OWEN J. ROBERTS AS A JUDGE

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Owen J. Roberts came to high judicial office at a period of transition, and he contributed qualities which eased that transition and made it more understandable to lawyers and to the public. This was not a conscious function on his part. He was not that sort of a man or a judge. But it was a consequence of his character, his personality, and his way of looking at law.

Owen Roberts was a Philadelphia lawyer, and an active one, but also an unusual one. He received his law degree at the University of Pennsylvania in 1898 and was immediately admitted to the bar. Very soon afterwards he got a substantial experience in public service, as the first assistant district attorney of Philadelphia county, a position he held for three years. Then he returned to private practice. But for the first twenty-one years after he left law school, from 1898 through 1919, he maintained an active association with the University of Pennsylvania Law School, first as an instructor, then as assistant professor, and finally with the rank of professor. This was always on a part time basis. His talents made him an unusually successful practicing lawyer. But a good piece of his heart was in the law school. He was always a student in his approach to the law. He must have been a remarkable law teacher. The qualities which made him interested in teaching and made the law school interested in him may be seen in his work on the bench.

During the nineteen-twenties, Roberts devoted himself exclusively to practice. Work came to him in large volume. At times he was overburdened by the sheer pressure of the cases he had to handle. He organized the work, with a staff of assistants. But he regretted the fact that he could not give more personal time and attention to close study of his cases. He saw in them problems which he did not have time to explore adequately. This gave him concern, for he was a very careful lawyer.

In 1924, he first came to national attention when he was appointed, with former Senator Atlee Pomerene, as special counsel to conduct the investigation and prosecution of the so-called "oil cases."

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This was a large and difficult task which was handled with skill, energy and effectiveness, but always as a lawyer's assignment. Roberts and Pomerene went ahead and did their job as lawyers. Some publicity was inevitable, but they did not court it. They built up the best cases they could and presented them to the courts, with great success. It was a long, hard, methodical task, and it was very well done.

All of this was very fine background when Roberts was appointed to the Supreme Court bench, at the age of 55, in 1930. It was not an appointment he had expected or had sought to prepare for. Yet he was in fact well prepared for the position he was to fill for the next fifteen years. The late William D. Mitchell, who was then Attorney General, must have been instrumental in the appointment. Attorney General Mitchell was himself a lawyer's lawyer, and there can be little doubt that he recommended Roberts because of the deep impression that Roberts had made on him as a lawyer.

Though Roberts was a student, he was not a scholar. He did not have an original or innovating mind. He was not a philosopher of the law. He did not spin new theories, on the one hand, nor dredge up bits of distant history, on the other, to bolster his judgments. His mind was analytical, and it was powerful. His character was powerful, too; and his intellectual honesty was never challenged. These are very fine qualities for a lawyer and a judge. His way of thinking led him to be methodical and precise. His opinions do not ring with phrases nor glint with striking metaphors, but they are clear and can be understood.

When Roberts came to the Court in 1930, Hughes had recently become Chief Justice. The other members of the Court at that time were Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler and Stone. Holmes had been appointed in 1902. Stone had been appointed in 1925. Although Hughes had just returned to the bench, his first appointment had been made in 1910. Thus Roberts was much the junior of the Court, not only in age but in judicial experience. He had the advantage of having practiced through the active decade of the twenties. It seems fair to say that he had a closer contact with current thought than some of his older brethren. Though his formal education had been in the nineteenth century, he had played an important part in an active life during the first three decades of the twentieth.

By 1930, a clear ideological division was apparent even to a casual observer of the Supreme Court. Four members of the Court—Justices Van Devanter, McReynolds, Sutherland and Butler—represented, with only slight variations of approach and shading among them, a

rather rigid and laissez faire point of view. No doubt they were often unconscious of this. They were only seeking to do, as we all do, what they thought was right. But their ideas of right had deep roots in the nineteenth century. They were to a considerable extent a reflection of American legal education and political attitudes during that period, attitudes that extended far into the twentieth century and have by no means disappeared entirely yet. Elements in these attitudes were a fairly mechanical view of law, and a considerable conviction, often unexpressed, that the best government was the least government, that men were men and should work out their problems with a minimum of governmental interference. These Justices—and their fellows, too —were the inheritors of a body of doctrine and case law which had found liberty of contract written into the Constitution. They were conscientious, systematic lawyers, with the lawyer's normal feeling for precedent and the continuity of the law.

