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Inside the Taft Court: Lessons from the Docket Books

Barry Cushman*

For many years, the docket books kept by certain of the Taft Court Justices have been held by the Office of the Curator of the Supreme Court. Though the existence of these docket books had been brought to the attention of the scholarly community, access to them was highly restricted. In April of 2014, however, the Court adopted new guidelines designed to increase access to the docket books for researchers. This article offers a report and analysis based on a review of all of the Taft Court docket books held by the Office of the Curator, which are the only such docket books known to have survived.

For the years of Chief Justice Williams Howard Taft’s tenure, the Curator’s office holds Justice Pierce Butler’s docket books for the 1922 through 1924 Terms, and Justice Harlan Fiske Stone’s docket books for the 1924-1929 Terms. Each of these docket books records the votes that each of the Court’s Justices cast in cases when they met to discuss them in conference. Justice Stone’s docket books also contain occasional notes of remarks made by colleagues during the conference discussion. Unfortunately, Stone’s handwriting frequently is quite difficult to decipher, and as a result the content of these notes too often remains obscure. Justice Butler’s handwriting is more readily understood, however, and fortunately he often used the pages of his docket books to keep remarkably detailed and informative notes of the conference deliberations.1

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These docket books have been examined and reported on before, but for limited purposes and therefore to a limited extent. Dean Robert Post, who has been commissioned to write the volume on the Taft Court for the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, has presented an illuminating statistical analysis of the aggregate conference vote data. Yet Dean Post’s scholarship addresses the particular and qualitative dimensions of the conference records for only a relatively small number of cases. This article seeks to improve our

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1 The Butler and Stone docket books remained in the Supreme Court building after each of these Justices died while in office. It is not known why these volumes were retained, nor why the set of Butler docket books is not complete. In 1972 all of the “historic” docket books held in the Supreme Court building were boxed up by the Court’s Marshal at the order of Chief Justice Warren Burger, and were later transferred to the Curator’s Office. Email communication from Matthew Hofstedt, Associate Curator, Supreme Court of the United States, Aug 26, 2014.


qualitative understanding of the Taft Court by examining and analyzing the votes and conference discussions in cases of particular interest to legal and constitutional historians.

This article examines the available docket book entries relevant to what scholars commonly regard as the major decisions of the Taft Court.4 This examination includes 117 cases concerning areas of law as diverse as the Commerce Clause, the dormant Commerce Clause, substantive due process, equal protection, the general law, antitrust, intergovernmental tax immunities, criminal procedure, civil rights, and civil liberties. The information in the docket books sheds particularly interesting new light on decisions such as *Whitney v California*,5 Village

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5 274 US 357 (1927).
of Euclid v Ambler,6 Adkins v Children’s Hospital7 and its successor minimum wage cases,8 Pierce v Society of Sisters,9 Buck v Bell,10 Frothingham v Mellon,11 Wolff Packing v Court of Industrial Relations,12 Fiske v Kansas,13 Tyson & Brothers v Banton,14 Coronado Coal v United Mine Workers,15 Corrigan v Buckley,16 Miles v Graham,17 Brooks v United States,18 and Radice v New York.19 In addition, for these and the many other cases examined, this article reports on whether a unanimous decision also was free from dissent at conference or became so only because one or more Justices acquiesced in the judgment of their colleagues, and on whether nonunanimous decisions were divided by the same vote and with the same alliances at conference. The docket books also provide records of instances in which a case that initially was assigned to one Justice later was reassigned to another. These records afford us some insight into the kinds of cases in which this tended to occur, and provide an opportunity to document for the first time the long held suspicion that the notoriously slow-writing Justice Willis Van Devanter frequently was relieved of his opinions by the Chief Justice.

An examination of the docket books yields a series of interesting and often surprising revelations. Among them, we learn that by 1925 five of the sitting Justices believed that the 1923

6 272 US 365 (1926).
7 261 US 525 (1923).
8 Donham v West-Nelson Co, 273 US 657 (1927); Murphy v Sardell, 269 US 530 (1925).
9 268 US 510 (1925).
10 274 US 200 (1927).
11 262 US 447 (1923).
12 262 US 522 (1923).
13 274 US 380 (1927).
14 273 US 418 (1927).
16 271 US 623 (1926).
18 267 US 432 (1925).
19 264 US 292 (1924).
decision of *Adkins v Children’s Hospital* invalidating a minimum wage law for women had been wrongly decided, and the precedent survived challenge only because four of those Justices continued to adhere to it as a matter of stare decisis. We discover that Justice Brandeis’s D. Brandeis initially was disposed to dissent from rather than to file his landmark concurrence in the First Amendment case of *Whitney v California*. We are informed that the Justices regarded as uncontroversial foundational decisions laying the constitutional groundwork for the modern welfare state. We learn that the Court’s published opinions present Chief Justice Taft and Justices Oliver Wendell Holmes and James Clark McReynolds as more favorably inclined toward the protection of civil rights and civil liberties than their votes in conference would indicate. The docket books also help to resolve a set of lingering questions concerning the behind-the-scenes deliberations in the landmark zoning case of *Village of Euclid v Ambler*.

A review of the Taft Court docket books also makes possible two contributions to the political science literature on judicial behavior. The first is to the scholarship on vote fluidity and unanimity norms in the Supreme Court. It is widely agreed that the period from the Chief Justiceship of John Marshall through that of Charles Evans Hughes was characterized by a “norm of consensus,” “marked by individual justices accepting the Court’s majority opinions.”

It is generally believed that this norm of consensus collapsed early in the Chief Justiceship of

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Harlan Fiske Stone,²¹ though some scholars have pointed to causes that antedate Stone’s elevation to the center chair.²² Still others have suggested that there may have been “an earlier, more gradual change in norms” on the late Taft and Hughes Courts.²³ Political scientists who


²² Compare Stephen C. Halpern and Kenneth N. Vines, _The Judges’ Bill and the Role of the US Supreme Court_, 30 Western Pol Q 471, 481 (1977) (arguing that the enactment of the Judges’ bill of 1925, which made the Court’s docket almost entirely discretionary, increased the proportion of cases that were legally or politically salient and thus less likely to elicit acquiescence from colleagues inclined to disagree with the majority), with Walker, Epstein, and Dixon, 50 J Pol at 365-66 (cited in note 20) (agreeing that “it is possible that a discretionary docket may be one factor, and a necessary one at that, in maintaining high levels of conflict once such patterns are established,” but disputing the contention that the 1925 statute was “the primary factor in the alteration of the Court’s consensus norms,” pointing out that “significant escalation in both the dissent and concurrence rates did not occur until almost fifteen years” after the dramatic increase in the discretionary share of the Court’s docket); accord, Caldeira and Zorn, 42 Am J Pol Sci at 875 (cited in note 20); Post, 85 Minn L Rev at 1319-31 (cited in note 2) (rejecting the Halpern and Vines hypothesis on the ground that unanimity rates in certiorari cases were higher than in those falling under the Court’s mandatory jurisdiction, and offering alternative reasons, such as changes in external circumstances, in Court personnel, and in the quality of Taft’s leadership for the decline in unanimity on the late Taft Court).

²³ Caldeira and Zorn, 42 Am J Pol Sci at 892. See also Aaron J. Ley, Kathleen Searles, and Cornell W. Clayton, _The Mysterious Persistence of Non-Consensual Norms on the US Supreme Court_, 49 Tulsa L Rev 99, 106 (2013) (“the proportion of unanimous decisions was declining prior to Stone’s Chief Justiceship”); Marcus E. Hendershot, Mark S. Hurwitz, Drew Noble Lanier, and Richard L. Pacelle Jr, _Dissensual Decision Making: Revisiting the Demise of Consensual Norms within the US Supreme Court_, 20 Pol R Q 1, 8 (2012) (“the Court’s norm of consensus was first challenged by growing levels of dissent in the later years of the Hughes Court”); David M. O’Brien, _Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions_, in Cornell W. Clayton and Howard Gillman, eds, _Supreme Court Decision-Making: New Institutionalist Approaches_ (Chicago 1999) (“the demise of the norm of consensus preceded Stone’s chief justiceship”); Stacia L. Haynie, _Leadership and Consensus on the US Supreme Court_, 54 J Pol 1158 (1992) (arguing that Stone consolidated a shift in behavioral expectations that began under Hughes). See also Kelsh, 77 Wash U L Q at 162 (cited in note 20) (“The most unusual thing about the nonunanimity rate for the 1864-1940 period is that the last ten years saw a sustained increase. This rate was to shoot up dramatically in the first years of the Stone Court, but the beginnings of the rise can be seen around 1930”); Kelsh, Wash U L Q at 173 (cited in note 20) (“By the 1930s…Justices had fully accepted the
have had access to the docket books of various Justices have demonstrated that much of the consensus achieved by the Court throughout its history has resulted from the decision of Justices who had dissented at conference to join the majority’s ultimate disposition. A large body of literature shows that Justices commonly have changed their votes between the conference and the final vote on the merits.24

Of the different types of vote fluidity between the conference vote and the final vote on the merits in major Taft Court cases, by far the most common was for a Justice to move from a dissenting or passing vote to a vote with the ultimate majority. An examination of the docket books permits us to illuminate several features of this phenomenon: the major cases in which it occurred; how frequently it occurred; its comparative frequency in major cases as opposed to those of lesser salience; the frequency with which each of the Justices did so, and the comparative frequency with which they did so in nonsalient cases; and the comparative success of Taft Court Justices in preparing majority opinions that would either enlarge the size of the ultimate winning coalition or produce ultimate unanimity from a divided conference. Among the more interesting findings here is that the member of the Court who most commonly acquiesced

in major decisions that he had declined to join at conference was the famously irascible Justice
McReynolds.

The second contribution concerns the behavior of newcomers to the Court. In 1958, Eloise C. Snyder published an article in which she concluded that new members of the Court tended initially to affiliate with a moderate, “pivotal clique” before migrating to a more clearly ideological liberal or conservative bloc.25 Seven years later, J. Woodford Howard argued that Justice Frank Murphy’s first three terms on the Court were marked by a “freshman effect” characterized by an “instability” in his decision making that rendered the Justice “diffident to the point of indecisiveness.”26 These studies in turn spawned a literature on the “freshman” or “acclimation” effect for Justices new to the Court. These studies generally characterize the freshman effect “as consisting of one or more of the following types of behavior: (1) initial bewilderment or disorientation, (2) assignment of a lower than average number of opinions to the new justices, and (3) an initial tendency on the part of the new justice to join a moderate block of justices.”27 While some studies have confirmed the existence of some feature or another of the freshman effect,28 others have cast significant doubt on the hypothesis, maintaining that it is

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28 See, for example, Lee Epstein, et al, *On the Perils of Drawing Inferences about Supreme Court Justices from Their First Few Years of Service*, 91 Judicature 168, 179 (2008) (finding
either non-existent or confined to limited circumstances. Studies of the freshman period for individual Justices on the whole have not lent much support to the hypothesis.

29 See, for example, Paul J. Wahlbeck, James F. Spriggs II, and Forrest Maltzman, The Politics of Dissents and Concurrences on the US Supreme Court, 27 Am Pol Q 488, 503-04 (1999) (“Contrary to the freshman effect hypothesis, freshman justices are no less likely to join or author a concurring or dissenting opinion than their more senior colleagues”); Richard Pacelle and Patricia Pauly, The Freshman Effect Revisited: An Individual Analysis, 17 Am Rev Pol 1, 6, 15 (1996) (finding no freshman effect with respect to ideological instability in merits votes in the aggregate, and “only limited evidence” of such an effect with respect to individual Justices joining the Court between 1945 and 1988); Terry Bowen, Consensual Norms and the Freshman Effect on the United States Supreme Court, 76 Soc Sci Q 222, 227 (1995) (finding no freshman effect for separate opinion writing on the Hughes and Taft Courts, but finding such a freshman effect during the 1941-1992 period); Terry Bowen and John M. Scheb, II, Freshman Opinion Writing on the US Supreme Court, 1921-1991, 76 Judicature 239 (1993) (finding no freshman effect with respect to opinion assignments); Robert L. Dudley, The Freshman Effect and Voting Alignments: A Reexamination of Judicial Folklore, 21 Am Polit Q 360 (1993) (finding no freshman effect with respect to bloc voting even when using Snyder’s data); Terry Bowen and John M. Scheb, II, Reassessing the “Freshman Effect”: The Voting Block Alignment of New Justices on the United States Supreme Court, 1921-90, 15 Pol Behav 1 (1983) (finding no freshman effect with respect to bloc voting); Heck and Hall, 43 J Pol 852 (cited in note 27) (finding very little evidence of a freshman effect in bloc voting on the Warren and Burger Courts); Slotnick, 41 J Pol 640 (cited in note 27) (finding no freshman effect with respect to opinion assignments). For efforts to explain the divergences in scholarly findings, see Hagle, 21 Southeastern Pol Rev 289 (cited in note 28); Hagle, 37 Am J Pol Sci 1142 (cited in note 27); Albert P. Melone, Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy, 74 Judicature 6, 13 (1990); Heck and Hall, 43 J Pol at 859-60 (cited in note 27).

30 See, for example, Thomas R. Hensley, Joyce A. Baugh, and Christopher E. Smith, The First-Term Performance of Chief Justice John Roberts, 43 Idaho L Rev 625, 631 (2007) (finding no freshman effect with respect to bloc voting); Christopher E. Smith and S. Thomas Read, The Performance and Effectiveness of New Appointees to the Rehnquist Court, 20 Ohio N U L R 205 (1993) (finding a freshman effect with respect to Justice Souter but not with respect to Justice Thomas); Arledge and Heck, 45 Western Pol Q 761 (cited in note 27) (finding no freshman effect); Melone, 74 Judicature 6 (cited in note 29) (finding a freshman effect only with respect to majority opinion assignments); Thea F. Rubin and Albert P. Melone, Justice Antonin Scalia: A First Year Freshman Effect?, 72 Judicature 98 (1988) (finding a freshman effect only with respect to majority opinion assignments); John M. Scheb, II and Lee W. Ailshie, Justice Sandra Day O’Connor and the Freshman Effect, 69 Judicature 9 (1985) (finding evidence of a freshman effect only with respect to majority opinion assignments in her first Term); Edward V. Heck, The Socialization of a Freshman Justice: The Early Years of Justice Brennan, 10 Pac L J 707, 714-16, 722-25 (1979) (finding little evidence of a freshman effect).
Professor Howard suggested that the freshman effect might also be manifested by a tendency of new Justices to change their votes between the conference vote and the final vote on the merits. Howard listed a number of considerations that might prompt a Justice to shift ground in this manner, but first among them were “unstable attitudes that seem to have resulted from the process of assimilation to the Court.” For instance, he remarked, “Justice Cardozo, according to one clerk’s recollection of the docket books…frequently vot[ed] alone in conference before ultimately submerging himself in a group opinion.”  

Howard reported that Justice Murphy exhibited “a similar instability” during his freshman years on the Court.

Subsequent studies from the Vinson, Warren, and Burger Court docket books have produced divergent conclusions with respect to this reputed feature of the freshman effect.

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31 Howard Jr, 62 Am Pol Sci Rev at 45 (cited in note 24). The clerk to whom Howard referred was Paul Freund. See Paul Freund, *A Tale of Two Terms*, 26 Ohio St L J 225, 227 (1965) (“I was struck in the 1932 Term with the number of occasions on which what came down as unanimous opinions had been far from that at conference. I had access to the docket book which the Justice kept as a record of the conference vote -- these books are destroyed at the end of each term -- and I was enormously impressed with how many divisions there were that did not show up in the final vote. I was impressed with how often Justice Cardozo was in a minority, often of one, at conference, but did not press his position.”)


33 Compare Maltzman and Wahlbeck, 90 Am Pol Sci Rev at 589 (cited in note 4) (finding that “freshmen justices are significantly more likely to switch than are their more senior colleagues”), Saul Brenner, *Another Look at Freshman Indecisiveness on the United States Supreme Court*, 16 Polity 320 (1983) (finding that between the 1946 and 1966 Terms freshman Justices exhibited on average greater fluidity between the conference vote and the final votes on the merits than did senior Justices, and that this fluidity tended to diminish between a Justice’s first and fourth terms on the Court), and Dorff and Brenner, 54 J Pol at 767, 769-71 (cited in note 4) (finding that freshman Justices were “more likely to be uncertain regarding how to vote at the original vote on the merits and more likely to be influenced by the decision of the majority at the final vote”) with Hagle and Spaeth, 44 Western Pol Q 119 (cited in note 4) (finding that the voting fluidity of freshman Justices on the Warren Court did not differ significantly from that of their more senior colleagues, and that the voting fluidity of such freshman Justices had not diminished by their third and fourth Terms on the Court). See also Timothy R. Johnson, James F. Spriggs II, and Peter J. Wahlbeck, *Passing and Strategic Voting on the US Supreme Court*, 39 L & Society Rev 349, 369 (2005) (finding that freshman Justices on the Burger Court did not pass more frequently than their senior colleagues).
A review of the voting behavior of newcomers to the Taft Court does not disclose any appreciable freshman effect with respect to voting fluidity. Instead, one finds that in the major cases examined here, those who were early in their judicial tenures were not more likely than were their senior colleagues to change their positions between the conference vote and the final vote on the merits.

This article proceeds as follows. Part I briefly introduces the Taft Court Justices and their voting practices. Part II discusses the major Taft Court cases that were unanimous both at conference and in the published report of the decision. Part III examines cases that were not unanimous at conference but became unanimous by the time the Court announced its decision. Part IV analyzes the Court’s nonunanimous cases. Part V reports on the Taft Court’s opinion reassignment practices. Part VI concludes.

