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The Switch In Time That Saved Nine: A Study of Justice Owen Roberts's Vote in West Coast Hotel Co. v. Parrish

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The Switch In Time That Saved Nine: A Study of Justice Owen Roberts's Vote in *West Coast Hotel Co. v. Parrish*

Abstract

During President Roosevelt's first term in office (1932-1936) the Supreme Court ruled several landmark New Deal measures unconstitutional; a handful of these decisions were by 5-4 margins. It all changed in 1937, when swing Justice Owen Roberts voted to affirm a minimum wage statute in *West Coast Hotel Co. v. Parrish*; a year earlier he had voted against minimum wage legislation in a similar case.

This "switch in time that saved nine" has no established consensus that explains its occurrence. Some have posited that President Roosevelt's "court packing" legislation forced Roberts's hand, while other have argued that public opinion caused Roberts's swing in jurisprudence.

This paper approaches the question in two realms. First, the specific jurisprudence of Justice Roberts on economic and labor rights issues is examined, producing an original dataset that provides a clear indication of where Roberts stood on these matters from 1931-1937.

Using this dataset, which denotes an undeniable *conservative* shift pre-Parrish (1934-1936), and a marked *liberal* shift post the 1936 election, this paper constructs a compelling argument that Justice Roberts's varying jurisprudence was not guided as much by public opinion, or differing legal arguments, but rather by a desire to run against President Roosevelt in the 1936 election. It is an explanation, supported by a plethora of original evidence, that most comprehensively explains Justice Roberts's confounding jurisprudence from 1933-1937.

Keywords

Supreme Court, New Deal, Roosevelt, Owen Roberts, Parrish, West Coast Hotel Co., Morehead, Humanities, Political Science, Alvin Felzenberg, Felzenberg, Alvin

Disciplines

American Politics | Constitutional Law | Political History | United States History

The Switch in Time that Saved Nine

A study of Justice Owen Roberts's vote in *West Coast Hotel Co. v Parrish*

By Brian Goldman

Advised by Alvin Felzenberg

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I. Introduction

Early to bed and early to rise, makes a man healthy, wealthy, and wise. A stitch in time saves nine. ~ Benjamin Franklin

i. March 29th, 1937

On Monday, March 29th, 1937, fifty three thousand people gathered on the South Lawn of the White House. However, despite continued economic uncertainty highlighted by talks of an imminent recession, these people did not gather for a strike, demonstration or protest. Rather, they came for the annual Easter Egg Roll celebration hosted by President Roosevelt.¹

The mood at the Supreme Court could not have been any different than the mood at 1600 Pennsylvania Avenue. When Chief Justice Charles Evan Hughes greeted a courtroom filled with roughly 4,000 attendees, tension filled the room. The Court, after all, had been the greatest obstacle to Roosevelt's New Deal since its inception, and onlookers were anxious to see if this would continue.

As Hughes proceeded to announce the outcome of five cases from the previous term, one case, *West Coast Hotel Co. v. Parrish*, was of particular interest. Here, the defendants argued that the minimum wage law in the State of Washington—which mandated that women be paid a minimum of 30 cents per hour—was unconstitutional.

Those arguing that the law was unconstitutional had recent Supreme Court precedents in their favor. In 1923, the Court in *Adkins v. Children's Hospital* ruled

¹ Shesol, Jeff, Supreme Power, W.W. Norton & Company 2010, pg. 403

that federal minimum wage laws were unconstitutional pursuant to an implied “liberty of contract.” As the Justice Sutherland wrote in the majority opinion, “liberty of contract” could be understood as the right of a twenty one-year old elevator operator and her boss to negotiate with “equal rights to obtain [...] the best terms they can.”² This right to contract was found, for “Sutherland and other court conservatives,” in “the due process clause of the Fifth Amendment,” which “protected private contracts from federal economic [regulatory] legislation.”³

The *Adkins* affirmation of a “liberty of contract” was further validated less than one year prior to *Parrish* in *Morehead v. New York ex rel. Tipaldo* (1936). In *Morehead*, the Court ruled by a 5-4 margin that a New York minimum wage law, similar to the Washington D.C. statute at question in *Adkins*, was unconstitutional. Furthermore, in the majority opinion penned by Justice Butler, the *Adkins* principle was declared “sound” and it was stated, “The *Adkins* case controls.” “Freedom of contract,” Butler wrote, “is the general rule and restraint is the exception.”⁴

Thus, when the *Parrish* decision was announced on March 29th, few surmised that the Court would *uphold* the State of Washington’s minimum wage law. However, that is exactly what the Court decided in a 5-4 ruling. As Burt Solomon put it in his account of the turbulent period, “the reversal was blunt, and unembarrassed, and a shock.”⁵

The “reversal,” was due to the vote of one judge, Associate Justice Owen Roberts. In the *Morehead* case, Roberts had voted with the 5-4 majority to uphold

² *Ibid.* pg. 219

³ Simon, James F., *FDR and Chief Justice Hughes*, Simon & Schuster 2012, pg. 182

⁴ Butler, Pierce, *Morehead v. People of State of New York* 298 U.S. 587, 1936

⁵ Solomon, Burt, *FDR v. The Constitution*. Walker & Company 2009, pg. 158

the *Adkins* precedent and strike down the minimum wage law. Nine months later, in *Parrish*, Justice Roberts had again voted with the majority, but this time to affirm the law and reverse the *Adkins* precedent. Chief Justice Hughes, writing for the majority in *Parrish*, asked of the so-called liberty of contract: “What is this freedom? The constitution does not speak of freedom of contract [...] freedom of contract is a qualified, and not an absolute, right.”⁶

The day that *Parrish* was announced soon became known as “White Monday,” which counteracted 1935’s “Black Monday.” Black Monday referred to May 27th, 1935, when the Supreme Court ruled that the National Industrial Recovery Act (“NIRA”) and Frazier-Lemke Act —key pieces of President Roosevelt’s “New Deal” initiative—were unconstitutional.⁷ This ruling was the latest in a series of rebuffs that the Supreme Court leveled at the New Deal, having previously struck down the Federal Farm Bankruptcy Act and the Railroad Act. In the next year, the Court ruled the Coal Conservation Act and Agricultural Adjustment Act unconstitutional as well. Three of these five laws were struck down by 6-3 or 5-4 margins. The other two decisions were unanimous. In each case, Justice Roberts had voted with the conservative majority. The Supreme Court had “made mincemeat of the Roosevelt New Deal.”⁸

The *Parrish* decision marked a turning point. Only weeks after *Parrish*, Justice Roberts voted in favor of the Social Security Act in *Steward Machine Co. v. Davis* and affirmed the constitutionality of the Wagner Act in *National Labor Relations Board v.*

⁶ Hughes, Charles, *West Coast Hotel v. Parrish* 300 U.S. 379, 1937

⁷ Shesol, *Supreme Power*, pgs. 127-130

⁸ Ball, Howard. *Hugo L. Black: Cold Steel Warrior*. Oxford University Press, 2006, p. 90

Jones & Laughlin Steel. Roberts was the deciding vote in each: *Davis* and *Laughlin* were both 5-4 rulings.

With the death or retirement of *five* Supreme Court justices in the two-year span thereafter, President Roosevelt was able to solidify the Court as primarily pro-New Deal, appointing allies such as longtime confidant Felix Frankfurter and Solicitor General Stanley Reed to the bench.

Oddly, for such an important moment in history, Justice Roberts's vote switch from *Morehead* to *Parrish* has no consensus that explains its occurrence. There are those who insist that President Roosevelt's proposed Judicial Reorganization Bill of 1937 (colloquially known as the "court packing" plan) forced Justice Roberts's hand. Others say the election of 1936—which saw Roosevelt reelected in a landslide— influenced Justice Roberts to change his opinion. Still, others argue that these outside factors had no such bearing on Roberts; rather, his vote in *Parrish* was not surprising and could have been anticipated.

This paper seeks to provide a contemporary analysis of this watershed moment in American politics and draw us closer to understanding the great conundrum: *Why did Justice Roberts switch his vote?*

ii. Research Design

a. Context

Following this Introduction, Part II of this research provides important contextual information, including the biography and perception of Justice Roberts. This section includes an analysis of a prior "vote switch" by Justice Roberts

overlooked in previous studies. Taken together, this section details Roberts's upbringing, ideology and jurisprudence.

b. Question One: Did a Predictable Switch Occur?

Part III addresses the first of two necessary questions in uncovering the reasons underlying the *Parrish* vote. Was Justice Roberts's vote in *Parrish* sudden and unpredictable? Or was the vote in *Parrish* more predictable; could it have been anticipated?

The *Parrish* outcome has aroused scholastic debate and interest since it was announced in 1937. In the *Morehead* case, the majority wrote that the *Adkins* precedent was "sound." In the *Parrish* opinion nine months later, the majority declared that the *Adkins* principle "should be, and is, overruled."⁹ By virtue of signing onto each majority opinion, and by refusing to clarify his jurisprudence in concurring opinions, the nickname a "switch in time saves nine" soon debuted to explain Roberts's vote.¹⁰

However, it is not completely clear that Justice Roberts's vote switch was as unpredictable as it may appear. Since the mid 1990's, many scholars—most notably Barry Cushman—have argued that *Parrish* should have been expected, and was simply a result of Roberts's evolving jurisprudence.

This question is important in several regards. It is generally assumed that Justice Roberts had a sudden, unpredictable switch from *Morehead* to *Parrish*, best epitomized by the continued use of the "switch in time" phrase. However, this

⁹ Solomon, *FDR v. The Constitution*, pg. 158

¹⁰ *Ibid.* pg. 162.

debased assumption confines the realm of possibilities and leads to an unproven conclusion; there *had* to be an impetus, or ulterior motive, behind this “sudden” shift. However, if *Parrish* was predictable, then this naturally alters the conclusion behind the “switch” itself and lessens the likelihood of an exterior motive. In this scenario, a more technical parsing—such as differences in the wording of the laws in *Morehead* and *Parrish*—could explain the supposed discrepancy.

Felix Frankfurter, a close advisor to President Roosevelt, best summarized these competing notions. In a letter to Roosevelt after the *Parrish* decision had been rendered, Frankfurter called Roberts’s vote switch “irreconcilable.”¹¹ However, in 1955, Frankfurter recanted that assertion and called the alleged vote switch a “ludicrous illustration” of which “this false charge against Justice Roberts must be dissipated.”¹²

To gauge the predictability of *Parrish*, it follows that a close study of the cases preceding it must be examined. Dissecting cases before *Parrish* allows one to develop a trend by which Roberts’s vote in *Parrish* can be accurately understood.

One such study focuses on mathematical modeling of Supreme Court decisions per voting bloc. The goal of such modeling, as employed by Daniel Ho and Kevin Quinn in a recent study of Roberts’s voting history, is to detect sudden changes in voting patterns. This style of quantitative insight is similar in nature to

¹¹ Ho, Daniel & Quinn, Kevin, “Did a Switch in Time Save Nine?” [CELS 2009 4th Annual Conference on Empirical Legal Studies Paper 2009](#), pg. 3

¹² Frankfurter, Felix, “Mr. Justice Roberts,” *The University of Pennsylvania Law Review*. Vol. 104 No. 3, December 1955, p. 313

what credit companies use to detect credit card fraud—identifying sudden breaks in purchasing patterns.¹³

However, this method has certain limitations. Primarily, such modeling does not discriminate amongst cases by category or issue. The substantive addition I make to the existing statistical data surveying Justice Roberts is in this qualitative realm. By gathering the totality of Justice Roberts's votes in Supreme Court cases from 1930-1937, the research herein analyzes an original dataset that is narrowed by relevancy to *Parrish*. Essentially, the dataset seeks to rectify the major flaw in the Ho & Quinn model, which is that it does not distinguish between case issue and category. This original dataset allows for the closest possible look at cases that are most similar to *Parrish* in topic and vote-margin.

c. Question Two: Why Did the "Switch in Time" Occur?

Part IV builds off of Part III and examines why Roberts voted the way he did in *Parrish*. The first question, focusing on predictability of *Parrish*, is designed to give this second research question context and a spectrum of possible explanations. For example, finding that an unpredictable switch on Roberts's behalf occurred in the *Parrish* case presents a range of possibilities for *why* he underwent an unpredictable shift. Conversely, concluding that Roberts's vote in *Parrish* was very much predictable confers a differing range of possible conclusions to this second question.

¹³ Ho & Quinn, "Did a Switch in Time Save Nine?" pg. 4

Uncovering why the switch occurred focuses mainly on a trio of qualitative, historical, and primary sources. There is a bevy of academic literature that seeks to answer—or at least provide a measure of clarity—to this question. This paper uses these academic and scholarly foundations to reach novel conclusions, specifically concerning individual actors, institutions, and dynamics of the time period.

However, the approach to this second question is limited to scholarly works spanning the two divides, which have been dubbed the “Internal” and “External” camps. These resources provide a good foundation for research, yet they do not tell the entire story. As a result, primary research focuses on qualitative historical relationships between individuals and within institutions. These include, but are not limited to, roles played by President Roosevelt, Chief Justice Hughes, Felix Frankfurter, and Justice Roberts in the occurrence of the vote switch. Institutionally, research focuses on the Supreme Court, the Republican Party and the American Liberty League, exclusively and as interacting dynamos.

Primary sources are of great value in this research. Newspaper and press releases that have been gathered reveal specific intentions and perceptions of the aforementioned actors and institutions. Published correspondence between President Roosevelt and Felix Frankfurter as well as the published memos of Chief Justice Hughes and Justices Roberts (although the latter destroyed almost the entirety of his manuscripts and papers) allow this research to dig deeper into the inner machinations of the men themselves.

d. Overview of Results

Part V discusses results, findings, and conclusions. This research advocates for two underpinnings of the “switch in time.” First, the original dataset compiled (in addressing Question One) verifies that a switch of both the unanticipated and unpredictable variety did occur in 1937. Secondly, the dataset also indicates that a pronounced change in Roberts’s jurisprudence occurred in the latter half of the 1934 term and persisted until the *Parrish* vote. These years indicate a conservative shift, which made Roberts’s pro-labor rights vote in *Parrish* so surprising in the first place.

Thus, there is a need to explain not only Justice Roberts’s vote in *Parrish*, but also the conservative trend that he developed in the years prior; it was a trend that deviated starkly from a more liberal jurisprudence that he displayed from 1930-1933. This paper, by incorporating previous findings with original research, is the first one of its kind to advance the notion (as a primary argument) that much of Justice Owen Roberts’s “somersault”¹⁴ stance on New Deal issues was due to the fact that Roberts deeply entertained the notion of running for President on the Republican ticket against President Roosevelt in 1936.

There is ample, original evidence to support such an assertion. Roberts was not only consistently mentioned among the national press as a viable candidate, but

¹⁴ Kalman, Laura, “The Constitution, the Supreme Court, and the New Deal” *The American Historical Review* Vol. 110 No. 4, 2005, Par. 1

was sought after by the American Liberty League, an avidly anti-New Deal “pro-constitution” organization that led the charge against FDR from 1934-1936. Roberts openly advocated for the same fundamental position on issues as the Liberty League, and maintained a host of close and personal connections to some of the most important political leaders and financiers of the group. It seems clear that Justice Owen Roberts was in many ways guided by a desire to seek the Presidency, a fact that explains not only the *Parrish* vote, but also, quite importantly, the conservative trend that preceded it. The *Parrish* vote, by extension, was the vote of a Justice who had been ridiculed—even by those in his own party—for his *Morehead* stance; it was also the vote of a Justice who recognized that public opinion had crystallized against him after Roosevelt won reelection in November of 1936 by historical proportions.

II. Background & Jurisprudence

“But can I be a lawyer and be honest?” The headmaster stood and put his hands on his student’s shoulder. “Owen, you can be honest at anything.”¹⁵

i. The Background and Biography of Owen Roberts

A study of Roberts’s vote in *West Coast Hotel v. Parrish* cannot be confined to merely examining votes, compiling patterns, or trolling through accounts of the turbulent period. The essence of individuality carries with it the implicit knowledge that one’s unique background and experience affects one’s decision-making. Thus, a survey into the background of Justice Owen Roberts is necessary for contextual purposes.

a. Rise to Supreme Court Justice

Owen Josephus Roberts was born to a fairly well to do family in Germantown, Pennsylvania, a suburb of Philadelphia, on May 2nd, 1875. His father, Josephus Roberts, was the son of Welsh immigrants and made a living initially as a wagon maker, before co-owning a wholesale hardware business in Philadelphia. He also dabbled in politics, spending two terms on the Philadelphia Common Council as a Republican. His success allowed him to send Owen to the Germantown Academy, an elite prep school, and then the University of Pennsylvania at the age of sixteen.¹⁶

¹⁵ Solomon, *FDR v. The Constitution* pg. 55

¹⁶ *Ibid.* pg. 54

After succeeding at the University of Pennsylvania, in both academics (selected to Phi Beta Kappa, the exclusive social science honors society) and extra-curricular activities (editor-in-chief of the student newspaper, and the chairman of the yearbook committee) Roberts followed up on a burgeoning interest in law by enrolling in the University of Pennsylvania Law School.

Roberts's career began its ascent while studying law at the University of Pennsylvania. He became part of the "University crowd," a group whose members "dominated the politics and economics of Pennsylvania."¹⁷ He also began a relationship with George Wharton Pepper, a corporate and insurance law professor at Penn Law. Wharton Pepper would later become a United States Senator, and is credited with introducing Roberts to President Coolidge, which provided his first foray into politics.¹⁸

After graduating from the University of Pennsylvania Law School in 1898, Roberts began his career as an assistant prosecutor for the District Attorney of Philadelphia. Upon leaving public service in 1904, Roberts became a lawyer for Philadelphia Rapid Transit, a powerful Philadelphia streetcar corporation. In 1912, he began a private practice with two others, and he represented a variety of corporate clients, including Pennsylvania Railroad, Bell Telephone of Pennsylvania, Drexel & Company and the Philadelphia Chamber of Commerce.¹⁹

Roberts first became involved in national politics in 1924 at age 39, at the outbreak of the "Teapot Dome" scandal. At the recommendation of his mentor

¹⁷ Geldreich, Gill Robert, "Justice Owen Roberts's Revolution of 1937" (1997). *University of Tennessee Honors Thesis Projects*. http://trace.tennessee.edu/utk_chanhonoproj/216 pg. 5

¹⁸ Leonard, Charles, *A Search For a Judicial Philosophy*, Kennikat Press 1971, pgs. 8-9

¹⁹ Solomon, *FDR v. The Constitution* pg. 56

Wharton Pepper, who by then had been elected a U.S. Senator, Roberts was appointed as a special federal prosecutor in co-charge of investigating the alleged malfeasance. Roberts's name was seconded by Harlan Stone Fisk, a close friend of President Coolidge, and by Charles Evans Hughes, Coolidge's secretary of state. Roberts's "plain-spoken manner" was said to appeal to Coolidge, who sought to pair a Republican with a Democrat in charge of the investigation. There was initial concern amongst some Senators that Roberts was too friendly towards corporations and thus would not be impartial in the Teapot Dome investigation. In a 1923 conference for bankers in New York, Roberts advocated for "old-fashioned Anglo-Saxon individualism," defended \$100,000 compensation for Standard Oil executives, and chided "noisy minorities" for "running to the legislators every year for government and state regulations of all sorts of businesses."²⁰ Although the Senate debated Roberts's nomination, he was eventually confirmed with only 8 dissenting votes.²¹

Roberts found success as a federal investigator; as *Literary Digest* wrote, "fame struck Owen J. Roberts with the swiftness of lightning."²² The secretary of the interior, Albert B. Fall, had been convicted of accepting a six-figure bribe, and Roberts was dubbed "Sherlock Holmes" by the press.²³

When Supreme Court Associate Justice Edward Sanford suddenly died in March of 1930, President Hoover selected 4th Circuit Court of Appeals Judge John J. Parker as Sanford's replacement.

