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Draft 11

# THE SUPREME COURT OPINION AS INSTITUTIONAL PRACTICE: DISSENT, LEGAL SCHOLARSHIP, AND DECISIONMAKING IN THE TAFT COURT[†]

In 1921, when William Howard Taft became Chief Justice, the Supreme Court did not occupy the serene and imposing marble building that has since become its contemporary icon.[1] Its courtroom was instead located in the old Senate Chamber, whose intimate, elegant surroundings echoed with the debates of Webster, Clay, and Calhoun.[2] Its administrative staff and offices were scattered haphazardly and inefficiently throughout the Capitol.[3] It was Taft who, with great skill and patience, seized the occasion to extract from Congress the resources to construct and design the present structure,[4] which, in the words of its architect Cass Gilbert, was intended to

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[1] Writing in 1984, Margaret P. Lord noted that to the Justices who first moved into the contemporary Supreme Court building in 1935, "the spaces were too huge, the corridors were too long and cold, the rooms too formal." Margaret P. Lord, "Supreme Courthouse," Connoisseur, Vol. 214, July 1984, p. 61. But, she added, "Today, the grandeur seems exactly appropriate." Contemporary representations of the Court nearly always include images of its building.

[2] Charles Moore, Washington Past and Present 126 (New York: The Century Co. 1929).

[3] See William Howard Taft to Senator Reed Smoot, July 3, 1925 (Taft Papers, Reel 275); Gregory Hankin and Charlotte A. Hankin, Progress of the Law in the United States Supreme Court, 1929-1930 5 (Legal Research Service: Washington D.C. 1930). In remarks at the laying of the cornerstone for the present Supreme Court building, Charles Evans Hughes referred to the administrative facilities of the old Court as "shockingly insufficient. . . . I doubt if any high court has performed its tasks with so slender a physical equipment." "Address of Chief Justice Hughes," 18 American Bar Association Journal 728, 728 (1932).

[4] Hughes was speaking simple truth when he later observed that "we are indebted to the late Chief Justice William Howard Taft more than to anyone else" for the construction of the contemporary Supreme Court building. Hughes, supra note 3. For a brief synopsis of Taft's intense lobbying campaign, see Alpheus

combine "all the beauty, charm and dignity of the Lincoln Memorial" with "the practical qualities of a first-rate office building."[5] Although Taft never lived to see the building constructed, a plaster model of it was placed beside his casket as he lay in state at the Capitol, in tribute to "one of [his] last contributions to the nation."[6]

In part, Taft's success was due to what Charles Evans Hughes accurately characterized as "his intelligent persistence."[7] But in part it was also due to the mood of the nation in the decade after World War I. Despite the notorious budgetary astringency of Republican administrations, there was a remarkable and widespread conviction that Washington D.C. should be rebuilt "to make the national capital as splendid as our new status in the world."[8] The spate of federal construction in the 1920s[9] reflected "the dawning consciousness that this capital is an equivalent of the Rome of Augustus."[10]

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Thomas Mason, William Howard Taft: Chief Justice 133-137 (Simon and Schuster: New York 1965). To get a sense of how remarkably innovative were Taft's lobbying efforts on behalf of the new Supreme Court building, consider the 1917 remarks of Representative James R. Mann, when speaking to the question of the housing of the Supreme Court:

> The members of the Supreme Court of the United States can not go lobbying. They can not permit one of their employees to go lobbying. It is beneath their dignity, properly so, to even make a representation in reference to the matter.

54 Congressional Record 1716, 64th Cong., 2nd Sess., January 19, 1917.

[5] Cass Gilbert to William Howard Taft, January 16, 1929, (Taft papers, Reel 307). Gilbert remarked that this was "a combination rather difficult to achieve, but nevertheless possible." Id. Although the classical elements of the Supreme Court are often remarked upon, it was equally important to Taft and Gilbert that "The practical, working elements of the building are as simple and modest and as sanitary as a modern office should be." Cass Gilbert to James M. Beck, November 28, 1933 (Gilbert Papers).

[6] "Hundreds File Past Taft Bier in Capitol," New York Times, March 12, 1930, p. 15.

[7] Hughes, supra note 3.

[8] Anne O'Hare McCormick, "Building the Greater Capital: A New Washington Rises as the Symbol of America's New Status," The New York Times Magazine, May 26, 1929, p. 1.

> The real pressure behind the new Washington is the new America. We have heard a good deal during the past few years of the United States as a great world power, perhaps the greatest. But that conception of our place in the international scheme is new to Americans, and in the country at large has been discounted as political hyperbole. Very slowly the legend has

> The proudest boast of the Emperor Augustus was that he found Rome a city of brick and left it a city of marble. All Washingtonians seem bent upon following in his footsteps and making our national capital, if not a marble city, at least a white city.[11]

The new Supreme Court building self-consciously participated in this imperial metaphor. Gilbert, who had been personally selected by Taft,[12] designed the structure "to express the serious beauty and quiet refined splendor of a Courtroom of the classic period of Rome."[13] The architectural reference to Rome was complex and multi-dimensional. It

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> acquired the vitality of a fact, predicated not upon a vague political pre-eminence but upon the clear evidence of our mechanistic supremacy. We begin to see ourselves first among the nations by the tangible standards the populace recognizes—wages, motor power, plumbing. Gradually our primacy has impressed ourselves. The capital, says Mr. Hoover, is "the symbol of the nation."

[9] See Emmet Dougherty, "$50,000,000 To Add Beauty and Dignity to Capital's Skyline: Stately Edifices of Classic Design to Accommodate an Army of Clerks," New York Herald Tribune, August 15, 1926, Section III, p. 3.

[10] McCormick, supra note 8.

[11] Fitzhugh L. Minnigerode, "Washington Doffs Its Brick for Marble: White Masterpieces of Architecture Replace Old Red Buildings as Townsmen Join the Government in Beautification Plan," The New York Times Magazine, September 21, 1930, p. 18.

> The most notable buildings either recently erected or soon to be erected include the Departments of Commerce, Justice, Posts and Labor. Then we shall see arise in majesty a new building for the Supreme Court, another for the Interstate Commerce Commission, the Archives Building, Independent Offices Building, House of Representatives Annex, and a number of lesser ones . . . .

Id.

[12] Taft, who had been Chair of the Lincoln Monument Commission, initially looked to Henry Bacon, who had designed the Monument. Bacon in fact produced preliminary drawings of a Supreme Court building. See Taft to Smoot, supra note 3; Carson C. Hathaway, "At Last a Home for the Supreme Court: Highest Tribunal of Nation Never Had Its Own Building But After 136 Years Plans for One are Now Drawn," The New York Times Magazine, September 26, 1926, p.13. Bacon died in 1924.

[13] Cass Gilbert to Benito Mussolini, August 11, 1932 (Gilbert Papers). Gilbert admired Mussolini, and he actively sought the dictator's assistance in acquiring the Italian marble that Gilbert insisted be used in the courtroom. Gilbert met with Mussolini in June 1933 to discuss the situation:

> I said that I had thought it would interest him to know of these matters at first hand & that I wanted him to know of them from me, as I had the greatest admiration for him & for what he had done & is doing for Italy. I moved to withdraw. He put out his hand across the table & said very simply "Goodbye—Goodbye"! We shook hands & I turned & walked rapidly to the door, reaching which I turned sharply around and raised my hand in the Roman Salute—as he did the same. And I shall always think of him as standing in the somewhat dim light of that great room

evoked associations of Roman law,[14] Roman power and virtue, and the stable equipoise of secure authority. By the time the Court actually moved into its new quarters in 1935, however, it had thrown down the gauntlet to the New Deal, so that the abstract and "pure" classicism[15] of the building acquired a hard and cold edge. It became "a building symbolic of the Court's intransigence," a "sepulchral temple of justice."[16]

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> alone, with his hand up above his head in the most impressive of gestures, the Roman Salute, which is so characteristic of the great organization he has created—The Facisti—and which he has led so successfully for nearly eleven years.

Gilbert Memorandum, "Mussolini," June 6, 1933 (Gilbert Papers).

[14] Taft's brother Henry, for example, wrote to Gilbert that the Courtroom "will be very beautiful, and the selection of the Roman feeling particularly appropriate, as the Romans were the first of the ancients who developed a system of law which has lasted down through the centuries." Henry Taft to Cass Gilbert, February 15, 1932 (Gilbert Papers).

[15] See Cass Gilbert to Sir Reginald Blomfield, April 5, 1933 (Gilbert Papers) ("The Supreme Court Building . . . is built of white marble and it is as pure in style as I can make it. I hope it will cause some reaction against the silly modernistic movement that has had such a hold here for the last few years.").

[16] Drew Pearson and Robert S. Allen, The Nine Old Men 3-4 (Doubleday, Doran & Co.: Garden City 1937). Pearson and Allen are quite inaccurate in their account of the building. For example, they describe Stone as opposed to its construction:

> Justice Stone was not impressed by the boyish pride of Mr. Taft in his blueprints.
> "I am very comfortable at home," he said. "I wouldn't move my library if you gave me the whole building to myself."

Id. at 3. Actually, however, Taft began earnestly seeking funding for a new building only after the newly-appointed Justice Stone was unable to find an office in the Capitol. See Harlan F. Stone to William Howard Taft, May 5, 1925 (Stone Papers); William Howard Taft to Harlan F. Stone, May 26, 1925 (Taft Papers, Reel 274); Harlan F. Stone to William Howard Taft, May 27, 1925 (Taft Papers, Reel 274); William Howard Taft to Harlan F. Stone, May 28, 1925 (Taft Papers, Reel 274); William Howard Taft to Senator Reed Smoot, July 3, 1925 (Taft Papers, Reel 275). In the 1920s there was virtually no room for Justices' Chambers in the Capitol; all the Justices but Sutherland and Sanford worked at home. But because Stone was in the process of constructing a house, he had no home office. Stone complained vociferously, writing to Taft that "I shall be about like a stray dog." Harlan F. Stone to William Howard Taft, August 30, 1925 (Taft Papers, Reel 276). See William Howard Taft to Senator Charles Curtis, September 4, 1925 (Taft Papers, Reel 276); Harlan F. Stone to William Howard Taft, October 21, 1925 (Taft Papers, Reel 277); William Howard Taft to Harlan F. Stone, October 22, 1925 (Taft Papers, Reel 277); Harlan F. Stone to William Howard Taft, October 23, 1925 (Taft Papers, Reel 277). Despite Taft's best efforts, Stone could in the end manage to wrangle only an ill-lighted basement room some "distance from the Law Library." Harlan F. Stone to Senator Charles Curtis, November 17, 1923 (Taft Papers, Reel 277); William Howard Taft to Elihu Root, November 22, 1925 (Taft Papers, Reel 278). As a consequence Stone strongly supported Taft's proposal for a new building. He was intimately involved with Gilbert's designs, and he always expressed his approval of the plans. See, e.g. Harlan F. Stone to Cass Gilbert, March 24, 1927 (Stone Papers); Harlan F. Stone to William Nelson Cromwell, October 22, 1928 (Stone

Although the building's classicism inevitably carried this potential for turning cold, empty, and isolated, in its original conception the Augustan composure of the building aspired to the quite different status of "a national symbol," bespeaking "the common cause, the unifying principle of our Nation."[17] In lobbying for congressional support, Taft repeatedly articulated the need for a building that would embody the dignity of the Court "as the head of the Federal Judiciary, and, in a constitutional sense, the head of the Judiciary of the Nation."[18] It was understood that "a monumental Supreme Court building" would "establish the judiciary as the equal, architecturally at least, of the legislative and executive branches of the government."[19]

Today it is natural for us to conceptualize the Supreme Court as overseeing a co-ordinate branch of the federal government. But in 1921 this was hardly a common vision. It was Taft who, as a former chief magistrate of the Executive Branch, transformed the role of Chief Justice into something analogous to a chief executive for the judicial branch of government, thereby for the first time imagining the federal judiciary as a coherent branch of government to be managed.[20] And it was Taft who

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Papers); Harlan F. Stone to Cass Gilbert, October 7, 1929 (Stone Papers)("It seems to me you have designed a building which is, at the same time, unique and dignified, and appropriate to its setting.")

[17] Hughes, supra note 3, at 728-29. Laying the cornerstone of the building, Charles Evans Hughes declared that the structure "symbolizes the national ideal of justice in the highest sphere of activity, in maintaining the balance between the Nation and the States and in enforcing the primary demands of individual liberty as safeguarded by the overriding guarantees of a written Constitution." Id. at 728.

[18] William Howard Taft to Senator Reed Smoot, July 3, 1925 (Taft Papers, Reel 275). See William Howard Taft to Senator Charles Curtis, September 4, 1925 (Taft Papers, Reel 276) ("We ought to have a building by ourselves and one under our control, as the chief body at the head of the judiciary branch of the Government.").

[19] Herbert Little, "The Omnipotent Nine," The American Mercury, Vol. XV, No. 57 (September 1928), p. 50.

[20] For a discussion, see Robert Post, "Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft," 1998 Journal of Supreme Court History, vol. I, 50-70.

conceived and pushed through Congress the Judiciary Act of February 13, 1925,[21] which "cut . . . to the bone"[22] the mandatory appellate jurisdiction of the Supreme Court, substituting therefor discretionary review by writs of certiorari.[23]

The Act represented a fundamental transformation of the role of the Supreme Court.[24] Before the Act, the Court was primarily a tribunal of ultimate resort; it was the highest and the last source of appellate review, whose chief function was correctly to discern and to protect the federal rights of litigants.[25] But the Act's sharp constriction of the Court's mandatory appellate jurisdiction "completely overrode" this "obstinate conception that the Court was to be the vindicator of all federal rights."[26] And the Act's

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[21] 43 Stat. 936. For an account of Taft's tireless efforts on behalf of the Act, see Mason, supra note 4, at 107-114.

[22] Felix Frankfurter and James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 299 (The MacMillan Company: New York 1928).

[23] In essence, the Act restricted the Court's mandatory appellate jurisdiction to four classes of cases: 1. Cases in which a state court has upheld a state statute against claims that it is invalid under federal law, or in which a state court has held invalid a federal statute or treaty; 2. Cases in which a Circuit Court of Appeals has held a state statute invalid under federal law; 3. Cases coming by way of direct appeal from specially constituted federal district courts; and 4. Cases certified by Circuit Courts of Appeals, the District of Columbia Court of Appeals, or the Court of Claims. All other appellate cases could come before the Court only through petitions for a writ of certiorari, which it was within the discretion of the Court to grant or to deny. On the grounds for granting certiorari, see Magnum Import Co. v. De Sporturno Coty, 262 U.S. 159, 163 (1923); Layne & Bowler Corp. v. Western Wells Works, 261 U.S. 387, 392 (1923).

[24] For an excellent summary of the origins and justifications of the Act, see Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643 (2000).

[25] As Judge Benjamin I. Salinger testified, in opposition to the bill:

> [T]he great function of the Supreme Court is to protect rights given by treaty, the Constitution, or other Federal law. On a proper plea set up, the citizen should be able to obtain the protection of such rights—not as a matter of grace or discretion, but as of right—as protection from the court which is specially charged with insisting upon reverence for Federal law.

Statement of Honorable Benjamin I Salinger, Hearing Before the Committee on the Judiciary of the House of Representatives on H.R. 10479, 67th Cong., 2nd Sess., April 18, 1922, p. 5.

[26] Frankfurter and Landis, supra note 22, at 260-61.

extraordinary enlargement of the Court's discretionary appellate jurisdiction expressed a profound recharacterization of the Court's function. As Taft succinctly put it, "The real work of the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it. . . . Its main purpose is to lay down important principles of law and thus to help the public at large to a knowledge of their rights and duties and to make the law clearer."[27] By ceding to the Court significant authority to shape its own docket, the Act essentially recognized the Court as the supervisor of the system of federal law:[28]

> The specific rights of particular parties are no longer the essence of the controversies before the Supreme Court. They are mere vehicles whereby the Constitution and the laws of the United States are interpreted, the means whereby the general principles of law are defined, and whereby the rules and conceptions of federal law are made uniform throughout the country. In this respect one might well say that the Supreme Court is abandoning its character as a court of last resort, and is assuming the function of a ministry of justice . . . .[29]

The Court's new building stands as the architectural marker of this important historical transition in the nature of the Court, from an institution focused on the rights of

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[27] William Howard Taft, Address to the New York County Bar Association, February 18, 1922, p. 5 (Taft Papers, Reel 590). See William Howard Taft to Senator A. Owsley Stanley, December 5, 1924 (Taft Papers, Reel 269)(The theory of the Act is "that the District Court and the Circuit Court of Appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance. The appeal to us should not be based on the right of a litigant to have a second appeal.")

[28] Thus Taft lobbied Congress for the Act on the grounds that it was "really quite essential to our playing the part we ought to play in the administration of justice in the country." Id.

[29] Gregory Hankin, "U.S. Supreme Court Under New Act," 12 Journal of the American Judicature Society 40, 40 (1928). In the words of Peter Fish, the Act "transformed" the Supreme Court "from a forum that primarily corrected errors arising in ordinary private litigation to a constitutional tribunal that resolved public policy issues of national importance." Peter Fish, "Judiciary Act of 1925," in Kermit L. Hall et al., eds., The Oxford Companion to the Supreme Court of the United States 477 (1992). For a contemporary critique of this transformation, see Hartnett, supra note 24, at 1713-37.

parties to one responsible for the development of federal law.[30] The classical serenity of the building, of course, tends to disguise such moments of transition, and to project instead a seemingly inevitable narrative of institutional continuity and identity. But an important thrust of the enterprise of institutional history is to pierce the marble exterior to uncover the myriad fundamental and invisible ways in which institutions change. Although the Supreme Court of the period 1921 to 1929, when Taft was Chief Justice, feels familiar, feels like simply a prior manifestation of the same Supreme Court that we now know, in fact it was in many ways quite a different institution.

In this Lecture I shall attempt to make palpable some of the more subtle and important of these differences. But I shall not do so in the usual way, by comparing the Taft Court's jurisprudence to our own, although such an approach would certainly reveal important sites of difference and discontinuity.[31] I shall instead focus on an institutional aspect of the Supreme Court that seems, like the Supreme Court building itself, constant and invulnerable to historical change: the practice of opinion-writing. In law school textbooks and classes, Supreme Court opinions from vastly different eras are typically set in timeless juxtaposition to one another, as if liberated from the historically specific settings in which they were produced. The implicit assumption is that Supreme Court opinions are a constant and invariable means by which the Court directs the development of federal law.

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[30] See David M. O'Brien, Storm Center: The Supreme Court in American Politics 156-57 (W.W. Norton & Co.: New York 1993).

[31] See, e.g., Robert Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. Rev. 1489 (1998).

Yet in fact the character of Supreme Court opinions has changed over time, and these changes track shifting notions of the role of the Supreme Court in the American legal system. In shape and configuration, opinions of the contemporary Court are demonstrably different from those of the Taft Court, in part because opinions suitable for a "court of last resort" differ from those appropriate for a "ministry of justice."[32] But this transformation has been accompanied by a deeper shift in the implicit norms of Supreme Court decision-making. Justices of the Taft Court felt presumptively obligated to join Court opinions, even if they disagreed with their content, so as to preserve the influence and prestige of the Court. No such norm is apparent among modern Justices. This revolution in the practice of dissent in part reflects a shift in the Court's jurisprudential understanding of the nature of law, from a grid of fixed and certain principles designed for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes. In part it also expresses an evolving conception of the distinction between law and politics. Norms concerning the citation of authority within Supreme Court opinions have also altered radically since the days of the Taft Court. Opinions of the modern Court routinely refer to law review articles, whereas such citations were quite rare during the 1920s. In this Lecture I shall argue that this shift signals an implicit alteration of the Court's understanding of its own institutional authority.

Because opinions are the primary means by which the Court intervenes to shape and affect its legal environment, opinion writing practices not only reflect the intellectual perspectives of the Justices, but also are themselves an important dimension of American

[32] Hankin, supra note 29, at 40.

law. The position of the Supreme Court is differently constituted because Court opinions are now written and designed "for the public at large, as distinguished from the particular litigants before it."[33] Our law is actually less fixed and certain, in part because unanimous Supreme Court opinions, routine during the Taft Court, are now so unusual. We inhabit a different tension between law and politics than did contemporaries of the Taft Court, in part because in our time the very concept of a Supreme Court opinion has begun to splinter.[34] The authority of our Supreme Court is different from that of the Taft Court, because modern opinions now routinely engage in an ongoing dialogue with American legal academia. Supreme Court opinions both reflect and constitute the role of the Supreme Court itself.

The practices by which members of the Taft Court created their opinions were recognizably distinct from our own. Yet in the 1920s these practices were also highly controversial, subject to the pressure of rapidly changing circumstances. By tracing the contours and trajectories of these controversies and circumstances, I hope to make visible the origins and significance of many of the norms of opinion writing that we now take for granted and that form for us the seemingly inevitable façade of our own Supreme Court.

## I.

To appreciate the historically changing nature of Supreme Court opinions, we must first understand the institutional environment in which such opinions are produced. The Court publishes a full opinion for only a small fraction of the cases on its docket. So,

[33] William Howard Taft, supra note 27, at 5.

[34] See John F. Davis & William L. Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 Duke L. J. 59 (1974).

for example, during the 1921 Term, which was Taft's first complete Term as Chief Justice,[35] there were 669 new cases filed on the Court's appellate docket. Together with 343 cases which had been carried over from the 1920 Term, the Court faced an appellate docket of some 1012 cases. Of these the Court disposed of 595 cases,[36] in the process publishing 173 full opinions. The Court aspired to publish full opinions in about 29% of all the appellate cases of which it disposed. The remainder of docket was decided primarily through short, unsigned "memorandum opinions" (almost all issued per curiam) or orders denying certiorari.

