Appendix D - UNIVERSITY HONORS PROGRAM
SENIOR PROJECT - APPROVAL

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Justice Owen Roberts's Revolution of 1937

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Introduction: Roberts v. Roosevelt

At the beginning of 1937, the United States government stood in an awkward position. Two of its three branches were locked in a struggle to determine the future course of the American political economy. President Franklin D. Roosevelt sought to establish a system of managed capitalism under expanded constitutional doctrines, while the Supreme Court held steady to a strict, laissez-faire constitutionalism. It was, perhaps, "the most serious conflict between the three branches of our government in this century."[1] Though the outcome of this struggle is not in doubt, there is debate over *how* this "constitutional revolution" came to be.[2] The popular mythology is that the Court retreated from its opposing stance owing to the popularity of the New Deal and the threat of Roosevelt's court-packing proposal. As the political satirist Finley Peter Dunne wrote years earlier, "No matther whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns."[3]

True to the mythology, the Supreme Court did reverse itself in *West Coast Hotel v. Parrish* [300 US 379 (1937)], a decision which upheld a Washington state minimum wage law for women. Ten months earlier, the same justices had struck down a nearly identical New York state law. Since the interim period included a stunning election victory for Roosevelt followed by his proposal of "judicial reform," the logical conclusion seemed to be that the Court bowed to Roosevelt and gave its blessing to the New Deal.[4] In reality, however, the situation was not as simple. The personnel of the Court during the 1930's is vital to an

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[1] Peter Irons, *The New Deal Lawyers*, (Princeton: Princeton University Press, 1982), p. 273.
[2] Edward S. Corwin, *Constitutional Revolution Ltd.*, (Claremont, CA: Claremont Colleges, 1941.) Professor Corwin's book was the first to refer to these events as a "constitutional revolution."
[3] Finley Peter Dunne, *Mr. Dooley's Opinions*, (New York: R.H. Russell, 1901), p. 26.

understanding of this controversy.[5] Justices Butler, McReynolds, Sutherland, and Van Devanter were popularly dubbed the "Four Horsemen of Reaction": conservative, elderly, and always voting as a group. Brandeis, Cardozo, and Stone provided a liberal voice in the Court. In the middle, then, were two justices whose swing vote became critical to every major issue before the Court: Chief Justice Charles Evans Hughes and Justice Owen J. Roberts. Chief Justice Hughes, a masterful politician as well as a judge, voted usually with the liberals of the Court.[6] This four-four split left Justice Roberts, a former corporation lawyer who had also prosecuted cases for the government, at the center of the controversy between Roosevelt and the Supreme Court.

Justice Roberts's vote was the difference between the 5-4 ruling in *New York v. Morehead ex rel. Tipaldo* [298 US 587 (1936)] which struck down a New York minimum wage law, and the 5-4 ruling ten months later in the *Parrish* case which upheld an identical Washington law. Justice Roberts's change of mind became popularly known as the "switch in time that saved nine," since the Court's reversal made Roosevelt's court-packing plan seem unnecessary.

Court followers and historians have since accused Roberts of vacillation or manipulation. According to Justice Felix Frankfurter, it was "lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations."[7] Nonetheless, such talk had become so common that Frankfurter, after "not a little persuasion," convinced Roberts to recount the

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[4] Pres. Roosevelt's plan to reform the judiciary can be found in *Franklin D. Roosevelt and the Supreme Court*, Alfred Haines Cope and Fred Krinsky, eds., (Lexington, MA: D.C. Heath, 1969), Pp. 18-27.
[5] See Appendix B.
[6] Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955*, (New York: Random House, 1955), p. 223.

events of his reversal to him upon his retirement from the Court. Frankfurter published the memorandum written to him by Roberts after his death in 1955.[8]

This study seeks to evaluate the facts as they were presented by Roberts and also as they are found in the judicial record. It will continue the work of others in seeking to find out what persuaded Roberts to change his vote.[9] Unlike most others, however, this study will concentrate also on Roberts's mindset throughout the New Deal and his attitude toward the political environment in which he operated. This will be accomplished by an evaluation of the opinions Roberts wrote for the Court and of other primary sources such as contemporary press articles. Unfortunately, Roberts left no substantial personal records which would be invaluable to a study of this type.[10]

Despite the fact that evidence concerning these events is lacking, historians have put forth various explanations for Roberts's switch. Given the accepted fact that his vote in the *Parrish* decision was recorded in conference on December 19, 1936,[11] before Roosevelt's court plan was announced on February 5, 1937, at least one historian has suggested that Roberts and the justices knew about the plan prior to its announcement, thereby altering their course early to conform with the wishes of the administration.[12] There is no conclusive evidence to support such a claim. Another has proposed that Roberts changed his mind in response to Roosevelt's massive 1936 election victory.[13] This assertion is more credible, yet it does not fully explain Robert's motives behind his votes in these two cases. This study

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[7] "Mr. Justice Roberts," *University of Pennsylvania Law Review*, CIV (1955): 313.
[8] Ibid., p. 314-315. See also Appendix A.
[9] John W. Chambers, "The Big Switch: Justice Roberts and the Minimum Wage Cases," *Labor History* X (1969): 44-73; Charles A. Leonard, *A Search For a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937*, (Port Washington, NY: Kennikat Press, 1971.)
[10] Leonard, *Search For a Judicial Philosophy*, Pp. 184-185.
[11] See Appendix A.
[12] Rodell, *Nine Men*, p. 249.

seeks to do that, and it proposes that Justice Roberts had personal political ambitions in mind when he voted to strike down the New York minimum wage law in June, 1936. In response to the nearly universal condemnation of the *Tipaldo* decision and Roosevelt's election victory, Roberts changed his vote and voted to affirm the minimum wage law seven months later in *Parrish.*

The body of this paper is organized into four distinct sections: The first is a discussion of Roberts's life and career leading up to his nomination as a Supreme Court Justice, followed by an analysis of his opinion in *Nebbia v. New York* [291 US 502 (1934)]. The second section is an analysis of Roberts's attitude toward the New Deal during the 1935 and 1936 terms of the Court, centering mainly on his opinions in *Railroad Retirement Board v. Alton Railroad Co.* [295 US 330 (1935)] and *United States v. Butler* [297 US 1 (1936)]. The third section focuses on the political environment during the 1936 elections and on the controversy surrounding the Court's *Tipaldo* decision. The fourth and final section is an analysis of Roberts's reversal in *Parrish.* A brief discussion outlining general conclusions to be drawn from this study follows at the end of the fourth section.

Part I: Owen Roberts, the Man and the Justice

Owen Josephus Roberts was born on May 2, 1875, in Germantown, Pennsylvania, a small town which has since become a respectable suburb of Philadelphia. His father, a prosperous, middle-class hardware merchant and wagon dealer, was involved in local Republican politics throughout Roberts's young life.[14] A *Fortune* magazine feature in 1936

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[13] Chambers, "The Big Switch," p. 71.

