MR. TAFT BECOMES CHIEF JUSTICE

Robert C. Post

Franklin Roosevelt once remarked that America was the "place of the second chance." He could have pointed to the remarkable career of William Howard Taft as proof. Crushingly defeated in his bid for a second term as President in 1912, Taft was resurrected as Chief Justice of the Supreme Court of the United States on June 30, 1921. It was, as The New York Times later remarked, "a 'come-back' unprecedented in American political annals." Taft became the only man in American history to head two distinct branches of the federal government. The combination proved propitious, for Taft's presidential perspective forever changed both the role of the Chief Justice and the institution of the Court.

Taft was, as he himself was first to acknowledge, a very fortunate man. The definitive biography is by Henry F. Pringle, and I will not recapitulate it here. Suffice it to say that Taft was born in 1857 to a prominent Cincinnati attorney, Alphonso Taft, who in 1876 had served in President Grant's cabinet as both Secretary of War and Attorney General. After his graduation from Yale in 1878, Taft capitalized on these impeccable Republican connections, as well as on his own

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2. Taft Gained Peaks in Unusual Career, N.Y. TIMES, Mar. 9, 1930, at 27. The New Republic characterized the remarkable shape of Taft's career in this way:

   It can be said of William Howard Taft that at the moment when he leaves the Supreme Court his reputation with the American people is undoubtedly higher than ever before. His term as President saw a steady diminution in his prestige which was reflected in the dismal failure of his candidacy in 1912, at a time when, according to the general political custom of America, he should have had an almost automatic reelection. Since then, by his modesty, geniality and unflagging energy in his work, he has rehabilitated himself to an extent which no one would have ventured to predict eighteen years ago.

The Week, NEW REPUBLIC, Feb. 12, 1930, at 310.


4. "Fortune has been so good to me in every way." Letter from William Howard Taft to Charles P. Taft (Apr. 17, 1923), microformed on William H. Taft Papers, Reel 252 (Library of Congress) [hereinafter Taft Papers].

manifest talent, to slide easily from position to position. In 1880, after receiving a degree from the Cincinnati Law School, Taft was appointed assistant prosecuting attorney of Hamilton County in Ohio. Seven years later he was appointed a Superior Court Judge. In 1890 President Harrison made him United States Solicitor General, and two years later Harrison elevated him to the Sixth Federal Circuit Court. President McKinley appointed him the first Governor of the Philippines in 1901, and in 1904 he became Theodore Roosevelt’s Secretary of War. Hand-picked by Roosevelt as his successor, Taft virtually inherited the Presidency in 1908. “Whenever an office fell,” Taft remarked, “my plate was up.”

As President, Taft’s good fortune temporarily ran out. It would have taken great political skill to bridge the widening gap between the progressive and conservative wings of the Republican party, but Taft was no such politician. He possessed neither charisma nor raw political talent. His fate was sealed when Teddy Roosevelt, his erstwhile mentor, decided to split the Republican vote by running for president on the ticket of the Progressive Party. Caught between Roosevelt and Wilson, Taft was butchered in the 1912 election. He received only eight electoral votes, representing the states of Vermont and Utah.

7. William Allen White offers an evocative portrait of Taft’s political ineptitude:

[I]n all his long career of office-holding, beginning with 1881 and lasting through his life until he ran for President, he was elected to office only once, and that as Judge of the Superior Court of Ohio, where he had no contact with politics in his campaign and served but a few months. . . . It was well said [of] him by O. K. Davis, a reporter who knew him for a dozen years at the height of his political activities, that Taft’s bump of political sagacity was a dent. . . . Figuratively, he used to come out upon the front stoop of the White House and quarrel petulantly with the American people every day. . . . He conceived a statesman’s job as an opportunity to do his work honestly, intelligently, courageously . . . . It was impossible even for his bitterest enemies to cast him for a villain in their hours of curdling hate, because of the easy gurgle of his laugh and the sweet insouciance of his answer which turned away wrath . . . . And the American people who chastised him, observing him chuckle as he rubbed the red place where their rage had blistered him, loved him for his merry countenance.

8. Wilson received 6,286,214 popular votes; Roosevelt 4,126,020, and the incumbent Taft only 3,483,922. “Mr. Bryan said in the course of the campaign that I had been elected to the Presidency by a large majority and would be relegated to private life by a unanimous vote,” Taft reported to the Republican Clubs of Boston and New York two months after the disastrous campaign. President William Howard Taft, Address at the Banquet of the Union League Club of New York 3 (Jan. 4, 1913), microformed on Taft Papers, supra note 4, Reel 381.
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It was a near total repudiation, but Taft received it graciously. In a characteristic display of a wit that was simultaneously self-deprecating and also sharply pointed at Roosevelt, Taft told the Lotos Club in New York that a swift dose of chloroform would be the best method of disposing of ex-presidents:

The proper and scientific administration of a dose of chloroform or of the fruit of the lotos tree, and the reduction of the flesh of the thus quietly departed to ashes in a funeral pyre to satisfy the wishes of his friends and the families, might make a fitting end to the life of one who has held the highest office, and at the same time would secure the country from the troublesome fear that the occupant could ever come back. His . . . demise in the honorable ceremony . . . would relieve the country from the burden of thinking how he is to support himself and his family, would fix his place in history, and enable the public to pass on to new men and new measures.9

Although Taft decided to retire to the Yale Law School as the Kent Professor of Constitutional Law,10 he was also determined to remain

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When I read what he said I thought he was as poetic and as unreliable in his prophecies as usual, but in truth nothing but Vermont and Utah prevented a literal fulfillment of his forecast, and he was nearer than ever before in his life to a fact. I think I have separated myself sufficiently from the humiliation of defeat to be able to look upon the history of my administration with calmness and clearness of vision, affected only by the fact that I was one of the principal actors and naturally inclined to give the best color to everything which I did or attempted to do.

Id.

9. PRINGLE, supra note 5, at 845–46 (quoting Taft).

10. Karl Llewellyn was Taft’s student at Yale, and he has bequeathed us a piquant portrait of Taft the law professor:

He knew nothing of case teaching. Someone would be asked to state the case. Taft would correct the statement as needed—which closed the “discussion.” Then—and he sold the class (including me, may the Lord forgive me) the idea that this was only for interest, for anecdote—there would be five to fifteen minutes from Taft, the man of politics; Taft, the student of governmental history; Taft, the student of life and man; Taft, who both from inside and from out had seen political arena, the bench, and all varieties of executive office . . . Taft imparted to us by his manner his own clear feeling that it was no part of “the law” or, really, of “the course.” Thus—almost the only piece which is still with me—”And I said to Holmes: ‘But do you think it was right or fair to leave that fact out of consideration?’ And,” continued Taft with the mountainous chuckle, “he said, ‘I’m sorry; I didn’t read that far in the record.’”

Such phenomena spell a man who felt the bearing of all the “background” and “human” and “situation” factors, and felt also deep value in communicating them, but whose conscious and doctrinal thinking saw them nevertheless as “outside” . . .

The matter is clinched by Taft’s treatment of doctrine itself. From time to time . . . he would produce an intellectual scalpel and slice the court’s phrased ruling down into an almost nothing. You then got, with another half-ton chuckle: “Mr. Justice Zilch sometimes let enthusiasm run away with him!”

Now I had a good brain and no sense, and this scalpel technique was as exciting to the
active and publicly visible. He became President of the American Bar Association in 1913-14, a regular columnist for the Philadelphia Public Ledger, and a frequent and prominent speaker on matters of national interest. He particularly stressed the need to maintain a strong and efficient judicial system. Taft projected an image of such earnest and disinterested good will that he quickly became, in the famous phrase of the journalist George Harvey, "our worst licked and best loved

one as it was uninhibited by the other. I started volunteering applications of it to opinions which Taft had never had professional reason to distinguish. Such admiring misuse of his technique... seemed to him that of a boor and a blasphemer. He complained to the Dean: he did not want to be subjected to half-grown children in the law "criticizing the Supreme Court of the United States."


12. As The New York Times observed in 1914, Taft may not be "front page" news, but "for a man nominally in retirement he both gets and takes a lot of newspaper space." Can He Have Meant the Colonel?, N.Y. TIMES, Oct. 20, 1914, at 12. See also Notes from the Capital, NATION, Dec. 30, 1915, at 771 ("[Taft]s] ready response to calls from all over the Union, for occasions which will assure him a large audience on the spot and a yet larger one through the press, enables him to interpret for the American people many of the political and social omens of the day, the full significance of which might otherwise be overlooked or misinterpreted."). Muckraking journalist Ray Stannard Baker has left us with a fascinating portrait of one of Taft's speeches:

While I found myself in rather hearty disagreement with nearly every position he took... still I was curiously interested both in the man himself and in what he said. He is a really significant figure today in our public life: he represents a definite point of view.

While Mr. Taft was in the White House he never seemed quite real. He was always a little out of focus—subdued by his environment. . . . The other night, listening to his address, I felt that here, at last, was the real Mr. Taft—saying with great vigor what he believes—and has always believed. ... [B]ehind his words one feels the full thrust of his sincere and robust personality.

He looks even happier than he did when he was in the White House. He is happier, his friends say. He is much in demand as a lecturer ... .

I was interested in what Mr. Taft said. It may set men to thinking more keenly upon the principles of government. It is perhaps as important to have honest men who hold back, as it is to have honest men who go ahead.

Ray Stannard Baker, Signs of the Times as Seen by Mr. Taft, HARPER'S WkLY., May 9, 1914, at 7–8. In 1915 The Nation reported that five federal judges "were unanimous in their opinion of the value of the service [Taft] was doing the country by his temperate public discussion of current history from the point of view of one who had recently had much to do with making it." Notes from the Capital, supra, at 770.

13. See, e.g., William H. Taft, The Attacks on the Courts and Legal Procedure, 5 KY. L.J. 3 (1916). Taft advocated judicial reforms designed to remedy "the delay in hearing and decision of causes" and "the excessive cost of litigation." Id. at 10. Taft was particularly concerned publicly to oppose "the attack upon our judiciary and the proposal by judicial recall, or recall of judicial decisions, to destroy its independence, and thus to take away from the arch of government the keystone." President William Howard Taft, Address at the Massachusetts State House (Mar. 18, 1912), as reprinted in Taft for Primary with Safeguards, N.Y. TIMES, Mar. 19, 1912, at 4. See William Howard Taft, The Future of the Republican Party, SATURDAY EVENING POST, Feb. 14, 1914, at 3–4, 32–33; William Howard Taft, The Courts and the Progressive Party, SATURDAY EVENING POST, Mar. 20, 1914, at 9.
Two aspects of Taft’s public rehabilitation are particularly significant. The first is his collegial co-chairmanship, with labor attorney Frank P. Walsh, of the National War Labor Board. Created by Woodrow Wilson to mediate labor disputes during World War I, the Board explicitly recognized “[t]he right of workers to organize in trade-unions and to bargain collectively, through chosen representatives,” and it affirmed that this “right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.” The Board shocked industrial leaders by declaring official support for the right of employees to receive a “living wage” that would “insure the subsistence of the worker and his family in health and reasonable comfort.” In the course of defending these rights, Taft developed a close working relationship with Walsh, voting with him against employer representatives on the Board.

