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Interpreting Secretary Perkins

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INTERPRETING SECRETARY PERKINS

Barry Cushman

I WOULD LIKE TO THANK Professors Ernst and Davies for inviting me to respond to Professor Ernst’s essay. Professor Ernst maintains that the Hughes-Roberts visit described by Secretary Perkins in her oral history occurred during the summer of 1936, while I believe that it took place in 1935. The principal reason for my belief is that the summer of 1935 is what Perkins herself expressly reported in her oral history as the time of the visit: during the summer *after* the May 1935 decision in *United States v. Schechter Poultry Corp.*, but *before* the January 1936 decision in *United States v. Butler*, and *before* other events that she places “quite early in ‘36.” As I noted in my previous essay, however, Perkins’s reference to a case involving “a peculiar child labor matter” that “came up from one of the states” in the autumn of 1935 introduced an ambiguity into the manuscript, as the Court did not hear any child labor cases during either the 1935 or the 1936 Terms. Professor Ernst and I agree that the identification of what he calls the “phantom” child labor case is critical to the effort to determine the timing of the visit Perkins described.

Professor Ernst believes that the case in question was in fact a conflation of two cases that did not concern child labor: *West Coast Hotel v. Parrish*, which upheld a state minimum wage statute for women, and *Helvering v. Davis*, which sustained the old-age pension

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provisions of the Social Security Act.¹ As Professor Ernst notes, I doubt that Perkins's reference was to *West Coast Hotel*. First, such a hypothesis requires that the Secretary of Labor, who had been an avid social reformer in a generation for whom *Adkins v. Children's Hospital* had been a *bête noir*, and to whom the 1936 decision in *Morehead v. Tipaldo*² was an affront, recalled a major landmark in constitutional law and a long hoped-for milestone in social reform as an obscure case about some "peculiar child labor matter" that she hadn't even realized was coming before the Court. Second, the hypothesis requires that she remembered a decision that was handed down after *Tipaldo*, after the 1936 election, on the heels of the largest sit-down strikes,³ and while the Court-packing plan was still pending, as coming to the Court during a more tranquil period preceding each of these events. Such a temporal placement would be all the more strange in view of the fact that Perkins correctly recalled the timing of *U.S. v. Butler*, the decision striking down the Agricultural Adjustment Act,⁴ a matter that was by contrast outside her policy portfolio; that she had been busy helping to work up a federal wage and hour bill since shortly after the *Schechter* decision;⁵ that she had testified in favor of that bill a little over two months after *West Coast Hotel* was decided;⁶ and that two days after *West Coast Hotel* was decided, she called for a conference of legal advisors and labor officials to counsel the states on how best to seize the opportunities it presented.⁷

¹ 300 U.S. 379 (1937); 301 U.S. 619 (1937).

² 261 U.S. 525 (1923); 298 U.S. 587 (1936).

³ See, e.g., SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-37 (1969), at 303-12; J. WOODFORD HOWARD, MR. JUSTICE MURPHY 151-52 (1968).

⁴ 297 U.S. 1 (1936).

⁵ The Reminiscences of Frances Perkins, 7:71, 76-83, Columbia University Oral History Collection, Columbia University, New York, NY (hereafter "Perkins Oral History"); FRANCES PERKINS, THE ROOSEVELT I KNEW 254-55 (1946).

⁶ See Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 before the S. Comm. on Educ. and Labor and the H. Comm. on Labor, pt. 1, 75th Cong. 173-211 (1937) (hereafter "Joint Hearings") (statement of Frances Perkins, Sec'y of the Dept. of Labor).

