MR. JUSTICE ROBERTS

by

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The dictum that history cannot be written without documents is less than a half-truth if it implies that it can be written from them. Especially is this so in making an assessment of individual contributions to the collective results of the work of an institution like the Supreme Court, whose labors, by the very nature of its functions, are done behind closed doors and, on the whole, without leaving to history the documentation leading up to what is ultimately recorded in the United States Reports. To be sure, the opinions of the different Justices tell things about them—about some, more; about some, less. As is true of all literary compositions, to a critic saturated in them, qualities of the writer emerge from the writing. However, even in the case of an opinion by a Justice with the most distinctive style, what is said and what is left unsaid present to students of the Court a fascinating challenge of untangling individual influences in a collective judgment.

To discover the man behind the opinion and to estimate the influence he may have exerted in the Court's labors, in the case of Mr. Justice Roberts, is an essentially hopeless task. Before I came on the Court I had been a close student of its opinions. But not until I became a colleague, and even then only after some time, did I come to realize how little the opinions of Roberts, J., revealed the man and therefore the qualities that he brought to the work of the Court. In his case it can fairly be said the style—his judicial style—was not the man.

The esprit of Roberts's private communications leave little doubt that when he came to writing his opinions he restrained the lively and imaginative phases of his temperament. I speak without knowledge, but he had evidently reflected much on the feel and flavor of a judicial opinion as an appropriate expression of the judicial judg-

ment. The fires of his strong feelings were banked by powerful self-discipline, and only on the rarest occasion does a spark flare up from the printed page. The sober and declaratory character of his opinions was, I believe, a form consciously chosen to carry out the judicial function as he saw it. We are told that Judge Augustus N. Hand, in disposing of a case that excited much popular agitation, set himself to writing an opinion in which nothing was "quotable." The reasons behind this attitude doubtless guided Justice Roberts in fashioning his judicial style. Moreover, his was, on the whole, a hidden rather than an obvious nature—hidden, that is, from the public view. His loyalties were deep, as was his devotion to his convictions. Both were phases of an uncompromising honesty. They constituted the most guarded qualities of his personality and he would not vulgarize them by public manifestation.

In not revealing, indeed in suppressing, the richer and deeper qualities of his mind and character, the Roberts opinions reflect his own underestimation of his work. Partly, he was a very modest man, partly his judicial self-depreciation expressed his sense of awe to be a member of the bench charged with functions, in the language of Chief Justice Hughes, "of the gravest consequence to our people and to the future of our institutions." Above all, the standards for his self-appraisal were, characteristically, judges of the greatest distinction in the Court's history. On leaving the bench, he wrote: "I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo."

Roberts was unjust to himself. He contributed more during his fifteen years on the Court than he himself could appraise. His extensive, diversified experience at the bar and his informed common sense brought wisdom to the disposition of the considerable body of litigation, outside

the passions of popular controversy, that still comes before the Court. Again, his qualities of character—humility engendered by consciousness of limitations, respect for the views of others whereby one's own instinctive reactions are examined anew, subordination of solo performances to institutional interests, courtesy in personal relations that derives from respect for the conscientious labor of others and is not merely a show of formal manners—are indispensable qualities for the work of any court, but pre-eminently for that of the Supreme Court. Probably no Justice in the Court's history attached more significance to these qualities than Mr. Justice Brandeis. It tells more than pages of argumentation that Brandeis held Roberts in especial esteem as a member of the Court.

It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations. One is more saddened than shocked that a high-minded and thoughtful United States Senator should assume it to be an established fact that it was by reason of "the famous switch of Mr. Justice Roberts" that legislation was constitutionally sustained after President Roosevelt's proposal for reconstructing the Court and because of it. The charge specifically relates to the fact that while Roberts was of the majority in *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, decided June 1, 1936, in reaffirming *Adkins* v. *Children's Hospital,* 261 U. S. 525, and thereby invalidating the New York Minimum Wage Law, he was again with the majority in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, decided on March 29, 1937, overruling the *Adkins* case and sustaining minimum wage legislation. Intellectual responsibility should, one would suppose, save a thoughtful man from the familiar trap of *post hoc ergo propter hoc.* Even those whose business it is to study the work of the Supreme Court have lent themselves to a charge which is

refuted on the face of the Court records. It is refuted, that is, if consideration is given not only to opinions but to appropriate deductions drawn from data pertaining to the time when petitions for certiorari are granted, when cases are argued, when dispositions are, in normal course, made at Conference, and when decisions are withheld because of absences and divisions on the Court.

It is time that this false charge against Roberts be dissipated by a recording of the indisputable facts. Disclosure of Court happenings not made public by the Court itself, in its opinions and orders, presents a ticklish problem. The secrecy that envelops the Court's work is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed. That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court. But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations. The more so is justification for thus lifting the veil of secrecy valid if thereby the conduct of a Justice whose intellectual morality has been impugned is vindicated.

