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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.² Yet Dean Post's scholarship addresses the particular and qualitative dimensions of the conference records for only a relatively small number of cases.³ This article seeks to improve our

and excellent research assistance; and to participants in the Notre Dame Law School Faculty Colloquium for valuable comments and conversation.

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.

² Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn L Rev 1267, 1309-55 (2001).

³ See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 Wm and Mary L Rev 1, 36 n 119 (2006) (discussing *Gambino v United States*, 275 US 310 (1927)); Post, 48 Wm and Mary L Rev at 101 n 343 (discussing *Byars v United States*, 273 US 28 (1927) and *Agnello v United States*, 269 US 20 (1925)); Post, 48 Wm and Mary L Rev at 111 n 368 (discussing *New York v Zimmerman*, 278 US 63 (1928)); Post, 48 Wm and Mary L Rev at 121 n 403 (again discussing *Byars*); Post, 48 Wm and Mary L Rev at 124 n 406 (discussing *Carroll v United States*, 267 US 132 (1925)); Post, 48 Wm and Mary L Rev at 134 n 442 (again discussing *Agnello*); Post, 48 Wm and Mary L Rev at 142 n 470 and n 471 (discussing *Olmstead v United States*, 277 US 438 (1927)); Post, 48 Wm and Mary L Rev at 160 n 537 (discussing *Donnelley v United States*, 276 US 505 (1928)); Post, 48 Wm and Mary L Rev at 161 n 537 (discussing *Ziang Sung Wan v United States*, 266 US 1 (1924)); See also Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 Duke L J 1513, 1535 n 84 (2002) (discussing *Metcalf v Mitchell*, 269 US 514 (1926)); Post 51 Duke L J at 1565 n 181 (discussing *Chicago Board of Trade v Olsen*, 262 US 1 (1923)); Post 51 Duke L J at 1595 n 288 (discussing *Black and White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co*, 276 US 518 (1928)); Post 51 Duke L J at 618 n 353 (discussing *Texas Transport and Terminal Co v New Orleans*, 264 US 150 (1924)); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 BU L Rev 1489, 1497 (1998) (discussing *Chastleton Corp v Sinclair*, 264 US 543 (1924)); Post, 78 BU L Rev at 1501 n 77 (discussing *Jay Burns Baking Co v Bryan*, 264 US 504 (1924)).

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*

⁴ The cases selected as “major” or “salient” are those that appear regularly in scholarly treatments of the Taft Court. See, for example, Peter Renstrom, *The Taft Court: Justices, Rulings, and Legacy* (ABC-CLIO 2003); Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (Simon and Schuster 1964); Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* (Louisiana State 1958); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (Viking 1956); Henry F. Pringle, *2 The Life and Times of William Howard Taft* (American Political Biography 1939); Post, 48 Wm and Mary L Rev at 1 (cited in note 3); Post, 51 Duke L J at 1513 (cited in note 3); Post, 85 Minn L Rev at 1267 (cited in note 2); Post, 78 BU L Rev at 1489 (cited in note 3); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va L Rev 559 (1997). Scholars may differ concerning the inclusion or exclusion of particular cases from this category, and the statistical discussion in the Conclusion must be read with that caveat in mind. Notwithstanding such potential differences, however, my effort has been to select cases about which I believe there would be a broad measure of agreement. For other scholarship exploring judicial behaviour in “major” or “salient” cases, see Forrest Maltzman and Peter J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 Am Pol Sci Rev 581, 589 (1996); Robert H. Dorff and Saul Brenner, *Conformity Voting on the United States Supreme Court*, 54 J Pol 762, 772, 773 (1992); Timothy M. Hagle and Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 Western Pol Q 119, 124 (1991); Saul Brenner, Timothy Hagle, and Harold J. Spaeth, *Increasing the Size of Minimum Winning Coalitions on the Warren Court*, 23 Polity 309 (1990); Saul Brenner, Timothy M. Hagle, and Harold J. Spaeth, *The Defection of the Marginal Justice on the Warren Court*, 42 Western Pol Q 409 (1989); Saul Brenner, *Fluidity on the Supreme Court: 1956-1967*, 26 Am J Pol Sci 388, 389 (1982); Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 Am J Pol Sci 526, 530 (1980); Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 Am J Pol Sci 60 (1979).

⁵ 274 US 357 (1927).

of *Euclid v Ambler*,⁶ *Adkins v Children's Hospital*⁷ 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).

¹⁵ 268 US 295 (1925).

¹⁶ 271 US 623 (1926).

¹⁷ 268 US 501 (1925).

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 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."²⁰ It is generally believed that this norm of consensus collapsed early in the Chief Justiceship of

²⁰ Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, *Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus*, 38 J Sup Ct Hist 20, 22 (2013); Mark S. Hurwitz and Drew Noble Lanier, *I Respectfully Dissent: Consensus, Agendas, and Policymaking on the US Supreme Court, 1888-1999*, 21 Rev of Pol Research 429, 429 (2004); Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, *The Norm of Consensus on the US Supreme Court*, 45 Am J Pol Sci 362, 376 (2001); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 Wash U L Q 137, 161-62 (1999); Gregory A. Caldeira and Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 Am J Pol Sci 874, 874-75 (1998); Thomas G. Walker, Lee Epstein, and William J. Dixon, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J Pol 361, 361-62 (1988).

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

²¹ Herman C. Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* 40, 251 (1948) ("In 1941 divisive forces of some kind hit the Court full force"); Corley, Steigerwalt, and Ward, 38 J Sup Ct Hist at 47 (cited in note 20); Caldeira and Zorn, 42 Am J Pol Sci at 874-75 (cited in note 20); Walker, Epstein, and Dixon, 50 J Pol 362; David Danelski, *The Influence of the Chief Justice in the Decisional Process*, in Joel B. Grossman and Richard S. Wells, eds, *Constitutional Law and Judicial Policy Making* 175 (New York Wiley 1972).