⁷ "Miss Perkins Calls Parley on State Minimum Pay Laws," CHRISTIAN SCIENCE

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Professor Ernst canvasses some of the difficulties involved in fitting *Helvering v. Davis* to Perkins's description of the phantom child labor case, but it also runs into many of the troubles attending the *West Coast Hotel* hypothesis. Perkins had been intimately involved in devising the Social Security Act,⁸ and as Professor Ernst recognizes, she most certainly was aware that *Davis* was before the Court. *Davis* was decided after both *West Coast Hotel* and the *Labor Board Cases*, and yet Professor Ernst's account requires not only that she mistakenly conflated it with the former and placed it before the latter, but also that she located it prior to all of the highly salient events preceding *West Coast Hotel*. It does not seem likely that Secretary Perkins could have gotten all of these matters in her own wheelhouse so badly wrong. But if by the 1950s her memory had become so unreliable that she made all of the errors that Professor Ernst's account requires, then one has to wonder about the reliability of any other uncorroborated claims that Perkins made in her oral history interview.

I do not believe that Secretary Perkins was that confused. Instead, I believe that the phantom child labor case was actually a case about convict labor. In *Whitfield v. Ohio*,⁹ handed down on March 2, 1936, the Court unanimously upheld Ohio's statute prohibiting sale on the open market of convict-made goods. More importantly, the Court also upheld the federal Hawes-Cooper Act, which divested convict-made goods of their interstate character upon their arrival in the destination state, thereby allowing that state's law to apply to the goods free from the restraints of the dormant Commerce Clause. The case came to the Court on a petition for *certiorari* from the Ohio Supreme Court, so unlike *Davis*, it did come up "from one of the states."¹⁰ Moreover, the Court granted *cert.* on October 14, 1935,¹¹ so unlike *West Coast Hotel*, it "went up to them that autumn"

MONITOR, Apr. 1, 1937, p. 6; "New National Labor Laws Pondered: Fresh Efforts Are Underway at Washington to Deal With the Problems of Minimum Wages and Child Labor," NEW YORK TIMES, Apr. 4, 1937, p. 70.

⁸ PERKINS at 278-301.

⁹ 297 U.S. 431 (1936).

¹⁰ Perkins Oral History, 7:74.

¹¹ 296 U.S. 561 (1935).

of 1935.¹² It was not decided by a vote of 5-4 or 6-3, but as Professor Ernst notes, neither was *Davis*; and in any event, the vote in the case strikes one as among the less important of its details, and one quite likely to escape recollection nearly two decades later.

This hypothesis requires further explanation. First, why would Secretary Perkins have confused a case about convict labor with one about child labor? Throughout this period, the issues of prison labor reform and child labor reform were understood to be closely related. For nearly three decades before passing the Keating-Owen Child Labor Act in 1916, Congress had considered dozens of bills that would have regulated the interstate shipment of convict-made goods. Some of these measures would have prohibited such interstate shipment altogether;¹³ others, like the Hawes-Cooper Act, would have divested the goods of their interstate character upon arrival in a destination state.¹⁴ Discussions of the constitutionality of these measures and the state statutes that they would have allowed to apply to interstate goods turned on precisely the sorts of considerations that would inform the Court's decision invalidating the Keating-Owen Act in the 1918 case of *Hammer v. Dagenhart*: whether the sale and shipment of goods that were in themselves "harmless" could be so restricted,¹⁵ and whether the competition that such low-

¹² Perkins Oral History, 7:74.

¹³ See, e.g., H.R. 8716 (50-1), 19 Cong. Rec. 2262 (1888); H.R. 7755 (63-1), 50 Cong. Rec. 3794 (1913).

¹⁴ See, e.g., H.R. 10617 (52-2), 24 Cong. Rec. 2367 (1893); H.R. 1933 (63-1), 51 Cong. Rec. 92 (1914).