In 1921, a large proportion of the cases on the Court's appellate docket had come to the Court by way of appeal, writ of error, or certification. These comprised the Court's so-called "mandatory" jurisdiction, because the Court was obligated to decide such cases, either by full or memorandum opinion. At the beginning of the 1920s, the strain of keeping up with its mandatory jurisdiction was causing the Court to fall increasingly behind in its docket. The Court's clogged docket was in fact a major argument advanced by Taft to lobby Congress to enact the Judiciary Act of 1925, which essentially shifted the bulk of the Court's appellate jurisdiction to the discretionary writ of certiorari.[37] The

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[35] Taft was confirmed as Chief Justice on June 30, 1921.

[36] Figures for the Supreme Court docket may be found in the annual reports of the Attorney General of the United States.

[37] See notes 26-27 supra. Letter from William Howard Taft to Senator A. Owsley Stanley, December 5, 1924 (Taft Papers) (Reel 269) ("The truth is that there is no other way by which the docket in our Court can be reduced so that we can manage it."); Letter of William Howard Taft to Major Edgar Bronson Tolman, February 25, 1925 (Taft Papers) (Reel 272) ("I consider [the Act] a great step in the history of the Court, and I sincerely hope it is going to enable us to catch up with our docket."). After passage of what Taft called "Our great Supreme Court bill," Letter from William Howard Taft to Mrs. Frederick J. Manning, February 15, 1925, (Taft Papers) (Reel 271), he presciently remarked that "I shall be disappointed if we do not catch up with our docket in two or three years." Letter from William Howard Taft to Horace Taft, March 1, 1925 (Taft Papers) (Reel 272). See also letter of William Howard Taft to William D. Mitchell, August 12, 1927 (Taft Papers) (Reel 293) (There is "basis for real hope that the new law of February 13th,

effect of the Act was "marvelous,"[38] enabling the Court sharply to diminish its backlog.[39] Within a very few years the Court reduced the delay between the filing of a case and its argument from about a year and a half to less than 6 months.[40] Indeed, in a speech before the American Law Institute, Taft joked that the 1925 Act had allowed the Court to make

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1925, will enable us, in the course of the next two years, to catch up and dispose of business at the term at which it has been initiated in the court. This would be a great achievement."). A second line of argument Taft advanced in support of the bill was that augmenting discretionary jurisdiction would enable the Court to concentrate on cases of truly national importance. See Letter of William Howard Taft to Robert A. Taft, March 1, 1925 (Taft Papers) (Reel 272) (The Act "will not reduce the work we have to do, but it will enable us to catch up with the docket and to give more attention to important cases."); Letter of William Howard Taft to Justice James Clark McReynolds, January 29, 1924 (Taft Papers) (Reel 260) (advising McReynolds, in his testimony before the Senate in favor the of the Act, "to present a table . . . showing that we are not catching up with the docket . . . I observe that the cases that we are now hearing on the regular, docket are about twelve months and a half behind – that is, they were filed nearly thirteen months ago. I think emphasis might be put upon the unimportant character of the cases we get from the Court of Claims."); Colgate v. United States, 280 U.S. 43 (1929); Sun Ship Building Co. v. United States, 271 U.S. 96, 99 (1926).

[38] Gregory Hankin and Charlotte A. Hankin, Progress of the Law in the United States Supreme Court 1929-1930 2 (1930).

[39] The dramatic effect on the Court's backlog is visible in Figure A. (Graphs identified by letter may be found in the Appendix).

[40] See, e.g., R.E.L. Saner, "Governmental Review," 10 *ABAJ* 537, 542 (August 1924) ("It now takes from fifteen to eighteen months after a case is docketed before it can be heard."); Letter from William Howard Taft to Senator A. Owsley Stanley, December 5, 1924 (Taft Papers) (Reel 269) ("We are now a year and three months behind."); Letter of William Howard Taft to Honorable Marcus Kavanagh, December 14, 1924 (Taft Papers) (Reel 270) ("We are a year and three months behind and likely to grow still further into arrears unless this bill passes."); Gregory Hankin and Charlotte A. Hankin, United States Supreme Court 1928-1930 2 & 3 n.2 (1929) ("Since the enactment of the Jurisdictional Act, the Court has made great strides in clearing its docket. . . . During the [1928 Term] the average time which elapsed between the filing of the last ten cases and their argument was about four and a half months."); Willis Van Devanter, The Supreme Court of the United States, 5 IND. L. J. 553, 560 (1930) ("The Court is now more nearly current by reason [of the 1925 Act] than it has been at any time in many years. Without advancement cases are now reached for argument within about six months after they are docketed."); Vinson Tells A.B.A. of Supreme Court Work; Opinion on Dissents, 29 The Journal of the Oklahoma Bar Association 1269, 1269 (September 24, 1949) ("The days before passage of the 1925 Act, when it took eighteen to twenty-four months for the Court to reach a case on its docket, are forgotten, and it is assumed by everyone, as it should be, that the Supreme Court is current in its work. The Court will soon have been operating under its basic jurisdictional statute for a quarter of a century, and experience has eloquently proved the wisdom of its architects.").

"such progress . . . that I think members of the bar are beginning to be a little embarrassed by the proximity of the Court to them. We are stepping on their heels."[41]

The shift of the Court's appellate jurisdiction toward the discretionary writ of certiorari, however, produced additional and more subtle effects, including a change in the underlying significance of full court opinions. In 1912 the Court decided about 47% of its appellate cases with a full Court opinion. In 1916, partly in response to a sharp increase in the number of docketed cases[42] and partly in response to the expansion of certiorari jurisdiction authorized by the Act of September 6, 1916,[43] this percentage shrank to 33%, where it remained more or less constantly until the 1925 Act. The Act's reduction of the Court's mandatory jurisdiction appears to have precipitated a sharp drop in the percentage of the appellate docket that the Court decided by full opinion.[44] The historical average of disposing of about 30% of its appellate docket by full opinion, which had persisted from 1916, shrank by almost 50% in three years. In the 1928 Term the Court wrote opinions in only 16% of its appellate cases.[45]

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[41] Transcript of Speech of William Howard Taft before the ALI, May 1929 (Taft Papers) (Reel 590) (The transcript of the speech records that Taft's remarks were met with "Applause").

[42] See Figure A.

[43] Act of September 6, 1916, 38 Stat. 804. An important effect of the Act was to establish that the Court's appellate jurisdiction over cases arising under FELA could be invoked only by way of the discretionary writ of certiorari. See Frankfurter and Landis, supra note 22, at 210-15. For a good discussion of the obscure provisions of the 1916 Act, see Hartnett, supra note 24, at 1657-60.

[44] Of the 1554 full opinions decided by the Taft Court during the 1921-1928 Terms, see note 51, only 33 came from cases that came to the Court through its original jurisdiction, as distinct from its appellate jurisdiction. In the 1921-1924 Terms, 71% of the Court's opinions were written in cases that had come to the Court through its mandatory jurisdiction (24% of its opinions were written in cases that had come to the Court through the discretionary writ of certiorari). In the 1925-1928 Terms, 53% of the Court's opinions were written in cases that had come to the Court through its mandatory jurisdiction (44% of its opinions were written in cases that had come to the Court through the discretionary writ of certiorari).

[45] The exact progression can be seen in Figure 1.

The ultimate outcome of this trend is well known. In the 1998 Term, for example, the Court wrote full opinions in only 1% of the 7043 appellate cases on its docket.[46] It is clear, then, that the Supreme Court during the 1920s was in the process of transition from an institution that used full opinions to dispose of a significant portion of its appellate docket, to an institution that used full opinions to decide only an infinitesimal proportion of that docket. This process was sharply accelerated by the Act of 1925, which reduced the number of appellate cases that the Court was obliged to decide.

Not only does the contemporary Court compose full opinions in a smaller percentage of its total cases, but in absolute terms it writes far fewer opinions than did the Court in the 1920s. In 1924, for example, the Court handed down 231 full opinions, whereas seventy years later, in 1994, the Court handed down only 89 full opinions. This contrast reflects a relatively stable distinction between the eras, as can be seen in Figure 2, which shows the number of full opinions that the Court issued in each Term from the 1912 Term through the 1998 Term.[47]

Comparisons of contemporary Supreme Court opinions with those of the past typically stress the current bureaucratization of the Court.[48] Supreme Court Justices now can draw on the assistance of four law clerks, selected from among the very best recently graduated law students, so that, as Justice Lewis Powell has remarked, "We function as

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[46] For the relevant figures, see 68 U.S.L.W. 3069 (July 20, 1999). The Court wrote full opinions in about 3.5% of the paid appellate cases on which it acted.

[47] The data for the 1930-1992 Terms are from Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, The Supreme Court Compendium: Data, Decisions and Developments 84-85 (2nd ed. 1996). Figure 2 strongly suggests that the 1925 Act was associated with a slide in the absolute number of opinions written by the Court.

[48] See, e.g., Charles W. Collier, The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship, 41 Duke L.J. 192, 228-232 (1991).

nine, small independent law firms."[49] The resources of the Court were in fact quite different in the 1920s, when each Justice had only one law clerk, and clerks tended to be mature, professional lawyers who provided largely technical forms of assistance.[50] What is striking about this difference, however, is that it might lead one to expect that the Taft Court would produce *fewer* rather than more opinions. But the contemporary Supreme Court actually publishes a far smaller number of opinions than did the Taft Court, in both absolute and proportional terms.

It is true, however, that opinions of the contemporary Court are longer and more substantial than Taft Court opinions. The average length of a full Court opinion during

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[49] Lewis Powell, "What the Justices are Saying . . . " 62 *ABAJ* 1454, 1454 (1976).

[50] For a history of Supreme Court law clerks, see Chester A. Newland, Personal Assistants to Supreme Court Justices: The Law Clerks, 40 Ore. L. Rev. 299 (1961). During the Taft Court, only Justices Holmes, Brandeis, and Stone consistently hired recently graduated law students as clerks. During the 1924-1928 Terms, Taft also hired recently graduated law-students as clerks, but because of his failing health he reverted to a professional clerk during the 1929 Term. (For the 1929 Term Taft hired Reynolds Robertson, author of Practice and Procedure in the Supreme Court of the United States (1928), who later continued on as a clerk for Charles Evans Hughes). For a description of how Taft used his law clerk, see John T. Suter, "Taft Speaks of Roosevelt Without Sign of Emotion," *Albany Evening News*, July 6, 1927 (Taft Papers) (Reel 293), which quotes Taft as saying:

> I have a law clerk who goes over the records and the briefs. He makes a statement for me of what is in each, and then with that statement before me I read the briefs and make such references to the records as seem necessary. But I always read the briefs so as to know what the claim on both sides is and then I read the opinions of the courts below so I become familiar with the case, and know what the issues are.

On selecting his first young recent graduate as a law clerk, Taft wrote Dean Thomas W. Swan of the Yale Law School, "It isn't exactly mental brilliancy that I need. What I need is plodding, thoroughness and somewhat meticulous attention to details in the matter of jurisdiction." Letter from William Howard Taft to Thomas W. Swan, May 30, 1924 (Taft Papers) (Reel 265). On Taft's description of the work, see Letter from William Howard Taft to Thomas W. Swan, May 17, 1924 (Taft Papers) (Reel 264) ("The work which I would expect him to do would be to prepare for me a succinct statement of the briefs and record in every application for a certiorari, and to prepare, under my direction of course, the per curiams, which include nothing but references to authorities upon which the case is disposed of. There will be of course other things I shall need him for in the running down of a list of authorities and the finding of authorities where the briefs are insufficient in this regard. Then I would wish him to correct the proofs of my opinions and to keep track of my docket and keep it up to date.").

the 1921-1928 Terms[51] was 6.7 pages, whereas the average length of a Court opinion during the 1993-1998 Terms was 16.0 pages, more than twice as long.[52] It is also worth observing that during the 1993-98 Terms the contemporary Court waited an average of 91.1 days after an argument before delivering a full opinion, whereas the Taft Court took one third less time, averaging only 60 days between argument and delivery of a full opinion.[53] By far the most noteworthy distinction between full opinions of the Taft Court and those of the contemporary Court, however, concerns the relative rates of unanimity. Of the 1554 full opinions announced by the Taft Court during the 1921-1928 Terms, 84% were unanimous; of the 507 full opinions announced by the Court during the 1993-1998 Terms, only 27% were unanimous.[54] This remarkable contrast is illustrated in Figure 5.

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[51] Taft suffered a stroke and essentially ceased to participate in the workings of the Court in January 1930; he resigned on February 3, 1930. In statistically analyzing the Taft Court, therefore, I have considered only the 1921-1928 Terms.

[52] See Figure 3. This difference is statistically significant at the .01 level. Figure 3 suggests that the length of Taft Court opinions was not aberrant; during the 1912-1920 Terms full opinions averaged 6.89 pages. The contrast in opinion length between the Taft Court and the modern Court remains striking, although slightly diminished, even if one considers only unanimous opinions. See Figure B. For a study of historical changes in the page lengths of court opinions, see Lawrence M. Friedman, et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 775-85 (1981) (finding that the average length of state supreme court opinions increased from 3.99 pages in the decade of the 1870s to 6.02 in the decade of the 1960s. The average length in the period from 1915-1925 was 4.73).

[53] See Figure 4. This difference is statistically significant at the .01 level. During the 1912-1920 Terms, the Court averaged 63.7 days from the argument of a case to the announcement of full opinion. On the one hand, this distinction between the modern Court and its predecessors is surprising, because during the 1920s the Court would routinely hold over cases, not announcing a decision until one or more terms after argument. During the Taft Court the most striking instance of this was *McGrain v. Daugherty*, 273 U.S. 135 (1927), which was a Van Devanter opinion argued on December 5, 1924, but not announced until January 17, 1927. On the other hand, Figure C indicates that during the 1993-1998 Terms the contemporary Court decided unanimous opinions almost as quickly as did the Taft Court. The contemporary Court averaged 61.8 days between oral argument and the announcement of an opinion, whereas the Taft Court averaged 55.1 days. Although this differences is statistically significant at the .02 level, the absence of unanimity nevertheless explains a good deal about the relative delay in the modern Court's announcement of opinions.

[54] This difference is statistically significant at the .01 level. For purposes of this Lecture, I define a unanimous opinion as one joined by all Justices participating in the decision, without any dissenting or concurring votes, statements, or opinions.

These distinctions between the Taft Court and its contemporary counterpart were sustained by complex webs of normative expectations. Norms against dissent, for example, were so prominent in the 1920s that they were explicitly embraced in Canon 19 of the American Bar Association's 1924 edition of the Canons of Judicial Ethics:

> 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. [55]

There were also norms concerning the prompt dispatch of judicial business. When Justice Sanford, who joined the Court in February of 1923, began to find it increasingly hard to compose his opinions in a timely way, as measured by the Court's pace of production, he experienced his difficulty as a personal failure to meet legitimate expectations. Figure 6 illustrates the contrast between Sanford's pace of production and that of the Court. In the 1924 Term the Court as a whole averaged 70 days from the argument of a case to the announcement of a full opinion; but in that same Term it took Sanford 121 days to produce his opinions. At the beginning of the 1925 Term, Sanford wrote Taft expressing his chagrin:

> [I] hope I can do my full share of the labor. I believe I have gotten into better methods of work, and can successfully lay aside some of my besetting meticulosity – But verily the writing of an opinion worthy of perpetual type is a task of the highest difficulty that takes every ounce of the best that one may have.[56]

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[55] Canon 19. Canons of Judicial Ethics (1924) in Lisa L. Milord, The Development of the ABA Judicial Code 137 (1992). Taft was Chair of the committee that drafted the 1924 Canons. Before his appointment to the Court, Justice Sutherland was also a member of the committee. Canon 19 was dropped from the ABA's revised Code of Judicial Conduct in 1972. See Walter P. Armstrong, Jr., The Code of Judicial Conduct, 26 Se. L.J. 708, 713-14 & n.44 (1972). The Reporter explained that "The Committee rejected the detailed discussion of judicial opinions, philosophy of law, and judicial idiosyncrasies and inconsistencies in old Canons 19, 20, and 21 as being neither helpful nor, for the most part, matters of ethical conduct." E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 50 (1973).

[56] Letter from Edward Sanford to William Howard Taft, September 8, 1925 (Taft Papers) (Reel 276).

Even the length of opinions was governed by tacit norms. When Harlan Stone joined the Taft Court in March 1925, for example, he drew on his background in legal academia to draft long and intricate opinions. These were sharply criticized by the other Justices. McReynolds wrote to Stone about the latter's draft opinion in *North Laramie Land Co. v. Hoffman*:[57]

> I agree. But I think your opinion would be much better if only half as long. There is really nothing new in the cause and simple statement of the issues with short reply to the points I think would better serve posterity. Think of the 12,000 who should read what you say here.[58]

In response to Stone's draft opinion in *Second Russian Insurance Co. v. Miller*,[59] McReynolds commented:

> I think your conclusions are good. But I think you confuse the opinion by too much detail. It would be easier to understand and to me more satisfactory if you stated the substantive finding of fact below and approved this. Then discuss the essential law point and no others. My observation has been that unnecessary discussion returns to plague.[60]

"Out of deference to the views of some of my associates," Stone was forced to revise and drastically to shorten his first attempt at an opinion in *May v. Henderson*.[61] This discipline altered the way that Stone wrote opinions, as can be seen in Figure 7, which demonstrates that Stone's opinions shrank 44% from an average of 10.8 pages during the 1924 Term to 6.1 pages in the 1926 Term. The latter was actually shorter than the average length for Taft Court opinions.

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[57] 268 U.S. 276 (1925).

[58] Stone Papers.

[59] 268 U.S. 552 (1925).

[60] Stone Papers (emphasis in the original).

[61] 268 U.S. 108 (1925). See Letter from Harlan Stone to William Howard Taft, April 8, 1925 (Taft Papers (Reel 273).

These simple anecdotes indicate that we must view a Supreme Court opinion as a form of writing that in part takes its significance from institutional conventions and contexts that change over time. During the Taft Court, a full Supreme Court opinion was a routine method of deciding a large proportion of the Court's appellate docket. It was expeditiously produced, predominantly unanimous, and relatively short and succinct. This is one version of what one might expect from a "court of last resort" whose function was to vindicate "the specific rights of particular parties."[62] By the 1990s, however, a full Supreme Court opinion had become the Court's way of addressing the very few cases on its docket of exceptional importance. Each opinion accordingly received fuller and more extensive attention, manifested both by its relative length and by the full complement of concurring and dissenting opinions that was likely to accompany it. Surely the influence of the Judiciary Act of 1925, which envisioned the Supreme Court as something akin to a "ministry of justice,"[63] is visible in this transformation.[64]

To understand opinions of the Taft Court era, therefore, we must put ourselves in the frame of mind described by Justice John Hessin Clarke in his letter to Woodrow Wilson explaining his own resignation from the Court in September 1922:

> Unless you have much more intimate knowledge of the character of work which a Supreme Court judge must do than I had before going to Washington you

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[62] Hankin, supra note 29.

[63] Id.

[64] A study of state supreme courts found that "Between 1940 and 1970, the supreme courts with high discretion wrote fewer opinions than the other courts. Their opinions tended to be longer and to cite more cases. They also reversed lower court decisions more often. Their opinions contained more dissents and concurrences." Robert Kagan et al., The Evolution of State Supreme Courts, 76 Mich. L. Rev. 961, 999 (1978). In the 1921-1928 Terms, 57% of all opinions in cases reaching the Supreme Court by way of its mandatory jurisdiction affirmed the decision below (27% reversed), whereas only 37% of the Court's opinions in cases reaching the Court by way of discretionary certiorari jurisdiction affirmed the decision below (56% reversed).

