William Howard Taft and the Importance of Unanimity*

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This Term, the Historical Society has put on a wonderful series about the man who is widely—and rightly—regarded as this Court's greatest Chief Justice. Through his recognition of the right of judicial review, John Marshall secured for this Court a role in shaping the nation's most important principles: racial equality, individual liberty, the meaning of democracy, and so many others.

Learning more about John Marshall this Term has caused me to think about another great Chief Justice, who perhaps deserves almost as much credit as Marshall for the Court's modern-day role, but does not often receive the recognition: William Howard Taft. Taft, of course, was remarkable even before he became Chief Justice—but even the presidency did not hold as much charm for Taft as did his eventual position on the Court. Mrs. Taft noted in her memoirs that "[N]ever did he cease to regard a Supreme Court appointment as vastly more desirable than the Presidency."[1]

Mrs. Taft, however, disagreed. She loved being First Lady, and was a good one, at that. She was responsible for bringing the cherry blossoms to Washington, a feat for which I am particularly grateful. She also made a bit of history on March 4, 1909 by becoming the first First Lady to accompany her husband from the Capitol to the White House on Inauguration Day.[2] She was a difficult woman to refuse.

Taft, on the other hand, was an unpopular President. His bid for re-election was so unsuccessful that he himself described his defeat as "not only a landslide but a tidal wave and holocaust all rolled into one general cataclysm."[3] Despite his failures as President, however, as chief executive of the Court Taft could only be considered a success. When he took over the job, he found a federal system overwhelmed with cases, causing the Supreme Court's docket to be as much as five years behind and placing the other federal courts in similarly dire straits.[4] Taft, with his experience as an executive and his connections on Capitol Hill, succeeded in securing the appointment of twenty-four additional federal judges.[5] He also founded the predecessor to the Judicial Conference of the United States,

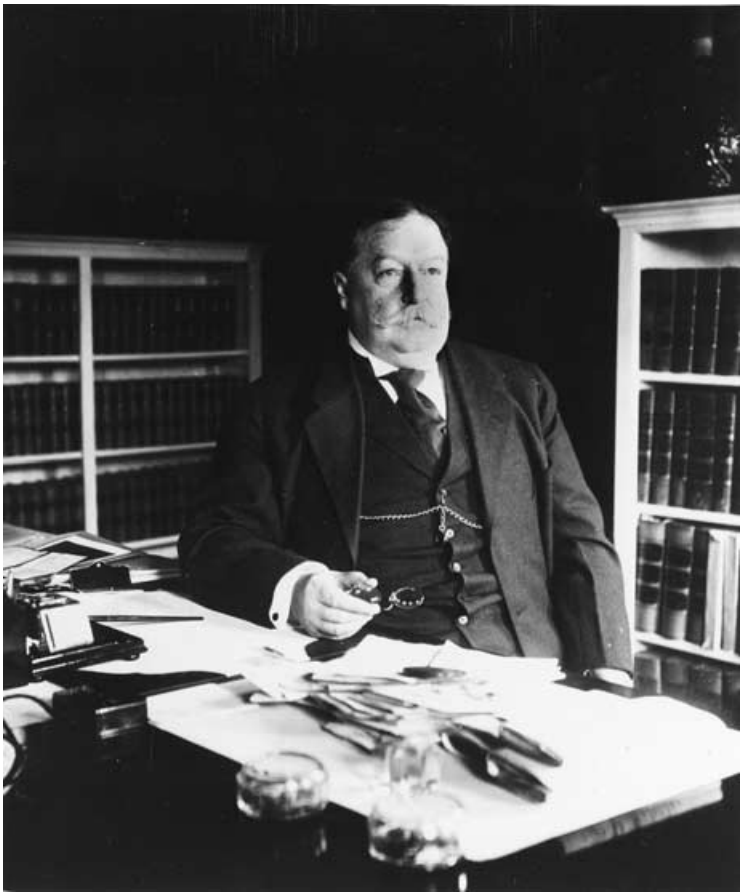
Helen Taft (pictured with her husband and son) became the first First Lady to accompany her husband from the Capitol to the White House on Inauguration Day. She preferred being the wife of a President to being that of a Chief Justice.