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 Institutional 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

view that separate opinions had a legitimate role in the American legal system.”) Compare Benjamin N. Cardozo, *Law and Literature* 34 (Harcourt Brace 1931) (characterizing dissenters as “irresponsible”).

²⁴ See, for example, Epstein, Segal, and Spaeth, 45 *Am J Pol Sci* 362 (cited in note 20) (Waite Court); Maltzman and Wahlbeck, 90 *Am Pol Sci Rev* 581 (cited in note 4) (Burger Court); Dorff and Brenner, 54 *J Pol* 762 (cited in note 4) (Vinson, Warren, and Burger Courts); Hagle and Spaeth, 44 *Western Pol Q* 119 (cited in note 4) (Warren Court); Brenner, Hagle, and Spaeth, 23 *Polity* 309 (cited in note 4) (Warren Court); Brenner, Hagle, and Spaeth, 42 *Western Pol Q* 409 (cited in note 4) (Warren Court); Brenner, 26 *Am J Pol Sci* 388 (cited in note 4) (Warren Court); Saul Brenner, *Ideological Voting on the US Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote*, 22 *Jurimetrics* 287 (1982) (Vinson and Warren Courts); Brenner, 24 *Am J Pol Sci* 526 (cited in note 4) (Vinson and Warren Courts); Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 *Am Pol Sci Rev* 43 (1968) (Stone and Vinson Courts).

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

²⁵ Eloise C. Snyder. *The Supreme Court as a Small Group*, 3 *Social Forces* 232, 238 (1958).

²⁶ Woodford Howard, *Justice Murphy: The Freshman Years*, 18 *Vand L Rev* 473, 474, 476, 477, 484, 488, 505 (1965).

²⁷ Timothy M. Hagle, “*Freshman Effects*” for Supreme Court Justices, 37 *Am J Pol Sci* 1142, 1142 (1993). See also Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 *Ohio St L J* 679, 718-19 (2007); Saul Brenner and Timothy M. Hagle, *Opinion Writing and Acclimation Effect*, 18 *Pol Behav* 235 (1996); Paul C. Arledge and Edward W. Heck, *A Freshman Justice Confronts the Constitution: Justice O’Connor and the First Amendment*, 45 *Western Pol Q* 761, 761-62 (1992); Edward V. Heck and Melinda Gann Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 *J Pol* 852, 853-54 (1981); Elliot E. Slotnick, *Judicial Career Patterns and Majority Opinion Assignment on the Supreme Court*, 41 *J Pol* 640, 641 (1979).

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

evidence of ideological instability in the merits voting of “virtually all” freshman Justices); Mark S. Hurwitz and Joseph V Stefko, *Acclimation and Attitudes: “Newcomer” Justices and Precedent Conformance on the Supreme Court*, 57 Pol Res Q 121 (2004) (finding freshman effect with respect to conformity to precedent); Charles R. Shipan, *Acclimation Effects Revisited*, 40 Jurimetrics 243 (2000) (finding evidence of ideological instability in the merits voting of some but not most freshmen Justices on the Warren and Burger Courts); Sandra L. Wood, et al, *“Acclimation Effects” for Supreme Court Justices: A Cross-Validation, 1888-1940*, 42 Am J Pol Sci 690, 694 (1998) (finding “some evidence of an acclimation effect for at least some of the justices” with respect to ideological instability in merits voting); Brenner and Hagle, 18 Pol Behav 235 (cited in note 27) (finding freshman effect with respect to opinion output); Timothy M. Hagle, *A New Test for the Freshman Effect*, 21 Southeastern Pol Rev 289 (1993) (finding evidence of ideological instability in the merits voting of some freshman Justices on the Burger and Rehnquist Courts); Hagle, 37 Am J Pol Sci 1142 (cited in note 27) (finding evidence of ideological instability in the merits voting of some Justices joining the Court between 1953 and 1989); S. Sidney Ulmer, *Toward a Theory of Sub-Group Formation in the United States Supreme Court*, 27 J Pol 133, 151 (1965) (finding some evidence of freshman effect in bloc voting for Justices joining the Court between 1946 and 1961).

either non-existent or confined to limited circumstances.²⁹ Studies of the freshman period for individual Justices on the whole have not lent much support to the hypothesis.³⁰

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 of 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.”³¹ Howard reported that Justice Murphy exhibited “a similar instability” during his freshman years on the Court.³² 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.³³

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.”)

³² Howard Jr, 62 Am Pol Sci Rev at 45 (cited in note 24).

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.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;³⁶ taking into account all of its decisions for the entirety of Taft’s tenure, the unanimity rate was 91.4 %.³⁷ Though this rate of unanimity was in line with the rates achieved by the White Court,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.³⁹ As a consequence, he worked hard to minimize disagreement, often sacrificing the expression of his own personal views.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

Commerce Clause challenge); *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 *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922) (holding that a state law impairing an owner’s subsurface mining rights constituted a taking).

³⁵ Mason, *William Howard Taft* at 198 (cited in note 4); Mason, *Taft to Warren* at 57 (cited in note 4); Alpheus Thomas Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J Pub L 20, 31-32 (1968).

³⁶ Post, 85 Minn L Rev at 1309 (cited in note 2).

³⁷ Lee Epstein, et al, *The Supreme Court Compendium: Data, Decisions, and Developments* 147, 161 (1994).

³⁸ Post, 85 Minn L Rev at 1310 (cited in note 2).

³⁹ Post, 85 Minn L Rev at 1310-11, 1356 (cited in note 2); Mason, *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, *Elements of Judicial Strategy* 47 (Chicago 1964); Danelski, *The Influence of the Chief Justice* at 174 (cited in note 21).

