 1938 Docket Book (hereafter “Roberts OT 1938 Docket Book”), OCSCOTUS; William O. Douglas OT 1938 Docket Book (hereafter “Douglas OT 1938 Docket Book”), William O. Douglas MSS, Manuscript Division, Library of Congress; Stanley Reed OT 1938 Docket Book (hereafter “Reed OT 1938 Docket Book”), Stanley Forman Reed MSS, Special Collections, M.I. King Library, University of Kentucky.

<sup>5</sup> 307 U.S. at 447-51.

<sup>6</sup> *Id.* at 451-56.

<sup>7</sup> *Id.* at 456-60 (Black, J., concurring).

<sup>8</sup> *Id.* at 470-74 (Butler, J., dissenting).

<sup>9</sup> Stone OT 1938 Docket Book; Butler OT Docket Book; Roberts OT 1938 Docket Book; Douglas OT 1938 Docket Book. Butler did not record a vote for Stone on the merits. Reed OT 1938 Docket Book records the merits vote as 6-2, with Butler and Roberts in dissent, and McReynolds not voting.

<sup>10</sup> 307 U.S. at 446-47.

<sup>11</sup> Bennett Boskey, “Recollections of *West Virginia Board of Education v. Barnette*,” 81 ST. JOHNS L. REV. 755, 787 (2007).

<sup>12</sup> Note, “Sawing a Justice in Half,” 48 YALE L.J. 1455 (1939).

<sup>13</sup> *Id.* (footnotes omitted).

<sup>14</sup> *Id.* at 1458.

<sup>15</sup> *Id.*

<sup>16</sup> Boskey, “Recollections,” at 787.

<sup>17</sup> See, e.g., Hughes to Black, May 30, 1939, Box 256, Hugo L. Black MSS, Manuscript Division, Library of Congress; Hughes to Douglas, May 30, 1939, Box 36,

William O. Douglas MSS, Manuscript Division, Library of Congress.

<sup>18</sup> See *Hague v. C.I.O.*, 307 U.S. 496, 500 (1939) (“Mr. Justice Butler, presiding in the absence of the Chief Justice and Justice McReynolds”). Hughes was absent due to illness with a duodenal ulcer. See “2 Members Away, High Court Plans to Finish Term,” WASH. POST, June 5, 1939, 2.

<sup>19</sup> Stone OT 1938 Docket Book at 556 lists McReynolds as “abs[ent]” for the vote on the petition for rehearing in No. 945, *City & County of Denver v. The People of the State of Colorado*, while listing everyone else as voting to dismiss. Douglas Docket OT 1938 Book at 303 similarly lists no vote for McReynolds and a vote to dismiss for everyone else. Douglas OT Docket Book at 304, Stone OT 1938 Docket Book at 557, and Butler OT 1938 Docket Book at 608 also list no vote for McReynolds and a vote to dismiss for everyone else in No. 975, *The Kansas Farmers’ Union Royalty Co. v. Hushaw*. With respect to petitions for *certiorari*, Douglas OT 1938 Docket Book records votes for everyone but McReynolds in No. 926, *Partridge v. Martin*, and No. 948 *Townshend v. Union Trust Co. of Maryland*. In none of the cases taken up at the June 3 Conference is there any indication of a vote cast by McReynolds at that Conference. See Butler OT 1938 Docket Book; Stone 1938 OT Docket Book; Roberts OT 1938 Docket Book; Douglas OT 1938 Docket Book. For the Conference list, see Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. On June 4, with a dateline of June 3, the *Times-Picayune* reported that McReynolds “already has left Washington to visit relatives in Kentucky.” “Hughes Stricken Ill; Will Be Off Bench for Time,” *TIMES-PICAYUNE*, June 4, 1939, 25.