Before his stint on the National War Labor Board, Taft had been implacably opposed by organized labor, which fiercely objected to his possible nomination to the Supreme Court in 1916 because Taft was “known among labor men everywhere as the father of the offensive injunction rule of procedure in labor disputes” and because Taft’s “emphatically pronounced” “opposition to labor organizations and the exercise by them of their normal and legitimate functions” rendered

14. Richard V. Oulahan, President Names Hughes Chief Justice as Taft Resigns Because of Ill Health When Trip to Asheville Fails to Aid Him, N.Y. TIMES, Feb. 4, 1930, at 2. The observation was a common one. The New York Times observed, for example, that Taft “was more widely beloved as an ex-President, even by those who had ostracized him politically, than he was as President, and was welcomed back to the exalted position of Chief Justice not only with the ‘highest admiration,’ . . . but with a popular affection such as few men in the history of the nation have enjoyed.” Editorial, A Modern Aristides, N.Y. TIMES, Sept. 17, 1927, at 16.

15. In his chairmanship of the controversial United States Commission on Industrial Relations, which had been created by Woodrow Wilson in 1913, Walsh “stood out as an undaunted agitator, and became the leader around whom American radicalism has tried to rally.” Industrial Conflict, NEW REPUBLIC, Aug. 28, 1915, at 89, 90. For a good discussion of Walsh’s efforts, see JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900–1918, at 172–213 (1968).

16. See WILLIAM HOWARD TAFT, National War Labor Board (Nov. 26, 1918), reprinted in COLLECTED EDITORIALS, supra note 11, at 124, 124.


18. Id. at 44.


him abhorrent. His co-chairmanship of the War Labor Board, however, appeared to have softened Taft’s attitude toward organized labor, which in turn “resulted in a change of heart toward him by many labor leaders.”

Taft, 78 U. PA. L. REV. 585, 587–601 (1930). In his inaugural address as President, Taft had staunchly defended “the power of the federal courts to issue injunctions in industrial disputes.” William Howard Taft, Inaugural Address (Mar. 4, 1909), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 197 (1965). As to that power, Taft announced, “my convictions are fixed. Take away from the courts, if it could be taken away, the power to issue injunctions in labor disputes, and it would create a privileges class among the laborers and save the lawless among their number from a most needful remedy available to all men for the protection of their business against lawless invasion. . . . The secondary boycott is an instrument of tyranny, and ought not to be made legitimate.” Id. As a result of such attitudes, Samuel Gompers had himself written to Woodrow Wilson to express his dismay that Taft might be nominated to the Supreme Court to fill the vacancy created by the death of Justice Lamar. Letter from Samuel Gompers to Woodrow Wilson (Jan. 7, 1916) (on file with the National Archives, Dep’t of Justice, Taft Folder). Taft, Gompers said, “was known as the father of [the] abuse of the writ of injunction.” Id.

There is lacking in Mr. Taft’s attitude toward fundamental principles of human and industrial justice an indefinable something that we call “heart understanding”—an understanding alone which enables the possessor to project himself into the experiences, the sorrows, the yearnings of others. Without this quality justice becomes cold and impersonal—in fact ceases to be justice and deteriorates into legalism.

Mr. Taft’s experiences have not given him a knowledge of the affairs of the world of labor, and the bent of his mind has made it impossible for him to secure that knowledge by intuition and human sympathy.

Id.

21. Thus, for example, the Omaha Bee observed that “in Omaha last summer [Taft] made the statement that he had almost entirely altered his views on the labor question, a result of his experience on the War Labor board.” Taft for Chief Justice, OMAHA BEE, July 2, 1921, at 4. For an example of Taft’s altered attitude, see, e.g., Carl W. Ackerman, Industrial Security Threatened Only by Bourbons, Taft Says, PUB. LEDGER (Phila.), Oct. 13, 1919, at 19 (“The Bourbons of Business are the reactionaries who will have nothing to do with labor or labor leaders. The Bourbons of Labor are the radicals, and they wish to have nothing whatever to do with business or business men. Both groups are agitators. Both injure the country.”). In truth, while Taft’s “heart understanding,” Gompers, supra note 20, of the challenges faced by organized labor, and of the intractable unreasonableness of many large employers, appears to have been enhanced by his experiences on the War Labor Board, there is little evidence that his settled convictions were significantly altered. See Mason, supra note 20.

22. Taft is Nominated As Chief Justice of U.S. Supreme Court, DALLAS MORNING NEWS, July 1, 1921, at 1. See Taft at Williamstown To-morrow, TIMES-UNION (Albany, N.Y.), July 28, 1921, at 4 (“Taft’s work as a member of the War Labor Board, during the war, did much to allay opposition to his supreme bench appointment on the theory that he was ultra-conservative. His decisions on the board were, in the main, more satisfactory to labor than the employers.”). Thus Frank Walsh wrote Taft after the latter’s appointment, “The great people of our equally great nation will feel sure that the solemn tribunal of Justice will offer a place of refuge for the weak and oppressed as well as the rich and powerful. It is with a feeling of great honor that I pen these poor lines to the one of few Chief Justices that carries into that sacred office a real, generous soul and a great, kind heart.” Letter from Frank P. Walsh to William Howard Taft (Aug. 2, 1921), microformed on Taft Papers, supra note 4, Reel 231. And Matthew Woll, president of the International Photo-Engravers’ Union, wrote:

My association with you as a member of the National War Labor Board has convinced me of your great fitness for this exalted and most responsible position . . . . and I feel too that your intimate contact with industrial relations has given you a practical vision of our
In March 1921, for example, Samuel Gompers, although angry at Taft's public support of the Supreme Court's anti-labor interpretation of the Clayton Act in *Duplex Printing Press Co. v. Deering*, nevertheless forthrightly conceded that

in some important respects, Mr. Taft has made much progress since his occupancy of the White House. He has given much proof of an increasing breadth of vision. He has shown a growing comprehension that has led a great many well-disposed men and women to hope at times that a new and progressive William H. Taft was emerging from the shell of the extremely conservative and easy-going William H. Taft, who once was described as "a very large body completely surrounded by politicians." 24

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Letter from Matthew Woll to William Howard Taft (Aug. 3, 1921), *microformed on Taft Papers, supra* note 4, Reel 231. Taft answered Woll by acknowledging "the advantage that came to all, I hope, and to me, I think, of a more intimate knowledge of the attitude of both sides in the relation between labor and capital. It is an experience that I value much." Letter from William Howard Taft to Matthew Woll (Aug. 10, 1921), *microformed on Taft Papers, supra* note 4, Reel 232. Reporter Gus Karger, Taft's intimate friend, wrote Taft to observe that Samuel Gompers himself was also pleased by Taft's appointment:

I had a very pleasant interview at the White House today with old Sam Gompers. "In the language of the street," he said, "Mr. Taft's appointment tickled me to death. I know of no one who has his legal attainments, coupled with his experience". He testified to the fact that you had "broadened" and paid tribute to your service on the War Labor Board. "You know we have been often on opposite sides", he added. "But no matter how much we may have differed, I always entertained a very warm admiration for him." Coming from an old political adversary, I call it plumb handsome.

Letter from Gus Karger to William Howard Taft (Sept. 3, 1921), *microformed on Taft Papers, supra* note 4, Reel 233. *See also Taft Gets the Biggest of Plums, NONPARTISAN LEADER, July 25, 1921, at 4* ("Though his administration as president was a failure and he carried only two of the 48 states when he ran for re-election, he functioned well on the war labor board, where he was associated with men who understood labor's problems and where he had an opportunity to get labor's viewpoint first hand, and see the greed of big business employers. . . . Taft wants to be fair, we think, and it may be that on the court, where he is compelled to hear both sides of every question, he may turn out better than progressives predict.").


24. Samuel Gompers, *The Courts and Mr. Taft on Labor*, 28 AM. FEDERATIONIST 220 (1921). Others on the left were less forgiving. See, e.g., Mr. Chief Justice Taft, *NEW REPUBLIC*, July 27, 1921, at 230, 231 ("The press greets Mr. Taft's appointment with almost universal acclaim. . . . Whence the change from Taft, the target of the Progressives, to Taft, their acclaimed? Surely it's the same Mr. Taft. True, during the war there was discernible in him a slight interlude, due partly to the general wooing of Labor, and partly to Mr. Taft's genial submissiveness to the constant stimulus of Frank Walsh. But it was only an interlude. The same stand-pat pieties and timidity which led Mr. Taft to denounce
The second important aspect of Taft’s rehabilitation was his support of Woodrow Wilson’s campaign to enter the League of Nations. Taft had always been committed to the cause of substituting legal procedures for war. As President he had negotiated and signed arbitration treaties with Great Britain and France “that were revolutionary when compared with previous agreements for the pacific settlement of disputes,” because they required arbitration “in all matters of national interest and honor.”

The treaties came under fierce attack by, among others, Theodore Roosevelt, who charged that they reflected an “ingrained personal timidity” that was “more afraid of war than of any dishonor, personal or national.” The treaties were so mutilated by the Senate that Taft withdrew them.

After his defeat in 1912, Taft continued to press the cause of international arbitration, assuming in 1915 the leadership of the League to Enforce Peace. Subsequently, when Woodrow Wilson sought to

Roosevelt for ‘laying the axe at the root of the tree’ and ‘profaning the Ark of the Covenant’ have inevitably made him an easy prey to post-war fears and hysteria.”); Harding May Fill Supreme Tribunal with Sutherland, WORLD, May 23, 1921, at 7 (“William Howard Taft’s friends have by no means given up hope of his succession to the Chief Justiceship, though organized labor is objecting to him because of the views he has indicated in recent publications, which have apparently quite neutralized the favor he gained on the War Labor Board.”).


26. Theodore Roosevelt, The Peace of Righteousness, OUTLOOK, Sept. 9, 1911, at 66. Taft responded by ridiculing war, the only alternative to arbitration, as the “absurd” modern equivalent of the old “duello.”

Of course you say if your national honor is involved you want to go on to the field of battle and vindicate your honor. That is all right if you have got the heaviest battalions and the most guns and the best disciplined army and you win. Then you parade up and down the battlefield and your leaders become Presidents and you have vindicated your honor, but if the nation that has insulted you has a larger number of troops and a better disciplined army and better guns and you are driven off the field of battle, and you have to surrender—that does not satisfy your honor very well. Does it decide anything[?] Does battle decide anything except that men who win have the strongest army? Does it decide anything about honor[?] Does it decide anything of vital interest on any basis of equality or justice[?] So I say there is nothing dishonorable but there is everything moral and there is everything progressive in substituting for war any question of national honor or of vital interest a decision by a board of arbitration of just and impartial men who shall proceed in their decision on principles of law and equity.

President William Howard Taft, Address at Pocatello, Idaho (Oct. 6, 1911), microformed on Taft Papers, supra note 4, Reel 568.