¹⁵ See, e.g., Interstate Commerce in Goods Manufactured by Convict Labor: Hearing Before the S. Comm. on Education and Labor on S. 4060, 64th Cong. (1916) (hereafter "1916 Senate Hearing") at 51 (Statement of Herbert E. Miles, President of the Wisconsin State Board of Industrial Education); *id.* at 128 (Statement of F. Emory Lyon); Interstate Commerce in Convict-Made Goods: Hearings Before the S. Comm. on Interstate Commerce on S. 2321, 63d Cong. (1914) (hereafter "1914 Hearing"), at 249-50, 253-54 (Statement of Edward Boyle, Treasurer, National Conference of Charities and Corrections); *id.* at 137 (Statement of W.H. Hartford); Interstate Commerce in Convict-Made Goods: Hearing Before a Subcomm. of the S. Comm. on the Judiciary, 62nd Cong., 2d Sess., on H.R. 5601, S. Doc. 63-446 (1912) at 49-50 (Statement of Edward Boyle); H.R. 4040, H.R. 4064, H.R. 4883,

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cost goods posed for comparable goods manufactured by free laborers could supply adequate justification for such regulation.¹⁶ Several participants in the debates explicitly raised the close analogy to child labor regulation, and recognized that the constitutionality of such congressional bills regulating convict-made goods would entail the constitutionality of similar measures regulating child-made goods.¹⁷ It was similarly recognized that a decision invalidating a child-made goods statute would cast a shadow over comparable regulations of convict-made goods, and after the Court invalidated the Keating-Owen Act in 1918, the previously steady flow of convict-made goods bills dried up. Between 1918 and 1925, inclusive, only one such bill was introduced in either house of Congress.¹⁸ At the hearing before the House Labor Committee, that bill was condemned as unconstitutional in light of *Hammer*,¹⁹ and was never reported out of

Competition of Penal Labor: Hearings Before Subcomm. No. 4 of the H. Comm. on Labor, 60th Cong. (1908) (hereafter "1908 Hearing") at 52, 55-57 (Statement of Edward Boyle); *id.* at 110 (Brief submitted by Edward Boyle); Report of the Industrial Commission on Labor Legislation, H.Doc. 476, Part 3 (56-1) (1900), at 16; In re Opinion of the Justices, 98 N.E. 334, 335-36 (Mass. 1912); *People v. Hawkins*, 51 N.E. 257, 258-59 (N.Y. 1898); *People v. Hawkins*, 47 N.Y. Supp. 56, 57-61 (1897); H. Rept. 2022, Part 2 (50-1), "Views of the Minority," p. 2.

¹⁶ 1914 Hearing at 250 (Statement of Edward Boyle); Report of the Industrial Commission on Labor Legislation, H.Doc. 476, Part 3 (56-1) (1900), at 15-16; *People v. Hawkins*, 51 N.E. 257, 258, 261-62 (N.Y. 1898); H. Rept. 2022 (50-1) at 5.

¹⁷ H.R. 12000, 12001, 21322, Competition of Penal Labor: Hearings Before Subcomm. No. 4 of the H. Comm. on Labor (1910) (hereafter "1910 Hearing") at 138 (Brief submitted by Leventritt, Cook & Nathan); 1908 Hearing at 110, 115, 170-71 (Brief submitted by Edward Boyle); *id.* at 144 (Statement of Edward Boyle). See also 41 Cong. Rec. 176 (1907) (Mr. Grosvenor envisioning a convict-labor bill as a precedent for a child labor bill); 1916 Senate Hearing at 51 (Herbert Miles opining that both the convict-labor bill and the Keating-Owen bill were unconstitutional); 1910 Hearing at 8 (Helen Boswell of the General Federation of Women's Clubs recognizing that the Beveridge Child Labor Bill prohibiting interstate shipment of child-made goods "was not constitutional," but distinguishing the convict-labor bill as merely a divesting measure); *ibid.* (Mrs. Ellen J. Foster, Chairman of the Committee on Child Labor of the National Society of the Daughters of the American Revolution, concurring with Ms. Boswell).

¹⁸ H.R. 10241 (67-2), 62 Cong. Rec. 2090 (1922).