²⁰ *Ibid.* pg. 57

²¹ *Ibid.* pgs. 58-59

²² *Ibid.* pg. 58

²³ *Ibid.* pg. 59

However, Parker's nomination erupted a controversy. The NAACP alleged that Parker had made a statement in 1920 "against the advancement of that race in politics," and organized labor vehemently opposed Parker due to an anti-union ruling he made in 1927. Parker was subsequently rejected by the Senate. Two days thereafter, Hoover submitted Roberts's name to the Senate as a Supreme Court nominee. Hoover desired a quick confirmation, and some speculated that Roberts's ideology would not be as easy to pin down as Parker's was.²⁴

At the time, Roberts's political leanings and judicial philosophy were of great mystery to the press and political punditry. While the magazine *Outlook* surmised that Roberts would "not infrequently, side with Holmes, Stone and Brandeis" (the Court's liberal bloc), the New York Herald-Tribune called Roberts a "metropolitan corporation lawyer," and "as conservative as Justice Parker."²⁵ There was also a contingent of the media that declared Roberts's philosophy a wild card. As the Baltimore Sun editorialized, "Neither the liberals nor conservatives can be absolutely certain in which direction his mind will move."²⁶

Roberts was widely acclaimed for his many years of public service, as both a prosecutor in Philadelphia and as the special prosecutor during the Teapot Dome scandal. As the Philadelphia Evening Bulletin wrote, "Mr. Roberts's whole life in his contact with public affairs [...] has shown him to be a liberal in the true sense, a progressive, forward-minded [...]"²⁷

²⁴ Fish, Peter G., "Perspectives on the Selection of Federal Judges," *Kentucky Law Journal* Vol. 77, 1988-1989, pg. 20

²⁵ Leonard [A Search For a Judicial Philosophy](#) pg. 10-11

²⁶ *Ibid.* pg. 11

²⁷ *Ibid.* pg. 12

On May 19th, 1930, ten days after sending Owen Roberts's name to the Senate for confirmation as a Supreme Court Associate Justice, the Senate confirmed his nomination in less than one minute.²⁸

Thus, Roberts began a career on the Supreme Court. He had been a lawyer his entire life, and had no judicial experience whatsoever before being confirmed to the Court.

b. Roberts's Outlook and Jurisprudence

Those closest with Roberts paint a portrait of a man who was anything but ideological in his approach to the law. Upon Roberts's passing in 1955, Erwin Griswold, who knew Roberts's since the 1920's, remarked that Roberts's "approach to [...] problems" was that "he dealt with them as a lawyer. He was not a philosopher, and he did not attempt to be. He was not a sociologist."²⁹

Perhaps more interesting is Griswold's assertion that Roberts was "rarely provocative, and never offensive. He was a lawyer [...] not a crusader."³⁰ This sentiment was echoed by Roberts's mentor, George Wharton Pepper, who wrote upon Roberts's passing that "his beliefs were not of a complicated sort." Wharton Pepper also levied a warning to detractors of Roberts, saying that "It is not wise for an outsider to speculate about the independence of [Roberts's] thought" during his Supreme Court tenure.³¹ It was a subtle allusion to the many whom believed that Roberts's vote in *Parrish* was irreconcilable and explainable only on the grounds

²⁸ *Ibid.* pg. 13

²⁹ Griswold, "Owen J. Roberts as a Judge" *University of Pennsylvania Law Review*, Vol. 104, No. 3 (Dec., 1955), 336

³⁰ *Ibid.* pg. 337

³¹ Wharton Pepper, George, "Owen J. Roberts- The Man," *The University of Pennsylvania Law Review*, Vol. 104 No. 3, December 1955, pg. 374

that there was an ulterior motive at play. Other close friends have supported this description of Roberts. John Lord O'Brien, who knew Roberts for many years, asserted that Roberts always took a "pragmatic, rather than a theoretical approach to legal questions."³²

However, this rosy portrait of Roberts should be viewed with some skepticism for several reasons. First, of course, is the context of Griswold and Wharton Pepper's musings. They were both written and published in memoriam very soon after Roberts's passing; they were also published in the *University of Pennsylvania Law Review*, which was published, of course, by Roberts's alma mater.

Secondly, there is an alternative view of Roberts that is not nearly as kind. Upon Roberts's retirement from the Supreme Court in 1945, then Chief Justice Stone circulated a letter amongst his colleagues that commended Roberts on his work and service to the nation. Although typically a formality, Justice Black took great issue with the letter, especially its final line; "You have made fidelity to principle your guiding decision." Black said he could not "subscribe to such a loose interpretation" of Roberts's jurisprudence, specifically how "from 1933 to 1937, he seesawed on critical economic New Deal cases."³³ In the end, Black so steadfastly refused to sign the letter with this line intact that no letter was sent at all.³⁴

³² Leonard, *A Search For a Judicial Philosophy* pg. 12

³³ Ball, Howard, *Hugo L. Black: Cold Steel Warrior* pg. 13

³⁴ *Ibid.* pg. 15

Griswold did not see a “seesawed” jurisprudence. As he wrote, Roberts “thought precedents and continuity were important, and he did not depart from them in any bursts of emotional enthusiasm.”³⁵

ii. Prior “Vote switch”

Being a Supreme Court justice is no small task. Over the course of his fifteen-year tenure on the nation’s highest bench, Roberts penned an opinion in 353 cases; over 80% of those opinions were written for the majority.³⁶

A close look into this voting record reveals several startling discrepancies that cannot easily be resolved. In fact, on the topic of estate tax law, it is not unreasonable to say that Justice Owen Roberts had a “switch” very similar to the famous vote in *Parrish*.

A cursory glance at Justice Roberts voting record on federal estate tax issues reveals a judge who, time and time again, voted against the federal government. In the 1935 watershed *St. Louis Trust Cases* (*Becker v. St. Louis Trust & Helvering v. St. Louis Trust*), the Court was asked to decide whether a certain type of trust could be considered a “transfer” of wealth (and immune from estate taxes), or if such a trust was merely a guise for avoiding these sort of taxes. The Supreme Court, by a 5-4 margin, voted against the government. Roberts, along with the conservative “four horsemen”³⁷ made up the majority.

³⁵ Griswold, “Owen J. Roberts as a Judge” pg. 336

³⁶ *Ibid.* pg. 336

³⁷ Popular nickname at the time referring to Justices Sutherland, Butler, Van Devanter and McReynolds

However, in 1940 that ruling was overturned in *Helvering v. Hallock*, where the same issue was presented to the Supreme Court. In a 5-4 decision, the Court ruled for the government and deemed these trusts as liable for taxation upon death.

Owen Roberts was *not* the reason why the *St. Louis Trust* precedent had been overturned five years later. Justice Van Devanter, a member of the Court's conservative wing, had retired in June of 1937 and been replaced by Hugo Black, a much more liberal judge. Justice Roberts, this time in the minority, dissented against the decision in *Hallock*, providing consistency with his votes in the *St. Louis Trust Cases*. Roberts was forceful in his denunciation of the *Hallock* decision, saying "to upset these precedents now, must necessarily shake the confidence of the bar and the public."³⁸

If this were the end of the story, Justice Roberts would be seen as remarkably principled in his approach to estate tax issues. However, the truth is anything of the sort.

In 1933, the Court heard the case *Helvering v. Duke*, 290 U.S. 591, which was re-petitioned as *Helvering v. Northern Coal Company*. It is a case that was not of interest to the public or the media, and there exists very little information on the case.

Helvering v. Duke concerned the same issue faced in the *St. Louis Trust* cases. As Erwin Griswold wrote in his memoir on Roberts, the issue in *Duke* "presented the question again in the following year."³⁹

³⁸ Francis C. Nash, "What Law of Taxation?," 9 *Fordham L. Rev.* 165 (1940),

³⁹ Griswold, "Owen J. Roberts as a Judge" pg. 344

Griswold includes a footnote at the end of the sentence, which references the *St. Louis Trust cases*. The *Duke* case, upon further research, shows to be concerned with the same central issue as *St. Louis Trust*—conditional transfers of wealth, and the estate tax.

Griswold also goes on to explain how the *Duke* case transpired. Chief Justice Hughes recused himself from the case, due to a prior relationship with the petitioner. The lower Court had ruled against the Government, so it stood that the government needed to obtain five votes in order to have the decision reversed. A 4-4 split would affirm the decision of the lower Court, and rule against the government.

That is exactly what happened. As evidenced by multiple sources, “a strange result followed affirmances [...] by an evenly divided court.”⁴⁰ This quote comes from *Fordham Law Review’s* “The Opinions of the United States Supreme Court from the 1934 Term”, and the “evenly divided court” phrase is footnoted with “*Helvering v. Northern Coal Co.*, U.S. 290 591.”

Several questions arise. First, which four justices ruled against the government, and affirmed the lower court’s ruling?

Here, Griswold states, “the Government knew quite definitely in advance that four Justices would be against them—Justices Van Devanter, McReynolds, Sutherland and Butler.”⁴¹

⁴⁰ Osmond K. Fraenkel, “The Opinions of United States Supreme Court for the 1934 Term-- General Issues,” 4 *Fordham L. Rev.* 416 (1935), pg. 453

⁴¹ Griswold, “Owen J. Roberts as a Judge” pg. 344

This would posit that Roberts would have voted *for* the Government, and in favor of the estate tax as applied to conditional transfers. It would be a vote irreconcilable with the *St. Louis Trust Cases*, which dealt with an identical issue.

However, how could Griswold have known that Chief Justice Hughes recused himself from the case, and which four Justices voted against the government? After all, the opinion was issued *per curiam*, meaning that the majority-voting bloc was anonymous.

It is a startling simple answer. Erwin *Griswold argued the case, on behalf of the government*. As the case notes read, "Mr. Justin Miller, with whom Solicitor General Biggs and Mr. Erwin N. Griswold were on the brief, for petitioner."⁴²

Griswold does not mention this obviously important fact in his very brief discussion of the case.

Griswold's biography supports this notion. He served as a special assistant to the U.S. Solicitor General from 1929-1934. He would be a prime candidate to help argue the government's case before the Supreme Court.

The notion that Griswold argued the case on behalf of the government also provides *mens rea* for Justice Roberts's vote. Is it conceivable that Justice Roberts, given the case's very low profile and irrelevancy, would have voted in favor of the Government as a favor to his friend Erwin Griswold? Griswold, keep in mind, was a friend so close and dear that he was chosen, along with Roberts's well-established

⁴² *Helvering v. Nother Coal.Co.*

[http://174.123.24.242/leagle/xmlResult.aspx?xmldoc=1934484293US191_1458.xml&docbase=CSLWAR1-1950-1985]

mentor George Wharton Pepper, to write a memorial of Roberts in the *University of Pennsylvania Law Review*.

The only other option is to claim that Roberts somehow reversed positions between the *Duke* and *St. Louis Trust Cases*. However, given Roberts's strongly worded dissent in *Hallock*, it begets the impression of a man who felt strongly about the issue—not one who inconsistently wavered between positions.

Griswold's own words would seem to support the former conclusion. He writes that Roberts's vote in 290 U.S. 591 (*Duke*) is "not so easy to explain."⁴³ However, he declines to mention the one fact that might provide clarity to the otherwise befuddling vote: that Griswold himself argued the case for the Government.

a. Conclusions

There is no connection, or skepticism, of Roberts's successive votes in *Duke*, *St. Louis Trust* and *Hallock* in any material besides the bit mentioned by Griswold. This is not all too surprising given the low profile of the case and the *per curiam* opinion.

However, the fact that Griswold argued the case before the Court provides an otherwise unattainable firsthand account of what transpired, including which justices voted in favor of the government, and which justice recused himself. It is odd, but not all too surprising, that Griswold did not mention his involvement.

What a study of these cases does accomplish, however, is to cast a shadow of doubt on Roberts's "pragmatic" approach to constitutional issues. As the *Duke* vote

⁴³ Griswold, "Owen J. Roberts as a Judge" pg. 344

shows, it appears that Roberts could perhaps be capable of compromising this approach, even if just once or twice. There seems to be reasonable suspicion that there was an ulterior motive behind Roberts's vote in *Duke*, a fact that would make any ulterior motive behind *Parrish* more likely. Given the estate tax cases, Roberts has shown a precedent for casting mysterious, contradictory votes with little or no explanation, a behavior that Justice Black noted in his strong opposition to the Roberts retirement letter.

III. Modeling Justice Roberts's Voting Patterns

Do not put faith in what statistics say until you have carefully considered what they

do not say ~ William W. Watt

i. Advanced Quantitative Metrics

Justice Roberts's vote in *Parrish* is conveniently referred to as a "switch." This label, however, takes a simple approach to a far more convoluted and multifaceted problem. True, Roberts seemed to have switched positions, in terms of minimum wage and its constitutionality, between *Morehead* and *Parrish*.

However, even that reasoning has been disputed, primarily by the "Internalist" camp. As Barry Cushman states in his piece, "Lost Fidelities," it was actually *Nebbia v. New York*, a case that upheld a New York statute regulating the price of milk, which "heralded the death of Adkins."⁴⁴ Although Cushman's argument, and the rest of the Internalist camp, will be discussed in greater depth later on, it is important to recognize a vital underpinning of the Internalist case: *Parrish* was not an anomaly, but part of a trend; it was a more predictable vote than otherwise given credit.

Thus, this section of the research hones in on that exact question of predictability or anticipation. In order to gauge predictability, it is necessary to establish an overall trend that details Roberts's voting pattern. Because the Court at

⁴⁴ Barry Cushman, "Lost Fidelities," 41 *Wm. & Mary L. Rev.* 95 (1999), pg. 104

the time was especially segmented, with a distinct conservative bloc and a fairly consistent liberal contingent, determining Roberts's voting pattern is not as daunting a task as it may appear.

a. The Ho & Quinn Study

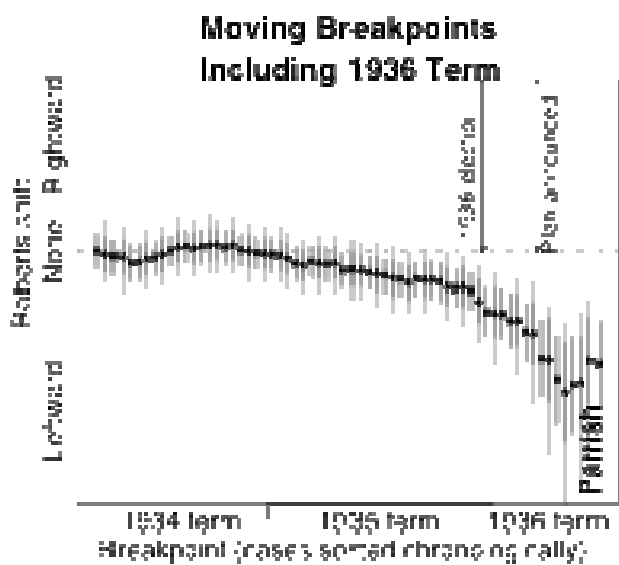
Daniel Ho and Kevin Quinn, of Stanford Law and the University of California-Berkeley School of Law respectively, released a study in 2009 that is the most advanced study to date of Justice Roberts's voting patterns. They collected all cases that Justice Roberts voted on from the 1931-1940 terms, excluding unanimous decisions, and recorded whom Justice Roberts voted with. Thus, their research is focused on voting blocs and which bloc Justice Roberts joined with on case after case.

With the help of advanced quantitative modeling and metrics, including Bayesian learning, Ho and Quinn are able to provide strong evidence that Justice Roberts exhibited a sharp, significant shift to the left during the 1936 term.

Bayesian learning allows for a computer model to adjust its interpretation based on the consistency of voting blocs. Essentially, it uses this intuition to hone data and render more precise results. For example, a majority voting coalition made up of the "four horsemen" plus Justice Roberts would move Roberts further to the right because it would be a coalition that was very common during that time. In contrast, a coalition of Roberts, two conservative justices and two liberal justices (such Brandeis and Cardozo) would affect the data almost unnoticeably. This coalition of two rigid conservatives and two liberal members would be such an

unusual, one-off voting bloc that it would be treated in the dataset as a negligible occurrence. Thus, after each case, moving chronologically from 1930 through *Parrish*, the system “learns” about the voting habits of the justices and whom they tend to vote with.

Ho and Quinn, utilizing this dataset of non-unanimous cases, compile various statistical analysis studies. Here is one, shown below⁴⁵:

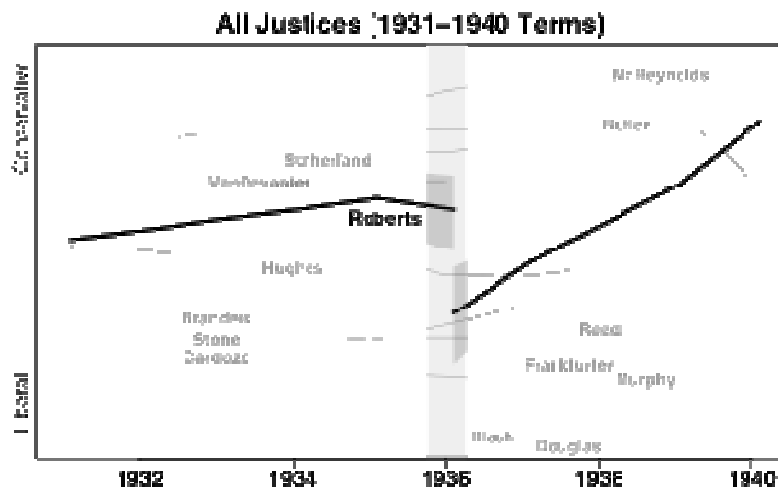


This model seeks to identify the “breakpoint” moment at which Roberts underwent a significant deviation from his prior votes. The y-axis denotes ideological positions, the upper part conservative, and the lower part of the axis liberal. The x-axis places the cases in chronological order, starting with the 1934 term and finishing with *Parrish*.

⁴⁵ Ho and Quinn, “Did a Switch in Time Save Nine?” pg. 30

As one can see, the 1936 term marks a statistically significant leftward movement on the part of Justice Roberts. According to Ho and Quinn, these findings “overwhelmingly confirm that the breakpoint occurred in the 1936 term.”⁴⁶

Of course, this model only analyzes cases from 1934-*Parrish* (1937). In a different model, Ho and Quinn use all the cases from 1931-1940 to assess Justice Roberts’s voting history. However, this graph, as seen below, separates these ten Court terms into two distinct data groups: pre-*Parrish* cases and *post-Parrish* cases:



This type of modeling relies on “ideal” point estimates. Ideal point estimates are a derivative of the Bayesian learning. As you can see above, Justice McReynolds’s “ideal point” is at the top portion of the graph, in the “conservative” territory of the y-axis. An ideal point refers to a justice’s preference. In McReynolds’s case, an analysis of his votes from 1931-1940 showed that he voted with the “conservative”

⁴⁶ *Ibid.* pg. 30

bloc more so than any other justice. Thus, his “ideal” vote, or preference, is with the conservative bloc.

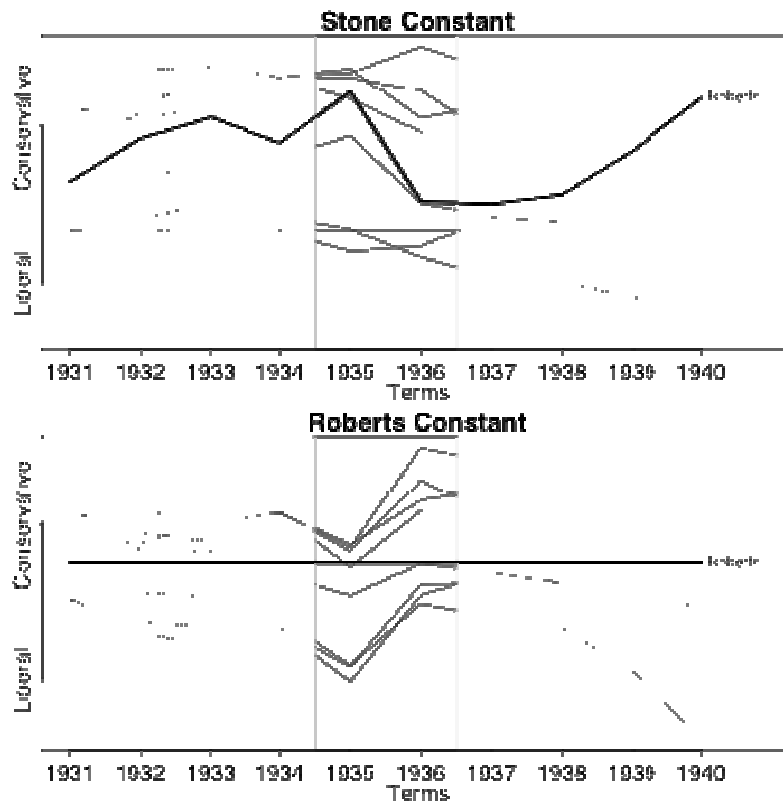
Consequently, Justice Roberts’s “ideal” point is towards the very middle, verifying the claim that he was often the swing justice on a majority of cases. Chief Justice Hughes—often regarded as somewhat of a swing vote as well—sits directly beneath Roberts towards the middle of the chart.

Here, the chart shows that Roberts exhibited a distinct shift in voting patterns in the 1936 term. Because the pre and post *Parrish* terms are analyzed separately in this model, one can see how greatly the 1936 term deviated from Roberts’s traditional behavior. From 1936-1938, he is a more reliably liberal justice than Hughes, and there is a tremendous “rupture” that separates the two data sets.⁴⁷ This rupture signifies a marked change from Roberts’s behavior from 1931-1935. Moreover, he is *the only justice* who has such a rupture, let alone the fact that his ideal point line jumps nearly half of the graph. All of the other Justices are fairly consistent from pre to post *Parrish*, and even the Justices who do exhibit a change (such as Brandeis, who trends conservatively) do not do so in such a noticeable and shocking way.