I. The Taft Court Justices and Their Voting Practices

Justice Stone was the last Justice to be appointed to the Taft Court, replacing Justice Joseph McKenna in 1925. The Court that he joined consisted of Chief Justice Taft, and Associate Justices Holmes, Devanter, McReynolds, Brandeis, George Sutherland, Butler, and Edward Terry Sanford. Because Justice Butler did not take his seat until January of 1923, we have no docket book records for cases decided during the 1921 Term, which was Taft’s first as Chief Justice. Also lacking are docket records for cases decided early in the 1922 Term, including some of considerable interest.34

34 These include Ozawa v United States, 260 US 178 (1922) (holding that a Japanese national born in Japan was not Caucasian and was therefore ineligible for naturalization); Yamashita v Hinkle, 260 US 199 (1922) (same); Heisler v Thomas Colliery Co, 260 US 245 (1922) (upholding that a state tax on coal to be shipped in interstate commerce against a dormant
Taft is famous for his “consuming ambition” to “mass the Court” – to build unanimity so as to give “weight and solidity” to its decisions.\textsuperscript{35} The Taft Court did achieve unanimity in a remarkable percentage of its cases. For the 1921-1928 Terms, 84 \% of the Court’s published opinions were unanimous;\textsuperscript{36} taking into account all of its decisions for the entirety of Taft’s tenure, the unanimity rate was 91.4 \%.\textsuperscript{37} Though this rate of unanimity was in line with the rates achieved by the White Court,\textsuperscript{38} certain characteristics of the Taft Court may have contributed to its maintenance. First, Taft discouraged dissents, believing that most of them were displays of egotism that weakened the Court’s prestige and contributed little of value.\textsuperscript{39} As a consequence, he worked hard to minimize disagreement, often sacrificing the expression of his own personal views.\textsuperscript{40} This is illustrated by a comparison of the percentage of cases accompanied by written opinions in which various Chief Justices have dissented over the course of the Court’s history. Taft dissented in only 0.93 \% of such cases. By contrast, his predecessor, Edward White, dissented in 1.53 \%; his successor, Charles Evans Hughes, did so in 2.24 \%; and Harlan Fiske

\begin{itemize}
\item Commerce Clause challenge); \textit{United States v Lanza}, 260 US 377 (1922) (holding that prosecutions by both state and federal authorities for violations of their respective liquor laws did not violate the prohibition against Double Jeopardy); and \textit{Pennsylvania Coal Co v Mahon}, 260 US 393 (1922) (holding that a state law impairing an owner’s subsurface mining rights constituted a taking).
\item Post, 85 Minn L Rev at 1309 (cited in note 2).
\item Lee Epstein, et al, \textit{The Supreme Court Compendium: Data, Decisions, and Developments} 147, 161 (1994).
\item Post, 85 Minn L Rev at 1310 (cited in note 2).
\item Post, 85 Minn L Rev at 1310-11, 1356 (cited in note 2); Mason, \textit{William Howard Taft} at 198 (cited in note 4); Mason, 17 J Pub L at 31-32 (cited in note 35); William Howard Taft to Harlan F. Stone, Jan 26, 1927, Box 76, Harlan F. Stone Papers, Manuscript Division, Library of Congress, quoted in Walter F. Murphy, \textit{Elements of Judicial Strategy} 47 (Chicago 1964); Danelski, \textit{The Influence of the Chief Justice} at 174 (cited in note 21).
\item 2 Pringle at 1049 (cited in note 4) (Taft “shrank from all dissents, including his own”); Post, 85 Minn L Rev at 1311-12 (cited in note 2).
\end{itemize}
Stone did so in 13.49% of all such cases handed down during his Chief Justiceship. Indeed, of all the Chief Justices to serve from John Marshall through Earl Warren, only Marshall could boast a dissenting percentage lower than Taft’s.\textsuperscript{41} Van Devanter shared Taft’s distaste for public displays of discord, and strongly lobbied his colleagues to suppress their dissenting views.\textsuperscript{42} Butler similarly regarded dissents as exercises of “vanity” that “seldom aid us in the right development or statement of the law,” and instead “often do harm.”\textsuperscript{43} He therefore commonly “acquiesce[d] for the sake of harmony & the Court.”\textsuperscript{44} McReynolds, Sutherland, Sanford, and McKenna expressed similar views and suppressed dissenting opinions accordingly.\textsuperscript{45} Even the “great dissenters,” Holmes and Brandeis, believed that dissents should be aired sparingly, and often “shut up,” as Holmes liked to put it, when their views departed from those of their colleagues.\textsuperscript{46}

\textsuperscript{42} Post, 85 Minn L Rev at 1318, 1340, 1341, 1343 (cited in note 2).
\textsuperscript{44} Post, 85 Min L Rev at 1341-43 (cited in note 2).
\textsuperscript{46} Post, 85 Minn L Rev at 1341-42, 1344-46, 1349-51 (cited in note 2); Mason, Taft to Warren at 58 (cited in note 4) (“For the sake of harmony staunch individualists such as Holmes, Brandeis, and Stone, though disagreeing, would sometimes go along with the majority”); Northern Securities Co v United States, 193 US 197, 400 (1904) (Holmes dissenting) (“I think it useless and undesirable, as a rule, to express dissent”); Alexander M. Bickel, ed, The Unpublished Opinions of Mr. Justice Brandeis 18 (Chicago 1957) (“‘Can’t always dissent,’ [Brandeis] said….‘I sometimes endorse an opinion with which I do not agree’”); Arthur M. Schlesinger Jr, The Supreme Court: 1947, 35 Fortune 78, 211-12 (1947) (“In the time of Chief Justice Taft, even Holmes and Brandeis might vote against a decision in conference without writing a dissent, and sometimes without even formally registering their disagreement.”)
A variety of factors may have contributed to this “norm of acquiescence.” First, the literature of the period illustrates among the bench and bar a widely-held aversion to dissents as excessively self-regarding, and as weakening the force of judicial decisions by unsettling the law. This conviction found expression in Canon 19 of the American Bar Association’s Canons of Judicial Ethics, which exhorted judges not to “yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.” Instead, “judges constituting a court of last resort” were admonished to “use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision.” It is worthy of note that Taft was the chair of the committee that drafted the Canons, and that Sutherland was a committee member before his appointment to the Court. Second, in the early years of the Taft Court, new Justices came to the Court who were more likely to vote with the majority than some of their predecessors had

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47 Post, 85 Minn L Rev at 1344 (cited in note 2). See Mason, Taft to Warren at 58 (cited in note 4) (“Sometimes as many as three Justices would reluctantly go along with the majority because no one of them felt strongly enough about the issue to raise his voice in protest. During the early years of Taft’s Chief Justiceship, it was not unusual for Justices to write on the back of circulated slip opinions: ‘I shall acquiesce in silence unless someone else dissents’; or ‘I do not agree, but shall submit.’”)

48 Post, 85 Minn L Rev at 1344, 1348-49, 1354, 1356-57 (cited in note 2); Evan A. Evans, The Dissenting Opinion – Its Use and Abuse, 3 Mo L Rev 120, 123-26 (1938) (quoting various criticisms of dissents made by members of the bench and bar); Alex Simpson Jr, Dissenting Opinions, 71 U Pa L Rev 205, 205-06 (1923) (quoting various professional criticisms of dissenting opinions); William A. Bowen, Dissenting Opinions, 17 Green Bag 690, 693 (1905) (“the Dissenting Opinion is of all judicial mistakes the most injurious”).


50 Post, 85 Minn L Rev at 1284 n 55 (cited in note 2).
been.\textsuperscript{51} Third, there was an impulse among the Justices to show a united front in order to “fend off external attacks” from progressive Senators like Robert LaFollette and William Borah, who shared the American Federation of Labor’s dissatisfaction with some of the Court’s recent decisions, and proposed legislation that would have limited the Court’s power to review congressional legislation.\textsuperscript{52} Fourth, the norm of acquiescence promoted a collegiality and reciprocity among the Justices that smoothed over potential conflicts.\textsuperscript{53} And fifth, during this period nearly all of the Justices had only one clerk rather than the four that Justices typically have today, and most of the Justices wrote their own opinions.\textsuperscript{54} With such comparatively limited resources at their disposal, the cost of preparing a dissenting opinion was considerably higher.\textsuperscript{55}

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\textsuperscript{51} Post, 85 Minn L Rev at 1313 (cited in note 2).
\textsuperscript{52} Post, 85 Minn L Rev at 1314-18 (cited in note 2).
\textsuperscript{53} Post, 85 Minn L Rev at 1345 (cited in note 2). See also Caldeira and Zorn, 42 Am J Pol Sci at 877 (cited in note 20); Murphy, \textit{Elements of Judicial Strategy} at 61 (cited in note 39) (“A Justice who persistently refuses to accommodate his views to those of his colleagues may come to be regarded as an obstructionist. A Justice whose dissents become levers for legislative or administrative action reversing judicial policies may come to be regarded as disloyal to the bench. It is possible that either appraisal would curtail his influence with his associates.”)
\textsuperscript{54} During this period, Justices were authorized to employ a law clerk and a secretary. Pierce Butler used each to perform the duties of a law clerk, and one of them, John Cotter, wrote first drafts of most of Butler’s opinions. The other Justices, however, tended to employ only one law clerk, and to do their own drafting. See Barry Cushman, \textit{The Clerks of the Four Horsemen, Part I}, 39 J Sup Ct Hist 386 (2014); Barry Cushman, \textit{The Clerks of the Four Horsemen, Part II}, 40 J Sup Ct Hist 55 (2015); Melvin I. Urofsky, \textit{Louis D. Brandeis: A Life} 465 (2009). Congress did not authorize the Justices to hire two law clerks until 1941, though most of them continued to employ only one clerk until 1946. See Artemus Ward and David L. Weiden, \textit{Sorcerer’s Apprentices: 100 Years of Law Clerks at the United States Supreme Court} 36-37 (NYU 2006).
\textsuperscript{55} See Bradley J. Best, \textit{Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court 1935-1995} 214, 232 (LFB 2002) (finding “a positive, statistically significant relationship between the number of law clerks on the Court and the frequency of dissenting and concurring opinions”); Ley, Searles, and Clayton, 49 Tulsa L Rev at 112-13, 121 (cited in note 23) (concluding that “the opportunity for cost-lowering effects of law clerks” is “significant to our understanding of the persistence of non-consensual norms.”)
In discussing the post-conference voting behaviors of the Taft Court Justices, I will be using several defined terms. I shall use the term *acquiescence* to denote instances in which a Justice who either dissented or passed at conference ultimately joined in the majority’s disposition.\(^56\) In other words, acquiescence denotes instances in which a Justice who was not with the majority at conference moved *toward* the majority. I will refer to movements from dissent at conference to the majority in the final vote on the merits\(^57\) as instances of *strong acquiescence*; I will refer to movements from a passing vote at conference to the majority in the final vote on the merits as instances of *weak acquiescence*.\(^58\) Of course, such movement might have occurred either because the Justice in question became persuaded that the majority was correct, or because, though remaining unpersuaded, he elected to go along with the majority for the sake of some other consideration such as collegiality or public perception.\(^59\) The information contained in the docket books does not enable us to discriminate between these two possibilities, and therefore I shall not attempt to do so here. I will use the term *nonacquiescence* to denote instances in which a Justice who dissented at conference remained steadfast in his opposition to the majority’s disposition. In cases of nonacquiescence, there was no post-conference change in the vote of the Justice in question. I will use the term *quasi-acquiescence* to denote a situation in which a Justice who was

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\(^56\) This is also sometimes referred to as “conformity voting,” see, for example, Dorff and Brenner, 54 J Pol at 763 (cited in note 4), or “minority-majority voting,” see, for example, Saul Brenner and Robert H. Dorff, *The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective*, 4 J Theoretical Polit 195, 197 (1992).

\(^57\) I borrow this term from Professor Saul Brenner, 22 Jurimetrics at 287 (cited in note 24). What he calls the “original vote on the merits” I refer to as the “conference vote.”

\(^58\) These two terms are adapted from Brenner, 26 Am J Pol Sci at 388 (cited in note 4), and Brenner, 24 J Pol Sci at 527 (cited in note 4) (referring to such movements as “strong fluidity” and “weak fluidity,” respectively.)

\(^59\) See, for example, Brenner and Dorff, 4 J Theoretical Pol at 200 (cited in note 56) (concluding that Justices acquiesce “for non-attitudinal reasons, including small-group reasons”); Howard Jr, 62 Am Pol Sci Rev at 45 (cited in note 24) (same).
inclined in conference to oppose the majority’s disposition withheld his dissent and instead publicly concurred in the result with the written statement that he was doing so only because he felt bound by the authority of an earlier decision with which he disagreed. Finally, I will use the term *defection* to denote instances in which a Justice who was either member of the conference majority or passed at conference later dissented from the published opinion.\(^{60}\) In other words, defection denotes instances in which the Justice in question moved *away* from the majority. Again, I will refer to movements from the majority at conference to dissent in the final vote on the merits as instances of *strong defection*; I will refer to movements from a passing vote at conference to the majority in the final vote on the merits as instances of *weak defection*.\(^{61}\)

II. **UNANIMOUS CASES WITH NO VOTE CHANGES**

The docket books contain vote tallies for 1200 of the 1381 cases in which the Court published a full opinion during the 1922-1928 Terms. Eighty-six % of these 1200 cases, or 1028, were decided unanimously. In 58 % of these 1028 unanimous cases, the vote also was unanimous in conference. Put another way, the conference vote was unanimous in 50 % of the 1200 cases for which we have conference records.\(^{62}\) A number of these were decisions of considerable and lasting import. For example, *Massachusetts v Mellon* and *Frothingham v Mellon*\(^{63}\) were unanimous 1923 decisions upholding the Sheppard-Towner Maternity Act of

\(^{60}\) This is also sometimes referred to as “counterconformity voting,” see, for example, Dorff and Brenner, Pol at 763 (cited in note 4), or “majority-minority voting,” see, for example, Brenner and Dorff, 4 J Theoretical Pol at 197 (cited in note 56).

\(^{61}\) See, for example, Brenner and Dorff, 4 J Theoretical Pol at 197 (cited in note 56). There also are instances in which a docket book entry does not record a vote for a particular Justice. Often that was because the Justice was absent from the conference, and where that was the case, I do not treat that Justice as having engaged in any of the defined voting behaviors.

\(^{62}\) Post, 85 Minn L Rev at 1332 (cited in note 2).

\(^{63}\) 262 US 447 (1923).
1921 against constitutional challenge and articulating the taxpayer standing doctrine. Under these decisions, the constitutionality of congressional appropriations from general revenue could not be challenged by taxpayers, nor could states challenge the constitutionality of cooperative federal grant-in-aid programs. These precedents later would immunize billions of dollars in New Deal federal relief and public works spending from constitutional attack.64 And the votes in conference were unanimous. Butler’s notes record the disposition as “Dismiss 24 OR [Massachusetts v Mellon] as suit v U.S. No int[erest]. Dismiss on no right to sue. Not hurt. 962 [Frothingham v Mellon] Dismissed below. ‘Affirmed’ by all. No interest to sue.”65

In Florida v Mellon,66 the Court unanimously upheld a provision of the federal estate tax granting a credit against the tax for inheritance taxes paid to a state. An attractive package of mild winters and no state inheritance taxes had induced a number of wealthy residents from northern states to relocate to the Sunshine State. The federal tax credit was designed to level the playing field so that there would be no estate tax advantage gained by moving from a state with an inheritance tax to a state without one. In either case, the total tax on the transmission of wealth at death would be the same. One predictable consequence of this would be that states with inheritance taxes would be less likely to repeal them, and states without such taxes might be more likely to enact them. This mechanism, of granting a credit against a federal tax for a

64 See Benjamin F. Wright, The Growth of American Constitutional Law 184 (Holt 1967); Carl B. Swisher, American Constitutional Development 838-39 (Praeger 2d ed 1954); Joel F. Paschal, Mr. Justice Sutherland: A Man Against the State 212 (Princeton 1951); Edward S. Corwin, Twilight of the Supreme Court: A History of our Constitutional Theory 176 (Shoe String 1934).
65 Butler OT 1922 Docket Book. Two other important Taft Court decisions concerning the separation of powers also were unanimous both at conference and in the announced judgment. See J.W. Hampton Jr and Co v United States, 276 US 394 (1928), a landmark in the development of the nondelegation doctrine, Stone OT 1927 Docket Book, and the Pocket Veto Case, 279 US 655 (1929), Stone OT 1928 Docket Book.
comparable tax paid to a state, would provide the blueprint for the unemployment compensation provisions of the Social Security Act. Those provisions were crafted with the guidance of Justice Brandeis, and with *Florida v Mellon* very much in mind. And the conference vote in that decision, like the conference vote in *Frothingham*, was unanimous. The docket books indicate that these two major building blocks of the modern welfare state met with no objection from the Justices of the Taft Court.

*Chas. Wolff Packing Co v Court of Industrial Relations of the State of Kansas*, also decided in 1923, unanimously invalidated as violating the Due Process Clause a wage order issued pursuant to the Kansas Court of Industrial Relations Act’s statutory scheme of compulsory industrial arbitration. The vote again was unanimous at conference. The case

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68 Stone OT 1926 Docket Book.

69 262 US 522 (1923).

70 Butler OT 1922 Docket Book.
returned to the Court in 1925 under the same style, this time involving the constitutionality of an order concerning working hours. The Court again unanimously invalidated the order,\(^71\) and the vote in conference similarly was unanimous. In arguing for reversal of the lower court, Taft lamented that “our mandate” in the earlier decision was “not obeyed.” “The whole jud[gment] should go,” he argued. “Also,” he added, “that fixing of hours is bad here.” Butler records Holmes and Van Devanter as following with “Yes,” while McReynolds agreed that the “order is bad as to hours.”\(^72\)

*Chastleton Corp. v Sinclair*,\(^73\) which unanimously held that the post-War emergency that had justified residential rent control in the District of Columbia had ended, also was unanimous at conference. Butler’s notes indicate that Van Devanter, McReynolds, Sutherland, Butler, Sanford, and perhaps Taft expressed the view that the “Act [is] bad.”\(^74\) *Yeiser v Dysart*,\(^75\) a 1925 decision unanimously upholding regulation of the compensation of lawyers representing workmen’s compensation claimants in Nebraska courts, likewise was unanimous at conference. Butler’s notes record Taft as stating that the regulation was a “Reasonable provision. Law applies to a class,” and that a lawyer representing such a client was an “Officer of [the] Court.”\(^76\) This reasoning was faithfully reflected in Holmes’ opinion.\(^77\) *Weller v New York*\(^78\) considered the constitutionality of a statute regulating theater ticket brokers. In 1927, a closely divided Court

\(^{71}\) Charles Wolff Packing Co v The Court of Industrial Relations of the State of Kansas, 267 US 552 (1925).
\(^{72}\) Butler OT 1924 Docket Book.
\(^{73}\) 264 US 543 (1924).
\(^{74}\) Butler OT 1923 Docket Book. For more a bit more detail about the conference discussion, see Post, BU L Rev at 1497-98 (cited in note 3).
\(^{75}\) 267 US 540 (1925).
\(^{76}\) Butler OT 1924 Docket Book.
\(^{77}\) 267 US 540 (1925).
\(^{78}\) 268 US 319 (1925).
would invalidate a provision of the statute limiting the price that such brokers could charge for resale tickets,\textsuperscript{79} but in \textit{Weller} the Court unanimously upheld a section of the statute requiring that such brokers be licensed. The vote at conference also was unanimous.\textsuperscript{80} Butler records the Chief Justice as stating, “Within power to license brokers. Doubt as to price.” Holmes remarked, “Stat. good,” and Van Devanter added, “Good as to license.”\textsuperscript{81} In \textit{Asakura v Seattle},\textsuperscript{82} the Court unanimously held that a Seattle ordinance excluding non-citizens from the business of pawn brokerage violated the terms of a treaty with Japan guaranteeing the rights of each nation’s citizens or subjects to reside in the other in order “to carry on trade.” The vote at conference was unanimous, with Taft stating, “Treaty gives right to carry on Trade & Pawn-broking is ‘trade as old as business itself.’”\textsuperscript{83}

There also were several important dormant Commerce Clause cases in which the unanimity generated in conference held firm. This was true in \textit{Real Silk Hosiery Mills v Portland},\textsuperscript{84} which struck down an ordinance imposing a license tax on solicitors of orders to be filled by an out-of-state manufacturer;\textsuperscript{85} in \textit{Clark v Poor},\textsuperscript{86} which upheld a state requirement that common carriers obtain a permit and pay a tax to help maintain highways;\textsuperscript{87} and in \textit{Leonard &

\textsuperscript{79} \textit{Tyson and Bro v Banton}, 273 US 418 (1927).
\textsuperscript{80} Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\textsuperscript{81} Butler OT 1924 Docket Book. As was often the case, here Butler ceased recording the remarks of his colleagues after the first few had spoken.
\textsuperscript{82} 265 US 332 (1924).
\textsuperscript{83} Butler OT 1923 Docket Book.
\textsuperscript{84} 268 US 325 (1925).
\textsuperscript{85} Butler OT 1924 Docket Book; Stone OT 1924 Docket Book. Butler records Taft as presenting the case to the conference with the assertion that “The business is interstate commerce. The interference is direct.”
\textsuperscript{86} 274 US 554 (1927).
\textsuperscript{87} Stone OT 1926 Docket Book.
Leonard v Earle, which upheld state licensure and regulation of oyster-packing establishments. Other significant economic regulation cases that were unanimous both at conference vote and at the final vote on the merits include Miller v Schoene, which upheld a state statute requiring destruction of cedar trees infected with disease; Tagg Bros. & Moorhead v United States, which upheld federal regulation of fees charged by commission salesmen working in major stockyards under the Packers and Stockyards Act of 1921; and Roschen v Ward, which upheld a New York statute making it unlawful to sell eyeglasses at retail in any store unless a duly licensed physician or optometrist was in charge and in personal attendance. Roschen would serve as the principal authority for the highly deferential 1955 decision in Williamson v Lee Optical Co, in which the Court rebuffed the due process and equal protection claims of Oklahoma opticians who objected to a state statute making it unlawful for anyone other than a licensed optometrist or ophthalmologist to fit lenses to a face, or to duplicate or replace lenses without a written prescription from a licensed optometrist or ophthalmologist.