⁴⁰ 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).

Stone did so in 13.49 % of all such cases handed down during his Chief Justiceship. Indeed, of all of the Chief Justices to serve from John Marshall through Earl Warren, only Marshall could boast a dissenting percentage lower than Taft's.⁴¹ Van Devanter shared Taft's distaste for public displays of discord, and strongly lobbied his colleagues to suppress their dissenting views.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."⁴³ He therefore commonly "acquiesce[d] for the sake of harmony & the Court."⁴⁴ McReynolds, Sutherland, Sanford, and McKenna expressed similar views and suppressed dissenting opinions accordingly.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.⁴⁶

⁴¹ S. Sidney Ulmer, *Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger*, in Sheldon Gordon and Charles M. Lamb, eds, *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts* 53 (1986).

⁴² Post, 85 Minn L Rev at 1318, 1340, 1341, 1343 (cited in note 2).

⁴³ Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* 214-15 (Oxford 2d ed 1968); Murphy, *Elements of Judicial Strategy* at 52 (cited in note 39); Post, 85 Minn L Rev at 1340 (cited in note 2).

⁴⁴ Post, 85 Minn L Rev at 1341-43 (cited in note 2).

⁴⁵ Post, 85 Minn L Rev at 1341-44 (cited in note 2); James C. McReynolds to Harlan F. Stone, Apr 2, 1930, Box 76, Harlan F. Stone Papers, Manuscript Division, Library of Congress, quoted in Corley, Steigerwalt, and Ward, 38 J Sup Ct Hist at 30 (cited in note 20); Murphy, *Elements of Judicial Strategy* at 52-53 (cited in note 39).

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.”⁴⁷ 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.⁴⁸ 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.”⁴⁹ 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.⁵⁰ 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

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”).

⁴⁹ ABA Canons of Judicial Ethics, Canon 19 (1924), in Lisa L. Milord, *The Development of the ABA Judicial Code* 137 (ABA 1992). In 1972, the American Bar Association replaced the Canons with a *Code of Judicial Conduct*, which does not contain a provision similar to Canon 19. Wahlbeck, Spriggs II, and Maltzman, 27 Am Pol Q at 508 n 1 (cited in note 29).

⁵⁰ Post, 85 Minn L Rev at 1284 n 55 (cited in note 2).

been.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.⁵² Fourth, the norm of acquiescence promoted a collegiality and reciprocity among the Justices that smoothed over potential conflicts.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.⁵⁴ With such comparatively limited resources at their disposal, the cost of preparing a dissenting opinion was considerably higher.⁵⁵

⁵¹ Post, 85 Minn L Rev at 1313 (cited in note 2).

⁵² Post, 85 Minn L Rev at 1314-18 (cited in note 2).

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, *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.”)

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, *The Clerks of the Four Horsemen, Part I*, 39 J Sup Ct Hist 386 (2014); Barry Cushman, *The Clerks of the Four Horsemen, Part II*, 40 J Sup Ct Hist 55 (2015); Melvin I. Urofsky, *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, *Sorcerer’s Apprentices: 100 Years of Law Clerks at the United States Supreme Court* 36-37 (NYU 2006).

⁵⁵ See Bradley J. Best, *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 merits⁵⁷ 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

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.

⁶⁶ 273 US 12 (1927).

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.⁶⁷ And the conference vote in that decision, like the conference vote in *Frothingham*, was unanimous.⁶⁸ 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,⁶⁹ 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.⁷⁰ The case

⁶⁷ See, for example Joseph P. Lash, *Dealers and Dreamers: A New Look at the New Deal* 244-45 (Doubleday 1988); Philippa Strum, *Louis D. Brandeis: Justice for the People* 386-87 (Harvard 1984); Lewis J. Paper, *Brandeis* 354-57 (Prentice-Hall 1983); Bruce Allan Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* 165-77 (Oxford 1982); Melvin I. Urofsky, *A Mind of One Piece: Brandeis and American Reform* 131 (Scribner 1971); Arthur M. Schlesinger Jr., *3 The Age of Roosevelt: The Politics of Upheaval* 301-03, 305-06 (Houghton Mifflin 1960); David J. Danelski, *The Propriety of Brandeis' Extrajudicial Conduct*, in Nelson L. Dawson, ed, *Brandeis and America* 11, 26-27 (Kentucky 1989); Nelson L. Dawson, *Brandeis and the New Deal*, in Dawson, ed, *Brandeis and America* 38, 48; Thomas H. Eliot, *The Advent of Social Security*, in Katie Louchheim, ed, *The Making of the New Deal* 150, 159, 160-61 (Harvard 1983); Paul Freund, *Mr. Justice Brandeis*, in Allison Dunham and Philip B. Kurland, eds, *Mr. Justice* 177, 190 (Chicago 1964); Melvin I. Urofsky and David W. Levy, eds, *5 Letters of Louis D. Brandeis* 520, 523, 526-27 (State Univ NY 1978); Franklin Roosevelt to Felix Frankfurter, June 11, 1934, in Max Freedman, annot, *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* at 122-23 (Atlantic Monthly 1968); Tom Corcoran and Ben Cohen to Felix Frankfurter, June 18, 1934, Freedman, annot, *Roosevelt and Frankfurter* 123-26; 79 Cong Rec 9287 (1935) (remarks of Senator Wagner); *Steward Machine Co v Davis*, 301 US 548, 557, 559 (1937) (oral argument of Charles Wyzanski); *Steward Machine Co v Davis*, 301 US at 562, 564 (oral argument of Assistant Attorney General Robert Jackson).