There were two members of the Court, however, who had for some years been giving expression to a different point of view, though for rather different reasons. Justice Holmes was led to dissent on philosophical grounds, in many cases; he was often supported by Justice Brandeis, on what might be called practical grounds. Brandeis was not so much interested in the theory, but he did not think the older approach was working out very well in practice. Both of these men had had close contact with the innovating professors at the Harvard Law School in the last few decades of the nineteenth century, and especially with James Bradley Thayer. With Professor Thayer, their views of constitutional doctrine were less circumscribed. They found it easier to remember with John Marshall that "it is a *constitution* that we are expounding." This phrase does not by any means answer all of the questions, but it helps to free the channels of thought so that the questions appear more readily, and can be seen to be answered, rather than being foreclosed by more rigid modes of thought.

For fifteen years "Holmes and Brandeis dissenting" had made occasional appearance in the Supreme Court reports, frequently enough to have considerable impact, in the law schools, and also among thoughtful lawyers. To some they were annoying, to others, interesting and stimulating. But they were, for a long time, only two among nine. Occasionally, they could attract one or more of their associates, but only rarely could they obtain a majority for their views on a controversial constitutional problem. In some quarters they were regarded as dangerous, in others with kindly and somewhat amused tolerance. Yet their opinions, though dissents, were powerful leaders of thought,

and were building up strength greater than many contemporary lawyers realized.

The remaining members of the Court were Stone, and the new Chief Justice, Hughes. Stone had a background not unlike that of Roberts, with perhaps a larger admixture of the academic. He had been in practice in New York, had been dean of the Columbia Law School, and then had been called in a time of stress to be Attorney General. He had played an active part at Columbia and had there come into contact with much of the thinking of the time. One of his colleagues there was Professor Thomas Reed Powell. The influence of John Dewey was not inconsiderable throughout Columbia. Stone was in no sense a disciple of Holmes or of Brandeis, but his own thinking usually led him to the same conclusions as they in the cases which produced dissenting opinions. Thus it came to be, quite frequently, "Holmes, Brandeis and Stone dissenting." And three judges generally made more impact than two.

When Roberts took his seat on the Bench, for the October Term, 1930, Holmes, writing to Laski, foresaw "some clashes of opinion," and found himself "wondering what turn our new member will take. He makes a good impression, but as yet I have little notice of his characteristics." [1] As things then stood, there were four Justices who could fairly surely be counted on to take one view in certain types of cases, chiefly constitutional; and three Justices were likely to take another. This left Hughes and Roberts in a position to carry the result. Hughes had been a Wall Street lawyer, and a successful one. But he had also been an investigator of insurance frauds, Governor of New York, a candidate for the Presidency, and Secretary of State. This gave him a breadth of background and view which surely affected his judicial outlook, as had been evidenced to some extent during his earlier tenure on the Supreme Court. Thus Hughes, though very much with a mind of his own, and though his views were not clearly foreseeable, frequently turned up on the same side as Holmes, Brandeis and Stone. In 1932, Holmes retired; but Cardozo was appointed in his place and carried on the same tradition, though with his own lustre.

Thus it developed that almost from the beginning, Justice Roberts had something very close to a controlling vote on the Supreme Court in many types of cases. This did not become immediately apparent, but with hindsight we can say that it was very largely true from 1930 until after there were several changes in the membership of the Court beginning in 1937. This was a crucial period in American constitu-

1. 2 HOLMES-LASKI LETTERS 1291 (Howe ed. 1953).

tional history, and Justice Roberts played a more central part in it than could have been anticipated and more than he relished.

In considering his approach to the problems which came to him, the essential fact to keep in mind, I think, is that he dealt with them as a lawyer. He was not a philosopher and did not attempt to be. He was not a sociologist, and did not think that lawyers should be sociologists, at least while they occupied positions on the bench. He was no more interested, as the saying goes, in Mr. Herbert Spencer's *Social Statics* than he was in some other Justice's social ecstatics. He was not seeking goals. He was just trying to decide cases. He considered authorities and arguments; he considered the received traditions of the law and had great respect for them. He did not by any means think that his sole function was to find a precedent and apply it.[2] But, as an active lawyer at heart, he thought that precedents and continuity were important, and he did not depart from them in any bursts of emotional enthusiasm.

To him the judicial task was a workmanlike task. His approach was exemplified, I think, by his method of rendering opinions from the bench. The Supreme Court follows the practice of announcing its decisions orally and at some length. Many of the Justices read their opinions in full, and others read from them extensively while summarizing them in part. But Roberts always stated his conclusions from the bench, without reading his opinions and without notes. With flawless delivery, without hesitations, with great clarity of phrase and voice, and with brevity, he gave a clear summary of the issues and the reasoning of his opinion. Often his orally announced opinions were little works of art. I heard him deliver many of them. He never faltered; there was no difficulty in understanding every word. When he was finished, those in the court room knew exactly what had been decided and the reasoning of the opinion. These were remarkably skilled lawyer's performances.

II.

