Judicial Review and Judicial Power in the Supreme Court

Edited with introductions by

Kermit L. Hall
North Carolina State University

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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

The most distinctive power associated with the Supreme Court is nowhere specified in the Constitution; it is the power to review on constitutional grounds the actions of state and federal governments, most notably through the examination of legislative enactments. The justices early in the history of the institution underscored the importance of this practice. Chief Justice John Marshall, in the landmark case of *Marbury* v. *Madison* (1803), asserted what became the major principle on which judicial review rests. "It is emphatically the province and the duty of the judicial department," Marshall wrote, "to say what the law is." Through the practice of judicial review the Court extends its powers in two ways. First, it can decide whether actions taken by the two other branches of the federal government comply with the word and spirit of the Constitution. The Supreme Court, for example, ordered President Richard M. Nixon to turn over tape recordings of conversations in the White House and struck down the congressionally mandated Missouri Compromise that excluded slavery from portions of the Louisiana Purchase. Second, judicial review has had an equally if not more dramatic role in fixing the scope of state governmental powers under the federal Constitution. The high court, for example, struck down in 1905 a New York state law that prohibited bakers from working more than sixty hours a week and more recently it has thrown out a host of state laws involving racial segregation (*Brown* v. *Board of Education* [1954]), criminal justice practices (*Mapp* v. *Ohio* [1961]), and abortion (*Roe* v. *Wade* [1973]).

The practice of judicial review has rested as well on the related concepts of judicial independence and judicial sovereignty. The former means that the justices, through the appointment process and tenure during good behavior, are shielded from direct political pressure; the latter means that in matters of constitutional interpretation what the justices say is sovereign, conclusive and final. As these essays make clear, however, all three concepts — judicial review, judicial independence, and judicial sovereignty — were at once hard earned by the Court and more often than not supported by the other branches and even the states. The high court, then, through the practice of judicial review has become a flashpoint for constitutional controversy, one often highly valued by the political branches who have found it convenient to shift the most controversial issues from the political to the legal stage for resolution. These essays also underscore that the power of judicial review is as effective when it sustains

a federal or state action as when it strikes down a law. In the end, it is the power of the Court to decide finally, whether positively or negatively, that makes the practice of judicial review so central to the American scheme of government.

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Judicial Review and Judicial Power in the Supreme Court

THE BIG SWITCH: JUSTICE ROBERTS AND THE MINIMUM-WAGE CASES*

By JOHN W. CHAMBERS

It was in the seventh year of the Chief Justiceship of Charles Evans Hughes that the Supreme Court of the United States gave up the fifty-year fight which it had been waging intermittently against social and economic reform.[1] The culmination of the Court's campaign came in 1935 and 1936 when, in a little more than twelve months, the high tribunal smashed much of the New Deal program. In a series of sledge-hammer judicial blows, the justices obliterated the federal government's sweeping attempts to restore depression-racked business and agriculture, and destroyed narrower measures aimed at creating railroad-worker pensions, insuring farm mortgages, resurrecting the coal industry, and aiding bankrupt municipalities.[2] The Court's final attempt to protect

*The author wishes to thank Professor William E. Leuchtenburg of Columbia University for his guidance in the preparation of this essay.

[1] The dramatic reversal which began in the Court's 1936-37 session has been called the most abrupt change in the high tribunal's entire history, in fact a limited constitutional revolution. See Alfred H. Kelly and Winfred A. Harbison, *The American Constitution, Its Origins and Development,* (3rd edition; New York, 1963), 760-64; E.S. Corwin, *Constitutional Revolution, Ltd.* (Claremont, Calif., 1941). The justices abandoned the doctrines of substantive due process and dual federalism, which had been developed in the late 19th century and in the 1920s as tools to protect business from what the judges had considered unreasonable federal and state regulation. They also jettisoned the concept of freedom f contract which had been constructed in the early 1900s to guarantee entrepreneurial liberty. Kelly and Harbison, 498, 518-21, 689, 788 and John P. Roche, "Entrepreneurial Liberty and the Fourteenth Amendment," *"Labor History,* IV (Winter, 1963), 3-31. In 1937, after having invalidated some sixty acts of Congress and more than 500 state laws since 1874, the Supreme Court virtually renounced its quasi-legislative function in the area of economic responsibility and allowed both state and federal governments to expand their authority. In the following decade, the justices rejected only one state economic statute as a violation of either the due process or equal protection clauses of the 14th Amendment. In essence, the Court since 1937 has rerouted its activism into the field of civil liberties. Kelley and Harbison, 541, 788-96, and chs. 29, 32, 33, 34.