[14] Drew Pearson and Robert S. Allen, *Nine Old Men*, (Garden City, NJ: Doubleday, Doran, & Co., 1937), p. 142.

which described the careers of all the justices of the Court commented that Roberts had been "gently born into the conservative circles of America's most conservative city, Philadelphia."[15]

Roberts took advantage of his stabile middle-class surroundings and was able to excel at his schoolwork, enough so that he was admitted to the prestigious and nearby University of Pennsylvania. During his undergraduate career, Roberts was the "plugging type to be found in every college class."[16] His list of activities in his senior yearbook was longer than anyone else's save one, the class president's. After graduation, Roberts enrolled directly at the University of Pennsylvania Law School, where he took a great interest in constitutional law as it was taught by C. Stuart Patterson, general solicitor for the Pennsylvania Railroad.[17]

While in law school, Roberts concentrated on good scholarship and making valuable contacts. Upon his graduation, he became part of the "University Crowd," the elite social group which dominated the politics and economics of Philadelphia. Members of the "University Crowd" were doctors, lawyers, and businessmen who were willing to help out fellow Pennsylvania graduates.[18] Roberts was destined to have a fabulous and lucrative legal career with the "University Crowd" backing him. Fellow graduates helped him obtain corporate clients such as the Pennsylvania Railroad Co. and J.P. Morgan.[19] Roberts became a gifted attorney, and although he was "lawyer to several corporations...he never served any one long enough to earn the title 'corporation lawyer.'"[20]

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[15] "Mr. Justice Roberts," *Fortune* XIII (1936), 192.
[16] Pearson and Allen, *Nine Old Men*, Pp. 142-143.
[17] David Burner, "Owen J. Roberts," *The Justices of the Supreme Court 1789-1969: Their Lives and Major Opinions*, Leon Friedman and Fred L. Israel, eds., vol. 3, (New York: Chelsea House, 1969,) p. 2254.
[18] Pearson and Allen, *Nine Old Men*, Pp. 142-143.
[19] Rodell, *Nine Men,* p.222.
[20] Burner, "Owen J. Roberts," p. 2254.

One such member of the "University Crowd" who assisted Roberts was George Wharton Pepper. Pepper, a powerful Republican and distinguished Philadelphia attorney, had graduated from the law school eight years prior to Roberts. As a law instructor he had come into contact with Roberts while he was a student, and he assisted Roberts as any member of the "Crowd" would.[21] The most significant assistance occurred in 1924 when Pepper, by then an United States Senator, recommended Roberts for a position as a special government prosecutor in the politically sensitive "Teapot Dome" oil scandals. In his autobiography, Pepper recalled his recommendation of Roberts to President Coolidge: "Mr. President, the Administration needs the best available man for this job. I know one who combines character, ability, fearlessness and wide experience and against whom no disqualifying insinuations can be made."[22] Pepper brought Roberts personally to Washington, and President Coolidge was so impressed with Roberts that he immediately submitted his name to the Senate for confirmation.

Roberts's nomination aroused suspicion among Senate liberals. His corporate clients caused them to wonder if Roberts would pursue forthrightly his work as a government prosecutor. In particular, a speech which Roberts had given at a 1923 executive conference was read into the Congressional Record. In the speech, Roberts defended the high salaries which oil executives were receiving:

> Now, gentlemen, what will nationalization bring? "Oh," says the propagandist, "the man who gets $100,000 will be displaced and we will put a man in for $5,000 who will do his work." Will any of the $95,000 fall into your pockets by way of reduced price? Well, some of it may, on the surface of things, but let me tell you this: A loose-jointed, badly-run Government industry will result, and while you don't pay it in the price of gasoline you will pay it not

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[21] Pearson and Allen, *Nine Old Men*, p. 146.
[22] George Wharton Pepper, *Philadelphia Lawyer*, (Philadelphia: J.B. Lippencott Co.,1944), p. 197.

> only on the gasoline you buy in taxes but you will pay the other fellow's gasoline in the taxes that you yourself pay.
>
> What is the answer? Are we prepared to revise our ideas of government? Are we prepared to go into a frank state of socialism in this country, with all that it means in the suppression of ambition, in the deterrence of industry, in the holding back of men who want to arrange their affairs for their good and the economic good, then for the good of us all—are we to go into a state of socialism, or are you men and men like you, who form the public opinion of this country, prepared to get out, take off your coats, and root for old-fashioned, Anglo-Saxon individualism, where a man does not have to figure how, first of all, he can do a perfectly honorable business thing without first calculating what all the prohibitory statutes say?[23]

Despite this significant revelation, Pepper made an "earnest plea" on the Senate floor in support of Roberts, defending him by noting that he had won a $55,000 personal injury lawsuit against the Reading Railroad.[24] Roberts nomination was approved by the Senate without major opposition, and his stint as a government prosecutor was largely successful. Pepper noted in his autobiography that the public was greatly pleased with his work, a fact which contributed to his appeal as a Supreme Court nominee.[25]

Roberts's speech can surely be viewed as one typical of a corporate attorney, of one also accustomed to large salaries, and of one attempting to engage an audience full of businessmen.[26] It is usually considered as a foreshadow of Owen Roberts, the conservative Supreme Court Justice. Pearson and Allen referred to Roberts as the "biggest joke ever played upon the fighting liberals of the United States Senate," saying that if liberals in power had only bothered to check into his background they could have foreseen his conservative judicial philosophy.[27] Another historian, though, has made the thoughtful comment that

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[23] Congressional Record-Senate, 68th Cong., 1st Sess., vol. 65, pt. 3, 1924: p. 2563.
[24] Pepper, *Philadelphia Lawyer*, p. 198; Burner, "Owen J. Roberts," p. 2255.
[25] Pepper, *Philadelphia Lawyer*, p. 231.
[26] Roberts's income was approximately $150,000 a year. Pearson and Allen, *Nine Old Men*, p. 150.
[27] Ibid., p. 139.

Roberts's remarks, if they are read in context, are "no more illiberal that the position taken by Mr. Justice Brandeis whose opposition to bigness in government, including the early New Deal measures, as well as to business, is well known."[28]

Though the context of his speech may somewhat soften his arguments, one cannot ignore the passion and zeal with which Roberts delivered these words. Indeed, he prompted the audience to "take off your coats, and root for old-fashioned Anglo-Saxon individualism," as if the rising tide of social reform during the 1920s was a disastrous threat to American individualism. More importantly, he referred to his audience as "men like you, who form the public opinion of this country," revealing an elitism on the part of the future justice. The businessmen of corporate America, in Roberts's opinion, had a firm grip on the rest of the nation economically and *politically* as well, since they could "form" public opinion.