Lastly, one more model depicting the dataset helps to emphasize Roberts’s dramatic shift during the 1936 term. This one, seen below, assumes that a justice’s position has been “constant” from 1931-1940. The top graph assumes that Justice

⁴⁷ *Ibid.* pg. 28

Stone's position was constant, while the bottom graph assumes that Justice Roberts's position was⁴⁸:



Here, there are two apparent observations that anchor Ho and Quinn's thesis. If you look at the Justice Stone model (top), you see, relative to Justice Stone, Roberts shifted significantly leftward (y-axis) during the 1936 term. The other justices, relative to Justice Stone, vary in their positions: McReynolds follows a more conservative path, while Cardozo a slightly more liberal one. Additionally, under the Stone constancy model, the other justices all appear to shift independently of one another.

⁴⁸ *Ibid.* pg. 25

However, the lower graph tells a much different story. Assuming that Justice Roberts stayed constant from 1931-1940, *every other justice* trended conservatively—significantly so—during the 1936 term. By looking at the lines of each other justice under the Roberts constancy model, one can readily see the dramatic upward shift of each other justice.

Of course, the lower graph does not demonstrate reality; Justice Roberts was anything but consistent in his voting patterns from 1931-1940. Thus, what this graph depicts is that it was not the other justices who shifted, but rather, Roberts himself.

ii. Original Dataset

a. Flaws in the Ho & Quinn Study

The Ho and Quinn study, while quite contemporary and unique, displays several shortcomings.

The structure of the study, in terms of case selection, is flawed. The exclusion of unanimous cases seems especially troubling. Although it may be true that unanimous cases do not usually touch on the most contentious issues of the day (by virtue of the lopsided vote) this is not always the case. One of the most important pillars of President Roosevelt's New Deal was the National Industrial Recovery Act. In *Schechter Poultry Corp. v. United States*, this federal statute was struck down by a 9-0 margin. Here, while the unanimous vote signals that the justices overwhelmingly agreed on the unconstitutionality of the legislation, it does not lend credence to other qualitative aspects that are arguably more important, such as the

magnitude of the legislation under review and the constitutional (or unconstitutional) reason for its success or failure.

Secondly, the dataset compiled by Ho and Quinn is, as they readily admit, “over inclusive, by focusing equally on all non-unanimous opinions.”⁴⁹ This aspect of the study is potentially more problematic. The *Parrish* vote, and the controversy surrounding it, was distinctly related to the New Deal, labor rights, and/or economic regulation. Including cases on free speech, for example, will shed negligible light on a voting pattern that is constructed to analyze a minimum wage case.

Ho and Quinn address this shortcoming by noting how their methodology “weighs” certain cases by giving greater emphasis to cases with repeating voting blocs. “A case with unusual voting coalitions will be down weighted by the model and will thus provide less information about the relative locations of the justices.”

Yet, they acknowledge in the next paragraph, “our analysis includes some cases that aren't necessarily the primary focus of extant scholarship.”⁵⁰ This is somewhat of an understatement. There are a dozen cases, by their own admission, that are of no value to *Parrish*.

These flaws help produce an imperfect study of Justice Roberts from 1931-1937. I submit that case *selection* should be the primary driver behind any developed data set that seeks to measure Roberts's voting patterns relative to *Parrish*. In order to truly evaluate whether Justice Roberts underwent a marked and sudden deviation in *Parrish*, a narrower study that focused on similar economic or labor issues will produce a more compelling and precise answer.

⁴⁹ *Ibid.* pgs. 34-35

⁵⁰ *Ibid.* pgs. 34-35

Therefore, while Ho and Quinn developed a tremendous statistical program for analyzing Roberts's voting pattern, the shortcomings produce misleading results. Thus, I undertook the task of compiling a dataset on Roberts's Supreme Court votes that would specifically hone in on case topic, and place less emphasis on non-unanimous cases that dealt with a completely separate issue.

b. Methodology

This new dataset consists of fifty-nine Supreme Court cases, ranging from the 1930 term through the Parrish case, which was part of the 1936 term. What primarily distinguishes this dataset from Ho and Quinn's is that these cases were specifically chosen based on the issue presented.

Supreme Court decisions are qualitative and interpretative based. It is important to reflect this quality in any *quantitative* study of Court cases. The qualitative aspect most highlighted in determining this dataset was relevancy to the Parrish decision. *Parrish* focused on a state law that mandated a minimum wage for all public and private employees. All fifty-nine cases fall under the general umbrella of economic regulation and/or labor rights, although they are not strictly reserved to cases dealing with state statutes. Federal legislation on economic or labor issues was also deemed relevant.

These cases were chosen by going through the United States Supreme Court Reports, Volumes 282-300 (which cover the aforementioned terms) and analyzing the decision reached in each case from those years. These decisions allowed myself to accurately glean the constitutional issue that the court faced in each case. I did

not discriminate between unanimous and non-unanimous cases that fell into these categories. While I agree with Ho and Quinn's premise that unanimous cases will not shed much light on Justice Roberts's judicial philosophy, these cases do promote an important finding: the direction of the Court. A study of unanimous cases allows one to ascertain whether the Court seems to lean "conservative" or "liberal" at a point in time.

It is important to also note which cases I left out of the dataset. There were many Supreme Court cases over these years that dealt with rates proscribed by the Interstate Commerce Commission. If the question facing the Court had to do with whether a specific rate was fair or unfair (in terms of dollars and cents), the case was excluded. If a constitutional issue was raised, it was included. I applied the same standard to workmen's compensation and liability cases. Any case before the Court that dealt with a fair or unfair sum for injury in the workplace was excluded unless it treaded on a constitutional issue. Usually, for these two subsets, the constitutional issue would center on the 14th amendment, as was the case in 285 U.S. 22 (a compensation case) and 284 U.S. 248 (an ICC rates case).

For each case deemed relevant, a few factors were noted. One was the central issue in the case. A second was the Supreme Court's ruling and the majority-minority split. The third aspect was the side on which Justice Roberts ruled. The fourth aspect, and perhaps most important, was whether the decision rendered by the Court was a "liberal" or "conservative" ruling. For the most part, these labels were easier to apply than initially expected. The "liberal" standard included any ruling that upheld state or federal legislation aimed at regulating business, or

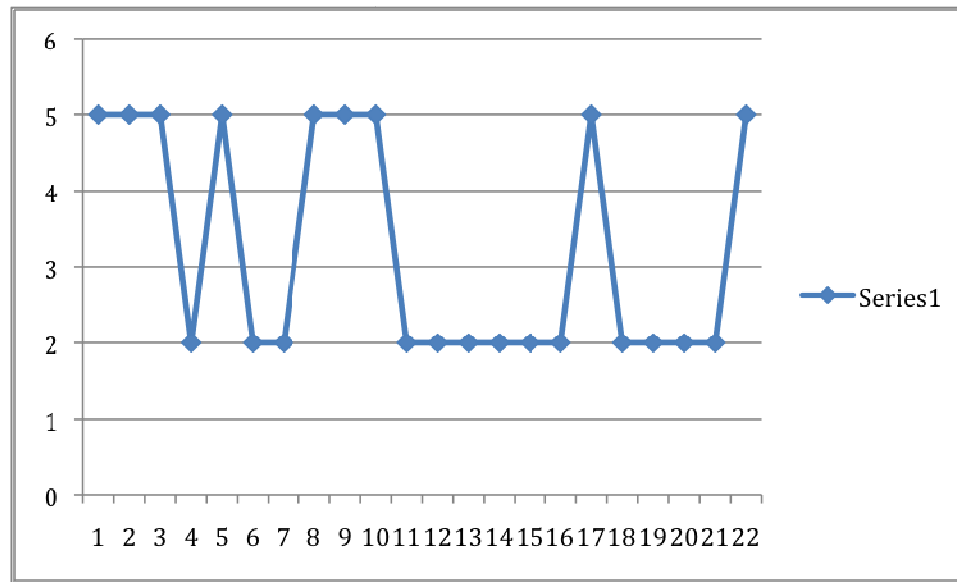
upheld any law that was pro-labor rights. These rulings took a broad view of the Constitution, in general. The “conservative” standard took the opposite approach, and included any ruling that struck down a state or federal statute regulating business or proscribing labor rights. Generally, these rulings took a narrower view of constitutional rights. If a case could not be clearly determined, I took to a closer reading of the full opinion and (if available) dissent, and made a judgment. Appendix A denotes the full table that was compiled for each case.

To effectively analyze the data, the cases were divided into three tiers. Tier One included the most hotly contested cases, those decided by 5-4 or 6-3 margins. Tier Two included any 7-2, 8-1, or unanimous decisions *with a concurring opinion written*. Finally, Tier Three included only unanimous decisions where no concurrence was penned or voiced.

c. Results: Tier One

The Tier One results are arguably the most important of all. These cases are the ones where Roberts’s vote mattered the most; they are the cases that were weighed most heavily in Ho and Quinn’s dataset for that reason. His judicial tendencies are most directly revealed when his vote mattered, as they were perhaps the toughest decisions to come to given the contested nature of the Court.

The chart below tracks Roberts votes in Tier One cases from the 1930 to *Parrish*. A 5 (the upward end of the y-axis) means Robert cast a liberal vote, while a 2 (lower end of y-axis) means a conservative vote.



As the x-axis shows, there were 22 cases in the Tier One data subset. This chart reveals surprising evidence that concurs with the conclusions reached by Ho and Quinn. Here, in the most tightly decided Supreme Court cases, Justice Roberts began his career leaning to the left on matters of economic regulation and labor rights. In fact, on the first ten cases in this category Justice Roberts voted with the liberal coalition 70% of the time. Case Ten, the last of Roberts's string of liberal votes, was 294 U.S. 240, *U.S. v. Bankers Trust Co.* (1935). This case is known as one of the *Gold Cases*, where the Court upheld the validity of federal legislation that asserted any contract requiring payment in gold was "against public policy."⁵¹ This case was decided 5-4, in favor of the government, with the four conservative horsemen joining together on a vigorous dissent.

⁵¹ Chief Justices Charles Hughes, majority opinion 294 U.S. 240

However, Roberts shifts sharply, and statistically significantly, to the right thereafter. Over the next eleven cases that are very similar to the first ten in category and vote margin, Roberts voted on the *conservative* side in 10/11 cases, or 91% of the time. It is an immense swing from the 70% liberal figure we saw in the initial ten cases. These cases span from the 1934 to the 1936 term, and indicate a sudden and quite verifiable switch in Roberts's voting pattern.

This chart also indicates that the *Parrish* vote—the 22nd and final case in this subset—was an anomaly. It became part of the very slim minority (9%) of cases that Roberts voted with the liberals on; it could not have been expected by any outsider using this dataset in trying to predict Roberts's vote. All indications here, in studying the closest Supreme Court decisions from 1931-1937, show that Justice Roberts had moved to the right by the time *Parrish* came about. Ho and Quinn's findings support this conclusion, saying, "The late 1934 cases seem to suggest that Roberts may have become more conservative."⁵²

d. Results: Tier Two

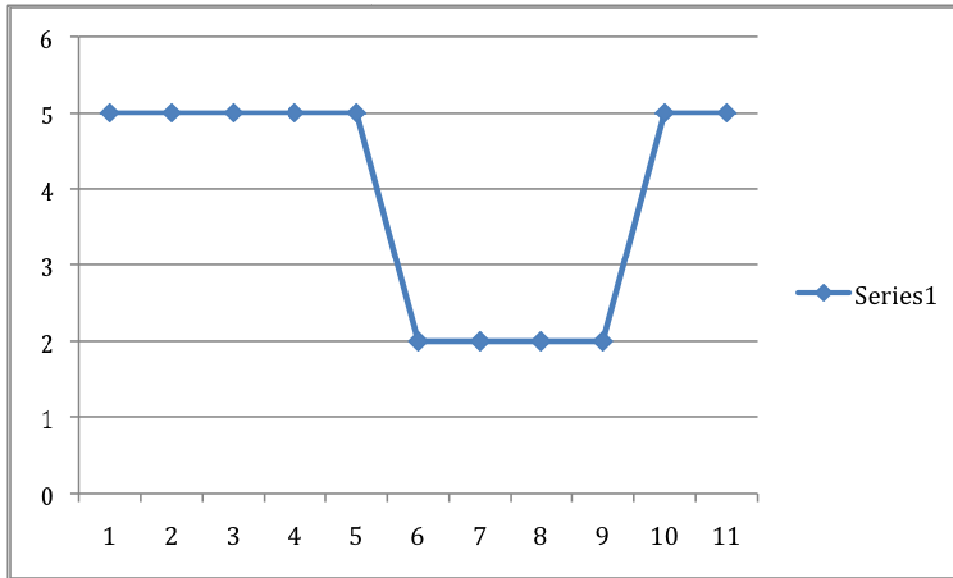
As stated, Tier One stands to tell the most about how Justice Roberts's vote in *Parrish* should be understood. The Tier One cases resemble *Parrish* in nearly every facet.

Tier Two is important, however, in trying to identify a broader trend. Tier Two cases include cases with some contention, as they include any case that was decided 7-2, 8-1, or unanimous but with a concurrence, which indicates that the

⁵² Ho and Quinn, "Did a Switch in Time Save Nine?" pg. 31

support was not completely uniform or on the same constitutional grounds. Tier Two tells us about Roberts, certainly, but it also tells us about the direction of the Court as a whole.

Using the same axis definitions as Tier 1, see chart below:



The Tier Two subset contained eleven cases, the fewest of the three tiers. Yet once, again, one can notice a shift taking place, this time after case five. Case five was 293 U.S. 163, *Hegeman Farms v. Baldwin* (1934), which challenged a New York regulation that placed a minimum price on milk. The Court ruled in favor of the New York statute, yet in Case 6 (*Borden's v. Baldwin*, 1934)⁵³ the Court ruled against New York (and remanded the case for further hearings) in regards to a different statute regulating milk sales. In fact, the Court would continue this line of conservative

⁵³ 293 U.S. 194

ruling in Tier Two cases, which include the striking down of the NIRA⁵⁴, until the 1935 term, when in *Ashwander v. Tennessee Valley Authority*⁵⁵ the Court upheld the federal government's right to dispose of surplus electrical power provided by a private company. Here, however, while the Court made a "unanimous" decision, four justices signed onto a concurrence penned by Justice Cardozo, including Roberts. Not only is the kind of disputed case that would fall through the cracks of Ho and Quinn's model, but it highlights a Court that was, if anything, *cautiously* liberal.

In conclusion, Tier Two highlights how the Court, as a whole, became slightly more conservative from 1934 through *Parrish* on issues that were generally agreed upon, but produced a modicum of disagreement.

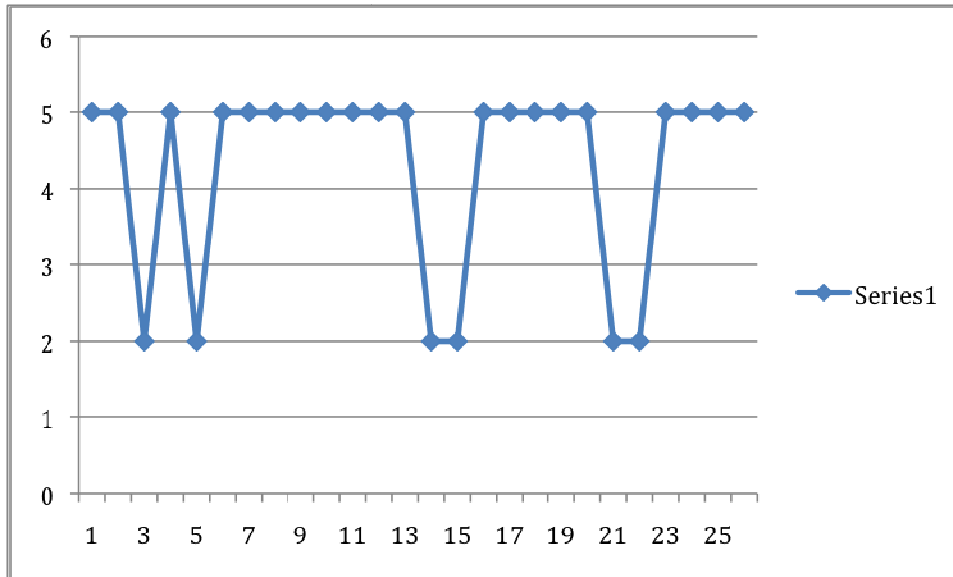
e. Results: Tier Three

Tier Three provides insight into cases completely unaccounted for in the Ho and Quinn dataset. Cases included in the Tier Three subset were decided unanimously, with no concurrence, and they provide an accurate snapshot of the Court's general position on economic, regulatory, and labor matters over time.

The axes uses the same definitions as the Tier One and Tier Two models:

⁵⁴ 295 U.S. 495

⁵⁵ 297 U.S. 288



Tier Three consists of twenty-six cases, and provides for an interesting look into the view of the Court on issues relevant to *Parrish* from 1931-1937. Here, it is readily apparent that the Court generally ruled in favor of the state, over the entire period, on such issues. In fact, the Court trended “liberal” approximately 83% of the time in Tier Three cases from 1931-1935.

However, from 1935 until *Parrish*, the Court ruled in favor of regulations and/or the government only 71% of the time, issuing four conservative rulings in that two-year time span. This reiterates the notion that the Court moved slightly to the right around the 1935 term. However, it should be noted that this model still shows the overall willingness of the Court to side, rather overwhelmingly, with the “liberal” paradigm throughout these years.

f. Conclusion from Dataset

Taken together, this dataset presents a Court that, as a whole, seemed to become slightly more conservative on matters of regulation and labor around late 1934-1935.

Justice Roberts stands as a microcosm of this overall trend. Amazingly, Justice Roberts voted with the majority coalition on 57 out of the 59 cases included here. Subtracting unanimous cases, which clearly distort the percentage, Justice Roberts voted with the majority on 24 out of the 26 non-unanimous cases. Of course, Justice Roberts was considered the “swing” vote on the Court, and that observation shows that this perception was indeed reality.

Moreover, understanding the slightly overall drift of the Court to the conservative side of these regulatory and labor issues makes the marked drift (seen in Tier One) of Justice Roberts more understandable. He was evidently not the only Justice who became slightly more conservative beginning the in 1935 term.

However, Justice Roberts’s drastic shift from a liberal to a conservative jurisprudence gains due attention because of the fact that he was the Court’s predominant swing vote. In 5-4 and 6-3 cases, his vote often decided, or helped to decide, which way the Court would rule. Looking at the Tier One chart, this shift is undeniable. The research done by Ho and Quinn verifies this slight rightward drift prior to the *Parrish* vote. Ho and Quinn also identify that Roberts moved sharply to the left during the 1936 term, when *Parrish* was decided.

What my dataset concludes to any reasonable observer is that Roberts’s vote in *Parrish* could not have been expected or anticipated by even the keenest of Court aficionados. On close cases dealing with issues very relevant to *Parrish*, Justice

Roberts demonstrated a sharp turn to the right beginning in 1935. As Tiers Two and Three show, he was also in line, generally, with the rest of his colleagues on the bench.

However, the fact that the Court moved ever so slightly to the right in the years proceeding *Parrish* makes Roberts's vote even *more* surprising and unexpected. He was bucking a trend that not only he had established, but the Court as a whole had slightly established as well.

For the most part, this more specific, category-driven case dataset confirms the findings of Ho and Quinn, that “unless the cases in the 1936 term [*Parrish*] themselves are sharply different, they cannot be reconciled” with Roberts's prior voting record. As the dataset shows, for all intents and purposes, Justice Roberts's vote in *Parrish* could not have been predicted or anticipated. It was a “switch” in every sense of the word.

IV. Why did a Switch Occur?

Why shouldn't the truth be stranger than fiction? Fiction, after all, has to make sense

~ Mark Twain

Part III of this research sought to clarify whether or not a sudden, unpredictable or unanticipated switch occurred. Given the compiled dataset—which focused primarily on the cases that were most relevant to *Parrish*—the answer seems to be a resounding *yes*. The contemporary and advanced metrics published by Ho and Quinn verify this finding. Justice Roberts seems to have suddenly altered his jurisprudence in *Parrish* and the 1936 term. The “switch in time” long acknowledged by popular history appears true.

The question now turns to the conundrum that has been ardently debated since the day that *Parrish* was announced on March 29th, 1937.

Why the switch?

