

# Commentary

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Of all the positions that came his way during what was to be a remarkable half century of public service, of all the offices that fell to a man who “owned to keeping his ‘plate rightside up’ when appointive jobs were being passed around,” William Howard Taft welcomed none as much as he did President Warren Harding’s offer to nominate him as the tenth Chief Justice of the Supreme Court of the United States.<sup>1</sup> This was the long-desired post that, at last, realized for Taft “the comfort and dignity and power without worry I like.”<sup>2</sup> Upon being notified of his nomination, Taft reportedly said to Harding: “I love judges and I love courts. They are my ideals on earth of what we shall meet afterward in heaven under a just God.”<sup>3</sup>

In nominating Taft as successor to the venerable Louisianan Edward Douglass White, Harding and his attorney general, Harry Daugherty, had no reason to wonder what type of judge Taft might be. His writings and speeches as an appeals court judge, law professor, and ex-president clearly set forth a judicial philosophy that would guide him for what would prove to be ten years at the helm of the Supreme Court. (From the start, Taft planned to serve ten years on the Court and then retire and take the grand tour of the world. Death would prevent him from making the voyage.)

Taft’s judicial philosophy was greatly influenced by his view of himself as a faithful disciple of both John Marshall and Alexander Hamilton. As

such, he was a federalist who viewed state regulation suspiciously, championed the federal government, and saw an independent and powerful judiciary as the bulwark for protecting the “vested rights” that the Framers sought to guarantee by this “more perfect union.” He also viewed the independence of the presidency and its total control over the executive branch as necessary for the Constitution’s system of checks and balances to work effectively. The essay “Liberty under Law,” reprinted in this volume and written by Taft before he assumed the chief justiceship, presents the picture of a person who was less likely to experience the learning curve faced by many other new justices, even those who, like Oliver Wendell Holmes, Jr., had had considerable previous judicial experience before joining the Supreme Court.

Taft arrived with a clear vision of what he needed to do as chief. During his ten-year tenure he came as close as any chief justice has to achieving just that. One student of Taft, for instance, asserts that Taft, more than any president in the first third of the twentieth century, shaped the Court and, as importantly, created an aura around the Court of judicial independence and nonpartisanship that allowed the Court to weather the storms that buffeted it in the 1930s.<sup>4</sup>

Even as his health declined and he realized that his days on the bench were numbered, Taft could reflect on how much he had accomplished and could feel reasonably confident that his legacy would endure. In contrast, the two later justices who also arrived on the bench with definite agendas—Felix Frankfurter and Warren Burger—failed almost totally to achieve their goals. In contrast, Taft could rightfully claim to have met almost all the ambitions he had set for himself when he arrived on the Court in 1921.

Although possibly unsuited for the presidency and surely unhappy in the White House, Taft was a natural for the role of chief justice. “I am head of the judicial branch of government,” he claimed in 1922.<sup>5</sup> Here the same attributes that doomed his term in the White House—one biographer characterized him as “a smiling Buddha, placid, wise, gentle, sweet”<sup>6</sup>—allowed him to establish himself as a respected and well-liked leader. As chief, he was also unusually effective in securing legislative support for those parts of his agenda that required congressional action. His three great triumphs in this arena were persuading Congress to establish the judicial conference, chaired by the chief justice; successfully lobbying through Congress the Judges’ Act of 1925, a statute that freed the Court of much of its burdensome obligatory jurisdiction and stands second only to the Judiciary Act of 1789 in establishing the power of the federal judiciary; and finally, securing an appropriation to purchase land and build the current Supreme Court building—the Court’s first

permanent home. These three accomplishments laid the foundation for the Supreme Court as we know it today. Taft's testimony to the House Judiciary Committee, contained in this volume, shows the clarity of Taft's vision of what a modern court system needed in order to function effectively.

Taft also saw his role as chief as allowing, indeed requiring, his involvement in the process of selecting federal judges. Taft appointed six justices during his one term as president—only George Washington and Franklin Delano Roosevelt appointed more. Harding and Daugherty appear to have given Taft significant control over nominations to the federal bench and, though less successful in the succeeding Coolidge and Hoover administrations, Taft continued throughout his term to importune presidents on judicial appointments. He appears to have had some say even in Herbert Hoover's selection of Charles Evans Hughes over Harlan Fiske Stone to succeed him as chief justice.<sup>7</sup>

Taft's legacy also includes 249 opinions of the Court and seventeen dissents. These demonstrate both how closely Taft followed the views expressed prior to his elevation to the high bench and how Taft's views reflected the changing nature of American society in the 1920s. Taft was, particularly in his early years on the Court, a workhorse, taking many cases that the other justices were not anxious to tackle. A few examples of his patent and admiralty cases are included, but in the main they have been omitted, along with cases involving contract and salary disputes. In one of the omitted cases, Taft began his opinion: "This is an ordinary patent case. There was no reason for granting the application for a writ" (*Layne v. Western Well Works*, 261 U.S. 387, 388 [1923]). Taft's willingness to take these less attractive cases resulted in his writing a disproportionate number of the Court's opinions during his service as chief. Abraham estimates that Taft "wrote almost twenty percent of the Court's opinions."<sup>8</sup>