Owen Roberts was suggested to Hoover for a Supreme Court appointment in 1930 by Attorney General William D. Mitchell.[29] He was not Hoover's first choice. Judge John J. Parker, a North Carolina Republican, was nominated first for the seat left vacant by the unexpected death of Justice Edward T. Sanford of Tennessee. However, Judge Parker had made some public slurs against black political activists, and he had issued some anti-labor injunctions as a federal judge, two things which spelled death for his confirmation effort in the Senate. Liberals in the Senate had weathered an exhaustive and unsucessful fight to oppose the nomination of Chief Justice Hughes a year earlier, and they were determined to assert their strength by defeating Parker's nomination. On May 7, 1930, the Senate rejected Parker's

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[28] Leonard, *Search For a Judicial Philosophy*, p. 10.
[29] Ibid., p. 7.

nomination by a vote of 39 to 41.[30] Historians have since noted Parker's liberal judicial record in the years following his rejection. Rodell has stated that Judge Parker, as compared to Roberts, went on to have an "outstandingly" liberal judicial record for twenty-five years afterward.[31] Leonard has noted that Judge Parker wrote the lower court opinion in the famously liberal civil rights case *Barnett v. West Virginia* [47 F Sup 251 (1942)], a case the Supreme Court later upheld in which school rules requiring flag salutes were deemed unconstitutional.[32]

On May 9, two days after Parker's rejection, Hoover submitted Roberts's name to the Senate. Pepper stated in his autobiography that there was "widespread demand" for Roberts as a Supreme Court nominee. Curiously, he also stated that Roberts had "begged his friends not to press for consideration of his name," and that he was happy practicing law.[33] Roberts was, no doubt, happy with the comfortable lifestyle which his law practice afforded him. Pepper continued in language that reveals pride in his protègè: "Nevertheless, public sentiment was so strong and his qualifications so obvious...he felt bound to accept." Pepper then closed this topic by trying hard, too hard, to discredit the rumor that politics, or perhaps the "University Crowd," had brought Roberts the nomination: "This simple statement of fact ought to dispel the mistaken impression that Roberts's influential friends were instrumental in bringing about his appointment."[34] Liberals in the Senate found little or no qualms with Roberts, and the American Federation of Labor came out in support of him because he had

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[30]Carl Brent Swisher, *American Constitutional Development*, 2nd Ed., (Cambridge, MA: The Riverside Press, 1954), Pp. 776-779.
[31] *Nine Men*, p. 222.
[32] *Search For a Judicial Philosophy*, p. 6.
[33] Pepper, *Philadelphia Lawyer*, p. 231.
[34] Ibid., p. 231.

charged nominal fees to labor leaders in his private practice.[35] On June 2, his nomination was confirmed by the Senate with no dissenting votes.

While Roberts found himself in a new job, the country found itself in the grips of the Great Depression. The election of Franklin D. Roosevelt brought an unprecendented amount of social and economic reform. It was only a matter of time before these new laws would be subject to judicial scrutiny. It was not certain how Roberts would view the new progressive legislation emanating from federal and state legislatures. Though he was a former corporate attorney, he had been successful at prosecuting cases for the government. Would he join the "Four Horsemen," or would he vote liberally? *Fortune* magazine referred to him as an "important question mark."[36] Carl Brent Swisher has referred to the confusion following Roberts's appointment by saying that "like Chief Justice Hughes, he avoided all attempts at easy classification. He moved back and forth between groups with an agility bewildering to those who sought to predict his conduct."[37]

The first case which gave some indication of how Justice Roberts would react to the New Deal involved a state statute rather than a federal one. *Nebbia v. New York* [291 US 502 (1934)] involved a challenge to a New York law which had set a minimum price for the sale of milk. New York had created a board to investigate trade practices which had caused the price of milk to fall more drastically than other agricultural products, so much so that "the situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve."[38] The board recommended a minimum price for the sale of milk at nine cents per quart. Nebbia, a

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[35] Burner, "Owen J. Roberts," p. 2255.
[36] "Mr. Justice Roberts," *Fortune* XIII (May, 1936): 192.
[37] *American Constitutional Development*, p. 779.

Rochester grocer, had sold two quarts of milk and a five cent loaf of bread for a total of eighteen cents, and was convicted for violating the law. He challenged the state's authority to set minimum prices in a private industry, claiming that such regulation violated the equal protection and due process clauses of the Fourteenth Amendment.

One report has it that Roberts paced the floor of his home during the early morning hours, trying to decide which way he would vote in the case.[39] After weighing the issues, Roberts decided to join Hughes and the liberals in upholding the right of New York to set minimum prices for the sale of milk. In conference, he was assigned to write the opinion by the Chief Justice. The opinion which he wrote has been called the most liberal of his entire career.[40] After dispensing easily with the equal protection argument of Nebbia, he addressed the main issue of due process. Did a substantive view of the due process clause hinder states from interfering with the property of shopkeepers, distributors, and dairy farmers by regulating the prices at which they could sell their product? Roberts did not duck this question in the least; indeed, he answered it quite definitively:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.[41]

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[38] (291 US 502), p. 515.
[39] Merlo Pusey, *Charles Evans Hughes*, vol. 2 (New York: Columbia University Press, 1963), p. 700.
[40] Rodell, *Nine Men*, p. 230.
[41] (291 US 502), p. 523.

He further stated that the states, as sovereign governments, had an inherent power to promote the general welfare of citizens through laws. The only demands of due process are that those laws must not be "unreasonable, arbitrary, or capricious."[42]

Roberts's opinion was regarded as good news for the Roosevelt administration, which after the haste of the "Hundred Days" sessions had only begun to consider the constitutional issues involved. A *University of Pennsylvania Law Review* article referred to the case as a "milestone" and stated that it marked "distinctly a change from recent conceptions of due process."[43] Perhaps directly referring to the Court's 1923 decision in *Adkins v. Children's Hospital* [261 US 525], the article stated that the decision made it possible for a state to regulate wages for labor, since the definition of due process was significantly narrowed.[44] This case, however, could not be viewed as a definite sign that the Court was willing to accept the New Deal, for it dealt with a state statute and not a federal one. Justices who would approve of states enacting laws under an inherent "police power" could certainly be reluctant to extend that authority to a massive federal government. Nonetheless, law reviews were generally optimistic that this meant good news for the New Deal. "The Court having gone back to the early decisions under the Fourteenth Amendment, may well return for support to the early decisions under the 'commerce clause', many of which, beginning with *Gibbons v. Ogden* [22 US 1 (1824)], upheld the theory of a wider federal control."[45]

The law reviews of the time overlooked certain passages of Roberts's opinion which, given the benefits of hindsight, are telling. Though he concluded by saying that such laws

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[42] Ibid., p. 525
[43] Morris Duane, "Nebbia v. People: A Milestone," *University of Pennsylvania Law Review* LXXXII (1934): 619.
[44] Ibid., p. 622.
[45] Ibid., p. 623.

pass the due process test unless they are "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt,"[46] he had earlier qualified this statement by saying that the degree of reasonableness to be reached depended on the facts of each case. "It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."[47] This statement seems to mitigate the broad statements concerning state police power and due process which Roberts made throughout the rest of the opinion. Roberts was saying, in effect, that the Court shall always have the final word regarding due process when it convenes to consider the "relevant facts." In truth, the relevant facts are whichever ones the justices consider to be relevant.

In this case, Roberts considered the relevant facts to be that unfair trade practices and price-cutting tactics in the milk industry had caused milk prices to fall dramatically. Large milk distributors and their suppliers were put at a disadvantage because they, due to the nature of milk consumption, had to maintain a surplus milk supply of about twenty percent, while smaller firms did not. The profits realized from these large surpluses were often diminished because of spoilage. The state of New York was justified, therefore, in setting minimum milk prices because stability would allow the large distributors to operate comfortably with surpluses, thereby eliminating any temptation to sell contaminated milk and increase profits.[48] The widespread sale of contaminated milk, of course, would seriously threaten the public health, which New York had an interest in maintaining.

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[46] (291 US 502), p. 539.
[47] Ibid., p.525.
[48] Ibid., p. 517-518.

Though Roberts sustained the law and gave indications that he would vote liberally in New Deal cases, this may serve as evidence that the corporate mentality was still very much alive in him. His view of the "relevant facts" leads one to believe that Roberts validated the law more because of compassion for large milk distributors who felt threatened rather than a sincere belief in the sovereignty of states to exercise such an authority.