[2] *Schechter Poultry Corp.* v. *U.S.,* 295 U.S. 495 (1935) invalidated N.R.A.; *U.S.* v.

JOHN W. CHAMBERS is *Assistant Professor of History at California State College at Hayward.*

business against government regulation came on June 1, 1936, when it overturned a New York minimum-wage law for women and children. After the reading of the five-to-four decision in *Morehead* v. *New York ex rel. Tipaldo,*[3] the nine justices rose, shook hands with friends in the audience, and filed out of the courtroom to begin their summer vacations.[4]

Within twelve months, however, the Supreme Court surrendered to the New Deal. The judicial bastion of *laissez-faire* economics crumbled before the concept of governmental responsibility for the state of the economy and the welfare of the people. Central to this change was Justice Owen J. Roberts, the square-jawed Philadelphia corporation lawyer and special prosecutor in the Teapot Dome scandals who had been appointed to the Court by President Hoover in 1930. Carrying his majority-making ballot like a white flag of truce, Roberts switched from the conservative to the liberal bloc of the Court. There he was joined by Chief Justice Charles Evans Hughes, who stopped his occasional flip-flops into the conservative camp, and together they shifted the balance of power on the high tribunal. In the next few years, the new liberal majority broadened the interpretation of the commerce and taxing clauses of the Constitution, shifted the emphasis of the due process clause from protection of property to protection of civil rights, and substantially sanctioned the New Deal and the Welfare State.[5]

State minimum-wage legislation was the focal point of the Court's conversion from an opponent into a supporter of social and economic reform. In June 1936, Roberts and the conservatives *invalidated* the New York minimum-wage law. Ten months later, Roberts and the liberals *upheld* a minimum-wage law from the State of Washington. The membership of the Court had not changed, but its decision had. Despite the apparent clearness of the switch, Roberts' role in the minimum-wage cases—and to a lesser extent that of Chief Justice Hughes—is still one of the mysteries of the Court, debated by lawyers,

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Butler et al., 297 U.S. 1 (1936) ended the A.A.A.; *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935) terminated the Railroad Retirement Pension Act; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935) overturned the Frazier-Lemke Farm Mortgage Act; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) invalidated the Guffey Bituminous Coal Act; and *Ashton* v. *Cameron County District*, 298 U.S. 513 (1936) ended the Municipal Bankruptcy Act.

[3] 298 U.S. 587.

[4] *Newsweek*, VII (June 6, 1936), 297.

[5] See Charles Herman Pritchett, *The Roosevelt Court, a Study in Judicial Politics and Values, 1937-1947* (New York, 1963), *passim* for an analysis of the new direction of the Supreme Court after 1936.

historians and political scientists. Did Roberts really switch? If so, what made him change his mind?[6]

It was fitting that minimum-wage legislation should have been the pivot for the Court's shift in favor of reform. Because of the Court's previous rulings, the United States in 1936 was at least twenty-five years behind most modern nations in legislating against substandard wages. Since 1923, the Court had ruled consistently against the constitutionality of minimum-wage legislation.