Statistics can of course give no real reflection of a judge's work, and nothing elaborate of that sort will be attempted here. Examination of the Reports from 282 U.S. through 326 U.S., covering the fifteen years of his tenure on the Court, shows that Roberts wrote opinions in 353 cases, an average of about 23 a year. He was always a hard worker, and always carried more than his share of the work of the Court. This was characteristic of him. He was strong and active

2. *Cf.* Lord Chancellor Jowitt in 25 AUST. L.J. 296 (1951).

and vigorous, a man you could rely on, not only to do his job, but to do it well. Of his total opinions, 282 were majority opinions, and 62 (or less than 20% of the total) were dissents. There were four concurring opinions and five separate opinions. These figures relate to opinions only. There were, of course, more dissenting votes, and far more cases in which he concurred with others in the majority. He must have been a great comfort to the Chief Justices under whom he served. He could be counted on to get out his work, have it done promptly, and ordinarily without "stirring up the animals." He could write vigorously when he wanted to do so, and he voiced some strong complaints. But he was rarely provocative, and never offensive. He was a lawyer doing a lawyer's job, and not a crusader.

The first case in which Roberts wrote an opinion was *Poe v. Seaborn,*[3] involving the federal income tax as applied to community property income in the State of Washington. In many ways, this opinion foreshadowed Roberts' work on the Court for the fifteen years to come. In the first place, the decision was rendered promptly. The case was argued (with several others) on October 21, 1930, and it was decided on November 24, 1930. The question was a complicated one, with a good deal of history behind it, and with much of "fairness" in the tax law turning on it. Roberts did not ignore these factors. But his decision was made on what might be called a lawyer's point. The question was whether the income of a husband under the community property system of Washington should be taxed to him (as it would be in New York or Pennsylvania) or whether it should be taxed half to him and half to his wife, on the ground that under the law of Washington the wife was the owner of half the income. Like most questions that come before the Supreme Court, this was one on which much could be said on both sides. Indeed, much had been said, and in *United States v. Robbins,*[4] involving a similar question, but under a rather different California legal system, the Court had decided that the income was taxable to the husband.

In handling *Poe v. Seaborn,* Roberts turned at once to the federal tax statute. This had no explicit provision on the subject. But Roberts looked to the basic provision of the revenue act which imposed the tax on the "net income of every individual." He said that the word "of" in this phrase connoted ownership. Under the law of Washington, the wife owned half of the community income. This was dispositive of the case. Roberts considered the other arguments made, but there was nothing in them that could overcome the effect of that

3. 282 U.S. 101 (1930).
4. 269 U.S. 315 (1926).

simple word "of." Thus, in a lawyer's way, he turned to the statute, not to the economics or the sociology, or to the arguments which might or might not be relevant and effective before Congress. It was simply a question of what Congress had said, and that was found in the language of the statute. A great complex of argument was cut through, and the case as it was finally laid bare was made very simple. Whether one agrees with the result or not—and it is hard not to do so at this distance in time, with the result finally straightened out by express, though rather elaborate, statutory provision— it is easy to have admiration for the clean cut lawyer's skill which struck with deadly accuracy at the two letter word in the then existing statute on which the decision was made to turn.[5]

Later in the same Term, another application of what I have called the lawyer's approach appeared in another tax case. In *Old Colony R.R. v. Commissioner*,[6] the railroad had issued bonds at a premium before 1913. In determining its income tax liability for 1921, the question arose as to the amount it could deduct for "interest" paid on these bonds. The Company deducted the coupon rate on the bonds. The Commissioner argued that this should be reduced by an allocation of the premium received, pointing out that a part of what the company paid as "interest" was in fact a return of capital to the bondholder. Thus the Commissioner was arguing for the "effective rate" of interest as distinguished from the "coupon rate." The Commissioner's argument was, shall we say, sound accounting, and it had been persuasive to the First Circuit Court of Appeals.

In the Supreme Court, however, Roberts, writing for a unanimous Court, held that the company was entitled to deduct the coupon rate. The touchstone, he said, was "the common understanding." "Interest" which the statute allowed to be deducted, "means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon. . . ." The words of the statute, he said, "do not refer to some esoteric concept derived from subtle and theoretic analysis."[7] Perhaps if Roberts had been an accountant, he would not have reached this conclusion. But he was not an account-

5. There is a rumor, which is now happily past the time of verification, about this decision. According to the rumor, it is the tradition of the Supreme Court that courtesy to a new Justice demands that there should be no dissents to his first opinion. (Observation of a few instances seems to verify the fact that this has been the practice, whatever may be the reason.) Chief Justice Hughes and Justice Stone took no part in *Poe v. Seaborn*. The rumor has it that there were some dissenting votes. It seems unlikely that there were more than two dissents, though there may of course have been three. At any rate, *Poe v. Seaborn* may in fact have been a much closer case than it has appeared to be from the published report.