the job of which it became to keep statistics on the work of federal courts and to suggest reforms to keep the federal system functioning smoothly.[6]

Taft lessened the load on the Supreme Court by successfully lobbying Congress to pass a statute that would give the Court greater control over its own docket by substituting discretionary certiorari review for much of what had previously been mandatory appellate jurisdiction.[7] But Taft's concern for the Court went beyond simple efficiency: he had a vision of the Court much grander than that of a court of error securing justice for individual litigants. As Taft saw it, individual litigants received all the justice they required through the federal district courts and courts of appeals. The Supreme Court's role was only "to maintain uniformity of decision for the various courts of appeal, [and] to pass on constitutional and other important questions."[8] Control over its own docket allowed the Court to pass over ordinary lawsuits and spend more time on these sorts of questions.

In keeping with his vision of the Court as a player in issues of national importance, Taft also lobbied Congress to appropriate funds to build the present Supreme Court Building, a building whose grandeur matched Taft's sense of the significance of the business conducted therein.[9]

Chief Justices Taft and Marshall also placed great value on keeping the Courts over which they presided unanimous. John Marshall began his Chief Justiceship by putting to an end the English practice of seriatim opinions,



Not only was Chief Justice William Howard Taft an efficient administrator, but he pushed Congress to allow the Court to pass over ordinary lawsuits in order to concentrate on constitutional issues and uniformity of decision in the appellate courts.

where each Justice wrote separately to give his own view of the case.[10] Marshall accomplished this by writing the opinion of the Court himself: in his first four years on the bench, he wrote in all of the cases not decided *per curiam*, save the two in which he did not participate. In these four years, there were no dissents and only one separate concurring opinion.[11]

Marshall explained his Court's ability to achieve unanimity thus: "The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning must be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all."[12] Certainly, Marshall's description of a Court striving for genuine consensus did not present the complete picture. In order to maintain agreement, Justices on the Marshall Court also acquiesced in opinions with which they did not agree. Marshall began one of his rare dissents with a disclaimer: "I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion."[13]

Thomas Jefferson, who was not always pleased at the outcomes reached by the unanimous Court, had another explanation for the Marshall Court's unanimity. Jefferson attributed the Court's level of agreement not to Marshall's willingness to modify opinions to reach consensus, but rather to the Chief's overwhelming influence on the other Justices. When the time came for President Madison to fill a vacancy on the Court, Jefferson lamented:

"It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall."[14]

The Court led by Chief Justice Taft was also remarkably cohesive: 84 percent of the opinions of the Taft Court were unanimous.[15] Taft did not approve of dissents, believing that "[I]t is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way."[16] Taft's concern with the certainty of the law had to do not only with the need for people to plan their lives and business transactions around it; it also had to do with the legitimacy of the institution itself. According to Taft, "Most dissents elaborated, are a form of egotism. They don't do any good, and only weaken the prestige of the Court."[17] Accordingly, he asserted that he "would not think of opposing the views of my brethren if there was a majority against my own."[18] In general, he kept to this view, writing only 20 dissents during his nearly ten years on the Court.[19] On the rare occasion when he did dissent, he was clearly troubled by it. He began his dissent in *Adkins v. Children's Hospital* with a disclaimer: "I regret much to differ from the Court in these cases."[20]

Taft's goal of achieving unanimity on the Court was no doubt helped by norms of the day, which generally disfavored dissent.[21] Canon 19 of the code of judicial ethics in place at the time stated that

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.[22]