On this question, two fairly distinguishable camps have emerged with competing hypotheses, the Externalist division and the Internalist division.

i. Literature Overview

a. Externalist Camp

The Externalist camp unites scholars, academics and historians who believe that Justice Roberts's vote in *Parrish* was due to outside political factors. Externalists "argue for the importance of politics," in assessing the so-called "constitutional revolution of 1937."⁵⁶ Most externalists focus on political occurrences such as the 1936 Presidential election, which saw Roosevelt reelected in a landslide, or President Roosevelt's 1937 "court-packing" legislation as the main influence behind *Parrish*.

The external hypothesis is thus slightly varied in regards to *which* political factor was the main contributor to Justice Roberts's *Parrish* vote.

President Roosevelt's Judicial Procedures Reform Bill of 1937, colloquially known as the court-packing plan, is a prominent external event given great weight. Laura Kalman, one of the renowned academics who attributes outside political forces to Roberts's *Parrish* vote, believes that "the Court's anxiety about the possibility that Congress would try to curb it" contributed greatly to the sudden reversal in *Parrish*.⁵⁷

The court-packing hypothesis has been around for many years; in fact, it arguably debuted the day after the *Parrish* decision. "Justice Owen J. Roberts switched from the 'conservative' to the 'liberal' side" wrote Turner Catledge in the

⁵⁶ Kalman, Laura, "The Constitution, the Supreme Court, and the New Deal" *The American Historical Review* Vol. 110 No. 4, 2005, Par. 5

⁵⁷ *Ibid.* Par. 58

next day's *New York Times*.⁵⁸ A few weeks later, Yale Law Professor Abe Fortas exclaimed to a group of labor activists, "Mr. Justice Roberts's theory must be a switch in time serves nine."⁵⁹ The idea of a switch in time that "saved nine," which debuted shortly after *Parrish*, is a blatant reference to the notion that Roberts had succumbed to President Roosevelt's assault on the Court. It was an assault that was led by the "court-packing" bill. This initial reasoning behind Roberts's vote—he had done it to save the Court from FDR—was widespread from the start. Felix Frankfurter, at the time a professor at Harvard Law, summarized this sentiment in a letter to Roberts's colleague, Justice Stone. The *Parrish* vote, according to Frankfurter, was a "somersault," and "'incapable of being attributed to a single factor relevant to the professed judicial process. Everything that he now subscribes to he rejected not only June first last, but as late as October twelfth."⁶⁰ October 12th is a reference to the day that the Court denied a petition to rehear the *Morehead* case, the case where New York's minimum wage law was ruled unconstitutional on June first.

However, the externalist camp focuses equally on the 1936 Presidential election—where FDR soundly defeated Republican candidate Alf Landon—as a factor that greatly influenced the *Parrish* outcome. This hypothesis is most often asserted by Bruce Ackerman, whose book *We the People 2: Transformations* alleges that the 1936 presidential election was the single most determinative factor in the *Parrish* vote. In 1936, Ackerman writes, "the People had embraced the ideal of

⁵⁸ Catledge, Turner, "A 5 to 4 Decision," *The New York Times*, March 30, 1937

⁵⁹ Solomon, *FDR v. The Constitution* pg. 162

⁶⁰ Cushman, "Lost Fidelities," pgs. 95-96

regulated capitalism with their eyes open [...] the Old Court finally began to respond with its switch in time.”⁶¹

The externalist camp, of course, counts among it many other scholars and historians, many of whose arguments will be dissected later on. It has been the most traditional and widely accepted explanation for the “switch in time.” However, contemporary scholars and authors have spawned a contrarian viewpoint that seeks to dispel of the externalist idea.

b. Internalist Camp

The Internalist camp takes issue with the notion that the *Parrish* case was a result of political factors that influenced the Court’s decision. On this note, the Internalist doctrine focuses on differences amongst cases, the changing way in which legislation was drawn (as a result of past Court decisions) and more technical legal matters as causes of *Parrish*. The internalist hypothesis does not generally believe that an outside ulterior motivation pushed Justice Roberts towards the liberal majority in *Parrish*.

The internalist theory gained wider recognition with the release of Barry Cushman’s book, Rethinking the New Deal. In this work, Cushman advocates that *Parrish*, instead of being an anomalistic or surprising outcome, was actually a few years in the making. Cushman points to the 1934 *Nebbia* decision—where Roberts

⁶¹ Ackerman, Bruce, We The People 2: Transformations, Belknap Press 1998, pgs. 380-381

joined the liberal bloc to uphold a New York statute that regulated milk producers—as the true turning point in the Court’s attitude towards the New Deal.⁶²

In fact, the internalist notion can perhaps be traced back to as far as 1945, when Justice Roberts wrote the only explanation of his vote in *Parrish*. However, this explanatory memorandum was not published until 1955, and was released by Felix Frankfurter, who included the memorandum in his piece “Mr. Justice Roberts,” which was written as a tribute upon Roberts’s passing. Frankfurter wrote “Mr. Justice Roberts gave me this memorandum on November 9, 1945, after he had resigned from the bench. He left the occasion for using it to my discretion.”⁶³

The memorandum reads, in part:

“I stated to him [Justice Butler] 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* [...] My proper course would have been to concur specially on the narrow ground I had taken. I did not do so. 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 [...] 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 necessity of facing the soundness of the *Adkins* case.”

Here, Roberts recounts the events preceding *Morehead* and then *Parrish*, and his rationale for voting the way he did in *Parrish*. According to Roberts, the Court had not been asked to overrule the *Adkins* precedent in the initial case (*Morehead*). However, he does say that he should have penned a concurrence to let it be known

⁶² Cushman, Barry, *Rethinking the New Deal*, Oxford University Press: 1998

⁶³ Frankfurter, “Mr. Justice Roberts,” pg. 314

that he did not subscribe to the entirety of Butler's majority opinion in *Morehead*. According to Roberts, the important difference in *Parrish* was that the counsel had asked the Court to reconsider *Adkins*.

This memorandum allegedly from Roberts spawned the notion that perhaps the vote in *Parrish* was not a "switch" as it had seemed. Many internalist proponents, in this spirit, argue litigation strategies, or the wording of the legislation itself, had shifted between *Morehead* and *Parrish*.

However, other internalist theories, such as those focusing on the overall arc of the Supreme Court and its history, have also gained attention. G. Edward White, in his book *The Constitution and the New Deal*, argues this strain of internalist thought. White claims that the Court, when looked at historically, has always been slow to accept changes in constitutional thought. Using the child labor cases as an example, White argues that the Court has always been slow to respond to gradual evolving notions of constitutional authority, and that the "switch in time" was nothing more than a final stand by a Supreme Court that had once again been slow to change gears.⁶⁴ This internalist theory does not depend at all on the Roberts memorandum, yet still emphasizes the institution of the Court as the main reason why *Parrish* occurred.

ii. A Grand Unifying Theory

Any complete theory that attempts to explain the motivation behind Justice Roberts's *Parrish* vote should provide a thorough portrait of Justice Roberts in not

⁶⁴ White, G. Edward, *The Constitution and the New Deal*, Harvard University Press: 2000

only 1937, but the years preceding it. As the dataset shows, Roberts not only tacked leftward in 1937, but also tacked *rightward* in the 1934 term. The dataset also shows, quite clearly, that Roberts initially started out as a fairly liberal-leaning justice, siding with the Brandeis-Stone-Cardozo bloc on a majority of occasions from the 1931 through 1933 terms.

Drew Pearson and Robert Allen published a book in 1936 entitled The Nine Old Men which supports the latter assertion. On Roberts, they write that in “his first two years on the Court [...] he voted with the liberals on every important case.”⁶⁵

Additionally, as the dataset shows, Roberts shifted drastically rightward around the 1934 term, especially in cases that were decided by 5-4 or 6-3 margins. This finding is supported by mounds of qualitative works. Barry Cushman, in an essay for the *Virginia Law Review* entitled “Lost Fidelities,” advocates that Roberts’s vote in *Parrish* was not a sudden switch of any sort. However, he does recognize that Roberts underwent a conservative transformation a few years earlier, in 1934-1936. “We find that there were cases decided between 1934 and 1937 in which [...] Roberts joined opinions invalidating statutory provisions [...] implicated in *Nebbia*. It is therefore entirely appropriate to suggest that [cases within these years] might require somewhat more explanation.”⁶⁶ Here, Cushman admits to the somewhat befuddling jurisprudence of Roberts, specifically his pronounced conservative transition in mid 1930’s. Louis Pollak, in a piece for the *University of Pennsylvania Law Review*, noted how Roberts “quickly aligned himself with Brandeis and Stone [...] the three liberal Justices.” However, in 1935, “judicial tide began to turn against

⁶⁵ Allen, Robert & Pearson, Drew, The Nine Old Men, Doubleday, Doran and Co, 1936. pg. 160

⁶⁶ Cushman, “Lost Fidelities,” pg. 129

the New Deal,” primarily, as Pollak notes, due to Roberts’s shifting stance.⁶⁷ Burt Solomon stated rather abruptly, “He [Roberts] had indeed switched—not once, but twice, first when he abandoned [...] *Nebbia* [...] then again [...] on the minimum wage.”⁶⁸

As can be seen, the ebb and flow of Roberts’s career on the Court seesawed from liberal, to conservative, to liberal in *Parrish* and the 1937 term. The basis for this study is to understand the reasoning behind Justice Roberts’s vote in *Parrish*. Hence, in order to construct a more verifiable picture, the most accurate explanation should also clarify the reasons underpinning Justice Roberts’s conservative shift a few years before *Parrish*. If Justice Roberts does not move to the conservative wing of the Court in 1934-1936, then the *Parrish* vote would have raised few eyebrows. This time period cannot be ignored; it appears that the “switch in time that saved nine” is inextricably tied to Justice Roberts’s conservative movement two years prior. The dataset shows that the conservative trend was too pronounced for it to be ignored.

Thus, the need to explain the dataset—encompassing Roberts’s conservative shift in 1934 and his leftward shift in *Parrish*— leads to a primary argument that is often overlooked within the “switch in time” debates. It seems duly plausible, perhaps likely, that Justice Roberts strongly considered running for President of the United States in 1936, on the Republican ticket, where he would have opposed the incumbent, Franklin Delano Roosevelt. It is an explanation that, besides being

⁶⁷ Pollak, Louis, “Philadelphia Lawyer: A Cautionary Tale,” *The University of Pennsylvania Law Review* Vol. 145 No. 3, January 1997, pg. 501

⁶⁸ Solomon, *FDR v. The Constitution* pg. 210

supported by original research conducted herein, satisfies the entirety of the dataset's findings.

iii. President Owen Roberts?

a. Context

Roberts's rightward shift is first identified in 294 U.S. 500, *Stewart Dry Goods v. Lewis* (1935), where a 6-3 Court struck down a Kentucky gross sales tax that levied different rates on different volumes of business.

A few months before this decision was announced, the Democratic Party had—in the context of history—a rare midterm electoral victory. Traditionally, midterm elections trend against the President, yet in 1934, the Democratic Party gained nine seats in both the House of Representatives and Senate. In the Senate, they controlled 69 seats and in the House 322 seats, both overwhelming majorities that have scant precedent in the annals of American history.

However, despite Roosevelt's reassuring midterm victories, unrest was alive, if not growing, in the United States. On the right, especially, a growing frustration with President Roosevelt, coupled with the public's 1934 reaffirmation of the Democratic Party, forced party leaders and activists to reconsider their approach to unseating Roosevelt in the upcoming 1936 Presidential election.

One particular organization that arose after the 1934 elections was the American Liberty League. However, what separated the American Liberty League from other organizations, and contributed to its rise, was its recruitment of high profile political figures from *both* political parties. In fact, the four founding

directors of the American Liberty League were Al Smith, Democratic candidate for President 1928, John W. Davis, the Democratic nominee for President in 1924, James Wadsworth, former Republican Senator from New York, and Nathan Miller, the former Republican Governor of New York. Also instrumental in the Liberty League's creation were Irenee duPont, wealthy heir to the DuPont estate, and John Raskob, former chairman of the Democratic National Committee.⁶⁹ After formally announcing the creation of the American Liberty League in late August of 1934, *The New York Times* announced on page one that "the "League is Formed to Scan New Deal, Protect Rights."⁷⁰ Over the next two years, the Liberty League would become the foremost conservative organization in the country, with the explicit goal of defeating President Roosevelt in the 1936 election. As the Liberty League repeatedly stated, "If the League has taken issue with the New Deal, it is only because the New Deal has taken issue with the Constitution."⁷¹

The Liberty League was not a coalition of grassroots activists and local organizers. Rather, it was a movement fueled by the wealthy, many of whom felt threatened by Roosevelt's economic politics. As *The New York Times* noted, "The financial community sees in this movement a new force for conservatism."⁷²

Moreover, although the fusion of former Democratic candidates for President with a predominantly conservative cause seemed odd to many—*Time* magazine dubbed the League "a strange political nosegay"—George Wolfskill, who documented the history of the American Liberty League in *Revolt of the*

⁶⁹ Wolfskill, George *The Revolt of Conservatives*, Houghton Mifflin Co. 1962, pg. 25

⁷⁰ *Ibid.* pgs. 19-21

⁷¹ *Ibid.* pg. 111

⁷² *Ibid.* pg. 29

Conservatives, rightfully noted that “there was nothing strange at all about the association of these men in the Liberty League [...] the realignment was taking place and the President was forced to a choice [...] many of [the Liberty League] felt that it implied an attack on the bedrock principles of the Republic. Others had a mutual dislike [...] of Roosevelt. The forces were sufficient to draw them together.”⁷³

The American Liberty League was first connected to Owen Roberts by Fred Rodell, in his 1955 book, Nine Men. Here, Rodell stated, “to exalt the Court for saving the Republic [...] the Liberty League had sprouted fast and made many a headline.” He goes on to assert that the League was quite interested in drafting Justice Roberts to seek the Republican nomination for President on the League’s anti-New Deal platform. Roberts was, according to Rodell, by “no means unaware of popular interest in the Court, and its members,” in running for President.⁷⁴

Rodell’s assertions are unreferenced; as a result, little consideration has been given to the idea that Justice Roberts seriously weighed a presidential candidacy in 1936. However, a closer look into the matter reveals tantalizing and original evidence that Rodell, a Yale Law professor for over forty years, was not making an unfounded claim.

b. Roberts Tacks Conservatively

Although Roberts had begun trending definitively rightward on the Court during the 1934 term, it was not until May 6th 1935 that the country would take notice as a whole. In *Railroad Retirement Board v. Alton*, Roberts provided the

⁷³ *Ibid.* pg. 36

⁷⁴ Rodell, Fred, Nine Men, Random House, 1955 pgs. 240-241

deciding vote in a 5-4 decision that ruled the federal Railroad Retirement Act was unconstitutional.⁷⁵ The ruling also notably declared that the railroad's pension retirement system was unconstitutional.

Not only did Roberts provide the deciding vote, but he wrote the majority decision as well. It was an opinion that was vehemently anti New Deal, and espoused a strong laissez-faire philosophy that outraged the left. In an editorial published by *The Nation*, Roberts's opinion was denounced as having "a complete lack of common sense," and was "a curious document." Across the country, much of the outrage had more to do with the opinion written by Roberts than with the outcome of the case itself.⁷⁶

The Liberty League, however, stood steadfastly by Justice Roberts and the ruling. The League asserted that the Railroad Retirement Act and other New Deal measures enacted in 1935 were "irresponsible deeds of a vindictive executive lusting for power." In fact, after the decision in *Alton*, Wolfskill noted that the Republicans, buoyed by the activist Liberty League, "were showing signs of rejuvenation."⁷⁷

As our dataset shows, the *Alton* vote was not an outlier; Justice Roberts continued to vote with conservatives on similarly controversial New Deal measures as the 1934 and 1935 terms transpired. William Leuchtenberg, a scholar of the period, states in his book Supreme Court Reborn that "Roberts had started out as a liberal with an affection for [Justice] Stone," until "he switched." The nation's capitol,

⁷⁵ 295 U.S. 330

⁷⁶ Leuchtenberg, William, Supreme Court Reborn, Oxford University Press: 1995, pgs. 45-46

⁷⁷ Wolfskill, Revolt of the Conservatives, pgs. 165-166

Leuchtenburg posits, began to speculate about what had cause Roberts to suddenly “shift allegiances.”⁷⁸

The Supreme Court finished the 1934 term on a conservative bang. On May 27th, 1935—colloquially known as “Black Monday,”—the Court *unanimously* struck down three Roosevelt policies, including the National Industrial Recovery Act in *Schechter Poultry Corp. v. U.S.* The Wall Street Journal declared that the “Constitution had survived the New Deal.”⁷⁹

President Roosevelt was so distraught about the result, especially the unanimity of the decisions, that he considered proposing an amendment to the Constitution that would allow Congress to regulate wages, hours, and labor conditions, among others. However, the Liberty League’s influence was so immense at the time that Roosevelt was too nervous of the potential political backlash to propose such measures. Felix Frankfurter, in a letter to President Roosevelt on May 29th, 1935, wrote “on the issue of the Supreme Court v. the President [...] a general attack on the Court ... would give opponents a chance to play on vague fears [...] and upon the traditionalist loyalties the Supreme Court is still able to inspire.”⁸⁰ The Liberty League had become a threatening force in American politics.

Justice Roberts’s decisive vote in *Alton* had won him praise and recognition from the Liberty League and other detractors of the New Deal. They took notice, and began to mount a campaign to persuade Roberts to run for President.

⁷⁸ Leuchtenberg, *Supreme Court Reborn* pg. 43

⁷⁹ Sheshol, *Supreme Power* pg. 138

⁸⁰ *Ibid.* pgs. 145-146

In June of 1935, only a month after *Alton*, the town of Macon, Georgia hosted a Grass Roots Convention where speakers and attendees sought to “counteract the appearance in government of the theories [...] which are alien to America.” Wolfskill stated that “there was much in the Macon meeting to appeal to the Liberty League.” The convention espoused “basic views of the League’s philosophy.”⁸¹

However, there were more than just rhetorical similarities between the Grass Roots Convention and the Liberty League organization. In fact, much of the convention in Macon was paid for by the very same financiers of the Liberty League. Pierre DuPont, whose family contributed publicly and heavily to the Liberty League, donated \$5,000 to the Grass Roots convention. Raskob, a founding member, donated \$5,000 dollars to the convention as well. In fact, both Raskob and DuPont would state that “they believed in the principles” of the Grass Roots Convention.⁸²

It seems likely that the Liberty League, with its eye on the 1936 Presidential election, did not go further in supporting this convention because of its overtly racist nature. At the conference, there were “obvious appeals to racial and religious bigotry,” which would have sounded a death knell for the Liberty League if they had chosen to publicly support the convention.⁸³

Yet, there is no doubt, by DuPont and Raskob’s own admission, that much of the Grass Roots convention’s stance on the New Deal paralleled that of the Liberty League. In writing about the Grass Roots conference on June 13th, 1935 for the *New York Herald Tribune*, a Republican paper that would cover such an event, Theodore

⁸¹ Wolfskill, *Revolt of the Conservatives* pgs. 175-176

⁸² *Ibid.* pg. 177

⁸³ *Ibid.* pg. 176

Wallen stated that the convention “set the stage for the nomination of a strict constructionist of the Constitution, thus virtually eliminating Associate Justice Harlan F. Stone of the Supreme Court, while leaving Associate Justice Owen J. Roberts in a preferred position.”⁸⁴

Justice Stone, of course, had dissatisfied conservatives and Republicans alike by consistently voting with the more liberal bloc of the Court on the most contentious issues of the time. At the time, along with Justices Brandeis and Cardozo, Justice Stone consistently voted to uphold economic regulations, labor rights, and other New Deal prerogatives. In fact, he voted with Brandeis and Cardozo so often that the threesome became known as the “Three Musketeers.”