The minimum-wage movement had emerged in Australia and New

[6] From the beginning, some jurists and students of the Court have indicated that Roberts did not really switch but had always favored minimum-wage legislation and had only voted against such a statute in the New York case because of a technicality. See, for example, Hughes' opinion in the Washington minimum wage case 300 U.S. 389 (1937); Merlo J. Pusey, *The Supreme Court Crisis* (New York, 1937), 51; Pusey, *Charles Evans Hughes* (New York, 1951), II, 757, 768, 770-71; Felix Frankfurter, "Mr. Justice Roberts," *Univ. of Pa. Law Rev.* CIV (December, 1955), 313-16; Erwin N. Griswold, "Owen J. Roberts as a Judge," *ibid.*, 332-44; Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* (New York, 1956), 81, 81n; J. Lee Rankin, "Our American Heritage; the Court, the Depression, and the New Deal, 1930-1941," mimeographed copy at the library of the University of California at Berkeley Law School of a speech at the University of Omaha, April 6, 1960; Arthur E. Sutherland, *Constitutionalism in America* (New York, 1965), 495-99; and Max Freedman, annotator, *Roosevelt and Frankfurter, Their Correspondence, 1928-45* (Boston, 1967), 372, 392-93. But at the same time, many other writers have concluded that Roberts did switch, although they sometimes differ over the reason. See Mary Dewson to Frank C. Brophy, March 31, 1937, in Dewson MSS, Box 6, Franklin D. Roosevelt Library, Hyde Park (hereafter FDRL); "Court's Reverse: Justice Robert's Change of Mind from Fire Over Enlargement Plan," *Literary Digest* CXXIII (April 10, 1937), 8; Joseph Alsop and Turner Catledge, *The 168 Days* (Garden City, N.Y., 1937), 145; Franklin D. Roosevelt, *Public Papers and Addresses*, (New York, 1941), VI, lxvii, lxix; Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York, 1941; Vintage edition, n.d.), 208; Alpheus T. Mason, *The Supreme Court from Taft to Warren* (New York, 1958 Norton Library edition, 1964), 98-101; Robert C. McClosky, *The American Supreme Court* (Chicago, 1960), 175-76; Kelly and Harbison, *op. cit.*, 759-61; Marjorie G. Fribourg, *The Supreme Court in American History, Ten Great Decisions* (Philadelphia, 1965), 121; Leo Pfeffer, *This Honorable Court, a History of the United States Supreme Court* (Boston, 1965), 317-22; and Leonard Baker, *Back to Back, the Duel between FDR and the Supreme Court* (New York, 1967), 174-177. Finally, some authors have contended that Chief Justice Hughes also shifted his position in regard to minimum wage legislation in the two cases. This point was made by Harlan F. Stone in a letter to his sons, April 7, 1937, and it has been developed by Samuel Hendel, *Charles Evans Hughes and the Supreme Court* (New York, 1951), 133, 279 and by Alpheus T. Mason in numerous works such as "Harlan Fiske Stone and FDR's Court Plan," *Yale Law Journal*, LXI (June-July 1952), 791-817; "Charles Evans Hughes: An Appeal to the Bar of History," *Vanderbilt Law Review*, VI (December 1952), 1-19; "The Supreme Court: Instrument of Power or Revealed Truth, 1930-1937," *Boston Univ., Law Review*, XXXIII (June, 1953), 279-336; and *Harlan Fiske Stone: Pillar of the Law* (New York, 1956), 455-56. This view has been contested by Merlo J. Pusey in "Charles Evans Hughes," in Allison Dunham and Philip B. Kurland, eds., *Mr. Justice* (Chicago, 1956), 165, and in his review of Mason, *Stone* in *The New York Times Book Review* LXI (November 11, 1956), 1. So the argument over the switch remains unsettled. It is the purpose of this essay to re-examine the two minimum-wage cases, the justices' positions, and their own explanations, and to determine whether Roberts — and Hughes — switched, and if so, to explain their actions.