6. 284 U.S. 552 (1932).

7. *Id.* at 561.

ant; he was a lawyer. He did not think that those who wrote the statute were using technical accounting terminology. As a lawyer, he felt that the proper construction of the statute was to be found in "common parlance." [8] On that basis he did not find difficulty in reaching his result. With the perspective of a quarter of a century, it is hard to differ with this conclusion. Congress did not use refined language. It is hard to see why its simple words should be held to have achieved a refined result. It is a lawyer's construction of the statute, stated simply, clearly and effectively.

These two cases may perhaps be regarded as more or less traditional, and as illustrating the conservative bent of Roberts' mind. I do not read them that way myself. They are mentioned here not because they are of any particular importance as decisions but because they seem to me to show one of the important qualities of Roberts' mind—that he approached the ordinary problem as a lawyer, not as a social scientist or a philosopher, and reached the direct, clear cut, "sound" result.

But Roberts was not just a tradesman in the art. The independence and grasp and freedom of his mind were indicated in some of his early opinions, of which *Nebbia v. New York* [9] is perhaps the outstanding example.

The *Nebbia* case involved the validity of the Milk Control Law enacted in New York in 1933. It established a Milk Control Board, and authorized it to fix minimum and maximum retail prices for milk. In *Tyson & Bros. v. Banton,* [10] the Supreme Court had, a few years earlier, struck down an effort by New York to regulate the resale price of theater tickets. A merely mechanical mind might have said that that decision was controlling, since it established that "price fixing," except in the case of so-called "public utilities," was invalid. But Roberts did not have a mechanical mind. He wrote an opinion sustaining the validity of the New York statute, against the dissenting votes of Justices Van Devanter, McReynolds, Sutherland and Butler, with Justice McReynolds writing one of his better and more powerful opinions.

But Roberts' opinion was powerful, too. It was thorough and painstaking, indeed almost exhaustive. He did not simply force his way through to a self-willed result. He considered the milk business and its problems in some detail. He analyzed the requirements of due

8. *Id.* at 560.

9. 291 U.S. 502 (1934).

10. 273 U.S. 418 (1927).

process in the area. He showed a very considerable flexibility of mind. In his view,

> ". . . the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. 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." [11]

The result in the *Nebbia* case was hailed in some quarters as showing that Roberts would side with the so-called "liberal" group on the Court, and that Van Devanter, McReynolds, Sutherland and Butler were now merely voices crying from the past. Reliance was also placed on the fact that his vote had been one of the five which had sustained the Minnesota Mortgage Moratorium Law, in *Home Building and Loan Ass'n v. Blaisdell,*[12] where the opinion was written by Chief Justice Hughes. Roberts, however, did not move in blocs; he did not court the liberal label. He continued to do a thorough, methodical job that appealed to him as "sound," with substantial indifference to the results of the particular cases before him. Many of his votes at this time now seem to have been unduly "conservative," for example, his joining with Justice Sutherland in the majority in *New State Ice Co. v. Liebmann,*[13] and in *Heiner v. Donnan,*[14] with Justices Brandeis and Stone alone dissenting in each case, and Justice Cardozo not participating.

This is perhaps an appropriate place to take up the matter which was probably most controversial during Roberts' long service on the bench. This is the episode involving the so-called "switch" of Roberts' vote on the validity of minimum wage legislation. The story is written quite clearly in the public record, but there has been much misunderstanding about it, and it is widely said that Roberts, frightened by the President's Court-packing plan, flopped over from a vote against minimum wage legislation in 1936 to one in favor of such statutes in 1937. No one could say this with any understanding of Roberts. It is therefore worth the risk of seeming to labor the point to undertake to restate the situation.*

11. 291 U.S. at 525.
12. 290 U.S. 398 (1934).
13. 285 U.S. 262 (1932).
14. 285 U.S. 312 (1932).

*Dean Griswold did not have available to him the memorandum by Justice Roberts which Justice Frankfurter has incorporated in his Introduction. The accuracy of Dean Griswold's conclusions demonstrates that the true facts were discernible from sources available to anyone who cared to look.—Ed.