## Taft as Chief Justice

Courts may have been heaven to William Howard Taft—and they must have appeared even more celestial after his four years in the White House and the disastrous presidential campaign of 1912—but the particular heaven to which Taft would quickly ascend, "affirmed with only four no votes on the very same day the nomination reached the Senate," was not an altogether happy Eden.<sup>9</sup> The Court had badly fractured during the final years of Edward Douglass White's tenure in its center chair (1910–21). Indeed, many of the problems that Franklin Roosevelt incorrectly alleged were afflicting the 1937 Court were present in 1921. The Court was behind in its caseload,

hampered by the infirmities of certain of its members, and divided by personal feuds among others of the brethren.<sup>10</sup>

Taft knew all of this and saw it as a challenge to which he could more than measure up. The stamina with which he attacked the job and the skill he showed as “social leader” quickly won him a respect, admiration, and friendship from his colleagues that would endure to the end of his service on the Court.<sup>11</sup> This respect was evidenced by the heartfelt tribute penned for the Court by its senior member, Oliver Wendell Holmes Jr. to mark Taft’s leaving in 1930.<sup>12</sup> Historians and political scientists have also been generally respectful of his years as chief justice. In a ranking of the first hundred justices, twelve were considered “greats” and fifteen “near greats.” Taft is found in the latter category.<sup>13</sup> A more recent survey, limited to the justices of the twentieth century, ranked Taft fourteenth out of fifty-two.<sup>14</sup> Admittedly, playing the role of *primus inter pares* does appear to increase a justice’s chances of being favorably evaluated. Five of the “greats” served as chief justice and two of the “near greats” also presided over the high court. In contrast, Taft is widely rated as only “average” among presidents, a conclusion in which the jovial Taft might well have concurred, having himself noted that he had “retired from the Presidency of the United States with the full and unmistakable consent of the American people.”<sup>15</sup>

Taft seems to have quickly brought a sense of concord to the Court, although he was never fully able to rein in the unusual behavior of Justice James Clark McReynolds.<sup>16</sup> He was able, however, quickly to “mass” the Court, based on the philosophy of “no dissent unless absolutely necessary.”<sup>17</sup> Early on, Theodore Roosevelt had summed up Taft’s general talent for bringing consensus, noting that with “Taft sitting on the lid, everything will be okay.”<sup>18</sup> Justices as diverse as Pierce Butler—“Dissents seldom aid . . . [and] often do harm. For myself I say: ‘lead us not into temptation’”—and Louis D. Brandeis gave in to the chief’s desire for consensus and held their dissents.<sup>19</sup>

Taft did have an aversion to dissents, but the fact was that he rarely found himself in the minority. He quickly overcame the divisiveness that had characterized the White Court toward the end of White’s service. The figure below presents the voting patterns on the Court from 1922 to 1924. This period was picked because it represents a period of stability in the Court’s membership. The “Index of Interagreement” was devised by Glendon Schubert in 1958 as a measure for determining the degree of inter-agreement in non-unanimous cases. Schubert posits .70 as high, .60 to .69 as moderate, and below .60 as low.<sup>20</sup> The center bloc controlled five votes. In

Table 1  
 Index of interagreement in split decisions of the Taft Court from 1922  
 (beginning 261 U.S. 86) to 1924 (ending 267 U.S. 132)

	Brandeis	Holmes	Taft	Van Devanter	Butler	McKenna	Sanford	Sutherland	McReynolds
Brandeis	—	77	61	51	51	44	54	34	41
Holmes	77	—	74	63	63	55	68	47	45
Taft	61	74	—	89	87	77	89	60	46
Van Devanter	51	63	89	—	95	78	85	67	45
Butler	51	63	87	95	—	83	85	61	48
McKenna	44	55	77	78	83	—	75	53	38
Sanford	54	68	89	85	85	75	—	72	55
Sutherland	34	47	60	67	61	53	72	—	67
McReynolds	41	45	55	45	48	38	55	67	—
Percent assent	59	70	92	93	93	80	93	69	53
						<b>Brandeis-Holmes</b>	<b>0.77</b>		
						<b>Center Bloc</b>	<b>0.778</b>		
						<b>Sanford-Sutherland</b>	<b>0.72</b>		

addition, Taft could count on a high level of support from Holmes. The two voted together 74 percent of the time.

The rate of dissent on the early Taft Court was dramatically lower than that of the Court in the waning days of the chief justiceship of Taft’s predecessor, Edward Douglass White. The same observers, however, who credit Taft with this achievement are equally quick to note that the dissent rate on the Court jumped after 1925.<sup>21</sup> In large part, the post-1925 rise in dissents can be attributed to the adoption of the Judiciary Act of 1925 (the “Judges’ Act”). One of Taft’s most significant accomplishments (see Appendixes 1 and 2 for Taft’s testimony before congressional committees on its behalf), the act eliminated many trivial cases from the Court’s docket. These were cases that prior to 1926 the Court would have had to take, cases that likely would have been decided by unanimous vote. Thus, while the percentage of cases not decided unanimously does climb in the terms after 1925, the number of cases decided by full opinion also declines dramatically. If one assumes that the cases no longer heard by the Court—cases that fewer than four judges deemed to involve a “substantial federal question”<sup>22</sup>—would have been noncontroversial had they remained on the docket, their inclusion would have reduced the dissent rate to a level almost identical to that found on the Court during Taft’s first four full years as chief. For example, if you take the average of the number of cases disposed of by full opinion beginning with the 1922 term and ending with the