88 279 US 392 (1929).
89 Stone OT 1928 Docket Book.
90 276 US 272 (1928). It appears, however, that Butler may have harbored reservations. On his return of Stone’s opinion he wrote, “I acquiesce.” Justice Butler, Return of Miller v. Schoene, Box 55, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress.
91 Stone OT 1927 Docket Book. McReynolds was absent from the conference.
92 280 US 420 (1930).
93 Stone OT 1929 Docket Book.
94 279 US 337 (1929).
95 Stone OT 1928 Docket Book. Sutherland was absent from the conference.
96 348 US 483 (1955). Other regulatory cases that were unanimous both at the conference vote and at the final vote on the merits include Sprout v City of South Bend, 277 US 163 (1928) (invalidating city license tax for commercial carrier conducting an interstate business), Stone OT 1927 Docket Book; Hygrade Provision Co v Sherman, 266 US 497 (1925) (upholding against a Dormant Commerce Clause challenge a state law imposing criminal penalties on companies misrepresenting foods as Kosher), Butler OT 1924 Docket Book, Stone OT 1924 Docket Book; and The New England Divisions Case, 261 US 184 (1923) (expansively reading the Interstate Commerce Commission’s power to set rates), Butler OT 1922 Docket Book. United States v
A number of high-profile civil rights and civil liberties decisions also were unanimous from wire to wire. *Pierce v Society of Sisters*, 97 which unanimously invalidated an Oregon measure requiring children in the state to attend public schools, also was unanimous at conference.98 Taft stated that the “Act deprives parents and children of liberty under the 14th Am.” The Chief “Quoted Meyer v Nebraska,” which two years earlier had invalidated a Nebraska statute prohibiting the teaching of any modern foreign language to children in the eighth grade or younger. Butler records that Taft “Couples” this precedent “with ‘religious liberty’ of par. & child – public schools cannot [illegible] it.”99 The Chief also cited to “Adams v Tanner, 244 U.S.”, 100 a 1917 decision invalidating a law prohibiting the receipt of fees by employment agents, which suggests that he was thinking of the case not only in as a protection of religious liberty, but also in terms of the occupational liberty of the instructors. Taft also invoked “Harlan’s diss. Berea College 211,”101 which intimates that he also considered the statute an infringement of what Justice John Marshall Harlan I there had described in dissent as the constitutionally protected “right to impart and receive instruction not harmful to the public.”102 Holmes next indicated that he “Agrees,” while adding that “As an original prop[osition] might be troublesome without Meyer,”103 from which he had dissented two years earlier.104 Two years

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97 268 US 510 (1925).
98 Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
99 *Meyer v Nebraska*, 262 US 390 (1923); Butler OT 1924 Docket Book.
100 Butler OT 1924 Docket Book; *Adams v Tanner*, 244 US 590 (1917).
101 Butler OT 1924 Docket Book.
102 *Berea College v Kentucky*, 211 US 45, 68 (Harlan dissenting).
103 Id.
104 262 US 390 (1923).
after *Pierce*, in *Farrington v Tokushige*, where the Court extended the benefits of the right recognized in *Meyer* to aliens in Hawaii attending schools in which the primary language of instruction was Japanese, the vote was unanimous at the conference as well as in the published opinion.\(^{105}\)

The same voting pattern occasionally occurred in cases involving criminal law and procedure. In *Linder v United States*,\(^ {106}\) for example, the Court unanimously reversed the conviction of a physician under the Harrison Narcotic Act by construing the statute not to apply to his conduct. The vote was unanimous,\(^ {107}\) with Brandeis and Sutherland voting to “Reverse,” and Holmes stating “Rev if possible.”\(^ {108}\) Van Devanter, who had voted to declare the statute unconstitutional in 1919,\(^ {109}\) asserted that the “Act [is] bad – but consistently with former decisions [the conviction] can be reversed.”\(^ {110}\) McReynolds, who preserved a running constitutional objection to the statute,\(^ {111}\) remarked, “Reverse – Would reverse the whole line.” Interestingly, Taft, who spoke first, is recorded as stating, “Reviewed decisions and concluded ‘affirm.’” But the Chief also voted last, and when the time came to cast his ballot, he joined his


\(^{106}\) 268 US 5 (1925).

\(^{107}\) Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

\(^{108}\) Butler OT 1924 Docket Book.

\(^{109}\) *United States v Doremus*, 249 US 86 (1919).

\(^{110}\) Butler OT 1924 Docket Book.

\(^{111}\) See, for example, *Casey v United States*, 276 US 413, 420-21 (1928); *Nigro v United States*, 276 US 332, 354-57 (1928); *United States v Daugherty*, 269 US 360, 362-63 (1926); *United States v Behrman*, 258 US 280, 289-90 (1922); *United States v Webb*, 249 US 96, 100 (1919); *United States v Doremus*, 249 US 86, 95 (1919).
colleagues in voting to reverse.\textsuperscript{112} In United States v Daugherty\textsuperscript{113} the Justices unanimously criticized a fifteen year sentence for three separate sales of cocaine as “extremely harsh” and unjustified by the circumstances disclosed in the record, and remanded the case for reconsideration of the appropriate punishment.\textsuperscript{114} And in Tumey v Ohio\textsuperscript{115} the Court invalidated as a denial of due process a scheme of compensation for certain judicial officers under which the officer received payment for his services only if the defendant were convicted.\textsuperscript{116}

Of course, not all civil rights and civil liberties decisions that were unanimous both at the conference vote and at the final vote on the merits favored those who claimed that their rights had been infringed. This is illustrated by a series of cases arising in connection with enforcement of the prohibition laws. In Dumbra v United States,\textsuperscript{117} the Court upheld a warrant to search premises for liquor as based upon probable cause.\textsuperscript{118} In Steele v United States,\textsuperscript{119} the Justices held that the description in a search warrant was sufficiently definite to satisfy constitutional and statutory requirements.\textsuperscript{120} Marron v United States\textsuperscript{121} upheld the seizure of account books and papers used in conducting a criminal enterprise during a search incident to a lawful arrest.\textsuperscript{122}

\textsuperscript{112} Butler OT 1924 Docket Book. The Justices also unanimously upheld the first section of the Harrison Act as a valid exercise of the taxing power in Alston v United States, 274 US 289 (1927). The vote in conference was similarly unanimous, with Sutherland absent. Stone OT 1926 Docket Book.
\textsuperscript{113} 269 US 360 (1926).
\textsuperscript{114} Stone OT 1925 Docket Book.
\textsuperscript{115} 273 US 510 (1927).
\textsuperscript{116} Stone OT 1926 Docket Book.
\textsuperscript{117} 268 US 435 (1925).
\textsuperscript{118} Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\textsuperscript{119} 267 US 498 (1925).
\textsuperscript{120} Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\textsuperscript{121} 275 US 192 (1927).
\textsuperscript{122} Stone OT 1927 Docket Book.
*Hebert v Louisiana*\(^{123}\) held that conduct violating both state and federal prohibition laws could be prosecuted by both state and federal authorities without violating the prohibition on Double Jeopardy.\(^{124}\) And in *Van Oster v Kansas*,\(^{125}\) the Court upheld a state forfeiture law as applied to property used in the violation of state liquor laws.\(^{126}\)

Such mixed results can be seen as well in a broader array of civil rights and civil liberties decisions that were unanimous both at the conference vote and at the final vote on the merits. Though *Nixon v Herndon*\(^{127}\) invalidated the Texas Democratic Party’s “white primary,”\(^{128}\) *Gong Lum v Rice*\(^{129}\) upheld Mississippi’s system of segregated education.\(^{130}\) While *Ex parte Grossman*\(^{131}\) upheld presidential commutation of a criminal contempt sentence imposed by a federal judge,\(^{132}\) and *Hammersmidt v United States*\(^{133}\) rejected a government attempt to characterize attempts to obstruct the draft as a criminal conspiracy to defraud the United States,\(^{134}\) *Cockrill v California*\(^{135}\) affirmed a conviction under California’s Alien Land Law.\(^{136}\) And just as *Cheung Sum Shee v Nagle*\(^{137}\) overturned the Secretary of Labor’s refusal to admit the alien wives and minor children of resident Chinese merchants lawfully domiciled in the United

\(^{123}\) 272 US 312 (1926).
\(^{124}\) Stone OT 1926 Docket Book.
\(^{125}\) 272 US 465 (1926).
\(^{126}\) Stone OT 1926 Docket Book.
\(^{127}\) 273 US 536 (1927).
\(^{128}\) Stone OT 1926 Docket Book. Van Devanter was absent from the conference.
\(^{129}\) 275 US 78 (1927).
\(^{130}\) Stone OT 1927 Docket Book. Sutherland was absent from the conference.
\(^{131}\) 267 US 87 (1925).
\(^{132}\) Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\(^{133}\) 265 US 182 (1924).
\(^{134}\) Butler OT 1923 Docket Book.
\(^{135}\) 268 US 258 (1925).
\(^{136}\) Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\(^{137}\) 268 US 336 (1925).
States, \(^{138}\) so *United States v Thind*\(^{139}\) held that a native of India was ineligible for naturalization.\(^{140}\) Notwithstanding their seemingly variable policy valences, the norm of acquiescence was not in play in any of these cases. All of these were dispositions to which each of the Justices agreed from the outset.

**III. UNANIMOUS CASES WITH VOTE CHANGES**

Of the 1028 unanimous 1922-1928 Term decisions for which we have conference records, in 30% unanimity would not have been achieved had a conference dissenter not changed his vote to join the majority. In another 12%, unanimity would not have been attained had not a Justice who had expressed “uncertainty” at conference overcome his doubts.\(^{141}\) In other words, 42% of the Taft Court’s unanimous decisions for this period were not unanimous at conference. In these cases, the ultimate unanimity of the Court obscured differences that had emerged at conference. Consider, for example, *Radice v New York*,\(^{142}\) which involved a challenge to a New York statute that prohibited the employment of women in restaurants between the hours of 10 P.M. and 6 A.M. The statute applied only to the state’s larger cities, however, and it contained exemptions for singers and performers, for attendants in ladies’ cloak rooms and parlors, and for those employed in hotel dining rooms and kitchens, or in lunch rooms or restaurants conducted by employers solely for the benefit of their employees. Sutherland’s unanimous opinion upholding the statute as a legitimate measure for the protection of health

\(^{138}\) Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.  
\(^{139}\) 261 US 204 (1923).  
\(^{140}\) Butler OT 1922 Docket Book.  
\(^{141}\) Post, 85 Minn L Rev at 1332-33 (cited in note 2).  
\(^{142}\) 264 US 292 (1924).
dispelled any concern that the recent decision of *Adkins v Children’s Hospital*\(^{143}\) invalidating a minimum wage law for women had implicitly overruled the 1908 decision in *Muller v Oregon*\(^{144}\) upholding a maximum working hours law for women. The Justices also were unanimous in their rejection of the contention that the limitation of the statute to larger cities and the exemptions for particular types of employment worked a denial of equal protection.

Felix Frankfurter later memorialized a conversation that he had with Brandeis about *Radice*, which he recounts as follows:

July 6, 1924. I have said that I was certain that Ct would decide NY statute prohibiting night work by women favorably as it did (Radice v New York, 264 U.S.). L.D.B. took me aside and said “you might have been certain but it was not at all certain. That was one of those 5 to 4 that was teetering back & forth for some time. The man who finally wrote -- Sutherland was the fifth man & he had doubts & after a good deal of study (for whatever you may say of him he has character & conscience) came out for the act & then wrote his opinion. That swung the others around to silence. It was deemed inadvisable to express dissent and add another 5 to 4. The doubt as to the statute turned on unequal protection, which now looms up even more menacingly than due process, because the statute omitted some night work & only included some.”\(^{145}\)

Butler’s record of the *Radice* conference confirms this account in most respects. The vote was 5-4, with McKenna, Van Devanter, McReynolds, and Butler voting to invalidate the statute, though Butler records McReynolds’s dissenting vote as cast “Doubtfully.” It also appears that it was the equal protection issue that divided the Justices, and that Sutherland was decisive in forming the majority to uphold the statute. Butler records Sutherland as stating, “Classification can be sustained.”\(^{146}\) It also is clear that the four conference dissenters ultimately acquiesced in the judgment of their colleagues in the majority. It is not clear, however, whether the outcome

\(^{143}\) 261 US 525 (1923).
\(^{144}\) 208 US 412 (1908).
\(^{146}\) Butler OT 1923 Docket Book.
was “teetering back & forth for some time.” The case was argued January 17th and 18th,\textsuperscript{147} and the conference at which Sutherland cast the deciding vote and defended the classification was held on January 26.\textsuperscript{148} If there was any subsequent vacillation, Butler’s docket book does not record it.

In \textit{Brooks v United States},\textsuperscript{149} the Court unanimously upheld the Dyer Act of 1919, which made it a federal crime to transport or cause to be transported in interstate commerce “a motor vehicle, knowing the same to be stolen.” Seven years earlier, in \textit{Hammer v Dagenhart},\textsuperscript{150} the Justices had struck down the Keating-Owen Child Labor Act,\textsuperscript{151} which forbade the interstate shipment of goods produced by firms employing children. The Court there had held that, unlike such predecessor statutes as the Lottery Act,\textsuperscript{152} which prohibited interstate shipment of lottery tickets, and the Pure Food and Drugs Act,\textsuperscript{153} which prohibited interstate shipment of adulterated or mislabeled food and drugs, the Keating-Owen Act was not properly a regulation of interstate commerce because the goods whose interstate shipment it prohibited were “of themselves harmless.”\textsuperscript{154} Yet as a number of commentators have observed, Taft’s opinion for the Court did not explain how there was anything in particular about cars that had been stolen that made them “of themselves” harmful.\textsuperscript{155}

\textsuperscript{147} 264 US 292 (1924).
\textsuperscript{148} Butler OT 1923 Docket Book.
\textsuperscript{149} 267 US 432 (1925).
\textsuperscript{150} 247 US 251 (1918).
\textsuperscript{151} 39 Stat 675 (1916).
\textsuperscript{152} 28 Stat 963 (1895), upheld in \textit{Champion v Ames}, 188 US 321 (1903) (“The Lottery Case”).
\textsuperscript{154} 247 US at 272.
\textsuperscript{155} See, for example, Melvin Urofsky and Paul Finkelman, \textit{2 A March of Liberty: A Constitutional History of the United States} 705 (Oxford 3d ed 2011) (the Dyer Act “bore a striking resemblance to the Child Labor Law, which had also prohibited the movement of things
A private memorandum located in Taft’s papers at the Library of Congress reveals that the Chief Justice himself struggled to distinguish the Dyer Act from the Keating-Owen Act. Taft understood the relevant line of cases to stand for the proposition that “[i]f the result of interstate transportation will be to spread some harmful matter or product, Congress may interfere without violating the Tenth Amendment. The facilities of interstate commerce may be withdrawn from those who are using it to corrupt others physically or morally.” If, on the other hand, “the transportation is being used to transport something harmless in itself and not calculated to spread evil, like cotton cloth,” Taft wrote, “Congress may not prohibit its interstate transportation, although its inception may have been in some evil which is the legitimate object of the police power, such as child labor.” Earlier decisions could be distinguished from *Hammer* on this basis. The Chief Justice noted that “the interstate carriage of lottery tickets will communicate the gambling fever, of obscene literature will communicate moral degeneracy, of impure food will endanger health, [and] of diseased cattle will infect local cattle. . . .” In each of these instances, interstate transportation of the item inflicted a harm outside the state of origin. The “justification” for the doctrine, Taft concluded, “must be that Congress can prohibit the interstate spread of an evil thing, although it cannot prohibit the spread of something harmless in itself in order to suppress an evil which is properly the object of state police regulation.”

Taft was persuaded that this reasoning sufficed to sustain the constitutionality of the Dyer Act, but he conceded that this conclusion might not be obvious. “At first I had a little difficulty that were not in themselves harmful”); David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888-1986* at 176 (Chicago 1990) (Taft “made no effort to show that stolen cars were harmful to anyone in the state to which they were transported”); Paul L. Murphy, *The Constitution in Crisis Times 1918-1969* at 61-62 (HarperCollins 1972) (the Court ignored the “obvious similarity” between the Dyer Act and the Keating-Owen Act, both of which prohibited interstate transportation of “things not in themselves harmful.”).

with stolen automobiles,” he confessed, “as the chief evil in connection therewith is the stealing and that of course is over before the machine takes on its character as a stolen automobile. This makes it look something like Hammer v Dagenhart.” But the Chief Justice reassured himself with the observation that “a stolen automobile is a canker. It attracts shady and disreputable individuals and leads to secret and underhanded dealings. Certainly it is not ultra vires for Congress to prohibit the interstate communication of this canker.”

Taft apparently wrote this memorandum before the conference on Brooks that was held on January 31, 1925, because his presentation to his colleagues affirmed his belief in the Act’s constitutionality. Butler summarized Taft’s remarks as, “Thinks first section good. Distinguishes bet Caminetti & Dagenhart Case.” Holmes expressed the view that the defendant’s constitutional claim was “not meritorious” and that the case presented “No substantial Const. qu[estion].” Van Devanter also is recorded as taking the position that both the statute and the indictment were “good.”