The truth about the so-called "switch" of Roberts in connection with the *Minimum Wage* cases is that when the *Tipaldo* case was before the Court in the spring of 1936, he was prepared to overrule the *Adkins* decision. Since a majority could not be had for overruling it, he silently agreed with the Court in finding the New York statute under attack in the *Tipaldo* case not distinguishable from the statute which had been declared unconstitutional in the *Adkins* case. That such was his position an alert reader could find in the interstices of the United States Reports. It took not a little persuasion—so indifferent was Roberts to misrepresentation—to induce him

to set forth what can be extracted from the Reports.* Here it is:

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

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

"Both in the petition for certiorari, in the brief on the merits, and in oral argument, counsel for the State of New York took the position that is was unnecessary to overrule the *Adkins* case in order to sustain the position of the State of New York. It was urged that further data and experience and additional facts distinguished the case at bar from the *Adkins* case. The argument seemed to me to be disingenuous and born of timidity. I could find nothing in the record to substantiate the alleged distinction. At conference I so stated, and stated further that I was for taking the State of New York at its word. The State had not asked that the *Adkins* case be overruled but that it be distinguished. I said I was unwilling to put a decision on any such ground. The vote was five to four for affirmance and the case was assigned to Justice Butler.

*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.

"I stated to him that I would concur in any opinion which was based on the fact that the State had not asked us to re-examine or overrule *Adkins* and that, as we found no material difference in the facts of the two cases, we should therefore follow the *Adkins* case. The case was originally so written by Justice Butler, but after a dissent had been circulated he added matter to his opinion, seeking to sustain the *Adkins* case in principle. My proper course would have been to concur specially on the narrow ground I had taken. I did not do so. But at conference in the Court I said that I did not propose to review and re-examine the *Adkins* case until a case should come to the Court requiring that this should be done.

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

vote, and I heard one of the brethren ask another, 'What is the matter with Roberts?'

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

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

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

More needs to be said for Roberts than he cared to say for himself. As a matter of history it is regrettable that Roberts's unconcern for his own record led him to abstain from stating his position. The occasions are not infrequent when the disfavor of separate opinions, on the part of the bar and to the extent that it prevails within the Court, should not be heeded. Such a situation was certainly presented when special circumstances made Roberts

agree with a result but basically disagree with the opinion which announced it.

The crucial factor in the whole episode was the absence of Mr. Justice Stone from the bench, on account of illness, from October 14, 1936, to February 1, 1937, 299 U. S. III.

In *Chamberlain* v. *Andrews* and its allied cases, decided November 23, 1936, the judgments of the New York Court of Appeals sustaining the New York Unemployment Insurance law were "affirmed by an equally divided Court." 299 U. S. 515. The constitutional outlook represented by these cases would reflect the attitude of a Justice towards the issues involved in the *Adkins* case. It can hardly be doubted that Van Devanter, McReynolds, Sutherland and Butler, JJ. were the four Justices for reversal in *Chamberlain* v. *Andrews, supra.* There can be equally no doubt that Hughes, C.J., and Brandeis and Cardozo, JJ. were for affirmance. Since Stone, J. was absent, it must have been Roberts who joined Hughes, Brandeis and Cardozo. The appellants petitioned for a rehearing before the full bench, but since the position of Stone, as disclosed by his views in the *Tipaldo* case, would not have changed the result, *i. e.,* affirmance, the judgments were allowed to stand and the petition for rehearing was denied. Moreover, in preceding Terms, Roberts had abundantly established that he did not have the narrow, restrictive attitude in the application of the broad, undefined provisions of the Constitution which led to decisions that provoked the acute controversies in 1936 and 1937.

Indeed, years before the 1936 election, in the 1933 Term he was the author of the opinion in *Nebbia* v. *New York,* 291 U. S. 502, which evoked substantially the same opposing constitutional philosophy from Van Devanter, McReynolds, Sutherland and Butler, JJ., as their dissent expressed in *West Coast Hotel Co.* v. *Parrish, supra.* The result in the *Nebbia* case was significant enough. But for candor and courage, the opinion in which Roberts justi-

fied it was surely one of the most important contributions in years in what is perhaps the most far-reaching field of constitutional adjudication. It was an effective blow for liberation from empty tags and meretricious assumptions. In effect, Roberts wrote the epitaph on the misconception, which had gained respect from repetition, that legislative price-fixing as such was at least presumptively unconstitutional. In his opinion in *Parrish,* the Chief Justice naturally relied heavily on Roberts's opinion in *Nebbia,* for the reasoning of *Nebbia* had undermined the foundations of *Adkins.*

Few speculations are more treacherous than diagnosis of motives or genetic explanations of the position taken by Justices in Supreme Court decisions. Seldom can attribution have been wider of the mark than to find in Roberts's views in this or that case a reflection of economic predilection. He was, to be sure, as all men are, a child of his antecedents. But his antecedents united with his temperament to make him a forthright, democratic, perhaps even somewhat innocently trusting, generous, humane creature. Long before it became popular to regard every so-called civil liberties question as constitutionally self-answering, Roberts gave powerful utterance to his sensitiveness for those procedural safeguards which are protective of human rights in a civilized society, even when invoked by the least appealing of characters. See his opinions in *Sorrells* v. *United States,* 287 U. S. 435, 453, and *Snyder* v. *Massachusetts,* 291 U. S. 97, 123.

Owen J. Roberts contributed his good and honest share to that coral-reef fabric which is law. He was content to let history ascertain, if it would, what his share was. But only one who had the good fortune to work for years beside him, day by day, is enabled to say that no man ever served on the Supreme Court with more scrupulous regard for its moral demands than Mr. Justice Roberts.