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,⁷⁹ but in *Weller* the Court unanimously upheld a section of the statute requiring that such brokers be licensed. The vote at conference also was unanimous.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.”⁸¹ In *Asakura v Seattle*,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.’”⁸³

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

⁷⁹ *Tyson and Bro v Banton*, 273 US 418 (1927).

⁸⁰ Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

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.

⁸² 265 US 332 (1924).

⁸³ Butler OT 1923 Docket Book.

⁸⁴ 268 US 325 (1925).

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.”

⁸⁶ 274 US 554 (1927).

⁸⁷ Stone OT 1926 Docket Book.

Leonard v Earle,⁸⁸ which upheld state licensure and regulation of oyster-packing establishments.⁸⁹ Other significant economic regulation cases that were unanimous both at conference vote and at the final vote on the merits include *Miller v Schoene*,⁹⁰ which upheld a state statute requiring destruction of cedar trees infected with disease;⁹¹ *Tagg Bros. & Moorhead v United States*,⁹² which upheld federal regulation of fees charged by commission salesmen working in major stockyards under the Packers and Stockyards Act of 1921;⁹³ and *Roschen v Ward*,⁹⁴ 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.⁹⁵ *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.⁹⁶

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

American Linseed Oil Co, 262 US 371 (1923) (sustaining a conviction under the Sherman Act), may also fall into this category. There were no dissenting votes recorded at the conference, though it is not clear whether Holmes, Brandeis, or Sutherland actually voted. Butler OT 1922 Docket Book.

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

¹⁰⁵ 273 US 284 (1927). Stone OT 1926 Docket Book.

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.¹¹² In *United States v Daugherty*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.¹¹⁴ And in *Tumey v Ohio*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.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*,¹¹⁷ the Court upheld a warrant to search premises for liquor as based upon probable cause.¹¹⁸ In *Steele v United States*,¹¹⁹ the Justices held that the description in a search warrant was sufficiently definite to satisfy constitutional and statutory requirements.¹²⁰ *Marron v United States*¹²¹ upheld the seizure of account books and papers used in conducting a criminal enterprise during a search incident to a lawful arrest.¹²²

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.

¹¹³ 269 US 360 (1926).

¹¹⁴ Stone OT 1925 Docket Book.

¹¹⁵ 273 US 510 (1927).

¹¹⁶ Stone OT 1926 Docket Book.

¹¹⁷ 268 US 435 (1925).

¹¹⁸ Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

¹¹⁹ 267 US 498 (1925).

¹²⁰ Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

¹²¹ 275 US 192 (1927).

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).

¹⁴⁵ Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 S Ct Rev 299, 330.

¹⁴⁶ Butler OT 1923 Docket Book.

was “teetering back & forth for some time.” The case was argued January 17th and 18th,¹⁴⁷ and the conference at which Sutherland cast the deciding vote and defended the classification was held on January 26.¹⁴⁸ If there was any subsequent vacillation, Butler’s docket book does not record it.

In *Brooks v United States*,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 *Hammer v Dagenhart*,¹⁵⁰ the Justices had struck down the Keating-Owen Child Labor Act,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,¹⁵² which prohibited interstate shipment of lottery tickets, and the Pure Food and Drugs Act,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.”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.¹⁵⁵

¹⁴⁷ 264 US 292 (1924).

¹⁴⁸ Butler OT 1923 Docket Book.

¹⁴⁹ 267 US 432 (1925).

¹⁵⁰ 247 US 251 (1918).

¹⁵¹ 39 Stat 675 (1916).

¹⁵² 28 Stat 963 (1895), upheld in *Champion v Ames*, 188 US 321 (1903) (“The Lottery Case”).

¹⁵³ 34 Stat 768 (1906), upheld in *Hipolite Egg Co v United States*, 220 US 45 (1910).

¹⁵⁴ 247 US at 272.

¹⁵⁵ See, for example, Melvin Urofsky and Paul Finkelman, *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."¹⁵⁶

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.").

¹⁵⁶ *Brooks v United States*, Reel 614 William Howard Taft Papers, Library of Congress, 6-7.

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.”¹⁵⁷

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*.”¹⁵⁸ Holmes expressed the view that the defendant’s constitutional claim was “not meritorious” and that the case presented “No substantial Const. qu[estion].”¹⁵⁹ Van Devanter also is recorded as taking the position that both the statute and the indictment were “good.”¹⁶⁰

Sutherland had been a United States Senator when the Pure Food and Drugs Act was passed, and had voted in favor of its passage.¹⁶¹ He also was in the Senate in 1910 when that body approved by a voice vote the Mann Act,¹⁶² 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).

¹⁶⁰ Butler OT 1924 Docket Book (“V Stat. good – Ind good”).

¹⁶¹ 40 Cong Rec 2773 (1906).

¹⁶² 36 Stat 825 (1910).

women and girls for immoral purposes.¹⁶³ And he still occupied a seat in the upper chamber in 1913 when Congress passed the Webb-Kenyon Act,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 against¹⁶⁵ and offered the principal constitutional argument in opposition to the bill.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.”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.”¹⁶⁸

The Court unanimously upheld the Pure Food and Drugs Act in *Hipolite Egg. Co v United States*,¹⁶⁹ and the Justices sustained the Mann Act in *Hoke v United States*¹⁷⁰ and *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.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

¹⁶³ 40 Cong Rec 9037 (1910).

¹⁶⁴ 37 Stat 699 (1913).

¹⁶⁵ 49 Cong Rec 2922 (1913).

¹⁶⁶ 49 Cong Rec 2903-11 (1913).

¹⁶⁷ 49 Cong Rec 2906 (1913).

¹⁶⁸ 49 Cong Rec 2904 (1913).

¹⁶⁹ 220 US 45 (1910).

¹⁷⁰ 277 US 308 (1913).