Sutherland had been a United States Senator when the Pure Food and Drugs Act was passed, and had voted in favor of its passage. He also was in the Senate in 1910 when that body approved by a voice vote the Mann Act, which prohibited the interstate transportation of

157 Id at 7.
158 Butler OT 1924 Docket Book. Caminetti v United States, 242 US 470 (1917), upheld a conviction under the Mann Act for interstate transportation of a woman for an immoral purpose under circumstances that did not involve “commercialized vice.” The “bet” case is presumably The Lottery Case, 188 US 321 (1903), in which the Court by a vote of 5-4 upheld a federal statute prohibiting the interstate transportation of lottery tickets.
159 Butler OT 1924 Docket Book. In support of this view Holmes apparently cited Purity Extract and Tonic Co v Lynch, 226 US 192 (1912).
161 40 Cong Rec 2773 (1906).
162 36 Stat 825 (1910).
women and girls for immoral purposes.\textsuperscript{163} And he still occupied a seat in the upper chamber in 1913 when Congress passed the Webb-Kenyon Act,\textsuperscript{164} which prohibited the interstate transportation of liquor into states where it was intended to be received, possessed, or sold in violation of state law. Here Sutherland had voted against\textsuperscript{165} and offered the principal constitutional argument in opposition to the bill.\textsuperscript{166} Sutherland maintained that Congress did not have the power to prohibit the interstate shipment of liquor unless and until it had become “outlawed by the common opinion of the people.”\textsuperscript{167} Until such time as that occurred, Sutherland insisted, alcohol was “a legitimate article of commerce, and so long as it is recognized as such it cannot be denied the right of interstate transportation.”\textsuperscript{168}

The Court unanimously upheld the Pure Food and Drugs Act in \textit{Hipolite Egg. Co v United States},\textsuperscript{169} and the Justices sustained the Mann Act in \textit{Hoke v United States}\textsuperscript{170} and \textit{Caminetti}. In 1917 the Court upheld the Webb-Kenyon Act as a legitimate exercise of the commerce power, with Chief Justice Edward Douglass White writing that because of alcohol’s “exceptional nature,” it would be within congressional power to exclude it from interstate commerce altogether.\textsuperscript{171} But despite these precedents, Sutherland was plagued by the very sorts of doubts about the Dyer Act that had troubled Taft. Butler records him as objecting that “Automobiles [are] not like liquor – [or] Bad food – [or] girls [transported for] immoral purposes

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  \item \textsuperscript{163} 40 Cong Rec 9037 (1910).
  \item \textsuperscript{164} 37 Stat 699 (1913).
  \item \textsuperscript{165} 49 Cong Rec 2922 (1913).
  \item \textsuperscript{166} 49 Cong Rec 2903-11 (1913).
  \item \textsuperscript{167} 49 Cong Rec 2906 (1913).
  \item \textsuperscript{168} 49 Cong Rec 2904 (1913).
  \item \textsuperscript{169} 220 US 45 (1910).
  \item \textsuperscript{170} 277 US 308 (1913).
  \item \textsuperscript{171} \textit{Clark Distilling Co v Western Maryland Railway Co}, 242 US 311, 325-26, 331-32 (1917).
\end{itemize}
– Transported as a [illegible] part.” Both Sutherland and McReynolds apparently were not persuaded that stolen automobiles were “in themselves harmful,” and when it came time to vote each of them registered their dissent. But here again these Justices observed the Taft Court norm of acquiescence, and joined with their colleagues to make a unanimous Court.

*Oliver Iron Mining Co v Lord* was an important decision in the line of Commerce Clause authority distinguishing production from commerce. There the Justices upheld a state occupation tax on coal mining, even though the coal extracted was to be shipped to points outside the state to satisfy existing contracts. “Mining,” wrote Van Devanter for a unanimous Court, “is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce.” In this case, he noted, “[t]he ore does not enter interstate commerce until after the mining is done.” It was true that “[t]he tax may indirectly and incidentally affect such commerce,” but this, he concluded, was “not a forbidden burden or interference.”

Only seven Justices participated in the conference vote taken on January 6, 1923. Justice Mahlon Pitney had retired a week earlier, and Sanford had not yet been nominated to replace

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172 Butler OT 1924 Docket Book.
173 262 US 172 (1923).
174 For later decisions relying upon *Oliver Iron* for this distinction, see, for example, *Carter v Carter Coal Co* 298 US 238, 302-03 (1936); *Champlin Refining Co v Corporation Commission of Oklahoma*, 286 US 210, 235 (1932); *Utah Power and Light Co v Pfoert*, 286 US 165, 182 (1932).
175 262 US at 178-79.
176 260 US iii.
him. Butler was not confirmed until December 21, 1922, two weeks after the arguments had taken place on December 6 and 7, and so did not participate at the conference. Butler records the conference vote as 4-3 to reverse the District Court, with Taft, McKenna, Van Devanter, and McReynolds opposed by Holmes, Brandeis, and Sutherland. Ultimately, however, the Court was unanimous to affirm – the Justices in the conference majority were persuaded to join with the minority Justices in massing the Court. The decision was not handed down until May 7, months after Sanford’s confirmation, and the published report contains no indication that Butler and Sanford did not participate. This suggests the possibility that another vote was held with a full Court, that the two new Justices agreed with the conference minority, and that the four Justices now in the minority then acquiesced in the decision.

*Coronado Coal Co v United Mine Workers of America* involved a strike called by a local affiliate of the United Mine Workers (UMW) against Arkansas coal producers in which the strikers had deliberately destroyed company mines and equipment. The case involved two questions. The first was whether, under the circumstances, the UMW could be held liable for the property damage inflicted by members of the local union. The trial court had directed a verdict in favor of the UMW on this issue, and the Supreme Court unanimously affirmed this judgment. The second issue was whether the actions of the local union might constitute a conspiracy in restraint of trade in violation of the Sherman Act. The trial court also had directed a verdict in favor of the local union on this question, but here the Court unanimously reversed the judgment.

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and remanded for a new trial. The Justices ruled that there was substantial evidence that the actions of the local union were undertaken with the intent to prevent interstate shipment of coal that would compete with union coal in neighboring states.\textsuperscript{182}

This was precisely the position that Taft had taken at conference, and he was joined in that view by Van Devanter, Sutherland, and Butler. Butler records that Taft stated, “Af”[firm] as [to] United M.W. [and] Rev[erse] as to Local 21. I.C.C. [Interstate Commerce Clause] point for jury.” Van Devanter is recorded “Same as 1[Taft],” and both Sutherland and Butler are recorded as “With 1.” Holmes stated that he “Would affirm” as to both issues, and Brandeis is noted as agreeing with “O.W.H.” McReynolds indicated that he “Would reverse all.” There is no indication of any comment from Sanford or Stone. McReynolds apparently acquiesced at the conference: When the vote was taken, the count was 6-2 in favor of the disposition advocated by the Chief Justice, with Holmes and Brandeis dissenting, and no vote recorded for Stone. As Butler noted, “Brandeis and Holmes [voted] to affirm all.” But between the time of the conference and the delivery of the Court’s opinion, these two Justices (and possibly Stone) acquiesced in the disposition favored by the majority.\textsuperscript{183}

In *National Assn. of Window Glass Manufacturers v United States*,\textsuperscript{184} the Court unanimously rejected a Sherman Act challenge to an agreement between union glass blowers and an association of window glass manufacturers to fix wages and seasonally rotate the labor force

\textsuperscript{182} In reviewing the verdict of the first trial in the case, the Court had held that the company had not adduced sufficient evidence of intent to restrain interstate commerce. *United Mine Workers v Coronado Coal Co*, 259 US 344, 408-13 (1922).
\textsuperscript{183} Butler OT 1924 Docket Book. Stone OT 1924 Docket Book contains no report of the conference.
\textsuperscript{184} 263 US 403 (1923).
between two sets of factories. At the November 24, 1923 conference, however, Taft, McKenna, and McReynolds had dissented from the judgments of their colleagues.185 In *Industrial Association of San Francisco v United States*,186 the Court unanimously rejected the Sherman Act prosecution of building contractors who had agreed to maintain open shop employment policies by permitting sales of specified materials only to contractors maintaining an open shop. The price of that unanimity was Taft’s suppression of the dissent that he had registered at conference.187 *Dayton-Goose Creek Railway Co v United States*188 unanimously upheld the recapture provisions of the Transportation Act of 1920, but only because McKenna suppressed the dissenting vote that he had cast at conference.189 *Panama Railroad v Johnson*190 unanimously upheld provisions of the Jones Act authorizing injured seamen to sue their employers for damages, but only because McReynolds suppressed his dissenting conference vote.191 And

185 Butler OT 1923 Docket Book.
186 268 US 64 (1925). This confirms the claims to this effect made in Taft’s letter to Stone, Jan 27, 1927, quoted in Mason, *Harlan Fiske Stone* at 257-58 (cited in note 4) (“I voted against the decision of the Court in [the San Francisco case], but I acquiesced because I considered it, on the statement of Sutherland, a mere difference on my part in the matter of the significance of evidence, rather than any difference in principle between us.”).
187 Stone OT 1924 Docket Book; Butler OT 1924 Docket Book. McReynolds passed at the conference vote.
188 263 US 456 (1924).
189 Butler OT 1923 Docket Book.
190 264 US 375 (1924). Sutherland did not participate.
191 Butler OT 1923 Docket Book. That same Term the Court invalidated a federal statute that allowed state workmen’s compensation laws to apply to certain work injuries sustained within the admiralty jurisdiction. *Washington v W.C. Dawson and Co*, 264 US 219 (1924). The decision followed the precedents of *Knickerbocker Ice Co v Stewart*, 253 US 149 (1920), which had struck down a similar federal statute, and *Southern Pacific v Jensen*, 244 US 205 (1917), which had held that New York’s workmen’s compensation statute could not apply to work injuries sustained in the admiralty jurisdiction. At the *Dawson* conference, Holmes and Brandeis voted to uphold the federal statute. Butler OT 1923 Docket Book. Brandeis also dissented from the published opinion, but Holmes wrote separately that the reasoning of *Jensen* and the cases following it “never has satisfied me and therefore I should have been glad to see a limit set to the principle. But I must leave it to those who think the principle right to say how far it extends.”
though the subject of intergovernmental tax immunities would become one of the most divisive confronting the Taft and Hughes Courts,192 in the 1926 case of Metcalf & Eddy v Mitchell193 the Justices unanimously upheld the imposition of the federal income tax on the profits of a private contractor from performance of contracts with state governments. In a gesture that would be in short supply in such cases in the future, Sutherland abandoned his dissenting conference stance and acquiesced to make a unanimous Court.194 On his return of Stone’s circulated draft opinion, Sutherland wrote, “I felt rather strongly the other way, but I shall yield. You have written a good opinion, and if we are to draw what seems to me to be a rather arbitrary line, perhaps this is as good as any.”195

Similarly, the result in Trusler v Crooks,196 which unanimously invalidated as a “penalty” a tax imposed on options contracts in grain by the Futures Trading Act, did not receive the support of Van Devanter and Sutherland at conference.197 In Michigan Pub. Util. Comm’n v Duke,198 the Court unanimously condemned the state’s attempt “to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier” as a deprivation of property without due process. At the conference, however, Holmes

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192 See notes 260–66 and accompanying text.
193 269 US 514 (1926).
194 Stone OT 1925 Docket Book. Stone placed a question mark next to the vote of either Sutherland or Butler, or perhaps both. The following year, in Northwestern Mutual Life Insurance Co v Wisconsin, 275 US 136 (1927), the Court unanimously held that a state tax on the income from federal securities violated constitutional principles of intergovernmental tax immunity. The vote in conference was similarly unanimous, with the ailing Sutherland absent. Stone OT 1927 Docket Book.
195 Justice Sutherland, Return of Metcalf v. Mitchell, Box 52, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress.
196 269 US 475 (1926).
197 Stone OT 1925 Docket Book.
198 266 US 570 (1925).
had passed.\textsuperscript{199} Also divided at conference were two important land use cases. The decision in \textit{Nectow v City of Cambridge},\textsuperscript{200} which unanimously invalidated a zoning ordinance as applied, received the support of only six Justices at conference. Brandeis dissented, and Holmes and Stone passed.\textsuperscript{201} That same year, in \textit{Washington v Roberge},\textsuperscript{202} the Court unanimously invalidated as repugnant to the Due Process Clause a zoning ordinance conditioning permission to construct a home for the aged poor on the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. In conference, however, that disposition had garnered only five votes. McReynolds, Sutherland, and Sanford had dissented, and Stone had passed.\textsuperscript{203}

Some significant civil rights and civil liberties decisions also followed this pattern. In \textit{Whitney v California},\textsuperscript{204} the Justices unanimously affirmed the criminal syndicalism conviction of Anita Whitney, the niece of former Justice Stephen J. Field. Brandeis wrote a celebrated

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\item[199] Butler OT 1924 Docket Book. Butler records Van Devanter as saying that the company was a “Private carrier,” citing “251/ US Pipe.” Butler’s notes clarify that Van Devanter was referring to the “Producer’s Oil Case 251 US” The reference here is to \textit{Producers Transportation Co v Railroad Commission}, 251 US 228 (1920), a Van Devanter opinion in which the Court had unanimously held that a pipeline had been devoted to public use and thus was subject to regulation as a common carrier. In dicta, the opinion had stated that “if the pipeline was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a Commission, convert it into a public utility or make its owner a common carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment.” 251 US at 230-31. Butler records Holmes as responding that the “Pipe line case right in result but no[t] reasons.” Stone OT 1924 Docket Book contains no entry for the case.
\item[200] 277 US 183 (1928).
\item[201] Stone OT 1927 Docket Book.
\item[202] 278 US 116 (1928).
\item[203] Stone OT 1928 Docket Book. Other regulatory cases in which unanimity was achieved after conference include \textit{Morris v Duby}, 274 US 135 (1927) (upholding regulation prescribing maximum weights for trucks and loads on state highways). At conference, Holmes and Sanford had passed. Stone OT 1926 Docket Book.
\item[204] 274 US 357 (1927).
\end{enumerate}
\end{footnotesize}
concurring opinion, joined by Holmes, in which the two Justices voted to affirm the conviction on the grounds that, at trial, Ms. Whitney had neither contended that the California statute as applied to her was void because there was no clear and present danger of a serious evil, nor requested that the question of the existence of such conditions be passed upon by the court or a jury. Because there was other evidence tending to establish a conspiracy to commit present serious crimes, Brandeis and Holmes believed that the Court was without power to disturb to judgment of the state court.\footnote{205}

Stone’s record of the conference in the spring of the 1926 Term contains only an indication that the opinion was assigned to Sanford.\footnote{206} The case was initially argued at the beginning of the 1925 Term,\footnote{207} however, and Stone’s docket book from that Term provides some insight into events at the initial conference. Stone’s notes indicate that the Justices unanimously voted to dismiss the case for want of jurisdiction.\footnote{208} The difficulty, as Sanford later explained in his opinion for the Court, was that the record contained no indication that Whitney had raised nor that the state courts had considered or decided any federal question. The lower court later entered an order certifying that it had in fact passed upon the question of whether the statute violated the Fourteenth Amendment, and that order subsequently was added to the record. With this addition, the Court concluded that it did have jurisdiction of the appeal, and returned the case to the docket for reargument in March of 1926.\footnote{209}

\footnote{205} 274 US at 372-80.  
\footnote{206} Stone OT 1926 Docket Book.  
\footnote{207} 274 US 357 (1927).  
\footnote{208} Stone OT 1925 Docket Book. McReynolds was absent for this vote.  
\footnote{209} 274 US at 360-62.
There is an ambiguity in Stone’s 1925 Term entry that is worth lingering over. Stone also records a vote on the merits in *Whitney*, though it is unclear whether this vote took place before or after reargument. That vote was 7-1 to affirm the conviction, with Brandeis dissenting, and a question mark placed in the “Reverse” column for Holmes.\(^{210}\) There is, however, another vote recorded, with “re-hearing” handwritten into the subject matter column above the vote tally. It is not clear whether this was a vote to grant reargument, or a vote on the merits following reargument. Stone lists the vote as 5-3, with Holmes, Brandeis, and Sanford voting in the negative column.\(^{211}\) It may be that these three Justices simply saw no point in reviewing a conviction that the previous vote gave them good reason to believe would be affirmed. But if this last vote was taken on the merits after reargument, Sanford’s vote to reverse would be remarkable for at least two reasons. First, he was the author of the 1925 decision *Gitlow v New York*,\(^{212}\) which upheld Benjamin Gitlow’s conviction under New York’s Criminal Anarchy statute for the publication of his “Left Wing Manifesto” in The Revolutionary Age newspaper. Brandeis there had joined Holmes’s celebrated dissent, in which he maintained that Gitlow’s “redundant discourse” presented no clear and present danger of an attempt to overthrow the government.\(^{213}\) Second, Sanford ultimately wrote the majority opinion in *Whitney*, and it is with much of the First Amendment theory contained in that opinion that Brandeis implicitly took issue in his famous concurring opinion. Based on Sanford’s opinions in *Gitlow* and *Whitney*, it

\(^{210}\) Stone OT 1925 Docket Book. Stone records McReynolds as voting with the majority on this issue.

\(^{211}\) Stone OT 1925 Book. McReynolds is again listed as absent.

\(^{212}\) 268 US at 652 (1925). Unfortunately, we do not have a docket book account of the conference in *Gitlow*. The case was reargued on Nov 23, 1923, but Butler’s docket books for the 1923 and 1924 Terms have no entries for the case. Butler’s OT 1922 Docket Book lists *Gitlow* in the index, but contains no entry for the case. Stone OT 1924 Docket Book also contains no entry for the case.

\(^{213}\) 268 US at 672 (Holmes dissenting).
does not seem likely that the 5-3 vote was on the merits. If it was, however, then Sanford may have performed the ultimate act of acquiescence, not only joining in a judgment from which he had dissented at conference, but also shouldering the responsibility for writing the opinion supporting that judgment. In any event, Holmes and Brandeis also ultimately acquiesced in the majority’s disposition and, to a limited extent, its rationale. For many years, scholars have questioned why Brandeis did not dissent in Whitney.214 Stone’s record of the conference votes on the case shows that Brandeis voted to do so at least once, and perhaps twice.