¹⁹ Hearings Before the Committee on Labor of the House of Representatives, Sixty-

committee. When the House Labor Committee again held hearings on a divesting bill in 1926, the legal opinion requested of the Department of Labor responded that the power of Congress to regulate the interstate movement of such “harmless” goods was doubtful in view of *Hammer*,²⁰ and the bill again died aborning. When the Senate Commerce Committee held hearings on the Hawes-Cooper Act in early 1928,²¹ Donald Richberg submitted a brief in which he argued that the divesting measure passed muster notwithstanding *Hammer* because it did not totally prohibit interstate shipment of the goods as the Keating-Owen Act had.²² Proponents of the bill followed Richberg’s lead in the floor debates.²³ Opponents of the bill, by contrast, maintained that *Hammer*’s condemnation of congressional interference with the interstate transportation of “harmless” goods in an attempt to alleviate alleged unfair competition made plain the measure’s invalidity.²⁴

Seventh Congress, Second Session, on H.R. 10241 (1922) at 11 (remarks of Mr. Black of Texas).

²⁰ Hearings Before the Committee on Labor, House of Representatives, Sixty-Ninth Congress, First Session, on H.R. 8653 (1926), at 343 (opinion of Ethelbert Shaw, Commissioner of Labor Statistics). See also *id.* at 208-09 (legal opinion of James S. Lakin, President of the West Virginia State Board of Control, appearing over the signature of state attorney general Howard B. Lee).

²¹ Hearings Before the Committee on Interstate Commerce of the United States Senate on S. 1940 (70-1) (1928).

²² 70 Cong. Rec. 666-67 (1928).

²³ See, e.g., 69 Cong. Rec. 8654 (Mr. Kopp); *id.* at 8664 (Mr. Sumners of Texas); *id.* at 8749-50 (Mr. LaGuardia); 70 Cong. Rec. at 860 (Sen. Wagner). See also Alphonse A. Laporte & Frederick D. Leuschner, *Extending State Jurisdiction by Act of Congress*, 15 A.B.A. J. 199, 200 (1929).

²⁴ See, e.g., 69 Cong. Rec. 8074-76 (Sen. Blease); *id.* at 8638-39 (Mr. Ramseyer); *id.* at 8662-63 (Mr. Montague); 70 Cong. Rec. 813 (Sen. Smith); *id.* at 853-63 (Sen. Goff); *id.* at 864-65, 867 (Sen. Borah); *id.* at 871, 875 (Sen. Reed of Missouri). See also 1928 House Hearing at 247-56 (Statement of Edward D. Robbins, Representing the State of Connecticut); *id.* at 257-66 (Statement of Oscar L. Heltzen, First Assistant to the Attorney General of the State of Rhode Island); Charles Hall Davis, *The Hawes-Cooper Act Unconstitutional*, 23 LAW. & BANKER & CENT. L.J. 296, 321-22 (1930); Arthur H. Schwartz, *Legal Aspects of Convict Labor*, 25 COLUM. L. REV. 814, 816 n.19 (1925) (opining on a predecessor divesting bill).

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When cases litigating the constitutionality of the Hawes-Cooper Act began to materialize in 1934, its opponents routinely invoked *Hammer* in support of their claims,²⁵ while supporters relied upon the distinction raised by Richberg.²⁶ Richberg had candidly maintained that a divesting bill for child-made goods would likewise be constitutional,²⁷ and when the Court unanimously upheld the Act without so much as mentioning *Hammer*, commentators immediately recognized the ramifications for child labor reform.²⁸ Washington Democratic Senator Lewis Schwellenbach introduced and defended a divesting bill for child-made goods in the waning days of the legislative session, too late for any action to be taken on it;²⁹ but when the members of a new Congress convened in January of 1937, they arrived prepared to introduce a bevy of child labor bills with provisions modeled on the Hawes-Cooper Act.³⁰ Indeed, Perkins herself

²⁵ See, e.g., Brief for the Complainant, *Alabama v. Arizona*, 291 U.S. 286 (1934), at 3, 26-39; *State v. Whitfield*, 257 N.W. 601, 602 (Wisc. 1934); Record, *Whitfield v. Ohio*, at 24-26; Brief for the Petitioner, *Whitfield v. Ohio*, 26-27, 47-51. See also Lawrence G. Knecht, *Notes on Ohio Cases – Power of Congress to Deprive Interstate Business of the Benefit of the Original Package Doctrine*, 4 Ohio Opinions 366, 368.