These norms affected even Justices Holmes and Brandeis, who, along with Justice Stone, vexed Taft with their vigorous dissenting opinions, most famously in cases involving freedom of speech.[23] Taft's frustration with the three was great enough to declare them all "of course hopeless" when they would not join the other six Justices in a case "to steady the Court."[24] But remarkably, even the "Great Dissenter" Holmes thought it was "useless and undesirable, as a rule, to express dissent."[25] Brandeis, too, recognized that he could not "always dissent," and kept his disagreement to himself when he felt he had been out of line with his fellow Justices on too many recent occasions.[26]

At least some of the Taft Court's agreement, however, was due to the Chief Justice's efforts to keep it together. Taft himself played some role in the perpetuation of the general judicial norm against dissent—he was the chair of the committee that drafted Canon 19.[27] But he also made many more efforts directly targeted at his Court. One estimate has it that Taft was directly responsible for suppressing at least 200 dissenting votes.[28]

How did he do it? Taft, who did not have the jurisprudential talent of Marshall, was surely not able to keep the Court together simply by the force of his legal reasoning. Instead, he used his influence over appointments to the Court to block those who he thought would "almost certainly" be dissenters, such as Learned Hand.[29] Taft made every effort to maintain a personal relationship with all of his colleagues, so much so that Justice Holmes in 1925 reported that "[N]ever before . . . have we gotten along with so little jangling and dissension."[30] Taft also used his assignment power to ensure that the opinion writer would garner as many votes as possible for his view.[31]

But achieving unanimity did not end with opinion assignment: it was an ongoing struggle. Professor Robert Post, who is currently

To suppress dissenting votes on the Court, Taft maintained good relations with his brethren and used his assignment power to assure that the opinion writer would garner as many votes as possible. The members of the Taft Court in 1925 are pictured above.

writing the Holmes Devise on the Taft Court, has uncovered the Court's original conference books. He has found that 30 percent of the Taft Court's unanimous opinions required a Justice to change his conference vote in order to achieve unanimity, and a further 12 percent required a Justice to side with the majority after originally passing or registering a tentative vote.[32]

In part, these switches occurred because the Justices of the Taft Court did what Marshall had aspired to do: achieve unanimity by carefully crafting opinions to meet the concerns of all of the Justices.[33] Taft led this practice by example, holding up voting on a complicated utility valuation case to allow Justice Brandeis to work through his concerns and then scheduling an entire day of discussion on the matter.[34] Taft also encouraged the Justices to keep their opinions to bare essentials, avoiding controversial discussions unnecessary to the result. Taft himself omitted a lengthy discussion of Congress's Commerce Clause power from one opinion at the request of Justice Pierce Butler, commenting that although the removal meant a "real sacrifice of personal preference," "[I]t is the duty of us all to control our personal preferences to the main object of the Court, which is to do effective justice."[35]

When methods of accommodation failed, however, the Justices of the Taft Court were willing to sign onto unanimous opinions that contained statements of the law with which they did not agree. Correspondence between the Justices shows that many of their votes were changed only under protest. Justice Butler responded to a Holmes opinion thus: "I voted the other way and remain unconvinced, but dissenting clamor does not often appeal to me as useful. I shall acquiesce." Other Justices were

Like many of the Justices, Pierce Butler acquiesced to signing onto a unanimous opinion to which he did not agree because "dissenting clamor does not often appeal to me as useful."

more blunt. Justice Brandeis concurred in an opinion of Justice Stone, commenting: "I think this is woefully wrong, but do not expect to dissent." Justice Sutherland ultimately joined an opinion to which he had originally responded: "Sorry, I cannot agree."[36]

Times have changed. In the 1991–2000 Terms, only 44 percent of the Court's opinions were unanimous, with 19 percent decided by only one vote. While these numbers do not indicate the sort of political divisions of which we are sometimes accused, the current Court has certainly not achieved anywhere near the level of consensus enjoyed by the Taft Court. In fact, that level of agreement did not last long. In the 1940s, only a decade after Taft left the bench, the statistics looked more modern—only 39 percent of the decisions were unanimous, and 14 percent were decided by a margin of one. The numbers have remained relatively stable since.