Table 2  
Rate of dissent on the Taft Court, by term

Term	Total dissents	Solo dissents	Total opinions	Percent dissent
1921	37	8	175	.211
1922	18	4	225	.08
1923	22	8	214	.103
1924	21	11	231	.091
1925	17	8	211	.081
1926	29	9	198	.146
1927	25	3	171	.146
1928	22	8	126	.174
1929	7	1	34	.205

1925 term, it is 219. By contrast, in 1927 the Court handed down only 171 cases with full opinions (as opposed to cases disposed of summarily). Assuming that the cases that no longer took up the Court's time as a result of the Judiciary Act of 1925 would likely have been disposed of without dissent, their inclusion would have changed the dissent rate for 1927 and made it more similar to the earlier low rates. Thus, if the Court had decided not 171 cases, as it did in 1927, but rather a number equal to the pre-1925 yearly average of 219 and if these additional cases were decided without dissent, the dissent rate for 1927 would have been .114 instead of the actual rate of .146. The former rate would have not been much different than the low dissent rate of the early Taft Court.

The later Taft Court, however, did show certain differences from the pre-1925 body. The appointment of Harlan Fiske Stone, Calvin Coolidge's attorney general, to succeed the aged and infirm Justice Joseph McKenna changed the Court's chemistry dramatically. With the accession of Stone, the last justice to join the Taft Court, there quickly developed a three-member bloc consisting of Stone and Justices Brandeis and Holmes. Unlike the Holmes-Brandeis dyad in table 1, however, this new bloc appears to have separated Taft from Holmes. The rate of interagreement between the two drops from 74 percent (high) to 60 percent (moderate, verging on low). At the same time, Justice George Sutherland begins to vote more often with Taft and the other members of the majority (center) bloc.

Comparing the earlier and later periods for dissents, one can see that Taft found himself presiding over a Court that was beginning to divide along the lines—clear liberal and conservative blocs—that would characterize the pre-1937 Hughes Court. Tables 4 and 5 show the number of dissenting votes cast by each justice. An index of cohesion is calculated for each. Following Schu-

Table 3

	Brandeis	Holmes	Stone	Taft	Van Devanter	Sanford	Butler	Sutherland	McReynolds
Brandeis	–	80	63	47	47	46	35	42	29
Holmes	80	–	78	60	56	46	46	44	33
Stone	63	78	–	67	62	62	54	55	39
Taft	47	60	67	–	91	80	78	70	60
Van Devanter	47	56	62	91	–	77	87	71	61
Sanford	46	46	62	80	77	–	71	73	60
Butler	35	46	54	78	87	71	–	83	59
Sutherland	43	44	55	70	76	73	83	–	56
McReynolds	29	33	39	60	61	60	59	56	–
Percent assent	52	63	68	94	94	84	76	75	63
<b>Index of interagreement</b>									
<b>Left Bloc</b>						<b>0.74</b>			
<b>Center Bloc</b>						<b>0.72</b>			

bert, an index of cohesion is defined as “the ratio of the mean of the included dissenting pairs, in a postulated bloc, to the mean of the total dissents of the included justices.”<sup>23</sup> More than .50 is considered to be high and .40 to .49 is seen as moderate.

Although the results of Taft’s efforts at building consensus began to fray in the late 1920s and totally collapsed after he left the Court, his administrative accomplishments continued to be felt. Indeed, few gainsay his accomplishments in this regard.<sup>24</sup> Even the critical Justice Felix Frankfurter said of Taft that his “great claim in history will be as a reformer,” and that he had adapted the federal judicial system “to the needs of a country that had grown from three million to a hundred and forty.”<sup>25</sup>

As president, Taft had regularly importuned Congress to proceed with various reforms of the federal judiciary.<sup>26</sup> As chief justice he continued in like fashion, with his great triumphs being the adoption of the Judges’ Bill of 1925 and his successful lobbying of Congress for the appropriation of funds for a separate building for the third branch of government.<sup>27</sup> The Judges’ Bill finally freed the Court from much of its obligatory docket and allowed it greater discretion in determining which cases it would hear. Earlier, Taft had convinced Congress to authorize the Judicial Conference with the chief justice, *ex officio*, as chair. Equally significant for the development of the Court in the twentieth century was the erection of the magnificent—Justice Brandeis, among others,

Table 4

	Brandeis	Holmes	Sanford	Taft	Van Devanter	Butler	McKenna	Sutherland	McReynolds
Brandeis	(3)	9	0	1	0	0	1	0	6
Holmes	9	(0)	1	2	0	0	1	2	2
Sanford	0	1	(0)	1	0	0	0	2	2
Taft	1	2	1	(0)	1	1	1	0	0
Van Devanter	0	0	0	1	(0)	2	1	1	0
Butler	0	0	0	1	2	(0)	2	0	0
McKenna	1	1	0	1	1	2	(3)	1	1
Sutherland	0	2	2	0	1	0	1	(0)	7
McReynolds	6	2	2	0	0	0	1	7	(5)
Total dissents	16	12	3	3	3	3	8	11	19