> little realize the amount of grinding, uninteresting, bone labor there is in writing more than half the cases decided by the Supreme Court. Much more than ½ the cases are of no considerable importance whether considered from the point of view of the principles or of the property involved in them, but, nevertheless, a conscientious judge writing them must master their details with the utmost care. My theory of writing opinions has always been that if clearly stated 9 cases out of 10 will decide themselves,--what the decision should be will emerge from the statement of the facts as certainly as the issues will. In this spirit I wrote always . . . . I protested often, but in vain, that too many trifling cases were being written, that our strength should be conserved for better things . . . .[65]

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[65] Letter from John Hessin Clarke to Woodrow Wilson, September 9, 1922 (Wilson Papers) (Reel 122). See John H. Clarke, Carrying the Case to the United States Supreme Court, 56 AM. L. REV. 283, 284 (1922). In 1924 Justice Sutherland, testifying before the Senate in support of the 1925 Act, observed that "a very large proportion of the cases that come" to the Supreme Court "ought never to be there at all." Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before the Subcomm. Of the Senate Comm. On the Judiciary, 68th Cong. 47 (1924). See also Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States, Hearings on H.R. 8206 Before the House Comm. On the Judiciary, 68th Cong.25 (1924) (Remarks of Justice Sutherland noting that the Court was burdened by "a lage number of trifling cases."). Nevertheless, Clarke's dark appraisal of the Court's work should be taken within the context of the depression from which he was suffering at the time of his retirement. His sister, to whom he had been very close, died in March 1922, throwing Clarke into a deep gloom from which he found it impossible to recover. See, e.g., Letter from John H. Clarke to William Howard Taft, March 7, 1922 (Taft Papers) (Reel 239) ("I am passing through an experience so crushing that it seems, for me, just now, the end of all earthly interests. My sister was both a sister and a brother to me all through life."); Letter from John H. Clarke to Willis Van Devanter, March 7, 1922 (Van Devanter Papers); Letter from John H. Clarke to Willis Van Devanter, July 13, 1922 (Van Devanter Papers) ("The truth is, my dear friend, my situation is quite paralyzing me. I mean I find myself without initiative or desire to go anywhere or to do anything,--all interest in life has so gone out of me."); Letter from John H. Clarke to Willis Van Devanter, August 23, 1922 (Van Devanter Papers) ("I have definitely decided to resign my office as of Sept 18 when I shall be 65 years old. . . . In the confidence of your friendship I may add that the death of my sisters has taken all interest out of life for me and I see no reason for going forward doing work which for the most part has become irksome in the extreme to me."). To his brother Horace, Taft summarized Clarke's retirement this way:

> Clarke's retirement is not altogether unexpected to me. He has been talking about it for a year. He lost two sisters in two years and he is now alone in the world so far as near relatives are concerned. He has always been very much interested in arbitration and machinery for peace between nations. He is much more of an orator than he is a lawyer. He has certain set notions against corporations and in favor of labor unions, which make him decide many cases before he hears them. Although he and Clarke often agreed, Holmes often commented to me on that feature of his judicial decisions. Clarke is a good fellow and I like him. He is a manly, generous, courageous man. The Court has not been a pleasant place for him because of the insulting and overbearing and contemptuous attitude of McReynolds toward him, because Clarke seemed to side rather with Brandeis than with McReynolds, who was Attorney General when Clarke was appointed, and who seemed to think therefore that Clarke ought to follow his leadership. Clarke is the wealthiest man on the Court and quite able to retire. I think he has had something near melancholia because of the death of his sister, who was a physician and a very public-spirited woman in Youngstown. I think the work of the Court, too, has not been agreeable to him, although he has done it promptly. He much prefers the platform, and it will be difficult for him to avoid drifting into politics.
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> Letter from William Howard Taft to Horace Taft, September 7, 1922 (Taft Papers)(Reel 245).

No one today would think to characterize "more than ½" of the Supreme Court's cases as "of no considerable importance." No one today would think to assert that "9 cases out of 10" on the Court's docket "will decide themselves." Every opinion published by the contemporary Court is, in one way or another, consequential; every opinion is, in one way or another, difficult.

This does not mean that difficult and consequential opinions did not exist in the 1920s or before. Of course the Court has since its origins confronted divisive and contentious issues, writing long opinions that were sometimes accompanied by sharp and unyielding dissents. My point is instead that the norms which define and sustain institutional practices of decision-making will likely be different in a Court whose docket contains a large proportion of "trifling cases" than in a Court like our own, where almost every opinion is momentous. And these practices of decision-making in turn shape the environment in which all opinions are formed and written, even those that decide unambiguously important cases.

## II.

A Supreme Court opinion is not merely a statement of the law. It is a written intervention, addressed to particular audiences, and designed to accomplish particular ends. The response of Justices to a changing institutional environment, or to evolving notions of law or of judicial authority, will be mediated by their conception of the nature and functions of Supreme Court opinions. During the Taft Court era, different Justices held different views about these matters.

At one end of the spectrum was Oliver Wendell Holmes, the oldest man on the Court[66] and the Justice most influenced by English conceptions of the nature of opinion-writing. Holmes's unique position on the Court can be seen in Figures 8 and 9. During the 1921-1928 Terms, Oliver Wendell Holmes announced his opinions an average of only 26.8 days after they were argued,[67] and they were an average of only 3.4 pages long.[68] In part this was a matter of personal temperament. Holmes was a fluent[69]and quick[70] writer, with a great "desire for speed" that, as Brandeis observed, had become a "point of pride with him" and "a vice": "He & McKenna run a race of diligence of finishing an opinion assigned to either. Holmes can't bear not to have [a] case done the same day it's given to him."[71] Holmes prized concision, believing that "the art of writing legal decisions . . . is to omit all but the essentials--`The point of contact formula—the

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[66] Holmes was born in 1841.

[67] If only unanimous opinions are considered, the average time between argument and delivery for Holmes's opinions was 26.1 days.

[68] If only unanimous opinions are considered, Holmes's opinions during this period averaged 3.3 pages in length.

[69] "Writing opinions is as easy as ever." Letter from Oliver Wendell Holmes to Baroness Moncheur, January 27, 1928 (Holmes Papers) (Reel 27, Frame 216).

[70] Holmes wrote to Frankfurter that in composing opinions he did not "search for epigrams," because "I write too rapidly to stop for phrases." Holmes and Frankfurter: Their Correspondence, 1912-1934 171 (Robert M. Mennel and Christine L. Compston eds. 1996). (On the other hand, Holmes also stressed to Frankfurter the power of "*phrases*—they put water under the boat and float over dangerous obstacles." Id. at 228.) Within the Court, Holmes' speed was legendary. Taft once thanked him "for the dispatch and the admirable quality" of his opinions, adding plaintively: "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, n.d. (Holmes Papers)(Reel 38, Frame 345).

[71] Melvin I. Urofsky, editor, "The Brandeis-Frankfurter Conversations," 1985 Supreme Court Review 299, 311 (hereinafter *The Brandeis-Frankfurter Conversations*). Holmes was a prolific author of opinions. Of the 1554 full opinions announced by the Taft Court in the 1921-1928 Terms, he wrote 205. He was the second-most productive Justice of all those who served throughout these eight Terms. Despite his onerous duties as Chief Justice, Taft wrote an astonishing 249 opinions. Brandeis authored 193 opinions, McReynolds 172, and Van Devanter only 94.

place where the boy got his fingers pinched. The rest of the machinery doesn't matter."[72] He once even complained to Stone about *McCulloch v. Maryland* that "I should not like to take so many pages to establish the obvious."[73] Holmes knew that his aesthetic troubled his colleagues; he confessed to being "apprehensive . . . that my opinions were shorter than Brandeis inwardly approved . . . but if as I meant to I hit the nail on the head I am content."[74]

Holmes's distinctive practice reflected his idiosyncratic understanding of the function and purpose of Supreme Court opinions. To Holmes an opinion expressed the "exuberance"[75] of "personality,"[76] so that, for example, he could write of an opinion that "as originally written it had a tiny pair of testicles-—but the scruples of my brethren have caused their removal and it sings in a very soft voice now."[77] Holmes characteristically

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[72] Holmes and Frankfurter, supra note 70, at 40.

[73] Letter from Oliver Wendell Holmes to Harlan Stone, August 7, 1926 (Stone Papers). Holmes remarked that "I should say generally . . .that I assume that I am writing for those skilled in the art and that long winded developments of the obvious seem to me as out of place in an opinion as elsewhere." Holmes and Frankfurter, supra note 70, at 186.

[74] Holmes and Frankfurter, infra, note 70, at 184.

[75] 2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932 175 (Mark DeWolfe Howe, ed. 1946).

[76] Holmes-Laski Letters, supra note 79, at 486 ("The general function of committees is to take the personality out of discourse. I dare say it has been just as well to have McKenna, Day and others cut out some of my exuberances from opinions of the Court . . . .").

[77] Holmes and Frankfurter, supra note 70, at 95. See Letter of December 24, 1920 (addressed by "My dear Friend) (Holmes Papers)(Reel 26, Frame 625) ("[T]he opinions that would otherwise have gone last Monday were hung up for others to write dissents and those that then fired have been more or less castrated, though not, I hope, quite deprived of their powers. It is rather an irritation to have pungent phrases cut out, but that makes for safety no doubt, and what one cares for sooner or later one gets a chance to say.") Holmes said that his "pleasure in writing" dissents was "that you can say just what you think, and don't have to cut out phrases to suit the squeams of your brethren." Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, May 5, 1928 (Holmes Papers)(Reel 24, Frame 228). Taft complained that Holmes "has more interest in, and gives more attention to, his dissents than he does to the opinions he writes for the Court, which are very short and not very helpful." Letter from William Howard Taft to Henry L. Stimson, May 18, 1928 (Taft Papers) (Reel 302).

referred to opinions in such metaphors of personal artistic expression.[78] He believed that "an opinion should" not "be like an essay with footnotes, but rather should be *quasi* an oral utterance."[79] Holmes commented to his colleague Sanford that "*Non obstat* the effective and powerful example of Brandeis to the contrary, I don't think opinions should be written in the form of essays with notes. They are theoretically spoken."[80] For Holmes

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[78]The image of "song," for example, frequently recurs. See Letter of March 29, 1926 (Addressed to "My Dear Friend,")(Holmes Papers)(Reel 27, Frame 47)("As I said before I think style is largely a matter of the ear. The cadences, and with some masters the undersong not always detected at first, get you without much regard to the meaning."); 1 Holmes-Laski Letters, supra note 79, at 709 ("I again realize that *sound* is the half of immortality. The song of Shakespeare's words counts, I think, as much as their meaning to keep them remembered."); id. at 474, 486. Sometimes, however, Holmes used the metaphor of the dance to describe his opinion writing process. See, e.g., Holmes and Frankfurter, supra note 70, at 132 ("Pouf—the sword dance is danced and I think I have kept off the blades in a case just sent to the printer."). In contrast to Holmes, Taft believed that he lacked "graceful literary style," so that "when I can write an opinion that is sound and convincing, I am happy, but beyond that I feel as if I were denied the gratification of authorship." Letter of William Howard Taft to Horace D. Taft, December 14, 1926 (Taft Papers) (Reel 287). "I don't read what I have been obliged to put into print from time to time with any degree of real satisfaction." Id.

[79] 1 Holmes-Laski Letters: The Corespondence of Mr. Justice Holmes and Harold J. Laski 675 (Mark DeWolfe Howe ed. 1953) (hereinafter ("Holmes-Laski Letters"). Holmes wrote to Brandeis in response to the draft opinion of United States v. Abilene & Southern Ry Co., 265 U.S. 274 (1924), "Another solid piece of work handsomely done. Though I never shall believe in footnotes in an opinion." (Brandeis Papers). See 2 Holmes-Laski Letters at 1066 ("I don't recognize the criticism on McReynolds for notes – that is Brandeis's *specialité* – which I criticised to him at the beginning, but which he sticks to and which certainly enables him to put in a lot of facts that no one but he could accumulate and which overawe me, even if I doubt the form."). Brandeis himself said to Frankfurter that Holmes "does not wholly reconcile himself to my footnotes." *The Brandeis-Frankfurter Conversations*, supra note 71, at 335. In the 205 opinions Holmes authored in the 1921 through 1928 Terms, he himself used only a single footnote. See Heyer v. Duplicator Mfg. Co., 263 U.S. 100 (1923). By contrast, in the 193 opinions that Brandeis authored during those eight Terms, he averaged 2.99 footnotes per opinion. As whole, during its eight complete Terms the Taft Court averaged 1 footnote for every majority opinion. During the 1998 Term, by contrast, the Court's use of footnotes had increased almost sevenfold, so that the Court averaged 6.91 footnotes per majority opinion. See Figures D and E. Footnotes in modern opinions tend to be substantive and argumentative; by contrast footnotes during the Taft Court era tended to consist of citations to authority.

[80] Note From Oliver Wendell Holmes to Edward Sanford, January 1, 1925 (Holmes Papers) (Reel 38, Frame 405). Surprisingly, Sanford used more footnotes in his majority opinions than any other Justice on the Taft Court, averaging 3.41 footnotes per opinion. See Figure D. Holmes, however, was not the only Justice who objected to the prolific use of footnotes in opinions. For example, for his draft opinion in the case of *Hudson v. United States*, 272 U.S. 451 (1926), Stone conducted original research into the origins and effects of the plea of nolo contendere, writing to Professors Joseph Beale (Harvard), Frederick Hicks (Columbia), and G.E. Woodbine (Yale), asking for help in translating Yearbook entries. He reproduced his research in the form of a long footnote. In a letter to the Court accompanying his opinion, Stone wrote:

> Owing to the unusual character of the case the result of related researches on the subject was incorporated in a long note on page 4, which I think has some utility, as the material cannot be

the point of an opinion was to solve the legal puzzle, the "speculative twister,"[81] of a case by application of "the fundamentals of legal theory."[82]

For Holmes's colleagues on the Court, however, opinions were conceived very differently. Willis Van Devanter, for example, did not conceptualize court opinions as the personal expression of a Justice,[83] but instead as the institutional response of a Court

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> found elsewhere in convenient form. The opinion, however, could proceed to its conclusion without the note and I have no objection to cutting it out if the Brethren feel that that should be done in the interest of brevity.

(Stone Papers). Butler responded that "I think I would prefer to have the note eliminated." Sutherland replied that "I was disposed to think the note should be omitted, but I leave it to you." Sanford observed that "I think the matter of including the note in p 4 is a matter of your personal choice. My own personal thought would be that as this note is not limited to question in hand –as the provision of historical notes—but is rather a collection of authorities in a cognate subject—although valuable it does not add to the opinion as an opinion." Van Devanter stated that "Personally I would omit note but leave that to you. Three out of four judges will think the court is adopting what is said in notes." He then wrote an additional memorandum to Stone, commenting:

> In your nolo contendere case please consider whether the long note (possibly more than one) ought to be omitted—whether it encourages an inadmissible use of notes. I thought of it when reading the opinion, but preferred to make no suggestion. Since then two of our brothers who were speaking of opinions in a general way referred to the use of notes and mentioned that opinion as going beyond what they thought proper in that regard. I merely suggest that you consider it and then do as you think best. As I recall the opinion the long note adds nothing to it.

(Stone Papers). Stone eventually omitted the note from the published version of his opinion. Throughout his time on the Taft Court, he remained cautious in his use of footnotes, averaging only .58 footnotes per majority opinion. See Figure D. But he no doubt carried the memory of this exchange with him some twelve years later, when he wrote footnote four of his *Carolene Products* decision. See United States v. Carolene Products Co., 304 U.S. 144 (1938). For a discussion of that footnote, see J.M. Balkin, The Footnote, 83 N.W.U.L.Rev. 275 (1989).

[81] "I am conscious of shrinking from facts—which Brandeis devours—but I shouldn't mind a speculative twister. Perhaps I will look one up – meantime I have had keen intellectual pleasure in writing opinions. Each one has had a kernel of interest. All cases do." Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, December 12, 1925 (Holmes Papers)(Reel 24 Frame 88). See Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, October 29, 1930 (Holmes Papers) (Reel 24, Frame 391) ("I suffer as I think I always have, when a case of any complication is presented, by being in a hopeless muddle during at least the earlier part of the argument and sometimes clear through it, but after a while in one way or another it clears up and becomes merely a question of law like any other.").

[82] Holmes and Frankfurter, supra note 70, at 170.

[83] He certainly did not conceive opinions as "theoretically spoken." In oral expression Van Devanter was said to be "fluent, precise and uninhibited." Drew Pearson and Robert S. Allen, supra note 16, at 187 ("In the Court's secret deliberations none of his colleagues excel him in clarity or succinctness of expression. Even Justice Brandeis . . . once remarked that if a stenographer could be present to take down Van Devanter's words, the Court would get as able an opinion as any he takes six months to write. But when

whose obligation it was clearly and decisively to provide guidance to parties and to the legal system. He thus criticized Holmes's opinions because they "do not give an adequate portrayal of the case in hand or of the grounds of the decision,"[84] and he pointed with pride at the ability of his own opinions to provide convincing and practical guidance to the parties and to the public about disputed issues of law:

> 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.[85]

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Van Devanter sits down to put his thoughts on paper he goes through weeks of mental torture. He writes and rewrites. In the end he turns out an able opinion, couched in readable literary style—but the birth pangs are prolonged and prodigious."). See Harlan Fiske Stone, "Associate Justice Van Devanter: An Appraisal," 28 *ABAJ* 438, 459 (1942) ("At the conference table he was a tower of strength. When his turn came to present his views of the case in hand, no point was overlooked, no promising possibility left unexplored. His statements were characteristically lucid and complete, the manifest expression of a judgment exercised with unswerving independence. Often his expositions would have served worthily, both in point of form and substance, as the Court's opinion in the case."); Letter from William Howard Taft to Robert A Taft, March 17, 1929 (Taft Papers) (Reel 309) ( "While at Conference [Van Devanter] can deliver a conclusion that could be put by stenographic announcement right into an opinion."); The Autobiographical Notes of Charles Evans Hughes 171 (David J. Danelski and Joseph S. Tulchin eds. 1973) ("[H]is careful and elaborate statements in conference, with his accurate review of authorities, were of the greatest value. If these statements had been taken down stenographically they would have served with but little editing as excellent opinions."). But Van Devanter balked at reducing his speech to writing, because "he never gets done looking over the various features that he would like to consider." Letter from William Howard Taft to Robert A Taft, March 17, 1929 (Taft Papers) (Reel 309). If the Taft Court as a whole averaged 60 days between the argument of a case and its decision by written opinion, Van Devanter took an average of 141.4 days after argument to publish his opinions. See Figure 9. Several times Taft was forced tactfully to reassign to other Justices cases originally given to Van Devanter so that they could be decided within a reasonable period of time.

[84] Letter from Willis Van Devanter to John H. Clarke, June 9, 1928 (Van Devanter Papers).

[85] Letter from Willis Van Devanter to John C. Pollock, June 7, 1921 (Van Devanter Papers). At the time Van Devanter believed that he had a chance to be named as Chief Justice to succeed Edward White. He had written to Pollock, a federal district judge, that "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 currents of my mind." Letter from Willis Van Devanter to John C. Pollock, May 26, 1921 (Van Devanter Papers). In the passage quoted in text, Van

The concision and oral quality of Holmes's opinions were inconsistent with these objectives. So, for example, Pierce Butler criticized Holmes's opinion in *United States v. New York Central Railroad Comm'n*[86] because "the failure of the opinion to give the language of the act on which it rests is quite remarkable. . . . The importance of the question, the parties & the great sums involved combine to make fuller treatment desirable."[87] Taft also believed that despite Holmes's "genius for giving a certain degree of piquancy and character to his opinions by sententious phrases," his opinions lose "strength and value by his disposition to cut down."

> The chief duty in a court of last resort is not to dispose of the case, but it is sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law. In the old days, this Court, especially in the days of Harlan, Peckham and others, wrote too long opinions, so that the Bar grew tired. On the other hand, I think the Bar is not particularly well

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Devanter recounts his virtues to Pollock. The passage continues: "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 thing for me to do is to take my usual vacation and let come what will."

[86] 279 U.S. 73 (1929). The case involved the very important question of whether the ICC could increase the amount of compensation that railroads received for carrying the mail from the date of their filing an application for an increase.

[87] Letter from Pierce Butler to Willis Van Devanter, March 6, 1929 (Van Devanter Papers). Butler continues: "But, under the circumstances, it seems to me best to let it be circulated as it is. G.S. & E.T.S. will not decline, I suspect. If vigorous dissent comes, it may be necessary to have the opinion properly expanded." McReynolds responded to Holmes's draft opinion with the tart observation, "If you did not have the votes, this would be wrong." (Holmes Papers). Brandeis, tweaking Holmes's noted positivism, wrote, "I am glad you found it possible to yield to your desire to do justice – I acquiesce." Id. Taft joined in Brandeis's teasing: "I shall concur in this conclusion because the result is just though I could not find that the language of the act justified it. I am glad it will prevail." Id. For an earlier example of Taft's friendly jabs at Holmes's positivism, see his response to Holmes's opinion in *Forbes Pioneer Boalt Line v. Board of Commissioners*, 258 U.S. 338 (1922): "I marvel at your bringing in a `sense of justice.'" (Holmes Papers). The following Term, Holmes retorted by commenting on Taft's draft opinion in Freund v. United States, 260 U.S. 60 (1922), "This sounds to me like the voice from the burning bush – and though it effects Justice, a ticklish thing, I rejoice at it." (Taft Papers ) (Reel 614).

> pleased with too short opinions, for the good reason that I have referred to above.[88]

Even Brandeis criticized Holmes for his failure sufficiently to "consider the need of others to understand or sufficiently regard the difficulties or arguments of others. So that he has a surprisingly large [number of] petitions for rehearing in his cases, because he does not seem to have considered arguments of counsel that are very weighty with them and often he hasn't. Philosophically he would admit difference between truth and consent of others to truth, but he does not regard difference in practice."[89]

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[88] Letter from William Howard Taft to Charles P. Taft, 2nd, November 1, 1925 (Taft Papers) (Reel 277). See Letter of William Howard Taft to Clyde B. Aitchison, December 4, 1925 (Taft Papers) (Reel 278):

> I am afraid I can not guide you in the matter of judicial style. I have great difficulty myself in the matter. . . . Clarity and as much brevity as is consistent with making the case and question you are deciding understood are usually what are needed, though it is hard often to reconcile the two as objects. The more one sits where I sit, the more he realizes the need of opinions for reviewing courts to aid them to consider the cases which come before them in the same atmosphere in which they were presented and heard below. . . . Our Court used to write very long opinions- too long. But I am convinced that some of our members in their zeal to shorten what they say are not as helpful as they should be to the Bar and the Public. Our chief function in our Court is not go get rid of cases, it is to clarify the law and to be helpful in other cases. It is not a discharge of that function to be cryptical and leave the reader still guessing.