Part II: Justice Roberts and the federal New Deal

The optimism of the Roosevelt administration that a majority of the justices would uphold New Deal laws, albeit a slim majority, was soon shattered. The Court's rejection of New Deal laws is well-documented and will not be discussed in-depth here. However, it is important to mention that most scholars, recognizing the importance of judicial review, believe that the Court did a good job fulfilling its duty reviewing the New Deal laws. Merlo Pusey, Hughes's biographer, has commented that "no court could have accepted all the undigested and ill-founded legislation of that period without abdicating its constitutional function."[49] Moreover, not every decision which voided a New Deal statute involved a 5-4 majority. Of the twelve decisions that voided federal legislation, six of them were unanimous, while two were 8-1.[50] The Court's problems, then, resulted from decisions that seemed to be extreme efforts to strike down economic and social legislation in favor of the laissez-faire philosophy which had dominated the Court since the nineteenth century. Many thought that the Court's reasoning processes had become convoluted and were manipulated. "No Supreme

[49] *Charles Evans Hughes,* vol. 2, 747.
[50] Ibid., p. 747.

Court justice can define 'due process' other than to say that the words are used to strike down a law which he does not like."[51]

Roberts, with corporate interests still in mind, authored two opinions for the Court striking down federal New Deal laws which invited such criticism. *Railroad Retirement Board v. Alton* [295 US 330 (1935)] and *United States v. Butler* [297 US 1 (1936)] will be discussed in this section. Together, these cases demonstrate Roberts's increasingly elitist and corporatist economic views as well as his ability to reason judicially in favor of those views.

Railroad Retirement Board v. Alton (hereafter referred to as the *Rail Pension* case) involved a challenge to the New Deal program created to provide a pension system for the nation's railroad employees. The Railroad Retirement Act was intended to breathe more life into the suffering rail industry by allowing older employees to retire with pensions while younger men who were seeking employment could take their positions.[52] The law was heralded by rail workers and their powerful lobbies. The large railroad carriers were understandably opposed, since the pension system was to be funded by compulsory employer-employee contributions. Each rail carrier was required to contribute twice the amount which its employees contributed.[53] The decision was, no doubt, also viewed as a preliminary test of how the Supreme Court would rule on the impending Social Security Act.

Roberts, despite his conflict of interest stemming from prior work for railroad companies, heard the case and wrote an opinion which in every conceivable way validated the interests of the rail carriers while subjugating those of rail employees. He dutifully noted at

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[51] Maury Maverick, *A Maverick American*, (New York: Covici, Friede, 1937), p. 302.
[52] For a more in-depth discussion of the Railroad Retirement Act, see William Leuchtenburg, "Mr. Justice Roberts and the Railroaders," *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*, (New York: Oxford University Press, 1995), Pp. 26-51.
[53] (295 US 330), p. 334.

the outset that the "pertinent provision of the Constitution is Article I, Section 8, Clause 3, which confers power on the Congress 'To regulate Commerce...among the several States...'; and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment."[54] From this straightforward introduction setting forth the issues to be resolved, Roberts then exploded in a diatribe upon the specific provisions of the act. He criticized vehemently a retroactive clause which allowed persons who had been employed up to one year prior to the act's passage to collect pensions. "About 146,000 persons fall within this class, which, as found below, includes those who have been discharged for cause, who have been retired, who have resigned to take other gainful employment, who have been discharged because their positions were abolished, who were temporarily employed, or who left the service for other reasons."[55] Roberts flatly rejected the argument of the government that the clause was intended to give pension benefits to those employees on furlough and subject to call. He also found the government's contention that the act would promote efficiency and safety in the railroad industry by improving morale to be "without support in reason or common sense."[56]

His opinion in this case is especially important for two reasons. First, it shows, at best, a very sympathetic attitude towards the large railroads, and, at worst, a propensity for social darwinism. His entire opinion focused only the few rail employees who were likely to abuse the law, rather than the hundreds of thousands who had served faithfully and were perhaps entitled to such benefits. In short, it betrays an unsympathetic view toward the needs of the laboring classes. Roberts discussed the fact that an employee could "take a position with a

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[54] Ibid., p. 347.
[55] Ibid., p. 348.
[56] Ibid., p. 349.

carrier at twenty, remain until he is thirty, resign after gaining valuable skill and aptitude for his work, enter a more lucrative profession, and, though never thereafter in carrier employ, at 65 receive a pension calculated on his ten years of service."[57] Not minding the facts that the above employee had paid portions of his salary into the pension fund and that his pension was calculated only upon his ten years of contribution, Roberts viewed this hypothetical man as ungrateful, disloyal, and undeserving of the benefits bestowed upon him by the law. Furthermore, even if providing old age security to these men improved their morale, increased their efficiency, and engaged their loyalties, it would "substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature."[58] These laborers, in Roberts's view, had an obligation to be loyal to their employers regardless of whether or not they received pensions. They were not entitled to federally guaranteed old-age security because it would undermine the seemingly feudal relationship between them and their employers.

Secondly, Roberts stated in his memorandum to Justice Frankfurter, which will be discussed later, that when the Court heard the *Tipaldo* case one year later in 1936, he was prepared to overrule the *Adkins* decision outright.[59] In other words, he was prepared to rule that minimum wage laws were not in violation of substantive due process, and that the freedom of contract between employer and employee was not an inherent freedom guaranteed by the Constitution. However, in the *Rail Pension* case, Roberts gives no indication that he would ever rule as such. In fact, given the tone of his opinion and the hypothetical situations he devised, his vote in the *Tipaldo* case seems a predictable one. Besides referring to

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[57] Ibid., p. 351.
[58] Ibid., p. 351.
[59] See Appendix A.

thousands of rail employees as "unfaithful," he concluded that parts of the pension law altered the "contractual rights" of employers and employees.[60]

Justice Roberts soon authored another opinion which struck down a federal New Deal statute. *United States v. Butler* [297 US 53 (1936)] involved a challenge to the Agricultural Adjustment Act, and was "probably the most troublesome case the Court had to deal with" during the New Deal years.[61] The specifics of the act or the case itself are not central to this discussion. However, it is important to note generally that the main issue of the case was whether or not the A.A.A. program quotas were voluntary.[62] The quotas were production amounts assigned to various commodities by the Department of Agriculture. While farmers were not legally required to abide by the quotas, they could choose to do so, and in return they would receive a subsidy, funded by an agricultural processing tax. The three most liberal justices found the program quotas to be adequately voluntary. The other six, including Roberts and the Chief Justice, found that the nature of the agricultural sector made such program quotas almost binding. Merlo Pusey wrote that Hughes, who at first was unwilling, ruled with the majority only after persuading them to accept the Hamiltonian thesis that the Constitution gives Congress the power to tax and spend for the general welfare beyond the enumerated powers.[63]

For the purposes of this study, it is most important to note the condemnation which Roberts's opinion received throughout the legal community. Many scholars criticized the logic by which Roberts had reached his conclusions. Dr. Howard Lee McBain, constitutional law professor at Columbia, stated that "one can hardly escape the conclusion that the Court

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[60] (295 US 330), p. 349.
[61] Pusey, *Charles Evans Hughes*, vol. 2, p. 743.
[62] Ibid., p. 744.

was determined to kill this law no matter what sacrifice of logic and reasoning was necessary in the process of torturing the Constitution to that end."[64] A prominent Republican and former Senator remarked: "I agree with Mr. Roberts's conclusions, but I wish to God he'd written a better opinion."[65] Perhaps the most revealing criticism came in the form of a parody: In a celebrated mock opinion published by the *Harvard Law Review*, Henry M. Hart, Jr. used Roberts's reasoning in the Butler case to invalidate the Smoot-Hawley Tariff Act of 1930.[66] The power of the Congress to impose tariffs is, of course, unquestionably provided for by the Constitution.[67] This only serves to make the parody more relevant, for it shows that some were questioning the traditional process of constitutional interpretation. An important question, though, which was not asked very loudly by critics of the time concerned Roberts and a potential conflict of interest: The attorney who argued for Butler against the A.A.A. was none other than George Wharton Pepper of Philadelphia.