27. PRINGLE, supra note 5, at 928–36. See WILLIAM HOWARD TAFT, TAFT PAPERS ON LEAGUE OF NATIONS (Theodore Marburg & Horace E. Flack eds., 1920). In 1912, Taft wrote Elihu Root that his Yale professorship would “enable me to proclaim the evangel of constitutionalism and international peace—the two subjects that I have been anxious to use the rest of my life so that someday we shall
convince the Senate to approve the League of Nations, Taft was one of very few Republicans willing publicly to defend him. Standing side by side with his successor on the stage of Metropolitan Opera House, Taft strongly supported Wilson’s commitment to the League in a speech that “carried great and convincing weight with his audience.” The following month The World’s Work reported that “out of the present welter of political antagonisms in this country one figure of statesmanlike size is emerging and giving American public life a tone which it sadly needs.”

That is ex-President Taft. His appearance on the same platform with President Wilson indicates that there is at least one of our public men who recognizes other motives than selfishness and partisanship. It is one of those spectacles which the American spirit admires above all else. The new hold which Mr. Taft is obtaining upon the affections and respect of the American people is becoming a fundamental fact in our national situation and one which is not unlikely to affect profoundly the history of the next two years.

It took real courage for Taft to speak “kind words of President Wilson when speaking anything except defamation and condemnation of the president was considered treason by the old guard in the senate. Taft was for peace when peace was looked upon as a crime by some of the

secure that advantage which we lost during my administration.” Letter from William Howard Taft to Elihu Root (Nov. 20, 1912), microformed on Taft Papers, supra note 4, Reel 515. Taft’s leadership of the League prompted the praise even of liberal democratic Justice John H. Clarke. See John H. Clarke, A Call To Service: The Duty of the Bench and Bar to Aid in Securing a League of Nations to Enforce the Peace of the World, 4 A.B.A. J. 567, 574 (1918) (“[A] group of distinguished American statesmen, lawyers and publicists, with former President Taft as their leader, have rendered a great public service by formulating a constitution or convention for such a league, which may serve as a starting point for discussion now and when the time shall come for settling the terms of the treaty of peace.”).

28. Editorial, The League Necessary to Peace, N.Y. TIMES, Mar. 5, 1919, at 10. The Times reported that “the audience showed its appreciation, with the President, of his presence on the same platform with ex-President Taft, when Mr. Wilson called attention to this fact, saying he was happy to associate himself with Mr. Taft and praising him for his ‘elevation of view and a devotion to public duty which is beyond praise.’” President and Taft Speak, N.Y. TIMES, Mar. 5, 1919, at 2. According to The Times:

The first applause for Mr. Taft came when he spoke of how he valued the opportunity to be at the meeting and to give it a nonpartisan flavor. He raised a general laugh when he referred to his own administration as one ‘the President has long forgotten.’ There was more laughter when he told of his attempt to have a recalcitrant Senate approve some arbitration treaties, which came back to him ‘crippled and truncated, so that their own father could not recognize them.

Id.


30. Id.
leaders of his party."\(^{31}\) Although Taft’s support of Wilson may have earned him the opposition of “the ‘irreconcilables’ to the Treaty of Versailles,"\(^{32}\) it also “won for him a respect and even affection which he had been unable to win for himself during his years as executive and administrator."\(^{33}\)

31. *The Fight on Taft*, WICHITA DAILY EAGLE, July 2, 1921, at 4 (“The real reason for the opposition [to Taft’s nomination as Chief Justice] is that Taft favors American participation in the League of Nations. Wichitans will recall that Mr. Taft made one of the most logical pleas for the League that was delivered in the Wichita Forum during the trying times of the fight that was led by Borah, Johnson and La Follette against the League. These three irreconcilables [who voted against Taft’s confirmation as Chief Justice] are not willing to lay aside their prejudice against the leading figure in their party, merely because Mr. Taft failed to show symptoms of ptomaine poisoning every time the League was mentioned.”). Several years later Taft’s close friend George D. Seymour wrote him:

[N]o American in [Taft’s] generation had shown any one single act of devotion to an ideal and courage in any way comparable to your appearance on the stage in Carnegie Hall [sic] with Mr. Wilson in support of the League of Nations, when every other prominent Republican had been besought to appear on the same platform with him and had declined. A few days after this, [Connecticut] Governor Woodruff came into my office and fairly “wept” over the occurrence, saying that you had made a profound political mistake and had absolutely cut yourself off from any political preferment by appearing on the stage with Wilson, when every other Republican of influence had refused to do so.

Letter from George D. Seymour to William Howard Taft (July 1, 1921), microformed on Taft Papers, *supra* note 4, Reel 228. See *Taft at Williamstown To-Morrow*, *supra* note 22 (“His insistence on following his conscience regardless of political effect, it is said in inside Republican circles, probably prevented his receiving the Republican nomination for president last year. Had he been willing to deal with Republican senators opposed to the League of Nations, he could have had the nomination on a platter, it is stated. But he would not. When he appeared on the same platform with President Wilson in New York, in support of the league, his name was stricken from the roster of presidential eligibles.”).

32. *Judge Taft’s Appointment*, SAVANNAH PRESS, July 2, 1921, at 6 (“The surprising thing is that there should have been opposition to his confirmation. It is significant that the fight was led by the ‘irreconcilables’ to the Treaty of Versailles—Senators Borah of Idaho, Johnson of California, La Follette of Wisconsin and Watson of Georgia. These are the men who fought the Treaty and the Peace Pact in and out of the Senate and who doubtless were displeased with the early efforts of Judge Taft, who seemed to favor the work of President Wilson and his associates in Paris. For Judge Taft first spoke upon the same platform as the ex-President and did what he could in the first stages of the contest to make the League of Nations popular with the people.”). See *Talk of Taft as a Possible Chief Justice*, POST-STANDARD (Syracuse, N.Y.), May 20, 1921, at 5 (“He is not so popular in official Washington. The senators have not forgiven him for the service he gave to Mr. Wilson’s league of nations. They feel that he is of too tolerant a partisanship ... [H]e will have the strong opposition of the irreconcilables.”); *Chief Justice Taft*, L.A. TIMES, July 2, 1921, at 4 (“The opposition displayed by the ‘bitter-enders’ in the Senate will not lessen the confidence which the American people feel both in his ability and his disinterestedness.”).

33. *Chief Justice Taft*, GALVESTON DAILY NEWS, July 2, 192, at 6 (“[T]he large-minded way in which he conducted himself during the war and afterward in support of Mr. Wilson’s administration, though of a political complexion different from his own in most particulars, won for him a respect and even affection which he had been unable to win for himself during his years as executive and administrator. America loves a good loser, and there have been few better losers than Mr. Taft.”). See *Chief Justice Taft*, DALLAS MORNING NEWS, July 2, 1921, at 12; *Chief Justice Taft: The Appointment Is as Gratifying to the Nation as to Its Recipient*, S.F. CHRON., July 1, 1921, at 24 (“With the lengthening distance from the period when he was the subject of political differences the partisan feeling of that time..."
The upshot was that just as America veered to the right in the presidential election of 1920, Taft also emerged as a national figure of broad, almost nonpartisan appeal, "at the very height of his popularity, a far bigger man, a more valuable citizen, than ever before." To Taft's immense good fortune, the new President, Warren G. Harding, was, like Taft himself, a conservative Ohio politician. Eight years younger than Taft, Harding had longstanding ties to the elder man, whom he affectionately called the "Big Chief." Harding had in fact nominated Taft at the infamous Republican convention of 1912, where Taft's cadre of party-regulars had ruthlessly crushed Roosevelt's attempt to obtain the party's endorsement. Above the protests of the dissidents, Harding had intoned:

Progression is not proclamation nor palaver. It is not pretense nor play on prejudice. . . . It is not the perturbation of a people passion-wrought, nor a promise proposed. Progression is everlastinglving the standards that marked the end of the world's march yesterday and planting them on new and advanced heights to-day. Tested by such a standard, President Taft is the greatest progressive of the age.

Although Harding equivocated on the League of Nations in 1920, Taft dutifully supported his candidacy. In a remarkably candid article, Taft argued that the greatest "domestic issue" in the election was "the maintenance of the Supreme Court as the bulwark to enforce the

has given way entirely before universal recognition of his great qualities and character. When he went through the country a few years ago to plead for his league to enforce peace it was a triumphal progress in which Americans, irrespective of whether they had formerly been friends of enemies or whether they favored the cause he was presenting, united everywhere in warm tribute to his personality."; J. M. Dickinson, Chief Justice William Howard Taft, 7 A.B.A. J. 331, 331 (1921) ("Perhaps nothing so exalted him in the admiration and established him in the esteem of the people as his courageous and patriotic support of a not too friendly administration throughout the war.").

34. The New Chief Justice, HONOLULU STAR-BULLETIN, July 1, 1921, at 6. See Chief Justice Taft, PITT. DISPATCH INDEPENDENT, July 1, 1921, at 6 ("Since his retirement from the Presidency Mr. Taft has gained greatly in popular understanding. He developed a breadth of view in the discussion of affairs that disarmed many who were his most vigorous critics while in the White House."). Writing in 1928, William Allen White articulated an important dimension of Taft's new-found appeal when he observed that as President Taft had been "both a throwback and a forecast, a terrible muddle; a throwback to the eighties of the last century, a forecast of the twenties in this century." WHITE, supra note 7, at 327.

35. Letter from Gus Karger to William Howard Taft (June 14, 1921), microformed on Taft Papers, supra note 4, Reel 227; Letter from Gus Karger to William Howard Taft (June 21, 1921), microformed on Taft Papers, supra note 4, Reel 227.


The guaranty that no man shall be deprived of his property without due process of law."

Mr. Wilson is in favor of a latitudinarian construction of the Constitution of the United States to weaken the protection it should afford against socialistic raids upon property rights, with the direct and inevitable result of paralyzing the initiative and enterprise of capital necessary to the real progress of all. He has made three appointments to the Supreme Court. He is understood to be greatly disappointed in the attitude of the first of these [James Clark McReynolds] upon such questions. The other two [Louis Dembitz Brandeis and John Hessin Clarke] represent a new school of constitutional construction, which if allowed to prevail will greatly impair our fundamental law. Four of the incumbent Justices are beyond the retiring age of seventy, and the next President will probably be called upon to appoint their successors. . . . Who can be better trusted to do this—Mr. Cox, the party successor of Mr. Wilson, or Mr. Harding the standard bearer of the Republican party?

After the election, Taft received an invitation from Harding to visit at Marion, Ohio. To Taft's "great surprise," Harding "plunged at once" into a discussion of political appointments. "Sutherland wants the Supreme Bench and I am going to put him there," Harding confided, after which he added:

"By the way", he said, "I want to ask you, would you accept a position on the Supreme Bench?" He said "because if you would, I'll put you on that Court." I said it was and always had been the ambition of my life. I had declined it twice for reasons I explained, but I was obliged to say that now under the circumstances of having been President, and having appointed three of the present Bench and three others, and having protested against Brandeis, I could not accept any place but the Chief

38. William Howard Taft, Mr. Wilson and the Campaign, YALE REV., Oct. 1920, at 1, 19.
39. Id. at 19–20. Felix Frankfurter, writing in The New Republic, immediately rose to the bait:

Mr. Taft deserves our gratitude for his candor in recognizing that the Supreme Court involves political issues to be discussed like other political issues. In 1912, Mr. Taft was shocked that Roosevelt should dare drag the Court into the political arena. But now Mr. Taft warns us that no issue is more important than the views of the candidates as to future Justices. Of course that means we must study past decisions, the line-up of the Justices, their attitude toward economic ("property") questions, the attitude of likely appointees toward such questions. . . . Mr. Taft has now made respectable what was heretofore tabooed. The door to the Holy of Holies has been opened. Others will follow where Mr. Taft's profanation leads.