¹⁷¹ *Clark Distilling Co v Western Maryland Railway Co*, 242 US 311, 325-26, 331-32 (1917).

– 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.¹⁷² 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*¹⁷³ was an important decision in the line of Commerce Clause authority distinguishing production from commerce.¹⁷⁴ 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.”¹⁷⁵

Only seven Justices participated in the conference vote taken on January 6, 1923. Justice Mahlon Pitney had retired a week earlier,¹⁷⁶ and Sanford had not yet been nominated to replace

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 Pfoest*, 286 US 165, 182 (1932).

¹⁷⁵ 262 US at 178-79.

¹⁷⁶ 260 US iii.

him.¹⁷⁷ Butler was not confirmed until December 21, 1922,¹⁷⁸ two weeks after the arguments had taken place on December 6 and 7,¹⁷⁹ 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.¹⁸⁰ 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*¹⁸¹ 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

¹⁷⁷ Sanford was nominated on Jan 24, 1923, and took his seat on Feb 19. 261 US iii.

¹⁷⁸ 260 US iii. Butler took his seat on Jan 2, 1923. *Id.*

¹⁷⁹ 262 US 172.

¹⁸⁰ Butler OT 1922 Docket Book.

¹⁸¹ 268 US 295 (1925).

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.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.¹⁸³

In *National Assn. of Window Glass Manufacturers v United States*,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

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).

¹⁸³ Butler OT 1924 Docket Book. Stone OT 1924 Docket Book contains no report of the conference.

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 Mitchell*¹⁹³ 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

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.¹⁹⁹ Also divided at conference were two important land use cases. The decision in *Nectow v City of Cambridge*,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.²⁰¹ That same year, in *Washington v Roberge*,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.²⁰³

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

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 *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.

²⁰⁰ 277 US 183 (1928).

²⁰¹ Stone OT 1927 Docket Book.

²⁰² 278 US 116 (1928).

²⁰³ Stone OT 1928 Docket Book. Other regulatory cases in which unanimity was achieved after conference include *Morris v Doby*, 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.

²⁰⁴ 274 US 357 (1927).

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.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.²⁰⁶ The case was initially argued at the beginning of the 1925 Term,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.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 1926.²⁰⁹

²⁰⁵ 274 US at 372-80.

²⁰⁶ Stone OT 1926 Docket Book.

²⁰⁷ 274 US 357 (1927).

²⁰⁸ Stone OT 1925 Docket Book. McReynolds was absent for this vote.

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 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

²¹⁴ See, for example, Harry Kalven Jr, *A Worthy Tradition: Freedom of Speech in America* 164-65 (Harper & Row 1988).

²¹⁵ 274 US 380 (1927).

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.

²¹⁷ 271 US 623 (1926).

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.²²⁰

The same pattern can be observed in several cases involving criminal law and criminal procedure. In *Agnello v United States*,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.²²² In *Fasulo v United States*²²³ the Justices unanimously held 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.²²⁴ In *United States v Lee*,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.²²⁶ In

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.

²²¹ 269 US 20 (1925).

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.

²²³ 272 US 620 (1926).

²²⁴ Stone OT 1926 Docket Book.

²²⁵ 274 US 559 (1927).

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*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.²²⁸

Similarly, in *Byars v United States*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.²³⁰ *Ziang Sung Wan v United States*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.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

²²⁷ 275 US 310 (1927).

²²⁸ Stone OT 1927 Docket Book. Sutherland also was absent from the Dec 10 conference.

²²⁹ 273 US 28 (1927).

²³⁰ Stone OT 1926 Docket Book.

²³¹ 266 US 1 (1924).

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

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.

²³⁶ 273 US 135 (1927). Stone took no part in the decision.

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.²³⁸ This was true in both *Meyer v Nebraska*²³⁹ and *Olmstead v United States*, in which a sharply divided Court upheld warrantless wiretapping.²⁴⁰ It also was true in *Myers v United States*, a landmark decision on the scope of the President’s removal power,²⁴¹ and in the four *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.²⁴²

This was also the case in *Adkins v Children’s Hospital*, which invalidated the District of Columbia’s minimum wage law for women by a vote of 5-3.²⁴³ In the four years following the decision in *Adkins*, the Court would twice invalidate state minimum wage statutes on the authority of that precedent. In the 1925 decision of *Murphy v Sardell*,²⁴⁴ the Court per curiam affirmed the judgment of the District Court striking down the Arizona statute “upon the authority of *Adkins v Children’s Hospital*.” The brief report of the case continued, “Mr. Justice Holmes

²³⁸ *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 *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.

²³⁹ 262 US 390 (1923). Holmes and Sutherland dissented. Butler OT 1922 Docket Book.

²⁴⁰ 277 US 438 (1928). Holmes, Brandeis, Butler, and Stone dissented. Stone OT 1927 Docket Book.

²⁴¹ 272 US 52 (1926). Holmes, McReynolds, and Brandeis dissented. Stone OT 1926 Docket Book.

²⁴² *Frick v Webb*, 263 US 326 (1923); *Webb v O’Brien*, 263 US 313 (1923); *Porterfield v Webb*, 263 US 225 (1923); *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.

²⁴³ 261 US 525 (1923). Taft, Holmes, and Sanford dissented. Brandeis did not participate. Butler OT 1922 Docket Book.

²⁴⁴ 269 US 530 (1925).

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.”²⁴⁵ In the 1927 case of *Donham v West-Nelson Co*,²⁴⁶ 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.²⁴⁷

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.²⁴⁸ 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.*²⁴⁹

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;²⁵⁰ in *Fairmont Creamery Co v Minnesota*, which invalidated regulation of the prices at which dairy products were purchased and sold;²⁵¹ 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;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.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;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.