Part III: Justice Roberts and the Elections of 1936

The *Butler* decision was handed down at the beginning of 1936, an election year. While the Presidential and Congressional elections of 1936 are noted throughout history for the incredible Roosevelt-Democratic landslide which occurred, it must be realized that such events were not obvious to contemporary observers. This is true especially in the times before the sophisticated science of political polling, which was just being developed during the 1930s. The year that began with Roberts's extremely conservative *Butler* decision ended on a

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[63] Ibid., p. 743.
[64] As quoted in Pearson and Allen, *Nine Old Men*, p. 158-159.
[65] Ibid., p. 159.
[66] Henry M. Hart, Jr., "Processing Taxes and Protective Tariffs," *Harvard Law Review*, XLIX (1936): 610-618.
[67] Article I, Section 8

rather different note. In the middle of the year, Roberts and the rest of the Court experienced public criticism such as they never had before due to the *Tipaldo* decision.

In 1934, a group of wealthy businessmen, financiers, professionals, and lawyers came together to form the American Liberty League.[68] Generally, the Liberty League was committed to making the Constitution and the New Deal an issue in the upcoming election of 1936. However, it was not an organization that endeavored simply to protect the Constitution. George Wolfskill, an expert on the League, has remarked that "it is perhaps no exaggeration to say that not in the history of the country did one organization marshal so much prestige, wealth, and managerial skill to undo a President as the Liberty League did in the fight against Roosevelt and the New Deal."[69] *Newsweek* magazine commented that "The Tories have come out of ambush."[70] Stopping short of nominating candidates for public office, the League published a series of pamphlets and held speeches and press conferences in support of its cause. One such pamphlet was issued criticizing the Roosevelt administration for emphasizing dissenting opinions of the Court. They said that such strategies were "prejudicial attempts" to undermine the Court's rulings.[71]

Only one scholar of this controversy, Fred Rodell, has given any significant attention to the Liberty League's role within Roberts's thinking.[72] Rodell has concluded that Roberts was attentive to the Liberty League's public campaign, and that the Liberty League stimulated him to consider his political ambitions. Though he cites no specific evidence, Rodell has claimed that Roberts secretly desired to run for the Republican nomination for President in

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[68] For a complete look at the Liberty League, see George Wolfskill, *The Revolt of the Conservatives: A History of the American Liberty League, 1934-1940*, (Boston: Houghton Mifflin, 1962).
[69] Ibid., p. viii.
[70] As quoted in Ibid., p. 29.

1936. With the Liberty League's resources and its emphasis on "saving" the Constitution, Roberts perhaps thought that he, as a staunch defender of the Constitution in the Courts, would have an excellent shot at running for President.

Since Rodell has not cited specific evidence to support such a claim, it is worthwhile to examine the situation and take account of the primary evidence which could point to such a conclusion. First, as has been demonstrated earlier, Roberts was an ambitious man who took his career and professional life seriously. However, his professional ambitions must have been tempered somewhat by a desire for public service. In 1924, while Roberts was approaching the age of fifty, he decided to forsake his high salary and become a prosecutor for the government. By contrast, in 1930 he reportedly did not wish to be nominated to the Supreme Court, a fact which some may find difficult to imagine. A justiceship on the Supreme Court is considered the pinnacle of any legal career. Was Roberts perhaps interested in another pinnacle? It must be remembered that only one other person had attempted to run for the Presidency while on the Court: Chief Justice Charles Evans Hughes had lost to Woodrow Wilson in 1916, reportedly by only 4,000 votes in California.[73] Hughes's close contest with Wilson may have reminded Roberts that, although it was difficult to seek higher office while on the Court, it was not impossible.

There is evidence that Roberts was cognizant of his situation. In 1954, an amendment to the Constitution was proposed that would have prohibited justices of the Court from running for President or Vice-President until five years had passed from the time of their resignation. While the specifics of the amendment were being debated in Congress, a retired

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[71] "Assails New Deal Record: Liberty League Issues Pamphlet on Anniversary of NRA decision," *The New York Times*, 28 May 1936, p.2, col.2.
[72] Rodell, *Nine Men,* p. 240.

Justice Roberts testified before a Senate subcommittee on the Judiciary in support of the proposal. An excerpt from the testimony is as follows:

> I hope that I will be excused from naming names, but it is a matter of common knowledge that ambition to go from the Court to the Chief Executive of the Government has hurt the work of a number of men on the Court.
>
> Only once has that occurred. As you know, my great Chief Justice Hughes yielded to almost the clamor of his party. After declaring that he would not leave the Bench for any other office, that he was not a candidate for the Presidency of the United States, a convention of the Republican Party almost riotously and by clamor nominated him unanimously for the Presidency of the United States and he was confronted with the question as to whether he should repudiate the party which had honored him over his life or whether he should yield, and he yielded.
>
> I think that he ought not to have been subjected to that pressure.
>
> But the contrary has been true of a number of Justices, Chief and Associate, of the Supreme Court. They have had in the back of their minds a possibility that they might get the nomination for President. Now, that is not a healthy situation because, however strong a man's mentality and character, if he has this ambition in his mind it may tinge or color what he does, and that is exactly what the Founding Fathers wanted to remove from the minds of the Supreme Court, to make them perfectly free knowing that there was no more in life for them than the work of the Court.

Roberts continued his testimony with the following remarks, which seem to be an attempt to make sure that no one could accuse him of such ambition:

> I happen to have a personal knowledge of what that pressure is like, for twice ill-advised but enthusiastic friends of mine urged me to let my name go up as a candidate for President while I was on the Court. Of course, I turned a hard face on that thing. I never had the notion in my mind.
>
> Men ought not to have the notion in their minds and ought not to be subject to those pressures. Chief Justice Hughes ought not to have been practically sandbagged into becoming a candidate for President...
>
> Now, I do not need to refer to the Court-packing plan which was resorted to when I was a member of the Court. Apart from the tremendous strain and threat to the existing Court, of which I was fully conscious, it is obviously, if ever resorted to, a political device to influence the Court and to

[73] Ibid., p. 240.

> pack it so as to be in conformity with the views of the Executive, or the Congress, or both.[74]

The interesting element of his testimony is not only his insistent denial that he had ever considered running for President, but the order in which he arranged his ideas. After the denial, he said that Hughes should not have been "sandbagged" into running for President in 1916, but then he skipped almost directly to a discussion of Roosevelt's court-packing proposal over twenty years later. Following his train of thought, it can be logically concluded that Roberts associated the idea of justices of the Court running for the Presidency with the controversy in 1937. Why he would do so is unclear unless, perhaps, he was considering running for President during the time.