Taft and the Supreme Court, NEW REPUBLIC, Oct. 27, 1920, at 208, 209.

40. Letter from William Howard Taft to Helen Taft (Dec. 26, 1920), microformed on Taft Papers, supra note 4, Reel 28. The meeting between Taft and Harding took place on December 24.
41. Id. "I said he would make a fine Judge," Taft replied to Harding, adding that Sutherland "was, after Root, the ablest lawyer in the Senate." Id.
Justiceship. He said nothing more about it and I could not make out whether he concluded that was satisfactory or whether he did not further wish to commit himself.42

Harding’s broad hint, subsequently confirmed,43 set Taft off on a concerted campaign to fulfill his dream of becoming Chief Justice, a campaign that has been well reported in the literature.44 Suffice it to say here that Harding’s plan to nominate Taft was complicated by what appears to have been a previous commitment to appoint George Sutherland, who had been one of Harding’s “principal” advisers during the presidential campaign,45 to the first available Supreme Court vacancy.46 As luck would have it, the first vacancy arose when Chief

42. Id. “In a note I sent him yesterday,” Taft observed to his wife:

I rather assumed the latter and said that if he concluded to make some one else Chief Justice, as he well might, I should still be very grateful for the honor he had done me in making the offer. I told him in the note that many times in the past Chief Justice [White] had said he was holding the office for me and that he would give it back to a Republican administration.

Id. Taft added:

I was non-plussed at the way in which he took me into his confidence and was nearly struck dumb when he asked me if I would go on the Supreme Court and I felt I spoke in a confused way and must make myself clearer in the letter I sent him yesterday . . . I don’t feel at all confident it will work out as I would like it, but it is more favorable to my hope and life ambition than I thought possible . . . I did not think I would tell you, not because you would not keep it, but because I don’t want to raise your hopes to have them dashed, but I concluded I owed it to you, Darling.

Id. Harding responded to Taft’s Christmas note with a short letter acknowledging that “I appreciate full all that you have to say concerning yourself and your ambitions. I have already told you of my abiding esteem and good will and I need not repeat it here.” Letter from Warren G. Harding to William Howard Taft (Jan. 4, 1921), microformed on Taft Papers, supra note 4, Reel 223.

43. See Letter from Warren G. Harding to William Howard Taft (Jan. 4, 1921), microformed on Taft Papers, supra note 4, Reel 223, quoted in Letter from William Howard Taft to Helen Taft, supra note 42; Letter from William Howard Taft to Horace Taft (Jan. 19, 1921), microformed on Taft Papers, supra note 4, Reel 223 (”[Harding’s note] seems to me to indicate that he wishes me to understand that his announced purpose to put me on the Bench was abiding and that he sympathized with my desire to be Chief Justice only.”).

44. See, e.g., ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 66-87 (1965).

45. J. Francis Paschal, Mr. Justice Sutherland, in MR. JUSTICE, 204 (Allison Dunham & Philip B. Kurland eds., 1964). Sutherland “was one of the Big Three among Harding’s advisers at Marion, Colonel Harvey and Richard Washburn Child being the others.” Meaning of the Supreme Court Shift, LITERARY DIG., Sept. 16, 1922, at 15. See Letter from Warren G. Harding to George Sutherland (Aug. 6, 1920) (on file as George Sutherland Papers, Library of Congress) [hereinafter Sutherland Papers] (”[H]ow I need you, and I need you greatly, and I wish you would arrange to come to me as soon as you can and stay with me as long as your affairs permit.”); Letter from Warren G. Harding to George Sutherland, (Nov. 16, 1920), Sutherland Papers, supra (“You helped me mightily and I am grateful. We were very happy to have you at Marion for so long a time and thereby fell quite in love with you . . . . You know how grateful I am.”).

46. See Letter from Senator Judson C. Welliver to George Sutherland (Dec. 10, 1920),
Justice White died on May 19 from an operation to lance an abscess in his prostate.47 Caught between his commitment to Sutherland and his

Sutherland Papers, supra note 45 ("I have gathered a pretty definite impression that you are not going to be a member of the Cabinet and that you will be the first appointee to the Supreme Bench."); Letter from William Howard Taft to Charles P. Taft, Sr. (May 25, 1921), microformed on Taft Papers, supra note 4, Reel 562; Letter from William Howard Taft to Mabel Boardman (May 31, 1921), microformed on Taft Papers, supra note 4, Reel 226 ("The President seems to feel that he is complicated by a promise to Sutherland to put him on the Bench at the first opportunity, although he has made a distinct promise to make me Chief Justice, and I have declined to accept any other place.").

47. White’s death prompted Holmes to write to his friend Harold Laski:

You may wonder if I am thinking of [the Chief Justiceship]. Not in any sense except that all possibilities occur to one and that no doubt a few here and there have named me. They would not appoint so old a man—and although I think I know my place with regard to the higher aspects of the law, I should not expect it of the appointing power. That is not the kind of thing that excites me much. . . . I wonder how many men are pulling wires now. I give you my word of honor that I am not. I don’t even know what, if any, wires I could pull.

Letter from Oliver Wendell Holmes to Harold J. Laski (May 27, 1921), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 339 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI CORRESPONDENCE]. Willis Van Devanter, by contrast, was intent on subtly pulling wires. The day before he had written to his close friend, district judge John C. Pollock:

Some suggestion has been made that the appointment will go to one of the senior members of the court as now constituted with the idea that it will be more or less temporary, but my impression is that there is nothing in this. Confidentially, Justices McKenna, Day, McReynolds and Clarke have said to me that they would be glad to see me appointed, but I realize that an expression of their views may not be solicited and cannot with propriety be given unless solicited. Senator Kellogg has volunteered to me the statement that he intends to recommend me and to recommend that ex-Senator George Sutherland be named in my place. Ex-Senator Bailey seems to think I will be the man, and others have volunteered a friendly interest, but I am neither saying nor doing anything nor permitting any of these statements to bring me any sense of elation or to change the current of my mind. Pleasant commendation by intimate friends or by those who in social intercourse prefer to be agreeable rather than otherwise is not to be taken for anything beyond what it really is, so I am not counting on anything but merely attending to my present responsibilities.

Letter from Willis Van Devanter to John C. Pollock (May 26, 1921) (on file as Willis Van Devanter Papers, Library of Congress) [hereinafter Van Devanter Papers]. The next day Van Devanter wrote to Pollock recounting conflicting assessments of Taft’s chances.

The fact that the President is not a lawyer, and the further fact that even a hasty or casual committal seems sacred to him, may be important factors in the ultimate outcome. It is known that he had a rather long conference with Judge Taft about the duties of the President, etc., shortly after the election, and they had a long conference on the same subject very shortly following the inauguration. Something may have been said in a generous and appreciative way on one or both of those occasions without particularly weighing it before it was said. . . . Another circumstance might appeal rather strongly to President Harding who does not think well of Mr. Wilson. The latter on becoming President sent word, as I happen to know, to Judge Taft that he was going to put him on the Supreme Court as soon as a vacancy occurred. When a vacancy did occur Mr. Wilson rather promptly appointed McReynolds. When the next vacancy occurred,
desire to appoint Taft Chief Justice, Harding put Taft’s nomination on hold while he struggled to find a way to appoint both Taft and Sutherland.48

Speculation concerning Harding’s plans ranged from elevating William Day to the Chief Justiceship on the understanding that he would retire after six months, meanwhile appointing Sutherland to Day’s old position,49 to inducing Holmes or McKenna to retire by offering them a

through the death of Justice Lamar, the President of the American Bar Association and four living ex-presidents of the Association, some of one party and some of the other, asked Mr. Wilson to appoint Judge Taft and suggested that it would be a fitting time for him to step over the party wall as Mr. Taft had done in appointing Justice Lamar. Instead, Mr. Wilson appointed Brandeis. This story, which is quite true, might appeal rather strongly to a fair-minded man like Mr. Harding and might cause him impulsively to say that he was going to do what his predecessor promised and yet failed to do.

Letter from Willis Van Devanter to John C. Pollock (May 27, 1921), Van Devanter Papers, supra. When Pollock offered to assist Van Devanter in securing the appointment, see Letter from John C. Pollock to Willis Van Devanter (June 2, 1921), Van Devanter Papers, supra. Van Devanter played coy:

Of course, there is nothing which I can do with propriety. No doubt there will be those who think that my opinions represent the only work which I do, and of course it would be quite inadmissible for me or my friends to intimate that I have any responsibility for the opinions of others or have done any work on them. At all events, no one outside of the court itself could speak of this no matter what they surmise. Aside from other elements of impropriety it would give offense in quarters where offense would be harmful. This has been a term in which dissents were quite frequent, and yet there has not been a single dissent from any of my opinions during the term. There are some who merely count the number of opinions regardless of their substance or the direction in which they go. When one does work on that line he can do what superficially seems a volume, and then the other federal courts and the state courts may grope as best they can in an effort to find out what was intended. My ideas and inclinations are not in that direction. It leads to uncertainty and confusion, makes for instability and in the long run results in tremendous waste. The number of petitions for rehearing during the term has been unusually large, but in my cases only one was presented. People outside do not know this and in the nature of things would not be supposed to know. Again, comment on it, save by someone inside, might arouse resentment where a kindly feeling now exists. The only things for me to do is to take my usual vacation and let come what will.

Letter from Willis Van Devanter to John C. Pollock (June 7, 1921), Van Devanter Papers, supra. Three days later, Van Devanter threw in the towel, conceding the inevitability of Taft’s appointment.

My impression is that nothing more should be done by my friends. I fear that under the circumstances it would not be welcome, and this becomes a little more pointed with me when I reflect that Mr. Taft appointed me to my present place and also that I must serve with whomever is appointed for a considerable time.

Letter from Willis Van Devanter to John C. Pollock (June 10, 1921), Van Devanter Papers, supra.

48. See Letter from Senator Frank B. Brandegee to William Howard Taft (May 23, 1921), microformed on Taft Papers, supra note 4, Reel 226 ("My impression is that the President would like to put both you and Sutherland on the Supreme Bench. I think he would like to make these appointments at the same time, but there is only one vacancy at present."); Letter from Gus Karger to William Howard Taft (May 25, 1921), microformed on Taft Papers, supra note 4, Reel 226 (Harding’s "desire is . . . to send in your name and Sutherland’s at the same time.").