²⁵¹ 274 US 1 (1927). Holmes, Brandeis, and Stone dissented without opinion. Stone OT 1926 Docket Book.

²⁵² 273 US 34 (1927). Holmes, Brandeis, and Stone dissented. Stone OT 1926 Docket Book. Stone placed a question mark next to his own conference vote with the majority.

²⁵³ 278 US 460 (1929). Holmes and Brandeis dissented. Stone OT 1928 Docket Book.

²⁵⁴ 270 US 402 (1926). Holmes, Brandeis, and Stone dissented. Stone OT 1925 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

²⁵⁵ 268 US 588 (1925). Taft, McReynolds, and Sanford dissented. Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

²⁵⁶ 268 US 563 (1925). Taft, McReynolds, and Sanford dissented. Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

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.

²⁵⁹ 279 US 461 (1929). Holmes, Brandeis, and Stone dissented. Butler took no part in the decision. Stone OT 1928 Docket Book.

²⁶⁰ 277 US 142 (1928).

their dissenting brethren.²⁶¹ In *Panhandle Oil Co v Mississippi*,²⁶² 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.²⁶³ 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.²⁶⁴ And in *Macallen v Massachusetts*,²⁶⁵ these same three Justices dissented both at conference and from the published decision invalidating a state tax on the income from federal securities.²⁶⁶

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.

²⁶¹ Stone OT 1927 Docket Book.

²⁶² 277 US 218 (1928).

²⁶³ Stone OT 1927 Docket Book.

²⁶⁴ 277 US 508 (1928). 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*,²⁶⁷ the Court upheld the Grain Futures Act of 1922.²⁶⁸ 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*,²⁶⁹ and which the Court had applied to uphold the Packers and Stockyards Act of 1921²⁷⁰ in the 1922 decision of *Stafford v Wallace*.²⁷¹ Holmes predictably had joined Taft's majority opinion in *Stafford*, but at the conference vote in *Olsen*, he mysteriously voted with McReynolds and Sutherland.²⁷² 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*,²⁷³ 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

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.²⁷⁴ The decision was accorded a critical reception,²⁷⁵ but the Nebraska legislature soon enacted a revised bread-weight regulation designed to meet the Court's objections.²⁷⁶ The Court unanimously upheld the revised statute in the 1934 case of *Petersen Baking Co v Bryan*.²⁷⁷ In that conference, Van Devanter passed, but everyone else voted to sustain the measure.²⁷⁸

In *Miles v Graham*,²⁷⁹ 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*²⁸⁰ 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 the 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."

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).

²⁷⁶ See *P.F. Petersen Baking Co v Bryan*, 290 US 570, 572 (1934).

²⁷⁷ 290 US 570 (1934).

²⁷⁸ Stone OT 1933 Docket Book.

²⁷⁹ 268 US 501 (1925).

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.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.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.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*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.²⁸⁵ *Buck v Kuykendall*²⁸⁶ and *George W. Bush & Sons v Maloy*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

²⁸¹ Butler OT 1924 Docket Book.

²⁸² Butler OT 1924 Docket Book; Stone OT 1924 Docket Book.

²⁸³ Mason, *Harlan Fiske Stone* at 790 n (cited in note 4).

²⁸⁴ 264 US 150 (1924).

²⁸⁵ Butler OT 1923 Docket Book.

²⁸⁶ 267 US 307 (1925).

²⁸⁷ 267 US 317 (1925).

at the *Bush* conference he was joined by Sutherland.²⁸⁸ When the Court invalidated a similar requirement for intrastate carriers under the Due Process Clause in *Frost & Frost Trucking Co v R.R. Commission of California*,²⁸⁹ Holmes, McReynolds, and Brandeis dissented. At the conference, however, they had been joined by Sanford, who ultimately acquiesced in the decision.²⁹⁰

In *Carroll v United States*,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.”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

²⁸⁸ Butler OT 1924 Docket Book. See also *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.

²⁸⁹ 271 US 583 (1926).

²⁹⁰ Stone OT 1925 Docket Book.

²⁹¹ 267 US 132 (1925).

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

that these are the remarks of Taft at the March 29 conference held after reargument on March 14.²⁹³ 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.”²⁹⁴ 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.²⁹⁵ Butler and Sanford had acquiesced in the majority’s judgment, while McReynolds remained resolute in his defection.²⁹⁶

*Black & White Taxicab Co v Brown & Yellow Taxicab Co*²⁹⁷ 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 Frankfurter [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 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 *Liggett 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.

³⁰⁷ 273 US 418 (1927).

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

concurrent separately only because they felt themselves bound by the authority of *Duplex Printing v Deering*,³¹³ an earlier decision that they were unable to distinguish.³¹⁴ 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.”³¹⁵

The Court’s nonunanimous decisions also occasionally featured the phenomenon of defection. Perhaps the best-known instance occurred in *Village of Euclid v Ambler*,³¹⁶ a landmark decision upholding a comprehensive zoning law. The case was originally argued in January of 1926,³¹⁷ and then reargued in October of that year.³¹⁸ 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.”³¹⁹ 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.

³¹³ 254 US 443 (1921).

³¹⁴ 274 US at 55 (Sanford concurring); 274 US at 55-56 (Stone concurring).

³¹⁵ W.H. Taft to Robert A. Taft, Apr 10, 1927, quoted in Mason, *Harlan Fiske Stone* at 259 (cited in note 4).

³¹⁶ 272 US 365 (1926).

³¹⁷ Stone OT 1925 Docket Book.

³¹⁸ 272 US 365.