In April, 1936, the case of *Morehead v. New York ex rel. Tipaldo* [15] was argued before the Supreme Court. The question raised was the validity of a New York act, passed in 1933, authorizing a board to fix minimum wages for women. It was, of course, well known that in *Adkins v. Children's Hospital,*[16] the Court in 1923 had held invalid a minimum wage law applicable in the District of Columbia on what might fairly be called sweeping due process grounds. The persons who sponsored and drafted the New York law were well aware of this fact. They placed some hope in a change of judicial climate. But they also drafted their statute somewhat differently from that involved in the *Adkins* case and provided that the board in fixing a minimum wage for women in New York should take into account *both* the "minimum cost of living necessary for health" and "the fair and reasonable value of the services rendered." Wisely or not, counsel for the State of New York followed an ancient principle that it is often better, or easier, to attack an established but perhaps doubtful doctrine by distinguishing it rather than by a frontal assault. No contention was made by the Attorney General and the Solicitor General of New York that *Adkins v. Children's Hospital* should be overruled. On the contrary the whole burden of their argument was that the *Adkins* case should be distinguished and held inapplicable to the New York statute. Point II of their brief, occupying seventeen pages, is headed: "Adkins v. Children's Hospital, 261 U.S. 525, distinguished." [17]

Roberts' approach to the case was unduly simple. Counsel argued that the *Adkins* case was distinguishable. He did not think it was. They did not ask the Court to overrule the *Adkins* case. That was obviously a difficult and ticklish question. Taking a good lawyer's approach, he did not think that question should be faced until it was raised. If counsel for the parties did not want the *Adkins* case overruled, it was none of his business as a judge to go ahead and do it. So he joined in an opinion written by Justice Butler holding the New York statute invalid.

The opinion states specifically that "the petition for the writ sought review upon the ground that this case is distinguishable from [the *Adkins* case]. No application has been made for reconsideration of the constitutional question there decided." There seems reason to believe that this language was put in at Roberts' behest. If the opinion had stopped with that, there would be little room for question.

15. 298 U.S. 587 (1936), decided June 1, 1936.

16. 261 U.S. 525 (1923).

17. See Brief for Appellant, pp. 32-49, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

But Justice Butler went on and wrote a rather sweeping opinion against the validity of minimum wage legislation, reaffirming the principles behind the *Adkins* case if not the case itself. Roberts did not choose to file a separate opinion concurring on his own special ground. It is hard to be too critical of that as a general proposition. The bar is inclined to feel that there are too many separate expressions of views by the Justices of the Supreme Court. Chief Justice Hughes wrote a strong dissenting opinion, as did Justice Stone, and Justice Brandeis and Cardozo concurred with them. Thus Roberts' was the deciding vote. He put it, in his own mind, on a narrow lawyer-like ground, and this was expressed in the opinion. It is clear that it would have been better if it had been separately expressed, and if, in the particular circumstances, he had limited his concurrence to his narrow procedural ground. Perhaps he was too indifferent to the consequences of his decisions. He should have foreseen the widespread public interest in the decision, and the misunderstanding which would result from his unqualified concurrence in the Butler opinion.

President Roosevelt's ire had already been raised by the Supreme Court. After the decision invalidating the National Industrial Recovery Act,[18] the President had said that this took the country back to "horse-and-buggy-days." After the New York Minimum Wage Law was held invalid, he said that the Court seemed determined to create a "no man's land of government." [19] It seems rather clear that the minimum wage decision was a "final irritant." [20]

By one of those strokes of fate that seem to be encountered rather often in Supreme Court history, another case soon came to the Court involving the validity of a minimum wage law. This was *West Coast Hotel Co. v. Parrish*,[21] from the State of Washington. The state supreme court had sustained the validity of the statute on April 2, 1936, before the *Tipaldo* case had been decided. The case was docketed in the Supreme Court on August 17, 1936, less than three months after the *Tipaldo* decision. It was reached for argument on December 16, 1936. Since the statute had been sustained by the state court, it could not be held invalid without considering its constitutionality. Thus the question which Roberts had felt he could avoid in the *Tipaldo* case (while associating himself too closely with others who did not really care to make that avoidance effective) was squarely raised in the *West Coast Hotel* case. Roberts was not one to duck a

18. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
19. See ALSOP & CATLEDGE, THE 168 DAYS 17 (1938).
20. *Id.* at 18.
21. 300 U.S. 379 (1937).

question which was clearly before him. He joined this time in Chief Justice Hughes' opinion sustaining the Washington law. It was a five to four decision, with Justices Van Devanter, McReynolds and Butler concurring in a dissenting opinion by Justice Sutherland. The decision was rendered on March 29, 1937. Thus a minimum wage statute was invalid on June 1, 1936, and valid on March 29, 1937, with President Roosevelt's court-packing plan being announced on February 5, 1937. It looked bad, and Roberts had not taken sufficient pains to keep it from looking bad.