49. Letter from Senator Frank B. Brandegee to William Howard Taft (May 23, 1921),
position in England on the Disarmament Commission. Taft hung fire for about six weeks, frying, as he said, “in the juice of doubt and worry.” Taft went so far as to confide to Pierce Butler that, “as a matter of fact, I don’t expect to be appointed.”

50. Letter from William Howard Taft to Horace Taft (June 7, 1921), microformed on Taft Papers, supra note 4, Reel 227 (“Harding can’t ‘jar loose’ either Holmes or McKenna without some inducement. . . . It is possible that Harding has in mind to offer to Holmes or McKenna a place on this Disarmament Commission that Harding is evidently framing in connection with the passage of the Naval Appropriation Bill. . . . Now Holmes loves England. He is the best known of our Judges there. His father had a great [?] in London after he was 75 and the son’s jealous of the father. That shows his character. It would be very alluring to him to end his career in such a conspicuous activity in ‘our old home.’ The Bench would be well rid of him for his influence is not good on the Bench. He is always or generally with Brandeis. Perhaps, however, McKenna is the man and what his predilections are for such a mission I do not know.”); Letter from Luther A. Brewer to William Howard Taft (June 9, 1921), microformed on Taft Papers, supra note 4, Reel 227 (Harding has “gone so far as to sound out Holmes and Day on the question of their resigning only to learn that neither one had any intention of so doing.”); Letter from William Howard Taft to Charles P. Taft (June 9, 1921), microformed on Taft Papers, supra note 4, Reel 227. See Letter from George Wickersham to William Howard Taft (June 14, 1921), microformed on Taft Papers, supra note 4, Reel 227 (“Daugherty told me, in confidence, that the President had had an intimation that there might be another vacancy in the Supreme bench, and that he had withheld action on the Chief Justiceship knowing that he might be able to fill the two places at once, putting George Sutherland into the Associate Justiceship.”).

51. Letter from William Howard Taft to Horace Taft (June 11, 1921), microformed on Taft Papers, supra note 4, Reel 227. Taft comforted himself with the thought that “the place is so great a one that it should not come in an easy way. . . . and if it does come, one will be quite willing to have gone through some suspense and some worry before getting it.” Letter from William Howard Taft to Gus Karger (June 21, 1921), microformed on Taft Papers, supra note 4, Reel 227.

52. Letter from William Howard Taft to Pierce Butler (May 26, 1921), microformed on Taft Papers, supra note 4, Reel 562. Taft and Butler had become acquainted during the arbitration proceedings to determine the value of the Grand Trunk railroad system, which was in the process of being acquired by the Canadian government. Butler represented the Canadian government, while Taft had in July 1920 been appointed one of the three arbitrators. See Acquisition of Grand Trunk and Subsidiary Concerns, in ANNUAL REPORT OF THE DEPARTMENT OF RAILWAYS AND CANALS FOR THE FISCAL YEAR FROM APRIL 1, 1920 TO MARCH 31, 1921, at 128–204 (1921); A. W. CURRIE, THE GRAND TRUNK RAILWAY OF CANADA 461–68 (1957); LESLIE T. FOURNIER, RAILWAY NATIONALIZATION IN CANADA: THE PROBLEM OF THE CANADIAN NATIONAL RAILWAYS 100–106 (1935); JOHN A. EAGLE, MONOPOLY OR COMPETITION: THE NATIONALIZATION OF THE GRAND TRUNK RAILWAY, 62 CAN. HIST. REV. 27

53. Letter from William Howard Taft to Pierce Butler (May 26, 1921), microformed on Taft Papers, supra note 4, Reel 562. Taft and Butler had become acquainted during the arbitration proceedings to determine the value of the Grand Trunk railroad system, which was in the process of being acquired by the Canadian government. Butler represented the Canadian government, while Taft had in July 1920 been appointed one of the three arbitrators. See Acquisition of Grand Trunk and Subsidiary Concerns, in ANNUAL REPORT OF THE DEPARTMENT OF RAILWAYS AND CANALS FOR THE FISCAL YEAR FROM APRIL 1, 1920 TO MARCH 31, 1921, at 128–204 (1921); A. W. CURRIE, THE GRAND TRUNK RAILWAY OF CANADA 461–68 (1957); LESLIE T. FOURNIER, RAILWAY NATIONALIZATION IN CANADA: THE PROBLEM OF THE CANADIAN NATIONAL RAILWAYS 100–106 (1935); JOHN A. EAGLE, MONOPOLY OR COMPETITION: THE NATIONALIZATION OF THE GRAND TRUNK RAILWAY, 62 CAN. HIST. REV. 27
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In the end it was Harding’s Attorney General, Harry Daugherty, who broke the deadlock. Daugherty was an old-school Ohio politician who had close ties to Taft dating back to Taft’s presidential campaigns. Daugherty had supported Taft in 1912, so that, as Taft later recalled, “Harry and I had been very warm friends, and . . . he had done much for me at a time when friends were needed.” In June of 1921 Daugherty pushed hard for Taft’s appointment, arguing, as Harding candidly acknowledged in his press conference announcing Taft’s nomination, that “the Department of Justice was anxious to see a Chief Justice named” so that work could immediately begin to assist “relieving the congestion” of federal courts “owing to the arrests made under the provisions of the Volstead act.”

(1981). Taft enjoyed Butler’s professional style. When Butler cross-examined a witness, Taft wrote his wife, “we could keep awake.” Letter from William Howard Taft to Helen Taft (Feb. 19, 1921), microformed on Taft Papers, supra note 4, Reel 28. See Letter from William Howard Taft to Helen Taft (July 8, 1921), microformed on Taft Papers, supra note 4, Reel 28. Butler and Taft evidently struck up a warm association. See Letter from William Howard Taft to Helen Taft (June 24, 1921), microformed on Taft Papers, supra note 4, Reel 28. On May 23 Butler wrote to congratulate Taft “upon your prospective (now, as I understand, fully assured) appointment to Chief Justice of the United States.” Letter from Pierce Butler to William Howard Taft (May 23, 1921), microformed on Taft Papers, supra note 4, Reel 226. “But the country is to be congratulated much more than you are,” Butler continued,

Now, as much as—even more than—at any time, the quality of the men constituting the court is important. Your fellow citizens, and especially lawyers of the country, heartily approve the President’s purpose and, because you will be the chief, will rely with greater confidence upon the Supreme Court. Your friends, and I have long counted myself one, are glad that in the record of illustrious and varied public service . . . you stand first in the history of the country.

One who was present when [White] took the oath of office as Chief Justice said to me that he saw “a senior associate administer the oath of office of chief justice to a junior associate, a Republican to a Democrat appointed Chief Justice by a Republican President, a Union soldier to a Confederate soldier, a Presbyterian to a Roman Catholic, who took the oath on the King James bible.” I answered that he saw a good deal that spoke well for the President and for the United States.

Id.

54. Daugherty was a faithful Taft supporter throughout the ill-fated campaign. See id. at 57–83.
55. Letter from William Howard Taft to Gus Karger (May 10, 1922), microformed on Taft Papers, supra note 4, Reel 241. Taft observed that he was “much impressed with Harry Daugherty’s determination to make his Department as effective as possible in the fulfillment of its functions, and I prophesy that he will be one of the successful Attorneys General.” Letter from William Howard Taft to Max Pam (Mar. 28, 1921), microformed on Taft Papers, supra note 4, Reel 562.
56. See Letter from William Howard Taft to Horace Taft (June 7, 1921), microformed on Taft Papers, supra note 4, Reel 227 (Max Pam reported that “Daugherty was going to press for my appointment before July 1st and he asked Max to give me the message that he was on the job and it was all right.”); Letter from George Wickersham to William Howard Taft (June 14, 1921), microformed on Taft Papers, supra note 4, Reel 227 (Daugherty “was all for you.”).
57. Harding Appoints Taft Chief Justice; Senate Confirms Him, 61 to 4 . . . Volume of Cases in Federal Courts Prompted President to Act Quickly, N.Y. TRIB., July 1, 1921, at 2. The Washington Post
Fittingly enough, what finally propelled Taft into the Chief Justiceship was the manifest need for invigorated federal judicial administration. Some in the popular press, recalling the widespread view that Taft had failed as President because “[h]e had too judicial a mind,” counted this as a strike against Taft’s nomination, arguing that because his “tastes” were “judicial rather than executive,” he could have only “small predilection” for the task of organizing “the work of the court and infus[ing] into it the efficiency which is more conspicuously recognized in commercial affairs.” But this objection radically reported that “Mr. Harding is understood to have been advised by legal officers of the administration that all the Federal courts were so congested with business that prompt action during the summer recess was necessary in order to expedite litigation as much as possible.” Taft Chief Justice, WASH. POST, July 1, 1921, at 5. See Taft is Nominated As Chief Justice of U.S. Supreme Court, supra note 22, at 1 (“Originally it had been Harding’s intention to delay naming a successor to the late Chief Justice White until just before the October term . . . . Since White’s death, however, developments necessitated alteration of this plan. Foremost among these developments has been the jam in the courts of all large cities resulting from a vast number of prosecutions ordered against alleged violators of the Volstead prohibition law. The Department of Justice is trying to work out a plan for special commissions to handle prohibition cases, for extra Judges in seriously affected districts or for some other measures to relieve the congestion and in this reorganization work Attorney General Daugherty stressed the need of having a Chief Justice of the Supreme Court to aid him. The first work, therefore, that the new Chief Justice will take up will probably be that involved in adjusting court facilities, particularly in large cities east of the Mississippi River, to meet the demands of prohibition cases.”); Letter from Gus Karger to William Howard Taft (June 30, 1921), microformed on Taft Papers, supra note 4, Reel 227 (“The courts are congested,” Harding said at the press conference announcing Taft’s nomination, “and the Chief Justice will be a factor in bringing on a better situation. Additional judges will be needed, there may be need of authorization of commissioners; something must be done to relieve the courts of cases of the less criminal type, I mean cases growing out of the Volstead act. The courts are all clogged up. It is the problem of the Department of Justice to work this out and the Attorney General wants the Chief Justice to help work it out.”). On the very day of his confirmation Taft received a telegram from his intimate friend, a reporter for his brother’s newspaper the Cincinnati Times-Star, that Daugherty “thinks you should come to Washington soon after” July 4th “to take oath” because he “desires to put you on committee of judges to determine changes needed in federal judicial administration.” Telegram from Gus Karger to William Howard Taft (June 30, 1921), microformed on Taft Papers, supra note 4, Reel 227.

58. Upon Taft’s confirmation, Brandeis wrote him a note saying that “I am delighted to hear that you have undertaken the task of making more efficient the administration of our law. It is by such intelligent appreciation of existing defects and determined effort to devise remedies that respect for law may be promoted.” Letter from Louis Dembitz Brandeis to William Howard Taft (July 19, 1921), microformed on Taft Papers, supra note 4, Reel 230.