In Fiske v Kansas,215 decided the same day as Whitney, the Justices reversed the criminal syndicalism conviction of an organizer for the Industrial Workers of the World. Here again the judgment was unanimous, and this time there were no concurring opinions. At the conference, however, McReynolds had voted to affirm, and Stone placed question marks next to his own and Sutherland’s votes to reverse.216 In Corrigan v Buckley,217 a unanimous bench held that the Court lacked jurisdiction to hear an appeal in a challenge to the constitutionality of racially restrictive real estate covenants, because the case presented no substantial federal question. At the conference, by contrast, Van Devanter, Brandeis, and Butler had voted against dismissal.218 And in Yu Cong Eng v Trinidad,219 the Court unanimously invalidated a law of the Philippine Islands prohibiting merchants from keeping account books in any other than one of three

216 Stone OT 1925 Docket Book. The case was held over from the 1925 Term. The opinion originally was assigned to Van Devanter, and then transferred to Sanford.
218 Stone OT 1925 Docket Book.
219 271 US 500 (1926).
approved languages. At the conference, however, this disposition had been opposed by Holmes and McReynolds.\textsuperscript{220}

The same pattern can be observed in several cases involving criminal law and criminal procedure. In \textit{Agnello v United States},\textsuperscript{221} the Court unanimously reversed a federal conviction for conspiracy to sell cocaine on the ground that the trial court had admitted evidence gathered during a warrantless search of the defendant’s residence. At the conference, however, Taft and Holmes had not been prepared to join the majority.\textsuperscript{222} In \textit{Fasulo v United States}\textsuperscript{223} the Justices unanimously held that that a scheme for obtaining money by means of intimidation through threats of murder and bodily harm was not a “scheme to defraud” within the meaning of a federal statute punishing the use of the mails for the purpose of executing any “scheme or artifice to defraud.” The vote at conference was 7-1, with Taft dissenting and McReynolds passing, but each of them ultimately acquiesced in the majority’s decision.\textsuperscript{224} In \textit{United States v Lee},\textsuperscript{225} the Court unanimously upheld the seizure and search incident to arrest by the Coast Guard of a vessel on the high seas, but only because Butler suppressed his dissenting conference vote.\textsuperscript{226}

\textsuperscript{220} Stone OT 1925 Docket Book. There is an erased vote to reverse in McReynolds’ column, raising the possibility that he initially voted with the majority but changed his vote during the conference.
\textsuperscript{221} 269 US 20 (1925).
\textsuperscript{222} Dean Post records Taft and Hughes as voting to affirm. See Post, 48 Wm and Mary L Rev at 101, n 343 (cited in note 3); id at 134 n 442. Butler’s record of the vote places X’s straddling the “affirm” and “reverse” columns for these two Justices, which I read as placing them on the fence. Butler OT 1924 Docket Book. Stone records all of the Justices voting to reverse except for Taft and Holmes, in whose voting columns he wrote something illegible. Stone also has erased a vote to reverse in Taft’s column. Stone OT 1924 Docket Book.
\textsuperscript{223} 272 US 620 (1926).
\textsuperscript{224} Stone OT 1926 Docket Book.
\textsuperscript{225} 274 US 559 (1927).
\textsuperscript{226} Stone OT 1926 Docket Book. Stone also placed a question mark next to Sutherland’s vote with the conference majority.
Gambino v United States\textsuperscript{227} the Court unanimously held that the Fourth Amendment barred introduction at federal trial of evidence seized by New York state police from the accused’s automobile without a warrant and without probable cause, and then turned over to federal authorities for prosecution. At the October 22, 1927 conference, there were only two votes for this disposition. Butler and Stone were in the minority, while McReynolds passed and Sutherland was absent. Moreover, Stone’s vote to reverse the conviction was uncertain: he placed a question mark next to his own vote. When the Justices again met to discuss the case on December 10, however, they unanimously approved Brandeis’ opinion for the Court reversing the conviction. The five members of the conference majority had changed their minds, and McReynolds and Sutherland joined the new majority.\textsuperscript{228}

Similarly, in Byars v United States\textsuperscript{229} the Court unanimously overturned a federal conviction secured on the basis of evidence discovered during a search underwritten by a defective state warrant. At conference, Taft, Holmes, and McReynolds had voted to affirm the conviction, but they ultimately acceded to the disposition favored by their brethren.\textsuperscript{230} Ziang Sung Wan v United States\textsuperscript{231} unanimously reversed a federal murder conviction obtained on the basis of a confession elicited under coercive circumstances. At the conference, however, McKenna, Van Devanter, and Sutherland had voted to affirm, and McReynolds passed.\textsuperscript{232} Here the returns of Brandeis’s draft opinion explicitly employed the language of acquiescence. McReynolds wrote, “I shall not oppose”; Van Devanter responded with “I shall assent”: and

\textsuperscript{227} 275 US 310 (1927).
\textsuperscript{228} Stone OT 1927 Docket Book. Sutherland also was absent from the Dec 10 conference.
\textsuperscript{229} 273 US 28 (1927).
\textsuperscript{230} Stone OT 1926 Docket Book.
\textsuperscript{231} 266 US 1 (1924).
\textsuperscript{232} Butler OT 1923 Docket Book.
Sutherland replied, “This is well done. I voted the other way but probably shall acquiesce.”233 Cooke v United States,234 which involved charges of contempt of court committed by a lawyer outside the courtroom, followed a similar pattern. The Court unanimously upheld the alleged contemnor’s rights to be advised of the charges against him, and to be afforded the opportunity to defend or explain his actions, with the assistance of counsel if he so desired. But the decision was unanimous only because McReynolds again swallowed the objections that he had registered at conference.235 And in McGrain v Daugherty,236 a unanimous bench held that Congress has the power to subpoena witnesses and compel testimony. At the conference vote, however, Brandeis had dissented from this consensus.237

IV. NONUNANIMOUS CASES

There were a number of major Taft Court decisions in which unanimity was not achieved. In some of these cases there was no notable movement – neither the votes of the Justices nor, to the extent recorded, the rationale of the decision changed between the conference

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233 Post, 48 Wm and Mary L Rev at 160-61 n 537 (cited in note 3).
234 267 US 517 (1925).
235 Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
237 Butler OT 1924 Docket Book. The case was carried over from the 1925 Term, where there was apparently no recorded vote, Stone OT 1925 Docket Book, and before that from the preceding Term, when it was argued on Dec 5, 1924. Butler recorded the 1924 vote reported in the text. He recorded Holmes as stating, “Was writ premature. Otherwise affirm.” The follow-on unanimous decision in Barry v United States, 279 US 597 (1929), also was unanimous at conference. Stone OT 1928 Docket Book.
and the published opinion.\textsuperscript{238} This was true in both \textit{Meyer v Nebraska}\textsuperscript{239} and \textit{Olmstead v United States}, in which a sharply divided Court upheld warrantless wiretapping.\textsuperscript{240} It also was true in \textit{Myers v United States}, a landmark decision on the scope of the President’s removal power,\textsuperscript{241} and in the four \textit{Alien Land Law Cases} of 1923, in which the majority affirmed judgments upholding the statutes while McReynolds and Brandeis maintained that there was “no jurisdiction” and voted to reverse.\textsuperscript{242}

This was also the case in \textit{Adkins v Children’s Hospital}, which invalidated the District of Columbia’s minimum wage law for women by a vote of 5-3.\textsuperscript{243} In the four years following the decision in \textit{Adkins}, the Court would twice invalidate state minimum wage statutes on the authority of that precedent. In the 1925 decision of \textit{Murphy v Sardell},\textsuperscript{244} the Court per curiam affirmed the judgment of the District Court striking down the Arizona statute “upon the authority of \textit{Adkins v Children's Hospital}.” The brief report of the case continued, “Mr. Justice Holmes

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\item \textsuperscript{238} \textit{Moore v Dempsey}, 261 US 86 (1923) may fall into this category. The conference vote of Sutherland, who ultimately joined McReynolds in dissent, is not clear. Otherwise, everyone voted in conference as he would in the published decision. Butler OT 1922 Docket Book. See also \textit{United States v Village of Hubbard}, 266 US 474 (1925) (upholding power of Interstate Commerce Commission to increase intrastate interurban railway rates), in which McReynolds, who wrote separately, registered the only dissenting vote at conference. Butler OT 1924 Docket Book.
\item \textsuperscript{239} 262 US 390 (1923). Holmes and Sutherland dissented. Butler OT 1922 Docket Book.
\item \textsuperscript{240} 277 US 438 (1928). Holmes, Brandeis, Butler, and Stone dissented. Stone OT 1927 Docket Book.
\item \textsuperscript{241} 272 US 52 (1926). Holmes, McReynolds, and Brandeis dissented. Stone OT 1926 Docket Book.
\item \textsuperscript{242} \textit{Frick v Webb}, 263 US 326 (1923); \textit{Webb v O’Brien}, 263 US 313 (1923); \textit{Porterfield v Webb}, 263 US 225 (1923); \textit{Terrace v Thompson}, 263 US 197 (1923). Sutherland took no part. At the conference, Van Devanter argued that the “cloud on title gives jurisdiction.” Butler OT 1922 Docket Book.
\item \textsuperscript{244} 269 US 530 (1925).
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requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins v Children's Hospital*. Mr. Justice Brandeis dissents.”

In the 1927 case of *Donham v West-Nelson Co.*, the Court, again per curiam, affirmed the judgment of the District Court declaring the Arkansas statute unconstitutional “on the authority of *Adkins v Children’s Hospital*.” Brandeis again noted his dissent, though this time Holmes silently joined the majority.

The conference vote in *Donham* was 7-1, with Brandeis dissenting and Sanford not voting, though Stone has an erased vote to affirm in the Brandeis column. Two years earlier, in *Murphy*, the conference vote had been 8-1, with Brandeis noting a lone dissent, though here again Stone at one point marked Brandeis with the majority and then erased his vote to affirm. Stone’s notes on *Murphy* differ from his record of *Donham* in one important respect, however.

Next to the votes to affirm of Taft, Holmes, and Sanford – the three dissenters in *Adkins* (Brandeis had not participated) – Stone wrote “on authority [illegible] [illegible].” Stone also wrote this next to his own vote to affirm. The illegibility of the latter two words in Stone’s notation makes it difficult to be certain, but it seems very likely that these four Justices indicated at the conference that they were voting to invalidate the statute only because they regarded themselves as bound by the recent authority of *Adkins*. If that is the case, then after McKenna’s replacement by Stone in 1925, there was a majority of the Court that believed that *Adkins* had been wrongly decided. Four of those five Justices continued to strike down state minimum wage laws solely on the basis of a precedent that they believed was demonstrably erroneous. This no

245 Id.
246 273 US 657 (1927).
247 Id.
248 Stone OT 1926 Docket Book.
doubt frustrated Brandeis, whose solo dissents from these per curiam decisions might be read as opposing not only their results, but also the fealty to stare decisis that he soon would criticize in his celebrated dissent in *Burnet v Coronado Oil & Gas Co.*

A similar pattern of post-conference vote stability obtained in a series of lesser-known but important economic regulation cases. This was the case in *Williams v Standard Oil Co,* which struck down a Tennessee statute regulating the retail price of gasoline;\(^\text{249}\) in *Fairmont Creamery Co v Minnesota,* which invalidated regulation of the prices at which dairy products were purchased and sold;\(^\text{250}\) in *Di Santo v Pennsylvania,* where the Court held that a statute requiring that sellers of tickets for steamship travel to foreign countries secure a license and post a bond violated the foreign dormant Commerce Clause;\(^\text{252}\) and in the domestic dormant Commerce Clause case of *Cudahy Packing Co v Hinkle,* which struck down a state tax on an out-of-state corporation.\(^\text{253}\) It was also the case in *Weaver v Palmer Bros.,* where the Court struck down a statute prohibiting the use of shoddy in the manufacturing of bedding;\(^\text{254}\) in *Cement*

\(^{249}\) 285 US 393, 406-10 (1932) (Brandeis dissenting) (“Stare decisis is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right….But in cases involving the Federal Constitution, where correction through legislative action is practically impossible…. this court should refuse to follow an earlier constitutional decision which it deems erroneous….”).

\(^{250}\) 278 US 235 (1929). Holmes dissented, while Brandeis and Stone concurred in the result. Stone OT 1928 Docket Book.


Manufacturers Protective v United States\(^{255}\) and Maple Flooring v United States,\(^{256}\) two major antitrust decisions of the period;\(^{257}\) in Quaker City Cab Co v Pennsylvania, where the Court invalidated as a denial of equal protection a gross receipts tax that applied to corporations operating taxicabs but not to partnerships or individuals engaged in the same trade;\(^{258}\) and in St. Louis & O’Fallon Co v United States, where the Court annulled a recapture order of the Interstate Commerce Commission.\(^{259}\)

Finally, none of the Justices budged in four closely divided decisions on the fractious subject of intergovernmental tax immunities, though the line-ups of the decisions differed. In Long v Rockwood\(^{260}\) Holmes, Brandeis, Stone, and Sutherland dissented both at conference and from the Court’s published decision holding *that* a state may not tax income received from patents issued by federal government. Stone’s docket book records question marks next to the conference votes of himself and Sutherland, but these two Justices ultimately stood firm with


\(^{257}\) The same pattern was observed in Lambert v Yellowley, 272 US 581 (1926), which upheld a federal statute strictly regulating the amount of alcohol a physician could prescribe for medicinal use. The case was voted on at the 1925 Term, and the opinions were circulated, “but held up for some reason and carried over.” The 5-4 conference vote was identical to the final vote, though Stone placed a question mark next to his own dissenting conference vote. Stone OT 1926 Docket Book; Stone OT 1925 Docket Book.

\(^{258}\) 277 US 389 (1928). Holmes, Brandeis, and Stone dissented. Stone OT 1927 Docket Book. Stone records a question mark next to his own conference vote. Stone’s notes indicate that the case was carried over from the 1926 Term. It was argued Apr 20, 1927, and set for conference on Apr 23, but apparently not acted on. The note continues, “On Conf. List Apr 30 – not voted on.” “May 14 Conference List.” The case originally was assigned to Van Devanter, but apparently he did not complete the assignment. It was “Left over at end of 1926 Term” and “Carried over to 1927 Term.” The published majority opinion was written by Butler.


\(^{260}\) 277 US 142 (1928).
their dissenting brethren. In *Panhandle Oil Co v Mississippi*, it was McReynolds who joined Holmes, Brandeis, and Stone at conference and in the published opinion in dissent from the majority’s holding that a state tax on gasoline was unconstitutional as applied to sales to federal government instrumentalities such as the Coast Guard Fleet and a Veterans’ Hospital. In *National Life Ins. Co v United States*, Holmes, Brandeis, and Stone held fast to their conference dissents from the position that a federal tax on the income from state and local securities was unconstitutional. And in *Macallen v Massachusetts*, these same three Justices dissented both at conference and from the published decision invalidating a state tax on the income from federal securities.

On the other hand, there also were a number of nonunanimous decisions in which the vote did change between conference and the announcement of the Court’s decision. Although unanimity was not achieved in these cases, there often is evidence that the norm of acquiescence was at work. Most such vote changes involved a dissenter at conference joining the majority’s opinion or judgment. These cases involved both acquiescence and nonacquiescence. One or more, but not all, of the Justices changed conference votes to join the majority. However, there also were some instances of defection, and in some cases instances of acquiescence by one Justice combined with defection by another. That is, in some cases Justices switched positions with one another between the conference vote and the final vote on the merits.

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261 Stone OT 1927 Docket Book.  
262 277 US 218 (1928).  
263 Stone OT 1927 Docket Book.  
265 279 US 620 (1929).  
266 Stone OT 1928 Docket Book.
First, let us consider examples where we can see the norm of acquiescence at work. In *Chicago Board of Trade v Olsen*, the Court upheld the Grain Futures Act of 1922. The vote was 7-2, with McReynolds and Sutherland dissenting without opinion. Taft rested his opinion for the majority on the stream of commerce theory that Holmes had adopted in his 1905 majority opinion in *Swift v United States*, and which the Court had applied to uphold the Packers and Stockyards Act of 1921 in the 1922 decision of *Stafford v Wallace*. Holmes predictably had joined Taft’s majority opinion in *Stafford*, but at the conference vote in *Olsen*, he mysteriously voted with McReynolds and Sutherland. Butler’s docket book unfortunately provides no indication concerning why Holmes might have voted this way, nor why he might have decided ultimately to join the majority.

In *Jay Burns Baking Co v Bryan*, the Court struck down a Nebraska statute regulating the weights of loaves of bread offered for sale. The vote was 7-2, with Brandeis and Holmes dissenting. At the conference, however, the vote was 5-4, with McKenna and Sutherland joining

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267 262 US 1 (1923).
268 38 Stat 803 (1922).
269 196 US 375 (1905).
270 42 Stat 159 (1921).
271 258 US 495 (1922).
272 Butler OT 1922 Docket Book. McKenna passed at the conference vote. Mason, *William Howard Taft* at 201 (cited in note 4), erroneously reports that Brandeis wrote to Taft that he had “voted the other way” in the *Olsen* conference and that “the opinion has not removed my difficulties….But I have differed from the Court recently on three expressed dissents and concluded that in this case, I had better ‘shut up,’” citing Brandeis to Taft, Dec 23, 1922. In fact, as Dean Post has demonstrated, that letter referred to the case of *FTC v Curtis Publishing Co*, 260 US 568 (1923). Post, 51 Duke L J at 1346 n 243 (cited in note 3) (citing William Howard Taft Papers, Reel 248). Butler’s record of the *Olsen* conference vote places Brandeis with the majority from the outset. Butler OT 1922 Docket Book.
273 264 US 504 (1924).
Holmes and Brandeis in voting to uphold the statute. The decision was accorded a critical reception, but the Nebraska legislature soon enacted a revised bread-weight regulation designed to meet the Court’s objections. The Court unanimously upheld the revised statute in the 1934 case of *Petersen Baking Co v Bryan*. In that conference, Van Devanter passed, but everyone else voted to sustain the measure.

In *Miles v Graham*, the Court held that the salaries of federal judges were not subject to the federal income tax. At the conference, Taft pointed out that the 1920 case of *Evans v Gore* had held that the federal “income tax is a diminution” of judicial compensation in violation of Article III’s prohibition. That case had involved a federal judge confirmed to his office before enactment of the challenged taxing statute. *Miles* involved a federal judge confirmed after the enactment of the challenged taxing statute. Holmes stated he was “Inclined to limit Evans v Gore,” but that he had “no feelings about it” and would “defer to [the] majority.” Van Devanter indicated that he agreed with Taft that the case fell within the principle of *Evans*. McReynolds argued that the case presented a “Question of power.” There was “A stat[ute] prescribing compensation,” he observed. “It is paid at stated times. Then [it is] a tax on compensation.”

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274 Butler OT 1923 Docket Book. Butler’s tally is inconsistent with Felix Frankfurter’s record of Brandeis’s account, in which Brandeis is quoted as saying that “The Burns case was really 5 to 4, but Van Devanter ‘got busy,’ in his personal way, talking and laboring with members of Court, finally led Sutherland and Sanford to suppress their dissents.” Urofsky, 1985 S Ct Rev at 328 (cited in note 145). See Post, 78 BU L Rev at 1501 n 77 (cited in note 3) (quoting a note from McKenna to Brandeis saying, “Disturbing doubts have come to me. I am struggling with them and frankly I don’t know whether they go to the conclusions or to details and reasoning.”)

275 See, for example, E.M.B., Comment, *State Police Legislation and the Supreme Court*, 33 Yale L J 847 (1924).


277 290 US 570 (1934).

278 Stone OT 1933 Docket Book.


280 253 US 245 (1920).
Brandeis stated that he would reverse the lower court decision holding that the judge’s salary was immune to income taxation.\textsuperscript{281}

Brandeis ultimately dissented alone and without opinion from the published decision, but at the conference he was joined in dissent by Holmes and Stone.\textsuperscript{282} The docket books thus confirm a claim that Stone made in a letter written to his sons in 1939, after Miles had been overruled:

The Graham case was argued shortly after I came on the Court, and you will be interested to know that I joined Holmes and Brandeis in voting against the immunity of the judge’s salary from income tax. The same principle as in the Graham case had been laid down in Evans v Gore, 253 U.S. 245 (1920), decided a year or two before I came on the Court. Holmes had written a dissent but he thought the Graham case indistinguishable in principle from the Gore case and therefore he and I concluded that we would not record a dissent. I have since regretted my action because it puts me apparently on record as supporting the majority decision which I thought then and still think wrong.\textsuperscript{283}

The phenomenon of post-conference acquiescence also occurred in some of the Court’s more important rulings under the dormant Commerce Clause. Texas Transport & Terminal Co, Inc v New Orleans\textsuperscript{284} invalidated a license tax on an interstate and foreign shipping business by a vote of 7-2, with Holmes and Brandeis dissenting. At the conference, however, they had been joined in dissent by Sanford.\textsuperscript{285} Buck v Kuykendall\textsuperscript{286} and George W. Bush & Sons v Maloy\textsuperscript{287} invalidated state laws requiring interstate common carriers to obtain certificates of necessity before using public highways. McReynolds dissented alone without opinion from the published decision in each case, but at the Buck conference he was joined by Sutherland and Sanford, and

\textsuperscript{281} Butler OT 1924 Docket Book.
\textsuperscript{282} Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
\textsuperscript{283} Mason, Harlan Fiske Stone at 790 n (cited in note 4).
\textsuperscript{284} 264 US 150 (1924).
\textsuperscript{285} Butler OT 1923 Docket Book.
\textsuperscript{286} 267 US 307 (1925).
\textsuperscript{287} 267 US 317 (1925).
at the Bush conference he was joined by Sutherland.\textsuperscript{288} When the Court invalidated a similar requirement for intrastate carriers under the Due Process Clause in \textit{Frost & Frost Trucking Co v R.R. Commission of California},\textsuperscript{289} Holmes, McReynolds, and Brandeis dissented. At the conference, however, they had been joined by Sanford, who ultimately acquiesced in the decision.\textsuperscript{290}

In \textit{Carroll v United States},\textsuperscript{291} the Court affirmed a judgment upholding a warrantless search of an automobile suspected of uses violating the National Prohibition Act. At the December 8, 1923 conference, Taft stated that there was “Ample evidence to sustain reasonable grounds for seizure. Adams case per Day, J.”\textsuperscript{292} It appears that the vote that day was 6-3 to affirm the conviction, with Sutherland, Butler, and Sanford in dissent. Butler’s docket book indicates that the case initially was assigned to McReynolds. However, Butler later erased the vote to affirm in McReynolds’s column, and added him to the ranks of the dissenters. It seems that on December 22, “McR brought [the case] up for further conference.” Taft, Butler records, “suggests automobile differs from home.” Holmes, who appeared to agree with Taft, is recorded as saying “Different principles.” Brandeis also agreed, saying that the “Court could find business stopping & Arrest misdemeanor on suspicion.” Following this Butler writes, “Common law right of peace officer to arrest,” though it is not clear whether this was part of Brandeis’s statement. It may be

\textsuperscript{288} Butler OT 1924 Docket Book. See also \textit{Shafer v Farmer’s Grain Co}, 268 US 189 (1925) (striking down a license requirement for the purchase of grain within a state where the grain sold was to be immediately shipped out of the state), from which Brandeis dissented alone without opinion. Holmes had voted with him at the conference, Butler OT 1924 Docket Book, Stone OT 1924 Docket Book, but suppressed his dissent and joined the published majority opinion.