Walter Lippmann, a widely heralded American journalist, took notice of Theodore Wallen’s piece in the *New York Herald Tribune*. He wrote that “Mr. Wallen is an accurate correspondent, and his report faithfully reflects the fact that there is considerable interest in the idea of going to the Supreme Court for the Republican candidate in 1936 [...] Justice Roberts, having decided against the New Deal measures, is to run as savior of the Constitution.”⁸⁵ He would go on to write that the idea of Justice Roberts running as the Republican nominee in 1936 “is seriously considered.” If he hadn’t already, “Mr. Justice Roberts will be compelled to take notice.”⁸⁶

After the Court recessed for the summer, the Liberty League continued to campaign against Roosevelt, and the prospects of a Roberts presidency continued to

⁸⁴ Lippmann, Walter “Today and Tomorrow,” *The Hartford Courant*, June 13, 1935

⁸⁵ Lippmann, Walter, *Interpretations*, Norwood Press, 1936 pg. 278

⁸⁶ *Ibid.* pg. 279

swell with only one year until the nominating conventions. On May 26th, 1935, famed political strategist Arthur Krock of the NY Times detailed how the 1936 Republican strategy “1(a)” was to nominate a “liberal conservative such as Justice Roberts [...] All but partisan Democrats, New Dealers and radicals will rally to the standard.”⁸⁷

The Hartford-Courant ran a piece during the summer of 1935 as well, detailing the cream of the crop Republican candidates, which they called the “Group A” of potential nominees. Roberts was included within the vaulted threesome. “Group A consists of three men who by experience and standing would [...] occupy a stratum above the others,” Mark Sullivan wrote.⁸⁸ On August 5th, 1935, the *Chicago Daily Tribune* published a piece that quoted Robert Lucas, former Director of the Republican National Committee, as suggesting Justice Roberts was being looked at as a potential nominee, given that “Roberts [...] would make a logical Republican nominee, in a contest in which the constitution is likely to be the paramount issue.”⁸⁹

As the Court commenced the 1935 term in October, Justice Roberts continued to vote conservatively on major cases, fueling speculation of a presidential bid. In *U.S. v Butler* (1936), Justice Roberts again voted with the Four Horsemen to strike down a prized Roosevelt New Deal measure, the Agricultural

⁸⁷ Krock, Arthur, Untitled, *The New York Times* May 26th, 1935

⁸⁸ Sullivan, Mark, “Hoover, Stone, Roberts, Possible GOP Candidates” *The Hartford-Courant*, May 26th, 1935

⁸⁹ Henning, Arthur Sears, “GOP President After 1936 Seen as Possibility,” *The Chicago Daily Tribune*, August 5th, 1935

Adjustment Act. And once again, most tellingly, Justice Roberts also penned the opinion for the majority.⁹⁰

Ruling that the AAA was simply a “means to an unconstitutional end,”⁹¹ Roberts’s opinion in *Butler* sparked a similar outrage as *Alton* had. Roberts’s fellow colleague, Justice Harlan Stone, wrote his sons “I doubt if any action of the Supreme Court has stirred the country so deeply since the Dred Scott decision.”⁹²

Burt Solomon, author of FDR v. The Constitution surmised that Roberts’s opinion in *Butler*—not specifically the ruling of the Court—“sparked outrage all over the country.” Roscoe Pound, dean of Harvard Law School, “derided” Roberts’s “simplistic” jurisprudence that was akin to a “slot machine theory of judicial review.”⁹³ The *Harvard Law Review* mocked the *Butler* opinion as taking a “novel approach” to the constitution, while Roberts’s own alma mater, the *University of Pennsylvania Law Review*, took the opinion to task for “purporting to adopt a liberal construction of the federal government’s taxing power,” while it “has in effect, created merely an indefinite limitation on the exercise of this power, the extent of which is known only to the Court itself.”⁹⁴

Despite howls about Justice Roberts’s jurisprudence in *Butler*—it’s “House-that-Jack-Built reasoning, as Justice Stone privately put it⁹⁵— the decision won great support from conservatives, and especially the American Liberty League. Liberty League leader Al Smith gave a speech a week after the *Butler* decision that was

⁹⁰ 297 U.S. 1

⁹¹ Solomon, FDR v. The Constitution pg. 77

⁹² *Ibid.* pg. 81

⁹³ *Ibid* pg. 80

⁹⁴ *Ibid* pg. 78

⁹⁵ *Ibid.* pg. 79

described as a “climax.” Wolkskill wrote, “Liberty League leaders would look back to their high adventure in January [1936].”⁹⁶ A few weeks later, Liberty League leader Jouett Shouse would exclaim “Roosevelt faces almost certain defeat in November.”⁹⁷ Justice Roberts had once again provided the deciding vote in a watershed New Deal case. The Liberty League, whose entire existence was predicated on the unconstitutionality of the New Deal, had a figure of the highest constitutional authority in their corner. Senator John Bankhead of Alabama called the Roberts opinion in *Butler* “a political stump speech.”⁹⁸

The harmony between Roberts’s interpretation of the constitution and the Liberty League’s continued. From January 1936 through the end of the Court’s term in June, the Supreme Court and Justice Roberts continued to strike down New Deal measures, such as the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.*⁹⁹ *Carter Coal* was another high profile case involving New Deal legislation, but Justice Roberts also joined with the Four Horsemen prior to *Carter Coal* on a spate of other cases that garnered less attention yet continued his string of conservative positions on economic regulation and labor issues.¹⁰⁰

As the 1935 term progressed, a variety of primary sources support the assertion that Justice Roberts was still under strong consideration for the Presidential nomination. Given the Liberty League’s growing influence and Roberts’s continued unabashed conservatism, it seemed only logical. On March 13th,

⁹⁶Wolkskill, *Revolt of the Conservatives* pg. 168

⁹⁷ *Ibid.* pg. 169

⁹⁸ Simon, James F., *FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle over the New Deal*, New York: Simon & Schuster, 2012 pg. 282

⁹⁹298 U.S. 238

¹⁰⁰ See 297 U.S. 135; 297 U.S. 266; 298 U.S. 1

1936, *The Evening Independent* of St. Petersburg, Florida, published an article exploring the possibility that Kansas Governor Alf Landon would become the Republican nominee for President later that year. However, the news piece made sure to state that “some of the influential GOP politicians still [...] express a feeling that a stronger and more perfect candidate [...] is somewhere in the offing. They don’t mean Knox, Dickinson, or Vandenberg—whose last speech aroused no enthusiasm [...] [they] mean Justice Owen J. Roberts of the Supreme Court.”¹⁰¹

In May 1936, *Fortune* magazine ran a profile on Justice Roberts. In the piece, the author stated that because the Constitution was primed to be a major issue in the 1936 Presidential election, there was “considerable talk” of Roberts as a “viable” candidate.¹⁰² On May 3rd, 1936, *The New York Times*, in a preview of the potential GOP candidates, asserted “It [GOP] might offer the crown [...] to Supreme Court Justice Owen J. Roberts.”¹⁰³ Later that month, the *Times* reported that Roberts was set to receive a “favorable son” designation by the Pennsylvania delegation at the Republican nominating convention in June.¹⁰⁴

Talk of Roberts being nominated for President in the first half of 1936 could come as no surprise to anyone, as Walter Lippmann, Arthur Krock, and others had identified his potential candidacy as early as the middle of 1935. Not only had various outlets explicitly mentioned Justice Roberts as a potential nominee, but Roberts’s was hailed in some quarters as a “perfect” candidate—a “Group A” nominee. That his name continued to be invoked with regards to the Presidency

¹⁰¹ Dutcher, Rodney, “Sits Borah to be Runner Up,” *The Evening Independent*, March 13th, 1936

¹⁰² Geldreich, “Justice Owen Roberts’s Revolution of 1937,” pg. 23

¹⁰³ Clark, Delbert, “Which of These Will the Lightning Hit?” *The New York Times* May 3rd, 1936

¹⁰⁴ Gelbright, “Justice Owen Roberts’s Revolution of 1937,” pg. 23

attests to his conservative opinions in *Alton, Butler*, and other cases which endeared him to the Republican base and the Liberty League, keeping his name in the fold.

Pearson and Allen, in *Nine Old Men*, reflect this overriding sentiment. In the chapter on Justice Roberts, they write “before his AAA [*Butler*] decision [...] he went through one of the most troubled [...] periods of his life. His trouble was a disease which affects many prominent men in an election year- *presidentitis*.” There were many favorable qualities that Justice Roberts brought to the table, Pearson and Allen note. He was a “candidate with prestige and popularity [...] [and had] the aura of liberalism surrounding his early decisions.” Moreover, Roberts hailed from Pennsylvania, a state which “commands the second largest vote in the electoral college.”¹⁰⁵The authors concluded with the bit by saying, “Roberts considered the possibilities most seriously.”¹⁰⁶

Clearly, Justice Roberts was mentioned often and seriously as a contender for the Republican nomination. His voting record aligns with someone who tried to placate a conservative Republican base, led by the Liberty League, with consistent anti New Deal rulings that ran counter to his prior record. This much is clear. Leonard Baker, author of *Back to Back: The Dueling Presidency*, agrees with this premise supported by my original dataset and qualitative research:

It was a suggestion encouraged by Roberts’s friends and members of his family. It was during this time that his philosophy, as expressed in Court opinion and votes, see-sawed from liberal to the conservative side. Finally, as

¹⁰⁵ Allen and Pearson, *Nine Old Men*, pg. 161

¹⁰⁶ *Ibid.* pg. 161

the political suggestions grew louder, his philosophy became more in line with what was considered the philosophy of the Republican Party.¹⁰⁷

iv. Associations Between Roberts and the Liberty League

However, previous mentions of a potential Roberts candidacy—by Baker, Pearson, and Rodell, among others—fail to establish any evidence beyond conjecture in the press, and quotes from Roberts’s family and friends who chose to remain anonymous.

However, as stated above, it is a theory that, if accurate, would explain more of Roberts’s voting record than any “externalist” theory to date. It would clarify not only Roberts’s vote in *Parrish*—made after Roosevelt was reelected, and long after his potential candidacy was extinguished—but also his rightward jurisprudential shift in 1935 and 1936, which made *Parrish* so surprising in the first place.

Looking at the situation through a general historical lens, the narrative advanced by Lippmann, Wallen, and others makes a great deal of sense. The American Liberty League was founded as a principally anti-New Deal group. Given that Justice Roberts was the face of constitutional opposition to the New Deal, it seems perfectly reasonable that he would be the Liberty League’s preferred candidate. He was most directly involved, even on the front lines, in the battle against the New Deal, and demonstrated a growing propensity for striking down New Deal measure after New Deal measure, a philosophy that meshed seamlessly with the Liberty League’s.

¹⁰⁷ Baker, Leonard, *Back to Back: The Dueling Presidency* pgs. 123-124

No connection beyond these sources and parallels between the Liberty League and Roberts has previously been established. However, this paper will introduce originally compiled research that, as a whole, sheds an entirely credible light upon the notion that Roberts eyed a potential candidacy fueled by the Liberty League's anti-New Deal platform.

a. The American Law Institute

On August 25th, 1935, about two months after Wallen had stated that Justice Roberts was being mentioned at various Liberty League-related events as a possible national candidate, *The New York Times* published an article, entitled "Bar Group Studies Constitutionality of New Deal Acts," which reported that the American Liberty League had convened a committee of 50 prominent national lawyers to "study the constitutionality of New Deal legislation," and make an initial report by September.

This committee was branded, in the sub-heading of *The New York Times* piece, as being composed of "lawyers of different political faiths." In the article itself, *The Times* stated that the lawyers were "serving without pay;" moreover, the committee would be conducted in a "strictly professional nature."¹⁰⁸

The implication that the committee would be independent and open-minded was a misleading one. As Wolfskill notes, "at least a dozen members of the committee held some important post in the League," and perhaps most shockingly, the American Liberty League *did* fund the commission. Liberty League leader Jouett

¹⁰⁸ "Bar Group Studies Constitutionality of New Deal Acts," *The New York Times*, August 22, 1935

Shouse appropriated \$25,000 to the Chairman of the commission, Raoul Desvernine, for “such purpose as the Chairman of the Lawyer’s National Committee [Desvernine] shall authorize and approve of.”¹⁰⁹The study was certainly far from independent. To this point, President Roosevelt’s Secretary of the Interior, Harold Ickes, sarcastically commented that the committee was “Chief Justice Jouett Shouse [President of the Liberty League] and his fifty-seven varieties of associate justices.”¹¹⁰

The list of the participating lawyers that was published by *The New York Times* provided a reference point by which to research any potential associations between Roberts and the participants of the committee. In fact, Justice Roberts had a close association with two of the people on the list—*via the same organization*.

In 1927, the American Law Institute published a speech in the *Michigan Law Review* that was read at the “Annual Meeting of the Michigan State Bar Association.” The American Law Institute was describing a goal of the organization, which was to “make a statement of the common law, in its various branches.” The speech went on to describe how the Institute functioned, describing how the “governing body of the Institute is a Council of thirty-two members, and an executive committee of that council.” The speech then mentioned five lawyers who composed this executive “Council;” three being Owen Roberts, George W. Wickersham, and John W. Davis.¹¹¹ The latter two are lawyers who would later become members of the Liberty League’s National Lawyer Committee, and were listed in *The New York Times* as well as in Wolfskill’s account of the League.

¹⁰⁹ Wolfskill, *Revolt of the Conservatives* pg. 72

¹¹⁰ *Ibid.* pg. 73

¹¹¹ Goodrich, Herbert F., “The Institute’s Restatement and Michigan Law,” *Michigan Law Review* Vol. 26 No. 2 Dec. 1927 pg. 153

However, not only were Davis and Wickersham members of the sham “independent” council created and funded by the Liberty League, but they were also leaders of the League itself. John W. Davis, as previously mentioned, was a founder of the American Liberty League and regarded as one of “the big names of the League.”¹¹²

George W. Wickersham was a public leader of the American Liberty League as well. In 1935, the Gridiron Club performed a widely heralded mockery of the Liberty League, dressing in costume as only nine “Liberty Leaguers, Jouett Shouse, John W. Davis [...] George Wickersham.”¹¹³ Both Davis and Wickersham were not only members of the Lawyer’s committee founded to investigate the constitutionality of the New Deal, but became prominent faces of the movement.

They were also associates of the future Justice Roberts while serving together on the board of the American Law Institute. According to the American Law Institute’s archives Wickersham was actually President of the organization from 1923 through 1936.¹¹⁴ George Wharton Pepper, Roberts’s mentor since his law school days, co-founded the Institute and later served as its President. Wharton Pepper, as will be discussed, was a supporter of the American Liberty League as well.¹¹⁵

¹¹² Wolfskill, *Revolt of the Conservatives* pg. 79

¹¹³ *Ibid.* pg. 119

¹¹⁴ “Officers 1923-2010,” *American Law Institute* [<http://www.ali.org/doc/officers.pdf>]

¹¹⁵ University of Pennsylvania Law School Archives, “Biddleblog,” 3/24/2010

b. Roberts and J.P. Morgan

Davis had a long and noteworthy relationship with Roberts that extended far beyond the executive council of the American Law Institute. In 1921, Davis left his post as Ambassador to Great Britain to found and head the Davis, Polk, and Wardwell law firm. One of his firm's major clients was J.P. Morgan; in fact, the firm considered Davis its chief counsel.¹¹⁶ Roberts, like Davis, was also heavily involved with J.P. Morgan. In fact, when the Banking Investigation committee analyzed the finances of the J.P. Morgan Co. during an investigation in 1933, it found that Roberts himself had been on a preferred stock purchase list which was the focus of the investigation. Essentially, Roberts had bought stock of J.P. Morgan "well below the market quotation."¹¹⁷ This finding was one that would cause Roberts embarrassment years later when it became public knowledge while he served on the Supreme Court.

The list of preferred stock recipients, published by *The New York Times* during the Senate investigation of the affair, is revealing. On the list, aside from Roberts and Davis, are George Wharton Pepper and John Raskob, co-founder and prominent member of the Liberty League.¹¹⁸

The reason Roberts was so cozy with J.P. Morgan, and able to purchase such discounted stock was due to his many connections to the firm. His "old friend,"¹¹⁹ Sydney E. Hutchinson, was the son-in-law of E.T. Stotesbury, a partner in the J.P. Morgan Company. Hutchinson was so close to Roberts that Pearson and Allen

¹¹⁶ Archer, Jules, *The Plot to Seize the White House*, 1973, pg. 5

¹¹⁷ Allen and Pearson, *The Nine Old Men*, pg. 148

¹¹⁸ "List of Favored In Allegheny Issue," *The New York Times*, May 25, 1933

¹¹⁹ Allen and Pearson, *The Nine Old Men* pg. 148

identified him as making “highly important contributions to his business and political advancement.”¹²⁰ Stotesbury, unsurprisingly, was issued the preferred stock as well.

Furthermore, Roberts had other personal connection to J.P. Morgan. Another one of Roberts’s closest friends who would make “highly important contributions to his business and political advancement” was Thomas Sovereign Gates, President of the University of Pennsylvania and a former partner of Drexel and Co. and J.P. Morgan. In fact, Gates and Roberts would become closer—they *married a pair of sisters*, the Rogers sisters who hailed from Connecticut. Eventually, Thomas Gates would jump back to an “important position” with Drexel and J.P. Morgan, and stayed with the two companies until his retirement in 1930—the year after the infamous stock purchase, which Gates participated in as well.¹²¹

Roberts also had professional involvement with J.P. Morgan. His law firm, which he founded in 1912 with two other partners, served Drexel and Company as one of its main clients. Drexel and Co. is described by Burt Solomon as an “affiliate” of J.P. Morgan¹²², and Roberts counted Drexel and Co. as a major client until he resigned from the firm in 1930 upon his appointment to the Court. During this time, Davis continued to serve as the chief counsel for J.P. Morgan, including in 1929 when the firm sold Roberts the illegal stock. Stotesbury— the father-in law of

¹²⁰ *Ibid.* pg. 146

¹²¹ *Ibid.* pg. 147

¹²² Solomon, FDR v. The Constitution pg. 57

Sydney Hutchinson, Roberts’s dear friend—was described as the “head of Drexel and Company” in 1933.¹²³

J.P. Morgan was a hotbed for the American Liberty League. Besides John W. Davis, a known leader within the organization, Stotesbury was identified by Wolfskill as a member of the Liberty League. In fact, Stotesbury was a prominent financial supporter of a group called the Sentinels of the Republic. The group was considered a sub-organization of the Liberty League, “one of the interlocking branches of the Liberty League.”

Besides Stotesbury, prominent financiers of the Sentinels included *George Wharton Pepper*.¹²⁴ Pepper was not only a financier but also a leader of the Sentinels; on October 18th, 1935, he delivered the keynote address at the official Sentinels of the Republic conference.¹²⁵ Wharton Pepper is a key figure in the puzzle. He was described as having a “hatred of Roosevelt and the New Deal,” and had a “core of bitterness” towards the President.¹²⁶ This was the man who not only mentored Roberts since law school, but provided for his entry into politics by recommending him to head President Coolidge’s Teapot Dome investigatory team.

Thus, Roberts’s association with John W. Davis extends far beyond being board members of the American Law Institute. Roberts was one of the select few invited to purchase discounted J.P. Morgan stock, an invitation that doesn’t seem surprising given his powerful associations within the firm: John W. Davis, its chief

¹²³ Baltzell, Digby, *Philadelphia Gentleman*, The Free Press: 1958 pg. 187

¹²⁴ Wolfskill, *Revolt of the Conservatives* pgs. 232-233

¹²⁵ A Guide to George Wharton Pepper, *University Archives*, Box 11 FF 47

¹²⁶ Burt, Nathaniel, *The Perennial Philadelphians: the Anatomy of an American Aristocracy*. Boston: Little, Brown, 1963, pg. 138

counsel, close lifelong friend Sydney Hutchinson, the son-in law of J.P. Morgan partner (and Drexel and Co. “head”) Edward T. Stotesbury, and his brother-in-law Thomas Gates, another J.P. Morgan executive.

Only a few years after the stock issuance, it would be the leaders of this very institution—John W. Davis, politically, and Edward Stotesbury, financially—who would become vital mainstays of the American Liberty League. Roberts’s mentor George Wharton Pepper was also involved in the League’s causes. Would these same actors, Stotesbury, Wharton Pepper, Gates, Hutchinson and Davis—who had previously enriched themselves with J.P. Morgan stock—be morally immune from trying to draft close and accomplished friend Owen J. Roberts into a race against Roosevelt a few years later, at the behest of an organization, the Liberty League, which they led and funded?

c. Roberts and the Wideners

A dissection of other associations in Roberts’s past ties him to the Liberty League even further. In 1904, still only a few years out of the University of Pennsylvania Law School, Roberts accepted a job as an attorney for the Philadelphia Rapid Transit Company. He worked for Charles Leaming, the chief counsel for P.R.T., and became one of “Leaming’s ablest assistants [...] He was worth every cent that P.R.T. paid him.”¹²⁷ The Philadelphia Rapid Transit Co. was a mega-corporation in its day, and was principally founded and financed by two “old money” estates: The Wideners and the Elkinses.

