



JUSTICE OWEN J. ROBERTS ON 1937

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THE MOTIVATIONS FOR Supreme Court Justice Owen J. Roberts' so-called "switch in time that saved nine" in 1937 remain largely obscured. For much of the past 75 years, judges, lawyers, and scholars have discussed – including recently in this journal¹ – why Roberts would vote to uphold minimum-wage legislation in March 1937² when he had voted to invalidate similar legislation in June 1936.³ Because President Franklin D. Roosevelt unveiled his court-packing plan on February 5, 1937, externalists have ascribed political motivations to Roberts and the Court.⁴ Internalists, meanwhile, have pointed to legal reasons for the switch.⁵ With the exception, however, of a memorandum Roberts gave to Justice Felix Frankfurter in 1945 that was first published a decade later,⁶ Roberts' own voice has been largely missing from the discussion.

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¹ Barry Cushman, *The Hughes-Roberts Visit*, 15 GREEN BAG 2D 125 (2012).

² *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

³ *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

⁴ See Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005) (compiling articles).

⁵ *Id.* (same).

⁶ Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

Roberts once facetiously said “[m]aybe the breakfast he had has something to do with it.”⁷ Otherwise, Roberts gave only legal reasons for distinguishing the 1937 *West Coast Hotel* case from the 1936 *Tipaldo* case.⁸ But possible strategic or attitudinal reasons⁹ for the switch have fascinated scholars. Even Frankfurter, who would in later years vigorously defend Roberts against charges of political influence, privately criticized Roberts at the time for providing a “lurid demonstration” that “the Court is in politics.”¹⁰ Chief Justice Charles Evans Hughes, however, was steadfast in defending Roberts’ integrity and legal reasoning. On December 3, 1946, Hughes’ authorized biographer recorded, in abbreviated terms, that the then-retired Hughes told him, “Roberts did not change on min. wage case after crt. plan came out”¹¹

Hughes’ biographer, journalist Merlo J. Pusey, also personally interviewed Roberts in the course of researching Hughes’ life. The details of Pusey’s interview with Roberts have apparently not been previously published in full. Yet the interview notes, containing the words of Roberts himself, shed light on one of the most discussed mysteries in American political and legal history – one that relates to questions about the very legitimacy of judicial review in the United States.

⁷ Merlo J. Pusey, *Justice Roberts’ 1937 Turnaround*, 8 YEARBOOK – SUP. CT. HIST. SOC’Y 102 (1983).

⁸ *Id.* See also Frankfurter, *supra* note 6.

⁹ Scholars developed the attitudinal, strategic, and legal models for judicial behavior after the events in question, but, in brief, the attitudinal model encompasses political motivations, and the legal behavioral model essentially accounts for Roberts’ description in the Frankfurter memorandum of his conduct. For a more complete description of the attitudinal, strategic, and legal models, see LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 109-132 (2006).

¹⁰ JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES* 327 (2012).

¹¹ Box 13, Merlo J. Pusey Papers, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah (notes of Merlo J. Pusey interview with Charles Evans Hughes in Pusey Notebook II) (hereinafter “Notebook II, Box 13, LTPSC”).

THE NEW DEAL, ROBERTS, AND PUSEY

Pusey grew up in humble circumstances in Woodruff, Utah, a tiny Mormon ranching community in the sparsely populated northeastern corner of the state. At age 18 in 1920, Pusey left Woodruff to receive his last two years of secondary schooling in Salt Lake City. During his final year of taking high school courses at Latter-day Saints University, he served as editor of the school newspaper. Later, while completing a bachelor's degree at the University of Utah, Pusey worked as a reporter at the *Deseret News*, a daily newspaper owned by The Church of Jesus Christ of Latter-day Saints. Upon graduation and marriage to Dorothy Richards in 1928, Pusey packed a car for a honeymoon trip to Washington, D.C. Once there, he worked temporarily at several newspapers and on Capitol Hill before landing a job as an editorial writer at the *Washington Post*, where he stayed for 43 years.¹²