**Index of cohesion**

**IC [left]**

**Holmes-Brandeis**                    **0.644**

**IC [right]**

**Sutherland-McReynolds**       **0.467**

Table 5

	Brandeis	Holmes	Stone	Sanford	Taft	Van Devanter	Butler	Sutherland	McReynolds
Brandeis	(9)	37	24	5	1	0	2	1	8
Holmes	37	(1)	25	3	2	0	1	2	4
Stone	24	25	(2)	5	2	0	3	6	4
Sanford	5	3	5	(0)	2	0	4	8	7
Taft	1	2	2	2	(1)	2	2	2	2
Van Devanter	0	0	0	0	2	(0)	7	4	2
Butler	2	1	3	4	2	7	(1)	15	8
Sutherland	1	2	6	8	2	4	15	(3)	10
McReynolds	8	4	4	7	2	2	8	10	(18)
Total dissents	53	41	34	18	7	7	25	27	41

**Index of cohesion**

**IC [left]**

**Butler-Sutherland**                    **0.677**

**Butler-Sutherland**

**0.577**

thought it too grand—Grecian-style temple that engaged Taft’s loving attention but that he did not live to see completed.<sup>28</sup> Aside from the grandeur, Brandeis was concerned with what moving away from Congress would mean for relations between the two branches. One wonders what relations would have been in succeeding decades had the Court remained attached to the Capitol.

That Taft was a success in this aspect of his role as chief justice is beyond doubt. “[N]o chief justice thus far in our history [1992] matched his active role in court administration, and his leadership in bringing about legislation that gave needed discretion to the Court to control its docket.”<sup>29</sup> The same historian, Jonathan Lurie of Rutgers University, concludes, however, that, in contrast to his administrative triumphs, “too often his decisions reflected a fear of change rather than its necessary facilitation.”<sup>30</sup> Pringle is harsher, dubbing him “conservative, if not reactionary.”<sup>31</sup>

A *Time* magazine observation made at the time of Taft’s retirement may have been most on target in remarking of his tenure: “Outstanding decisions: none.”<sup>32</sup> More recently, a scholar of the chief justice has noted that “Taft has drifted into almost total professional eclipse . . . , no more known to the average lawyer or law student than are Chief Justices White, Fuller, or Waite.”<sup>33</sup> Current students of neither law nor political science are apt to be frequently exposed to his writings.<sup>34</sup>

Alpheus Thomas Mason, Taft’s pre-eminent judicial biographer, characterizes Taft’s record as “chameleonlike.”<sup>35</sup> Whether this characterization is complimentary or not is, perhaps, arguable. It does, however, set Taft apart from the other leading judicial conservatives of the period, such as Pierce Butler, James McReynolds, Willis Van Devanter, and George Sutherland, however “intertwined [Taft was in many regards] with the aspirations and accomplishments of . . . the Four Horsemen.”<sup>36</sup> As members of the Hughes Court, these four were rarely, if ever, to change their coloration to suit current conditions, even if such conditions included the Depression of the 1930s. Taft’s opinions on unions and picketing are examples of what his supporters might term flexibility. His union critics must have been somewhat surprised and pleased by the *Tri-Cities Trades Council* case, 257 U.S. 184 (1921), only to have their worst fears confirmed in the same term in *Truax v. Corrigan*, 257 U.S. 312 (1921).

Part of Taft’s reputation as a die-hard conservative might come from some of the outrageous comments he made during his career, especially toward the

end of his service on the Court. Taft, who was diagnosed with hardening of the arteries and who relied in his later years on Justice Sutherland to complete some of the opinions issued in his name, was fearful of what would come when he left the Court. Hoover, he felt, was just like Holmes, Brandeis, and Stone—a Progressive!<sup>37</sup> Mason and Beaney quote a 1929 letter from Taft to his fellow conservative justice, Pierce Butler, in which Taft worried that “the most we can hope for is continued life of enough of the present membership to prevent disastrous reversals.”<sup>38</sup> Pritchett quotes Taft during the same period as warning that “I must stay in the Court in order to prevent the Bolsheviki from gaining control.”<sup>39</sup> Such comments, however, cropped up even in his early years as chief. Mason quotes Taft, for example, as promising to block all “socialistic raids on property rights.”<sup>40</sup>

Surely Taft was a conservative, but in fact all the justices of the time were conservatives of some stripe.<sup>41</sup> Brandeis, the true Jeffersonian Democrat, feared the vice of big government, even if he did not share the Big Chief’s fear of a “Bolshevik” threat to America.<sup>42</sup> One aspect of Taft’s understanding of his role as a judge sets him apart from the likes of Brandeis and Holmes: his warm embrace of judicial activism. Taft believed firmly in the power of the judiciary to make law. In this he was akin to the great Cardozo, but unlike Cardozo and other advocates of self-restraint, Taft believed that it was not simply the right of the judge to act, but his duty to do so.<sup>43</sup> Cardozo would caution that judges were limited, that their task was to work within the “‘interstices’ of the law” and to respect precedent.<sup>44</sup> Taft, in contrast, boasted after his confirmation that he had “announced at a conference of the Justices that he “had been appointed to reverse a few decisions” and, with his famous chuckle, added, “I looked right at old man Holmes when I said it.”<sup>45</sup>