However, it is wholly clear that Roberts did not "switch" his vote either in awe or fear or respect for the President, or otherwise. In the first place, his vote in the *Tipaldo* case was on a narrow ground of practice—rightly or wrongly—and was, in effect, so stated in Justice Butler's opinion. Roberts was there avoiding a hard job until it became in his eyes his duty to undertake it. In the second place, his vote in the *West Coast Hotel* case was made and recorded well before the announcement of the Court-packing plan. As has been pointed out, the *West Coast* case was argued on December 16 and 17, 1936. When the case was argued, Justice Stone was absent, recovering from an extended illness. Thus there were eight Justices who heard the case. In accordance with the Court's custom, the case was taken up at conference on the following Saturday, December 19, 1936. We now know that the vote then was four to four, with Roberts voting to sustain the statute.[22] As the decision of the state court had been in favor of the statute, the Supreme Court's equally divided vote would sustain its validity. It can readily be seen, however, that such a result should not be left to an equal division if that could be avoided. Accordingly, the matter was left in abeyance until Stone returned to the Court about February 1st. Then opinions were written by both sides, and on March 29, 1937, the *West Coast Hotel* decision was announced, with a five to four division in the Court. It is clear, though, that Roberts' vote was given and the decision was a *fait accompli* many weeks before the announcement of the Court-packing plan.

Roberts did not switch his vote to save the Court. He voted in favor of the validity of a minimum wage statute in the *West Coast Hotel* case because that was his judicial view when, in his opinion, that question first came before him. The only criticism that can be made, I think, is that he did not sufficiently make his position known in the *Tipaldo* case, though the ground on which he acted is written all over that opinion for those who choose to look for it. It is undoubtedly

22. These facts are stated in a memorandum by Chief Justice Hughes referred to in 2 PUSEY, CHARLES EVANS HUGHES 757 (1951).

true, though, that this procedural ground was somewhat subtle, and he did not take the steps to identify it with himself. This may have been an error in opinion writing. It was not a switch of vote under political pressure.[23]

There is another situation where Roberts' successive votes are not so easy to explain. It arose with respect to a somewhat technical tax problem, and will not be discussed in detail. In *Duke v. Commissioner*,[24] the Court had before it a conditional gift under the estate tax—to my daughter Doris in fee, but if she dies before I do, then back to me. Doris survived her father, and the question was whether anything should be included in his estate as a transfer intended to take effect at or after his death. When the case came on for argument, counsel for the Government could know quite definitely in advance that four Justices would be against them—Justices Van Devanter, McReynolds, Sutherland and Butler. Thus, to win, the Government had to obtain the votes of all the remaining five Justices. As soon as the argument began, Chief Justice Hughes arose and left the bench. It was learned later that he regarded himself as disqualified because of a prior professional relation with Mr. Duke. The argument went on before eight Justices, but the expected result occurred. On the following Monday, the Court announced its order: "Per Curiam: Decree affirmed by an equally divided Court. Mr. Chief Justice Hughes took no part in the consideration or decision of this case." To explain this result, it seems virtually inevitable that Justice Roberts voted with Justices Brandeis, Stone and Cardozo, in favor of the Government's position.

Yet, when a different case presented the question again in the following year,[25] Roberts voted against a tax when such a conditional gift was involved, with the Chief Justice, and Justices Brandeis, Stone and Cardozo dissenting. It is not easy to see any real basis of distinction between the *Duke* and the *St. Louis Union Trust* cases, and it is hard to interpret the situation except as a change of mind. When, a few years later, the *St. Louis Union Trust* case was overruled in *Helvering v. Hallock*,[26] Roberts wrote a dissenting opinion, in which Justice McReynolds concurred. This is all quite understandable, except the apparent vote in the *Duke* case. That has always been a mystery to me.

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23. It is stated that Roberts decided to resign if the Court-packing bill were passed. 2 *id.* at 753.

24. 290 U.S. 591 (1934).

25. Helvering v. St. Louis Trust Co., 296 U.S. 39 (1935).

26. 309 U.S. 106 (1940).

In some ways, Roberts' most spectacular case was *United States v. Butler*,[27] where he wrote the opinion holding the taxes under the Agricultural Adjustment Act unconstitutional. It seems fairly clear at this date that Roberts took too much of an "old view" approach in this case, that he was too firmly tied to the past. It should not have been too hard to sustain that statute, even in 1936, as did Justice Stone in his dissenting opinion, with the concurrence of Justices Brandeis and Cardozo. Yet the draftsmen of the statute had done everything possible to invite disaster. They had tied the taxing provisions directly to the control of agricultural production. The very money raised by the tax was to be paid to farmers to compensate them for reducing production. Moreover, "the government," as Roberts later said, "disavowed any support for the statute under the commerce power." [28]

In this setting, Roberts' lawyer-like approach, I think, led him to give too little weight to other factors, now generally accepted, which would have led to the conclusion that there was federal power to act in this field no matter how ineptly the statute was worded or supported. Though I have no knowledge of the fact, I am inclined to think that he later came to have some doubts about the correctness of the *Butler* decision. It should be recalled that he wrote the opinion sustaining the revised Agricultural Adjustment Act in *Mulford v. Smith*,[29] where he was aided by the fact that reliance had been placed, in drafting the statute, directly on the commerce power.[30]