Having reported on state and federal courts in Utah, Pusey took an interest in legal affairs, particularly at the Supreme Court. By 1937, he had developed a reputation for journalistic expertise on the Court, and he helped lead the *Post*'s editorial campaign against Roosevelt's court-packing plan. He wrote a book, *The Supreme Court Crisis*, in a whirlwind, 22-day effort to help defeat the plan. After he finished a second book, *Big Government: Can We Control It?*, in 1945, he approached Hughes about writing a biography. At their first meeting in Hughes' home on October 24, 1945, Pusey recorded that Hughes "laughs readily and heartily" and his "white chin whiskers part from the mustache in a rather astonishingly frank and open smile."¹³ They hit it off, though Hughes challenged Pusey at their second meeting on November 19, 1945, for having suggested in *The Supreme Court Crisis* that the Court's decision in *West Coast Hotel* was influenced by Roosevelt's court-packing plan. Macmillan published

¹² Merlo J. Pusey, *My Fifty Years in Journalism*, 18 DIALOGUE 70 (1977).

¹³ Box 13, Merlo J. Pusey Papers, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah (notes of Merlo J. Pusey interview with Charles Evans Hughes in Pusey Notebook I) (hereinafter "Notebook I, Box 13, LTPSC").

Pusey's two-volume biography of Hughes in 1951.

While researching the book, Pusey met regularly with Hughes until his death in 1948. Pusey's handwritten notes – many but not all of which ended up in the biography – record that Hughes spoke often about the New Deal cases of the 1930s, defending the Court's work and his own behavior. For example, Hughes defended his opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹⁴ decided the month after *West Coast Hotel*. Critics said Hughes' position in *Jones & Laughlin*, upholding federal power over labor-management disputes, contradicted his earlier position in *Carter v. Carter Coal Co.*,¹⁵ in which Hughes had joined an opinion that distinguished interstate commerce from purely intrastate production and thus invalidated a federal statute prescribing economic regulation of the coal industry.

In November 1945, Hughes told Pusey that if he had not voted the way he did in *Carter*, "all power over economic activity would pass to Congress."¹⁶ And in an April 30, 1946 interview, Hughes further explained that Roberts' opinion in *United States v. Butler*,¹⁷ striking down the Agricultural Adjustment Act, had been "widely misunderstood."¹⁸ Exactly one year later, however, Hughes admitted to Pusey that *Butler* was the lone case that might have justified Roosevelt's actions against the Court.¹⁹



Roberts' judicial behavior in 1937 has been the subject of much scholarly discussion. There are literally hundreds of relevant sources, but our careful review of a selection of leading scholarly sources on the events of 1937²⁰ suggests that the full details of Rob-

¹⁴ 301 U.S. 1 (1937).

¹⁵ 298 U.S. 238 (1936).

¹⁶ Notebook I, Box 13, LTPSC (interview of Nov. 19, 1945).

¹⁷ 297 U.S. 1 (1936).

¹⁸ Notebook I, Box 13, LTPSC.

¹⁹ Notebook II, Box 13, LTPSC (interview of April 30, 1947).

²⁰ See, e.g., G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 202-204

erts' interview with Pusey in 1946 have not previously come forward. Scholars have discussed extensively the memorandum that Roberts gave to Frankfurter, and somewhat less extensively Roberts' statement before the Senate Judiciary Committee in the early 1950s about "the tremendous strain [in 1937] and the threat to the existing Court, of which I was fully conscious."²¹ Although Friedman²² and Ariens²³ mention the 1946 Roberts–Pusey interview, they recount only a relatively small number of cryptic summaries of Roberts' comments that Pusey included in a 1983 article.

PUSEY'S INTERVIEW WITH ROBERTS, PART I

In his Pulitzer-Prize-winning Hughes biography, Pusey – by then a 20-year *Post* veteran – cited a confidential source for the Chief Justice's statement in response to the court-packing plan: "If they want me to preside over a convention, I can do it."²⁴ This quote,

(2000); MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 101-106 (2002); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 231-236 (1995); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 97-104 (1998); Barry Cushman, *The Securities Laws and the Mechanics of Legal Change*, 95 VA. L. REV. 927, 932-933 (2009); William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L. J. 1153 (2005); Daniel A. Farber, Book Review, *Who Killed Lochner?*, 90 GEO. L.J. 985 (2002); David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63 (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994); David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504 (1987).