Zealand in the 1890s out of public horror at sweat-shop working conditions. The idea was to build a floor under wages in order to eliminate unscrupulous wage-cutting and guarantee workers enough money to live. Employers would have to compete through managerial efficiency rather than by cutting wages to undersell their competition. After its success in the South Pacific, the minimum-wage movement spread quickly to Western Europe where legislation was enacted in most of the major nations.[7]

In the United States, the drive for minimum-wage laws was sponsored by the National Consumers' League, a crusading social-reform organization dedicated to improving the conditions of working women and children. The League, under the direction of former Hull House worker Florence Kelley, launched its campaign for minimum-wage legislation for women and children in 1909.[8] Massachusetts enacted the first minimum-wage law in the United States in 1912, and fourteen other states adopted League-sponsored bills within the next eleven years.[9]

The crucial test of minimum-wage legislation came in 1923, when a conservative-dominated Supreme Court rejected both the wisdom and the constitutionality of minimum-wage laws in *Adkins* v. *Children's Hospital,* a decision that became a classic of *laissez-faire* philosophy. The Court majority in this case invalidated the minimum-wage law for women and children which Congress had enacted for the District of Columbia. Justice George Sutherland for the majority called it a violation of the right of an employee to contract for her services with the employer. The *New York World,* speaking for the opposition, blasted the ruling as a guarantee of the working girl's "constitutional right to starve."[10]

In 1923, Justice Sutherland warned that "the legislative authority to abridge [freedom of contract] can be justified only by the existence of exceptional circumstances."[11] The exceptional circumstances came with the Great Depression. In 1932, three out of every ten women in New York who had been employed in 1929 were out of work.[12] Those who

[7] Barbara N. Armstrong, *Insuring the Essentials, Minimum Wage Plus Social Insurance—a Living Wage Program* (New York, 1932), 4-8; John R. Commons and John B. Andrews, *Principles of Labor Legislation* (rev. ed.; New York, 1927), 198-205.

[8] Josephine Goldmark, *Impatient Crusader: Florence Kelley's Life Story* (Urbana, Ill., 1953), 132-35.

[9] Alice Cheyney, "The Course of Minimum Wage Legislation in the United States," *International Labour Review,* XXXVIII (July, 1938), 26-7.

[10] Quoted in Carl B. Swisher, *American Constitutional Development* (2d ed.; Boston, 1954), 806.

Adkins v. *Children's Hospital,* 261 U.S. 525 (1923).

Statement by Frieda S. Miller, chief of the Women's Bureau of the New York State

were still working were not much better off. One-third of the women employed in Manhattan earned less than $10.00 a week, and one out of four working women in Brooklyn made less than $8.00 a week.[13] The *New York World-Telegram* reported that working girls were sleeping in the subways because they did not have enough money to pay for both food and lodging.[14]

Moving into action, the National Consumers' League enlisted Felix Frankfurter of the Harvard Law School and Benjamin V. Cohen, Justice Louis Brandeis' former law clerk, to draft a new minimum-wage bill which would cope with Sutherland's objections to the District of Columbia law.[15] The League's New York branch lined up support and lobbied the model bill through the state legislature. The Minimum Wage Law for Women and Children was signed by Governor Herbert Lehman on May 1, 1933.[16]

The first industry to come under a minimum-wage order in New York was the laundry industry. It was already tottering because of labor chiseling and price warfare.[17] In Brooklyn, the industry was riddled with graft and racketeering and was dominated by a laundry czar.[18] Women in the New York laundries — the flat-work girls, the hand ironers, the press operators — were faced with near-starvation wages. New York City's Emergency Relief Bureau pegged the absolute minimum weekly income needed for a person to stay alive at $10.00, but half the city's laundrywomen were making less than $10.41 per week, and nearly one out of five of the girls was earning less than $8.00 a week.[19] Supported by the laundry owners, the state set a minimum wage of $12.40 for a forty-hour week in New York City with time and a half for overtime.[20] In thirty-one months, the average hourly

Dept. of Labor, in National Consumers' League, *Conference on the Breakdown of Industrial Standards* (New York, 1933), 10.

[13] Statement by Mrs. Elinore M. Herrick, executive secretary of the Consumers' League of New York, in *ibid.*, 10-11.

[14] Clipping from the New York *World-Telegram*, March 1, 1933, located in the National Consumers' League Records, Section II, at the New York State School for Industrial and Labor Relations, Ithaca, N.Y. (hereafter NCL Records).

[15] Goldmark, *op. cit.*, 177.

[16] *The New York Times*, May 2, 1933.

[17] *Journal of Retailing*, XII (December, 1936), 116-18.