59. Notes from the Capital, supra note 12, at 770.

60. Chief Justice Taft, N.Y. EVENING POST, July 1, 1921, at 6:

Any qualification upon Mr. Taft’s fitness for the Chief Justiceship concerns the administrative duties of the position. The Chief Justice . . . has responsibility of keeping the court as nearly abreast of its business as possible. This demands the exercise of executive abilities. . . . He must organize the work of the court and infuse into it the efficiency which is more conspicuously recognized in commercial affairs. For this part of his task, Mr. Taft admittedly has small predilection. But he cannot complain if an occupation which in general he finds highly congenial imposes upon him one uncongenial duty.
misunderstood Taft’s abilities. Taft had been ineffective as president because he was, in William Allen White’s lovely phrase, “innocent of politics.” He had always been, by contrast, a crackerjack administrator. Henry L. Stimson, who served Presidents from Theodore Roosevelt to Harry Truman, regarded Taft as the best organized and “most efficient” President of them all. Judicial administration was in fact what suited Taft most of all.

Charles Evans Hughes accurately observed that Taft’s astonishing career “fittingly culminated in his work as Chief Justice,” because the “efficient administration of justice was, after all, the dominant interest of his public life.” Few presidential candidates indeed would have staked their campaign, as Taft did in 1908, on the ground that “the greatest

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Id. See The New Chief Justice, supra note 34, at 6 (“The fact is, and it is recognized by his closest and most sympathetic friends, that Mr. Taft has a judicial, not an executive, mind; he is a keen judge and constructive critic of the actions of others but he himself is not a doer, he lacking in initiative, indispensable attribute of leadership.”).

61. White, supra note 7, at 333–34. Taft’s nomination was nevertheless attacked by progressive Republican Senator William E. Borah of Idaho on the grounds that Taft was merely a politician, not a judge. Borah contrasted Taft with Justice Charles Evans Hughes, who had resigned from the Court to become the Republican candidate for President in 1916: “[H]aving taken an able lawyer from the Supreme Bench four years ago and made a politician of him, it was now proposed to take a politician—a man who has devoted practically his mature life to politics—and put him on the Supreme Bench in the interest of party politics.” Taft Chief Justice of Supreme Court: Confirmed 60 to 4: Negative Votes Cast by Borah, Johnson, La Follette, Republicans, and Watson, Democrat, N.Y. Herald, July 1, 1921, at 1. Taft’s reputation as a politician was so poor, however, that six months later he could effectively mock Borah’s charge:

I seem to have heard a suggestion, by way of friendly criticism, when my name was up for the Chief Justiceship, that a politician was being put upon the bench. All I have to say is, that that was news to me (renewed and increasing laughter), and I think it was news to the people.


62. Alpheus Thomas Mason, President by Chance, Chief Justice by Choice, 55 A.B.A. J. 35, 39 (1969) (“Taft was a ‘great’ administrator . . . .”). Taft viewed his attempted improvements of the management of the executive branch as among his most important contributions as president. In his address accepting the 1912 Republican nomination for the presidency, for example, Taft proclaimed:

During this administration we have given special attention to the machinery of government with a view to increasing its efficiency and reducing its cost. . . . I have secured an appropriation for the appointment of an Economy and Efficiency Commission, consisting of the ablest experts in the country, and they have been working for two years on the question of how the Government departments may be reorganized and what changes can be made with a view to giving them greater effectiveness for governmental purpose on the one hand, and securing this at considerably less cost on the other.

William Howard Taft, Accepting the Republican Nomination for President of the United States (Aug. 1, 1912), in S. Doc. No. 902 (1912). See William Howard Taft, National Budget Plan (July 24, 1919), reprinted in Collected Editorials, supra note 11, at 244, 244–46.


64. Taft’s Life Praised as Truly American, N.Y. Times, Mar. 9, 1930, at 1 (quoting Hughes).
question now before the American public is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use.\textsuperscript{65} Once confirmed as Chief Justice, Taft turned his formidable executive talent toward the rationalization and improvement of the federal judiciary, with the consequence that, as even Felix Frankfurter conceded, he became a great "law reformer," with "a place in history . . . next to Oliver Ellsworth, who originally devised the judicial system."\textsuperscript{66} Taft's achievements are legion, ranging from the design and construction of the contemporary Supreme Court building to the pathbreaking reformation of the Supreme Court's jurisdiction in the Judiciary Act of February 13, 1925,\textsuperscript{67} which transformed the United States Supreme Court from a tribunal of last resort into something like the supervisor of the system of federal law.

Taft's administrative skills also served him well within the Court itself. He was ruthlessly efficient, moving heaven and earth to push the Court to diminish its embarrassingly large backlog of cases.\textsuperscript{68} Brandeis remarked to Frankfurter that Taft, "like the Steel Corporation, is attaining [all] time production records."\textsuperscript{69} In the popular press it was rapidly recognized that "The spirit of speed and efficiency lurking in the corpulent form of an ex-President of the United States has entered the Court and broken up its old lethargy."\textsuperscript{70} Figure 1 offers a statistical picture of Taft's remarkable accomplishments in this regard.\textsuperscript{71}

Within the Court, however, the dominant image of Taft was not that of a disciplinarian, but rather of a man who could dispose "of executive details . . . easily" and "get through them without friction."\textsuperscript{72} "The new

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\item 65. Taft Wants Quick and Cheap Justice, N.Y. TIMES, Aug. 2, 1908, at 1 (quoting Taft).
\item 66. FELIX FRANKFURTER, Chief Justices I Have Known, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 471, 487–88 (Philip B. Kurland ed., 1970). Frankfurter credited Taft for adapting the federal judicial system "to the needs of a country that had grown from three million to a hundred and twenty million." Id. at 488. See Mason, supra note 62, at 39 ("As a judicial architect, Taft is without peer.").
\item 67. 43 Stat. 936.
\item 68. Taft's old friend, Charles E. Barker, reports that on his deathbed in January 1930 Taft said to him that "I can report that my one great ambition as Chief Justice has been accomplished. The docket is up to date, so I guess I've earned a few weeks' rest." CHARLES E. BARKER, WITH PRESIDENT TAFT IN THE WHITE HOUSE: MEMORIES OF WILLIAM HOWARD TAFT 71 (1947).
\item 70. Herbert Little, The Omnipotent Nine, AM. MERCURY, Sept. 1928, at 48.
\item 71. Figure 1 reveals both Taft's effort to drive the Court to dispose of an increasing number of cases and the dramatic effects of the Judiciary Act of Feb. 13, 1925, 43 Stat. 936, which shifted a large proportion of the Court's jurisdiction to the discretionary writ of certiorari and which took effect in the 1925 Term.
\item 72. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Oct. 2, 1921), in 2 HOLMES-
Chief Justice makes the work very pleasant," Holmes said. "He is always good natured and carries things along with a smile or a laugh. (It makes a devil of a difference if the C.J.'s temperament diminishes friction.) He is very open to suggestions and appreciates the labors of others. I rather think the other J.J. are as pleased as I am." Brandeis concurred in this positive assessment:

On the personal side the present C.J. has admirable qualities, a great improvement on the late C.J.; he smooths out difficulties instead of making them. It's astonishing he should have been such a horribly bad President, for he has considerable executive ability. The fact, probably, is that he cared about law all the time & nothing else. He has an excellent memory, makes quick decisions on questions of administration that arise & if a large output were the chief desideratum, he would be very good.

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Taft's genial and prepossessing personality was particularly useful in managing the Court's potentially contentious conferences. Holmes remarked that "The meetings are perhaps pleasanter than I ever have known them—thanks largely to the C.J." The Justices also appreciated how "fairly" Taft distributed case assignments. Stone later remarked that "there was never a Chief Justice as generous to his brethren in the assignment of cases." Taft himself conceived of the Chief Justice as "the head of the court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized learning, and statesmanlike foresight, expected to promote teamwork by the court, so as to give weight and solidarity to

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its opinions." In this regard Taft maintained within the Court, as Augustus Hand wrote to him, "a certain leadership that is enormously important and I don’t believe has ever existed since the times of Marshall himself. Indeed I think Brandeis, in the left wing, greatly appreciates this and knows how much it means to have a C.J. whom the Court will in certain respects follow and at any rate will ‘rally around.’"

By the time a series of incapacitating strokes forced Taft to resign on February 3, 1930, his energetic revitalization of the Court and his vigorous reformation of the federal judiciary had won over even old and implacable enemies. Consider California Senator Hiram Johnson, who had been Theodore Roosevelt’s vice presidential running-mate in 1912 and who had been one of the four bitter and unyielding votes against Taft’s confirmation in 1921:

I felt that I would be false to the old Roosevelt fight, false to every principle in which I believed, false to myself, and false to my country, if I voted for Taft’s confirmation. . . . Yesterday, we may have changed the course of our country, we may have altered the history of the world by placing in the position where he was the deciding vote in the most powerful tribunal of the universe, a man devoid of learning, judicial temperament, and of principle.

79. WILLIAM HOWARD TAFT, Chief Justice White (May 20, 1921), reprinted in COLLECTED EDITORIALS, supra note 11, at 581, 581.

80. Letter from Augustus Hand to William Howard Taft (Sept. 18, 1929), microformed on Taft Papers, supra note 4, Reel 314. On Taft’s ability to rally the Court, see Henry J. Friendly, The Unpublished Opinions of Mr. Justice Brandeis, 106 U. PA. L. REV. 766, 768 (1958) (book review). Friendly was Brandeis’ law clerk during the 1927 Term. See also David J. Danielski, The Influence of the Chief Justice in the Decisional Process, reprinted in COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 695–703 (Walter F. Murphy & C. Herman Pritchett eds., 1979). In 1923 Brandeis confided to Frankfurter that Taft “usually” had an “open mind” and that he was “very powerful when he changes his mind, with others.” Brandeis-Frankfurter Conversations, supra note 75, at 320. Important to Taft’s leadership was the good will which he cultivated with his colleagues. After Taft generously and spontaneously took the initiative to arrange the details of Mrs. Holmes’s funeral, for example, Holmes exclaimed, “How can one help loving a man with such a kind heart?” Letter from Oliver Wendell Holmes to Harold J. Laski (June 15, 1929), in HOLMES-LASKI CORRESPONDENCE, supra note 47, at 1158. After Taft retired, Holmes commented that “We all loved Taft and grieved at his bodily collapse.” Letter from Oliver Wendell Holmes to Nina Grey (Feb. 26, 1930), microformed on Holmes Papers, supra note 73, Reel 24, Frame 362. Frankfurter, who had reason to know, commented that Taft “always had the love and affection of his colleagues.” FRANKFURTER, supra note 66, at 490.

81. Taft ceased participating in the Court’s deliberations in early January, 1930. When we speak of the “Taft Court,” therefore, we are essentially referring to the 1921 through 1928 Terms, with a small fraction of the 1929 Term.

82. Letter from Hiram Johnson to Raymond Robins (July 1, 1921) (on file as Hiram Johnson Papers, Library of Congress) [hereinafter Johnson Papers]. On July 2, 1921, Johnson wrote his sons:

Day before yesterday Taft’s name was sent to the Senate as Chief Justice of the
Yet Taft's manifest competence as a positive institutional force during the eight and a half years of his Chief Justiceship brought even
Johnson around, so that after Taft's death on March 8, 1930, Johnson
could affirm to the press, "Of recent years I have become very fond of
Chief Justice Taft. It was with the utmost regret that I learned of the
necessity of his resignation. I feel that he has rendered a great and
lasting public service and that his death is a very severe loss to the
nation." At the time of Taft's death even Franklin Roosevelt himself,
then Governor of New York, ordered state flags to be hung at half staff
for thirty days to signify the "universal sorrow" and "affectionate
esteem" of the people of the state.