\textsuperscript{289} 271 US 583 (1926).

\textsuperscript{290} Stone OT 1925 Docket Book.

\textsuperscript{291} 267 US 132 (1925).

\textsuperscript{292} Butler OT 1923 Docket Book. The reference is apparently to \textit{Adams v New York}, 192 US 585 (1904). Butler OT 1924 Docket Book contains no entry for \textit{Carroll}. 

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that these are the remarks of Taft at the March 29 conference held after reargument on March 14. The remarks continued, “F. 294 page 776 what are reasonable grounds for belief of present commission. Must have ascertained facts. ‘In presence of’ = ‘immediate knowledge’.” Holmes is then recorded as saying, “Probable cause to surmise.” Following that conference, the vote was apparently 5-4, with McReynolds joining the dissenters from the earlier conference. When the published decision appeared nearly a year later, on March 2, 1925, however, only McReynolds and Sutherland dissented. Butler and Sanford had acquiesced in the majority’s judgment, while McReynolds remained resolute in his defection.

Black & White Taxicab Co v Brown & Yellow Taxicab Co involved a Kentucky taxicab concern that sought to enter into an enforceable exclusive service contract with a railroad. In order to avail itself of the favorable “general law” rule upholding such contracts that the federal courts applied when sitting in diversity, and to avoid application of the rule of the Kentucky state courts holding such contracts invalid, the company incorporated in Tennessee. The Court

293 267 US 132.
294 Butler OT 1923 Docket Book. The reference is to Park v United States, 294 F. 776 (1st Cir 1924).
295 267 US 132 (1925). The published opinion indicated that McKenna had concurred in the majority opinion before his retirement on Jan 5.
296 The long delay in the production of the opinion may have been caused in part by vote changes after this last conference. Taft wrote to his brother that, after McReynolds had returned the case saying that he could not write in support of the seizure, “On a vote we lost once but McKenna came over so that I was able to assign it to myself.” William Howard Taft to Horace D. Taft (Mar 1, 1925), quoted in Post, 48 Wm and Mary L Rev at 123 n 406 (cited in note 3). Butler’s docket book, however, seems to record McKenna as with Taft from the outset. Taft earlier wrote his brother that “Brandeis was with me strongly before the summer vacation, but he went up to Cambridge and must have communed with Frankfurther [sic] and that crowd, and he came back with a notice to me that he was going to change his vote.” William Howard Taft to Horace D. Taft, (Dec 26, 1924), quoted in Post, 48 Wm and Mary L Rev at 125 n 406 (cited in note 3). Butler’s docket book contains no record of such a vacillation.
297 276 US (1928).
affirmed the lower federal court’s application of the general law rule by a vote of 6-3, with Holmes, Brandeis, and Stone dissenting. At the conference, however, the dissenters were joined by McReynolds,\(^{298}\) one of the principal expositors of what Holmes disparaged as the view that the common law was “a brooding omnipresence in the sky.”\(^{299}\)

In *New York v Zimmerman*,\(^{300}\) the Justices upheld the power of New York to require the Ku Klux Klan to disclose to the secretary of state its governing documents, officer roster, and membership list. The Klan argued that requiring it to make such disclosure while excusing labor unions and other oath-bound organizations from such revelations denied the Klan equal protection, but only McReynolds dissented from Van Devanter’s opinion maintaining that the classification was justified because the Klan, unlike labor unions, had a tendency “to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare”; because it engaged in acts designed “to strike terror into the minds of the people”; because “its membership was limited to native born, gentile, Protestant whites” and its members took an oath “to shield and preserve ‘white supremacy’”; and because “it was conducting a crusade against Catholics, Jews, and Negroes and stimulating hurtful religious and race prejudices.”\(^{301}\) The near unanimity of the decision was achieved only because

\(^{298}\) Stone OT 1927 Docket Book
\(^{299}\) *Southern Pacific Co v Jensen*, 244 US 205, 222 (1917) (Holmes dissenting). McReynolds was the author of the majority opinion in *Jensen*.
\(^{300}\) 278 US 63 (1928).
\(^{301}\) 278 US at 75-76.
the Chief Justice acquiesced, however. At the conference vote, Taft had been paired with McReynolds in dissent.302

In *Ligget Co v Baldridge*,303 the Justices invalidated a statute requiring that each of the shareholders of any corporation owning and operating a drug store be a licensed pharmacist. The final vote on the merits was 7-2, with Brandeis joining Holmes in dissent. At the conference, however, McReynolds had passed, and Stone had placed a question mark next to his own vote to strike down the statute.304 Each of these Justices ultimately overcame his doubts sufficiently to join the majority opinion. And in *United Railways & Electric Co v West*, the Court invalidated a regulation imposing a passenger fare rate that permitted a return “so inadequate as to result in a deprivation of property in violation of the due process of law clause of the Fourteenth Amendment.”305 Holmes, Brandeis, and Stone ultimately dissented, but at the conference McReynolds was with them as well.306

Sometimes persistent divisions on the merits masked acquiescence on issues of jurisdiction. In *Tyson & Bro. v Banton*,307 for example, the New York statute regulating resale brokers of theater tickets returned to the Court. The Justices had upheld the statute’s provisions requiring licensure of such brokers two years earlier in *Weller v New York*, but Taft and perhaps others had expressed doubts in conference about the constitutionality of the statute’s price

302 Stone OT 1927 Docket Book. The case was submitted on Oct 11, 1927, and was voted on in conference on Oct 15 of that year. The opinion was assigned to Van Devanter, who took over a year to get it out. The decision was announced on Nov 19, 1928. 278 US 63.
303 278 US 105 (1928).
304 Stone OT 1928 Docket Book.
305 280 US 234, 349 (1930).
306 Stone OT 1929 Docket Book.
regulation provisions. The *Tyson* Court invalidated those provisions, and the vote on the merits in conference and the published opinion were the same: 5-4, with Holmes, Brandeis, Stone, and Sanford dissenting. But in conference there were three votes to dismiss the case on jurisdictional grounds: Holmes, McReynolds, and Brandeis. Sutherland’s majority opinion disposed of the jurisdictional question summarily, and these three registered no dissent from the Court’s resolution of that issue.\(^308\)

Another price regulation case that came before the Court provides an illustration of quasi-acquiescence. *Ribnik v McBride*\(^309\) concerned the constitutionality of state regulation of the fees charged by employment agencies. The case was ultimately decided by a vote of 6-3, with Holmes, Brandeis, and Stone dissenting from the majority opinion invalidating the measure. In conference, however, the vote had been 5-2: Stone and Sanford had passed.\(^310\) These Justices ultimately resolved their doubts differently: Stone would write a lengthy dissent; Sanford would concur on the ground that he was bound by the authority of *Tyson*, from which he had dissented the previous year. An even clearer example of quasi-acquiescence is presented by *Bedford Cut Stone Co v Journeymen Stone Cutters*.\(^311\) There, over the dissents of Holmes and Brandeis, the Court held that a stonecutter union’s boycott of stone quarried by members of unaffiliated unions violated the Sherman Act. At the conference the vote had been 5-4, with Sanford and Stone joining their dissenting colleagues.\(^312\) In the published decision, however, each of them

\(^{308}\) Stone OT 1926 Docket Book.
\(^{309}\) 277 US 350 (1928).
\(^{310}\) Stone OT 1927 Docket Book.
\(^{311}\) 274 US 37 (1927).
\(^{312}\) Stone OT 1926 Docket Book. This confirms the account reconstructed from intracurial correspondence in Mason, *Harlan Fiske Stone* at 255-60 (cited in note 4). Stone’s docket book contains an erased vote to affirm in Sutherland’s column, which raises the tantalizing but
concurred separately only because they felt themselves bound by the authority of *Duplex Printing v Deering*, an earlier decision that they were unable to distinguish. As Taft wrote, “while Sanford and Stone concur in our opinion, they do it grudgingly, Stone with a kind of kickback that will make nobody happy.”

The Court’s nonunanimous decisions also occasionally featured the phenomenon of defection. Perhaps the best-known instance occurred in *Village of Euclid v Ambler*, a landmark decision upholding a comprehensive zoning law. The case was originally argued in January of 1926, and then reargued in October of that year. Two decades later, Alfred McCormack, Stone’s clerk for the 1925 Term, reported that Sutherland had been writing an opinion in the case “holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, I believe) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld.” On the basis of McCormack’s brief report, Alpheus Thomas Mason offered a more elaborate account, claiming that Stone, along “[w]ith Brandeis and Holmes, who had also disagreed with the decision in conference…carried on the argument with the opinion writer Justice Sutherland….Under Stone’s seemingly very remote possibility that there may at one point have been five votes for the Holmes/Brandeis position.

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313 254 US 443 (1921).
314 274 US at 55 (Sanford concurring); 274 US at 55-56 (Stone concurring).
316 272 US 365 (1926).
317 Stone OT 1925 Docket Book.
318 272 US 365.
persistent hammering…Sutherland began to doubt the correctness of his conclusion and asked for reargument. On the second hearing Sutherland changed his mind.”

This story has been repeated many times, but elements of its accuracy have been called into question. Dean Post points out that nine months before *Euclid* was argued, Sutherland prepared a memorandum for Taft concerning another zoning case that the Court ultimately dismissed on procedural grounds. In that memorandum, Sutherland wrote that “[i]n the modern development of cities and towns, zoning laws are universally recognized as necessary and proper. The question presented by the law under review is a matter of degree, and I am not prepared to say that the judgment of the local law makers was arbitrarily exercised.” This would seem to make it less likely that Sutherland would have voted initially to invalidate the ordinance challenged in *Euclid*. Others have pointed out that because Sutherland did not hear the initial argument of the case, it is “unlikely” that the opinion would have been assigned to him, and that “Sutherland was even less likely to have formed a negative opinion (or any other opinion) following the first hearing of the case--since he did not participate in it.” Some have maintained that the reargument was in fact suggested by Stone, who “as a new member of the

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322 Post, 78 BU L Rev at 1543 n 259 (cited in note 3) (quoting Memorandum from Sutherland to Taft (Taft Papers, Reel 273)).
Court . . . was not fully conversant with the situation.”325 It also has been suggested that the reargument was ordered to provide the Court with more time to deliberate about the case and to permit an interested party to submit an amicus curiae brief that might better educate the Justices about the fundamentals of zoning.326 Finally, it has been observed that “while the case was reargued, in order for a majority intending to strike down the ordinance to transform into a six to three majority to refrain from doing so, at least one other Justice (apart from Sutherland) must have switched his vote.”327

Stone’s docket books do not resolve all of these questions definitively, but they do shed considerable light on a number of them. Stone records that when the case was discussed in conference on February 13, Sutherland did participate in the deliberations. Stone records the vote as 5-3 to invalidate the ordinance, with Brandeis, Sanford, and Stone dissenting, and Holmes not voting. He records Sutherland in the majority along with his fellow Horsemen and Taft. Interestingly, however, Stone placed question marks next to both his own and Sutherland’s votes, suggesting that each of them was uncertain about the positions that they had taken. This record, taken in combination with Sutherland’s earlier memo to Taft on zoning, casts doubt on the notion that Stone was rock-solid in his views and that Sutherland was brought around by Stone’s “persistent hammering.” It seems more likely that these two establishment Republicans discussed their own doubts with one another, perhaps only at the 1925 conference, and were sufficiently unsettled in their convictions to want to hear more argument. Moreover, though Stone typically

327 Shoked, 28 Yale J Reg at 95 n 17 (cited in note 324).
signified opinion assignments by inscribing a large “X” next to the name of the Justice selected, his docket book record of the 1925 Term *Euclid* conference contains no indication that the opinion was assigned to Sutherland, nor to anyone else. Instead, on the same page of Stone’s 1925 docket book, written in by another hand, appears “Rehearing suggested by Sutherland, J., and case set down for rehearing October Term 1926.” This entry bears no date, but it was in all likelihood written by McCormack, and based upon information provided to him by Stone.328 When the Justices met on October 26 to discuss the case again after reargument, Stone recorded the vote as identical to the breakdown in the published decision: 6-3, with Van Devanter, McReynolds, and Butler dissenting. Holmes registered his vote in favor of sustaining the ordinance, and both Sutherland and Taft abandoned their earlier positions and joined the new majority.329

Some instances of defection involved a Justice who had passed at conference deciding to cast a lone dissenting vote rather than to acquiesce and make a unanimous Court. Perhaps the most prominent of these involves Butler, at the time the Court’s lone Catholic, who dissented without opinion from the Court’s decision upholding Virginia’s eugenic sterilization statute in *Buck v Bell*.330 Yet Stone’s docket book reveals that Butler did not register his dissenting vote at conference. Instead, he alone passed.331 It was only after the conference that Butler resolved his doubts in favor of nonacquiescence. Similarly, McReynolds dissented alone from the Court’s decision in *Foster-Fountain Packing Co v Haydel*332 striking down as a violation of the dormant

328 Stone OT 1925 Docket Book.
329 Stone OT 1926 Docket Book.
331 Stone OT 1926 Docket Book.
332 278 US 1 (1928).
Commerce Clause a Louisiana statute that sought to force shrimp producers to pack shrimp harvested in Louisiana within state. At the conference, however, McReynolds had merely passed.333 United States v One Ford Coupe Automobile,334 by contrast, involved an instance of defection from the majority to the dissent. There the Court upheld and interpreted broadly various seizure and taxation provisions of the Supplementary Prohibition Act. At the conference vote only Sutherland and Butler dissented. In the published decision, however, Stone concurred separately, and McReynolds defected from the majority to join Sutherland and Butler in opposition.335

There also were instances in which Justices passed one another crossing the line between majority and minority. In Helson v Kentucky,336 for example, the Court by a vote of 6-3 struck down a state tax on gasoline purchased out of state and used to power an interstate ferry as violating the dormant Commerce Clause. The dissenters were Holmes, McReynolds, and Brandeis. At the conference, however, Brandeis had passed, Holmes had voted with the majority, and Stone had voted with the dissent. Holmes and Stone exchanged places between the conference vote and the final decision.337 In Louisville Gas & Electric Co v Coleman, a 5-4 Court held that a state tax imposed upon mortgages that did not mature within five years but exempting those that did violated the Equal Protection Clause. The dissenters were Holmes, Brandeis, Sanford, and Stone,338 but Stone records that at the initial conference it was Holmes, Brandeis, Stone, and McReynolds who voted to uphold the tax, and Taft, Van Devanter, Butler,

333 Stone OT 1928 Docket Book.
334 272 US 321 (1926).
335 Stone OT 1926 Docket Book.
336 279 US 245 (1929).
337 Stone OT 1928 Docket Book.
338 277 US 32 (1928).
and Sanford voting to strike it down. Sutherland was ill and absent from the conference, so the equally divided Court set the case down for reargument. After the reargument, Sanford switched sides to vote in favor of the statute, while McReynolds shifted to the side favoring invalidation. Stone placed a question mark in Sutherland’s column, indicating that at the conclusion of the second conference the Justices remained equally divided. Eventually, however, Sutherland resolved his uncertainty sufficiently to make a majority nullifying the law.339

*United Leather Workers v Herkert & Meisel Trunk Co*340 may also fall into this category. There the Court held that a strike for a closed shop, conducted by means of illegal picketing and intimidation, did not violate the Sherman Act. Though the strike admittedly was designed to prevent the manufacture of goods to be shipped in interstate commerce, there was no evidence that the strikers had sought to interfere with the transport or sale of goods once they had been manufactured. Because the effect of the strikers’ conduct on interstate commerce was therefore “indirect” rather than “direct,” Chief Taft’s majority opinion maintained that their activities lay beyond the reach of federal authority, and were subject only to state regulation.

This is precisely the position that Taft had taken at conference. There was, he stated, “No evidence of restraint of interstate commerce.” Van Devanter, who dissented without opinion along with McKenna and Butler, argued at the conference that the “Restraint [was] direct.” Yet the final vote of 6-3 belies the configuration in conference. At the conference vote, Butler records a vote of 5-4, with Van Devanter joined not only by McKenna, but also by McReynolds and Sanford. Moreover, Butler places himself in the majority. Thus, it appears that between the

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339 Stone OT 1927 Docket Book.
conference and the final opinion, three votes changed: McReynolds and Sanford moved from the minority to the majority, and Butler moved from the majority to the minority.  

Finally, among the most interesting instances of defection were those in which the unanimity of a conference vote was shattered by a Justice’s later change of heart. For example, the vote in *Samuels v McCurdy*, in which Butler dissented from an opinion upholding a Georgia statute authorizing seizure and destruction of alcohol that had been purchased legally before the enactment of the statute, was unanimous to affirm at conference. And in *Toyota v United States*, which held that a Japanese national born in Japan was not eligible for naturalization, the vote at conference was unanimous, but the Chief Justice himself – the Court’s great proponent of the acquiescence norm -- dissented without opinion from the published decision.

V. REASSIGNMENTS

Van Devanter was valued highly by his colleagues for his contributions to conference discussions and his comments on the draft opinions of others. But his “pen paralysis,” as

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341 Butler OT 1923 Docket Book. This hypothesis must be advanced with caution. Butler’s record of the conference vote is difficult to interpret, because he records the majority Justices as voting to affirm, and the minority Justices as voting to reverse, where in fact it was the other way around. In addition, Butler’s entry has erased votes in the opposing columns for Taft, McKenna, Van Devanter, Sutherland, and Butler.
342 267 US 188 (1925).
343 Butler OT 1924 Docket Book.
345 Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.
346 Charles Evans Hughes, *The Autobiographical Notes of Charles Evans Hughes* 171 (Harvard 1973) (David D. Danelski and Joseph L. Tulchin, eds) (“his careful and elaborate statements in conference, with his accurate review of authorities, were of the greatest value. If these statements had been taken down stenographically they would have served with but little editing as excellent opinions.”); Harlan Fiske Stone, *Associate Justice Van Devanter: An Appraisal*, 28 ABA J 458, 459 (1942) (“At the conference table he was a tower of strength. When his turn came to present his views of the case in hand, no point was overlooked, no promising possibility left unexplored.
Sutherland called it, left him notoriously incapable of producing written opinions promptly.\textsuperscript{347} During the nine Terms of the Taft Court, Van Devanter authored only ninety-eight (6.07 \%) of the Court’s majority opinions.\textsuperscript{348} It has been reported in a general way that “[s]everal times Taft was forced tactfully to reassign to other Justices cases originally given to Van Devanter so that they could be decided within a reasonable period of time,”\textsuperscript{349} but the extent and details of this practice never have been documented. The docket books enable us to undertake such documentation.