Taft himself confessed "to a tendency to length that I try to restrain," noting that "Judge Holmes and Judge McReynolds are very, very short." Letter from William Howard Taft to Charles P. Taft, 2nd, November 1, 1925 (Taft Papers) (Reel 277). See Letter of William Howard Taft to Horace Taft, October 5, 1925 (Taft Papers) (Reel 276) ("I have [an] important opinion still in the stocks. It is hard for me to compress it and to get it into proper shape. The strategy of framing an opinion is as difficult as anything about the work."). For all his objections, Taft nevertheless admired Holmes's power of concision, writing Holmes that "I envy your power of succinct statement." North Dakota ex rel. Lemke v. Chicago & N.W.R. Co., 257 U.S. 485 (1922) (Holmes Papers). See also Duckett & Co. v. United States, 266 U.S. 149 (1924) (Holmes Papers) ("I regard your power in these taking cases to concentrate on the point in a few words with admiration and awe.").

[89] *The Brandeis-Frankfurter Conversations*, supra note 71, at 335-36. The "Truth of [the] matter," Brandeis told Frankfurter, is that Holmes "takes joy in the trick of working out what he calls `a form of words' in which to express desired result. He occasionally says, 'I think I can find a form of words,' to which I reply, 'of course you can, you can find a form of words for anything.'" Id. at 334. See "Half Brother, Half Son,": The Letters of Louis D. Brandeis to Felix Frankfurter 356 (Melvin I. Urofsky and David W. Levy eds. 1991) (hereinafter ("Brandeis-Frankfurter Letters") (Holmes "has had quite a number of unimportant cases, but I think it also an element that he minimizes the importance of those he gets. Of course, his determination to finish the job on the Sunday following the assignment leads to this.").

If we carefully attend to discussion among the Taft Court Justices, we can discern (at least) three distinct functions for Supreme Court opinions to which they implicitly appeal. First, the function of an opinion was to reflect the collective judgment of the Justices who joined it. To fulfill this function, an opinion had to satisfy an internal audience; it had to fulfill the expectations of as many Justices as were necessary to acquire the status of an institutional judgment of the Court. The surest sign of McKenna's growing incompetence was his inability to write an opinion that discharged this function. Thus when McKenna's draft opinion in *Smietanka v. First Trust & Sav. Bank*[90] misstated the views of the conference, he was forced to retreat in disgrace. He wrote Taft, "I must have been absent from the Conference Room when you stated the case and then on my return voted carelessly. I had marked my copy of the transcript with my sign for reversal and, not looking at my docket, I took it for granted that the decision was in accordance with my views, and hence the opinion. . . . Expressing regrets . . . at the trouble I have caused and confessing to some shame for my blunder . . ."[91]

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[90] 257 U.S. 602 (1922).

[91] Memorandum from Joseph McKenna to William Howard Taft, February 7, 1922 (Taft Papers) (Reel 239). Eventually Taft took over the opinion and wrote it himself. Although in his Memorandum to Taft McKenna had strongly defended his view of the case, he did not dissent from Taft's opinion. Taft wrote his brother Horace:

> The worst and most embarrassing member [of the Court] . . . is the oldest member, McKenna. I don't know what course to take with respect to him, or what cases to assign to him. In case after case assigned to him he will write an opinion, and bring it into conference, and it will met objection because he has missed a point in one case, or, as in one instance, he wrote an opinion deciding the case one way when there had been a unanimous vote the other, including his own. He wrote an opinion in an Oklahoma case that we let get through the other day, [Oklahoma Natural Gas Co. v. Oklahoma, 258 U.S. 234 (1922)] which brought a petition for rehearing that is most humiliating to the Court, and I think we shall have to grant it. I had to take back a case from him last Saturday because he would not write it in accordance with the vote of the Court on the right ground, and have taken it over to myself. . . . The difficulty is of course that McKenna's vote may change the judgment of the Court on important issues, and it is too bad to have a mind like that decide when it is not able to grasp the point, or give a wise and deliberate consideration of it.

Fidelity to the collective views of the Justices who joined an opinion meant not merely getting those views right, it also meant not materially exceeding them. Stone seems to have been a particular offender in this regard. Taft remarked that Stone

> has great difficulty in getting his opinions through, because he is quite disposed to be discursive and to write opinions as if he were writing an editorial or a comment for a legal law journal, covering as much as he can upon a general subject and thus expressing opinions that have not been thought out by the whole Court. . . . I am afraid he is disposed to interject a general disquisition looking toward an embarrassing recurrence on his part to some other principle that has been questioned or denied by the Court when that principle was plainly before us. Without impeaching at all his good faith in matters of that sort, we find we have to watch closely the language he uses.[92]

Taft's observation is amply confirmed by the correspondence accompanying Stone's draft opinions.[93] In response to Stone's opinion in *Gulf Refining Co. v. Atlantic Mutual Co.*,[94] for example, McReynolds wrote, "I think you have indulged in rather too much discussion & said what may hurt. If confined narrowly to the point I think your opinion would be better."[95] In response to Stone's opinion in *Van Oster v. Kansas*,[96] Van

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Letter from William Howard Taft to Horace Taft, April 17, 1922 (Taft Papers) (Reel 241). Taft labeled McKenna "a Cubist on the Bench," adding that "Cubists are not safe on the Bench." Letter from William Howard Taft to Mrs. Frederick J. Manning, June 11, 1923 (Taft Papers) (Reel 254). Brandeis said of McKenna that the "only way of dealing with him is to appoint guardians. . . . The Chief & Van D. are his guardians – McReynolds tries to handle him but does it badly. He knows he (McK) doesn't count, his suggestions are [not] taken, so every once in a while he sends up a balloon just to show that he is there. . . . His opinions are often suppressed—they are held up & held up & gets mad & throws up the opinion and it's given to someone else." *The Brandeis-Frankfurter Conversations*, supra note 71, at 326-27. Eventually the Court decided to have Taft convince McKenna to retire. The incident is movingly recounted in a memorandum by Taft that is reproduced in Walter F. Murphy and C. Herman Pritchett, Courts, Judges, and Politics: An Introduction to the Judicial Process 217-19 (2nd ed. 1974).

[92] Letter from William Howard Taft to Charles P. Taft, 2nd, May 12, 1929 (Taft Papers) (Reel 311).

[93] So, for example, in December of 1928 Taft had objected to a statement in Stone's draft opinion in *United Fuel Gas Co. v. Railroad Comm'n.*, 278 U.S. 300 (1929), because "He does not seem to be able to get it from our cases except Brandeis's dissenting opinion and wants to get into an opinion of the Court. `Heraus mit it.'" Letter from William Howard Taft to Willis Van Devanter, December 28, 1928 (Van Devanter Papers).

[94] 279 U.S. 708 (1929).

[95] Stone Papers.

Devanter commented, "You have written discursively and in a vein much like that of a student writing for a law journal."[97] Pierce Butler would agree to join Stone's *Van Oster* opinion only if Stone eliminated a paragraph containing a general statement of the law.[98]

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[96] 272 U.S. 465 (1926).

[97] Stone Papers.

[98] *Van Oster* concerned the constitutionality of a Kansas law authorizing the forfeiture of an automobile used in the transportation of intoxicating liquor, even as against an innocent owner. The paragraph, which Stone ultimately omitted, said:

> Such a law as we are now considering may be regarded harsh and unwise, but we are concerned not with its wisdom but with the power of the legislature to enact it. Where as here the challenged statute is within the sphere of legislative power and the particular legal device chosen to make effective the exercise of the power is consonant with recognized principles, the objection that it is harsh and oppressive must be addressed to the legislative and not to the judicial branch of the government. . . . Conduct itself innocuous may be so related to prohibited acts as to bring the former within the proscription of the latter in order that the permitted legislative purpose may be attained.

Id. Butler asked if this paragraph was "really necessary? The statements are very general. Can it not be omitted?" He agreed to join Stone's opinion "subject to the elimination of the paragraph." Id.

Butler also objected to a statement in Stone's draft opinion in *Lucas v. Alexander*, 279 U.S. 573 (1929), a case about the taxation of insurance policies. Stone had written that "`value', as distinguished from market price or value, can have no precise or definite connotation apart from the particular relationship or purpose with respect to which the term is used." (Stone Papers). At the time the concept of "value" was jurisprudentially controversial, because it was the basis on which the Court scrutinized the constitutionality of utility rate regulation. See, e.g., St. Louis & O'Fallon Ry. Co. v. United States, 279 U.S. 461 (1929). Butler wrote Stone:

> It seems to me that the sentence to which I called your attention yesterday may be eliminated without disadvantage to your opinion. . . .
>
> "Value" is now . . . much in controversy. That seems to me to be a good reason for restricting the statements of this court to the questions to be decided. . . . There are some who insist that value is one thing for one purpose and another for another.
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> And others think that constitutional protection depends upon the meaning to be given to "value", and that if the term may be defined according to the purpose for which appraisal is made the just compensation and due process clauses may be evaded. It seems to me that in your case the court need not enter that field and that therefore the discussion should be restricted to the question in the case.
>
> But if we must go into the matter I suggest in lieu of the sentence in question that there be inserted the following: "But `value' of private property is that sum which would constitute just compensation if it were taken by exertion of the sovereign power of eminent domain for public use . . . ."

Memorandum from Pierce Butler to Harlan Fiske Stone, May 9, 1929 (Stone Papers). Stone dropped the offending sentence, and Butler wrote back, "This is improved and I am willing to go along." Id.

The extant records of the Taft Court[99] reveal a surprisingly healthy dialogue and exchange as authors struggled to craft their opinions to express the specific views of the Justices who joined them.[100] So, for example, when in the draft of his opinion in *Risty v. Chicago, Rock Island & Pacific Ry Co.*[101] Stone observed that federal courts "will *ordinarily* follow the decisions of state courts as to the interpretation of a state statute,"[102] Holmes immediately wrote back that "I think they ought *always* to follow state decisions on interpretation of state statutes. I should pay no attention to wobbly phrases in that matter."[103] Stone omitted the adverb.

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[99] We shouldn't discount the possibility that these records are not representative. We have more or less complete case records only for Justices Holmes, Brandeis and Stone, and very fragmentary case records for Taft.

[100] In June of 1927 Taft reported to Moses Strauss, the managing editor of the *Cincinnati Times-Star*, that

> We have been comparing notes in the Court over the work we do in reaching our decisions and preparing our opinions. It is thorough to the last degree, and the contrast between the rough and ready method by which state courts and some of the lower Federal courts decide their cases is very great. The amount of deliberation that we give to them, the care with which we prepare the opinions and send them about for every Judge to make himself familiar with the opinion as it is to be pronounced, and the freedom with which we criticise the opinions, all are an insurance against mistakes that so far as I know no other Court has; and yet even in spite of that we make mistakes and errors, but as far as we can exercise care, we do it.

Letter from William Howard Taft to Moses Strauss, June 5, 1927 (Taft Papers) (Reel 292). Four months later Taft wrote his son on the same theme:

> I sometimes feel that in discussing argued and submitted cases we are too much hurried because of the certioraris, but the process of discussion through which we go before and after the opinion is written, with the opinion of the opinion writer, saves us, so that I still maintain that there is no Court in this country, and I don't know whether there is a Court anywhere, that gives more careful attention to the cases we decide than we do. But it is at the cost of arduous and continuous labor.

Letter from William Howard Taft to Charles P. Taft, 2nd, October 23, 1927 (Taft Papers)(Reel 296).

[101] 279 U.S. 378 (1926).

[102] Stone Papers (Emphasis added).

[103] Id. (Emphasis added).

When in the draft of his opinion in *Brooke v. Norfolk*,[104] a case challenging the constitutionality of a tax imposed in Virginia on a Virginia resident of the corpus of a trust fund located, controlled, and administered in Maryland, Holmes speculated that "If the State and City had preferred to treat her as owning an equitable estate for life, to estimate the value of her interest by the use of the mortality tables and to tax that as a fund, we presume that there would have been dispute," several members of the Court banded together in immediate protest. Butler marked the passage and commented that "it would better be left out."[105] Sutherland also suggested "that we ought not to express an opinion on this. . . . It does not seem necessary to do so until the issue is made." Van Devanter added, "Yes, but think you both discuss and state what is not involved," while McReynolds bluntly observed that "I think the opinion should be confined to the situation here presented & should not undertake to say what would or would not be the rule under different circumstances." Holmes deleted the offending passages.[106]

If the Justices could sometimes be demanding in their expectations of an opinion, an opinion writer could sometimes alter the views of his colleagues. In *McCarthy v. Arndstein*,[107] for example, an important decision involving the question of whether Fifth Amendment protections against self-incrimination extended to the financial papers of a petitioner in bankruptcy, the vote of the Conference was to reverse and the case was

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[104] 277 U.S. 27 (1928).

[105] Holmes Papers.

[106] He wrote to Frankfurter: "In conference today I have a decision on a point not open to doubt, which a few remarks extended to a page and a half. My brethren express doubt on what I thought obvious—and will cut it down to a page—to which I have no objection. It is like Franklin's `John Thompson Hatter makes and sells hats' with a picture—which his friends by successive eliminations cut down to his name and the picture . . . ." Holmes and Frankfurter, supra note 70, at 226.

[107] 266 U.S. 34 (1924).

assigned to Brandeis. After study, Brandeis "concluded that the entry should be judgment reaffirmed,"[108] and he accordingly circulated an opinion reaching a contrary conclusion to the conference. His proposed opinion carried a unanimous Court.[109] Other examples of Brandeis's draft opinions that caused the unanimous reversal of the initial resolution of a case include *Sprout v. South Bend*[110] and *St. Louis Southwestern Ry. Co. v. United States*.[111]

A second function served by Supreme Court opinions was justly to decide a particular case in a manner that satisfied litigants that the Court had fairly and rationally

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[108] Brandeis Papers.

[109] Taft responded to Brandeis, "I am inclined to go with you because I don't know where else to go." Van Devanter, Sanford, and Butler all suggested changes to the opinion that Brandeis subsequently made. Although it was quite unusual for Brandeis to accept revisions suggested by Sanford, he frequently accepted the proposed changes of Van Devanter. For typical examples, see Brandeis's draft opinions in West v. Standard Oil Co., 278 U.S. 200 (1929) ("I am relying upon you to protect from treacherous pitfalls a stranger ranging over rugged country."); Bank of Jasper v. First National Bank of Rome, 258 U.S. 112 (1922); Bank of America v. Whiney Central National Bank, 261 U.S. 171 (1923); Baltimore & Ohio Rd. Co. v. Parkersburg, 268 U.S. 35 (1925); Heald v. District of Columbia, 259 U.S. 114 (1922); Price Fire & Water Proofing Co. v. United States, 261 U.S. 179 (1923); St. Louis Southwestern Ry. Co. v. United States, 262 U.S. 70 (1923); Tutun v. United States, 270 U.S. 568 (1926); St. Louis & San Francisco Ry. Co. v. Spiller, 275 U.S. 156 (1926); St. Louis-San Francisco Ry. Co. v. Alabama Public Service Comm'n., 279 U.S. 560 (1929). In fact, it was not at all uncommon for Brandeis to send his opinions to Van Devanter before their circulation to the full Court. See, e.g., Baltimore & Ohio Rd. Co. v. United States, 264 U.S. 258 (1924); Taubel-Scott-Kitzmiller v. Fox, 264 U.S. 426 (1924) ("You have thought so much on kindred questions that I am venturing to ask you to let me have your suggestions before enclosed opinion goes into general circulation."); Smyth v. Asphalt Belt Railway Co. 267 U.S. 326 (1925) ("May I trouble you to let me have your suggestions before I circulate this?"); In re Buder, 271 U.S. 461 (1926); Albrecht v. United States, 273 U.S. 1 (1927); United States v. California Co-Operative Canneries, 279 U.S. 553 (1929) ("May I have your suggestions before I circulate the opinion?").

[110] 277 U.S. 163 (1928).

[111] 262 U.S. 70 (1923). A memorandum circulated by Stone reversed the judgment of the Court in Louisville & Nashville Rd Co. v. Chatters, 279 U.S. 320 (1929) ("I voted with the majority that jurisdiction to maintain the suit against the Southern Railway Company had not been established. A study of the case and the authorities has led me to a different conclusion. At the suggestion of the Chief Justice I have embodied it in the following memorandum, so that the matter may receive the further consideration of the Court."). Stone's eventual opinion upholding jurisdiction was unanimous, even though Sanford wrote back to Stone: "Regret that I cannot agree as to the Southern." (Stone Papers).

"considered arguments of counsel"[112] and had adjudicated among them. The parties to a case thus constituted a relevant audience for an opinion. There was relatively little exchange among the Taft Court Justices with regard to this function, in part because its significance was simply taken for granted.[113] From time immemorial an essential judicial function had been to offer judgment between contestants so as to preserve the peace.

Occasionally, however, the Justices would refer to their obligations to the parties. Thus Taft once suggested changes to a draft Holmes opinion (which the latter accepted) on the grounds that the draft "leaves our decision less positive than it should be and is. .You'll have a petition for rehearing and create an impression of doubt on our part which does not conduce to a `once for all' decision."[114] When Taft sought to praise Brandeis's opinion in *United States ex rel. Bilokumsky v. Tod*,[115] which upheld the deportation of an alien because of his possession of seditious literature, he wrote that "Certainly [Walter] Nelles [the alien's lawyer] ought to be satisfied that his shadowy contentions have had close consideration and have been fully and overwhelmingly answered."[116]

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[112] *The Brandeis-Frankfurter Conversations*, supra note 71, at 335-36.

[113] An exception is Taft's note to Holmes in response to the latter's suggested changes in Taft's opinion in Balzac v. Porto Rico, 258 U.S. 298 (1922): "I shall be glad go talk with you about it and see whether I can modify what is there said. The principle I state disposes of the argument of counsel so completely that I would like to retain them, but I am not an obstinate man." Letter from William Howard Taft to Oliver Wendell Holmes, March 30, 1922 (Taft Papers)(Quoted in David Joseph Danelski, The Chief Justice and the Supreme Court 185 (Ph.D. Dissertation, University of Chicago 1961)).

[114] White Oak Transportation Co. v. Boston, Cape Cod & New York Canal Co., 258 U.S. 341 (1922) (Holmes Papers).

[115] 263 U.S. 149 (1923).

[116] Brandeis Papers. See Taft's comments on Brandeis's opinion in *Galveston Electric Co. v.Galveston*, 258 U.S. 388 (1922) ("This is a carefully drawn opinion and answers every contention. Much more satisfactory than what Judge Day calls a `journal entry.'"). Brandeis Papers.

A third function of a Supreme Court opinion was "sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law."[117] From the perspective of this function, the audience for a Supreme Court opinion was the general legal public, which included state courts and lower federal courts, the legal profession, Congress and state legislators. The purpose of an opinion was to clarify standards of federal law so as to provide guidance for those who needed to know the law.

Taft was an especially articulate spokesman for this standpoint; within the confines of the Court, he used his powers of persuasion and leadership to encourage opinions that fulfilled these functions.[118] So, for example, he praised Brandeis's opinion

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[117] Letter from William Howard Taft to Charles P. Taft, 2nd, November 1, 1925 (Taft Papers) (Reel 277).

[118] Sometimes Taft used his own opinions to achieve this function though the frank advocacy of explicit law reform. For example, in *Irwin v. Wright*, 258 U.S. 219 (1922), which concerned the question of whether suits to enjoin a state officer from enforcing a statute abated upon the death or retirement of the officer, he frankly appealed to Congress for legislative reform of an otherwise unfair situation:

> It may not be improper to say that it would promote justice if Congress were to enlarge the scope of the Act of February 8, 1899, so as to permit the substitution of successors for state officers suing or sued in the Federal courts, who cease to be officers by retirement or death, upon a sufficient showing in proper cases. Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure.

Id. at 223-24. In the absence of such legislation, Taft candidly advised that every effort should be made so as to achieve a fair outcome. See, e.g., Gorham Manufacturing Co. v. Wendell, 261 U.S. 1, 5 (1923) (Where "officers on behalf of State or County consent to the substitution, the federal courts need not be astute to enforce the abatement of the suit if any basis at all can be found in state law or the practice of the state courts for substitution of the successors in office."). Eventually the Court itself drafted the necessary legislation, which Congress enacted as a section of the Act of February 13, 1925. The story is fully recounted in *Snyder v. Buck*, 340 U.S. 15, 22-26 (1950) (Frankfurter, J., dissenting). Another example of Taft's use of opinions to provide explicit instructions to other legal actors is *Hill v. Wallace*, 259 U.S. 44 (1922), in which the Court struck down the Future Trading Act. 42 Stat. at Large 187 (August 24, 1921). In his opinion for the Court, Taft "hinted rather plainly" that Congress could cure the constitutional defects of the Act. Thomas Reed Powell, "Umpiring the Federal System: 1922-1924," 40 Pol. Sci. Q. 101, 106 (1925). When Congress promptly amended the deficiencies by enacting the revised Grain Futures Act, 42 Stat. At Large 998 (September 21, 1922), Taft cheerfully upheld the modified statute in *Board of Trade v.*

in *Great Northern Rd. Co. v. Merchants Elevator Co.*[119] because "it will inform the courts and the profession and your ignorant colleagues. It will be leading case showing what this Court is for."[120] Of Brandeis's opinion in *St. Louis, Brownsville, & Mexico Ry. Co. v. United States*[121] Taft said that "This is a most useful opinion and straightens out the law not only for the public but for your colleagues."[122] Brandeis's opinion in *United States v. Los Angeles & Salt Lake Rd. Co.*[123] was "an admirable opinion [that] lays down an authoritative rule for dealing with . . . valuations that makes it a really leading case. I congratulate you. This is most clarifying and satisfactory."[124]

The Judiciary Act of 1925, of course, emphasized this function of Supreme Court opinions. As Taft said in promoting the Act, "The real work of the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it."[125] By empowering the Court to choose its own jurisdiction, the Act shifted the Court's emphasis away from opinions addressed to private litigants, and toward opinions addressed to those concerned with the development of American law. Justices like Taft

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*Olsen*. 262 U.S. 1, 33 (1923) ("The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held, in the somewhat carefully framed language of the foregoing, prevented our sustaining the Future Trading Act.").