²⁶ Brief for the Respondent, *Whitfield v. Ohio*, at 34-35, 38.

²⁷ Hearings Before the Committee on Labor of the House of Representatives on H.R. 7729 (70-1) (1928) (hereinafter “1928 House Hearing”) at 65. See also Proceedings of the 60th Annual Congress of the American Prison Association 138 (1930) (Assistant Director of the Federal Bureau of Prisons J.V. Bennett opining that if the Hawes-Cooper Act were constitutional there could be no objection to a comparable statute concerning child-made goods).

²⁸ See, e.g., Hugh Evander Willis, *Constitution Making in 1935-36*, 22 WASH. U. L.Q. 206, 214 (1936); *Interstate Commerce – Power of Congress – Validity of Hawes-Cooper Act and State Statute Prohibiting Sale of Convict-Made Goods*, 49 HARV. L. REV. 1007, 1008 (1936); Marvin M. Finder, *Constitutional Law – Divesting Prison-Made Goods of Their Interstate Character – Original Package Doctrine*, 27 AM. INST. CRIM. L. & CRIMINOLOGY 283, 284-85 (1936); Note, *The Power of Congress to Subject Interstate Commerce to State Regulation*, 3 U. CHI. L. REV. 636, 639-40 (1936). Willis and another commentator went so far as to suggest that *Whitfield* had implicitly overruled *Hammer*. See Willis, *supra*, at 214; J.A.C. Grant, *State Power to Prohibit Interstate Commerce*, 26 CAL. L. REV. 34, 67-68 (1937).

²⁹ S. 4736 (74-2), 80 Cong. Rec. 8626-30 (1936).

³⁰ See, e.g., S. 10 (75-1), 81 Cong. Rec. 65 (1937); S. 26 (75-1), 81 Cong. Rec. 65 (1937); S. 592 (75-1), 81 Cong. Rec. 149 (1937); S. 668 (75-1), 81 Cong. Rec.

explained in her oral history that in 1936 – before either *West Coast Hotel* or *Davis* had been decided – she attempted to persuade Roosevelt to introduce her Department’s draft of a bill that could “be defended on the grounds that were canvassed in this child labor case,”³¹ and that Administration lawyers “thought it was a pretty good draft, that we had taken advantage of this child labor decision.”³² Such a divesting provision was included in the Fair Labor Standards Act (FLSA) as it was introduced in Congress,³³ in the version of the bill that passed the Senate in the summer of 1937,³⁴ and in the Wheeler-Johnson child labor bill that was passed independently by the Senate when the FLSA bogged down in the House.³⁵ In the spring of 1938, UCLA political scientist J.A.C. Grant wrote that “the ‘divesting’ theory, originated to handle the problem of interstate commerce in intoxicants, has proved its practicability as a basis for labor legislation as well. Quare, will child labor be the next field to feel its sting?”³⁶

But if *Whitfield* was viewed as such an important decision at the time, why would Perkins have remembered it so imperfectly? Though *West Coast Hotel* and *Davis* remain decisional landmarks that are taught in Constitutional Law classes to this day, the significance of *Whitfield* was quickly eclipsed by events. The divesting provision of the Senate version of the Fair Labor Standards Act was stripped out by the House, and was not included in the measure that ultimately secured congressional approval.³⁷ The Act’s blanket prohibition on interstate shipment of goods made under substandard labor

176 (1937); H.R. 4651 (75-1), 81 Cong. Rec. 1179 (1937); H.R. 5377 (75-1), 81 Cong. Rec. 1939 (1937); S. 1976 (75-1), 81 Cong. Rec. 2670 (1937); S. 2226 (75-1), 81 Cong. Rec. 3615 (1937); H.R. 6608 (75-1), 81 Cong. Rec. 3772 (1937).