The primary evidence that Roberts was a viable candidate is sketchy but still significant. The *Fortune* magazine feature of Roberts in May, 1936, stated that when it seemed that the Constitution would be a major issue during the 1936 campaign, that "considerable talk" of Roberts as a viable candidate began to circulate. However, the article also stated that when Roberts was asked the question after the Rail Pension case was handed down, he replied, "I figure that would cost about 3,000,000 votes." The article also said that Roberts laughed at the question because he had "no thought of cultivating" supporters for a Presidential candidacy.[75] *The New York Times* reported on May 30 that Roberts was set to receive a "favorite son" vote by the Pennsylvania delegation at the Republican convention to be held in June.[76] Pennsylvania's electoral votes at the time were the second largest in the

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[74] "Hearing before a Subcommittee of the Committee on The Judiciary on Senate Joint Resolution 44," *United States Senate*, 83rd Congress, 2nd Session, 29 January 1954, p. 9.
[75] "Mr. Justice Roberts," *Fortune*, XIII (May, 1936): 194.
[76] "Roberts a 'Favorite Son,'" *New York Times*, 30 May 1936, p.3, col.1.

electoral college.[77] Drew Pearson and Robert S. Allen wrote in their contemporary book on the Court that Roberts was afflicted with "presidentitis" and that he had an excellent chance at achieving the high office due to his "youth, health, great ability, rare charm, and a convincing, powerful personality."[78] This evidence, though it is circumstantial and subject to criticism, does show that Roberts would have been a viable candidate for the Presidency in 1936 and, despite his insistent denial, that he may have considered the notion in the "back of" his mind.

Having established this situation, the question now is this: What occurred to prevent Roberts from running for President? If he had wanted to run in 1936 he would have begun preparations several months prior, so it is safe to conclude that he did not seriously intend to run. Pearson and Allen stated that Robert's domineering wife had made the decision for him not to run, telling other members of the family that "Owen's duty is to use his position to stabilize the country."[79] To her, stabilizing the country probably meant guarding it against the New Deal, and Roberts's vote in the Supreme Court had proven to be an effective safeguard, more powerful than any presidential veto. If Roberts were to use his vote wisely in this regard, he would naturally become more respected by Republican party leaders. Such loyalty would perhaps bring executive appointments, cabinet posts, and greater influence. Because there is no direct evidence that Roberts desired to attract the attention of Republican leaders, this assertion is speculative; however, with Roberts's ambitious past and early career in mind, one can easily infer that he had contemplated the power he wielded as a Supreme Court justice and the effect which his votes carried with the businessmen of the country.

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[77] Pearson and Allen, *Nine Old Men,* p. 161.
[78] Ibid., p. 140, 161.
[79] Ibid., P. 162.

If Roberts considered his votes carefully to that end, he made a critical misstep in the summer of 1936, one week before the Republican convention, and at a time when the Liberty League's constitutional cries were loudest. As stated previously, *New York v. Morehead ex rel. Tipaldo* [298 US 587 (1936)] involved a New York minimum wage law for women and minors. Roberts voted to strike down the law, perhaps because he was attempting to "stabilize the country." This vote was a misstep, though, because the Court's ruling in the *Tipaldo* case was subsequently criticized by Democrats and Republicans alike. One historian has concluded that "more than any other decision by the Court during the New Deal period, *Morehead* unleashed a barrage of criticism from conservatives as well as liberals."[80] *The New York Times*, by no means an enthusiastic supporter of the New Deal, called the decision "unfortunate in more than one respect."[81] In an editorial entitled "A Deplorable Decision," the Catholic publication *Commonweal* stated that "when five justices of the Supreme Court decided to outlaw the New York minimum wage law for women, they did something to public opinion which is comparable - we do not say equivalent - to a few activities by Louis XVI...There is nowhere in any Catholic or Christian system of morality any room whatever for a commendation of the minimum wage decision."[82] *The New Republic*, in an editorial entitled "Liberty to Starve," quoted at length from the minority opinion of Justice Stone and then stated that "the majority of the Court...are the dictators of our form of government."[83]

The Court had decided a minimum wage case thirteen years earlier. *Adkins v. Children's Hospital* [261 US 525 (1923)] involved a minimum wage law which Congress had enacted for women and minors within the District of Columbia. Justice Sutherland had

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[80] Irons, *New Deal Lawyers*, p. 278.
[81] 2 June 1936, p. 26, col. 1.
[82] 19 June 1936, p. 199.

authored the opinion which endorsed a substantive view of the due process clause of the Fifth Amendment: "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question...Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."[84] The law in this case provided for the establishment of a commission to determine wages adequate enough to "supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals."[85] Especially critical of what he considered to be an arbitrary exercise of government control, Sutherland stated that a statute which proscribed the payment of minimum wages without regard to the value of the services rendered for the wage was clearly unconstitutional.[86]

The state of New York and its counsel were aware of the Court's *Adkins* decision, and its 1936 law was carefully drafted in response to the criticisms put forth by the Court in 1923. While the *Adkins* law had merely dictated that a "living wage" be paid by employers, the New York law added a "fair wage" component that directly tied the minimum wage to the value of service provided by the wage earner.[87] The state of New York was cautious in its arguments before the Court, stating that the Court need not overrule the *Adkins* case in order to validate its law. The New York law was written so that it could be distinguished from the earlier

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[83] 10 June 1936, p. 117.
[84] (261 US 525), p. 545.
[85] Ibid., p. 540.
[86] Ibid., p. 559.
[87] Pusey, *Charles Evans Hughes*, p. 701; (298 US 587), p. 593.

Adkins law.[88] Indeed, it seems that the law was written specifically with the conservative Court in mind. The Court, however, dismissed such reasoning, and as one historian has written, "Justice Butler went on to reassert the 'liberty of contract' doctrine in its most arid and pristine laissez-faire form."[89]

Justice Roberts voted with Butler and the other three horsemen in this case, although it significantly contradicted his earlier opinion in the *Nebbia* case. There, Roberts had endorsed a broad state police power and had encouraged a narrower definition of due process clause. Here, he voted in favor of broad due process and limited state police power. Chief Justice Hughes dissented in an opinion which found that the New York law was distinguishable from *Adkins* and should therefore be upheld. In a separate, vigorous dissent joined by Brandeis and Cardozo, Justice Stone advocated overruling *Adkins* altogether. The most vicious criticism for the majority came through in these words:

> It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve.

Justice Stone concluded the words above by stating that the Court should "follow our decision in the *Nebbia* case" and grant discretion to legislatures in solving their social and economic concerns.[90]

Roberts must have voted with his future political career in mind. Though Mr. Tipaldo, the owner of a Brooklyn laundry house, was not a corporate mogul like the ones Roberts had

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[88] (298 US 587), p. 593.
[89] Irons, *New Deal Lawyers*, p. 277.

faithfully represented, big business would ultimately be pleased by the decision. Moreover, the wealthy patrons of the Liberty League would be rallied by the Court's refusal to see the Constitution as Roosevelt and other progressives did. The League could then bring that excitement to the Republican convention, and Roberts's name would be on their lips as the man who saved their cause.