[119] 259 U.S. 285 (1922).

[120] Brandeis Papers. Brandeis returned the favor the following term, responding to Taft's draft opinion in Cumberland Telephone & Telegraph Co. v.Louisiana Public Service Commission, 260 U.S. 212 (1922), "This will be of much service in clearing up a confusion quite widely experienced at the bar." (Taft Papers) (Reel 614).

[121] 268 U.S. 169 (1925).

[122] Brandeis Papers.

[123] 273 U.S. 299 (1927).

[124] Brandeis Papers.

[125] Taft, supra note 27, at 5.

and Van Devanter, however, seldom perceived a conflict between these two audiences. They believed that the Court could best offer guidance to the legal public by enunciating the same kind of stable and definite legal principles as it would announce to litigants in the resolution of a case.[126] In their view, the 1925 Act merely affected the Court's

[126] The characteristic rhetoric of Supreme Court opinions was thus one of closure, as though the legal principles that both settled the case between the parties and clarified the law for the rest of the country were the only possible solution to the difficulties of the case. See Robert A. Ferguson, The Judicial Opinion as Literary Genre, 2 Yale J. L. & Hum. 201, 207, 210, 213 (1990). It is noteworthy that during this period Brandeis, whose emphasis on judicial abstention evidenced his belief that there might be important differences between the function of settling the disputes of litigants and offering guidance to the legal public, pioneered an idiosyncratic and distinctive style that sought to inform legal actors precisely by resisting this framework of closure. Primarily concerned with informing the institutional relationships of the emerging administrative state, Brandeis frequently used his opinions to suggest to public officials the myriad possibilities of legitimate legal action. In *Missouri Pacific Railroad v. Boone*, 270 U.S. 466 (1926), for example, the specific legal question for determination was whether state intrastate railway regulations that had been preempted by federal control over the railroads during World War I could be enforced without re-enactment after cessation of that control on February 29, 1920. Brandeis's opinion stresses the multiple ways that state regulations might acquire legal force after 1920:

> In order to remove doubts as to what tariffs were to be applicable after the termination of Federal control, Congress declared that the existing tariffs, largely initiated by the Director General, should be deemed operative, except so far as changed thereafter—that is, after February 29, 1920—pursuant to law. Such modifications of intrastate tariffs might result from action of the carriers taken on their own initiative. It might result from orders of the Interstate Commerce Commission. It might result from the making either of new state laws or of new orders of a state commission acting under old laws still in force and again becoming operative. Or such modification might result from the mere cessation of the suspension, which had been effected through Federal control, of statutes or orders theretofore in force and still unaffected by any action of the authority which made them. In any of these cases, the change would be effected "thereafter;" that is, after the termination of Federal control.

Id. at 475-76. The rhetorical structure of this passage, its insistently reiterated conjuring of possible methods that "might result" in an effective change of law, serves to negate the closure made to seem inevitable in typical Court opinions. Instead *Boone* unfolds a virtual roadmap for the guidance of public officials attempting to negotiate the complex domain of federal and state railroad regulation. It is hard to imagine a sharper contrast to the typical aesthetic of a Holmes opinion, in which a "shapeless black immensity . . . shrinks . . . to an infinitesimal luminous point." Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, June 5, 1927 (Holmes Papers)(Reel 24, Frame 175). In opinions like *Boone*, Brandeis's ambition is to illuminate the many paths available for the legal exercise of administrative and legislative discretion. See, e.g., Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co. v. Taylor, 266 U.S. 200, 208 (1924).

An important and little noted dimension of Brandeis's focus on facts is that it also served to maintain this open space of potential legal action. Thus in *Hammond v. Schappi Bus Line*, 275 U.S. 164 (1927), Brandeis confronted the question of whether city ordinances regulating buses were consistent with the dormant commerce clause. Instead of laying down a singular rule, he used his opinion to explain how the scope of local competence would depend upon contingent facts:

> The contentions made in the briefs and arguments suggest, among other questions, the following: Where there is congestion of city streets sufficient to justify some limitation of the

control over its own docket; it did not alter the terms on which the Court would construct its opinions.

But in fact they were wrong. Fashioning an opinion justly to resolve a dispute between parties is closely related to conceiving an opinion as a routine method of disposing of a large mandatory docket. It is rooted in the conception of the Supreme Court as a tribunal of last resort that predominated during the first 150 years of the Court's existence. Crafting an opinion in order to influence the administration and development of the law, by contrast, requires reaching out beyond particular parties and addressing the entire community of legal actors. This alters the stakes of an opinion. It also transforms the position of the Court. If the function of an opinion is to resolve disputes between parties, the Court can rest on its traditional authority as a tribunal

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> number of motor vehicles to be operated thereon as common carriers, or some prohibition of stops to load or unload passengers, may the limitation or prohibition be applied to some vehicles used wholly or partly in interstate commerce while, at the same time, vehicles of like character, including many that are engaged solely in local, or intrastate, commerce are not subjected thereto? Is the right in the premises to which interstate carriers would otherwise be entitled, affected by the fact that, prior to the establishment of the interstate lines, the City had granted to a local carrier, by contract or franchise, the unlimited right to use all the streets of the City, and that elimination of the interstate vehicles would put an end to the congestion experienced? May the City's right to limit the number of vehicles, and to prohibit stops to load or unload passengers, be exercised in such a way as to allocate streets on which motor traffic is more profitable exclusively to the local lines and to allocate streets on which the traffic is less profitable to the lines engaged wholly, or partly, in interstate commerce? Is limitation of the number of vehicles, or prohibition of stops to load or unload passengers, of carriers engaged wholly, or partly, in interstate commerce, justifiable, where the congestion could be obviated by denying to private carriers existing parking privileges or by curtailing those so enjoyed? Are the rights of the interstate carrier in the premises dependent, in any respect, upon the dates of the establishment of its lines, as compared with the dates of the establishment of the lines of the local carrier?
>
> These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. . . . Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.

Id. at 170-72.

deemed necessary to terminate strife and avoid violence.[127] But to the extent that an opinion is addressed to the general legal public, this institutional function competes with the Court's character as a lawgiver, as an originator of law, somewhat in the fashion of a "ministry of justice." And this change may oblige an opinion to justify the authority of the Court in manner that is different from what would be necessary were an opinion simply the means of resolving disputes between private parties.

The sharp contrast between the opinion writing practices of the Taft Court and those of the modern Court no doubt reflects these more subtle transformations. Of course such profound changes are driven by many different causes, not merely (or even especially) by the Judiciary Act of 1925. The Act, however, permanently and pervasively altered the institutional ecology of Supreme Court opinions, and this changed organizational environment in turn shaped the impact of the many influences that caused the decision-making practices of the Taft Court to evolve into those of the contemporary Court. In the remainder of this Lecture, I shall focus on two such fundamental shifts in the Court's decision making practices. The first concerns the role of dissent. The second involves the Court's willingness to cite law review literature in its opinions.

## III.

Figure 5 illustrates how sharply unanimity rates have fallen between the Taft Court and the 1990s. In the 1921-28 Terms, 84% of the Court's opinions were unanimous; by contrast, only 27% of the Court's opinions were unanimous during the

[127] "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 148 (1907). See International Textbook Co. v. Pigg, 217 U.S. 91, 112 (1910).

1993-98 Terms.[128] It has justly been observed that this "increase in the frequency of the issuance of separate opinions is a central event in the history of the Court's opinion-delivery practices."[129]

Figure 10, which traces the decline of unanimity term by term from 1912 to 1957, allows us to examine this transformation somewhat more carefully.[130] Figure 10 suggests that although emphasis is sometimes put on Taft's "absorbing ambition . . . in his own phrase, to `mass' the Court,"[131] and although this has been adduced as a factor to explain the low rates of dissent during the pre-War period,[132] the high rates of unanimity during

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[128] Figure 5 also illustrates that during the period from the 1912 Term to the 1920 Term, 82% of the Court's opinions were unanimous.

[129] John P. Kelsh, The Opinion Delivery Practices of the United Supreme Court 1790-1945, 77 Wash. U. L. Q. 137, 178 (1999). Unanimity rates were also exceedingly high throughout the 19th Century; "[f]ew dissenting or concurring opinions were written before the turn of the century." Stacia L. Haynie, 54 J. Pol. 1158, 1158 (1992). See Gregory A. Caldeira and Christopher J.W. Zorn, Of Time and Consensual Norms in the Supreme Court, 42 Am J. Pol. Sci. 874, 882 (1998); David M. O'Brien, "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions," in Cornell W. Clayton & Howard Gillman, eds., Supreme Court Decision-Making 91-95 (1999). It is noteworthy that at least as of 1970 unanimity rates in state supreme courts do not seem to have fallen to anything like the low levels characteristic of the United States Supreme Court. One study finds that in the period 1915-1925, 88.9% of state supreme court opinions were unanimous, whereas in the period 1960-70, 83.5% of such opinions were unanimous. Friedman et al., supra note 52, at 787. For other studies, see Mark A. Kadzielski and Robet C. Kunda, The Origins of Modern Dissent: The Unmaking of Judicial Consensus in the 1930s, 14 UWLA L. Rev. 43, 67-69 (1983); Kagan, et. al, supra note 64, at 994 (84.7% of state supreme court opinions in the period 1940-1970 were unanimous).

[130] The data in Figure 10 for the 1912-1929 Terms are my own. I have borrowed the data for the 1930-1957 Terms from Karl M. ZoBell, Division of Opinion in the Supreme Court: A History of Judicial Disintegration, 44 Cornell L. Q. 186, 205 (1959).

[131] Alpheus Thomas Mason, The Supreme Court: From Taft to Warren 60 (1968).

[132] Thomas G. Walker, Lee Epstein & William J. Dixon, On the Mysterious Demise of Consensual Norms in the United States Supreme Court, 50 J. of Politics 361, 380-81 (1988); cf. Caldeira and Zorn, supra note 129, at 878 ("Of the various explanations [for consensus], none has figured more prominently than the influence of the chief justice."); Haynie, supra note 129, at 1160 (speculating on the relationship between "leadership and consensus" because "[j]udicial leadership is consistently identified as one of the major influences on the court's behavior.").

Taft's tenure can not be attributed to him personally. They were in fact typical of the pre-New Deal Court.[133]

This is not to say, however, that Taft did not "deprecate"[134] dissents, which he did.[135] He wrote to Clarke that "I don't approve of dissents generally, for I think that in many cases, where I differ from the majority, it 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."[136] He believed that "[m]ost dissents elaborated, are a form of egotism. They don't do any good, and only weaken the prestige of the Court. It is much more important what the Court thinks than what any one thinks."[137] Taft strongly counseled Harding against nominating New York Court of Appeals Judge Cuthbert Pound to replace Mahlon Pitney on the Court, because Pound "has a marked trait as a Judge that would make him of very doubtful use on our

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[133] See notes 128-129 supra.

[134] Letter from William Howard Taft to Sir Thomas White, January 8, 1922 (Taft Papers) (Reel 238).

[135] Taft once received an unsolicited letter from one Walter S. Whiton, an unknown attorney in Minneapolis, asking Taft if he did "not think that it would be better all round, if no dissenting opinions of any court were printed or published?" Letter from Walter S. Whiton to William Howard Taft, April 16, 1923 (Taft Papers) (Reel 252). Taft promptly replied, "I agree with you about dissenting opinions. I think it would be better to have none, but the custom has grown so now that it can not be eradicated, unless perhaps by act of Congress. But I am quite sure that Congress would not sustain such legislation." Letter from William Howard Taft to Walter S. Whiton, April 19, 1923 (Taft Papers) (Reel 252). In fact the Constitution of the State of Louisiana forbade the publication of dissents between 1898 and 1921. Art. 92, Louisiana Constitutions of 1898 and 1913, in Benjamin Wall Dart, Constitutions of the State of Louisiana, 616, 672 (1932).

[136] Letter from William Howard Taft to John Hessin Clarke, February 10, 1922 (Clarke Papers) (Quoted in Danelski, supra note 113, at 184). So, for example, Taft wrote to Holmes in response to Holmes's draft opinion in *New Orleans Land Co. v. Brott*, 263 U.S. 98 (1923), "While I make the sign of the scissors to you, I do not intend to do so to the public. I concur." (Holmes Papers). In regard to Holmes's opinion in *National Association of Window Glass Manufacturers v. United States*, 263 U.S. 403 (1923), Taft wrote, "I come in and shut my mouth." (Holmes Papers).

[137] Letter from William Howard Taft to Willis Van Devanter, December 26, 1921 (Van Devanter Papers). Taft continued, "but that sense of proportion is not present in the minds of some of our brethren. As to B[randeis], that sense is not lacking but his ultimate purpose is to break down the prestige of the Court." Id.

Bench. He is a great dissenter. He was a professor of Law in Cornell for five or ten years, and he evidently thinks it is more important that he should ventilate his individual views than that the Court should be consistent and by team work should give solidarity and punch to what it decides. We have one dissenter on the Bench, and often two. It would not be well, it seems to me, to introduce a third."[138]

Nor is it to say that Taft didn't work hard to build consensus and avoid dissents. He believed that an important task of the Chief Justice was "to promote teamwork by the Court so as to give weight and solidarity to its opinions."[139] He successfully diminished dissension in such cases in *United Mine Workers v. Coronado,*[140] *Hill v. Wallace,*[141] *Railroad Commission of California v. Southern Pacific Co.*[142] *Opelika v. Opelika Sewer,*[143] and *FTC v. Claire Furnace Co.*[144] He was willing to go to extraordinary lengths to modify his own opinions to reach out to others. In *Wisconsin v. Illinois,*[145] for example, he had worked for an entire summer on an opinion, advancing a very broad

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[138] Letter from William Howard Taft to Warren G. Harding, December 4, 1922 (Taft Papers) (Reel 248). In that letter Taft also advised against the appointment of Learned Hand because "he would almost certainly herd with Brandeis and be a dissenter. I think it would be risking too much to appoint him." Id.

[139] Draft of a tribute to Edward Douglas White, May 1921, Taft Papers (Cited in Danelski, supra note 113, at 177).

[140] 259 U.S. 344 (1922). The circumstances are discussed in Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work 77-99 (1957). Bickel also discusses Taft's efforts to "mass the court" in the case of *Sonneborn Brothers v. Cureton*, 262 U.S. 506 (1923). See id. at 100-118.

[141] 258 U.S. 44 (1922). The circumstances are discussed in Danelski, supra note 113, at 188-89. Danelski also discusses Taft's efforts to minimize dissents in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). See id. at 180-81.

[142] 264 U.S. 331 (1924). The circumstances are discussed in Alpheus Thomas Mason, supra note 4, at 211-12, and in Bickle, supra note 140 at 202-10.

[143] 265 U.S. 215 (1924) (Holmes papers).

[144] 274 U.S. 160 (1927). See Brandeis Papers.

theory of federal commerce power that he fervently supported. But in order to attain unanimity he agreed to censor his own views: "I worked all summer on the constitutional part of the opinion, . . . and satisfied myself completely by an examination of the briefs and the authorities on the subject, and I parted with it as a child that I was glad to father, if it needed any fathering, and it is a real sacrifice of my personal preference. But it is the duty of us all to control our personal preferences to the main object of the Court."[146]

What Figure 10 allows us to say is that Taft's interventions were responsible for marginal changes along the edges of a practice of unanimity that existed before Taft and that would persist after him. Within the parameters of that practice, many different factors, including but not exhausted by Taft's efforts, affected the degree of the Court's unanimity.[147] Figure 11 allows us to take a somewhat closer look at these factors by focusing on unanimity rates during the 1921-28 Terms. It indicates, for example, that there was a sharp increase in unanimity between the 1921 Term (72.8%) and the 1922 Term (91.1%). Of course there was a major change in Court personnel between these two Terms. Justices Clarke, Day and Pitney resigned and were replaced, respectively, by Justices Sutherland, Butler and Sanford. Figure 12, which shows how frequently

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[145] 278 U.S. 367 U.S. (1929).

[146] Letter from William Howard Taft to Pierce Butler, January 7, 1929 (Taft Papers) (Reel 307).

[147] Figure F offers some rough measure of Taft's ability to create consensus. Figure F examines the voting behavior of the eight Justices who both preceded Taft and served with him. Figure F divides the number of times that a Justice joined the opinion of the Court by the total number of cases in which that that Justice participated. It then compares the resulting percentage for each Justice for the 1915-1920 Terms to the percentage for each Justice for the 1921-1928 Terms. Figure F indicates that Taft generally had a positive effect, particularly on Justices Van Devanter and McKenna. The data for Justices Day, Pitney, and Clarke are potentially unreliable, however, because each served for so short a period with Taft. The seemingly negative effect that Taft had on Clarke is particularly misleading; as Figure G demonstrates, the 1921 Term was for Clarke simply the last straw in a rapidly deteriorating situation that could not be attributed to Taft. It should also be noted that during the Taft years McKenna's competence was open to question. See note 91 supra.

individual Justices joined opinions for the Court during the 1921-1928 Terms,[148] illustrates that the new Justices, as a group, were more likely to vote with the Court than the Justices they replaced. This is particularly true of Sutherland's replacement of Clarke.[149]

Figure 11 also indicates that rates of unanimity were very high during the 1922-1925 Terms, but that this rate dropped perceptibly during the remainder of the decade. This trend can be seen more clearly in Figure 13, which measures dissenting votes as a percentage of Court opinions. Although this pattern might be the result of random fluctuations of the docket, it is possible to identify a number of potential factors that may have contributed to this outcome.

There is some internal evidence, for example, that during the first half of the 1920s dissent was suppressed within the Court because of the need to fend off external attacks. In 1919 the AFL had launched an assault on judicial review[150] that unleashed a wave of progressive efforts to restrict the power of the Court to declare federal law unconstitutional.[151] In 1922 Robert La Follette advocated that Congress be able to

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[148] For each Justice in Figure 12, I have divided the total number of time he joined a Court opinion by the total number of cases in which he participated.

[149] Clarke joined in the opinion for the Court 87.1% of the time, whereas Sutherland joined 96.7% of the time. Butler and Sanford joined the Court's opinions 97.8% and 97.5% of the time, respectively, while the corresponding figures for Day and Pitney were 98% and 96.4%. During the 1922 Term, Butler joined the Court 100% of the time, Sanford 99% of the time, and Sutherland 96% of the time. The sharp change between the 1921 and 1922 Terms is shown more distinctly in Figure 13, which measures dissenting votes as a percentage of total court opinions. The data for the 1916-1920 Terms in Figure 13 comes from William G. Rice, How the Supreme Court Mill is Working, 56 Am. L. Rev. 763, 765 (1922).

[150] For a good summary, see William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937 170-178 (1994).

[151] Steven F. Lawson, Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s, 42 The Historian 419 (May 1980).

overturn Supreme Court decisions declaring Acts of Congress unconstitutional.[152] In 1923 Senator William E. Borah proposed legislation that would require the concurrence

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[152] Id. at 192-217. La Follete's proposal was contained in an address before the AFL.

> He proposed an amendment to the constitution providing:
>
> > 1.—That no inferior Federal Judge could set aside a law of Congress on the ground that it was unconstitutional.
> >
> > 2.—That if the Supreme Court assumed to declare any law of Congress unconstitutional Congress could, by repassing the law, nullify the action of the court and thereafter the law would remain in full force and effect precisely as though the court had never acted on it. . . .
>
> The Senator's speech was a sizzler and he received a great ovation. Delegates applauded, shouted and pounded the tables for several minutes. . . .
>
> His first reference to Chief Justice Taft was greeted with hisses from all parts of the hall. . . .
>
> After the hisses had subsided La Follette said:
>
> "Ex-President Taft was appointed Chief Justice by President Harding. Thus a man was invested with the prestige and influence of Chief Justice who had been repudiated by the voters on his record. . . .
>
> "No one will contend that he could have been elected Chief Justice by a vote of the people. And yet Chief Justice Taft wrote the opinion that annulled the child labor law. He wrote the opinion in the Coronado Coal Company case."

Earl L. Shaub, "Labor Plans for Slash of Court Power: Federation Convention Spends Day Denouncing Decisions Made by U.S. Supreme Court," San Francisco Examiner, June 15, 1922, p. 11. For La Follete's proposal, see Congressional Record, June 21, 1922, 9074-9082. For a proposed constitutional amendment, see H.J. Res. 436, 67th Cong., 4th Sess. February 6, 1923; 64 Cong. Record 2607-2615 January 27, 1923. For press reactions to La Follete's proposal, see "Is the Supreme Court Too Supreme?" The Literary Digest, July 1, 1922, at 21.