³¹ Perkins Oral History, 7:80.

³² Id. at 7:81.

³³ See Joint Hearings at 62 (testimony of Robert H. Jackson).

³⁴ 81 Cong. Rec. 7949-51, 7957 (1937).

³⁵ 81 Cong. Rec. 9318-20 (1937).

³⁶ J.A.C. Grant, *Interstate Traffic in Convict-Made Goods*, 28 AM. INST. CRIM. L. & CRIMINOLOGY 854, 857 (1938).

³⁷ 52 Stat. 1060 (1938).

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conditions was unanimously sustained in *United States v. Darby Lumber Co.*,³⁸ rendering the divesting alternative no longer attractive or relevant. By 1940 Congress had enacted a comparable statute flatly prohibiting the interstate transportation of convict-made goods, making the divesting approach otiose even within that domain.³⁹ And though *Whitfield* was much-discussed in the law review literature of the 1930s, by the time that Perkins gave her interview it had virtually fallen out of legal discourse. For example, a Westlaw search discloses only two law review articles citing the decision between 1941 and 1957.⁴⁰ What once had seemed to be the key to successful child labor reform was quickly reduced to a curious relic of a bygone era. One can readily understand how Secretary Perkins could have forgotten the name of and the vote in *Whitfield*, and yet at the same time appreciate her recollection of its relation to one of the contemporary issues that was foremost in her mind: child labor.

If, as I believe, the phantom child labor case is properly identified as *Whitfield v. Ohio*, then that previously worrisome portion of the transcript coheres with other portions placing the Hughes-Roberts visit in the summer of 1935. With that ambiguity resolved, the question then becomes whether the evidence adduced by Professor Ernst suffices to dislodge the visit from this placement in 1935 and to relocate it to the summer of 1936. I am not persuaded that it does. Let us examine each of the pieces of evidence offered. The interview with Roberts's daughter Elizabeth Hamilton corroborating the occurrence of at least one Hughes visit to the Roberts's farm Kimberton confirms a matter that I do not take to be in dispute, and as Professor Ernst observes, it does not help to place the visit in time. The June 4, 1936 letter from Mrs. Roberts to Perkins placing the Roberts's at their yearly summer retreat similarly confirms a matter that is not disputed, and it too does not assist in pinpointing

³⁸ 312 U.S. 100 (1941).

³⁹ 54 Stat. 1134 (1940).

⁴⁰ Samuel Mermin, "Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I, 57 YALE L.J. 1 (1947); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

the year of the visit to which Perkins refers in her interview. The *Washington Post* story placing the Hugheses at the Skytop Club in the Pennsylvania Poconos during June of 1936 may appear at first blush to offer helpful circumstantial evidence of a visit to Kimberton that summer. The Hugheses also stayed at Skytop during June of 1935,⁴¹ however, which limits the value of the 1936 report in fixing the timing of the visit. And the Wyzanski letter reporting the Secretary's visit to the Roberts home on May 24, 1937 by no means precludes other such visits in which Perkins may have discussed recent decisions with the Justice. Such visits would not seem at all unlikely in view of the close relationship between Perkins and Mrs. Roberts; and in light of the perceived contemporary significance of *Whitfield* for child labor reform, it does not appear implausible that that decision might have provided such an occasion. Professor Ernst does not suggest that Perkins apprised Wyzanski of all such visits, nor that Wyzanski reported all such visits in his correspondence. The ground for making any such assumption is not readily apparent, and therefore one must question whether there is reason to conclude that this particular visit, the timing of which does not cohere with the other temporal landmarks in the interview, was the one to which Perkins refers in the transcript.