²¹ Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 279 (1994) (citing Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 Before the Subcomm. On Constitutional Amendments of the Senate Comm. on the Judiciary, 83rd Cong., 2d Sess. 9 (statement of Owen J. Roberts)).

²² Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985, 1994 (1994).

²³ Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 634 (1994).

²⁴ MERLO J. PUSEY, 2 CHARLES EVANS HUGHES 753 (1951).

plus the tidbit that Hughes had nearly hugged Roberts in late 1936 when Roberts told Hughes he intended to vote with the Chief and Justices Louis Brandeis, Harlan Fiske Stone, and Benjamin Cardozo in *West Coast Hotel*, came from a May 21, 1946 interview Roberts gave to Pusey at the Willard Hotel in Washington, D.C.²⁵ Although Pusey reported a few details of this interview in his Hughes biography and a few more in his 1983 article,²⁶ the complete contents of the interview have apparently remained hidden in Pusey's handwritten notebook, which was included among materials that Pusey donated to Brigham Young University before his death in 1985.²⁷

Under the heading "Confidential," Pusey took 23 pages of handwritten notes in a small bound notebook about his two-hour conversation with Roberts at the Willard. By May 1946, Roberts had been retired from the Court for nearly 10 months. He would die nine years later, but not before burning his Court papers. Hence Pusey's notes, along with the 1945 memorandum that Roberts gave to Frankfurter, provide unique and critical firsthand explanations of Roberts' handling of the New Deal cases.

At the outset of the interview, Roberts said he believed *Tipaldo* (which Pusey's notes called *Morehead*) should not have been heard by the Supreme Court unless the Court was willing to reconsider its 1923 decision in *Adkins v. Children's Hospital*, in which the Court had invalidated a District of Columbia minimum-wage law for women and children.²⁸ Roberts felt that counsel challenging the New York minimum-wage law in *Tipaldo* made a "dishonest argument" in trying to distinguish the facts of *Tipaldo* from those of *Adkins*. But Hughes, Brandeis, Stone, and Cardozo had all voted to grant *certiorari* in

²⁵ In one published account, Pusey recorded the interview date as May 31, 1946. See Pusey, *supra* note 7. But Pusey's original handwritten notes indicate that the interview took place on May 21, 1946.

²⁶ See Pusey, *supra* note 7.

²⁷ MSS 1532, Box 13, Merlo J. Pusey Papers, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah (notes of Merlo J. Pusey May 21, 1946 interview with Owen J. Roberts) (hereinafter "Roberts Interview, Box 13, LTPSC").

²⁸ 261 U.S. 525 (1923).

Interview with former
Justice Owen J. Roberts
May 2nd, 1946 - (confidential)

When the Grocehead case
came before the Supreme Court
in 1936 Roberts saw no point
in taking it unless the Court
was willing to reconsider,
Atkins v. Children's Hospital.
Roberts thought it was a dishonest
argument counsel^{later} made in
trying to distinguish the N.Y. law
from that of D.C. which the
Court had invalidated.

~~But~~ But H. Brandeis, Stone
and Cargozo wanted to take it.
That was enough votes ^{for taking case} ~~for taking case~~.
Why didn't he meet the real issue?
Since he didn't Roberts decided
to go with the "four horsemen."
making a majority against the N.Y. law.

The first page of Merlo Pusey's notes of his 1946 interview with Justice Owen Roberts.