Roberts apparently made a tactical error, for as demonstrated previously, criticism of the decision seemed to hail from all corners of the country. Moreover, the decision seemed to create a "no-man's land" in which neither federal government nor state governments could legislate. Merlo Pusey has eloquently commented that "the Court's revolt against innovation reached its climax in the *Tipaldo* case...Having blocked an orderly evolution of federal power in the name of states' rights, the majority suddenly turned and clamped the states themselves in the irons of standpattism."[91] Fred Rodell, the Yale law professor and historian who originally stated that Roberts had considered running for President, has written that unlike the federal New Deal laws, the New York law was not a "visionary product of professors and other brain-trusters who swarmed around that 'traitor to his class' in the White House." It was instead a "carefully drafted, badly needed law that had been backed by Republicans as well as Democrats in the nation's most heavily peopled state." He wrote further that after *Tipaldo*, the "fervor of a save-the-Constitution crusade to stop Roosevelt's re-election simmered down; the Liberty League lost some of its luster; the Republican nomination went, not to Roberts, but to unjudging and almost unknown Alf Landon of Kansas."[92] Of course, the nomination of Landon as the Republican candidate cannot be tied to the *Tipaldo* case decided merely a week

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[90] (298 US 587), p. 636.
[91] Pusey, *Charles Evans Hughes*, p. 746.
[92] Rodell, *Nine Men*, p. 242.

earlier. However, the Republican convention did respond to the case in its platform, stating that it would encourage state minimum wage laws and that "we believe that this can be done within the Constitution as it now stands."[93] By then, it seemed, even the Republican party was reluctant to be identified with a Supreme Court that ignored the social and economic necessities of life in the 1930s in favor of a dated, 19th Century economic philosophy.

The *Tipaldo* decision can therefore be considered as an extreme attempt by the majority of the Court to thwart liberal objectives, and Roberts joined the majority with the misguided hope of gaining further political viability. He most likely did not expect a Roosevelt landslide in November 1936. The *Literary Digest* remarked, as it published its presidential poll in the summer predicting Landon would defeat Roosevelt, that "not since Hughes battled Wilson in 1916 have the lines been so sharply drawn, the outcome so in doubt."[94] That widely-read prediction could not have been more false, for the results show only a resounding victory for Roosevelt: Roosevelt received 27.8 million popular votes while Landon garnered 16.7 million. In the electoral college, Roosevelt won 46 states with a total of 523 votes while Landon captured only Maine and Vermont with a total of eight. Coupled with a resounding Democratic Congressional victory as well, these results must have given Roberts reason to reconsider his vote.

Part IV: Justice Roberts and the "Switch"

Roberts would not have to wait long for an opportunity to correct himself. In October the Court convened to consider petitions filed during the summer. The state of New York had

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[93] Arthur M. Schlesinger, Jr., ed., *History of American Presidential Elections 1789-1968*, vol. 3, (New York: Chelsea House Publishers, 1971), p. 2859.

[94] As quoted in William E. Leuchtenburg, "Election of 1936," ibid., p. 2809.

petitioned the Court for a rehearing of the *Tipaldo* case. Though the Court denied the petition, it did grant a writ of certiorari in another minimum wage case. The West Coast Hotel Company had been sued by Elsie Parrish, a former chambermaid, for $216.19 in back pay, money which she claimed was due her because the hotel had not paid her the minimum wage according to Washington state law. The Washington Supreme Court had ruled in favor of Parrish, and, unlike New York, had definitely assailed the *Adkins* precedent.[95] It would be in this case, then, that Justice Roberts would perform his "switch." Representative Maury Maverick, in an excellent contemporary account from the Court's chambers on March 29, 1937, the day the *Parrish* decision was announced, called it the "Greatest Constitutional Somersault in History. For Owen Roberts, one single human being, had amended the Constitution of the United States by nodding his head instead of shaking it. The lives of millions were changed by this nod."[96]

Roberts's switch did not go unnoticed by the public. *The Nation*, in an article entitled "Is the Supreme Court Going Liberal?" expressed gladness that the Court had upheld the Washington law, but also stated that the "liberal margin of advantage is the margin of Justice Roberts's very changeable mind. That is not a sturdy enough peg on which to hang the garment of one's hopes." The magazine also stated what was to become a common belief: that Roberts had changed his vote in response to Roosevelt's court-packing plan which had been announced nearly two months earlier. "We find...that whatever we may say or think of judicial independence, the Supreme Court does actually in its functioning operate within the

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[95] *West Coast Hotel Co. v. Parrish* [300 US 379 (1937)], Pp. 389-390.
[96] Maverick, *Maverick American*, p. 332.

ambit of political considerations. Such a day of decisions would not have been possible before the court faced the threat of the President's reorganization proposal."[97]

It was in response to such criticism that Roberts composed his memorandum explaining his switch to Justice Frankfurter eight years later.[98] In the memorandum, Roberts contended that he was prepared to overrule the *Adkins* decision outright in *Tipaldo*, but since New York argued that its law was distinguishable from *Adkins*, he was unable to validate the law on such shaky judicial grounds. Peter Irons has called this reasoning "disingenuous" because, he says, no rule of judicial process has ever prevented the Court from deciding cases on constitutional grounds other than those presented by counsel.[99] Justices Stone, Brandeis, and Cardozo felt perfectly comfortable going beyond New York's arguments and found that *Adkins* should be overruled. Leuchtenburg has called Roberts's contention "unpersuasive."[100] Only one historian, Charles Leonard, has found that Roberts had valid legal reasons for voiding the *Tipaldo* law.[101] Most others, "wary of public men who seek in retrospect to set the record straight," have found his memorandum contrived and his explanation, on the whole, to be "unlikely."[102]

Besides the fact that he did not record his account in writing until several years after the fact, there are couple of reasons why Roberts's memorandum seems "unpersuasive" or "unlikely." First, Justice Roberts stated that he concurred with the majority based on the grounds 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

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[97] 3 April 1937, p. 368.
[98] For a complete copy of the memorandum, see Appendix A.
[99] *New Deal Lawyers*, p.279.
[100] *Supreme Court Reborn*, p. 177.
[101] *Search For a Judicial Philosophy*, p. 179.

Adkins case." Butler's opinion, though at the outset stating that New York has not challenged the *Adkins* law, relies heavily on the *Adkins* precedent. At this point, Roberts would have been well-advised to write a separate concurring opinion which concentrated specifically on the grounds that *Adkins* should be overruled. "My proper course would have been to concur specially on the narrow ground I had taken, I did not do so." Roberts realized what he should have done at the time, yet he gives no reason why he concurred silently with Butler's opinion. Was he afraid to appear as if he were prepared to uphold minimum wage laws? Was he afraid to rule contrary to the wishes of the wealthy, powerful Liberty League, an organization which could assist him as a political candidate? There seems to be no better explanation.