Despite the statistical difference, in some ways, the Taft Court sounds a lot like the Court on which I sit. We all strive to write opinions that will satisfy the concerns of as many of our colleagues as possible. We all greatly prefer the Court to be unanimous or almost so whenever possible, and we work to make that happen. I have never heard any of my colleagues express in seriousness the view about which Justice Brennan used to joke: that the most important skill for a Supreme Court Justice to have is the ability to "count to five."[37]

The statistical differences between the Taft Court and the present Court are probably reflective of the lengths we are willing to go to achieve unanimity. The agreement we do achieve is almost exclusively accomplished by the extensive revision of opinions in response to comments by other Justices. Unlike the Justices of the Taft Court, neither my colleagues nor I make a practice of joining opinions with which we do not agree. While unanimity is most certainly a goal of the present-day Court, it does not overwhelm our other goals. When agreement cannot be reached, each one of us takes the opportunity to make our disagreement known, often quite forcefully. Rather than following Taft's Canon 19, we generally, I think, follow the practice recommended by a later Chief Justice, Charles Evans Hughes:

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time.[38]

Perhaps ironically, we owe our ability to dissent in such cases in part to Chief Justice

Taft. Taft's focus on unanimity was largely motivated by a concern for the institutional integrity of the Court.[39] It naturally accompanied Taft's attempts to transform the Court from simply a higher appellate body to an expounder of national principle. Taft was as concerned that the Court be a grand presence in the public mind as he was that it be a grand presence on Maryland Avenue. He rightly recognized that too much fragmentation among the Justices would undermine the public's confidence in the institution and its decisions. No doubt the same can be said of John Marshall, who was dedicated to establishing the Court as a body justified in exercising its newly recognized power of judicial review. It is the success of Taft and Marshall in bolstering the Court's integrity that allows us the luxury of expressing our individual views today.

Although I believe that the Court ought to be careful not to squander the nest egg our predecessors have left us, I am thankful that it is there to use when needed. Dissents can play an important role in the future course of the law. One need look no further than Justice Holmes' dissent in *Lochner*,[40] or Justice Harlan's in *Plessy v. Ferguson*,[41] to see the good that can ultimately come from the expression of a minority view. In fact, Harlan's view in *Plessy* was so worth expressing that when the Court finally came around to it in *Brown v. Board of Education*,[42] Chief Justice Warren went to great efforts to do so unanimously. *Plessy* and *Lochner* show us that what was once simply a powerful disagreement by one individual may eventually become the law of the land. This is perhaps the most obvious advantage of dissenting opinions.

There is value to dissent even if it does not eventually carry the day. Dissenting opinions can force the Justices in the majority to respond to criticisms, honing the Court's opinion. Karl Llewellyn has referred to this function of dissent with an idiom that particularly appeals to the cowgirl in me: "rid[ing] herd on the majority."[43] Dissents can also serve to limit the holding of the majority opinion—what Justice Brennan called "damage control"[44]—alerting future litigants and all those who must be governed by the law of the precise scope of the Court's opinion.

Perhaps most importantly, the dissent plays a role in showing those members of the public who disagree with the Court's opinion that their views, though ultimately not successful, were at least understood and taken seriously. The citizens of this nation are educated and aware enough to understand that the questions that come before the Court rarely have easy answers. The existence of dissent demonstrates—indeed, embodies—the struggles we undergo in reaching our decisions. Only a very unsophisticated public could be duped into thinking the law on such controversial issues as abortion rights, immigration, and the rights of criminal defendants could be resolved so simply as to engender no disagreement whatsoever.