This activism manifested itself not only in the number of statutes that the Taft Court declared unconstitutional—Henry Abraham, for example, identifies twelve cases in which the Taft Court voided a federal statute—but also in the way Taft appeared to ignore any factors that might have allowed a less activist Court to sustain a law.<sup>46</sup> In *Truax v. Corrigan*, 257 U.S. 312 (1921), Taft saw all alternative remedies for the owners of “The English Kitchen” cut off by the Arizona statute. In the much less well known case of *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), Taft, in contrast to Holmes, Brandeis, and Stone, who also saw potential due process problems with the New Jersey law, saw the statute as on its face a violation of procedural due process.

In addition to his activism and his love of judicial power, and, particularly, its exercise, another major factor shaping Taft’s judicial record was his admiration for John Marshall and the principles underlying the arguments

in favor of the Constitution found in the *Federalist Papers*. His writings and lectures prior to becoming chief justice resonate with the influence of Marshall and Hamilton. For Taft, as for the framers, property rights were seen as the basis for individual rights, and a strong federal government, a presidency in control of the entire executive branch of government, and an independent judiciary were the means by which rights could be protected. As a disciple of Marshall, Taft was keen to defend federal supremacy from any encroachments by states on areas delegated to the federal government. As a disciple of Hamilton, he invariably rose to the defense of both judicial and executive power, seeing their preservation as essential for maintaining an effective system of checks and balances.

The influence of Marshall is noted by most students of Taft.<sup>47</sup> His oft-stated admiration for Marshall stemmed in part from the fact that it was Marshall who made the judiciary, and in particular the Supreme Court, a major player in the governmental process. Marshall, by his opinion in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), had moved the Court out of the shadows cast by the other two branches of government. Like former secretary of state Marshall, Taft never envisioned his career on the Court as an end to an already enviable political career but rather as the crowning capstone of that career. Both chiefs clearly relished power.

Taft's view of how the Constitution was to be interpreted was also drawn from the Marshall era. It was a Constitution "intended to endure for ages to come" (*McCulloch v. Maryland*, 4 Wheat [17 U.S.] 316, at 322 [1819]), and therefore its interpretation called for judicial craftsmanship. The "slot-machine" theory of justice, an addition best exemplified in a subsequent decade by Justice Owen Roberts's decision in *United States v. Butler*, 297 U.S. 1 (1936), which held that the duty of a judge is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former," had no appeal for him.

Thus, unlike other judicial conservatives of the late nineteenth century and, particularly, those who sat with Taft on the 1920s Court, Taft rejected the positivist or declaratory theory of the law. Instead, he concurred, surprisingly, with the notions of Holmes and Brandeis as to the importance of considering the lessons learned from sociology and economics. The lessons learned, however, were often quite different for the activist Taft than for the self-restraintist Holmes and Brandeis. For Taft, "shaping the law to meet new situations [was] the Court's 'highest and most useful function.' The notion that 'judges should interpret the exact intention of those who established the Constitution' was the 'theory of one who does not understand the

proper administration of justice.”<sup>48</sup> Judicial knowledge of economics and sociology would help preserve the best of American institutions.<sup>49</sup>

In interpreting the powers of Congress under the Commerce Clause (I-8–3), Taft was likely to follow what most scholars would agree is the tradition of John Marshall. In these cases, he was apt to go along with the wishes of Congress, even if those who challenged the law invoked the rights of property or the liberty of contract doctrine. In fact, one historian says of his Commerce Clause decisions that “Taft was a decided liberal,” and another speculates that Taft would have approved of Hughes’s famous “switch in time that saved nine” decision in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).<sup>50</sup> Had Taft’s health been better and had he served longer, it is possible that the clash between the Court and the other two branches of government that occurred shortly after his death might have been less intense and that the distinctions advocated by Cardozo and Brandeis between commerce subject to federal regulation and that subject to state regulation might have carried the day.

Taft’s commerce decisions frequently ignored the infamous *United States v. E. C. Knight*, 156 U.S. 1 (1895), decision of Chief Justice Melville Fuller, which had distinguished between manufacturing, a state concern solely, and commerce, which occurs afterward and is alone subject to congressional power. Instead, Taft’s opinions on the subject closely tacked the stance set forth by Justice Holmes in the landmark case of *Swift v. United States*, 196 U.S. 375 (1905). He did this most notably in the case of *Stafford v. Wallace*, 258 U.S. 495 (1922), upholding for a unanimous Court the constitutionality of the Packers and Stockyards Act of 1921 and in *Board of Trade v. Olsen*, 262 U.S. 1 (1923), where Taft’s liberal reading of the commerce power forced Justices McReynolds and Sutherland into dissent. Taft’s opinion in the second child labor case, *Bailey v. Drexel Furniture Company*, 259 U.S. 20 (1922), obviously takes a less expansive view of federal power, but it should be noted that *Bailey* has not been overturned and that, as Justice Frankfurter would subsequently stress in an opinion that cited *Bailey*, Taft’s opinion in *Bailey* had “the silent accord of Justices Brandeis and Holmes.”<sup>51</sup>