Another clue which is revealing is Roberts's recalling of the remarks of his brethren when he voted to review the *Parrish* case. Roberts voted to review *Parrish* because it definitely assailed the *Adkins* precedent. "Those who were in the majority in the *Morehead* [*Tipaldo*] case expressed some surprise at my vote, and I heard one of the brethren ask another, 'What is the matter with Roberts?'" David Burner has skillfully noted that "surely the Four Horsemen, unless their surprise was feigned, would have been wary of Roberts on this matter had he earlier in the year dropped the hints he remembered."[103]

The only purpose which the memorandum successfully accomplished was that Justice Roberts's switch was no longer tied to Roosevelt's court-packing proposal. Due to Justice Stone's illness, Roberts rightfully noted that the announcement of the *Parrish* decision had been delayed since December 19, 1936. Since Roosevelt's plan was not announced until February 5, 1937, it could not have been that his "switch" was in response to Roosevelt's plan. "These facts make it evident that no action taken by the President in the interim had any

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[102] Burner, "Owen J. Roberts," p. 2262.

causal relation to my action in the *Parrish* case." Most observers and critics, though willing to grant Roberts the benefit of the doubt on this issue, cannot accept the obscure legal technicality upon which he based his "switch." After the 1936 elections, the writing on the wall was most evident to everyone, Roberts included. The Supreme Court and its strict laissez-faire constitutionalism could not last.

Conclusion: Judges Are Human

Introducing an article entitled "Judges Are Human," *The Nation* began:

> History has a way of weeding out the essential from the familiar. When future historians try to sum up the results of the 1937 controversy over the Supreme Court, they will pass by the arguments and slogans that have been staled by repetition—the talk either of packing or of unpacking the court, the charges of dictatorship leveled against the President or the judges. And they will find the most lasting result in the mind of the ordinary citizen is his increasing awareness , as a result of the Great Debate of 1937, that judges are after all human.[104]

The greatest significance of the events examined in this study are, indeed, that judges are simply human after all. Justice Roberts, a man with many great attributes as well as faults, could not escape this fact. An ambition to be President probably led him to a personal, though also judicial, decision in the *Tipaldo* case which had universal ramifications politically and constitutionally. More than that, it sparked probably the greatest constitutional debate in this century.

It is somewhat unsettling to realize that our Constitution, so often thought of as a secure document that has an answer for every controversy, is subject to the whims and pleasures of the nine people who happen to occupy the Supreme Court bench. And in an era

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[103] Ibid., p. 2262.
[104] 24 April 1937, p. 451.

which has seemingly lost nearly all faith in the wisdom and goodness of elected officials, Supreme Court justices are somewhat immune to public criticism on the grounds that they are highly experienced and qualified. We do not question their decisions, though we may try to persuade them one way or another. But while judges will always rule differently according to philosophical disagreements, it is quite disturbing to think that they may rule according to their own personal ambitions.

Justice Roberts, acting more as an attorney rather than as a judge, could likely see both sides of these cases. Therefore, if voting a particular way could serve to advance his career, that probably became a factor in his decision-making process. It is not for the historian to pass judgment as to whether Roberts was right or wrong to do so; the historian's job is to illustrate the effect that such action carried. In this case, Justice Roberts behavior during this time greatly contributed to public concern about the Court, its power to void laws, and also to Roosevelt's indignation. The result, Roosevelt's court-packing plan, could have altered permanently the balance of power between the Court and the President. The President's plan, however, was ultimately unsuccessful, and Justice Roberts's "revolution" must have been a contributing factor to its failure.

Appendix A

Memorandum of Justice Roberts to Justice Felix Frankfurter
November 9, 1945

(This was reprinted in University of Pennsylvania Law Review 104 (1955): 314-315.

"A petition for certiorari was filed in *Morehead v. Tipaldo*, 298 U.S. 587, on March 16, 1936. When the petition came to be acted upon, the Chief Justice spoke in favor of a grant, but several others spoke against it on the ground that the case was ruled by *Adkins v. Children's Hospital* 261 U.S. 525. Justices Brandeis, Cardozo and Stone were in favor of a grant. They, with the Chief Justice, made up four votes for a grant.

"When my turn came to speak I said I saw no reason to grant the writ unless the Court were prepared to re-examine and overrule the *Adkins* case. To this remark there was no response around the table, and the case was marked granted.

"Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that it was unnecessary to overrule the *Adkins* case. The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. 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. The vote was five to four for affirmance, and the case was assigned to Justice Butler.

"I stated to him 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. The case was originally so written by Justice Butler, but after a dissent had been circulated he added matter to his opinion, seeking to sustain the *Adkins* case in principle. My proper course would have been to concur specially on the narrow ground I had taken. I did not do so. But at conference in the Court I said that I did not propose to review and re-examine the *Adkins* case until a case should come to the Court requiring that this should be done.

"August 17, 1936, an appeal was filed in *West Coast Hotels* [sic] *Company v. Parrish,* 300 U.S. 379. The Court as usual met to consider applications in the week of Monday, October 5, 1936, and concluded its work by Saturday, October 10. During the conferences the jurisdictional statement in the *Parrish* case was considered and the question arose whether the appeal should be dismissed* on the authority of *Adkins* and *Morehead.* Four of those who had voted in the majority in the *Morehead* case voted to dismiss the appeal in the *Parrish* case. I stated that I would vote for the notation of probable jurisdiction. I am not sure that I gave my reason, but it was that in the appeal in the *Parrish* case the authority of *Adkins* was definitely assailed and the Court was asked to reconsider and overrule it. Thus, for the first time, I was confronted with the neccessity of facing the soundness of the *Adkins* case. Those who were in the majority in the *Morehead* case expressed some surprise at my vote, and I heard one of the brethren ask another, 'What is the matter with Roberts?'

"Justice Stone was taken ill about October 14. The case was argued December 16 and 17, 1936, in the absence of Justice Stone, who at that time was lying in a comatose condition at his home, It came on for consideration at the conference on December 19. I voted for an affirmance. There

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* Evidently he meant should be reversed summarily, since the Washington Supreme Court had sustained the statute.

were three other such votes, those of the Chief Justice, Justice Brandeis, and Justice Cardozo. The other four voted for a reversal.

"If a decision had then been announced, the case would have been affirmed by a divided Court. It was thought that this would be an unfortunate outcome, as everyone on the Court knew Justice Stone's views. The case was, therefore, laid over for further consideration when Justice Stone should be able to participate. Justice Stone was convalescent during January and returned to the sessions of the Court on February 1, 1937. I believe that the *Parrish* case was taken up at the conference on February 6, 1937, and Justice Stone then voted for affirmance. This made it possible to assign the case for an opinion, which was done. The decision affirming the lower court was announced March 29, 1937.

"These facts make it evident that no action taken by the President in the interim had any causal relation to my action in the *Parrish* case."

Appendix B

The Justices of the Supreme Court, 1936

Charles Evans Hughes, Chief Justice
Nominated by: Taft/Hoover
State: New York
Party affiliation: Republican

Willis Van Devanter
Nominated by: Taft
State: Wyoming
Party affiliation: Republican

James McReynolds
Nominated by: Wilson
State: Tennessee
Party affiliation: Democrat

Louis Brandeis
Nominated by: Wilson
State: Massachusetts
Party affiliation: Independent

Pierce Butler
Nominated by: Harding
State: Minnesota
Party affiliation: Democrat

George Sutherland
Nominated by: Harding
State: Utah
Party affiliation: Republican

Harlan Fiske Stone
Nominated by: Coolidge
State: New York
Party affiliation: Republican

Owen Roberts
Nominated by: Hoover
State: Pennsylvania
Party affiliation: Republican

Benjamin Cardozo
Nominated by: Hoover
State: New York
Party affiliation: Democrat

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