For the 1922 Term, Butler notes that two cases were transferred from McKenna, one each to Taft\textsuperscript{350} and Brandeis.\textsuperscript{351} Sutherland and Sanford also traded cases in late April.\textsuperscript{352} Van Devanter, who wrote sixteen (7.11 \%) of the Term’s majority opinions,\textsuperscript{353} is not recorded as transferring any cases. During the 1923 Term, Van Devanter wrote twenty (9.43 \%) of the Court’s majority opinions, and two dissents.\textsuperscript{354} That Term he released a case to Brandeis\textsuperscript{355} and one to Sutherland,\textsuperscript{356} but he also absorbed from McKenna a case in which the latter ultimately

His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court’s opinion in the case.”).  
\textsuperscript{347} Merlo J. Pusey, 2 Charles Evans Hughes 284 (Macmillan 1951).  
\textsuperscript{348} Renstrom, The Taft Court at 99 (cited in note 4).  
\textsuperscript{349} Post, 85 Minn L Rev at 1295 n 86 (cited in note 2).  
\textsuperscript{350} No 330, Dier v Banton, transferred 4/28/23. Butler OT 1922 Docket Book.  
\textsuperscript{351} No 880, Collins v Loisel, transferred 5/6/23. Butler OT 1922 Docket Book.  
\textsuperscript{352} Nos 463-464, Georgia Railway and Power Co v Town of Decatur, transferred from Sanford to Sutherland, 4/29/23; No 237, Rindge Co v Los Angeles County, transferred from Sutherland to Sanford, 4/29/23. Butler OT 1922 Docket Book. Sutherland ultimately took no part in Rindge. 267 US 700, 710 (1923).  
\textsuperscript{353} Renstrom, The Taft Court at 264 (cited in note 4). Van Devanter wrote no concurring opinions during the Term. Id.  
\textsuperscript{354} Renstrom, The Taft Court at 265 (cited in note 4).  
\textsuperscript{355} No 49, Benedict v Ratner, transferred 4/6/24. Butler OT 1923 Docket Book. Benedict was carried over to the 1924 Term. Butler OT 1924 Docket Book.  
\textsuperscript{356} Nos 324 and 336, Idaho Irrigation Co v Gooding. Butler OT 1923 Docket Book.
dissented. That year McReynolds also gave up two cases to Taft. During the 1924 Term, Taft became ill, and relied upon Van Devanter to run the conference. Van Devanter’s output dropped to twelve (5.22%) of the Court’s majority opinions and two dissents, as he gave up eight cases. In January Van Devanter took on a case initially assigned to Sutherland, but by early April he had relinquished it to Brandeis. Taft transferred one to McKenna and received one from Brandeis; Brandeis absorbed one from McReynolds; and Holmes took one from Sanford.

Van Devanter’s output rebounded for the 1925 Term, during which he authored seventeen (8.13%) of the majority opinions and one dissent. Stone’s docket book contains no indication that any opinions were reassigned during the Term. During the 1926 Term,

57 No 181, Manufacturers’ Land and Improvement Co v United States Shipping Board Emergency Fleet Corp. Butler OT 1923 Docket Book; 264 US 250, 255 (1924) (McKenna dissenting).
59 Clare Cushman, Courtwatchers: Eyewitness Accounts in Supreme Court History 150 (Rowman & Littlefield 2011).
60 Renstrom, The Taft Court at 266 (cited in note 4).
61 Van Devanter transferred three cases to Holmes: No 47, United States v The Coamo; No 75, Flanagan v Federal Coal Co; and No 177, Stein v Tip-Top Baking Co; and one each to Brandeis: No 443, Ray Consolidated Copper Co v United States; Sanford, No 64, Endicott-Johnson Corp v Smith; Sutherland, No 187, Grayson v Harris; and McReynolds, No 53, Miles v Graham. Butler OT 1924 Docket Book. Butler also records Van Devanter as relinquishing to Brandeis No 49, Federal Trade Commission v Hammond, Snyder, and Co, but the case was ultimately decided per curiam. 267 US 586 (1925).
63 No 147, Davis v Manry. Butler OT 1924 Docket Book.
64 No 144, Wells v Bodkin. Butler OT 1924 Docket Book.
65 No 229, St. Louis, K and Southeast Railroad Co v United States. Butler OT 1924 Docket Book.
66 No 130, Yeiser v Dysart. Butler OT 1924 Docket Book.
67 Renstrom, The Taft Court at 267 (cited in note 4).
68 Stone OT 1925 Docket Book.
however, Van Devanter’s workload began a slide from which it never fully recovered. That year
he wrote ten (5.03 %) of the majority opinions and two dissents,369 while giving up ten opinions
and absorbing none.370 That Term Taft gave up one opinion to Holmes371 and two to Brandeis,372
and took two from McReynolds.373 Sanford gave up two opinions to Holmes374 and one to
Brandeis.375 During the 1927 Term, Van Devanter’s production slipped to eight (4.62 %) of the
majority opinions and one concurrence.376 That year Van Devanter gave up six cases and

369 Renstrom, The Taft Court at 268 (cited in note 4).
370 Van Devanter transferred four opinions to Taft: No 312, Ford v United States; No 199, Rhea
v Smith; No 202, Messel v Foundation Co; and No 237, Weedin v Chin Bow. He also gave two to
Stone: No 46, Fidelity National Bank and Trust Co of Kansas City v Swope; and No 492, Fox
River Paper Co v Railroad Commission of Wisconsin. Four other colleagues absorbed one case
each from Van Devanter: McReynolds, No 116, American Railway Express Co v F.S. Royster
Guano Co; Butler, No 33, Southern Railway Co v Kentucky; Sanford, No 48, Fiske v Kansas;
371 No 180, Zimmerman v Sutherland. Stone OT 1926 Docket Book.
372 No 894, Lawrence v St. Louis-San Francisco Railway Co; No 549, Arkansas Railroad
373 No 123, United States v Shelby Iron Co of New Jersey; No 1, Federal Trade Commission v
Claire Furnace Co. Stone OT 1926 Docket Book. McReynolds ultimately dissented in Claire
Furnace. The case was carried over from the 1925 Term. The ultimate outcome is remarkable
because the vote at the conference was 8-1 to affirm, with only Taft voting to reverse. Stone OT
1925 Docket Book. Eventually Sutherland and Butler took no part, and Taft was able to bring
the rest of the Court over to his side, leaving behind only McReynolds, to whom the opinion was
initially assigned. 274 US 160 (1927); Stone OT 1925 Docket Book. See Post, 85 Minn L Rev at
1311-12 (cited in note 2) (Taft “successfully diminished dissension” in Claire Furnace, citing
“Brandeis Papers”).
374 No 766, Westfall v United States; No 983, United States v Alford. Stone OT 1926 Docket
Book.
375 No 257, United States v McCari. Stone OT 1926 Docket Book.
376 Renstrom, The Taft Court at 269 (cited in note 4).
absorbed none. Holmes gave one to Butler, and he took a case from Sutherland in which the latter ultimately dissented.

The final two Terms of the Taft Court saw Van Devanter’s written contributions decline even further. During the 1928 Term he authored four (3.1%) of the Court’s majority opinions and three dissents. It appears that Taft had determined to give him fewer assignments, as he gave up only two cases that year and again absorbed none. The only other recorded reassignments for the 1928 Term were two cases transferred from Sanford, one to Holmes and one to McReynolds. The 1929 Term was marked by the retirement of Taft and the death of Sanford while in office, and their replacements by Charles Evans Hughes and Owen Roberts, respectively. Most of the reassignments of the Term thus involved transfers from Taft or Sanford

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380 277 US 88, 95 (1928) (Sutherland dissenting). Stone noted that Nos 150-51, *Denney v Pacific Telephone and Telegraph Co*, a case in which he ultimately took no part, 267 US 97, 104 (1928), was “assigned to Justice Stone by mistake” and transferred to McReynolds. Stone OT 1927 Docket Book.
381 Renstrom, *The Taft Court* at 270 (cited in note 4).
to another Justice.\textsuperscript{385} In addition, Brandeis took a case from Sutherland,\textsuperscript{386} and Hughes took one from Holmes.\textsuperscript{387} Van Devanter’s output dropped to one majority opinion, one concurrence, and two dissents.\textsuperscript{388} Indeed, it appears that he did not receive any initial assignments, for the one majority opinion that he did write was a transfer from McReynolds.\textsuperscript{389}

VI. CONCLUSION

The Butler and Stone docket books provide us with a variety of valuable insights into the inner workings of the Taft Court. First, the docket books show that instances in which cases were reassigned on the Taft Court typically involved illness, death, a mid-Term retirement, a voting shift following conference, or the direct or indirect effects of Justice Van Devanter’s increasing inability to discharge his literary burdens. Second, Stone’s docket books help to clarify a series of questions about the deliberations in \textit{Village of Euclid v Ambler}. Sutherland did vote in the initial conference on the case, and it seems that he was indeed the driving force behind the order for reargument. But Sutherland apparently expressed at the conference his doubts about his initial vote to invalidate the ordinance, and Stone also expressed at the conference reservations

\textsuperscript{385} See No 31, \textit{Gunning v Cooley}, transferred from Taft to Butler; Nos 15-16, \textit{Wheeler Lumber Bridge and Supply Co v United States} and \textit{Indian Motor Cycle Co v United States}, which on May 26, 1930 were transferred from Taft to Van Devanter and restored to the docket for reargument; No 104, \textit{National Fire Insurance Co of Hartford v Thompson}, transferred from Sanford to Butler; No 19, \textit{Alexander Sprunt and Son v United States}, transferred from Sanford to Brandeis; No 248, \textit{Nogueira v. New York, New Haven & Hartford Railroad Co}, transferred from Sanford to Hughes; No 356, \textit{Lucas v Pilliod Lumber Co}, transferred from Sanford to McReynolds; and Nos 10-11, \textit{Powers Kennedy Contracting Corp v Concrete Mixing and Conveying Co}, transferred from Taft to Sanford, and then reargued after Sanford’s death. Stone OT 1929 Docket Book. \textit{Powers Kennedy} was reargued Oct 24, 1930, and was decided Dec 15 of that year in a unanimous opinion written by Sanford’s successor, Owen Roberts. 282 US 175 (1930).

\textsuperscript{386} Nos 443-45, \textit{Campbell v Galeno Chemical Co}. Stone OT 1929 Docket Book.

\textsuperscript{387} Nos 372-74, \textit{City of Cincinnati v Vester}. Stone OT 1929 Docket Book.

\textsuperscript{388} Renstrom, \textit{The Taft Court} at 271 (cited in note 4).

about his own vote to uphold it. Indeed, it is not at all clear that the opinion was assigned before the Justices agreed to order reargument. Stone’s record of the deliberations also shows that it was Taft who joined Sutherland in defecting from the original conference majority and making a supermajority to sustain Euclid’s zoning law.

The docket books also show that by 1925 a majority of the Justices believed that Adkins v Children’s Hospital had been wrongly decided, and that the precedent survived two challenges only because of stare decisis. They disclose that Frothingham v Mellon and Florida v Mellon, two foundational decisions in the development of the national welfare state, were uncontroversial at conference. They reveal in addition that Brandeis, Holmes, and possibly even Sanford came close to dissenting in Whitney v California. And they demonstrate that none of the Justices voted to invalidate racially segregated education in Gong Lum v Rice.

We also learn from the docket books that the Court’s published decisions are somewhat misleading concerning the civil rights and civil liberties views of Taft, Holmes, and McReynolds. Though he ultimately joined majorities favoring such claims in several cases, at conference the Chief Justice dissented from dispositions that he would publicly join in Fasulo v United States, Byars v United States, and New York v Zimmerman. Holmes likewise ultimately joined the Byars majority, but he was with Taft in dissent at the conference. And though both of these men were in the end with the rest of their colleagues in Agnello v United States, at conference each of them had assumed a posture that was at best equivocal. Similarly, McReynolds dissented at conference from positions that he ultimately would appear to endorse in Byars and Cooke v United States, and though he joined the published opinions in Fasulo and Ziang Sung Wan v United States, at the conference vote he had passed in each case. On the other hand, McReynolds took some surprising conference positions in cases involving questions of
political economy. Though he ultimately joined majorities to invalidate the regulations challenged in *Liggett v Baldridge* and *United Railways & Electric Co v West*, he passed at the conference on the former and dissented at the conference on the latter. Perhaps most notably, at the conference vote on *Black & White Taxicab Co v Brown & Yellow Taxicab Co*, McReynolds was with Holmes, Brandeis, and Stone in dissent.

The docket books also reveal considerable fluidity between the initial conference vote and the final vote on the merits among the Justices of the Taft Court. First, there were eight instances of defection to the minority in major cases. McReynolds was responsible for three of these, departing from conference votes with the majority in *Carroll* and *One Ford Coupe*, and from a passing conference vote in *Haydel*. Butler accounted for another two, departing from a conference vote with the majority in *Samuels* and from a passing conference vote in *Buck v Bell*. Taft abandoned a majority conference vote in *Toyota*, as did Holmes in *Helson*. And Stone departed from his passing conference vote in *Ribnik*.

Second, there also were shifts in voting that created majorities in favor of dispositions contrary to those produced at conference. In *Oliver Iron*, each of the Justices comprising the conference majority to reverse ultimately changed his vote to form a unanimous Court for affirmance. At the *Gambino* conference only Butler and Stone voted to reverse the conviction, but ultimately each of their colleagues joined them in the unanimous decision to reverse. And in *Euclid*, Taft and Sutherland defected from the initial conference majority to form a new majority to uphold rather than invalidate the Village’s pioneering zoning ordinance.

Third, there were four instances of quasi-acquiescence. The published per curiam opinion in *Murphy v Sardell* stated that Holmes concurred only because he regarded himself as bound by
the recent authority of *Adkins v Children’s Hospital*. Sanford passed at the Ribnik conference, but ultimately concurred in the result on the ground that the case was governed by *Tyson*. And both Sanford and Stone cast dissenting ballots at the *Bedford Cut Stone* conference, but ultimately concurred on the ground that the case was governed by *Duplex Printing*.

Fourth, there was more than one instance in which Justices who had been in opposing camps at conference switched places before the final vote on the merits. In *Helson*, this movement did not change the ultimate disposition: Stone’s acquiescence in the views of the majority offset Holmes’s defection to the minority. Similarly, in *Coleman*, Sutherland’s absence from the first conference and irresolution at the second meant that the post-reargument exchange of places between McReynolds and Sanford did not meaningfully alter the deadlocked status quo. Due to the difficulties of interpretation presented by Butler’s docket book record of the *United Leather Workers* conference, one cannot rely upon that source for a definitive account of what transpired. But it appears that three votes changed between the conference vote and the final vote on the merits, with McReynolds and Sanford moving from the minority to the majority while Butler moved from the majority to the minority.

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390 Depending on the sequence of vote changes, one or the other of these Justices was presumably defecting from a newly-constituted majority. But as the docket books do not reveal the sequence, they cannot inform us which of the Justices was the defector. Therefore I do not include this among the instances of defection listed above, though it might properly be added to the roster.

391 Again, depending on the sequence of vote changes, these Justices may have been either acquiescing in or defecting from the majority. But as the docket books do not reveal the sequence, they cannot inform us which of the Justices should be characterized in which way. Therefore I do not include this among the instances of defection listed above, nor among the instances of acquiescence canvassed below.
The most common form of vote fluidity in major cases before the Taft Court, however, was acquiescence. Of the sixty-five unanimous decisions discussed here, thirty-nine (60%) also were unanimous at conference, but twenty-six (40%) were not. This observation is consistent with earlier studies finding that conformity voting is the most common form of vote fluidity.\textsuperscript{392} The frequency with which each of the Justices acquiesced in the views of the majority is worthy of note. The notoriously cantankerous and disagreeable Justice McReynolds was actually the member of the Court who most frequently acquiesced in a major decision in order to produce unanimity. Of the twenty-six unanimous decisions examined here that were not unanimous at conference, McReynolds acquiesced in eleven (42.3%). Holmes acquiesced in eight (30.7%), Taft, Brandeis, and Sutherland in five (19.2%) each, McKenna and Van Devanter in four (15.4%) each, Butler in three (11.5%), and Sanford and Stone in two (7.7%) each. Of these forty-nine instances of acquiescence, thirty-eight (77.6%) were of the strong variety and eleven (22.4%) were of the weak variety.\textsuperscript{393}

\textsuperscript{392} See, for example, Maltzman and Wahlbeck, 90 Am Pol Sci Rev at 590-91 (cited in note 4) (finding that Justices were more likely to move from a dissenting conference vote to the majority than to defect from the conference majority); Brenner and Dorff, 4 J Theoretical Polit at 198 (cited in note 55) (finding that movement from conference minority to ultimate majority is the most frequent type of vote fluidity); Brenner, 26 Am J Pol Sci at 389 (cited in note 4) (finding that 68% of the cases in which there was vote fluidity resulted in an increase in the size of the majority); Brenner, 24 Am J Pol Sci at 531, 534 (cited in note 4) ("justices are more likely to switch from the minority or nonparticipation at the original vote to the majority position at the final vote than to shift in the opposite direction….Clearly, some of the justices, once they have lost at the original vote or failed to participate in that vote, are willing to conform to the opinion of the court’s majority and vote with them at the final vote. Indeed, over three-quarters of the vote changes moved in a consensus direction.")