Taft is more typical of the pre-1937 Hughes Court on issues involving state regulation of property. Here his love of the rights of private property combines with the Federalist suspicion of local majorities and how such majorities use power to violate “vested rights.” *Wolff v. Court of Industrial Relations*, 262 U.S. 522 (1923), offers an example of this. In contrast, Taft’s famous dissent in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)—admittedly a case involving the exercise of federal and not state power—and specifically his conclusion in *Adkins* that *Lochner v. New York*, 198 U.S. 45 (1905), was no

longer viable as precedent (261 U.S. 525, at 564) does indicate that Taft's embrace of the sanctity of liberty of contract was not absolute. He did adjust a Fieldian philosophy to the spirit of the times.<sup>52</sup>

The "old Court," the pre-1937 Court, was generally little concerned with issues of individual rights and liberties apart from that of property and contract, nor was it interested in issues of equal protection. Given the conservative tenor of the Court, it is surprising that the process of incorporation, whereby the guarantees of the Bill of Rights are applied to the states through the due process clause of the Fourteenth Amendment, began during Taft's tenure. *Gitlow v. New York*, 268 U.S. 652 (1925), initiated this practice. Surprisingly, there was no dissent among the nine justices as to the applicability of the guarantee of free speech as a restraint on state police power.

Taft never wrote an opinion that specifically addressed the issue of incorporation, but in those cases that dealt with individual rights he never took the position that states were not bound by the Bill of Rights. In fact, in several criminal cases, Taft seems to proceed as if the states were under the same restraints with regard to criminal procedure as the federal government.

His two major decisions on matters related to the Bill of Rights are surely of a type that one would expect of a conservative jurist. One, *United States v. Lanza*, 260 U.S. 377 (1922), which dealt with the guarantee of double jeopardy, remains good law. The other, more famous one, *Olmstead v. United States*, 277 U.S. 438 (1928), which dealt with wiretaps, stood as precedent until almost the end of the Warren Court.

Taft's view of the judiciary's role—in American society and as a coordinate branch of government—is perhaps the most significant legacy of his chief justiceship. Although it is hardly likely that he will ever be rated ahead of a Holmes or a Black or even a Frankfurter, Taft's view of the role of the Court is probably more contemporary than those of any of these judges. Taft operated in a political environment in which the other two branches of government were frequently deadlocked. "Cool Cal" Coolidge might have slept a lot, as Alice Longworth Roosevelt was wont to note, but his veto pen was quite hot. The fourth party system was coming to a close, and with it the ability of government to take the initiative. In this vacuum of leadership, Taft and the Court could play a major role. Much the same as been observed concerning the Rehnquist Court in current American politics.<sup>53</sup>

Despite his remarks when first appointed to the bench, Taft's concern with precedent also seems contemporary and reflects the *cri de coeur* about the importance of precedent in insuring not just certainty in the law but the power of the Court issued in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992),

by the three justices—O'Connor, Kennedy, and Souter—whose votes determine most of the present Court's close decisions.

Finally, Taft's commitment to "vested rights" provided the basis upon which the "modern Court" moved to protect individual rights and liberties, both those found in the text of the Bill of Rights and those found in the vague contours of the Fourteenth Amendment's due process and equal protection clauses. Writing in 1968, Mason and Beane observed that "the new interest in judicial guardianship . . . has not won full support."<sup>54</sup> Whether or not it had "full support," many commentators have concluded that the Burger Court was far more apt to assume the role of "Guardian Kings" than was its predecessor, and that the Rehnquist Court seems to have continued the course of sitting as a superlegislature as each June it routinely strikes down a brace of federal legislation.<sup>55</sup> Taft would understand.

Yet in the final analysis, Chief Justice Taft was a part of the America of the 1920s. He was the "the most influential constitutionalist of the 1920s," and his tenure as chief was hailed broadly at his retirement.<sup>56</sup> However different his arguments sound to contemporary ears, in reading Taft one must remember, as Archibald Cox has so eloquently written, that "while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. The legitimacy of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus."<sup>57</sup>

## Notes

1. Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* (Baton Rouge: Louisiana State University Press, 1968), 43–44.
2. William Howard Taft to Horace D. Taft, January 28, 1900, as quoted in Henry F. Pringle, *The Life and Times of William Howard Taft: A Biography*, 2 vols. (New York: Farrar and Rinehart, Inc., 1939), 1:148.
3. Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955* (New York: Random House, 1955), 189.
4. Donald F. Anderson, "Building National Consensus: The Career of William Howard Taft," paper presented at the annual meeting of the American Political Science Association (Boston, September 3–6, 1998), 26–27.
5. Walter F. Murphy, C. Herman Pritchett, and Lee Epstein, eds., *Courts, Judges, and Politics: An Introduction to the Judicial Process*, 5th edition (Boston: McGraw Hill, 2002), 88.
6. Judith I. Anderson, *William Howard Taft: An Intimate History* (New York: Norton, 1981), 259.
7. A. Anderson, "Building," 22.

8. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd edition (New York: Oxford University Press, 1992), 188.