Taft was distressed by the attack. When Sutherland was confirmed to replace Clarke, Taft wrote him:

> I write to congratulate you from the bottom of my heart on your appointment to the Bench, and upon the reception which your nomination and confirmation have had by the American people. . . . I should judge that the Court is about to enter upon another period of agitation against its powers, such as it had in the period before Marshall came onto the Bench; again after he locked horns with Jefferson and Jackson; again during the period of the Fugitive Slave law; again during the reconstruction days when Thad Stevens and the radical Republicans defied the Court; and again when Bryan and the income tax decision were made a part of the 1896 campaign. La Follette's overwhelming victory in Wisconsin will put great confidence into the hearts and souls of all who are opposed to property rights and the support which the Constitution gives to them, and who are radically hostile to the existence of the Supreme Court. . . . While it is unpleasant, I think perhaps it is well to fight out this issue and develop in its clear and unmistakable features what the labor unions and La Follette have in mind with respect to the Government and the change of its constitutional structure. When that issue arises, I can not believe that there is any doubt of the strength of the conservative element in the Republic. It may for the time throw Republicans and Democrats together, as I hope it will. Of course were we to have a radical Congress and a radical Senate, they might take steps either to abolish or to practically destroy much of the useful jurisdiction of the inferior Federal courts. We could be certain that the minute they had power, they would frighten the country into a reaction, which would teach a permanent lesson, but meantime the cause of justice in the country would suffer. Of course we may count on a lot of weak-kneed people who are conservative when conservatism

of at least seven members of the Court in any decision invalidating an act of Congress.[153] Matters came to a head when La Follete included his amendment as a plank in his progressive party platform during the 1924 presidential campaign.[154] Contemporary antagonists of the Court, like Jackson Harvey Ralston, the General Counsel of the AFL, seized upon dissents as evidence of the Court's illegitimate usurpation of power: "To show . . . even more clearly the doubtful exercise of power by the Supreme Court . . . we need but point to the repeated dissents on the part of a minority continually made against the assumption that the court knew more of the necessities of the times than the legislature. Surely if the majority had based their action upon definitely understood constitutional principles, no differences of moment need have arisen."[155]

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> seems to be strong, and are radical when radicalism seems to be sweeping the country; but there are many elements who do not manifest themselves superficially and seem to remain inert until they are startled by a danger that ought to have been long foreseen. And it is upon those elements that the hope and confidence in the preservation of our institutions must be based. Meantime there is nothing for the Court to do but to go on about its business, exercise the jurisdiction it has, and not be frightened because of threats against its existence.
>
> It is most interesting, in view of what we may anticipate, to read the history of the Court just published by Warren. I do not agree with a good many of his statements, nor do I subscribe to some of his conclusions, but he has massed together in historical form the history of the Court to show that, with some periods of quiet, its whole history has been one of threat, attack and defeat of its enemies, and it is a proud record that on the whole the Court never bowed its head for motives of political expediency, to yield its conscientious views and convictions to assaults, of which it has had to meet so many in its life of more than a century and a quarter.
>
> I don't know why I have fallen into this disquisition, except that I note in the press a good deal of excitement over the La Follette election and the attacks of labor organizations upon our Court, and I could not refrain from discussing the situation with you as you now come into the Court with a general opinion as to the functions of the Court similar to my own.

[153] Ross, supra note 150, at 218-232. See S. 4483, 67th Cong. 4th Sess, February 5, 1923. Borah's bill was just one of a rash of proposed legislation. See, e.g., H.R. 14209, 67th Cong., 4th Sess., February 5, 1923; H.R. 697, 68th Cong., 1st Sess., December 5, 1923; H.R. 721, 68th Cong., 1st Sess., December 5, 1923.

[154] Ross, supra note 150, at 254-84. See Kenneth Campbell MacKay, The Progressive Movement of 1924 (1947).

[155] Jackson Harvey Ralston, Shall We Curb the Supreme Court? 71 The Forum 561, 565 (May, 1924). Charges that dissents undermined the Court's claim to speak with the authority of law were common during the tumultuous period. See, e.g., Albert J. Beveridge, "Common Sense and the Constitution," Saturday Evening Post, Volume 196, December 15, 1923, 25, at 119 ("When five able and learned justices think one way, and four equally able and learned justices, all on the same bench, think the other way and express their dissent in powerful argument, sometimes with warm feeling, is it not obvious that the law in question

The point was not lost in the Court. Taft wrote a friend that La Follete "is probably framing an attack upon the Supreme Court's infamous nullification of valuable laws demanded by the people. He could find a good deal of material in Brandeis's dissenting opinions."[156] By July of 1924 Brandeis could remark to Frankfurter that "the drive against the Court has tended" to reduce dissents.[157]

> The whole policy is to suppress dissents, that is the one positive result of Borah 7 to 2 business, to suppress dissent so as not to make it 7 to 2. Holmes, for instance, is always in doubt whether to express his dissent, once he's "had his say" on a given subject & he's had his say on almost everything. You may look for fewer dissents. That's Van Devanter's particularly strong lobbying with the members individually, to have them suppress their dissents. He is perhaps closest with Butler, whom he treats as an elder brother, & while Butler is not easy to move, the prudential arguments of Van D. as to what is "good—or bad—for the Court" are weighty with him & with all of them.[158]

We can speculate, then, that at least some dissenting votes were repressed during the first half of the 1920s in order to defend the Court from external assault. After La Follete's defeat, however, the Court could breathe a sigh of relief,[159] because "the controversy over

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is not such a plain infraction of the Constitution as to be unconstitutional `beyond all question'?"). Even John W. Davis, in his presidential address to the ABA, was moved to observe that "Much of the current discontent is caused perhaps by the publication of dissenting opinions which serve to fan the flame of public distrust. Certainly, it is not edifying to the lay mind that an opinion representing the considered judgment of the majority of any court should be accompanied at the moment of deliverance by an effort to prove its manifest error." John W. Davis, "Present Day Problems," 9 ABAJ 553, 557 (September 1923). See John K. Shields, "Senator Condemns Legislative Efforts to Curb Supreme Court," The New York Times, April 15, 1923, Sec. 8 at 10 ("It will not be improper here to suggest the impropriety of these dissenting opinions for the bad effect they have upon the public mind concerning the wisdom of the court and the certainty of the law. It has been urged, with much force, that when a majority of the court come to a conclusion and solemnly declare the law, its action is as binding upon the minority as upon the parties and the public and the minority by express dissent ought not to challenge the soundness or justice of the judgment but yield to it the obedience and respect that is due the decisions of the court.").

[156] Letter from William Howard Taft to Gus Karger, August 30, 1924 (Taft Papers) (Reel 267).

[157] *The Brandeis-Frankfurter Conversations*, supra note 71, at 328. Figure 20 provides some support for Brandeis's assertion. It demonstrates that the Court augmented its efforts to produce unanimous judgments during the 1923 Term. For an explanation of Figure 20, see note 202 infra.

[158] Id. at 330.

[159] William Howard Taft to Willis Van Devanter, June 19, 1925 (Van Devanter Papers):

judicial review subsided for several years after the 1924 election."[160] With external pressure diminished, unanimity rates were free to drop during the second half of the decade.

There are also several reasons why unanimity might have been more difficult to achieve during these latter years. There was yet another personnel change in 1925, when Joseph McKenna resigned and in March was replaced by Harlan Stone.[161] Stone had been the Dean of the Columbia Law School, but he came to the Court as a Coolidge appointee with strong ties to Wall Street.[162] He "liked solid virtues" and in "his early

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> As I look back over the Term it seems to me we got through very well. . . . We have had no unseemly dissensions among our members. I think the result of the last election does not show that the Court stands any better than it always has with the people but it shows to a great many who were convinced that they could profit by abusing it that they should look for some other field for their demagoguery more profitable. I don't think I am mistaken in thinking that Borah and that ilk are losing interest in efforts to change the Court.

Taft wrote to his brother Horace that "The greatest failure of La Follette was his attack upon our court. He confessed his failure in his effort to minimize the issue after the campaign was well on." Letter from William Howard Taft to Horace Taft, June 20, 1925 (Taft Papers) (Reel 275).

[160] Ross, supra note 153, at 285. See, e.g., "The Supreme Court's New Term," The Christian Science Monitor, October 3, 1927, p. 16 ("In 1801, the Court was suffering from attacks in the press, and from suspicion from the other departments of the National Government. Now it is the most honored branch of the federal institutions. Qualms as to its impartiality and apprehensions regarding its political prejudice have long since vanished. Attacks upon its decisions are rare, and questions of its integrity do not exist."). Indeed, as late as February 1930, and just before the controversy over Hughes' nomination, so astute a public observer as Mark Sullivan could comment about "the present and recent high public satisfaction with the Supreme Court. . . . In the 1928 Presidential campaign the Supreme Court never was mentioned even faintly as even the most minor kind of issue. The last occasion when dissatisfaction with any aspect of the court expressed itself in politics was in 1924. . . . The movement came to nothing." Mark Sullivan, Public Esteem For Court Called Aid to Hughes, New York Herald Tribune, Thursday, February 6, 1930, at 9.

[161] Figure 12 illustrates that while Justice McKenna joined in opinions of the Court 97.3% of the time, Stone joined only 94.0%.

[162] For the attitude of *The New Republic* toward Stone before his appointment to the Bench, See "Legal Orthodoxy," 11 *The New Republic* 227 (June 23, 1917) (Review of Stone's Law and Its Administration):

> This . . . book . . . is devoted to the . . . pious aim of "contributing to the cause of good citizenship" by strengthening the traditional American faith that God can govern his chosen people only through a constitution, courts and lawyers.

days on the Court he was drawn to judges in whom he found them—Justice Butler especially . . . and Van Devanter."[163] His "first reactions" to Brandeis were "unfavorable."[164] As Stone himself later recalled, "When I came to the Court from a Wall Street environment, I had no adequate understanding of the man."[165]

This orientation is reflected in Stone's voting as a Justice, as is illustrated in Figure 14. During the 1924 Term, Stone joined the Court's opinion 100% of the time,[166]

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> In recent years shameless scepticism in regard to this faith has raised its head; and this has brought forth a large number of devotional books which, like the one before us, contain just enough information to justify the ways of the Law and the Lawyers to man. Though perfectly decorous and unexciting, these books thus belong to revivalistic literature. . . .
>
> The noble purpose of these books does not call for much original knowledge or novelty; and Dean Stone has in that respect wisely followed the pattern set by ex-President Taft . . . . As the dean of one of our large law schools, however, he has felt peculiarly called upon to rebuke the adherents of sociologic jurisprudence who would make judicial decisions in regard to large public questions depend upon the fallible and sometimes hasty human sciences of sociology and economics, instead of recognizing that a training in the law and elevation to the bench must be sufficient if we are to maintain our system of government.

[163] Alfred McCormack, A Law Clerk's Recollections, 46 Colum L. Rev. 710, 710 (1946).

[164] Id. at 714. There is some indication that the feeling was mutual. On February 3, 1926, The New Republic, apropos of *Connolly v. General Construction Co*., 269 U.S. 385 (1926), noted "that Mr. Justice Stone was with the majority. This is the third time since Mr. Justice Stone's accession to the Bench that Mr. Justice Holmes and Mr. Justice Brandeis have expressed views different from the majority. Apparently Mr. Justice Stone does not find it congenial to shiver with Holmes and Brandeis; he prefers the warmth of the solid majority." 45 The New Republic 280 (February 3, 1926). Brandeis wrote to Frankfurter:

> A passage in Feb 5 N.R. which I attribute to you suggests:
>
> "Du bist am Ende was du bist.
> Sez dir Perucken auf von millionen Locken,
> Setz deiner Feuss auf ellen hohen Socken,
> Du bleibst am Ende was du bist."
>
> (You are in the end what you are
> Put on wigs of millions of locks
> Put on your feet very high socks
> You remain in the end what you are)

Brandeis-Frankfurter Letters, supra note 89, at 229.

[165] Letter from Harlan Fiske Stone to Irving Dilliard, October 13, 1941 (Stone Papers).

[166] Throughout the 1920s, Stone never expressed the support for civil liberties one would expect from the author of footnote 4 of *Carolene Products.* He joined speech-repressive opinions for the Court in *Whitney v. California*, 274 U.S. 356 (1927), and *United States v. Schwimmer*, 279 U.S. 644 (1929), despite strong

and he joined it 98% of the time during the 1925 Term.[167] By the 1926 Term, however, as Stone increasingly began to associate with Brandeis and Holmes on questions of substantive due process, he joined the Court only 90% of the time.[168] By the end of the decade, Stone could refuse Hoover's urgent offer of a cabinet position because, as he commented to his ex-clerk Milton Handler, "You know the battle of ideas that is going on in the Court and consequently know how difficult it would be for me to abandon the fight for anything else."[169] Stone's shift undoubtedly contributed to the decline in unanimity during the last years of the decade.

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dissents by Brandeis and Holmes. See T.R. Powell, The Supreme Court and State Police Power, 17 Va. L. Rev. 765, 788-89 (1931) ("[T]hus far at least, Mr Justice Stone is like the former Mr. Justice Clarke in breaking with Justices Holmes and Brandeis on issues of freedom of speech and association, though otherwise they are usually found in the same camp."). During World War I, Stone was on the Board of Inquiry that determined whether draftees could claim conscientious objector status. *See* Harlan Fiske Stone, The Conscientious Objector, 21 Columbia University Quarterly 253 (October 1919). For an unflattering description of his demeanor in office, *see* Ernest L. Meyer, "Hey! Yellowbacks!": The War Diary of a Conscientious Objector 89-95 (1930). On Stone's lenient attitude toward legal discriminations against minorities, see Gong Lum v. Rice, 275 U.S. 78 (1927); Corrigan v. Buckley, 271 U.S. 323 (1926); Cockrill v. California, 268 U.S. 258 (1925), and compare Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (upholding Cincinnati ordinance prohibiting aliens from obtaining licenses for pool halls) with Jordan v. Tashiro, 278 U.S. 123 (1928) (striking down as inconsistent with a treaty a California prohibition on Japanese citizens creating a hospital corporation).

[167] So, for example, during the 1925 Term Stone wrote to Taft about the latter's draft opinion in *Myers v. United States*, 272 U.S. 52 (1926), "You know I am a team player and I should not have kicked over the traces if you had not accepted any of my views. . . . I have only been longing to be helpful in the way which I believe we should all be, in carrying on the difficult work of the Court—without . . . pride of opinion or over insistence on anything." Harlan Fiske Stone to William Howard Taft, December 7, 1925 (Taft Papers) (Reel 278).

[168] For important decisions marking Stone's transition, see Di Santo v. Pennsylvania, 273 U.S. 34 (1927); Tyson & Bros. v. Banton, 273 U.S. 418 (1927); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927). By 1929 the *Chicago Tribune* could write that "In virtually every case of major importance involving constitutional or economic issues in the last three years, Justices Oliver Wendell Holmes, Louis Brandeis, and Harlan F. Stone have stood together in the minority . . . ." "3 `Liberals' in Supreme Court Again Dissent to Rail Ruling," *Chicago Tribune*, May 22, 1929, at 4.

[169] Letter from Harlan Fiske Stone to Milton Handler, February 17, 1929 (Stone Papers). From Taft's point of view, however,

> Stone has become entirely subservient to Holmes and Brandeis. I am very much disappointed in him. I urged Coolidge to appoint him but he hungers for the applause of the law school professors and the admirers of Holmes.

The slide in unanimity rates was encouraged by Taft's own failing health. In February 1924 Taft suffered severe palpitations of the heart that prevented him from attending Woodrow Wilson's funeral as an honorary pallbearer.[170] He resolved "to try to do less work,"[171] but nevertheless suffered a recurrence four months later[172] and again the following October.[173] Taft took the point. "I do not strain myself to do as much work as I did for the first three years. I have had a warning and I am trying to respect it."[174] In

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Letter from William Howard Taft to Horace Taft, June 8, 1928 (Taft Papers) (Reel 302). Compare Letter of William Howard Taft to Charles P. Taft, March 27, 1925 (Taft Papers) (Reel 272) ("We . . . are very much delighted with our new member Stone. He is a real Judge, a real lawyer and a hard worker."). Stone also recalled that Taft's "enthusiasm for me seems to have waned after my opinion in the Bedford Stone case, in which I expressed the view that under the provisions of the Clayton Act labor unions could not be held to violate the Sherman Anti-Trust law by merely refusing to work on non-union material which had been the subject of interstate commerce. After that he seems to have thought that, like Holmes and Brandeis, I was `hopeless.'" Id. See Bedford Cut Stone Co.. v. Journeymen S.C. Ass'n., 274 U.S. 37 (1927).

[170] Letter from William Howard Taft to Horace Taft, February 6, 1924 (Taft Papers) (Reel 261):

> I had an attack of palpitation of the heart this morning . . . I sent for the Doctor and he found what I had already found, that my pulse was running fast and irregularly. He said that what I needed was rest, and that I could not go to Woodrow Wilson's funeral this afternoon, where I had intended to go as a pall bearer. I would have given anything to go, not alone to pay a tribute to a deceased President, but also to avoid the circulation against alarming reports as to my illness. I explained that to the Doctor and the Doctor seemed to realize the awkwardness of it, but it did not abate his insistence that I should be quiet and run no risk. There is only one living ex-President, and I don't care to reduce that number, so I obey orders.

[171] Letter from William Howard Taft to Horace Taft, February 16, 1924 (Taft Papers) (Reel 261). "The truth is I have had a pretty close call to a breakdown. I hope, however, to go back to Court on Monday, with a warning that I can not do all the work there is to do. I was treating myself as I might have treated myself thirty years ago. There is no fool like an old fool. There is some hope, however, if he mends his ways." Letter from William Howard Taft to James Gregg (Taft Papers) (Reel 261).

[172] Memorandum sent by William Howard Taft to members of his family, June 8, 1924 (Taft Papers) (Reel 265) ("The trouble with me is febrilation of the auricle.").

[173] "The first day of the Court was a pretty exciting one, and I ate some roast pork, something I rarely do, although I love the meat. I had a heavy cold, waked up in a sweat about one o-clock, and found my heart going as it did last January . . . . Visions of a recurrence of the trouble and at my having to stay home from Court came over me, and I was a good deal alarmed. Indeed it seemed to me as if I might have to give up the office and spend my time trying to live." Letter from William Howard Taft to Horace Taft, October 10, 1924 (Taft Papers) (Reel 268). "If I am not going to be able to do my work (I was not able to go to Conference yesterday), I have got to resign." Letter from William Howard Taft to Mrs. Frederick J. Manning, October 12, 1924 (Taft Papers) (Reel 268).

[174] Letter from William Howard Taft to Henry E. Coe, January 7, 1925 (Taft Papers) (Reel 270).

June 1926 Taft suffered yet another and far more disabling heart attack,[175] which lasted throughout the summer.[176] He began the 1926 Term hesitantly,[177] and he never again was able to assume command of the Court with the same vigorous assurance as previously. He increasingly complained that his "mental facilities" were "dulling a bit and that it takes more work for me to get hold of questions and to dispose of them."[178] "The truth is," he wrote a friend, "that my mind does not work as well as it did, and I scatter."[179]

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[175] Taft suffered the attack after serving as a judge of a national oratory contest on "The Constitution." The contest was an effort to encourage "Americanization." "I had to go out last night to be one of the judges in the National Oratorical constitutional discussion, where seven contestants, representing two million applicants, were to be judged. The management was not properly attentive to my needs, and in order to get to the place I had to walk clear up to the top of the theater and then down. After I got to bed, and had been in bed about twenty minutes, this thing came on and it is still on." Letter from William Howard Taft to Horace Taft, June 5, 1926 (Taft Papers) (Reel 283). Other judges at the contest included Justices Van Devanter, Sutherland, Sanford and Butler. "Los Angles Boy First in Contest of School Orators," New York Times, June 5, 1926, 1. The winning oration, which the New York Times reproduced in full, featured passages like:

> Only an American, one who knows our history, can feel the sacred symbolism of that Constitution; only one whose soul is steeped in the spirit of the far-off days when the old meeting-house in Philadelphia felt the throb of the great hearts of the constitutional fathers can understand.
>
> What solemn obligation is ours, to teach those who come among us from foreign shores, and who often, all too often, come to scoff because they do not understand. And here is our duty, here is our obligation, too, for those who do not know must be enlightened; and those who do not care must be taught to love our institutions, and the Constitution by which they live.
>
> And for those who come with hatred in their hearts, ladies and gentlemen, no words of mine could fully express the indignation that should rouse every true American heart to stand on guard as they did on Concord Bridge, who gave to us our flag, our country, our Constitution.

[176] "I have had, as you know, trouble with my heart for now more than two years. It is recurrent. . . . I haven't succeeded as yet this summer in getting back to normal regularity. . . . I don't like it, and I think it may interfere more or less with my work." Letter from William Howard Taft to Mrs. Charles D. Norton, August 10, 1926 (Taft Papers) (Reel 284).

[177] "I am as careful as I can be. I am trying to see if I cannot hold myself in such way as to continue work. My fibrillation continues but it is not excessive and I am hopeful that by care, I may avoid its being so." Letter from William Howard Taft to Henry D. Taft, September 30, 1926 (Taft Papers) (Reel 285).

[178] Letter from William Howard Taft to Mrs. Frederick J. Manning, October 23, 1927 (Taft Papers) (Reel 296). Taft continued, "However, I have to stay on the Bench until 1931 in order to earn my pension, and that I must struggle to do, unless I am so weakened that I can not do the work." Id. Taft wrote to his son Robert:

> I sometimes feel that I do not have time enough in making ready for Conferences to examine with the closeness they deserve the argued and submitted cases, but they are examined by the Court with care. They have more time than I have, and sometimes they humiliate me with their pointing

It seems likely that the Court's declining unanimity rates at the end of the 1920s in part reflects Taft's failing ability energetically and proactively to intervene into the Court's deliberations so as to achieve consensus, as he had done during his first Terms in cases like *United Mine Workers v. Coronado.*[180] By the end of his Chief Justiceship, Taft was merely hanging on. "I am older and slower and less acute and more confused. However, as long as things continue as they are, and I am able to answer in my place, I must stay on the Court in order to prevent the Bolsheviki from getting control."[181]

In this vacuum of leadership, the Court slid toward factionalism.[182] A month before his disabling stroke, Taft wrote his brother that "Of course we have a dissenting

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> out matters that I haven't given time enough to the cases to discover. The familiarity with the practice and the thoroughness of examination in certain cases that Van Devanter is able to give makes him a most valuable member of the Court, and makes me feel quite small, and as if it would be better to have the matter run by him alone, for he is wonderfully familiar with our practice and our authorities. Still I must worry along until I get to the end of my ten years, content to aid in the deliberations when there is a difference of opinion.