[18] *The New York Times*, October 7, 1933; *ibid.*, April 26, 1934; *ibid.* July 19, 1934.

[19] Cost of living figures from *Factual Brief for Appellant*, p. 32, *Morehead* v. *New York ex rel. Tipaldo*, in U.S. Briefs 1935, No. 396; wage figures from Division of Women in Industry and Minimum Wage, N.Y. Dept. of Labor, *Report to the Industrial Commissioner on the Effect of Directory Order No. 1*, located in Mary Dewson MSS, Box 14, FDRL.

[20] *Ibid.*

earnings of the New York laundry women increased approximately 30 percent.[21]

From the beginning, some laundry operators violated the new law. One of the accused offenders was Joseph Tipaldo, the manager of the Spotlight Laundry in Brooklyn. Nine women worked for him in an old bottling plant at the edge of a railroad cut. In 1934, state inspectors discovered that Tipaldo was paying his laundry girls only $10.00 for a forty-seven hour week instead of the required $14.88. When the inspectors made him pay the girls the difference, he had the workers return the money afterwards for fear of losing their jobs. Later, inspectors learned that the girls were being forced to endorse and hand back their pay checks without seeing the face of the checks. While the payroll records and the checks showed the proper figures, the girls actually were being underpaid in cash. The state decided to take Tipaldo to court.[22]

Tipaldo, the laundry owner, and the bookkeeper were arrested on charges of failing to pay the state minimum wage, third-degree forgery for falsifying payrolls to conceal the violation, and conspiracy.[23] But the state never got the chance to present its case to a jury or to support its charges. Tipaldo's attorneys seized the initiative. Returning the laundry manager (who had been out on bail) to the City Prison in Brooklyn, they sought a writ of *habeas corpus* to force warden Frederick L. Morehead to release him on the grounds that the New York minimum-wage law was unconstitutional. They based their challenge squarely on the Supreme Court's ruling in the *Adkins* case.[24]

The state, however, won the first round. The New York Supreme Court for Kings County dismissed the writ and upheld the minimum-wage law as a "humane legislative intent to ameliorate human distress."[25] Tipaldo appealed to the New York Court of Appeals, the highest tribunal in the state. The appeal cost $16,000 and was financed

[21] John M. Peterson, "Employment Effects of State Minimum Wages for Women: Three Historical Cases Re-examined," *Industrial and Labor Relations Review,* XII (April, 1958), 414.

[22] News release from the Office of New York Attorney General John J. Bennett Jr., Nov. 3. [1934] located in NCL Records Section II; Beulah Amidon, "Due Process," *Survey Graphic,* XXV (July, 1936), 412-15; *Brooklyn Daily Eagle,* Nov. 1, 1934; *ibid.,* Nov. 3, 1934.

[23] News release, *ibid.*

[24] *Transcript of Record, Petition for Certiorari to the Supreme Court of the United States,* in *Morehead* v. *New York ex rel. Tipaldo,* 11, located in U.S. Briefs, 1935, No. 396; *Brooklyn Daily Eagle,* May 1, 1935.

[25] 156 Misc. 522; 282 N.Y.S. 576.

by the New York State Hotel Association.[26] The state's hotel and restaurant industry was notorious for low wages and long hours, and many hotels were reinstituting the twelve-hour day and the seven-day work week.[27] At the same time, the industry was bitterly opposing a state attempt to bring it under the minimum-wage law provisions.[28] On March 4, 1936, the Court of Appeals overturned the New York Minimum-Wage Law and dismissed the charges against Tipaldo. The majority held that the New York law was basically the same as the District of Columbia statute invalidated by the Supreme Court in the *Adkins* case.[29] Tipaldo was jubilant. He told a newspaperman that he had just spent $8,000 for new equipment and doubled his work force, but he was not worried about the money. "I expect to get it back eventually," he declared, "on what I save in wages."[30]