9. *Ibid.*, 187.

10. Pringle, *Life and Times*, 2:968.

11. On Taft's stamina, Pringle writes, "Preparing for his new duties, Taft drafted a schedule for his daily life. He rose at 5:15, began work at 6 o'clock . . . [worked all day, went home], worked from five to seven, took an hour off for dinner, and labored again until ten o'clock. This would be his hour to retire" (*Life and Times*, 2:961–62). Regarding his leadership role, David J. Danelski introduced the concept that the effectiveness of the Court depended upon the functions of both task leader and social leader being performed. Although Hughes was able to perform both, Danelski argued that during the Taft Court Justice Willis Van Devanter acted as task leader while Taft functioned as social leader ("The Influence of the Chief Justice in the Decisional Process," in *Courts, Judges, and Politics*, ed. Murphy, Pritchett, and Epstein, 663–64).

12. Wrote Holmes: "We call you Chief Justice still—for we can not give up the title by which we have known you all these later years and which you have made dear to us. We can not let you leave us without trying to tell you how dear you have made it. You came to us from achievement in other fields and with the prestige of the illustrious place that you lately held and you showed us in new form your voluminous capacity for getting work done, your humor that smoothed the rough places, your golden heart that brought you love from very side and most of all from your brethren whose tasks you have made happy and light. We grieve at your illness, but your spirit has given life and impulse that will abide whether you are with us or away" (280 U.S. v [1930]).

13. Albert P. Blaustein and Roy M. Mersky, *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* (Hamden, Conn.: Archon Books, 1978), 37–38.

14. Michael Comiskey, "Has the Modern Senate Confirmation Process Affected the Quality of U.S. Supreme Court Justices?" paper presented at the annual meeting of the American Political Science Association (Boston, September 3–6, 1998), 15.

15. Abraham reports the results from eight surveys of presidential success and failure (*Justices and Presidents*, 415–17). The Taft quote is from Herbert S. Duffy, *William Howard Taft* (New York: Minton, Balch & Company, 1930), 313, as cited in Kenneth B. Umbreit, *Our Eleven Chief Justices*, vol. 2 (Washington, N.Y.: Kennikat Press, 1969), 397.

16. "McReynolds and Brandeis belong to a class of people that have no loyalty to the court and sacrifice almost everything to the gratification of their own publicity and wish to stir up dissatisfaction with the decision of the Court, if they don't happen to agree with it" (W. H. Taft to C. P. Taft II, October 30, 1926, as quoted in Alpheus Thomas Mason, *William Howard Taft, Chief Justice* [New York: Simon and Schuster, 1965], 226). Mason here asserts that "Taft's castigation of McReynolds exceeded that against Brandeis" (226–27; see also 215–17).

17. Danelski, "Influence," 668.

18. Lawrence Martin, *The Presidents and the Prime Ministers* (Markham, Ontario: Paper Jacks, Ltd., 1982), 72.

19. The Butler quote is from Martin, *Presidents*, 72. On Brandeis, see Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (Cambridge: Harvard University Press, 1957).

20. Glendon A. Schubert, "The Study of Judicial Decision-Making as an Aspect of Political Behavior," *American Political Science Review* 52 (1958): 1013.

21. Cf. Mason, *William Howard Taft*, 255; Mason, *Supreme Court*, 61. Danelski points out that after 1925 Taft was more likely to assign the opinion of the Court to one of the conservatives and not use the assignment as a means of winning over one of the more liberal (self-restraint-oriented) justices (“Influence,” 667).

22. The “rule of four” appears to date back to 1891. After 1891 cases that came to the Court on “discretionary” writs required the vote of four justices to be added to the docket. The Judiciary Act of 1925 dramatically reduced still further the number of cases the Court had to take as a matter of right, thereby increasing the Court’s discretion to determine the cases it heard. As part of Taft’s lobbying effort before Congress on behalf of this legislation, Taft’s chief lieutenant on the Court, Justice Willis Van Devanter, made what subsequent Courts and justices have seen as a commitment to employ “the rule of four.” “We always grant the petitions [for review of a case] when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted” (As quoted in David M. O’Brien, *Storm Center: The Supreme Court in American Politics*, 6th edition [New York: W.W. Norton & Company, 2003], 208). In 1988 Congress finally ended the practice that required certain cases to be taken by the Court. The current Court, as a result, has no obligatory caseload. During the 1980s the Court under Chief Justice Warren Burger appears to have relaxed the “rule of four.” The result was that it was necessary only for three judges to wish to add a case. One consequence of this was a dramatic increase in the number of cases the Court heard. Chief Justice William Rehnquist ended this practice and reduced the Court’s workload by over one third.

23. Schubert, “Study,” 1011.

24. An excellent survey of Taft’s role in modernizing the federal judiciary can be had in Robert Post, “Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft,” 1 *Journal of Supreme Court History* (1980): 50–78.

25. An unsigned editorial in the July 27, 1921, issue of the *New Republic*, written by then Harvard law professor Felix Frankfurter, sounded a very different note than had most of the contemporary press concerning Taft’s appointment as chief justice. Cf., Alpheus Thomas Mason, *William Howard Taft*, 236–38. The quote is on page 15.