When talk is made about Roberts' switching his vote after the Court-packing plan, the reference sometimes includes cases after the *West Coast Hotel* case, such as *NLRB v. Jones & Laughlin Steel Co.*,[31] sustaining the National Labor Relations Act, and *Stewart Machine Co. v. Davis*,[32] sustaining the Social Security Act.[33] Roberts' votes in these cases seem to me to be fully explicable simply as a natural development of his views. He was a thoughtful middle-of-the-roader. His reactions were naturally conservative, but he had an open and alert and receptive mind. It took a while for newer ideas to establish themselves in his thinking. He did not give up past ways of thought easily; but he did not reject new thought. It may well be that the key to Roberts' votes in the controversial cases in 1937, and later, can be

27. 297 U.S. 1 (1936).

28. ROBERTS, THE COURT AND THE CONSTITUTION 47 (1951).

29. 307 U.S. 38 (1939).

30. See ROBERTS, *op. cit. supra* note 28, at 54, where this explanation is briefly made.

31. 301 U.S. 1 (1937).

32. 301 U.S. 548 (1937).

33. For a general discussion, see CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 39-79 (1941).

found in the *Butler* case. He there did as conscientious and careful a job as he could. On the statute then before him, there was much to be said for the result he reached. But it was a hard job, and I doubt that it was satisfying to him. When similar questions arose later, he was more receptive to arguments which resulted in an extension of federal power. It may well be that the *Butler* case was simply a step in the process by which Roberts educated himself to his later views on these problems. Professor Corwin has referred to Roberts' "eagerness for the light." [34] He was constantly searching for what appeared to him to be sound answers. That he found the light only after experiencing the effort of searching for it over a considerable period of time would not mark him off from many able members of the bench.

After changes came in the membership of the Court, Roberts passed from a place of central influence, and his work became less significant. He wrote an important opinion in the field of religious liberty in *Cantwell v. Connecticut*.[35] He wrote a fine lawyer's opinion in *Sibbach v. Wilson & Co.*,[36] sustaining the validity of the Federal Rules of Civil Procedure, and in particular a rule requiring parties to submit to physical examination—against vigorous dissent. He wrote the (I think) unduly broad opinion in *Betts v. Brady*,[37] holding that a state has little or no obligation to provide counsel for defendants in criminal cases. This is a difficult situation, particularly as to past cases; but it is not hard to argue that competent counsel in a criminal case should be an essential of due process. Perhaps Roberts' answer would be that the states should themselves recognize their obligations in this area. But the Court, though it can act only in isolated cases, can have a great influence on this problem by acting as those cases arise.

Roberts frequently wrote in "hard" cases. Where there was a voluminous record and many issues, Roberts could be counted on to dig in and get the job done. An instance is his opinion in *United States v. Northern Pacific Ry.*,[38] where he handled twenty difficult issues in an opinion occupying fifty-two pages. His final opinion was a dissent of twenty pages in *Associated Press v. United States*.[39] He found himself frequently in dissent in his later years,[40] and did not,

34. *Id.* at 76.
35. 310 U.S. 296 (1940).
36. 312 U.S. 1 (1941).
37. 316 U.S. 455 (1942).
38. 311 U.S. 317 (1940).
39. 326 U.S. 1, 29 (1945).
40. Near the end of his service, some of his dissenting opinions were rather bitter. See, *e.g.*, Mahnich v. Southern Steamship Co., 321 U.S. 96, 105 (1944); Yakus v. United States, 321 U.S. 414, 448 (1944); Smith v. Allwright, 321 U.S.

I think, find the work of the Court, and his associations, as congenial as he had during the first half of his period of service.

Many other cases could be discussed. For instance, it would be interesting to have him available for cross-examination with respect to his decision in the *Koshland* case,[41] where it was held that certain stock dividends were taxable. These were dividends where the stockholder, in his words, got something "different" from what he had before, or a different "proportionate interest." [42] Just why these facts should make the dividend taxable, and in particular, why a slightly "different" interest should bring tax on the entire stock dividend and not just on the value of the "difference" was never made clear. Although Roberts had not been a tax lawyer, he gave the impression that he rather liked tax cases, and he contributed many leading decisions to the tax law.

III.

Roberts' important function on the Court was to smooth the process of transition. The two groups on the Court when he came to it were in sharp disagreement. To a considerable extent they represented two different modes of thought. It was very nearly inevitable that the minority group would come in time to be a majority. If this had happened all at once, the shock might have been considerable. Moreover, it might have been much harder for the public to understand the process, and partisans of one group or the other might have been sharply opposed to each other. As it was, however, Roberts (and Hughes) came to the Court in 1930. A process of transition which had begun long before gained momentum, and then culminated over the next decade.