¹²⁷ Allen and Pearson, *The Nine Old Men* pg. 146

The American Taxpayer's League was another one of the smaller, single-issue groups that fell under the American Liberty League's increasingly expanding umbrella. The American Taxpayer League, which predated the Liberty League by two decades, was run by "veteran conservative" James A. Arnold. A Congressional investigation into the American Taxpayer League found that Arnold had raised "nearly a million dollars," almost exclusively from "a small group of utility and industrial concerns, prominent in them [...] the P.A.B. Widener estate."¹²⁸ In 1935, Arnold raised nearly \$45,000 from a small group of donors that included Irene DuPont and "other DuPont's," who were the most notorious financiers of the American Liberty League and its affiliates. In fact, the American Taxpayer's League received free press and radio time from William Randolph Hearst's New York radio station, WINS, and the National Broadcasting Co. facilities.¹²⁹ Hearst himself was an expressed supporter of the Liberty League and supported a 3rd party candidacy on a "constitutional" platform for the 1936 election.¹³⁰

The P.A.B. Widener estate, and all of its subsidiary companies, was principally run by Joseph E. Widener, who as an individual was a prominent and direct contributor to the Liberty League as well. In 1935, *The New York Times* reported that Widener had donated \$10,000 dollars to the Liberty League¹³¹; the following year, he donated \$10,000 more. These figures match the donations of John Raskob, leader of the League, and Alfred P. Sloan, the CEO of General Motors

¹²⁸ Wolfskill, *Revolt of the Conservatives* pg. 234

¹²⁹ *Ibid.* pg. 235

¹³⁰ *Ibid.* pg 191

¹³¹ "3 Political Groups Expended Millions," *The New York Times*, January 3, 1936

who, along with the DuPont's, was a principal financier of the American Liberty League.¹³²

The American Taxpayer League, funded in large part by the Wideners, was a principal subsidiary of the American Liberty League. Moreover, Joseph Widener, who controlled the estate at the time in question, was a noted donor to the American Liberty League directly. The Wideners, given their Philadelphia roots and connection with Roberts early in his life, would surely have maintained a relationship with their former employee as he ascended to the position of Associate Justice on the Supreme Court. Given this association, and the Widener's and Roberts's intimate involvement with the city of Philadelphia their entire lives, they were certainly no strangers.

d. Roberts and Pierre DuPont

Besides strong connections to Liberty League leaders such as John W. Davis, George Wharton Pepper, and George Wickersham, and financiers such as E.T. Stotesbury and the Widener family, Roberts had perhaps his strongest and most natural bond with a family who were both a public leaders *and* prominent financiers of the American Liberty League.

Pierre DuPont, whose wealth came from the DuPont chemical company, was perhaps the most prominent financier of the American Liberty League and its various umbrella organizations. The DuPont family, mainly Irene DuPont and Pierre DuPont, contributed approximately 30% of the *entire Liberty League's*

¹³² "Democrats Report 1,008,840 Spent," *The New York Times*, September 12, 1936

funding in 1935. It is estimated that one out of every four dollars spent by the Liberty League came from the DuPont family.¹³³ Upon the organization's founding, Irene DuPont was named as a director along with folks such as John W. Davis, Al Smith, Nathan Miller and James Wadsworth.

Pierre DuPont had a connection with Roberts that transcended politics. In fact, both were leaders of an organization that is built on forming bonds between individuals: the Boy Scouts, specifically, the one on the Horseshoe Scout Reservation in Pennsylvania.

Owen Roberts became somewhat of a savior of the Horseshoe Scout Reservation, according to their Alumni Association website. Specifically, Roberts was revered in the organization for undertaking a massive fundraising venture during the Great Depression that allowed the camp to continue thriving. According to the website, in 1930—only a year after the stock market crash—Roberts accomplished this by enlisting “some of the most prominent people in the County to aid in this effort.” It was no small feat: Roberts succeeded in raising \$150,000 dollars, (nearly \$2 million in today's terms) a success which earned him the distinction of being named Chairman of the governing council's Executive Board.¹³⁴

Pierre DuPont was a fellow leader of the Horseshoe Scout Reservation—and a major benefactor to Roberts's massive fundraising mission. In the group's history, Roberts's fundraising drive was said to have “called on DuPont and other major

¹³³ Wolfskill, *Revolt of the Conservatives* pg. 63

¹³⁴ Horseshoe Scout Reservation Alumni Association, “Horseshoe- ‘A Real Camp for Real Boys’ 1929-1940,” [<http://www.hsraa.org/spirit-of-the-horseshoe-mainmenu-37?start=6>]

corporations” to secure the necessary funding.¹³⁵ In fact, DuPont himself, many times, hosted various ceremonies for the Reservation at his home in Longwood. In 1929, he hosted a reception at his house where he was awarded a statue “in honor of his service” towards the organization. Later, he hosted a “Council Camporee” at the same estate.¹³⁶ DuPont and Roberts were not just members of the Boy Scouts—they were together leaders of a specific Boy Scout Reservation, the Horseshoe Scout Reservation, which is located in Chester County, Pennsylvania.

In 1928, the alumni association of this reservation wrote about a Reception Committee, which met to bestow honors and new ranks to various members. Besides DuPont and Roberts, a man named A. Atwater Kent was mentioned as a part of this “prominent” committee. Atwater Kent would become a financial supporter of the Liberty League, donating to many of the same causes as the DuPont’s.¹³⁷ In fact, Atwater was specifically associated with the Sentinels of the Republic, the same Liberty-League affiliate that was heavily financed by E.T. Stotesbury and George Wharton Pepper.

Pierre DuPont and Owen Roberts were not merely members of the same Horseshoe Scout Reservation organization. They were both intimately involved with the group—Roberts spearheaded a notable fundraising drive, mainly successful due to DuPont’s donations, and later become Chairman. At the same time, DuPont, besides contributing significant sums of money, hosted a spate of Horseshoe events

¹³⁵ Horseshoe Scout Reservation Alumni Association, “Foreword,”
[<http://www.hsraa.org/spirit-of-the-horseshoe-mainmenu-37?showall=1>]

¹³⁶ Horseshoe Scout Reservation Alumni Association, “1928-1929,”
[<http://www.hsraa.org/spirit-of-the-horseshoe-mainmenu-37?start=5>]

¹³⁷ Wolfskill, Revolt of the Conservatives pg. 220

at his personal estate and was recognized for his service and dedication to the club. They cared intimately for the Horseshoe Reservation and made sure that it would continue to thrive for generations to come.

It appears clear that Owen Roberts had enough very strong and close ties to the American Liberty League that Rodell's assertion that the League had tried "drafting" Roberts to run against Roosevelt in 1936 is anything but a baseless claim. His well established ties with figures such as Wharton Pepper, Stotesbury, Pierre DuPont, Wickersham and John W. Davis support the sentiment voiced by Rodell, Pearson, Baker and others: Roberts closely eyed a Presidential run in 1936, and considered it strongly enough that his ever teetering jurisprudence swayed rightward. Among the American Liberty League, Roberts was close with several of its leader and a handful of its main financiers, through interactions spanning many, many years. If John W. Davis, Pierre DuPont, and the other leaders of the American Liberty League had wanted a "savior of the Constitution" to run against Roosevelt, they would not have to look very far at all. They would also not have to find a way to get in touch with Roberts.

However, there exists further original evidence that shows that Roberts held dear to his heart an issue that was a guiding principle of the Liberty League.

e. Owen Roberts, The Crusaders, & The American Liberty League

The first mention of an organization called "The Crusaders" came in a piece by *The New York Times*, published on April 12th, 1938—after Roosevelt had been reelected, after the controversial *Parrish* outcome and after the Liberty League had

de-submitted from its apex. The piece discusses an investigation by a Congressional lobby committee into the “financing of the Crusaders and other groups hostile to the New Deal.” The article reports that the committee had found surprising results: Irene DuPont and Alfred P. Sloan had donated \$10,000 each to this organization, and qualified these donations as being “large shares of [The Crusaders] operating funds.”¹³⁸

The association between The Crusaders and the Liberty League, in fact, runs much deeper than even the financing indicates. The Crusaders were a natural successor to the Americans Against the Prohibition Amendment organization, or AAPA, which was formed in 1918 to protest the 18th Amendment to the U.S. Constitution.¹³⁹ As Wolfskill writes, “The Crusaders and the Women’s Organization for National Prohibition Reform were more than auxiliaries of the AAPA. They were blood relatives.”¹⁴⁰

The Crusaders were “young men [...] who were scions of the wealthiest families in the land.”¹⁴¹ In 1933, The Crusaders, AAPA, and its brethren achieved their goal of Prohibition repeal. However, as opposed to dismantling, the leaders of The Crusaders and the AAPA, its parent organization, simply moved onto other initiatives. In fact, the majority of them focused on founding a different group—The American Liberty League.

In 1934, when “John Raskob initiated the series of early meetings that culminated in the formation of the American Liberty League, it was a simple matter

¹³⁸ Lobby Inquiry Upheld” *The New York Times*, April 12, 1938

¹³⁹ Wolfskill, *Revolt of the Conservatives*, pg. 37

¹⁴⁰ *Ibid.* pg. 52

¹⁴¹ *Ibid.* pg. 53

to summon [...] members of the AAPA. The former executive committee of the AAPA was 'unanimously of opinion' to assist in the new organization."¹⁴²

These two groups were not just composed of similar members or even similar leaders. Wolfskill declared that the AAPA had become a "new organization [...] the American Liberty League."¹⁴³

The Crusaders itself persisted after the repeal of Prohibition in 1933. However, it was understood to be simply another branch of the American Liberty League. The Crusader's "national advisory council [...] all [...] were members of the Executive Committee of the Liberty League."¹⁴⁴

In fact, one of those advisors who sat on the Board of both The Crusaders and the Liberty League was none other than *John W. Davis*, whom Roberts had known intimately through the executive board of the American Law Institute and J.P. Morgan.

Most importantly, Justice Roberts was known for exactly the issue that The Crusaders and AAPA formed around: *Prohibition repeal*. In fact, Roberts was very much an ally of the AAPA, and a strong public advocate for their primary cause. He was such an outspoken proponent of prohibition repeal that it nearly derailed his Supreme Court nomination. As Charles Leonard notes in his study of Roberts's decisions, entitled *A Search for a Judicial Philosophy*, "the only serious objection to [Roberts's] confirmation arose over his views on the 18th amendment." There was ample evidence to support this wariness. In a 1923 speech to the American Bankers

¹⁴² *Ibid.* pg. 55

¹⁴³ *Ibid.* pg. 55

¹⁴⁴ *Ibid.* pg 229

Association, Roberts denounced Prohibition as a “police regulation,” which violated the Constitution. In fact, he was so rabidly against Prohibition that he even refused to serve on President Hoover’s commission charged to investigate enforcement of Prohibition. *The Sun* (Baltimore) columnist Frank R. Kent noted, “there ought to be some opposition to Roberts,” based on his well-documented belief that the 18th amendment “has no business in the Constitution at all.”¹⁴⁵

Even the University of Pennsylvania, in a publication that detailed the life and legacy of Roberts, noted Roberts’s avowed resistance to Prohibition as one of his main legacies. “Somehow, Roberts managed to allay the fears of the most ardent supports of Prohibition,” despite his past statements where he had “decried the 18th amendment.”¹⁴⁶

However, Roberts not only publicly supported the platform of the AAPA, but also had a personal connection with the organization. In fact, Roberts’s law partner—with whom he co-founded a private practice in Philadelphia in 1912—would become the *director of the AAPA* a few years after starting the firm. This connection was so clearly important and obvious that it became the major source of Senatorial opposition to Roberts’s Supreme Court nomination. As the *New York Herald Tribune* noted at the time of the nomination battle, Roberts’s law partner was a “militant wet,” whose avid anti-Prohibition stance elevated him within the ranks of the AAPA.¹⁴⁷

¹⁴⁵ Leonard, *A Search for a Judicial Philosophy* pg. 13

¹⁴⁶ “Justice Owen J. Roberts: The Law School,” *University of Pennsylvania Repository* [http://repository.upenn.edu/cgi/viewcontent.cgi?filename=12&article=1009&context=penn_history&type=additional]

¹⁴⁷ Fish, Peter G., “Spite Nominations,” Footnote 117

Clearly, Justice Roberts not only had a myriad of financial and political connections to the American Liberty League, but also shared at least one area of common concern. Given Justice Roberts's opposition to Prohibition as a well-known public figure, he was a vital ally to the AAPA, the Crusaders, and their related affiliates.

The connection is important because it seems quite viable that the thought of drafting Justice Roberts for President—after he became the driver against the New Deal on the Supreme Court—would relate back to his successful allegiance with anti-Prohibition groups that had then transitioned to the American Liberty League. Between John W. Davis, leader of the Crusaders and the American Liberty League, and Roberts's former law partner—an association that nearly derailed his Supreme Court nomination—Roberts's historical record demonstrates a consistent and marked connection with an organization and cause that formed the very basis of the American Liberty League. It was a cause Roberts vehemently believed in. Roberts had been affiliated with 'Liberty Leaguer's' and their causes long before they became the American Liberty League. He was, especially given his anti-New Deal stance, undoubtedly one of them.

v. The Nomination Vanishes & Roosevelt Wins

Thus far, this paper demonstrates that Justice Roberts's name was consistently invoked as a potential Republican candidate, and that his votes in *Alton*, *Butler*, and other economic cases became more outspokenly conservative as the 1936 election approached. Prior to the election, the American Liberty League had

transformed into a dynamic, bi-partisan association that was determined on making the unconstitutionality of the New Deal the focus of the election. Some speculated that the American Liberty League had fixated on Roberts as their preferred candidate given his position of authority on this matter. This research shows that there was indeed a marked and definitive connection between Justice Roberts and the leaders of the American Liberty League. Justice Roberts had close and personal ties with so many key Liberty League leaders and financiers that the speculation of collusion between the two seems certain.

Of course, Justice Roberts was not nominated as the Republican candidate for President in 1936. Nevertheless, a close dissection of the period leading up to the GOP's June nominating convention in Cleveland supports the notion that Roberts keenly eyed a Presidential run. In fact, he may have so closely vied a candidacy that he ended up overstepping political boundaries that extinguished any hope of higher office.

a. The Morehead Case

In *Morehead v. New York ex rel. Tipaldo*, the final case of the 1935 term, the Supreme Court invalidated a NY statute that mandated minimum wages for all workers within the state. The vote followed the same formula as other contentious New Deal cases that came before: Justice Roberts voting to strike down the measure, joined by the "Four Horsemen," with Hughes, Stone, Brandeis and Cardozo dissenting.

The case was decided only months before the Republican nominating convention, held in June, and was announced just days before the convention. *Morehead* itself was the decision that provided the baseline for the outrage ten months later in *Parrish*. A close look at *Morehead* reveals that Roberts's decision-making ability had indeed been compromised by the "presidentitis" that Pearson and Allen had identified.

Roberts's presidential prospects were nullified in *Morehead* because the decision provoked an "immediate and vociferous" backlash that eclipsed the negativity from *Alton* and *Butler*. Unlike the reaction to *Alton* and *Butler*, the *Morehead* ruling provoked criticism from all corners of the political world—even from Republicans and conservatives. As John Chambers notes in his analysis entitled *The Big Switch*, former Republican President Herbert Hoover agreed, "the Court had gone too far." The *New York Herald-Tribune*, a Republican outlet, voiced opposition to the decision in *Morehead*. Republican Congressman Hamilton Fish notably called the majority ruling a "Dred Scott decision." A study conducted found that nearly 80% of all newspaper editorials disputed the opinion of Roberts and the Four Horsemen. To some, including "prominent" conservative Washington Post columnist Franklyn Waltman Jr., the fallout from the *Morehead* decision would give Roosevelt "one of the best political breaks" of his Presidential tenure.¹⁴⁸ Clearly, as Chambers notes, *Morehead* "was one of the most criticized decisions in the history of the Supreme Court."¹⁴⁹ As Justice Stone noted in a quip directed at Roberts and the Four

¹⁴⁸ Shesol, *Supreme Power* pg. 223

¹⁴⁹ Chambers, John W. "The Big Switch," *Labor History* Vol. 10 Issue 1, 1969 pg. 55

Horsemen, “it is rather amusing to have Republicans and well as Democrats expressing doubts about the wisdom of the Minimum Wage decision.”¹⁵⁰

The tremendous and genuine outrage that followed in the aftermath of *Morehead* was not confined to the general public. Chief Justice Hughes was described by biographer Merlo Pusey as being afraid that *Morehead* would be a “self-inflicted wound like the *Dred Scott* decision.”¹⁵¹

Other Supreme Court colleagues of Roberts, most memorably Justice Stone, expressed shock at *Morehead* decision. In writing to Felix Frankfurter a few weeks before the *Morehead* decision, Stone commented “I think there has never been a time in the history of the Court when there has been so little intelligible, recognizable pattern in its judicial performance as in the last few years.”¹⁵² After *Morehead* had been decided, Stone wrote to his sister that the Supreme Court had ended “the most disastrous term in its history.”¹⁵³

Morehead is not only notable for the unique, bipartisan outcry that it initiated. Additionally, the opinion penned by Justice Butler seemed to directly contradict earlier decisions, such as *Nebbia* (1934), which affirmed a New York statute that regulated the price of milk. Interestingly enough, this contradiction would not implicate the Four Horsemen necessarily—after all, they had also dissented in *Nebbia*—but rather, would certainly implicate Justice Roberts, who had voted with the majority in *Nebbia*, yet ignored its basic principles in *Morehead*. Justice Stone would not leave this issue untouched, asserting in his separate dissent

¹⁵⁰ Leonard, *A Search for a Judicial Philosophy* pg. 93

¹⁵¹ Chambers, “The Big Switch,” pg. 53

¹⁵² Solomon, *FDR v. The Constitution* pg. 82

¹⁵³ *Ibid.* pgs. 82-83

that the Court “should follow our decision in the *Nebbia* case and leave the selection and the method of the solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch of the government.”¹⁵⁴

According to a variety of scholars of the period, “most” law school journals and reviewers wholeheartedly agreed with Stone’s portrayal of the Court. Legal scholars and critics “tore [the *Morehead* decision] apart,” Chambers writes, “noting that the Court had previously approved such restrictions on freedom of contract,” such as “laws limiting the hours of work where long hours would be detrimental to health.”¹⁵⁵ Roberts’s vote in *Morehead* was irreconcilable with his past positions.

The widespread outrage that followed *Morehead* would bury any ambitions of higher office that Roberts harbored. Unlike *Alton* and *Butler*, where his conservative jurisprudence had rallied conservatives and been praised by the American Liberty League, *Morehead* forced the opposite conclusion. As Rodell notes, it was the *Morehead* decision, the apex of Roberts’s conservatism on the Court, which “killed his chance for the nomination.”¹⁵⁶ The nominating convention was held only eight days after the *Morehead* decision had been announced, and the national opposition that it garnered from every political corner rendered it an untenable position to take.

¹⁵⁴ Leonard, *A Search for a Judicial Philosophy* pg. 92

¹⁵⁵ Chambers, “The Big Switch,” pg. 55

¹⁵⁶ Rodell, *Nine Men*, pg. 241

Roberts's political death in *Morehead* is no better exemplified by the platform of the Republican Party adopted at the convention. It read:

“We pledge ourselves to [...] support the adoption of State laws and interstate compacts to abolish sweatshops and child labor, and to protect women and children with respect to maximum working hours, minimum wages, and working conditions. *We believe that this can be done within the Constitution as it now stands.*”¹⁵⁷

The American Liberty League fully supported the Republican Party platform that was unveiled at the Cleveland nominating convention. Of course, supporting the Republican platform—which openly advocated for minimum wages laws, working hour limits, and other labor rights on the state level—put the Liberty League squarely at odds with Justice Roberts. Wolfskill noted that the Republican platform “was everything that the Liberty League could have hoped for.” In fact, Wolfskill goes on to say that “the amazing similarity between the Republican platform [...] and the Liberty League Document [its own election year manifesto] suggested something more than coincidence.”¹⁵⁸

By June of 1936, the national Republican Party and the Liberty League were nearly identical in membership, makeup, and financiers. Four of the men who designed the Republican platform belonged to the Liberty League and one third of the Republican “national finance committee” was composed of Liberty League

¹⁵⁷ Leonard, *A Search for a Judicial Philosophy* pg. 93

¹⁵⁸ Wolfskill, *Revolt of the Conservatives* pg. 206

members. Most tellingly, John Daniel Hamilton, the chairman of the Republican National Committee, was quoted as saying “Without Liberty League money, we couldn’t have had a national headquarters.”¹⁵⁹ The American Liberty League, for all intents and purposes, had been successfully co-opted by the Republican Party. Most importantly for this research, it demonstrates that Justice Roberts’s vote in *Morehead* not only made him a pariah amongst liberals and conservatives across the country, but made him an outcast in his own party—and the activist organization that had previously admired him as a “savior of the Constitution.” His presidential aspirations were rendered a pipe dream.