26. Allen E. Ragan, *Chief Justice Taft* (Columbus: The Ohio State Archaeological and Historical Society, 1937), 104–11. Ragan provides very possibly the best description and analysis of Taft’s opinions of all the students of Taft’s tenure as chief justice.

27. “Judges’ Bill” is the popular term for what was in fact the Judiciary Act of 1925, one in a series of statutes that began with the Judiciary Act of 1789, whereby Congress, exercising its power under Article III, Section 2, regulates the appellate jurisdiction of the Court.

28. On Brandeis’s opinion, see Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge: Harvard University Press, 1984), 354–55.

29. Jonathan Lurie, “William Howard Taft,” in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, (New York: Oxford University Press, 1992), 856.

30. *Ibid.*

31. Pringle, *Life and Times*, 2:967.

32. As quoted in Post, “Judicial Management,” 51.

33. *Ibid.*, 50.

34. The leading law school casebooks carry few Taft opinions, as is the case with their counterparts in political science. Walter F. Murphy, James E. Fleming, and Sotiros A. Barber (*American Constitutional Interpretation*, 2nd edition [(Mineola, N.Y.: Foundation Press, 1995)] include only one Taft opinion: his dissent in *Adkins*. David M. O'Brien (*Constitutional Law and Politics: Civil Rights and Civil Liberties*, 2 vols., 3rd edition [New York: W.W. Norton & Company, 1997]) includes excerpts from Taft's opinion in *Olmstead* but gives almost twice as much space to selections from the Brandeis dissent. Alpheus Thomas Mason and Donald Grier Stephenson Jr. (*American Constitutional Law*, 12th edition [Upper Saddle River, N.J.: Prentice Hall, 1999]) appropriately—Mason is Taft's leading biographer—give the greatest space to Taft opinions, providing their readers with both *Stafford v. Wallace* and *Olmstead v. United States*. The sixth edition of the work (1978), edited by Mason and William M. Beane, also contained *Bailey v. Drexel Furniture Co.* and *Adkins v. Children's Hospital*, both missing from the later edition. Taft's absence from law school casebooks is even more noticeable. Gerald Gunther and Kathleen M. Sullivan (*Constitutional Law*, 14th edition [Westbury, N.Y.: Foundation Press, 1997]) allot fifteen lines to a "summary" of Taft's opinion in *Myers*. William B. Lockhart, Yale Kamisar, Jesse H. Choper, and Steven H. Shiffrin (*The American Constitution*, 7th edition [Saint Paul: West Publishing Co., 1991]) include none of Taft's opinions.

35. Mason, *William Howard Taft*, 261.

36. G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1976), 179.

37. Pringle, *Life and Times*, 2:967.

38. Alpheus Thomas Mason and William M. Beane, *The Supreme Court in a Free Society* (New York: W. W. Norton & Company, 1968), 162.

39. C. Herman Pritchett, *The Roosevelt Court* (New York: MacMillan and Company, 1948), 18.

40. Mason, *Supreme Court*, 52.

41. *Ibid.*, 71.

42. The fact that Brandeis did not dissent in *Wolff v. Court of Industrial Relations*, 262 U.S. 522 (1923) was not a tactical decision by Brandeis as in the case of other withheld dissents. "Warmly approving Taft's opinion, Brandeis thought it would 'clarify thought and bury the ashes of a sometime [compulsory-arbitration] boom'" (Mason, *William Howard Taft*, 253).

43. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 141.

44. *Ibid.*, 113, 93–94.

45. Mason, *Supreme Court*, 52.

46. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, 7th ed. (New York: Oxford University Press, 1998), 304. Included in this total is *Adkins*, from which the chief dissented. On the whole, Abraham classifies the Taft Court as "cooperative" and not challenging the other two branches inordinately, unlike, for example, the Marshall, Taney, Fuller, Hughes, and Warren Courts (373–74).

47. Cf. Mason, *William Howard Taft*, 244; Ragan, *Chief Justice Taft*, 79; David H. Burton, *Taft, Holmes, and the 1920s Court* (Madison, N.J.: Fairleigh Dickinson University Press, 1998), 147. Paul L. Murphy ("Constitutional History, 1921–1933," in *American Constitutional History*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney [New

York: MacMillan and Company, 1989]) adds John Locke, Adam Smith, and the Manchester economists—William Blackstone, Thomas Cooley, and Herbert Spencer—to the list of those whose thinking influenced Taft (207).

48. Mason, *Supreme Court*, 48.

49. *Ibid.*, 51.

50. Ragan, *Chief Justice Taft*, 119; Burton, *Taft, Holmes*, 151.

51. Mason, *William Howard Taft*, 248.

52. White, *American Judicial Tradition*, 180–81.

53. Linda Greenhouse, “The Justices Decide Who’s in Charge,” *New York Times*, June 27, 1999, 4. The Greenhouse article begins with the simple statement: “The Supreme Court rules.” Chief Justice Taft must smile atop the pediment of his Temple.

54. Mason and Beaney, *Supreme Court*, 348.

55. The term “Guardian Kings” is taken from Mason, *William Howard Taft*, 262.

56. Paul L. Murphy, “Constitutional History,” 207.

57. Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976), 117–18.