As Professor Ernst indicates, the most probative piece of evidence tending to place the visit in 1936 is a letter that Wyzanski wrote to his mother in April of 1937 reporting on a conversation with Perkins in which she stated that "Hughes had been to visit Roberts in Pa. last summer" For two reasons I am not persuaded that this letter shifts the preponderance of the evidence. First, there is the question of the reliability of the report. The communicative structure of the evidence in the letter is presumably Mrs. Roberts (A) to Secretary Perkins (B) to Wyzanski (C), who then related the account contained in the letter to his mother. This kind of serial transmission of information, more colloquially known as "telephone," is well known

⁴¹ *Justice Hughes Spending Week in Poconos*, WASH. POST, June 16, 1935, p. S7 ("Chief Justice Charles Evans Hughes and Mrs. Hughes arrived at the Skytop Club in the Pocono Mountains of Pennsylvania").

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for its vulnerability to misunderstanding, distortion, invention, exaggeration, and elaboration.⁴² Indeed, this vulnerability provides one of the principal reasons for the exclusion of hearsay from judicial proceedings.⁴³

To illustrate the problem, consider another contemporary report with the same communicative structure. In October of 1936, Wyzanski wrote to his mother to report on a conversation that he had had with Thomas Harris, who was Justice Stone's clerk during the 1935 Term. Wyzanski wrote that Harris had told him that "the Chief Justice at conference voted with the 3 liberals in the SEC case (*Jones v. SEC*), the case involving excess valuation of railroads (*Great Northern*), and the case involving the commodities clause of the Hepburn Act (*Elgin, Joliet, R. v. U.S.*), but when he found he was in the minority, he shied away from a 5-4 decision which would accentuate popular doubts about the infallibility of the Sup. Ct."⁴⁴ Yet the

⁴² The *loci classici* in the social psychology literature are GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* (1947), and G.W. Allport & L. Postman, *The Basic Psychology of Rumor*, 8 *TRANSACTIONS OF THE NEW YORK ACADEMY OF SCIENCES* (Series II) 61 (1945). See also NICHOLAS DIFONZO & PRASHANT BORDIA, *RUMOR PSYCHOLOGY: SOCIAL AND ORGANIZATIONAL APPROACHES* 135-37, 143, 145 (2007); DAVID L. MILLER, *INTRODUCTION TO COLLECTIVE BEHAVIOR* 84-87, 92, 96 (1985); LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* 41-42 (2d ed. 1972); TAMOTSU SHIBUTAMI, *IMPROVISED NEWS: A SOCIOLOGICAL STUDY OF RUMOR* 3-6 (1966); F.C. BARTLETT, *REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY* 118-76 (1932); Anthony Lyons & Yoshihisa Kashima, *The Reproduction of Culture: Communication Processes Tend to Maintain Cultural Stereotypes*, 19 *SOCIAL COGNITION* 372 (2001); Molly Treadway & Michael McCloskey, *Cite Unseen: Distortions of the Allport and Postman Rumor Study in the Eyewitness Testimony Literature*, 11 *LAW & HUM. BEHAV.* 19, 22-24 (1987); H. Taylor Buckner, *A Theory of Rumor Transmission*, 29 *PUB. OP. Q.* 54, 58, 63 (1965); T.M. Higham, *The Experimental Study of the Transmission of Rumour*, 42 *BRIT. J. PSYCH.* 42 (1951); Gordon W. Allport & Leo Postman, *An Analysis of Rumor*, 10 *PUB. OP. Q.* 501, 504-05 (1947); Clifford Kirkpatrick, *A Tentative Study in Experimental Social Psychology*, 38 *AM. J. SOC.* 194 (1932).

⁴³ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 721-23 (4th ed. 2009).