\textsuperscript{393} Nine of McReynolds’s eleven acquiescences in ultimately unanimous case were strong (Radice, Brooks, Window Glass Manufacturers, Panama Railroad, Roberge, Fiske, Yu Cong Eng, Byars, and Cooke), while two were weak (Fasulo and Ziang). Holmes’s acquiescences in Coronado Coal II, Yu Cong Eng, and Byars were strong, and his acquiescence in Whitney was strong as to result if not as to First Amendment theory. His remaining four acquiescences were of the weak variety (Duke, Nectow, Duby, and Agnello). Four of Taft’s five acquiescences were
With respect to cases that did not produce unanimity, McReynolds, Holmes, and Sanford acquiesced in four each, Sutherland in three, McKenna, Brandeis, and Stone in two each, and Taft and Butler in one each. The only member of the Court who did not acquiesce in any of these divided decisions was Van Devanter. Of these twenty-three instances of acquiescence, twenty-one (91.3%) were of the strong variety, and only two (8.7%) were of the weak sort. Thus, of these seventy-two total instances of acquiescence in major Taft Court cases, fifty-nine (81.9%) were of the strong variety, and thirteen (18.1%) were of the weak variety. McReynolds alone was responsible for 20.8% of these instances of acquiescence, recording fifteen in all. Holmes accounted for twelve (16.7%), Sutherland for eight (11.1%), Brandeis for seven (9.7%), Taft, McKenna, and Sanford for six (8.3%) each, and Van Devanter, Butler, and Stone for four (5.6%) each. Expressed as a percentage of acquiescences per conference vote in which he participated, McReynolds acquiesced in 12.9% of such cases, Holmes did so in 10.2%, Sutherland in 7.5%, Brandeis in 6%, Taft in 5.1%, Butler in 3.5%, and Van Devanter in 3.4%

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strong (Window Glass Manufacturers, Industrial Association, Fasulo, and Byars), while one was weak (Agnello). Brandeis’s acquiescences in Coronado Coal II, Nectow, Corrigan, and McGrain were all of the strong variety, and his acquiescence in Whitney was strong as to result if not as to First Amendment theory. Each of Sutherland’s five acquiescences was strong (Brooks, Metcalf, Trusler, Roberge, and Ziang), as were McKenna’s four (Radice, Window Glass Manufacturers, Dayton-Goose Creek, and Ziang) and Van Devanter’s four (Radice, Trusler, Corrigan, Ziang). Butler acquiesced strongly in Radice and Corrigan but only weakly in Lee. Sanford acquiesced strongly in Roberge but weakly in Duby. And Stone acquiesced weakly in both Nectow and Roberge.

394 McReynolds acquiesced strongly in Black and White Taxicab, West, and on the jurisdictional issue in Tyson, but weakly in Ligget. Holmes acquiesced strongly in Olsen, Shafer, and on the jurisdictional issue in Tyson, and though he expressed at the Miles conference his willingness to defer to the majority, his dissenting conference vote qualifies his acquiescence in that decision as strong also. Sanford acquiesced strongly in Texas Transport, Buck v Kuykendall, Frost, and Carroll. Sutherland acquiesced strongly in Jay Burns, Buck v Kuykendall, and Bush, while McKenna acquiesced strongly in Jay Burns but weakly in Olsen. Brandeis acquiesced strongly in the jurisdictional holding in Tyson, but weakly in Helson. Stone acquiesced strongly in both Miles and Helson, as did Taft in Zimmerman and Butler in Carroll.
The fact that McReynolds and Holmes were the Taft Court Justices who most frequently acquiesced in major decisions echoes Professor Saul Brenner’s finding that on the Vinson Court “extreme justices [were] most likely to be closer to the mean at the final vote than at the original vote,” because “extreme justices are likely to lose more often at the original vote.”

Van Devanter did not participate in the conference vote in Nixon v Herndon; McReynolds did not do so in Miller v Schoene; Brandeis did not participate in Adkins; Sutherland did not participate in the conference votes in Panama Railroad, Frick v Webb, Webb v O’Brien, Porterfield v Webb, Terrace v Thompson, Gambino, Roschen, Alston, Gong Lum, Northwestern Mutual, or Whitney; and Butler did not participate in the conference votes for O’Fallon or Oliver Iron.

The numbers for these major cases are generally consistent with Dean Post’s finding of the total number of times each of the Justices changed his conference vote to join the Court’s opinion. McReynolds was first with 99; Brandeis second with 95; Sanford third with 93; Sutherland fourth with 87; Holmes fifth with 80; Butler sixth with 60; Taft seventh with 48; Van Devaner eighth with 45; McKenna ninth with 38; and Stone last with 35. Expressed as a percentage of the decisions in which he participated, McKenna led the Court by acquiescing in 10.3 %, McReynolds was next with 9.3 %, followed by Brandeis, Sanford and Sutherland each comfortably above 8 %, Holmes well over 7 %, Stone and Butler over 5 %, Taft at 4.7 %, and Van Devaner at 3.9 %. As Dean Post observes, however, these percentages might be misleading for the reason that Taft and Van Devaner rarely cast dissenting votes in conference. When one looks at the rate at which each of the Justices was willing to change a dissenting conference vote and join the majority in the final vote on the merits, a different picture appears. McKenna again led the Court by doing so in nearly 90 % of the cases in which he was a conference dissenter, but Van Devaner did so in 83.3 %, Taft did so in 80 %, followed by Sanford, Sutherland, and Butler each above 70 %, Holmes in 60 %, McReynolds in 59.3 %, Brandeis in 57.2 %, and Stone in 50 %. Post, 85 Minn L Rev at 1333-34 n 203, 1377-78 (cited in note 2).

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Saul Brenner, Ideological Voting on the Vinson Court: A Comparison of Original & Final Votes on the Merits, 22 Polity 157, 163 (1989). An examination of these cases also provides some indication of the success of each of the Justices in preparing opinions that would attract colleagues who had dissented or passed at conference. In his study of all Taft Court opinions that became unanimous following a divided conference vote, Dean Post determined that Van Devaner did so at the highest rate and that McKenna was the least successful in doing so. Following Van Devaner in descending order were Butler, Sutherland, Holmes, Stone, McReynolds, Brandeis, Taft, and Sanford. Post, 85 Minn L Rev at 1334 n 203, 1388 (cited in note 2). If we exclude Whitney, which was unanimous only as to the judgment, there were twenty-five major cases that became unanimous after a divided conference vote. McMenna accounted for none of these, thus mirroring Dean Post’s aggregate result. Similarly, though he wrote comparatively few opinions, Van Devaner accounted for three (Oliver Iron, McGrain, Panama Railroad), or 12 %. Sutherland (Industrial Association, Byars, Radice, Nectow) and Butler (Agnello, Fasulo, Roberge, Duke) also again performed strongly in this category, each
These figures also speak to another debate in the political science literature. Some studies of voting fluidity conclude that “justices were no more likely to change their votes in important, or salient, cases than in those of lesser importance.” Others conclude that acquiescence was in accounting for four, or 16%. Brandeis also accounted for three (Ziang, Lee, Gambino), or 12%, and Sanford’s record of two (Corrigan, Fiske), or 8%, was consistent with his comparatively weak aggregate performance. Holmes (Window Glass Manufacturers), Stone (Metcalf), and McReynolds (Trusler), however, who were in the middle of the aggregate pack, each accounted for only one such opinion in a major case, or 4% each. By contrast, Taft, who was in the bottom third in the aggregate, was the author of six such major opinions (Dayton Goose-Creek, Brooks, Yu Cong Eng, Cooke, Coronado Coal, Duby), or fully 24% of the total.

This phenomenon also can be examined by looking at the percentage of unanimous opinions authored by a Justice that were not unanimous at conference. Overall, Dean Post found that Butler had the highest such percentage at 53%, followed by Holmes at about 50%, Sutherland at about 47%, Van Devanter at about 46%, Stone at around 40%, Brandeis at about 37%, McReynolds at about 36%, Taft at about 35%, Sanford at about 33%, and McKenna at 24%. Post, 85 Minn L Rev at 1334 n 203, 1389 (cited in note 2). When we examine the smaller number of major cases, we see substantial changes in ordinality. Here Van Devanter ranks first at 75% (3/4), Sanford second at 66.7% (2/3), Butler third at 57% (4/7), Taft fourth at 46.2% (6/13), Sutherland fifth at 44.4% (4/9), Brandeis sixth at 42.9% (3/7), Stone seventh at 25% (1/4), Holmes eighth at 20% (1/5), and McReynolds ninth at a remarkable 9.1% (1/11). McKenna did not author any major unanimous opinions.

These data also should be viewed in light of divided major decisions in which the author failed to increase the size of the conference majority. Neither Holmes, McKenna, Van Devanter, nor Sanford authored any such decisions; but of the twenty-two such cases, McReynolds was the author of six (Meyer, Cudahy Packing, Fairmont Creamery, O’Fallon, Long v Rockwood, National Life), Sutherland of three (Adkins, Williams v Standard Oil, Macallen), Taft of two (Olmstead, Myers), and Brandeis of one (Lambert). Stone was the author of two such companion cases (Cement Manufacturers, Maple Flooring) that were decided by identical votes and therefore might be more properly considered as one. Depending upon whether one counts the four companion Alien Land Law Cases (Frick v Webb, Webb v O’Brien, Porterfield v Webb, Terrace v Thompson) as four cases or one, Butler was the author of either eight or five. (The other four were Di Santo, Weaver v Palmer Brothers, Quaker City Cab, Panhandle Oil). Thus, some of the Justices who were apparently most adept at attracting additional votes in major cases were also among those who most often failed to do so.

One should also consider cases in which the author of an opinion managed to attract additional votes, but failed to achieve unanimity. Sutherland did so in Texas Transport, Frost Trucking, Liggett, and West; Taft did so in Carroll and Olsen; Butler did so in Jay Burns and Black and White Taxicab; Van Devanter did so in Shafer and Zimmerman; Brandeis did so in the companion cases of Buck v Kuykendall and Bush; and McReynolds did so in Miles. 397 Hagle and Spaeth, 44 Western Pol Q at 124 (cited in note 4). See also Maltzman and Wahlbeck, 90 Am Pol Sci Rev at 589 (cited in note 4) (finding that “justices are not less likely to switch in salient cases”); Brenner, Hagle, and Spaeth, 42 Western Pol Q 409 (cited in note 4)
fact more likely to occur in cases that were not “salient.”

Dean Post has determined the percentage of all cases in which each of the Taft Court Justices changed his vote following the conference and ultimately joined the Court’s opinion. With respect to those Justices who served on the Taft Court for the entire period for which we have docket books, a comparison of Dean Post’s figures to those generated in this article produces an interesting result: some of the Justices were more likely to acquiesce in major cases than they were in cases of lower salience, whereas other were less likely to do so. Among the former category were McReynolds, Holmes, and Taft. McReynolds’s overall acquiescence rate was 9.3 %, but his rate in major cases was 12.9 %. Holmes’s overall rate was between 7 and 8 %, but his major case rate was 10.2 %. Taft’s overall rate was 4.7 %, but his major case rate was 5.1 %. By contrast, Brandeis, Sutherland, Butler, and Van Devanter each had higher overall rates of acquiescence than rates of acquiescence in major cases. For Brandeis the figures were 8-9 % vs 6 %; for Sutherland they were 8-9 % vs 7.5 %; for Butler they were 5-6 % vs 3.5 %; and for Van Devanter they were 3.9 % vs 3.4 %.

For the Court as a whole, however, acquiescence was actually more likely in salient than in nonsalient cases. Overall there were 680 instances of acquiescence in 1200 cases, or a rate

(keeping that the defection of the marginal member of the minimum winning coalition on the Warren Court is best explained not by the importance of the case, but instead by that Justice’s ideological proximity to members of the dissenting coalition and, secondarily, to that Justice’s relative lack of competence).

Dorff and Brenner, 54 J Pol at 772, 773 (cited in note 4); Brenner, Hagle, and Spaeth, 23 Polity 309 (cited in note 4). Compare Brenner, 24 Am J Pol Sci at 530 (cited in note 4) (finding that percentage of total vote switches was no greater in “nonmajor” than in “major” cases, but that vote switches occurred in a higher percentage of “nonmajor” cases); Brenner, 26 Am J Pol Sci at 389 (cited in note 4) (reaching similar conclusions with a different data set).

Post, 85 Minn L Rev at 1333 n 203, 1387 (cited in note 2).

Post, 85 Minn L Rev at 1333 (cited in note 2).
of 56.6%. In the major cases examined here, by contrast, there were 72 instances of acquiescence in 117 cases, or a rate of 61.5%. But when one looks at cases rather than votes, a different picture emerges. Whereas 55.6% of the Taft Court’s decisions in major cases were unanimous, only 33.3% were unanimous at conference. By contrast, the Taft Court’s overall rate of unanimity was 86%, and in 50% of its cases the vote was unanimous at conference.401 At the same time, however, 58% of the Court’s aggregate unanimous decisions were unanimous at conference, while 42% were not402 – very nearly the same percentages (60-40%) that we found for major decisions. Thus, while both conference unanimity and ultimate unanimity were significantly less likely to be achieved in salient than in nonsalient cases, the likelihood that a divided conference vote would ultimately be transformed into a unanimous decision was almost the same.

The fact that two of the most senior Justices – McReynolds and Holmes -- were those who most frequently acquiesced in the conference majority’s judgment in major cases also indicates that newcomers to the Taft Court did not experience the kind of freshman effect with respect to voting fluidity that some scholars have found on other Courts. Though there is no agreed-upon period of judicial tenure during which to test for the freshman effect, the periods tested in the literature have ranged from one to five years.403 Professor Howard, the first to identify the phenomenon, suggested that the freshman period was typically about three years.404 Yet many of the instances of fluidity exhibited by these freshman Justices were produced well into their tenures on the Taft Court, and indeed persisted long after their freshman years had

401 Id.
402 Id.
403 Brenner and Hagle, 18 Pol Behav at 239 (cited in note 27).
concluded.$^{405}$ Taft was the most mobile of the group, manifesting fluidity in ten major cases. The Chief Justice acquiesced in one major case (*Window Glass Manufacturers*) in his third full Term,$^{406}$ two (*Industrial Association*, *Agnello*) in his fourth, two (*Fasulo*, *Byars*) in his sixth, and one (*Zimmerman*) in his seventh. His one defection (*Toyota*) occurred in his fourth full Term. His three shifts from one conference majority to another occurred in his second (*Oliver Iron*), sixth (*Euclid*), and seventh (*Gambino*) full Terms. Moreover, at least some of Taft’s shifts must have been prompted not by uncertainty, but instead by a desire to lead by example in cultivating the norm of acquiescence.

Two (*Jay Burns*, *Ziang*) of Sutherland’s nine shifts in major cases occurred during his second full Term,$^{407}$ three (*Brooks*, *Buck v Kuykendall*, *Bush*) in his third, two (*Metcalf*, *Trusler*) in his fourth, and one (*Roberge*) in his seventh. His shift from one conference majority to another in *Euclid* occurred during his fifth full Term. Butler acquiesced in one major case (*Radice*) during his first Term, and one each during his second (*Carroll*), third (*Corrigan*), and fourth (*Lee*) full Terms. His two defections in major cases came in his second (*Samuels*) and fourth (*Buck v Bell*) full Terms, for a total of six instances of fluidity. Sanford acquiesced in one major case in each of his first (*Texas Transport*), third (*Frost*), fourth (*Duby*), and sixth (*Roberge*) full Terms, and two (*Carroll*, *Buck v Kuykendall*) in his second. His shift from one conference majority to another in *Gambino* came in his fifth full Term, for a total of seven such instances.


$^{406}$ As indicated in note 34 and its accompanying text, we do not have a docket book for the 1921 Term, Taft’s first on the Court, nor for that portion of the 1922 Term antedating Justice Butler’s accession to the Court.

$^{407}$ As indicated in note 34 and the accompanying text, we do not have docket book entries for that portion of the 1922 Term – Sutherland’s first on the Court -- antedating Justice Butler’s accession to the Court.
Stone, who was on the Taft Court for a shorter time than his other freshman colleagues, acquiesced in one major case (Miles v Graham) in his first Term on the Court, in one (Nectow) during his third full Term, and in two (Helson, Roberge) during his fourth. His defection in Ribnik came during his third full Term, giving him a total of five instances of fluidity. Moreover, Stone and Butler were the only participants in the original Gambino conference to vote for the Court’s ultimate disposition. By contrast, McReynolds exhibited nineteen instances of fluidity, Holmes fourteen, Brandeis eight, and Van Devanter six. The freshman Justices of the Taft Court were not markedly more likely than were their senior colleagues to change their votes between the conference and the final vote on the merits. Indeed, these five Justices together accounted for considerably fewer instances of fluidity in major cases than did the senior quartet of McReynolds, Holmes, Brandeis, and Van Devanter.

408 He acquiesced in Radice, Brooks, Window Glass Manufacturers, Panama Railroad, Roberge, Fiske, Yu Cong Eng, Fasulo, Byars, Ziang, Cooke, Black and White Taxicab, Liggett, West, and on the jurisdictional issue in Tyson; defected in Carroll, Haydel, and One Ford Coupe; and shifted from the initial conference majority to support a contrary disposition in Oliver Iron.

409 He acquiesced Coronado Coal, Duke, Nectow, Duby, Yu Cong Eng, Agnello, Olsen, Miles, Shafer, Byars, on the jurisdictional issue in Tyson, and in the judgment in Whitney; he defected in Helson; and he shifted from the initial conference majority to support a contrary disposition in Gambino.

410 He acquiesced in Coronado Coal, Nectow, Corrigan, McGrain, and Helson, in the judgment in Whitney, on the jurisdictional issue in Tyson, and shifted from the initial conference majority to support a contrary disposition in Gambino.

411 He acquiesced in Radice, Trusler, Corrigan, and Ziang, and shifted from the initial conference majority to support a contrary disposition in Oliver Iron and Gambino.

412 Taft (10), Sutherland (9), Sanford (7), Butler (6), and Stone (5) accounted together for thirty-seven instances of fluidity. McReynolds (19), Holmes (14), Brandeis (8), and Van Devanter (6) accounted together for forty-seven. Other studies have shown that newcomers to the Taft Court did not demonstrate a freshman effect with respect to bloc voting. See Dudley, 21 Am Polit Q at 364-65 (cited in note 29); Bowen and Scheb II, 15 Pol Behav at 7, 11 (cited in note 29). Further research will be necessary to determine whether freshman Justices demonstrated greater degrees of vacillation in less salient cases than they did in the major cases discussed here. Paul Freund reported that, “As far as I could make out, [Cardozo’s] disagreements [with the majority in conference] -- this being his first full term on the Court -- derived from the fact that in New York
Of course, there are limits to what the docket books alone can teach us. Though they can document voting shifts between conference and published opinion, they typically do not reveal the reasons underlying such shifts.\footnote{For discussions of various possibilities, see, for example, Epstein, Segal, and Spaeth, 45 Am J Pol Sci at 372-73 (cited in note 20); Saul Brenner, \textit{Minimum Winning Coalitions on the United States Supreme Court: A Comparison of the Original Vote on the Merits with the Opinion Vote}, 7 Am Polit Q 384, 391-92 (1979); Howard Jr, 62 Am Pol Sci Rev at 45-51 (cited in note 24).} Often they do not reveal the strength of preference underlying a conference vote, nor the force of persuasion required for that vote to change. The docket books typically do not reveal the extent to which a passing vote is explained by genuine indecision on the merits, a desire to see a draft of the majority opinion and its reasoning before making a commitment, or, as one might have reason to suspect in the case of McReynolds based on the assessment of one of his later clerks, a lack of preparation.\footnote{John Knox, \textit{Experiences as a Law Clerk to Mr. Justice James C. McReynolds of the Supreme Court of the United States during the Year that President Franklin D. Roosevelt Attempted to “Pack” the Court} *vi (unpublished manuscript, Oct Term 1936, available at John Knox MSS, Special Collections, University of Virginia Library) (describing McReynolds as “genuinely lazy”).} The docket books often do not reveal whether senior Justices, who spoke first but voted last, might have cast votes at variance with their expressed views in order to acquiesce in an emerging majority or, in the case of the Chief Justice or the most senior Associate Justice, to control assignment of the majority opinion.\footnote{See Johnson, Spriggs II, and Wahlbeck, 39 L & Society Rev 349 (cited in note 33).} For answers to these questions we must rely upon other sources or educated speculation, and to many of these issues we may never have satisfactory resolutions. But the information contained in the docket books permits us to answer a number of questions about the
Taft Court, allows us to corroborate or confute a variety of scholarly claims, and opens avenues of investigation that previously had been obstructed or closed.