Letter from William Howard Taft to Robert Taft, October 23, 1927 (Taft Papers) (Reel 296).

[179] Letter to J.M. Dickinson, December 12, 1928 (Taft Papers) (Reel 306). "The work of the Court not so much in writing opinions as in getting ready for Conferences grows heavier and heavier. I feel tired over it and suffer from a lack of quickness of comprehension, which has not heretofore troubled me much." Id. Writing in February 1929, Van Devanter observed that "The Chief Justice's health is such that he will retire when he can, which will be in 1931." Letter from Willis Van Devanter to Mrs. John W. Lacey, February 12, 1929 (Van Devanter Papers). (In that same letter, Van Devanter asserts that "Mr. Justice McReynolds will certainly retire when he can, which will be in 1932. He would retire now if he could. Mr. Justice Sutherland is not in good health and will certainly retire when he can which will be in 1932. I will be 70 in April and unless there is a great change for the better in Dollie's [his wife's] condition I shall retire during the year. I am making no public announcement but my mind is becoming pretty well fixed on retirement.")

[180] 259 U.S. 344 (1922). See note 140 supra.

[181] Letter from William Howard Taft to Horace Taft, November 14, 1929 (Taft Papers) (Reel 315).

[182] See note 169 supra, and accompanying text. A good example of this factionalism may be found in the correspondence surrounding Stone's opinion in *United Fuel and Gas Co. v. Railroad Comm'n*., 278 U.S. 300 (1929), an "important" case "dealing with the problem of valuation of a natural resource." Letter from Harlan Fiske Stone to Milton Handler, January 22, 1929 (Stone Papers). After Stone circulated his opinion, he received the following letter from Van Devanter: "I looked over your opinion in No 1 and found myself quite reluctant to accept it as written. Accordingly I made various changes which to me seemed desirable. Since then I have shown them to the Chief Justice and Justices Sutherland, Butler and Sanford. These being all that it was convenient to see. They authorize me to say they approve the changes and join me in

minority of three in the Court. I think we can hold our six to steady the Court. Brandeis is of course hopeless, as Holmes is, and as Stone is."[183] The intensity of the struggle is

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asking their adoption." Letter from Willis Van Devanter to Harlan Fiske Stone, n.d. (Stone Papers). For Taft's reaction, see note 92 supra.

A glimpse of how this factionalism infected the everyday operations of the Court can be seen in George Sutherland's preparations for a European vacation. Sutherland had been quite sick with "chronic colitis" during the Fall of 1927, missing nearly three months of the Term. See Letter of Dr. Thomas R. Brown to William Howard Taft, December 22, 1927 (Taft Papers) (Reel 297); Letter of William Howard Taft to Charles P. Taft Jr., April 1, 1928 (Taft Papers) (Reel 300). Sutherland planned to leave for Italy "for his health" on May 19th, before the end of the 1927 Term. See Letter of George Sutherland to Dr. Thomas R. Brown, March 16, 1928 (Sutherland Papers); Letter of William Howard Taft to Robert A. Taft, April 15, 1928 (Taft Papers) (Reel 301); Letter of William Howard Taft to George Sutherland, May 17, 1928 (Sutherland Papers) ("I was humiliated not to have called to say good bye to you and Mrs. Sutherland but a chapter of accidents interfered with a well laid plan . . . . I am hoping that this will reach you before you leave these shores for a real cure. I have been delighted with how strong you are now and how much work you have done of the hard kind of opinion writing that consumes thinking energy. I am looking forward with satisfaction to greeting you both in the full bloom of youthful health. And what pleasure you will have in the consciousness that you are not a slave to a lot of opinions the thought of which would continue to cloud your summer. . . . [K]now too you carry with you the loving thought and hopes of all your colleagues. They are real and sincere and awaken fervor."); Letter of George Sutherland to William Howard Taft, May 18, 1928 (Taft Papers) (Reel 302) ("That was a very sweet going away letter . . . . I shall think of you always as my good Chief for whom my admiration and affection run a close race."). In preparation for his journey, Sutherland sent a Memorandum to Taft on May 15, 1928, instructing the Chief Justice on Sutherland's votes in pending cases. (Sutherland Papers). Concerning Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), for example, Sutherland announced: "[I]f Van Devanter writes the opinion I shall unhesitatingly agree to it. If written by anybody else, I will agree to what you and he accept." Concerning National Life Ins. Co. v. United States, 277 U.S. 508 (1928), Sutherland wrote, "An opinion satisfactory to you will be satisfactory to me." The political alignments in the memorandum bear out Taft's prescience when, speculating to Van Devanter in August 1922 on Sutherland's "doubtless " nomination to the Court, he had correctly conjectured that Sutherland "will be one of our kind I think." Letter from William Howared Taft to Willis Van Devanter, August 19, 1922 (Taft Papers) (Reel 244). By contrast, in National Life Ins. Co. v. United States, 277 U.S. 508 (1928), a dissenting Harlan Stone had written to Oliver Wendell Holmes on June 7, 1928, that "I think it is good for the dissenters to stand together when they can.") (Stone Papers).

[183] Letter from William Howard Taft to Horace Taft, December 1, 1929 (Taft Papers) (Reel 316). Aware of his own ill health, and aware also of Stone's ambitions to succeed him, Taft continued, " Should Stone ever have the administration of the Chief Justiceship, he would find himself embarrassed in respect to a good many principles that we have declared as the result of a great many years of careful consideration. However, the only hope we have of keeping a consistent declaration of constitutional law is for us to live as long as we can, because should Hoover's administration continue, I do not doubt there will be an attempted revolution. . . . I don't think that Hoover knows as much as he thinks he does, and that it is just as well for him to remember the warning in the Scripture about removing landmarks. The truth is that Hoover is a Progressive, just as Stone is, and just as Brandeis is, and just as Holmes is, but should the change take place, they will find themselves in a situation full of difficulties in determining how far they are going, especially when they have made the change and don't realize how far it will carry them."

When Taft's brother wrote back remarking on Taft's "pessimism," and advising that "You and I have got to get used to the fact that we belong to the former generation and that things are sliding along," Letter from Horace Taft to William Howard Taft, December 2, 1929 (Taft Papers) (Reel 316), Taft answered:

well captured in a memorandum written by Stone to McReynolds just after Taft's resignation. It is worth quoting at length:

> I have your note of yesterday's date. I, of course, do not regard it as presumptuous. On the contrary, I thank you for it, for I hold very strongly that willingness to speak our views and to listen to those of others should guide the actions of all the members of our Court. . . .
>
> I am sure you will give me credit for being sincere in the views which I express. If I did not hold them strongly and believe that very many thoughtful men, trained in the law, would agree with them, I should not take the trouble to write any dissent. . . .
>
> I think you will not misunderstand me when I add that I am profoundly convinced that . . . some very serious mistakes have been made by the Court, which would not have been made had it not been for the disposition of the majority to rush to conclusions without taking the trouble to listen to the views of the minority. If the majority overrules the settled decisions of the Court, if it insists on including in opinions, over the protests of the minority, what is not necessary to the decision – see Justice Sutherland's opinion in . . . Patton v. United States,[184] as the latest example – if it insists on putting out opinions which do not consider or deal with questions raised by the minority, it must, I think, be expected that the minority will give some expression to their views. Otherwise, their function is reduced to registering a vote which is not even published.
>
> What I have written in Nos 281 and 282[185] is, I think you will agree, at least worthy of consideration, but I was not even given an opportunity to state my position at the Conference. If the Court is willing to put out its opinion without meeting that argument or referring to its own decisions . . . any consequences for such ill considered action should not, I think, be attributed to me or what I have written. Very much the same thing might, I think, be said of No. 222.[186] The

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> You speak of my pessimism. I suppose it must have had reference to the situation in the Court. My feeling with respect to the Court is that if a number of us die, Hoover would put in some rather extreme destroyers of the Constitution, but perhaps we are unduly exercised, because of the conservative members of the Court we have six, and two of the remainder are Brandeis and Holmes. Brandeis is 73 and Holmes is 89. He enters his ninetieth year next month. I have no doubt there is persistent hope, especially by the younger crowd of college professors, that in some way or other Holmes will be continued on the Court while the rest of us die off. . . . I think the Court on the whole stands very well. Of course there are quite a number of extremists and we are likely to hear a good deal more from them than from the other side, and it is the dissenters who make the loudest noise. I think that Hoover is a new man and thinks that everything ought to be new. He will learn a good deal before he gets through. I think he is trying to do the best he can, and we can probably solve everything if we can only live, because delay makes for conservatism.

Letter from William Howard Taft to Horace Taft, December 8, 1929 (Taft Papers) (Reel 316).

[184] 281 U.S. 276 (1930).

[185] United States v. Adams, 281 U.S. 202 (1930).

[186] Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930).

> opinion of the Court is made to rest on propositions that are demonstrably not sound and lead to consequences which, it seems to me, we all ought to be eager to avoid. But if we are not to reach that result, at least the opinion should deal in some plausible manner with the issues raised in my dissent—at least if I am expected to remain silent.[187]

These are very strong words, and yet, as Figure 10 illustrates, 74% of the Court's opinions in the 1929 Term were unanimous.[188] Although division and tension within the Court was high, it nevertheless decided cases with a degree of unanimity that would be quite unimaginable today.[189] It is clear, therefore, that fluctuations in the dissent rate during the 1920s, although responsive to many factors, including changes in external circumstances, Court personnel, and Taft's own leadership, nevertheless occurred within boundaries that mark the Taft Court as genuinely different from the contemporary Court. The question is why this might be so.

One possibility is that the Court's docket during the 1920s was simply less divisive than today. Although this explanation threatens to collapse into tautology, since the question of what *counts* as divisiveness is what we are seeking to illuminate, there is nevertheless some plausibility in contrasting the contemporary Court, which publishes a relatively small number of opinions in highly-selected, controversial, and significant cases, with the Taft Court, which published many more opinions in routine and "trifling"

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[187]Memorandum from Harlan Fiske Stone to James McReynolds, April 3, 1930, Stone Papers. Unfortunately I have been unable to locate the McReynolds memorandum to which Stone is responding.

[188] If one looks at the cases cited by Stone in his memorandum, for example, Nos 281 and 282 were decided on April 14, 1930 as United States v. Adams, 281 U.S. 202 (1930). What appears in the U.S. Reports is a unanimous opinion by Oliver Wendell Holmes. Patton v. United States, 281 U.S. 276 (1930), also decided on April 14, 1930, features Holmes, Brandeis and Stone concurring in the result, but not writing a separate opinion. Only in No. 222, Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930), also decided on April 14, 1930, did Stone, joined by Holmes and Brandeis, dissent.

[189] Indeed, Figure 20 suggests that the Court responded to increased factionalism by redoubling its efforts to achieve unanimity. For an explanation of Figure 20, see note 202 infra.

cases. This hypothesis is sometimes phrased in terms of the Judiciary Act of 1925, which shifted the Court's docket away from trivial cases forced on the Court by its mandatory jurisdiction[190] and toward the more important but controversial cases that could be chosen through certiorari.[191]

Figures 15 and 16 illustrate how the Court obtained jurisdiction in the cases that it decided by full opinion in the 1921 and 1928 Terms. The effect of the 1925 Act is readily apparent. In the 1921 Term, 19% of the Court's opinions were issued in cases that came to the Court through the discretionary writ of certiorari. By the 1928 Term this

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[190] See, e.g., Sun Ship Building Co. v. United States, 271 U.S. 96, 99 (1926) ("Valuable time was taken in hearing these cases. After arguments on behalf of the claimants, we declined to hear the other side because the correctness of the judgments of the Court of Claims was clear. It is fortunate for all that under the Act of February 13, 1925, judgments of the Court of Claims entered after May 13, 1925, can only be reviewed here after a showing of merits."). Figure 22 graphically illustrates the effect on unanimity rates of the disappearance of these cases. After the 1925 Act, cases reaching the Court through its mandatory tended to consist primarily of those posing difficult constitutional issues. See note 23 supra. Unanimity rates in opinions for these cases plunged from 92.4% in the 1921 Term to 64.7% in the 1928 Term.

[191] See, e.g., Stephen C. Halpern and Kenneth N. Vines, Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court, 30 The Western Political Quarterly 471, 480-81 (1977) ("Eliminating the right of appeal in many minor and uncontroversial cases freed the court to concentrate in obligatory appeals on only those cases raising salient national issues. Granting the justices much wider discretion to choose from among the cases appealed to them, the number and nature of those they wished to decide, provided greater opportunity to choose difficult and disputatious cases. Greater dissent was made more likely not only by the specific reforms of the Act but by the expectation as to how the justices would utilize their new powers. The Act's supporters advanced a conception of the Court as an institution which should reserve its judgment only for the most important national policy questions."). In 1949 Chief Justice Vinson made this point by way of explaining the decreasing rates of unanimity in Supreme Court opinions:

> [T]he very nature of the Supreme Court's jurisdiction is such that the easy cases, the clear and indisputable cases, very seldom come before the Court. Our discretionary certiorari jurisdiction encompasses, for the most part, only the borderline cases—those in which there is conflict among lower courts or widespread uncertainty regarding problems of national importance . . . Considering, therefore, the importance and difficulty of the cases which the Court must decide, it is not strange that there is some of the same disagreement on the Court as exists among others of the bench and bar concerning the questions decided.

Vinson, supra note 40, at 1273. See Ben W. Palmer, Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents, 34 ABAJ 677, 679 (1948) ("Under the certiorari system the Court now picks out for adjudication cases involving the most difficult questions of constitutional law and statutory construction; cases of the utmost public or political importance; cases that bring to focus the interests of pressure groups—the claims and contentions of vast social, economic, political, religious and ideological forces that engage the deepest passions and the most aggressive loyalties of minority millions of men and women.").

proportion had almost tripled, so that 55% of the Court's opinions were issued in such cases.[192] Yet if unanimity rates are disaggregated by jurisdiction, the results do not show any apparent connection between the Court's jurisdiction and unanimous opinions.

In fact Figure 17 illustrates that during the 1921-1928 Terms, 83% of the opinions written in cases reaching the Court through its mandatory jurisdiction were decided unanimously, whereas 87% of the opinions written in cases that reached the Court through the discretionary writ of certiorari were unanimous. This does not suggest that the Court's ability to achieve unanimity was substantially undermined by its capacity to select for more "controversial" cases through the exercise of certiorari jurisdiction. We should also note that although the Court's docket had shifted decisively toward certiorari by the end of the 1920s, Figure 10 demonstrates that the Court's rates of unanimity did not begin their free-fall until the mid-1930s. Thus "changes in the Court's ratio of obligatory to discretionary cases do not coincide with the justices' patterns of increasing dissent activity."[193] Evidently the centrifugal thrust of discretionary jurisdiction was during the Taft Court contained by a more powerful centripetal force toward unanimity.

To explore the nature of this force, it is useful to compare the Justices' private views of a case with their willingness publicly to express dissent. We are fortunate to have preserved Justice Butler's docket books for the 1922-1924 Terms, and Justice

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[192] By contrast, 92% of all full opinions issued by the Court in the 1993-1998 Terms were issued in cases that came to the Court by way of the discretionary writ of certiorari. On the contemporary erosion of the distinction between mandatory and discretionary jurisdiction, an erosion that began at the end of the 1927 Term, see Hartnett, supra note 24, at 1708-12.

[193] Walker, et al., supra note 132, at 365. "The discretionary share of the Court's docket rose dramatically immediately following the [1925] Act and remained relatively stable thereafter . . . . However, . . . significant escalation in both dissent and concurrence rates did not occur until almost fifteen years later." Id.

Stone's docket books for the 1924-1929 Terms.[194] If we consider only the 1922-1928 Terms, the docket books allow us to tally the votes in some 1200 of the 1381 published full opinions issued by the Court during these Terms.[195] These 1200 opinions, which for ease of reference I shall call the "conference cases," seem representative. As published, for example, 86% of the conference cases were unanimous, as were 86% of the total set of 1381 opinions.

Docket books present nontrivial questions of interpretation. They were meant to be personal and private documents; most were burned at the end of the Term.[196] They contain a good deal of idiosyncratic notation. But if we examine the conference cases that were ultimately decided by unanimous opinions, we can divide them into three categories:

- Cases which were unanimous in conference.[197]
- Cases in which one or more Justices have voted in conference against the ultimate resolution of the case. In such cases Justices have switched their votes for the Court to achieved unanimity in its published opinion.
- Cases in which one or more Justices have expressed uncertainty in conference, either by "passing" or "acquiescing" or otherwise refusing to vote because of indecision. In such cases, Justices have resolved their uncertainty in favor of

[194] The docket books are located in the office of the Archivist of the Supreme Court. For a discussion of the reliability of docket books, see Forrest Maltzman and Paul J. Wahlbeck, Inside the U.S. Supreme Court: The Reliability of the Justices' Conference Records, 58 J. of Politics 528 (1996).

[195] Justice Butler joined the Court in January 1923, and so his docket book for the 1922 Term does not contain any cases before that time. There are also a number of cases that simply do not have docket book entries. This could be for any number of reasons, ranging from the fact that either Butler or Stone had recused himself in the case or had failed to attend conference or had omitted to record the votes of the conference.

[196] "When I was a law clerk . . . I had access to the docket book of Justice Brandeis. It was burned with the others at the end of the term, and I hope that still obtains." Remarks of Paul A. Freund, "A Colloquy," Proceedings of the Fort-Ninth Judicial Conference of the District of Columbia Circuit (May 24, 1989), *reprinted in* 124 F.R.D. 241, 347 (1988).

[197] I include within this category cases in which the votes of one or more justices are not recorded.

the Court's judgment for the Court to achieve unanimity in its published opinion.

Of the 1028 conference cases that were ultimately decided unanimously by a published opinion of the Court, 58% were also unanimous in conference, 30% required a switch in vote in order to obtain ultimate unanimity, and a further 12% required justices to overcome uncertainty in order to achieve unanimity. Within the set of 1200 conference cases the unanimity rate, as measured by a unanimous vote at conference, was only 50%.[198] The unanimity rate for the published opinions of the conference cases was by contrast 86%. This establishes that it was common practice during the Taft Court for Justices to change their votes between conference and the publication of an opinion.[199] In the complete set of 1200 published conference opinions, a Justice changed his vote to join the Court opinion 680 times.[200] Like Taft, they were willing to "make the sign of the scissors" in private, but reluctant to do so "to the public."[201]

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[198] The unanimity rate was 60% if one counts as unanimous those cases in which Justices explicitly express uncertainty in conference. These results are represented in Figure 18. The actual figures are these: The set of conference cases consists of 1200 decisions. Of these 1028 were ultimately decided unanimously. Of these, 601 were also unanimous in conference; 304 had dissenting votes in conference; and 123 had justices who registered uncertainty in conference. If one considers the entire set of 1200 cases, 670 (56%) had the same vote in conference as the ultimately published opinion; in 358 (30%), one or more justices switched his conference vote to join the court opinion; and in 129 (11%), one or more justices ultimately resolved an uncertainty expressed in conference in order to join the Court opinion. In 18 cases (2%), one or more Justices who voted with the Court in conference refused to join the published Court opinion; in 11 cases (1%), one or more justices switched their conference vote away from the Court's opinion; in 6 cases, one or more justices expressed uncertainty in conference, but resolved their uncertainty by dissenting from the Court's opinion; in 5 cases, one or more justices voted against the Court's judgment in conference, but ultimately switched their vote to support the Court's judgment while refusing to join the Court's opinion; and in 3 cases there were switches of votes in both directions, both for and against the Court's ultimate opinion.

[199] This conclusion is confirmed by a forthcoming article in the *American Journal of Political Science* that analyzes conference voting during the period of Chief Justice Morrison R. Waite. Using Waite's docket books, the article analyzed 2,863 cases and found that while only 9% of these decisions had one or more dissenting votes when published, 40% did within the conference. See Lee Epstein, Jeffrey A. Siegal, & Harold J. Spaeth, The Norm of Consensus on the U.S. Supreme Court, 45 *American Journal of Political Science* (April 2001) (forthcoming).

[200] Taft changed his vote to join the Court opinion 48 times; McKenna, 38 times; Holmes 80, times; Van Devanter, 45 times; McReynolds, 99 times; Brandeis, 95 times; Sutherland, 87 times; Butler, 60 times;

The differences between unanimity in published opinions and unanimity in conference voting are summarized in Figure 18.[202] Two aspects of Figure 18 are especially striking. The first is that the rate of unanimity in conference during the Taft Court (50%) was almost double that achieved now by the Court in its published opinions

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Sanford, 93 times; and Stone, 35 times. Figure H represents these numbers as a percentage of the total number of cases in which each Justice participated. Figure H shows that McKenna was the Justice most likely to switch his conference vote, doing so in 10.3% of all cases in which he participated. Justice McReynolds was the next most likely, switching his vote in 9.3% of all cases in which he participated. Justices Van Devanter and Taft, by contrast, switched their conference vote in only 3.9% and 4.7% of the cases in which they participated. This is a bit misleading, however, because Taft and Van Devanter so rarely differed from the Court in conference. Figure I therefore calculates the percentage of all a Justice's dissenting votes in conference that are switched to join a Court opinion. It indicates that Taft and Van Devanter were actually quite willing to change their votes in order to display judicial solidarity, switching (respectively) 80.0% and 83.3% of their dissenting votes in order to join the opinion of the Court. By this measure, Justices Stone (50%) and Brandeis (57.2%) were the least pliable of the all the Justices, with McReynolds (59.3%) and Holmes (60.6%) close behind them.