⁴⁴ Charles Wyzanski to Maude J. Wyzanski, Oct. 18, 1936, Box 22, Charles Wyzanski MSS, Massachusetts Historical Society, quoted in DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014), pp. 182-83 n.76.

surviving docket book records of the conferences in these cases do not corroborate this account. They do show that Hughes changed his vote in *Great Northern Railway v. Weeks*.⁴⁵ Both Stone and Brandeis record that the conference vote was 5-4, with Hughes joining Brandeis, Stone, and Cardozo in dissent. By the time the decision was rendered, however, Hughes had abandoned them and joined the majority.⁴⁶ But the docket books do not bear out this account of *U.S. v. Elgin, Joliet, & Eastern Railway Co.*⁴⁷ Stone and Brandeis each record the conference vote as identical to the final vote: 6-3, with Justices Brandeis, Stone, and Cardozo dissenting.⁴⁸ Moreover, the docket books do not support Wyzanski's report of the conference in *Jones v. SEC*.⁴⁹ Both Stone and Brandeis record a conference vote of 6-2, with Chief Justice Hughes in the majority. Indeed, the only movement between the conference and the final decision was that of Justice Brandeis, who had passed at conference but ultimately joined Stone and Cardozo in dissent.⁵⁰

⁴⁵ 297 U.S. 135 (1936) (holding that North Dakota's valuation of the railroad for purposes of taxation was too high).

⁴⁶ Stone OT 1935 Docket Book; Brandeis OT 1935 Docket Book.

⁴⁷ 298 U.S. 492 (1936) (holding that the fact that all of the shares of a railroad corporation and all of the shares of a manufacturing corporation were owned by a holding company did not render transportation of the manufacturer's products by the railroad a violation of the commodities clause of the Interstate Commerce Act).

⁴⁸ Stone OT 1935 Docket Book; Brandeis OT 1935 Docket Book. The case was argued April 8 and 9. Stone provides no date for the conference vote, but Brandeis records it as April 27. Brandeis entered a note indicating some action on the case – though no record of a vote – on April 11. Unfortunately, the note is obscured by a pasted-over, typed account of the ultimate disposition – an unfortunate and regrettably common practice in the Brandeis chambers. What can be made out of the note reads, “Passed [obscured by paste-over] of C.J. [obscured by paste-over].” The Brandeis docket book contains no record of any other cases being discussed at an April 11 conference, so this action may not have occurred at a conference.

⁴⁹ 298 U.S. 1 (1936) (upholding the registration statement provisions of the Securities Act of 1933, but strongly disapproving the agency's refusal to permit withdrawal of a registration statement allegedly containing material misrepresentations, and quashing its subpoena of the withdrawing registrant's testimony and business records).

⁵⁰ Stone OT 1935 Docket Book; Brandeis OT 1935 Docket Book. Professor Ernst had not been granted access to these docket books at the time that his book went to

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The communicative structure of the evidence in this letter is apparently the same as that of the letter on which Professor Ernst relies here: presumably Justice Stone (A) to Harris (B) to Wyzanski (C), who then related the account contained in the letter to his mother. We don't know where along this chain of communication the mistakes were made, but the Stone and Brandeis docket books cast exceedingly grave doubt over the reliability of the report that Wyzanski delivered to his mother concerning Hughes's voting behavior. We cannot discount the possibility that Wyzanski's report concerning the detail of the timing of a Hughes visit to Kimberton may also prove to be unreliable gossip, particularly when there does not appear to be any other evidence to corroborate that report, and when that report would appear to be impeached by Perkins's own account.

There is a second reason to doubt the contention that the Wyzanski letter shifts the preponderance of the evidence. As mentioned above, the Hugheses traveled to Skytop during the summers of both 1935 and 1936. There is nothing in the evidence presented by Professor Ernst that would preclude there having been more than one Hughes visit to Kimberton. Thus, even if Wyzanski's report of a 1936 visit were correct, that would not exclude the possibility that the visit described by Secretary Perkins in her oral history took place during the summer of 1935.

As Professor Ernst remarks, further evidence may yet be discovered. I am happy, as I am sure he is, to follow the evidence wherever it may lead. For now, however, it seems to me that the preponderance of the evidence locates the visit to which Perkins referred in her interview precisely where she herself placed it: in the summer of 1935.

GB

press, see legalthistoryblog.blogspot.com/2014/04/the-supreme-courts-docket-books.html, and therefore he is not to be faulted for not consulting them.