Roberts had misjudged the political winds. Although the Liberty League had conducted a focused effort to portray the New Deal as unconstitutional, a vision helped by Roberts’s votes in *Alton*, *Butler*, and now, *Morehead*, Roberts had overlooked the power of the establishment figures in the Republican Party. Although the Liberty League forced a fight on the convention floor over the inclusion of minimum wage and labor rights planks in the GOP’s platform, this was only a brief affirmation of Roberts and *Morehead*. By the end of the convention, “Landon’s [the 1936 GOP nominee] men had managed to hold their ground on key questions.”¹⁶⁰

This cannot be surprising. After all, the Liberty League was an establishment organization itself, founded by former presidential candidates and party leaders. Recognizing that adopting the *Morehead* principles would be mean likely defeat against Roosevelt, and cause a suicidal fission in the Republican Party, the leaders of

¹⁵⁹ *Ibid.* pg. 207

¹⁶⁰ Shesol, *Supreme Power* pg. 229

the Liberty League knew that the protest on the floor of the convention over the labor rights plank was nothing more than a show. If it were anything more than a show, the party would be damaged internally and hurt in the eyes of independent voters nationwide. Thus, it was not the vote in *Morehead* that killed Roberts's candidacy, specifically, but the makeup of the organization that most supported his candidacy. The establishment nature of the American Liberty League meant that, in their goal of uniting the GOP and defeating Roosevelt in November, they recognized that they would have to distance themselves from the *Morehead* decision. Roberts's votes never made him unacceptable to the Liberty League, but it made him unacceptable in pursuit of defeating Roosevelt in the election, a goal that necessitated collaboration and compromise with the Republican Party.

This narrative is supported by history. William Lemke, a Republican senator, launched a third-party bid for the presidency that summer, but his candidacy was not supported by the American Liberty League or its affiliates. These organizations were behind the GOP nominee, Alf Landon, not because they agreed with every single position of his, but rather, because he posed the greatest chance of defeating Roosevelt.

Moreover, the Liberty League was not as powerful as an organization as it once had been. Consistent investigations into "lobbying, pressure, and politics" of the organization by Senator Hugo Black beginning in January 1936 had taken its toll by the time of the Republican convention.¹⁶¹ Perhaps the League could have pushed

¹⁶¹ Wolfskill, *Revolt of the Conservatives* pg. 227

more vociferously for a Roberts candidacy a few months earlier, but by June of 1936, they had undergone a “deflation”¹⁶² that curtailed its influence.

In November of 1936, the country rendered a decisive decision in favor of Roosevelt. He won in an absolute landslide, winning all but two states and nabbing all but eight electoral votes. The country, it appeared, had decided which vision of the country they preferred.

b. *Parrish, the 1936 Election, and Public Opinion*

Parrish still remains the final frontier. However, the “devil theory,”¹⁶³ as coined by William F. Shughart II in his piece, *Bending Before the Storm*, provides a logical and rational reason for Roberts’s vote in *Parrish*. Without presidential aspirations tugging at his jurisprudence, *Parrish* is a return to Roberts’s pre-1934 voting history. Moreover, after the 1936 election, public opinion had crystallized in full favor of Roosevelt’s New Deal. By 1937, Roberts did not have to worry about backlash from his Liberty League friends in *Parrish*— and run the risk of losing the presidential nomination—but he had to be cognizant of continued backlash against the bench in the court of public opinion.

The so-called “Ackerman” thesis advances the idea that the *Parrish* vote was brought about by the electoral landslide in 1936 that saw Roosevelt win reelection.

This seems to be the case. As Jeff Shesol noted, Roberts was “a man who cared greatly, perhaps too greatly, about his public reputation.” Roberts was

¹⁶² *Ibid.* pg. 225

¹⁶³ Shughart, William F., “Bending Before the Storm,” *Independent Review*, Vol. 9 Issue 1, pg. 76

described by a reporter as being “too anxious for worldly approval.”¹⁶⁴ After failing to get the nomination—cemented by his broadly criticized vote in *Morehead*—Roberts witnessed the country make a decisive and powerful decision in reelecting President Roosevelt. Suddenly, Roberts was given the chance to redeem his vote in *Morehead*, and do so without worrying about presidential pressures from Pierre DuPont or John W. Davis.

Moreover, the vote in *Parrish* was also influenced by outside forces that would have forced Roberts in the same direction, towards the liberal bloc. For one, Chief Justice Hughes dedicated himself to persuading Roberts to join the liberal coalition during the summer of 1936. Hughes, an adroit politician in his own right (Republican nominee for President in 1916) personally visited Roberts and his wife—after the “Roberts for President boomlet was [...] squelched”—at their estate in Pennsylvania. There is rampant speculation that Hughes pressed Roberts on his jurisprudence during his 24-hour visit.¹⁶⁵

Some speculate the President Roosevelt’s Judicial Reform Procedures Bill of 1937 was the primary influence at the time; however, there are very valid issues with the “court packing hypothesis.” The most prominent is that Roosevelt did not announce the court-packing measure until February 5th, six weeks *after* the *Parrish* decision had been voted on. As has been established throughout many accounts of the time period, Justice Roberts indicated his desire to vote in favor of Washington’s minimum wage statute, and overturn *Adkins v. Children’s Hospital* (1923)

¹⁶⁴ Shesol, *Supreme Power*, pg. 232

¹⁶⁵ Simon, James F, *FDR and Hughes*, pg. 300

immediately after oral arguments had concluded on December 17th, 1936.¹⁶⁶ In fact, the record shows that the decision would have been announced much earlier than March, if not for Chief Justice Hughes. Because Justice Stone was absent at the hearing in December due to illness, the Chief Justice preferred waiting for Stone to return, rather than announce a 4-4 decision. The 4-4 decision would have created the same result, as it would have affirmed the lower courts decision to uphold the state's minimum wage statute; however Hughes believed that a 5-4 majority opinion would provide a much stronger voice than a 4-4 split.¹⁶⁷ This sentiment on the part of Hughes is both rational and understandable given the ire directed at the Court after the *Morehead* decision the previous June.

Of course, there is likelihood that Roberts knew of the "court-packing" bill before it was introduced, given the widespread knowledge inside Washington that Roosevelt intended to confront the Court if he won reelection in 1936. However, Hughes was aware that the perception that the Court was intimidated by FDR's Court packing plan would dominate any speculation once *Parrish* was announced. It was for this reason that Hughes delayed announcing the decision in *Parrish* even after Stone returned to the bench in February. According to Marian McKenna, "Hughes realized that if the justices ruled favorably in *Parrish* right away, it would convey the impression that they were bowing to the political threat of court-packing. Thus they delayed announcing the decision."¹⁶⁸ It seems as if Hughes was worried that the press and political world would get the wrong idea if *Parrish* was

¹⁶⁶ McKenna, Marian, Franklin Roosevelt and the Great Constitutional War, Fordham University Press, 2002, pg. 413

¹⁶⁷ *Ibid.* pg. 414

¹⁶⁸ *Ibid.* pg. 414

announced soon after February 5th, implying that Court-packing was inconsequential with regards to the *Parrish* vote. Barry Cushman, in Rethinking the New Deal, posits that the justices knew that Roosevelt's Court-packing procedure had minimal chance of passing, given the likelihood of a Congressional filibuster, thus further mitigating the chance that the *Parrish* outcome sought to derail Roosevelt's attempt at reconstructing the Supreme Court.¹⁶⁹

A more likely scenario—bolstered by the possibility that Roberts's considered running for President—is that the 1936 election outcome, and public opinion more generally, drove Roberts to reconsider his previous vote in *Morehead*.

The 1936 election, despite some pleas to the contrary, did focus on the issue of the Supreme Court and the constitutionality of the New Deal. Barry Cushman's analysis that Roosevelt did not campaign much at all against the Court is quite true—as I learned firsthand upon finding nearly no speeches concerning the matter in Roosevelt's archives in Hyde Park.

However, that only tells half the story. As shown by Bruce Ackerman, the Republican Candidate, Alf Landon of Kansas, campaigned constantly and viciously on the issue of the Supreme Court. Three days before the 1936 election, Landon hosted a major, final campaign speech at Madison Square Garden in New York. The focus of his case to the public was, in fact, the Supreme Court:

I come finally to the underlying and fundamental issue of this campaign [...] the President has been responsible for nine acts declared unconstitutional by

¹⁶⁹ Cushman, Barry, Rethinking the New Deal, Oxford University Press: 1998

the Supreme Court. He has publicly urged Congress to pass a law, even though it had reasonable doubts as to its constitutionality. He has publicly belittled the Supreme Court of the United States [...] will he attempt to get around the Constitution by tampering with the Supreme Court? The answer is: No one can be sure.¹⁷⁰

As Ackerman puts it, “with such questions ringing in their ears, Americans went to the polls—and gave Roosevelt and the New Deal the greatest victory in American history.”¹⁷¹

The idea that it was the 1936 election results—along with the absence of any “presidentitis”—that pushed Justice Roberts to the liberal wing of the Court is supported by the rest of his votes in the 1936 term. In fact, if the court-packing scheme was the sole initiator of Justice Roberts’s vote switch it would fail to account for any reason why Roberts may have continued affirming New Deal measures as the 1936 term transpired.

To the contrary, theorizing that public opinion and Roosevelt’s sweeping reelection swayed Justice Roberts would also account for his votes later in the term, which touched on major New Deal measures. In *National Labor Relations Board v. Jones & Laughlin Steel Corp* (1937), Roberts provided the decisive vote in a 5-4 ruling that affirmed the constitutionality of the federal Wagner Act.¹⁷² In *Steward Machine Co. v Davis* (1937), Roberts once again joined with the “Three Musketeers”

¹⁷⁰ Ackerman, *We the People: Transformations* pg. 307

¹⁷¹ *Ibid.* pg. 310

¹⁷² Cushman, Robert, “Con. Law in 1936-1937,” *The American Political Science Review* Vol. 32 No. 2 April 1938, pg. 280

and Chief Justice Hughes to assert the constitutionality of the unemployment provisions of the Social Security Act by a slim 5-4 margin.¹⁷³ As Charles Leonard notes in his qualitative study of all the Court opinions in the first five months of 1937, “the Justices arrived at some very liberal decisions;” the Court ruled in favor of state regulation at a six percent higher clip than in any of the previous three years. Most importantly, Justice Roberts dissented in only one case, “making his record almost a replica of the Court’s line of decisions.”¹⁷⁴ Moreover, these liberal positions are consistent with Roberts’s pre-1934 votes as far as economic cases go. The outlier, it appears, is the 1934-1936 period.

Finally, in a lecture at Harvard University in 1951, then ex-Justice Roberts addressed the tension between public opinion and the Supreme Court, saying, “Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy.”¹⁷⁵

There is no greater endorsement of the public opinion hypothesis than Roberts’s own words. It seems unshakeable, perhaps certain, that Howard Brubaker’s sarcastic line in the *New Yorker*, published soon after *Parrish*, rings true. “We are told that the Supreme Court’s about face was not due to outside clamor. It seems that the new building has a soundproof room to which the judges may retire to change their minds.”¹⁷⁶

¹⁷³ *Ibid.* pg. 286

¹⁷⁴ Leonard, *A Search for a Judicial Philosophy* pg. 128

¹⁷⁵ *Ibid.* pg. 44

¹⁷⁶ *Ibid.* pg. 145

However, there is a very important piece of the puzzle that has yet to be discussed. It must be analyzed for any legitimate theory on “the switch in time” to be put forth. This would be Justice Roberts’s own explanation of his reasoning behind the *Parrish* vote in the 1936 Supreme Court term.

vi. Justice Roberts’s Own Words

a. *The Owen Roberts’s Memoranda On West Coast Hotel v. Parrish*

In 1955, Felix Frankfurter penned a piece for the *University of Pennsylvania Law Review*, which was written on the occasion of Roberts’s death. In that tribute, Frankfurter reveals a document that historians and the press had been seeking since 1937: A memorandum from Roberts explaining his vote in *Parrish*. In the piece, Frankfurter explains in a footnote, “Mr. Justice Roberts gave me this memorandum on November 9, 1945, after he had resigned from the bench. He left the occasion for using it to my discretion. For reasons indicated in the text, the present seems to me an appropriate time for making it public.”¹⁷⁷

For the parts relevant to this research, the memorandum reads:

"I stated to him [Justice Butler] 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* [...] My proper course would have been to concur specially on the narrow ground I had taken. I did not do so. 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 [...] 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

¹⁷⁷ Frankfurter, *Mr. Justice Roberts*, pg. 314

the first time, I was confronted with the necessity of facing the soundness of the Adkins case.”¹⁷⁸

The reasoning advanced by Roberts, as seen above, is predicated on the very technical notion that the counsel for *Morehead* had never asked the Court to overturn the *Adkins* precedent. Justice Roberts admits in the memorandum that because this was the basis for his ruling against the minimum wage statute, he should have written a concurring opinion making that clear.

However, the basic premise of the memorandum is far from sound. Interestingly enough, a bevy of scholars have shed considerable doubt on the idea that the lawyers in *Morehead* did not ask the Court to reconsider *Adkins*. In *The New York Times*, lawyers for the State of New York took great issue with the sentiment that they had somehow not asked for a reconsideration of *Adkins*. As the *Times* reported, “Attorney General John Bennett maintained that [...] in the petition to the Supreme Court for certiorari [...] reconsideration of the *Adkins* case had been stressed.”¹⁷⁹ Moreover, by signing onto Justice Butler’s majority opinion in *Morehead*, Roberts accomplished the exact opposite of what he expressed in his memo—he signed onto an opinion that stated “The *Adkins* case [...] requires affirmance of the judgment below.”¹⁸⁰ Instead of seeking to overturn *Adkins*, as Roberts’s states was his wish in the Frankfurter memo, he doubled down on it.

Even if Roberts was not aware of the counsel’s desire to see *Adkins* overturned, throughout his career he had overturned precedents even when the

¹⁷⁸ *Ibid.* pgs. 314-315

¹⁷⁹ Leonard, *A Search for a Judicial Philosophy*, pg. 90

¹⁸⁰ *Ibid.* pg. 89

counsel did not explicitly ask him to. Just one year after *Morehead*, Roberts voted to overturn precedent in *Swift v. Tyson*, even though the counsel had “specifically denied that they were challenging that venerable precedent.”¹⁸¹

Moreover, if Justice Roberts’s did not desire to overturn *Adkins*, but felt that the regulation may have been constitutional (as he alluded to in the memorandum by claiming he should have, in hindsight, written a concurrence), he had the option of signing onto Chief Justice Hughes opinion, which had voiced those exact concerns. In his opinion, Hughes distinguished the New York minimum wage law from the law in question in *Adkins*, and was thus able to deftly *affirm* the minimum wage statute *without overruling Adkins*.

In fact, Hughes’s opinion was exactly the response that the drafters of the New York statute had hoped for when the bill was drawn up. Surprisingly, one of the two chief co-authors of the measure was none other than *Felix Frankfurter*, who purposefully drafted the law so that it could withstand a Supreme Court challenge. Frankfurter was all too aware that the *Adkins* precedent would be difficult to overturn, so the New York statute contained “actual differences” that were there “if Roberts had wanted to recognize them.” As Chambers writes, “Frankfurter and Cohen had drafted a minimum wage bill designed to express the legal pitfalls expressed in the *Adkins* decision.” Sure, these differences were technical, but as rightly pointed out, “they were no more technical than the point on which Roberts based his stand,” in *Morehead*.¹⁸² Furthermore, Frankfurter was an expert on these matters, heavily involved in politics and acted as a close advisor to the President at

¹⁸¹ Chambers, “The Big Switch,” pg. 67

¹⁸² *Ibid.* pg. 65

the time; he would be appointed to the Supreme Court a few years thereafter. It seems quite unlikely that he would make such an amateur error and draw up a bill that could not be distinguished from *Adkins*, which, as he well knew, would sound a death knell for the bill on arrival in the Supreme Court.

Frankfurter's involvement with the creation of the New York statute brings his association with the matter into question as well. In fact, some scholars, such as Michael Ariens, have accused Frankfurter of creating the memo himself as a way to protect the integrity of the Supreme Court, and defend his old friend Roosevelt.¹⁸³ Aside from Ariens, it is a legitimate matter to wonder why Roberts would choose Frankfurter to publish such an important memorandum. For example, after Roberts's vote in *Parrish* Frankfurter scathingly wrote that with "the shift by Roberts, even a blind man ought to see that the Court is in politics."¹⁸⁴

Understandably, Frankfurter would feel this way; he had explicitly drawn up a measure that was designed to be distinguishable from *Adkins*, yet the Court not only ruled the bill unconstitutional but also declared it *undistinguishable* from *Adkins*. Why Frankfurter would recant his seemingly correct dismay with the *Morehead* decision and later agree with Roberts's technical parsing of the *Parrish* vote remains somewhat of a mystery to this day.

Chief Justice Hughes also failed to see any reason why Justice Roberts had switched his opinion between *Morehead* and *Parrish*. In his published Autobiographical Notes, Hughes resisted speculation that the Court had been

¹⁸³ Ariens, Michael, "A Thrice-Told Tale, or Felix the Cat," *Harvard Law Review*, Vol. 107, No. 3 (Jan., 1994)

¹⁸⁴ Mckenna, Franklin Roosevelt and the Great Constitutional War pg. 418

influenced, in any way, by FDR's court-packing plan, but then also noted, "The record shows that Roberts's change of mind, *whatever its cause*, came almost three months before Roosevelt's court proposal..."¹⁸⁵

Chief Justice Hughes's befuddlement with Roberts's behavior was mirrored by the other Justices, most notably by an anonymous Justice who famously whispered, "What is wrong with Roberts?" upon hearing that Roberts had voted to overturn *Adkins* in *Parrish*. Of course, these are the same people who would be most inclined to— perhaps not agree, but understand— Roberts's point of view on the matter. Clearly, they did not understand his reasoning, and moreover, Roberts did not take care to clarify his shifting stance.¹⁸⁶

For these reasons, there is enough evidence to shed substantial doubt on the truthfulness to the reasons expressed in Roberts alleged memorandum to Felix Frankfurter. Either Roberts's recollection of the incidents taking place in 1936 and 1937 was severely compromised, or he displayed adroit "sophistry rather than excess legal craftsmanship" in the 1945 letter.¹⁸⁷ The oddities surrounding the contents of Roberts's memorandum has been widely documented. William Leuchtenberg, a foremost scholar on the time, would not speculate as to the authenticity of the letter but noted "Roberts's contention that he did not switch" seemed "unpersuasive" to many.¹⁸⁸ It seems clear that this sentiment perseveres.

¹⁸⁵ *Ibid.* pg. 419

¹⁸⁶ Sheshol, *Supreme Power* pg. 414

¹⁸⁷ Chambers "The Big Switch," pg. 65

¹⁸⁸ Leuchtenberg, *Supreme Court Reborn*, pg. 177

b. Justice Roberts on Higher Office

Doubts regarding the truthfulness of the Roberts memorandum necessarily imply that there was a hidden motive behind Roberts's vote in *Morehead*. As has been explored in this paper, it seems that the most thorough explanation for *Morehead* rests with the calls for Justice Roberts to run as the Republican candidate against FDR in 1936. It was a calling made ever the more personal by his close friends and acquaintances— among them John W. Davis, the Widener family, George Wharton Pepper, AAPA leaders, boy scout buddy Pierre DuPont, brother in-law Thomas Gates, and dear friend Sydney Hutchinson—all of whom were closely associated with an organization hell bent on defeating Roosevelt in 1936 on the very issue that Roberts knew best: the Constitution of the United States.

After this vision was interrupted by the national and bipartisan outrage to *Morehead* and once Roosevelt was reelected in 1936 against a Republican candidate and Party which explicitly promoted minimum wage laws and certain labor regulations, Roberts had every reason to finally acquiesce to Chief Justice Hughes, who had been pushing for Justice Roberts's vote in *Parrish* ever since *Morehead*. He also had little reason to continue to oppose a President that had won a landslide reelection and was prepared to fight the Supreme Court tooth and nail. Roberts, regardless, had always retained a view of the constitution that would allow for regulations and substantive labor rights as was the case in *Nebbia*.

However, we have not yet looked at Justice Roberts's own commentary on the matter, a testimony that supports this narrative. In 1954, Congress considered passing an amendment that would have prohibited Supreme Court Justices from

running for President or Vice-President until five years had passed since he/she retired from the Court. The Senate, perhaps tellingly, brought Justice Roberts in to share his views on the matter. More revealing are Justice Roberts's own words:

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 [...] 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, [...] 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.

Roberts's testimony fully corroborates all the evidence that has been accumulated in this research. While Roberts does not elaborate on which friends may have "urged" him to run President, it seems clear enough— given both the primary press sources and bevy of connections between Roberts and the Liberty

League—that the anti-New Deal Liberty League was the main proponent of a Roberts’s candidacy. Perhaps Pierre DuPont had pressed Roberts on a presidential run at an annual Horseshoe Scout Reservation function at his Longwood Estate, with promises of secure funding and powerful allies. Perhaps George Wharton Pepper, whom had guided Roberts since he was at the University of Pennsylvania Law School, tried to persuade Roberts over a drink in Philadelphia. Perhaps Thomas Gates, Sydney Hutchinson and John W. Davis advocated the idea at a J.P. Morgan gathering. What is clear is that these were also not just “ideas” thrown out by friends. They were serious considerations that could be implemented at a moments notice, given the League’s incredible organization and funding capabilities.