<sup>20</sup> “Supreme Court to Quit May 29 for Summer,” WASH. POST, May 2, 1939, 2 (“The Supreme Court announced yesterday that it will adjourn for the summer on May 29, barring unexpected developments”). It appears that the six-week absence of the Chief Justice owing to illness (March 4–April 15), compounded by the two-month hiatus (February 13–April 17) between the resignation of Justice Louis Brandeis and the confirmation of Douglas, put the Court a bit behind in its work. Though the Justices handed down thirteen decisions on February 27, see 306 U.S. at 240–397, they delivered only one more over the next month (*Texas v. Florida*, 306 U.S. 398 (1939), on March 13). The Court handed down ten more decisions on March 27, see 306 U.S. at 436–521, but only two more on April 3, see 306 U.S. at 522–30. When the Court was restored to full strength on April 17, the Justices announced twenty-one more decisions. See 306 U.S. at 531–614, 307 U.S. at 1–160. The Court announced one more decision on April 24,

see 307 U.S. at 161–70; six more on May 15, see 307 U.S. at 171–218; and eight more on May 22, see 307 U.S. at 219–313. But despite handing down six more decisions on May 29, see 307 U.S. at 313–432, there remained seven more that had yet to be rendered. These included not only *Coleman* and its companion case from Kentucky, *Chandler v. Wise*, 307 U.S. 414 (1939), but also such other major cases generating multiple opinions as *Hague v. C.I.O.*, 307 U.S. 496 (1939), *U.S. v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), and *H.P. Hood & Sons v. United States*, 307 U.S. 588 (1939). Justice Douglas’s files show that he was at work on an opinion concurring in the result of *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486 (1939), every day from May 29 to June 2. See Box 37, William O. Douglas MSS, Manuscript Division, Library of Congress. Douglas eventually scrapped the opinion and simply noted his concurrence in the result. 307 U.S. at 496. The Court heard argument in twenty cases during Hughes’s absence in March, see 306 U.S. at 466–601; in late April and early May, after Hughes had returned and Douglas had joined the Court, the Justices heard argument or re-argument in seventeen cases. These included *Coleman*, *Chandler*, *Rock Royal*, *Hood*, *O’Malley v. Woodrough*, 307 U.S. 277 (1939), *Graves v. Elliott*, 307 U.S. 383 (1939), and *United States v. Powers*, 307 U.S. 214 (1939). See 307 U.S. at 171–588. *Rock Royal* and *Hood* were not argued until April 24–26, see 307 U.S. at 533, 588, and were not discussed in Conference until May 6. See Conference List, May 6, 1939, Box 36 William O. Douglas MSS, Manuscript Division, Library of Congress. Indeed, the Justices needed another Conference on June 3 in order to dispose of some remaining matters. See Conference List, June 3, 1939, Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. Justice Douglas’s papers contain a document, apparently prepared some time before March 27, 1939, with the heading “Proposed Schedule for Remainder of October Term, 1938.” The schedule anticipates Argument days on March 27, April 17, and April 24; Recess on April 3, April 10, and May 8; and Court Sessions on May 1, May 15, May 22, and May 29. Box 36, William O. Douglas MSS, Manuscript Division, Library of Congress. Both the Proposed Schedule and the May 1 announcement of the Court’s remaining calendar appear in retrospect to have been overly optimistic.

<sup>21</sup> “Justice McReynolds ‘Snubs’ Royalty for Reunion,” *CHICAGO DAILY TRIBUNE*, June 6, 1939, 9.

<sup>22</sup> Milton Musser to Ellis Shipp Musser, June 16, 1939, Box 21, folder 4, Musser Family Papers, Utah State Archives. Musser continued, “I hope he leaves again and soon.” *Id.*

<sup>23</sup> “McReynolds Coming Here,” WASH. POST, June 12, 1939, 17.

<sup>24</sup> “Justice McReynolds Picks Elkton Visit Over Fete for King,” PADUCAH SUN-DEMOCRAT, June 2, 1939, 5. See also, “Justice McReynolds ‘Snubs’ Royalty for Reunion,” CHICAGO DAILY TRIBUNE, June 6, 1939, 9.

<sup>25</sup> See DENNIS J. HUTCHINSON & DAVID J. GARROW, eds., *THE FORGOTTEN MEMOIR OF JOHN KNOX* (2002), pp. 23-27.

<sup>26</sup> <http://www.american-rails.com/cincinnati.html>.