This function of dissent demonstrates one thing Chief Justice Taft may have missed: at times, the existence of dissent can bolster, rather than undermine, the Court's legitimacy. Again, a quote from Chief Justice Hughes is useful:

> [W]hat must ultimately sustain the Court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.[45]

We should never lose sight of how regrettable it is when the Court cannot find its way to agreement. The Court must always try, through all available means, to find grounds on which there can be genuine agreement. I feel pride in the Court when we are able to issue unanimous opinions in controversial cases,

as we did this Term in a difficult case or two. But when agreement is not possible, I also feel pride when my colleagues and I are able to disagree honestly and respectfully. I admire Chief Justice Taft for his heroic efforts to keep his Court together—for his flexibility and his willingness to discuss cases repeatedly and at length until the Court could find agreement. These efforts have contributed perhaps more to our Court than the other things Taft gave us: more than this building, however grand, and more than even the greater degree of control over our docket. I appreciate Taft the most for setting an example for future Courts of the importance of reaching agreement when possible, and for helping secure for the Court the respect necessary to enable us to depart from the practice of his own Court and disagree when disagreement is necessary. He truly was a great Chief Justice.

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ENDNOTES

[1]Donald F. Anderson, "Building National Consensus: The Career of William Howard Taft," 68 *U. Cin. L. Rev.* 323, 328 (2000).
[2]Mrs. William Howard Taft, **Recollections of Full Years** (1914), at 331–332.
[3]Anderson, *supra* note 1, at 336.
[4]Kenneth W. Starr, "William Howard Taft: The Chief Justice as Judicial Architect," 60 *U. Cin. L. Rev.* 963, 964 (1992).
[5]*Id.* at 965.
[6]*Id*.
[7]Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court," 85 *Minn. L. Rev.* 1267, 1277 (2001).
[8]Starr*, supra* note 4, at 968.
[9]*Id.*
[10]Percival E. Jackson, **Dissent in the Supreme Court** 21 (1969).
[11]*Id.*
[12]*Id.* at 22.
[13]*Bank of United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C. J., dissenting).
[14]Jackson, *supra* note 10, at 23.
[15]Post, *supra* note 7, at 1283.
[16]*Id.* at 1311.
[17]*Id.*
[18]Alpheus Thomas Mason, **William Howard Taft: Chief Justice** 223 (1964).
[19]Alpheus Thomas Mason, **The Supreme Court from Taft to Warren** 50 (1958).
[20]261 U.S. 525, 562 (1923) (Taft, C. J., dissenting).
[21]Post, *supra* note 7, at 1284.
[22]Mason, *supra* note 18, at 219.
[23]*See, e.g., Whitney v. California*, 274 U.S. 357 (1927); *United States v. Schwimmer*, 279 U.S. 644 (1929).
[24]Post, *supra* note 7, at 1326.
[25]Jackson, *supra* note 10, at 18.
[26]Mason, *supra* note 18, at 201.
[27]*Id.* at 219.
[28]*Id.* at 223, citing David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," unpublished paper, September 1963, p. 20, n. 122.
[29]*Id.* at 171.
[30]*Id.* at 199.
[31]*Id.* at 212.
[32]Post, *supra* note 7, at 1332–1333.
[33]*Id.* at 1301.
[34]Mason, *supra* note 18, at 202.
[35]*Id.*, *supra* note 18, at 204 (discussing *Sanitary Dist. of Chicago v. United States,* 266 U.S. 405 [1925])
[36]Post, *supra* note 7, at 1340–1341.
[37]Anthony Lewis, "In Memoriam: William J. Brennan, Jr.," 111 *Harv. L. Rev.* 29, 32 (1997).
[38]Charles Evans Hughes, **The Supreme Court of the United States** 67–68 (1928).
[39]Post, *supra* note 7, at 1356.
[40]198 U.S. 45, 76 (1905).
[41]163 U.S. 537, 551 (1896).
[42]349 U.S. 294 (1955).
[43]Karl Llewellyn, **The Common Law Tradition: Deciding Appeals** 26 (1960).
[44]William J. Brennan, Jr., "In Defense of Dissents," 37 *Hastings L. J.* 427, 430 (1986).
[45]Hughes, *supra* note 38, at 67–68.