³¹⁹ Alfred McCormack, *A Law Clerk’s Recollections*, 46 Colum L Rev 710, 712 (1946).

persistent hammering...Sutherland began to doubt the correctness of his conclusion and asked for reargument. On the second hearing Sutherland changed his mind.”³²⁰

This story has been repeated many times,³²¹ 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.”³²² 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,³²³ 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.”³²⁴ Some have maintained that the reargument was in fact suggested by Stone, who “as a new member of the

³²⁰ Mason, *Harlan Fiske Stone* at 252 (cited in note 4).

³²¹ See, for example, David J. Garrow, “*The Lowest Form of Animal Life*”? : *Supreme Court Clerks and Supreme Court History*, 84 *Cornell L Rev* 855, 862 (1999); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 *Wm & Mary Bill Rights J* 1, 70 n 329 (1997); Miriam Galston, *Activism and Restraint: The Evolution of Harlan Fiske Stone’s Judicial Philosophy*, 70 *Tulane L Rev* 137, 162 (1995).

³²² Post, 78 *BU L Rev* at 1543 n 259 (cited in note 3) (quoting Memorandum from Sutherland to Taft (Taft Papers, Reel 273)).

³²³ Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 *J S Ct Hist* 79, 87 n 39 (1997) (McCormack’s recollection “is almost certainly garbled”).

³²⁴ Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *Yale J Reg* 91, 95 n 17 (2011).

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

³²⁵ Arthur V.N. Brooks, *The Office File Box--Emanation from the Battlefield*, in Charles M. Haar and Jerold S. Kayden, eds, *Zoning and the American Dream: Promises Still to Keep* 3, 17 (APA Planners 1989).

³²⁶ Timothy Alan Fluck, *Euclid v Ambler: A Retrospective*, 52 J Am Planning Assn 326, 331-32 (1986).

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.

³³⁰ 274 US 200 (1927).

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

³³⁹ Stone OT 1927 Docket Book.

³⁴⁰ 265 US 457 (1924).

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.³⁴¹

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,³⁴² was unanimous to affirm at conference.³⁴³ And in *Toyota v United States*, which held that a Japanese national born in Japan was not eligible for naturalization,³⁴⁴ the vote at conference was unanimous,³⁴⁵ 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 discussions³⁴⁶ and his comments on the draft opinions of others. But his “pen paralysis,” as

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.

³⁴⁴ 268 US 402 (1925).

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.³⁴⁷ During the nine Terms of the Taft Court, Van Devanter authored only ninety-eight (6.07 %) of the Court's majority opinions.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,"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 Taft³⁵⁰ and Brandeis.³⁵¹ Sutherland and Sanford also traded cases in late April.³⁵² Van Devanter, who wrote sixteen (7.11 %) of the Term's majority opinions,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.³⁵⁴ That Term he released a case to Brandeis³⁵⁵ and one to Sutherland,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.").

³⁴⁷ Merlo J. Pusey, *2 Charles Evans Hughes* 284 (Macmillan 1951).

³⁴⁸ Renstrom, *The Taft Court* at 99 (cited in note 4).

³⁴⁹ Post, 85 Minn L Rev at 1295 n 86 (cited in note 2).

³⁵⁰ No 330, *Dier v Banton*, transferred 4/28/23. Butler OT 1922 Docket Book.

³⁵¹ No 880, *Collins v Loisel*, transferred 5/6/23. Butler OT 1922 Docket Book.

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).

³⁵³ Renstrom, *The Taft Court* at 264 (cited in note 4). Van Devanter wrote no concurring opinions during the Term. Id.

³⁵⁴ Renstrom, *The Taft Court* at 265 (cited in note 4).

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.

³⁵⁶ Nos 324 and 336, *Idaho Irrigation Co v Gooding*. Butler OT 1923 Docket Book.

dissented.³⁵⁷ That year McReynolds also gave up two cases to Taft.³⁵⁸ During the 1924 Term, Taft became ill, and relied upon Van Devanter to run the conference.³⁵⁹ Van Devanter's output dropped to twelve (5.22 %) of the Court's majority opinions and two dissents,³⁶⁰ as he gave up eight cases.³⁶¹ In January Van Devanter took on a case initially assigned to Sutherland, but by early April he had relinquished it to Brandeis.³⁶² Taft transferred one to McKenna³⁶³ and received one from Brandeis;³⁶⁴ Brandeis absorbed one from McReynolds;³⁶⁵ and Holmes took one from Sanford.³⁶⁶

Van Devanter's output rebounded for the 1925 Term, during which he authored seventeen (8.13 %) of the majority opinions and one dissent.³⁶⁷ Stone's docket book contains no indication that any opinions were reassigned during the Term.³⁶⁸ During the 1926 Term,

³⁵⁷ 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).

³⁵⁸ Nos 283-85, *Railroad Commission of California v Southern Pacific Co*, transferred 2/16/24; No 117, *Carroll v United States*, transferred 5/24/24. Butler OT 1923 Docket Book. McReynolds ultimately dissented in *Carroll*. 267 US at 163 (McReynolds dissenting).

³⁵⁹ Clare Cushman, *Courtwatchers: Eyewitness Accounts in Supreme Court History* 150 (Rowman & Littlefield 2011).

³⁶⁰ Renstrom, *The Taft Court* at 266 (cited in note 4).

³⁶¹ 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).

³⁶² No 443, *Ray Consolidated Copper Co v United States*. Butler OT 1924 Docket Book.

³⁶³ No 147, *Davis v Manry*. Butler OT 1924 Docket Book.

³⁶⁴ No 144, *Wells v Bodkin*. Butler OT 1924 Docket Book.

³⁶⁵ No 229, *St. Louis, K and Southeast Railroad Co v United States*. Butler OT 1924 Docket Book.

³⁶⁶ No 130, *Yeiser v Dysart*. Butler OT 1924 Docket Book.