This time it was the state's turn to appeal. Less than two weeks after the Court of Appeals announced its decision, New York filed for a writ of *certiorari* to move the case to the Supreme Court of the United States.[31] When the high tribunal considered the petition in conference, Chief Justice Hughes led off by urging that it be granted. The conservatives—Pierce Butler, the Minnesota railroad lawyer; George Sutherland, the former Utah senator and Republican boss; James McReynolds, the Virginia attorney who had served briefly as Wilson's attorney general; and Willis Van Devanter, the Wyoming judge who had been assistant attorney general under McKinley—claimed the *Adkins* precedent was still controlling and spoke against hearing the case. The four votes needed to grant *certiorari* were provided by the liberals—Brandeis, the crusading reformer from Boston; Benjamin Cardozo, the New York judge and legal scholar; and Harlan Stone, who had been dean of the Columbia Law School and Coolidge's attorney general—and the moderately liberal Hughes, the former New York governor, Republican presidential candidate and secretary of state. Justice Roberts had refused to join the liberals in voting to hear

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[26] Statement by Tipaldo in New York *World-Telegram*, April 10, 1936. By the time the Supreme Court of the United States decided the case, Tipaldo's defense had cost $70,000. *Brooklyn Daily Eagle*, June 2, 1936.

[27] Clipping from the *New York Post*, June 11, 1935, located in NCL Records, Section II.

[28] *The New York Times*, July 10, 1935; *ibid.*, Nov. 27, 1935.

[29] 270 N.Y. 233; 200 N.E. 799.

[30] New York *World-Telegram*, April 10, 1936.

[31] *Petition for Certiorari, Morehead* v. *Tipaldo*, in U.S. Briefs, 1935, No. 396.

the case. Nearly a decade later, he wrote a memorandum implying—but not explicitly stating—that he had been ready to overrule the *Adkins* precedent and uphold minimum-wage legislation in the spring of 1936. "I said I saw no reason to grant the writ unless the Court was 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."[33]

New York filed two briefs — one legal and one economic — in defense of the minimum-wage law. The massive, 202-page economic brief pictured statistically the plight of the woman worker. Challenging the belief that women only worked for a few years before marriage, the state showed that women frequently worked for many years after their wedding, not for pin money, but to support themselves and their dependents. As a group, women were continuously paid low wages because they were not union members and because they worked in highly seasonal industries where employment fluctuated widely. Voluntary employer efforts to correct the situation had failed; only minimum-wage legislation had succeeded in easing their condition. In the legal brief, the state contended that the minimum-wage law was a valid use of the state's police power to protect the public welfare. It was an attempt to eliminate unfair competition and maintain the health of women industrial workers. The state argued that the New York law and the Washington D.C. statute were "vitally dissimilar." The Washington law ordered that wages had to be high enough to maintain a decent standard of living; the New York law provided that wages must be *equal to the value of the work performed*. The state also pointed out that the New York law sought to meet the objections the Court had raised in the *Adkins* case thirteen years before, by taking into considera-

[33] Owen J. Roberts to Felix Frankfurter, memorandum dated Nov. 9, 1945, printed in Felix Frankfurter, "Mr. Justice Roberts," *Univ. of Pa. Law Rev.*, CIV (December, 1955), 314-15 (hereafter, Roberts' memorandum to Frankfurter). In evaluating this document, it must be remembered that it was written nearly ten years after the event, and that there had been extensive criticism of Roberts' action in the minimum-wage cases. Roberts' defensive attitude is seen in his conclusion that "these facts make it evident that no action taken by the President in the interim [between the vote on the Washington state minimum-wage case—the *Parrish* case—and the announcement of the Court's decision in that case] had any casual relation to my action in the *Parrish* case." I have used the memorandum in this essay by splitting it up and setting it in chronological order in the narrative. In evaluating the document, I have given most weight to Roberts' assertions which can be supported by additional testimony, generally from Hughes or Stone, some weight to Roberts' unsupported description of a justice's action as long as it was consistent with that justice's customary behavior, and least weight to Roberts' unsupported statements of what he alone thought, said, or did. In fact, it is my contention that Roberts' memorandum is both ambiguous and contrived and that its main point — that Roberts did not switch and had favored