Tipaldo. Roberts explained that he sided with the “four horsemen” — Justices Willis Van Devanter, George Sutherland, Pierce Butler and James McReynolds — because counsel challenging the New York law did not address the “real issue” of whether *Adkins* should be overruled.²⁹

Initially, Roberts said, the *Tipaldo* opinion written by Justice Butler adhered closely to the rationale of *Adkins*. But after the draft opinion was circulated internally to the Justices, “it brought out powerful dissents” and, therefore, Butler “buttressed it by putting in additional arguments.” According to Pusey’s notes, “Roberts didn’t like all this. He had to swallow hard to take some of what was said, but he held to the position he had taken.” Less than a year later, *West Coast Hotel* came before the Court and, Roberts said, it presented “a clear-cut challenge to *Adkins*.”³⁰

Unlike *Tipaldo*, Roberts felt the “straight issue” confronting him in *West Coast Hotel* was whether to overrule *Adkins*, which he voted to do. Pusey wrote that Roberts said, “When he told [Hughes] in a private conversation that he intended to do so Hughes was so pleased that he almost hugged Roberts.” Roberts then explained to Pusey that *West Coast Hotel* had been internally decided in December 1936 but held by Hughes until Stone could recuperate from a serious illness and return to the Court to record his vote in favor of the legislation in early 1937. In the interim, FDR had introduced his court-packing plan as a way to achieve judicial approval for New Deal legislation, thus making it appear the “switch in time” was occasioned by Roosevelt’s threat to pack the Supreme Court with Justices sympathetic to his agenda.³¹

Roberts, however, told Pusey that “the real change that came about was in the lawmaking itself.” Congress and the President, Roberts said, had required “a few jolts” from the Supreme Court before they learned “how to frame constitutional laws,” largely by basing economic legislation on Congress’ powers under the Com-

²⁹ Roberts Interview, Box 13, LTPSC.

³⁰ *Id.*

³¹ *Id.*

merce Clause power rather than its power to tax. Next Pusey recorded a critical paragraph that seems to contradict statements by Roberts in the Frankfurter memorandum that his reasoning for the switch was purely legal:

He does not say that the court fight had no affect [sic] on thinking of justices. It is diff. to say what makes a judge decide as he does. Public outcry against an opinion is bound to have some effect on a man's thinking when it is a question of degree – of how far can we go.³²

The implication here seems to be that Roberts, and perhaps Hughes (who had his own “switch” moment in *Jones & Laughlin*), had been influenced by popular events leading up to and following FDR's court-packing scheme, if not by the scheme itself. This suggestion seems to contrast with Hughes' consistent position; he told Pusey in interviews that “Roosevelt's criticism of the court had no influence whatever” (Nov. 19, 1945) and that the “[c]old fact is there was not slightest change in [Hughes'] viewpoint as result of [Roosevelt's] actions” (Dec. 3, 1946).³³ Even Roberts, immediately after making the statement above to Pusey, seemingly backpedaled somewhat when he next said that “he sees no compromise of [the Supreme Court's] opinions – no trimming of sails to catch the wind of popular opinion.”³⁴ Roberts apparently saw himself as something more than a mechanical legal decision-maker while remaining something less than an overtly political actor.

PUSEY'S INTERVIEW WITH ROBERTS, PART II

At this point in the interview, Roberts moved away from discussing the New Deal cases directly and instead spoke about Hughes, ostensibly Pusey's primary interest. Among other observations, Roberts noted that Hughes lived “strictly according to rules”

³² *Id.*

³³ Notebook II, Box 13, LTPSC.

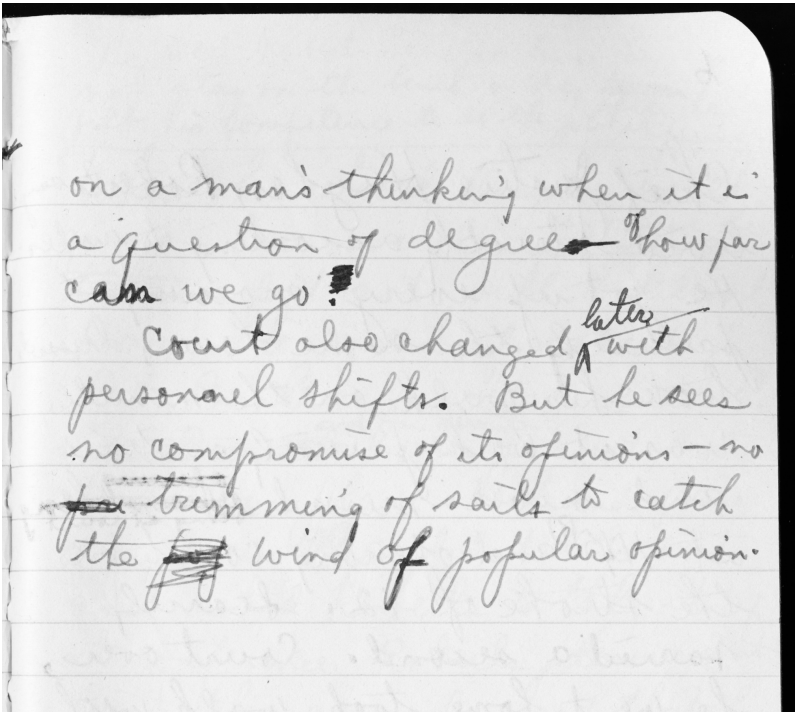
³⁴ Roberts Interview, Box 13, LTPSC.