³⁶⁷ Renstrom, *The Taft Court* at 267 (cited in note 4).

³⁶⁸ 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*; and Sutherland, No 51, *Sacramento Navigation Co v Salz*. Stone OT 1926 Docket Book.

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 Commission v Chicago, Rock Island & Pacific Co*. Stone OT 1926 Docket Book.

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 McCarl*. Stone OT 1926 Docket Book.

³⁷⁶ Renstrom, *The Taft Court* at 269 (cited in note 4).

absorbed none.³⁷⁷ Holmes gave one to Butler,³⁷⁸ and he took a case from Sutherland³⁷⁹ in which the latter ultimately dissented.³⁸⁰

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.³⁸¹ It appears that Taft had determined to give him fewer assignments, as he gave up only two cases that year and again absorbed none.³⁸² The only other recorded reassignments for the 1928 Term were two cases transferred from Sanford, one to Holmes³⁸³ and one to McReynolds.³⁸⁴ 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

³⁷⁷ Van Devanter transferred two opinions to McReynolds, No 131, *Mellon v Goodyear*, and No 225, *Plamals v The Pinar Del Rio*; two to Sutherland, No 62, *Grosfield v United States*, and No 207, *Montana National Bank of Billings v Yellowstone County*; one to Butler, No 139, *Quaker City Cab Co v Pennsylvania*; and one to Sanford, No 205, *National Leather Co v Massachusetts*. Stone OT 1927 Docket Book.

³⁷⁸ No 110, *Donnelley v United States*. Stone OT 1927 Docket Book.

³⁷⁹ Nos. 407-18, *Ferry v Ramsey*. Stone OT 1927 Docket Book.

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).

³⁸² Van Devanter gave up No 305, *United States v Fruit Growers' Express Co*, to Taft and No 8, *Highland v Russell Car and Snowplow Co*, to Butler. Stone OT 1928 Docket Book.

³⁸³ No 513, *United States v American Livestock Commission Co*. Stone OT 1928 Docket Book.

³⁸⁴ No 530 *Bekins Van Lines, Inc v Riley*. Stone OT 1928 Docket Book.

to another Justice.³⁸⁵ In addition, Brandeis took a case from Sutherland,³⁸⁶ and Hughes took one from Holmes.³⁸⁷ Van Devanter's output dropped to one majority opinion, one concurrence, and two dissents.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.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 *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

³⁸⁵ See No 31, *Gunning v Cooley*, transferred from Taft to Butler; Nos 15-16, *Wheeler Lumber Bridge and Supply Co v United States* and *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, *National Fire Insurance Co of Hartford v Thompson*, transferred from Sanford to Butler; No 19, *Alexander Sprunt and Son v United States*, transferred from Sanford to Brandeis; No 248, *Nogueira v. New York, New Haven & Hartford Railroad Co*, transferred from Sanford to Hughes; No 356, *Lucas v Pilliod Lumber Co*, transferred from Sanford to McReynolds; and Nos 10-11, *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. *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).

³⁸⁶ Nos 443-45, *Campbell v Galeno Chemical Co*. Stone OT 1929 Docket Book.

³⁸⁷ Nos 372-74, *City of Cincinnati v Vester*. Stone OT 1929 Docket Book.

³⁸⁸ Renstrom, *The Taft Court* at 271 (cited in note 4).

³⁸⁹ No 122, *Federal Radio Commission v General Electric Co*. Stone OT 1929 Docket Book.

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 Baldrige* 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.³⁹⁰ 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.³⁹¹

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.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.³⁹³

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.”)

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.³⁹⁴ 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

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 *Liggett*. 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*.

%.³⁹⁵ 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."³⁹⁶

³⁹⁵ 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 Devanter 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 Devanter at 3.9 %. As Dean Post observes, however, these percentages might be misleading for the reason that Taft and Van Devanter 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 Devanter 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).

³⁹⁶ 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 Devanter did so at the highest rate and that McKenna was the least successful in doing so. Following Van Devanter 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. McKenna accounted for none of these, thus mirroring Dean Post's aggregate result. Similarly, though he wrote comparatively few opinions, Van Devanter 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.”³⁹⁷ 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.”³⁹⁸ 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 others 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 %.³⁹⁹

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,⁴⁰⁰ or a rate

(concluding 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).

³⁹⁸ 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).

³⁹⁹ Post, 85 Minn L Rev at 1333 n 203, 1387 (cited in note 2).

⁴⁰⁰ 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).

⁴⁰⁴ Howard Jr, 62 *Am Pol Sci Rev* at 45 (cited in note 24).

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.

⁴⁰⁵ See Barry Cushman, *The Hughes Court Docket Books: The Early Terms, 1930-1933*, 40 J Sup Ct Hist 103 (2015); Barry Cushman, *The Hughes Court Docket Books: The Late Terms, 1937-1940*, 55 Am J Leg Hist 361 (2015).

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,⁴⁰⁸ Holmes fourteen,⁴⁰⁹ Brandeis eight,⁴¹⁰ and Van Devanter six.⁴¹¹ 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.⁴¹²

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.⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵ 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

he had been accustomed to a rather different set of procedural rules and substantive rules intermeshed with procedure, so that some things which were decided one way in the federal courts would have been decided differently in New York,” and that this is what may have accounted for the Justice’s allegedly frequent changes of vote between the conference and the final vote on the merits. Freund, 26 Ohio St L J at 227 (cited in note 31). This suggests the possibility that in some instances a greater degree of freshman vote fluidity might be exhibited in less salient cases.

⁴¹³ 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, *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).

⁴¹⁴ John Knox, *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”).

⁴¹⁵ See Johnson, Spriggs II, and Wahlbeck, 39 L & Society Rev 349 (cited in note 33).

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.