Taft's standing was never higher than at the moment of his demise. It
has since sunk into deep oblivion, which suggests that judicial
administration is not the platform on which to erect an enduring judicial
reputation. We do not tend to remember great judicial reformers. We
instead honor judges who craft striking opinions or who convey deep
jurisprudential vision. Taft could do neither. He readily confessed to
"great difficulty in the matter" of "judicial style," so that on his

United States Supreme Court. . . . I said he was unfit to be the Chief Justice . . . . It is
another instance, where I have been put in a woeful minority . . . . I can't help it,
however. I would think myself the most contemptible of men if I did not at least vote
against the confirmation of a man like Taft. In my opinion he is, first, without the
qualifications for a United States Supreme Court Judge, and secondly, he is crooked, both
intellectually and otherwise, and thirdly, I think he was a traitor to his country in the
League of Nations' fight. . . . I think in the press the nomination is with practical
unanimity praised. This may be so with the people, too. I do not know. . . . The incident
was very depressing to me. . . . Taft deciding the grave problems which will come to us in
the next few years is the most sinister thing that has come to us thus far in the
administration. I confess that I went home Thursday night as low in spirits as I have ever
been here.

Letter from Hiram Johnson to his Sons (July 2, 1921), in 3 THE DIARY LETTERS OF HIRAM JOHNSON:
1919–1921 (1983). See Letter from Hiram Johnson to Harold L. Ickes (July 2, 1921), Johnson Papers,
supra.

83. Taft's Life Praised as Truly American, supra note 64, at 26 (quoting Johnson).
84. State Tribute to Taft, N.Y. TIMES, Mar. 10, 1930, at 5. On the "universal regret" that had
greeted Taft's resignation on February 3, 1920, see Oulahan, supra note 14, at 2.
85. His "lastling monument" was said to be that he "laid the foundation for a reorganization of the
judicial administration in this country." Jurist Here Adds Tribute, L.A. TIMES, Mar. 12, 1930, at 2
(quoting Judge Harry A. Hollzer).
86. This despite the eulogy of the Los Angeles Times, which predicted that Taft's "name will . . .
be . . . connected with . . . the speeding up and modernizing of the Supreme Court and its reorganization
to cope fully with its work. Directly and indirectly, Taft exercised a profound influence on court
procedure, and if the law's delay, of which complaint has been made from time immemorial, shall ever
cease to be a subject of complaint it will be in large part due to him." William Howard Taft, L.A. TIMES,
87. Letter from William Howard Taft to Clyde B. Aitchison (Dec. 4, 1925), microformed on Taft
Papers, supra note 4, Reel 278. Taft once wrote plaintively to Holmes in appreciation of the latter's
retirement *Time Magazine* could ruthlessly encapsulate his career with the pithy assessment: "Outstanding decisions: none."  

It is not that Taft wrote few court opinions; indeed he wrote more than anyone else on the Court during his tenure, a remarkable accomplishment given his prodigious commitments to judicial administration and reform. It is rather that Taft’s opinions were, as Holmes observed, “rather spongy,” so that they seemed indistinct and unmemorable. When Frankfurter complained that Taft’s opinions were “loose & mischievous in dicta & language even when result is right,” Brandeis noted that Taft “can’t help it—he can’t write and think closely.” Taft, said Brandeis, possessed “a first-rate second-rate

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opinions: “When I read them, I marvel. They read so well and so easily and I ask why can’t I, but I can’t.” Letter from William Howard Taft to Oliver Wendell Holmes (May 6, 1927), microform on Holmes Papers, *supra* note 73, Reel 38, Frame 345.


89. The statistics for opinion writing are displayed in Figure 2. Figure 2 calculates the number of court opinions authored by each Justice in the full terms during which he participated in the Taft Court, which is defined as the 1921 to 1928 Terms, inclusive. In each period, Taft produced by far the greatest number of opinions. As Brandeis observed to Frankfurter, Taft “does about two men’s work—with his added administrative tasks, extra work on certiorari etc. etc.” *Brandeis-Frankfurter Conversations*, supra note 75, at 321. Edward Sanford wrote to Van Devanter after Taft had suffered a heart attack in the summer of 1926 that Taft must become “reconciled to taking things more easily and not doing so large a share of the joint task—unduly large—as he has been.” Letter from Edward T. Sanford to Willis Van Devanter (Aug. 26, 1926), Van Devanter Papers, supra note 47. Early in his career as Chief Justice, the press published a grueling account of Taft’s “typical” workday:

> Mr. Taft is up every morning at 5:30 o’clock. By 6:15 he is at work in his study in his house. (None of the justices has an office. All of them do all of their work at home.) He works until 8:30, when he has breakfast. At 9:00 he is at his desk again and stays there until 10:15, when he starts to walk from his house to the Supreme Court Chamber in the Capitol. That is a little journey of three and seven-tenths miles. When Mr. Taft arrives on Capitol Hill he is in need of a bath and fresh linen. That process requires half an hour. As Chief Justice he then has a certain amount of routine administrative and executive business to dispose. He barely gets through with it before noon, when the Court opens its session to hear arguments and pleadings. It sits until 4:30 o’clock, with a half-hour intermission for lunch.

> Mr. Taft drives home every afternoon and is at his desk again at 5:30 o’clock. He works until 6:45, has dinner at 7, goes upstairs to his desk at 8, and gets in two solid hours of labor before going to bed, at 10 o’clock.


90. Letter from Oliver Wendell Holmes to Harold J. Laski (Jan. 15, 1922), in HOLMES-LASKI CORRESPONDENCE, supra note 47, at 398.

91. It was said at the time of his death that “While as Chief Justice . . . Taft delivered several notable opinions of a pioneering quality, it is certain that his words will not be studied and pondered over as, say, the decisions of Marshall, of Taney, or even of Fuller.” Stephen Bonsal, *The Man Who Served Us—Taft*, 59 WORLD’S WORK 79 (1930).

92. *Brandeis-Frankfurter Conversations*, supra note 75, at 310 (quoting from a conversation of Nov. 30, 1922). Brandeis noted that Taft “doesn’t sufficiently work over materials.” Id. at 307 (quoting from a conversation of July 1, 1922).
At the time of his death, even Taft’s supporters recognized that “His name will not be ... connected with any outstanding decisions—as are the names, for instance, of Chief Justice Marshall and Chief Justice Taney.”

At root, the weakness of Taft’s opinions was also their strength. They were so suffused with common sense as to be utterly unremarkable. They both reflected the conventional conservative pieties of his time and exuded good practical judgment; ideological principles were never

93. Id. at 313 (quoting from a conversation of June 28, 1923). Oddly enough, Holmes had independently used almost the exact same formulation to describe Taft, observing that “I doubt if he can go higher than the first rate second rate.” Letter from Oliver Wendell Holmes to Harold J. Laski (July 12, 1921), in HOMES-LASKI CORRESPONDENCE, supra note 47, at 346.


95. Taft frequently avowed that the social Darwinist William G. Sumner “had more effect on me mentally than any man with whom I came in contact either at college or at school.” Letter from William Howard Taft to Hamilton Holt (Nov. 25, 1927), microformed on Taft Papers, supra note 4, Reel 297. See Letter from William Howard Taft to Mrs. Frederick J. Manning (Feb. 14, 1926), microformed on Taft Papers, supra note 4, Reel 280; Letter from William Howard Taft to Horace Taft (Nov. 4, 1925), microformed on Taft Papers, supra note 4, Reel 278. Taft fundamentally believed that “the corner stone of our civilization is in the proper maintenance of the guaranties of the 14th Amendment and the 5th Amendment.” Letter from William Howard Taft to Elihu Root (Dec. 21, 1922), microformed on Taft Papers, supra note 4, Reel 248. Taft regarded the end of government as “the promotion of the happiness of the individual and his progress.” WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 9-10 (1913). See WILLIAM HOWARD TAFT, LIBERTY UNDER LAW: AN INTERPRETATION OF THE PRINCIPLES OF OUR CONSTITUTIONAL GOVERNMENT 51 (1922); WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 37 (1914) (“We believe that government is, of course, for the benefit of society as a whole, but that society is composed of individuals and that the benefit of society as a whole is only consistent with the full opportunity of its members to pursue happiness and their individual liberty. This . . . includes freedom from personal restraint, right of free labor, right of property, right of religious worship, right of contract.”). Of these freedoms, property rights constituted “the keystone of our society,” William Howard Taft, Criticisms of the Federal Judiciary, 29 AM. L. REV. 641, 654 (1895), because “the institution of private property is what has led to the accumulation of capital in the world.” William Howard Taft, The Right of Private Property, 3 Mich. L.J. 215, 220-21 (1894); William Howard Taft, Speech at Minneapolis, Minnesota (Feb. 11, 1920), microformed on Taft Papers, supra note 4, Reel 574 (“You cannot conceive of a government of individual liberty in which the right of property is not secured—the destruction of the right of property is the beginning of the end of individual liberty, because the right of property is that right which secures to the individual the product of his labor and the ownership of his savings, the reward of his industry and self-restraint.”). “Until human nature becomes far more exalted in moral character and self-sacrifice than it is today, the motive of gain is the only one which will be constant to induce industry, saving, invention and organization, which will effect an increase in production greater than the increase in population.” TAFT, LIBERTY UNDER LAW, supra, at 25-26. These unchanging and universal facts of human nature sustained Taft’s belief that “there is only a limited zone within which legislation and governments can accomplish good. We cannot regulate beyond that zone with success or benefit. . . . If we do not conform to human nature in legislation we shall fail.” Id. at 42. Religion was the only “means of neutralizing the necessarily selfish element in humanity. I say ‘necessarily selfish’—I mean . . . necessary . . . in the progress of the world from an economic standpoint. Religion is the only secure method of neutralizing what is likely to be the bad effect of unrestrained selfishness.” Letter from William Howard Taft to Emory R. Buckner (Nov. 9, 1922), microformed on Taft Papers, supra note 4, Reel 247.
permitted to override "a political sense of proportion."96 Thus while Taft vigorously opposed the "radical" views of Brandeis, which he interpreted as "in favor of breaking down the Constitution, or making it a mere scrap of paper," he was equally opposed to the "reactionary" views of McReynolds,97 which in Taft's view failed to appreciate the manifold ways in which the Constitution was "a political instrument" that needed to be adapted "to new conditions."98

The upshot was a fuzzy and genial conservatism, memorable neither for its intransigence nor for its intellectual perspicuity. Taft's jurisprudence perfectly vindicated "the determination of President Harding to return the country to a condition of 'normalcy.'"99 Taft's easy and privileged career had produced a judge without "Weltschemrz;"100 in Brandeis's shrewd estimation, Taft had "all the

96. Letter from William Howard Taft to Robert McDoagl (Oct. 13, 1924), microformed on Taft Papers, supra note 4, Reel 268.
97. Letter from William Howard Taft to Elihu Root (Dec. 21, 1922), microformed on Taft Papers, supra note 4, Reel 248. A propos of the question of whether Harding should nominate Henry Stimson for a vacancy on the Supreme Court, Taft remarked:

[T]he only thing I know against Stimson is his good opinion of Frankfurter. I suppose it does not indicate an unsoundness of view as to the Constitution on Stimson's part, for it would be a great disappointment to have him appointed and then find him herding with Brandeis. I should think this quite unlikely, but I know you can give me assurances on the point, and that he is not in favor of breaking down the Constitution, or making it a mere scrap of paper. The influence of the Harvard Law School through Frankfurter and Pound . . . is to break down that fundamental instrument and make it go for nothing. That I think was Wilson's purpose in appointing Brandeis and Clark.