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one + gave it to another making simply a regulatory exaction - instead of ~~the~~ proper tax. He sees real distinction between (rev. ^{tax} power) and regulatory power - commerce clause.

Agrees that the real change that came about was in the lawmaking itself. After a few yrls Cong. + ad. learned how to frame constitutional laws + mistakes of the early new deal legislation was not repeated - until ^{war time} price-control act, Roberts says.

He does not say that the court fight had no effect on thinking of justices. It is diff. to say what makes a judge decide ~~as~~ as he does. Public outcry against an opinion is bound to have some effect



The fourth (at left) and fifth (above) pages of Pusey's notes of his Roberts interview, briefly hinting that Roberts' switch may have been influenced by non-legal factors, including "[p]ublic outcry."

and followed a regimented daily schedule of exercise, work, spending time with his wife, and reading. Hughes, Roberts said, was circumspect and rarely ventured out in public after retiring from the Court in 1941 because of the fear that he might overshadow Stone, his successor as Chief Justice. Hughes was a great administrator whose example motivated others to excel. Hughes "dominated the court by reason of the power and keenness of his intellect," Roberts said. One gets the feeling here that Roberts did not merely shower platitudes on a former colleague but rather had been genuinely convinced of Hughes' powers:

Every one [sic] on the court had great respect for him and his views. The Justices were reluctant to take issue with him

because of the eminence of his intellect. It was a case of intellectual superiority, Roberts says. He felt it keenly and freely acknowledges it. He was told by Cardozo that on bench Cardozo waited 24 hours to decide case after a Hughes argument because of its superior cogency. Roberts says Hughes is a towering personality – the most orderly and astute mind he has encountered.³⁵

The power of Hughes, Roberts said, stemmed not only from his intellect but also “his thorough preparation of every case [which] gave him a commanding position.” Hughes’ ability to come up with what Roberts called “ingenious arguments” that often persuaded his brethren on the Court to change their minds and side with him stemmed from his deep knowledge of the facts of each case. As the Chief Justice, Hughes began the discussion of each case at conferences with his colleagues by reciting the facts and legal issues “with amazing speed and accuracy, seldom looking at his penciled notes,” according to Roberts.³⁶ Hughes himself told Pusey that he invested “an immense amount of work” into knowing and summarizing the factual record in each case, and that this prevented a lot of “fumbling around for facts” at conference.³⁷ Another colleague had said of Hughes the lawyer that “he believed in God but believed equally that God was on the side of the facts.”³⁸

Both Roberts and Hughes, in their interviews with Pusey, denied that Hughes ever went to Roberts individually for the specific purpose of convincing him to switch his vote from *Tipaldo* to *West Coast Hotel* for purely political reasons. Hughes averred that he “never took a judge aside and said, ‘Good God, you can see the difficult spot we’re in, you’ve got to help us out.’”³⁹ But even at conference Hughes’ spellbinding powers were legendary. In fact, while Hughes told Pusey he did not “appeal to emotions” of his brethren, Hughes

³⁵ *Id.* (underlining in original).

³⁶ *Id.*

³⁷ Notebook I, Box 13, LTPSC.

³⁸ Zechariah Chafee, Jr., *Charles Evans Hughes*, 93 PROCEED. AM. PHIL. SOC’Y 267, 267 (1949).