However, the testimony also sheds considerable doubt on the most important statement of his testimony; that “of course,” he never considered a Presidential run. If this was indeed the case, then why did he not, as Lippmann pleaded him to in 1935, “put to an end once and for all the idea that Justices of the Supreme Court are available candidates for public office?”¹⁸⁹

Lippmann’s reasoning would be logical to Roberts if he had indeed dismissed any Presidential consideration so abruptly. As Lippmann put it, the notion of a Roberts’s candidacy would be “certain to cause acute embarrassment to the Supreme Court as a whole and to Mr. Justice Roberts in particular, especially because Roberts would continue to sit in judgment upon much of the New Deal.”¹⁹⁰

¹⁸⁹ Lippmann, Interpretations pgs. 279-280

¹⁹⁰ *Ibid.* pgs. 279-280

Lippmann's assertion is proven true by the test of time. Had Roberts truly not considered a Presidential candidacy, a simple statement at the time when speculation was running rampant would have all but quelled the rumors. The theory put forward by this research would not have been suggested. That Roberts decided to address these rumors twenty years after the fact only suggests that it had been tearing inside Roberts for the last two decades, lending further credence to the notion that the idea of a Roberts presidency was not simply dismissed of immediately.

More concretely, Justice Roberts would not have to look far and wide to find an example where a justice effectively and directly shot down rumors of higher office. Justice Harlan Stone, who served on the Court with Roberts for many years, was also mentioned as a potential Republican candidate in the 1936 election. However, Stone took the rational approach that any person who truly did not entertain the notion of a Presidential campaign would take. As William G. Ross explains in his essay, *Presidential Ambitions*, "Stone steadfastly resisted their encouragement, explaining [...] that justices 'should keep out of politics.'" Furthermore, according to Ross, "Stone refused even to address the American Bar Association at its 1935 convention because he feared that his appearance would stimulate speculation that he would become a candidate."¹⁹¹ Pearson and Allen's observation that Roberts "considered the possibility most seriously," seems quite genuine.

¹⁹¹ Ross, William G. "Presidential Ambitions," *Northern Kentucky Law Review* Vol. 38 Rev. 115 2011, footnote 327

These startling revelations also highlight a potential *Freudian slip* by Roberts in the testimony: The idea that the thought of a Presidential candidacy by a Supreme Court Justice “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.*” That logic, it seems, can and should be conveniently applied to Justice Roberts and his jurisprudence.

vii. After the “Switch”

Soon after *Parrish* in 1937, Roberts’s status as a deciding swing vote on the Supreme Court would come to an end. Within a year, two of the “Four Horsemen”—Van Devanter and Sutherland—would retire, and by 1941 President Roosevelt had appointed seven new Justices to the Supreme Court, remaking the entire bench. Roberts’s previous middle-of-the-road jurisprudence soon became viewed as more conservative, given that his new colleagues were supportive of President Roosevelt and the New Deal, in general.

Upon his retirement from the bench (as discussed in Part II) Justice Black refused to sign a letter congratulating Roberts on his years of service; he could not “subscribe to such a loose interpretation” of Roberts’s jurisprudence, specifically because “from 1933 to 1937, he seesawed on critical economic New Deal cases.”¹⁹²

a. Pearl Harbor Commission and the “Dublin Declaration”

However, before retirement, Roberts would not leave the public spotlight completely. In December 1941, President Roosevelt appointed Roberts to head the

¹⁹² Ball, Howard, Hugo L. Black: Cold Steel Warrior pg. 13

commission that would investigate the Pearl Harbor attacks. Roberts's selection, especially in the context of this thesis, could be viewed as an odd one. After all, wouldn't Roosevelt have been wary of a man who had caused him great trouble on the bench only a few years earlier, and who had been rumored to run against him in 1936?

In fact, this was not the sentiment at all. To the contrary, as journalist John T. Flynn noted at the time in *The Chicago Daily Tribune*, the selection of Roberts to head the commission was a "master stroke" by Roosevelt. According to Flynn, Roberts had been "screaming for an open declaration of war," and would be sure to produce findings that would be pro-intervention in nature.¹⁹³ Despite any tensions between the two men, the choice of Roberts was a politically acute maneuver by Roosevelt that he could not pass up. Roberts was a Republican, which Roosevelt desired when searching for a candidate, and also had an interventionist philosophy that would become clear later in life. Republican ideology at the time most closely aligned with isolationism, so Roberts held a rare combination of two traits that President Roosevelt sought.

Roberts continued to be involved in foreign policy issues after retiring from the Supreme Court in 1945. Most surprising was Roberts's involvement in the so-called "Dublin Declaration," which was a fifty-member conference held in New Hampshire. The conference in Dublin—*organized and headlined by Roberts*—called for a "world government," designed to go much further than the United Nations. In fact, the Dublin Declaration, according to *The New York Times*, advocated for the

¹⁹³ Flynn, John T. "The Final Secret of Pearl Harbor," *The Chicago Tribune* September 2, 1945

creation of not only a world federal government, but a “world legislative assembly” as well, and called the United Nations charter “inadequate” and “behind the times.”¹⁹⁴ The Dublin Declaration was essentially a call for united global governance.

Roberts’s involvement in foreign policy post-*Parrish*—as the head of the Pearl Harbor commission and a prominent organizer of the Dublin conference— are important considerations in the positing of this thesis. In fact, it seems, Roberts’s activities later in life further support the notion that his votes from 1934-1936—his major conservative swing on the Court—are categorically out of place when looking at Roberts’s career in sum. It is hard to reconcile the beliefs of a man who, in the span of less than one decade, went from advocating rigid conservative notions of governance, with little room for economic or labor regulations (see *Alton* and *Butler*) to calling for the formation of a world government that would harbor significant control over sovereign nations.

Sure, these two visions deal with very distinct aspects of public policy, the domestic economy and foreign policy. But philosophically, it seems that Roberts’s brief, but defined, conservative pattern from 1934-1936 held influence no longer than that two-year span. The next year, he would turn on that philosophy in *Parrish*, *Jones & Laughlin*, and *Davis*, and his foreign policy stances a few years later are consistent with these later votes, as well as pre-1934 votes in cases such as *Nebbia*. The two-year conservative trend is clearly, when looking at Roberts’s career as a whole, the true outlier. His foreign policy involvement later in life paints the portrait of a man who believed in the power of central planning and government; in the

¹⁹⁴ “Declaration of Dublin, N.H. Conference,” *The New York Times*, October 17, 1945

Wilsonian tradition, his views on foreign policy would render him a true, unabashed *progressive*.

V. Conclusion

Trust men and they will be true to you ~ Ralph Waldo Emerson

i. Overview of Findings

Speculation regarding the motive underlying Roberts's vote in *Parrish* has been alive since the day the decision was announced. To some, the "switch" could be attributed to the court-packing plan and pressure from FDR. Others theorize that it could be the election of 1936, and the growing public approval of the New Deal.

However, these two hypotheses only account for half of the equation and consequently only solve half of the problem. *Parrish* was only surprising because Justice Owen Roberts underwent a marked and drastic conservative transformation beginning in the 1934 term, a pattern that came to a halt after the election of 1936 and was highlighted by his vote in *Parrish*. It is a shift definitively underscored by the original dataset compiled herein, which narrowed cases from 1931-1937 by both category and voting margin. The findings of this dataset are reaffirmed by the more inclusive advanced metrics study undertaken by Ho and Quinn.

This evidence suggests that more attention should be paid to Justice Roberts's jurisprudence in the 1934 and 1935 terms. Without these conservative votes, his decision in *Parrish* would be only a footnote in the annals of history. Instead, his conservative trend during these years made the *Parrish* decision a topic of scholarly research for the last 75 years.

The one hypothesis that explains more of Justice Roberts's voting pattern than any other is that he seriously considered running for President. The evidence

gathered in this research strengthens this theory, which was previously posited on the evidence that he was mentioned as a strong contender for the nomination by the press and other political observers.

However, the uncovered entanglement between Roberts and important leaders and financiers of the Republican Party and the American Liberty League lends new and strong favor to this theory. Roberts did not have mere connections; he had a history of very close relationships with a multitude of these individuals. These associations span from John W. Davis, leader of the Liberty league, to Pierre DuPont, a man whom he knew intimately through the Horseshoe Scout Reservation, to George Wharton Pepper, his mentor since the University of Pennsylvania Law School and prominent supporter of Liberty League-affiliate Sentinels of the Republic. The list continues with Edward T. Stotesbury, father in-law of lifelong friend Sydney Hutchinson and major financier of Liberty League umbrella organizations (especially Wharton Pepper's Sentinels), to the Widener family, whom helped vault Roberts to prominence, to Thomas Gates, his brother-in law and partner at J.P. Morgan, to George Wickersham, fellow executive board member of the American Law Institute, to Atwater Kent, another man heavily involved in the Horseshoe Scout Reservation's executive body who become a supporter of the Sentinels as well.

There was a common cause underneath these connections that had previously proven successful. Roberts was a public champion of the anti-Prohibition cause; this was the same cause that the AAPA, directed by his current law firm founder and partner, used to become the foremost anti-Prohibition organization in

the land. The AAPA then transformed, post a victorious Prohibition repeal, into the American Liberty League, the same organization with a different name.

Roberts admitted in Senate testimony that “two friends” of his had, on several occasions, urged him to run for President. We can now take a strong guess as to which “friends” he was referring to.

In his testimony, Roberts also made sure to note that he dismissed these suggestions immediately. However, actions speak louder than words. Instead of publicly dismissing these presidential ambitions, as his colleague Justice Stone had, Roberts took the confounding route of keeping silent, which only served to spark, not quell, speculation of a Roberts candidacy. His remarkable about-face in *Parrish* came, not surprisingly, once his prospective candidacy was extinguished and Roosevelt had been reelected by historical margins.

ii. Implications of this Thesis

The simple, yet consequential question thus only remains: Did these personal influences and ambitious desires actually cause Justice Roberts’s to vote conservatively from 1935-1936?

It seems that now, more than ever, the answer to that question may be yes.

There is a substantial chance that Roberts always had the notion in the back of his mind, enough so that he would not dismiss it forthrightly. For a swing voter such as Justice Roberts, this idea alive in the back of his mind would be more than

enough to make him tack conservatively when was on the fence. It strains credulity to think that all of his friends and acquaintances affiliated with the Liberty League did not vociferously push Roberts to pursue an anti New Deal agenda. Perhaps these persuasions were paired with the promise that, if possible, the League would unite behind Roberts at the Republican convention in June. After all, Pierre DuPont and E.T. Stotesbury did not contribute massive sums of money to the Liberty League for it to be inconsequential in the 1936 election. What greater impact could the League have than fielding a candidate who was a source of authority on the issue that mattered to them most, the Constitution? And what better choice than DuPont's Boy Scout colleague, Wharton Pepper's mentee, and Thomas Gates's brother-in-law, Owen Roberts?

Many of the Liberty League's leaders, such as John W. Davis and Al Smith, were initially supporters of President Roosevelt, but formed the Liberty League because he had violated their trust and values. Owen Roberts represented the opposite. He was a man they could trust; many of them had known him for a long period of time. He had fought with them against Prohibition, and was fighting with them against the New Deal from the Supreme Court.

Roberts followed a conservative jurisprudence, very much aware of the strong possibility that his political allies would return the favor at the Republican Convention. However, Roberts crucially mis-stepped with *Morehead*. Although the ruling was not anathema to the Liberty League, it was to the Republican Party. More importantly, it was a decision that could not be supported if the Liberty League and GOP had any hope in the November election.

This was the one goal above all else, and the establishment figures that led the Liberty League knew it. Nominating Roberts was no longer a possibility.

This once-burning presidential desire caused Roberts a great deal of stress when, after the election had concluded, he knew that he disagreed with the tenets of *Adkins* and *Morehead*, and thus voted to overturn them in *Parrish*. His ambition extinguished, he could no longer ignore growing public opinion favoring the New Deal. His rightward drift on the Court was a period in his life that he was so ashamed of that he would take it with him to his grave—quite literally. Frankfurter would not publish the memo until after Roberts’s death, a fact that seems too coincidental given the circumstance.

He only desired to confront the questions surrounding the confusing votes of *Morehead* and *Parrish* once he was no longer around to face the inevitable scrutiny, and perhaps, the truth.

iii. Final Considerations

The conclusion of this research is thrice folded. One, Justice Roberts underwent not one switch, but two. First, he moved to the right on matters of economic regulation and labor rights during the latter half of the 1934 term.

Secondly, he switched again in the 1936 term, starting with *Parrish*, and sided with the liberal coalition on the same category of issues. The vote in *Parrish* marked a return to his pre-1934 decisions such as *Nebbia*.

Third, and finally, the reason why Justice Roberts “seesawed” between these two coalitions had to do with the fact that he considered, for a few months between

1935 and 1936, the prospect of running for President. He entertained the notion—which was a very real one— just enough that it swayed his middle-of-the-road jurisprudence.

Scholars of the time period, whom I spoke with personally, such as Jeff Shesol, Laura Kalman, and William G. Ross, find that the thesis herein is an intriguing and plausible one. They all correctly note that there is no “smoking gun,” which leaves the argument as intriguing rather than irrefutable.

However, there will never be a “smoking gun” with regards to the “switch in time that saved nine,” unless a document is recovered from Roberts’s attic that reveals his true intentions.

Moreover, there is no ‘smoking gun’ to the Court-packing hypothesis; there is no smoking gun to the public-opinion theory; there is no smoking gun to the Internalist argument. The thesis posited here falls in line with the above. Thus, those involved in the study of “the switch in time” can only hope to continue building a constructive narrative that continues to clarify the confounding story and fill in the gaps.

I am of the opinion that Justice Roberts’s votes in *Morehead* and *Parrish* derived from a desire to run for president in 1936. I cannot ignore the conclusions reached from the dataset. The evidence gathered uncovers close connection after close connection between Roberts and the American Liberty League. Together, these two original findings support one another.

The “switch in time that saved nine” has heretofore been remanded for further hearings.

Appendix A: Dataset Cases

Case #	Issue	Roberts's Vote	Dissent	Roberts's Position
282 U.S. 251	NJ regulation of insurance commission	With majority, upholding law	Four Horseman	Liberal
283 U.S. 35	ICC Regulation	Pro-ICC	N/A- Unanimous	Liberal
283 U.S. 249	State regulation of railroads brakes	Uphold regulation	N/A- Unanimous	Liberal
283 U.S. 380	Mandating Public Utilities	Pro state	McReynolds	Liberal
283 U.S. 527	Mandate state licensing of any business	Pro state	Four Horseman	Liberal
284 U.S. 80	ICC regulatory rules	Against state	Stone, Holmes, Brandeis	Conservative
284 U.S. 248	ICC maximum rates via due process	Against ICC/state	N/A- Unanimous	Conservative
285 U.S. 22	Substantive due process in compensation	Pro-worker and state	Roberts, Brandeis, Stone	Liberal
285 U.S. 234	Massachussetts workmen comp.	Pro-state	N/A- Unanimous	Liberal
285 U.S. 393	Oklahoma Oil Taxation rights	Pro state	Roberts, Stone, Brandeis, Cardozo	Liberal
286 U.S. 210	OK law regulating production of petroleum	Anti regulation/state	N/A- Unanimous	Conservative
286 U.S. 352	Motor Vehicle Act of Kansas	Pro-state	N/A- Unanimous	Liberal
286 U.S. 472	South Carolina Gas Tax	Pro-tax/state	N/A- Unanimous	Liberal
287 U.S. 251	TX regulation of truck driver licensing	Pro regulation	Butler	Liberal
287 U.S. 283	ND law allowing consumer item return	Pro state	Unanimous w/ Stone & Cardozo concurrence	Liberal

288 U.S. 14	ICC mandate to build more tracks	Anti ICC/regulation	Stone, Brandeis, Cardozo	Conservative
288 U.S. 517	FL requiring state licensing of business	Anti state/regulation	Stone, Brandeis, Cardozo	Conservative
290 U.S. 326	S.C. regulation of banks	Pro state law (against regulation)	Roberts, Sutherland, Butler, McReynolds	Liberal
290 U.S. 398	Emergency Relief Act of Minnesota	Pro state	Four Horseman	Liberal
290 U.S. 570	Nebraska regulation of bread sales	Pro state	N/A- Unanimous	Liberal
291 U.S. 300	Washington tax on different businesses	Pro state	N/A- Unanimous	Liberal
291 U.S. 352	Mississippi law protecting contractors	Pro state	N/A- Unanimous	Liberal
291 U.S. 502	NY law regulating price of milk	Pro state	Four Horseman	Liberal
291 U.S. 619	Seattle municipal tax	Pro tax/state	Unanimous w/ Four Horseman concurrence	Liberal
292 U.S. 263	NH tax on peddlers	Pro state	N/A- Unanimous	Liberal
293 U.S. 163	NY law regulating milk sales	Pro state	Unanimous w/ Sutherland concurrence	Liberal
293 U.S. 194	NY milk law	Anti state	Unanimous w/ Stone & Cardozo concurrence	Conservative
293 U.S. 388	Presidential Authority in NIRA	Anti state	Cardozo	Conservative
294 U.S. 169	PA liquid/fuel tax	Pro tax/state	N/A- Unanimous	Liberal
294 U.S. 240	U.S. anti-gold law	Pro state/regulation	Four Horseman	Liberal
294 U.S. 384	Montana business licensing taxes	Anti tax/state	N/A- Unanimous	Conservative
294 U.S. 405	Tennessee Highway Regulation	Anti state	Stone, Cardozo	Conservative
294	NY milk law in	Anti state	N/A- Unanimous	Conservative

U.S. 514	interstate commerce			
294 U.S. 550	Kentucky Gross sales tax	Anti tax/state	Stone, Brandeis, Cardozo	Conservative
294 U.S. 608	Oregon Dentist Regulations	Pro state	N/A- Unanimous	Liberal
295 U.S. 76	Maine law regulating carriers	Pro state	N/A- Unanimous	Liberal
295 U.S. 89	NY violating of compensation in Motor Vehicle Act	Pro state	N/A- Unanimous	Liberal
295 U.S. 165	GA city imposing tax on paving streets	Anti tax/state	Stone, Brandeis, Cardozo	Conservative
295 U.S. 285	GA Motor Carrier Act	Pro state	N/A- Unanimous	Liberal
295 U.S. 330	Railroad Retirement Act	Anti state	Hughes, Cardozo, Brandeis, Stone	Conservative
295 U.S. 495	Constitutionality of NIRA	Anti state	Unanimous w/ Stone & Cardozo concurrence	Conservative
296 U.S. 176	Dept of Agriculture packaging regulations	Pro state	N/A- Unanimous	Liberal
296 U.S. 315	Homeowners loan act regarding states	Anti state	N/A- Unanimous	Conservative
296 U.S. 404	Vermont business tax	Anti state	Stone, Brandeis, Cardozo	Conservative
297 U.S. 1	Agricultural Adjustment Act	Anti state	Stone, Brandeis, Cardozo	Conservative
297 U.S. 135	ND 'excessive' tax	Anti tax/state	Stone, Brandeis, Cardozo	Conservative
297 U.S. 189	LA law changing right of associations	Anti state	N/A- Unanimous	Conservative
297 U.S. 251	NY Milk control law, 14th amendment due process	Pro state	Four Horseman	Liberal
297 U.S. 266	NY milk licensing law	Anti state/regulation	Stone, Brandeis, Cardozo	Conservative
297 U.S.	Fed Gov't contracting rights	Pro state	Unanimous w/ Roberts, 4 others	Liberal

288			concurring	
297 U.S. 422	CA 'Fish & Game' regulations	Pro state	N/A- Unanimous	Liberal
298 U.S. 1	Securities and Exchange Commission regulation	Anti regulation/state	Stone, Brandeis, Cardozo	Conservative
298 U.S. 238	Coal Conservation Act	Anti state	Stone, Brandeis, Cardozo	Conservative
298 U.S. 349	Railroad Commission Rules	Pro state	Unanimous w/ Stone, Cardozo, Brandeis Roberts concurring	Liberal
298 U.S. 587	NY Minimum wage law	Anti regulation/state	Hughes, Cardozo, Brandeis, Stone	Conservative
299 U.S. 33	TX tax on production of oil	Pro tax/state	N/A- Unanimous	Liberal
299 U.S. 183	Fair Trade Act of Illinois	Pro state	N/A- Unanimous	Liberal
299 U.S. 387	Truckdriver regulation ordinance, Illinois	Pro state/regulation	N/A- Unanimous	Liberal
300 U.S. 379	Parrish	Pro state	Four Horseman	Liberal

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