The struggles he went through were shared by many others to whom they were intellectual, not fighting, problems. He helped to show to those who cared to look that we did not go through a "constitutional revolution" in 1937 but through a gradual constitutional development extending over many years. Politics played its part through appointments made by four Presidents other than Franklin

649, 666 (1944). He was particularly concerned with lack of consistency in the Court's opinions. In his *Allwright* dissent, he wrote: "This tendency [to disregard and overrule past considered decisions] it seems to me, indicates an intolerance for what those who have composed this Court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us, which was denied to our predecessors." 321 U.S. at 666. For better or for worse, dissenting opinions which are in a sense behind the times do not have the ring of those which presage new developments in thought and doctrine.

41. Koshland v. Helvering, 298 U.S. 441 (1936).

42. *Id.* at 445-46.

Roosevelt.[43] But the development was in essence the result of the persistent force of novel ideas and arguments as they slowly won acceptance from thoughtful people. Ideas are powerful, but they ordinarily grow slowly. There are many premises from which conclusions may be drawn. The conclusions depend on the premises, but it is the nature of premises that they cannot be proven, and their choice may depend on subtle factors often only imperfectly understood by the judge. We should not forget that even now we do not know what is "right" in the areas which were controversial in the nineteen-thirities. Roberts helped to show to those who care to observe that what occurred in those years was a part of the process of development of thought and not an example of power politics.

When Roberts came to the Court he respected all his brethren. He got along well with the conservative group, and many of their views were naturally congenial to him. But he also understood the so-called liberals. Their flame did not burn brightly within him. He was too traditional for that. But he understood them, and respected them, and their ideas, too. He voted his own mind, and sometimes it fell one way, and sometimes the other. Thus in a number of cases, such as *Nebbia,* and *Blaisdell,* and *West Coast Hotel* he adopted the "liberal" view. In others he did not. His moves were not made with enthusiasm, but with cold judgment, and his judgment would take him only so far. Yet his judgment was not static. It moved, but slowly. His views were different after he had been ten years on the bench, but not much different. He had an open, honest mind; but it moved deliberately and cautiously. There was room for such a mind in the nineteen-thirties. Roberts was a man in whom you could have confidence, whether you agreed with him or not. It was, for example, natural that the President should turn to him to conduct the first Pearl Harbor investigation after that national calamity in 1941.

When the nineteen-forties came, Roberts found his work on the Court less congenial and less meaningful. He did not have the feeling for some of the new members of the Court that he had had for his associates during his earlier years on the bench. He felt, I think, that some of them were moved by ends to be realized and not by what he regarded as the law. They seemed to him to write reasons to support conclusions rather than finding conclusions, as he felt he did, out of their reasons. The Court was never the same for him after Chief Justice Hughes retired. When he resigned himself in 1945, he wrote to Hughes:

43. Holmes was appointed by Theodore Roosevelt, Brandeis by Wilson, Stone by Coolidge, and Hughes, Roberts and Cardozo by Hoover.

> "To work under you was the greatest experience and the greatest satisfaction of my life. When you left the Court, the whole picture changed. For me it would never be the same." [44]

Roberts' resignation was sent to the President a few weeks after his seventieth birthday. He did not retire—he resigned. This was typical of him. He thought that his connection with the Court should be severed, not attenuated. He wanted to be free to engage in public causes. And, being an active man, he made himself available for engagements in practice. But he set himself a typically strict set of rules for his professional work. He would not appear in any court, and he would not allow his name to appear on any brief in the Supreme Court. He advised on some cases which went to the Supreme Court, in a number of instances without fee.

Then in 1948, he returned to his old love, the law school of the University of Pennsylvania, where he had taught for many years in the early days of his practice. He served for three years as dean of the school, again performing a transitional function. He found the administrative duties burdensome. But he enjoyed the association with his colleagues and with the students of the school. During this period he was president of the Pennsylvania Bar Association. In 1951, he delivered the Holmes Lectures at the Harvard Law School, which were published in a book entitled *The Court and the Constitution.*

In 1932, Owen J. Roberts presented Benjamin Nathan Cardozo for an honorary degree at the University of Pennsylvania. He referred to Cardozo as a man who was "instinct with the traditions and aspirations of the American people," who sought to administer "justice among men without taint or stain of any motive, private or selfish; the purity of your character and the great talents you have devoted to the service of your fellows, evoke the admiration and gratitude of all men." [45] One may believe that these words spoken by Roberts were a reflection of his own ideal of the perfect judge. They could fittingly have been applied to his own judicial work.

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44. 2 PUSEY, CHARLES EVANS HUGHES 802 (1951).

45. HELLMAN, BENJAMIN N. CARDOZO, AMERICAN JUDGE 82 (1940).