³⁹ Notebook II, Box 13, LTPSC (interview of Dec. 3, 1946).

admitted he used facts and reasoning as persuasively as he could. Hughes further allowed that “he may have dominated the court in some measure. . . .”⁴⁰ It is therefore not hard to imagine that if Hughes – an austere man whom Theodore Roosevelt once called a “bearded iceberg”⁴¹ – wanted to hug Roberts upon hearing his decision in *West Coast Hotel*, Hughes might have subtly or perhaps just subconsciously exercised his powers of persuasion on Roberts.



Some 30 years after his interviews with Roberts and Hughes, Pusey wrote that Hughes “had led the Court into a new era of liberal decisions.”⁴² Did this leadership include persuading Roberts to change his vote and uphold the New Deal legislation at issue in *West Coast Hotel*? The available evidence suggests that Hughes, who was known as an influential person and who had at least one private conversation with Roberts about *West Coast Hotel*, likely did influence Roberts. Thus in the continuing search for explanation of Roberts’ judicial decision-making behavior in 1937, strategic factors must be taken into account along with legal reasons and attitudinal, or political, reasons. Roberts said he and others felt “affection and admiration” for Hughes,⁴³ and many perceived that Hughes in 1937 was chiefly responsible for rescuing the Court from FDR.⁴⁴ Under those circumstances, and given Roberts’ own words as reported by Pusey, it seems “the switch in time that saved nine” was neither a wholly cynical political calculation nor a purely legal determination.

Support for the idea that Roberts in 1937 acted strategically and was influenced by elements of both law and politics also comes from several statements made by Frankfurter. In assessing the meaning of

⁴⁰ *Id.*

⁴¹ SIMON, *supra* note 10 at 100.

⁴² Pusey, *supra* note 12 at 77.

⁴³ Owen J. Roberts, *A Fine Life of Charles Evans Hughes*, N.Y. HERALD-TRIBUNE BK. REV., Nov. 18, 1951 (located in Robert H. Jackson Papers, Folder 8, Box 56, Manuscript Division, Library of Congress, Washington, D.C.).

⁴⁴ SIMON, *supra* note 10 at 323.

the memorandum Roberts had given him in 1945,⁴⁵ Frankfurter warned against finding any “economic predilection” of Roberts in Supreme Court opinions authored or joined by him.⁴⁶ Frankfurter then called Roberts “a forthright, democratic, perhaps even somewhat innocently trusting, generous, humane creature,” and he observed that “no man ever served on the Supreme Court with more scrupulous regard for its moral demands.”⁴⁷ Meanwhile, describing Hughes and the Court he led, Frankfurter said “judicial application is not a mechanical exercise, but a profound task of statecraft exercised by judges set apart from the turbulence of politics.”⁴⁸

In his interview with Pusey, Roberts believed himself to be set apart from politics, not simply a ship trimming its sails “to catch the wind of popular opinion.” Yet Roberts recognized that being set apart from politics does not mean being ignorant of contemporary events and attitudes. Notably, Roosevelt in the 1936 election had achieved a forceful victory that many perceived to be a mandate for the New Deal. In “a question of degree” – such as how far the interstate commerce clause extended in 1937 – “[p]ublic outcry” was, in Roberts’ view, one of several appropriate factors to consider. He did not wilt under political pressure from Roosevelt, but he also did not ignore changing public opinions and circumstances. That Roberts could think critically on his role as both a legal and strategic judicial decision-maker does not make him illegitimate as a Supreme Court Justice. Roberts’ sincerity and candor only enhance the notion that he was a conscientious human being doing his best to fulfill his judicial responsibility and benefit society.



⁴⁵ For an interesting debate on the legitimacy and meaning of this memorandum, see Ariens, *supra* note 23, and Friedman, *supra* note 22.

⁴⁶ Frankfurter, *supra* note 6 at 317.

⁴⁷ *Id.*

⁴⁸ Felix Frankfurter, *The Impact of Charles Evans Hughes*, N.Y. TIMES BK. REV., Nov. 18, 1951 (located in Felix Frankfurter Papers, Reel 92, Manuscript Division, Library of Congress, Washington, D.C.).