98. Letter from William Howard Taft to George Sutherland (Sept. 10, 1922), microformed on Taft Papers, supra note 4, Reel 245 ("I do not minimize at all the importance of having Judges of learning in the law on the Supreme Bench, but the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State. A Supreme Judge must needs keep abreast of the actual situation in the country so as to understand all the phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions."). Taft stressed the importance of "the elasticity of our constitutional restraints and the possibility of squaring them with the change of conditions that calls for greater limitations than have heretofore been deemed necessary. But this does not do away with fundamental principles of our liberties." William Howard Taft, Speech at Minneapolis, supra note 95.
100. Brandeis-Frankfurter Conversations, supra note 75, at 303 (quoting from a conversation of Apr. 17, 1922). At times Brandeis could more sharply characterize Taft's lack of depth:

As a matter of fact the present Chief, with all his good nature & kindliness & the quality that makes everybody like him, looks like many a benevolent, good-natured distillery drummer I used to see in the days when I was counsel for some distilleries. His face has nothing in it—it's so vapid.
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defects but also the advantages of the aristocratic order that has done well by him. He accepts it, but doesn’t sweat & labor to maintain his position.”

There is no doubt but that Taft stood at the dead center of the Court he undertook to lead. As Chief Justice, Taft participated in some 1583 decisions, he dissented in only 19. He authored or joined the opinion for the Court in 98.7% of its decisions. This remarkable record strongly suggests that Taft’s vision of “progressive conservatism” was

Id. at 333 (quoting from a conversation of Aug. 3, 1924). Curiously, Taft himself remarked that “the men who are taken for me, and who rejoice in it and tell me of it, are smooth, light-complexioned, men with a mustache and curvilinear outline in front, without any intelligence in their faces and look something like successful bootleggers.” Letter from William Howard Taft to Horace Taft (May 23, 1928), microformed on Taft Papers, supra note 4, Reel 302.

101. Brandeis-Frankfurter Conversations, supra note 75, at 303 (quoting from a conversation of Apr. 17, 1922). Compare the judgment of Charles A Beard: “Mr. Taft was a very dogmatic man, given to conservative legalism, easy-going, . . . solicitous about getting the ‘right’ kind of men on the bench, . . . and from first to last a veritable and monumental embodiment of the American middle class in its upper ranges.” Charles A. Beard, The Life and Times of William Howard Taft by Henry F. Pringle, 40 Colum. L. Rev. 950, 950 (1940) (book review). In Mark DeWolfe Howe’s view, the ultimate “explanation of Taft’s mediocrity” lay in “the uneasy fear of change which lay behind the cheerful surface.” Mark DeWolfe Howe, The Life and Times of William Howard Taft by Henry F. Pringle, 53 Harv. L. Rev. 505, 505(1940) (book review). Howe continues:

The warm heart of Taft, his patient industry, his sympathy for individuals, his thoroughly shrewd intelligence were qualities which should have made his contribution to American life something of permanent importance. . . . His virtues were so many and so appealing that his failure to achieve greatness is an almost tragic story. . . . In the last analysis [the explanation of Taft’s failure] seems to lie in the crippling fear of change which so warped intelligence and sympathy that understanding and imagination were destroyed.

Id. at 506-07.

102. Unless otherwise noted, a “decision” of the Court shall refer in this article to a case (or cases) decided by a full opinion, as distinct, for example, from a case (or cases) decided by a memorandum opinion or by a denial of certiorari or by the bare issuance of a judgment. Used in this way, a single “decision” may dispose of several cases, if the latter are defined by separate docket numbers.

103. Taft issued one opinion “dubitante” in FTC v. Curtis Publishing Co., 260 U.S. 568 (1923). He also published one concurring opinion in Craig v. Hecht, 263 U.S. 255 (1923). Taft’s record was equaled during the period of his Chief Justiceship (which included a fragment of the 1929 Term) only by Willis Van Devanter. During Taft’s tenure, Van Devanter participated in 1591 decisions, dissenting in only 21. Van Devanter wrote no separate concurrences, and, like Taft, he either authored or joined the opinion for Court in 98.7% of its decisions. (During the 1915–1920 Terms, by contrast, Van Devanter had joined or authored only 96.2% of the Court’s opinions.) In Figure 3, I have calculated the percentage of decisions during the 1921–1928 Terms in which each participating Justice either authored or joined the Court’s opinion. The percentages range from 87.1% (John Hessen Clarke) to 98.8% (Willis Van Devanter).

104. Letter from William Howard Taft to Gus Karger (Jan. 31, 1916), microformed on Taft Papers, supra note 4, Reel 162. See Letter from Frank H. Hiscock, Chief Judge, New York Court of Appeals, to William Howard Taft (July 6, 1921), microformed on Taft Papers, supra note 4, Reel 229 (“We all know that you will bring to the duties of the office that combination of progressiveness and conservatism which will adjust the law to the new requirements of a constantly changing civilization, but which will not regard passing fantasies, theories and desires of the moment as good substitutes for those fundamental principles which are the basis of our system of jurisprudence.”).
not merely idiosyncratic, but that it dominated the Court itself. In part this was because Taft presided over an institution that to an astonishing extent was shaped by the same commitment to “normalcy” that had led to Taft’s own nomination. Although Harding was President for only about two and a half years, he managed to reshape the Court by appointing three conservative Associate Justices who very much supported Taft’s jurisprudential outlook: George Sutherland (September 1922), Pierce Butler (December 1922), and Edward T. Sanford (January 1923).

Most fundamentally, however, Taft’s predominance reflected the fact that his hesitations and limitations “were probably shared by the dominant people” of his time. Taft took charge of the Court at a moment when the nation was attempting to assimilate the seismic implications of World War I, which snapped “old certainties like rotten boards.” The massive federal intervention unleashed by the Wilson administration to prosecute the war landed squarely athwart fierce constitutional debates about the proper extent of national power and the proper role of state regulation. The war revealed the future of the American state with intolerable clarity, undercutting the entire framework of the pre-war constitutional order. Yet the country’s pell mell retreat to “normalcy” testified to the nation’s unwillingness frankly

105. Upon his appointment as Chief Justice, Taft had written Sutherland: “I look forward to having you on the Bench with me . . . Our views are much alike and it is important that they prevail.” Letter from William Howard Taft to George Sutherland (July 2, 1921), Sutherland Papers, supra note 45. Upon Sutherland’s appointment to the Court, Taft warmly welcomed him to the bench because “you now come into the Court with a general opinion as to the functions of the Court similar to my own.” Letter from William Howard Taft to George Sutherland (Sept. 10, 1922), microformed on Taft Papers, supra note 4, Reel 245. Sutherland responded to Taft by avowing that “our outlook on things in general is so much the same that I am sure it will be not only a work of pleasure but of cooperation as well.” Letter from George Sutherland to William Howard Taft (Sept. 19, 1922), microformed on Taft Papers, supra note 4, Reel 245.


107. Sanford was also “a conservative,” Sanford Collapsed in Dentist’s Office; Became Unconscious Soon After Tooth was Pulled—Death is Laid to Uremic Poisoning, N.Y. TIMES, Mar. 9, 1930, at 28, albeit one “with progressive tendencies.” Allen E. Ragan, Mr. Justice Sanford, 15 E. TENN. HIST. SOC’YS PUBLICATIONS 74, 77 (1943). See Lewis L. Laska, Mr. Sanford and the Fourteenth Amendment, 33 TENN. HIST. Q. 210, 219 (1974). It was accurately said of Sanford that his “sweet and compliant personality made him a satellite of the affable Chief Justice Taft.” SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES 86 (1971).

108. Howe, supra note 101, at 506.

to face the new realities of the twentieth century. Throughout the 1920s the nation vacillated between attempting to stuff the genie of modernity back into its bottle and tentatively exploring the powerful new administrative possibilities rendered suddenly visible by the war. The country as a whole shared Taft’s conservative ambivalences and confusions.\textsuperscript{110}

It is clear that the Taft Court was, like Taft himself, caught at the cusp between two eras. Its jurisprudence can be succinctly summarized as a hesitant effort both to conserve pre-war pieties and to accommodate the consequences of profound social change. The Court could frequently recognize the need for new forms of state and federal control, but it was unwilling decisively to break with traditional forms of constitutional analysis. The result was a muddle. It is not surprising that the Court’s jurisprudence has largely sunk into an oblivion as deep as that of Taft himself. The ambivalent jurisprudence of the Taft Court provided neither a sure guide to pre-war constitutionalism nor a sure foundation for future developments. Instead it offers the rare opportunity to witness a talented Court struggle to adjust American constitutional law to profoundly altered circumstances. Caught at just the right angle of vision, this struggle reveals much about the deep and implicit premises of pre-New Deal jurisprudence, as well as the immanent structures of our own constitutional thought.\textsuperscript{111}

\textsuperscript{110} On the ambivalence of American society in the 1920s, see id. at 148–49 (the 1920s championed “tomorrow’s technology in the guise of yesterday’s virtues”). Taft’s personal ambivalence concerning reform is best illustrated in a letter he wrote to his sister-in-law at the end of his life, in which within three sentences he simultaneously reported that “I am going to devote myself to lobbying” Congress in order to ensure the passage of important legislation creating a new Supreme Court Building, and that “I really don’t feel particularly troubled when legislation is not pressed through because it means that Congress is not doing anything much, which means that it is not doing injurious things.” Letter from William Howard Taft to Mrs. Charles P. Taft, (Dec. 8, 1929), microformed on Taft Papers, supra note 4, Reel 316.

Figure 1: Supreme Court Appellate Docket 1910-1928

Cases Disposed of During the Term
Cases Remaining on the Docket at the End of the Term
Cases Docketed During the Term

Number of Cases

1928
1927
1926
1925
1924
1923
1922
1921
1920
1919
1918
1917
1916
1915
1914
1913
1912
1911
1910

1000
800
600
400
200
0
Figure 2: Number of Court Opinions

Authored by Each Justice

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<th>Taft</th>
<th>Holmes</th>
<th>Van</th>
<th>Mc-Devanter</th>
<th>Brandeis</th>
<th>Sutherland</th>
<th>Butler</th>
<th>Sanford</th>
<th>Stone</th>
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