<sup>27</sup> [http://www.lnrr.org/Magazine/Ln\\_passenger\\_timetable.pdf](http://www.lnrr.org/Magazine/Ln_passenger_timetable.pdf).

<sup>28</sup> Drew Pearson & Robert S. Allen, “McReynolds Jumps Gun on Court Associates by Taking Vacation Early,” NASHVILLE TENNESSEAN, June 5, 1939, 5.

<sup>29</sup> McReynolds was absent from the June 2, 1934 conference, the last of the 1933 Term. Butler OT 1933 Docket Book; Stone OT 1933 Docket Book; Robert OT 1933 Docket Book. The reason for his absence is unclear. Other Justices appear occasionally to have missed the final conference. For instance, Chief Justice William Howard Taft was away from the final conference of the 1925 Term due to illness. Stone OT 1925 Docket Book; “Chief Justice Overworked, Ill,” BOSTON DAILY GLOBE, June 8, 1926, 7; Justice Benjamin Cardozo missed the final conference of the 1937 Term due to illness. Roberts OT 1937 Docket Book; 304 U.S. iii. And it appears that Justice George Sutherland may have missed the final conferences of the 1924, 1927, and 1929 Terms. Stone OT 1924 Docket Book; Stone OT 1927 Docket Book; Stone OT 1929 Docket Book. Justice William O. Douglas later would become notorious (and resented by all of his fellow Justices) for habitually leaving Washington for the summer several weeks before the end of the term, sometimes without as much as a fare-thee-well. JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* (1980), p. 432.

<sup>30</sup> Stephen Tyree Early, Jr., *James Clark McReynolds and the Judicial Process* (unpublished Ph.D. dissertation, University of Virginia, 1954), p. 90 (“The only member of the Court for whom he had genuine and complete respect was Chief Justice Hughes. The Chief Justice,

McReynolds thought, was too much for him; he was the only Justice on the bench to whom McReynolds would defer”).

<sup>31</sup> In support of this possibility, consider William H. Rehnquist, “Chief Justices I Never Knew,” 3 HAST. CON. L. Q. 637, 637-38 (1976) (Hughes was “meticulous in his desire that the Court, which then convened at noon, come through the red velour curtains at the very stroke of the hour. On several occasions, however, the senior associate, Mr. Justice McReynolds, had barely made it to the robing room in time. On one particular day the hour of noon was almost at hand, and Mr. Justice McReynolds had not yet appeared. The Chief Justice dispatched one of his messengers to Justice McReynolds’ chambers to importune him to hurry. The messenger returned a moment or two later, but without Mr. Justice McReynolds. The Chief Justice asked the messenger if he had communicated the message to Mr. Justice McReynolds, and the messenger replied that he had. To the Chief Justice’s next question the messenger replied, ‘He said to tell you that he doesn’t work for you’”).

<sup>32</sup> Brief on Behalf of Petitioner, *Coleman v. Miller*, pp. 5-13; Brief on Behalf of Respondents, *Coleman v. Miller*, pp. 1-2, 4-6.

<sup>33</sup> Chief Justice Hughes, draft opinion in *Coleman v. Miller*, Box 256, Hugo L. Black MSS, Manuscript Division, Library of Congress, pp. 9-14.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> 307 U.S. at 457 (Black, J., concurring) (emphasis added).

<sup>37</sup> *Id.* at 458.

<sup>38</sup> *Id.* at 459. These three passages also appear in an earlier, undated, uncirculated draft of Black’s separate opinion. Box 256, Hugo Black MSS, Manuscript Division, Library of Congress.

<sup>39</sup> *Id.* at 474 (Butler, J., dissenting).

<sup>40</sup> Douglas OT 1938 Docket Book.

<sup>41</sup> Note, “Sawing a Justice in Half,” at 1458.

<sup>42</sup> See, e.g., Melvin I. Urofsky, ‘The Brandeis-Frankfurter Conversations,’ 1985 SUP. CT. REV. 299, 317 (Brandeis opining that “McR. cares more about jurisdictional restraints than any of them”).