Figure J represents the converse of Figure H. It shows the ability of a Justice to *attract* votes. For each Justice, Figure J divides the total number of votes that changed to join a Justice's opinion by the total number of the Justice's opinions. Figure J allows us to see why McKenna was such a weak Justice. Not only did he change his vote to join the opinions of other Justices in 10.3% of his cases, but other Justices only infrequently changed their votes to join his opinions. McKenna attracted votes at the rate of only 28 for every 100 opinions. McKenna's performance can be contrasted with that of Van Devanter, who attracted votes at the rate of 74 for every 100 opinions. Figure J gives us some measure of the authority wielded by Van Devanter within the Court. It also demonstrates why Butler was such a powerful Justice, -- in Brandeis's assessment "one of the most powerful on the Bench" --as were Sutherland and Holmes. *The Brandeis-Frankfurter Conversations,* supra note 71, at 336. Sanford, on the other hand, was quite weak. (Brandeis said of him that "Sanford ought never to have been above D.J.—a dull bourgeois mind—terribly tiresome." Id.) Figure K, which displays the percentage of a Justice's unanimous opinions that were without dissenting or uncertain votes in conference, shows the relative success of different Justices in achieving unanimity. Thus 76% of McKenna's unanimous opinions were already unanimous in conference, whereas only 47% of Butler's unanimous opinions were unanimous in conference. Figure K confirms the internal authority carried by Justices Butler, Holmes, Sutherland and Van Devanter. Figure L illustrates how these differences affected Taft's assignment of opinions. Figure L calculates the number of a Justice's cases that had unanimous votes in conference (without dissenting or uncertain votes) as a percentage of the Justice's total number of opinions (in the set of conference cases). Not surprisingly, 69% of the cases McKenna wrote were already unanimous in conference, whereas only 38% of the cases written by Butler were unanimous in conference.

[201] See note 136 supra.

[202] Figure 19 compares for each Term between 1922 and 1928 the percentage of conference cases that were decided by a unanimous published opinion, the percentage of conference cases that were unanimous in conference (without dissenting or uncertain votes), and the percentage of conference cases ultimately decided unanimously that had uncertain but no dissenting votes in conference. The percentage of published opinions that are unanimous can be expressed as a multiple of the percentage of cases that are decided unanimously within conference. The greater the multiple, the more the Court has succeeded in transforming private disagreement in conference into public unanimity. Figure 20 displays these multiples for each Term between 1922 and 1928. It shows that the Court made especially concerted efforts to maintain the unanimity of its published opinions during the 1923 and 1928 Terms.

(27%).[203] This suggests that the Court's spontaneous view of the substantive issues raised by its docket was in fact more cohesive in the 1920s than at present. If the Court's voting at conference is disaggregated by jurisdiction, however, it is clear that this cohesiveness was strained by the Judiciary Act of 1925. The data are summarized in Figure 21, which indicates that although there is virtually no difference in the rate of unanimity for the published opinions of the conference set when cases reaching the Court through its mandatory or discretionary jurisdictions are compared--84% and 87%, respectively[204]--at conference the unanimity rate for the former was 55%, while it was only 41% for the latter.[205]

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[203] See Figure 5.

[204] A difference which is not statistically significant at the .05 level.

[205] A difference which is statistically significant at the .01 level. These figures define a unanimous conference vote as one without dissenting or uncertain votes. If a unanimous conference vote is defined as one merely without dissenting votes, cases reaching the Court through its mandatory jurisdiction were 64% unanimous in conference; cases reaching the Court through the discretionary writ of certiorari were 53% unanimous in conference. Figure 22 shows the percentage of conference cases both decided unanimously at conference (without dissenting and uncertain votes), and decided by a unanimous published opinion, term by term and disaggregated by jurisdiction. It shows that the cases reaching the Court through its discretionary certiorari jurisdiction were less unanimous at conference than were cases that reached the Court through its mandatory jurisdiction, although the margin between the two began to lessen after the Judiciary Act of 1925 took effect, and by the 1928 Term cases reaching the Court through its certiorari jurisdiction were actually more unanimous in conference than were cases that had reached the Court by way of its mandatory jurisdiction. This was probably because the "trifling" controversies that could previously have been brought to the Court through writ of error and appeal were eliminated from the Court's docket. See note 190 supra. The increasing dissensus associated with the Court's mandatory docket after the 1925 Act is striking; no such trend is discernable in the cases that came to the Court through certiorari. Figure 23, which displays the same multiples as those illustrated in Figure 20, see note 202 supra, but disaggregated by jurisdiction, shows that the Court made significantly greater efforts to achieve unanimity in opinions published in cases reaching the Court through certiorari than in cases reaching the Court through its mandatory jurisdiction. The difference is in fact quite striking. In opinions written in cases that had reached the Court through its mandatory jurisdiction, the percentage of published opinions that were unanimous ranged from 1.4 to 1.8 times the percentage of cases that were unanimous in conference. Multiples for cases that reached the Court through the discretionary writ of certiorari, by contrast, were higher in every single Term, ranging from 1.8 to 2.7. It is almost as if the decision to use the writ of certiorari to hear and decide a case carried within it an implicit commitment especially to strive to decide it unanimously. This may reflect the fact that in such cases the Court felt particularly obligated to provide clear and unambiguous guidance to the legal public.

This difference suggests that spontaneous unanimity was indeed harder to achieve in the more controversial cases selected through certiorari than in the more routine, "trifling" cases that the Court had been obliged to hear prior to 1925 because of its mandatory jurisdiction.[206] But the fact that at conference the Court was able reach unanimity on 41% of even these controversial cases suggests that the Court's ideological cohesion was greater in the 1920s than today.[207] There are no doubt many factors that could contribute to this. We might consider, for example, the massive increase of the reach and significance of federal law, which both augments the occasions for dissensus and magnifies the stakes in particular cases.[208] Or we might ponder the assault on the cohesiveness of legal reasoning created by "American Legal Realism" that David M. O'Brien has suggested has "made consensus more difficult."[209] Analysis of these various

[206] But see Figure 22 and note 190 supra.

[207] We cannot know the full extent of the difference, since we do not know the conference voting records of the contemporary Court. It might be that the Court's current 27% unanimity rate, which is largely obtained in cases coming to the Court through certiorari, *overstates* the spontaneous cohesion of the contemporary Court.

[208] At an early stage of my research, I had attempted to classify the Court's opinions by their subject matter. Although I ultimately classified all the opinions decided during the Court's 1923 Term, I discontinued the effort because I found the process of classification to be too arbitrary to provide reliable data. Nevertheless, for what it is worth, of the 47 opinions in the 1923 Term that I classified as dealing with "constitutional law" (which included issues of Due Process, Equal Protection, interstate commerce, both dormant and plenary, and the Contracts Clause), 74% were decided unanimously. This is less than the 86% unanimity rate for all opinions decided that Term. The unanimity rate at conference for the 45 such opinions of which we have conference records was 47%, which equals the rate of unanimity at conference for all cases during the 1923 Term. See Figure 19. Forty three of these 45 opinions had come to the Court through its mandatory jurisdiction. Of these, 49% were decided unanimously at conference, compared to a 54% conference unanimity rate for all cases in the 1923 Term coming to the Court through its mandatory jurisdiction. See Figure 22. If instead of subject matter we view the certification process as a proxy for difficult cases, since lower federal courts would likely certify only especially significant or especially divisive questions of law, we can say that during the 1921-1928 Terms, the Court published 56 full opinions in cases coming to the Court by way of certification from lower federal courts. Of these, 80% were unanimous. Of the 43 of these opinions for which we conference records, 51% were unanimous in conference. For a discussion of certification, see Reynolds Robertson and Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States §§ 112-119 (1936); Hartnett, supra note 24, at 1710-12.

[209] David M. O'Brien, supra note 129, at 101.

causes lies outside the boundaries of this Lecture; for our purposes it is sufficient to note that, at least when measured by conference voting in the more difficult cases arising from discretionary certiorari jurisdiction, members of the Taft Court seem to have had spontaneous reservoirs of ideological coherence apparently unavailable to their modern counterparts.[210]

The second striking aspect of Figure 18 is the huge discrepancy between the level of unanimity in conference and the level of unanimity in published opinions. This difference clearly reflects an institutional aversion to dissent.[211] Justice Van Devanter put the matter well: "Unanimity of opinion is very desirable and is always sought, but never at the sacrifice of strong conviction."[212] This norm of agreement is expressed in case after case in the extant record of circulated opinions. Justice Butler,[213] for example, responded to a Stone opinion with a short disquisition on the subject:

> I voted to reverse. While this sustains your conclusion to affirm, I still think a reversal would be better. But I shall in silence acquiesce. Dissents

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[210] I should note, however, that, as Figure 22 illustrates, the unanimity rate in conference for opinions in cases that reached the Court through its mandatory jurisdiction in the 1928 Term was only 35.3%, while the unanimity rate in conference for opinions in cases that reached the Court through its discretionary jurisdiction was only 38.6%. These figures come very close to the unanimity rate of the published opinions of the contemporary Court. Figures 19 and 23 indicate, however, that the Taft Court took extraordinary pains during the 1928 Term to maintain a relatively high rate of unanimity in its published opinions.

[211] See text at note 55 supra; Lee Epstein, et al., supra note 199.

[212] Willis Van Devanter, The Supreme Court of the United States, 5 Ind. L. J. 553, 560 (1930). Van Devanter continued, "Whatever may be the effect upon public opinion at the moment, freedom to dissent is essential, because what must ultimately sustain the court in public confidence is the character and independence of the judges." Id.

[213] In 1923 Brandeis commented to Frankfurter apropos of Butler:

> Referring to a writer in June 1923 Journal of Am Bar Assoc. who would suppress all dissenting opinions as "vanity of dissent," [Brandeis] said "he isn't alone in that view. P. Butler rather regards dissents as vanity of dissenters & would like not to have them. He himself rarely dissents—partly because of newness, partly because of disbelief in them.

*The Brandeis-Frankfurter Conversations,* supra note 71, at 313-14.

> seldom aid us in the right development or statement of the law. They often do harm. For myself I say: "Lead us not unto Temptation."[214]

To Holmes, Butler announced, "I voted the other way & remain unconvinced, but dissenting clamor does not often appeal to me as useful. I shall acquiesce."[215] To yet another draft opinion, he responded, "I voted the other way and am still inclined that way, but acquiesce for the sake of harmony & the Court."[216]

Brandeis concurred in an opinion of Stone, noting that "I think this is woefully wrong, but do not expect to dissent."[217] In response to the draft of a Holmes opinion, Brandeis remarked, "I think the question was one for a jury – but the case is of a class in

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[214] Republic of France v. French Overseas Corp., 277 U.S. 323 (1928) (Stone Papers). Butler was so pleased with his disquisition that he sent it under separate cover to Taft. Letter from Pierce Butler to William Howard Taft, May 19, 1928 (Taft Papers) (Reel 302). In that same case, Taft wrote to Stone: "I suppose I ought not to dissent. I think we dissent too much especially when a principle has once been decided." Id. Stone himself refused to join Brandeis's dissent in *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460 (1929), claiming that he had a "general disposition not to dissent unless I feel strongly on the subject." Letter from Harlan Fiske Stone to Louis D. Brandeis, February 16, 1929 (Brandeis Papers, Stone Papers).

[215] Nashville Chattanooga & St. Louis Ry Co. v. White, 278 U.S. 456 (1929) (Holmes Papers). In that same case, Butler wrote privately to Van Devanter, "You and I voted to reverse. The opinion does not change my view of the matter. I still think the ordinance as applied here unreasonable & arbitrary. I also think . . . that evidence was erroneously excluded. But it is doubtful whether dissenting opinion or the mere noting of disagreement would do any good; and, unless you incline the other way, I am dispose to acquiesce. What say you?" Letter from Pierce Butler to Willis Van Devanter, January 22, 1929 (Van Devanter Papers). Van Devanter wrote Holmes, "I do not agree. But as the matter is open to discussion, I shall not object, but acquiesce." In another Holmes opinion, Butler wrote to Holmes, "I voted the other way; but yielding to the weight of reason and votes, I acquiesce." Western Union Telegraph Co. v. Georgia, 269 U.S. 67 (1925) (Holmes Papers).

[216] Standard Oil Co. v. Marysville, 279 U.S. 582 (1929) (Stone Papers). To the draft of a Brandeis opinion, he replied, "I voted & still prefer to reverse, but I shall acquiesce unless one protests." St. Louis-San Francisco Ry Co. v. Alabama Public Service Comm'n., 279 U.S. 560 (1929) (Brandeis Papers). In this same case, Sutherland wrote to Brandeis, "Not for, but shall not be `agin.'" Id . McReynolds wrote, "I am not wholly in accord with this but do not care to say anything."

[217] Heiner v. Tindle, 276 U.S. 582 (1928) (Stone Papers). In that same case, Holmes commented, "My inclination is the other way . . . But I don't intend to say anything if you can get a majority." Id. In response to the draft of Taft's unanimous opinion in Chicago & Northwstern Ry. CO. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922), Brandeis wrote: "I still think the reasoning as to $100 fee wrong. But the opinion handles the matter so deftly that I think there will be no such lasting harm done as to require dissent. So as our Junior says: 'I'll shut up.'" (Taft Papers) (Reel 614). Although Holmes acknowledged that the opinion was "plausibly reasoned," he added, "but as I voted the other way and still have some misgivings I retain them to see if any dissent is written. It would not be by me."

which one may properly `shut up.'"[218] To the draft of another unanimous Stone opinion, Holmes commented, "I incline the other way. If B[randeis] who I believe voted as I did writes, . . probably I shall concur with him. If he is silent, I probably shall . . . shut up."[219] Sutherland wrote to Brandeis, ""I thought otherwise, but shall probably acquiesce."[220] To the draft of a unanimous Stone opinion, Sutherland replied, "I had a different view, and shall withhold final determination in order to see what the other stubborn members have to say."[221] Without registering a dissent, Sutherland responded to a Holmes opinion: "Sorry, I cannot agree."[222]

Sanford replied to the draft of a unanimous Holmes opinion with the comment, "I regret that I cannot see my way clear to agree. . . . I shall probably not dissent, unless

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[218] Atlantic Coast Line Railroad Co. v. Southwell, 275 U.S. 64 (1927) (Holmes papers). Brandeis joined Holmes's opinion in A.G. Spalding & Bros. V. Edwards, 262 U.S. 66 (1923), even though Brandeis thought that Holmes's "construction of this Constitutional provision is wrong." (Holmes Papers). Holmes, in turn, responded to the draft of Brandeis's unanimous opinion in Taubel-Scott-Kitzmiller v. Fox, 264 U.S. 426 (1924), with the observation that "I am unconvinced. I think the other interpretation more reasonable." To that same opinion, McReynolds wrote, "I shall not object." Butler wrote, "I think you make a strong argument for the result & it is likely you are right. As you know I inclined the other way. I am content -- & concur." And McKenna answered, "This leaves me no excuse not to be right so I say Yes." (Brandeis Papers).

[219] Seeman v. Philadelphia Warehouse Col., 274 U.S. 403 (1927) (Stone Papers). Brandeis had written to Stone, "I shall probably acquiesce & await Conference before deciding." To the draft of Stone's unanimous opinion reversing a criminal conviction in Brasfield v. United States, 272 U.S. 448 (1926), Holmes wrote, "I shall not dissent . . . . But I would not reverse for what the Judge did." In that same case, Sanford wrote Stone: "I regret that I cannot concur except in the result. . . . But I shall not dissent or express any separate opinion." (Stone Papers). To Taft's draft opinion in Continental Ins. Co. v. United States, 259 U.S. 156 (1922), Holmes responded: "Where reason totters on the throne, Faith takes my hand and leads me on." (Taft Papers) (Reel 615). In response to Taft's draft opinion in United States v. Rider, 261 U.S. 363 (1923), Holmes wrote: "I defer humbly to the Commander in Chief. What he says goes." (Taft Papers) (Reel 615).

[220] United States v. Ludey, 274 U.S. 295 (1927) (Brandeis Papers). In this same case, Taft wrote, "I concur but these discussions always make my head buzz." Id. Sanford wrote, "While I voted to `reverse' with some doubt, this doubt has been removed by your clear and strong presentation of the case – and I unreservedly concur." Id.

[221] Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927) (Stone Papers). Butler commented, "I voted the other way in this and will withhold further expression until I hear what others say at the Conference." Id.

[222] United States v. Sischo, 262 U.S. 165 (1923) (Holmes Papers).

some one else does so."[223] To the draft of another opinion, he answered, "I regret that I cannot concur but shall not dissent."[224] To an opinion by Brandeis, McReynolds wrote, "I thought otherwise but do not care to say anything now."[225] To a Holmes opinion, McReynolds commented, "I have my doubts but not the necessary votes. Wherefore I am mum."[226] To the draft of another unanimous Holmes opinion, Van Devanter wrote, "I am not satisfied, but if others agree I shall have nothing to say."[227] McKenna, who as Figure H illustrates, was the most inclined of any Justice to alter his conference vote, turned concession into a virtual art form:

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[223] Mercantile Trust Co. v. Wilmot Road District, 275 U.S. 117 (1927) (Holmes Papers). To this same opinion, Brandeis responded, "I do not assent to your interpretation of the statute, but I `shut up.'" Id. To the draft of another unanimous Holmes opinion, Sanford responded, "I regret that I do not see my way clear to concurring in this view (albeit most persuasively stated), but do not expect to dissent." United States v. Cambridge Loan & Building Co., 278 U.S. 55 (1928) (Holmes Papers). To that same opinion, Sutherland wrote, "I give up. You are very persuasive, tho I still `have my doubts.'" Id. Butler wrote, "Doubtfully yes. I shall be glad to consider opposing views if any are expressed." Id. And Taft answered, "I concur. I don't like to do so because the result should be different but if Congress wishes it different let it draft the law accordingly."

[224] American Railway Express v. Levee, 263 U.S. 19 (1923) (Holmes Papers). To the draft of a unanimous Brandeis opinion, Sanford wrote, "I still have great doubt, but shall not dissent." Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926). To the draft of a Stone opinion, Sanford wrote, "Regret that I cannot agree, but do not expect to dissent." New York Central Rd. Co. v. Johnson, 279 U.S. 310 (1929) (Stone Papers).

[225] Western & Atlantic Railroad Co. v. Hughes, 278 U.S. 496 (1929) (Brandeis Papers). To that same opinion, Butler responded, "I voted to reverse, but I acquiesce in the views of the majority as attractively put by you." Id. Sutherland returned simply, "I yield." Id. To another unanimous Brandeis opinion, McReynolds answered simply, "Sorry but I cannot agree." United States v. Illinois Central Railroad Co., 263 U.S. 515 (1924) (Brandeis Papers). See also Davis v. Cornwall, 264 U.S. 560 (1924) (unanimous Brandeis opinion to the draft of which McReynolds had responded, "Sorry but I cannot agree.").

[226] Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) (Holmes Papers). To another Holmes opinion, he wrote, "Maybe it should be as it seems destined to be. But yr humble servant has something rather deeper than a doubt." Diaz v. Carlota and Clementina Gonzalez Y Lugo, 261 U.S. 102 (1923) (Holmes Papers).

[227] Gardner v. Chicago Title & Trust Co., 260 U.S. 453 (1923) (Holmes Papers). To that same opinion, Sutherland responded, "I am sorry not to agree with you, at least, for the present." Butler answered, "I still have grave doubt as to the result." Brandeis wrote, "I think you are wrong . . . – But I . . . shall `shut up' unless others make a stir." Id. In another case, Van Devanter wrote to Stone, "I do not agree but shall submit." Raffel v. United States, 271 U. 494 (1926). (Stone Papers). In that same case, Sanford wrote, "This is a strong presentation and while my doubt in the question is not entirely removed, I shall acquiesce in silence unless some one else dissents." Butler wrote, "In Silentio." Id.

> I voted the other way but my effort is to please so I will accede.[228]
>
> Plausible if not sound. And being alone there seems no reason for making a fuss.[229]
>
> I voted the other way but I have resolved on amiability & concession, so submit. I am not sure that I am not convinced.[230]
>
> You have the art of making the wrong appear the better reason and gives me excuse to acquiesce, and as I hail opportunities to be amicable I say yes.[231]
>
> Narrow treading but there is only one result when one opposes, or tries to oppose, a majority. Besides by yielding one gets the praise of being susceptible to reason.[232]
>
> Dubitante. There are objections against a plenum and objections against a vacuum but one of them must be true.[233]

What is fascinating about these various communications is that they do not so much express a "norm of consensus,"[234] as a norm of acquiescence. The Justices preserve their differences, but they each assume that in the absence of strong reasons, these differences should be put aside so that the Court can present a united front to the

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[228] International Railway Co. v Davidson, 257 U.S. 506 (1922) (Brandeis Papers). In that same case, Pitney wrote, "I say nothing."

[229] First National Bank of Aiken v. J.L. Mott Iron Works, 258 U.S. 240 (1922) (Holmes Papers).

[230] Federal Baseball Club of Baltimore v. National League of Professoinal Baseball Clubs, 259 U.S. 200 (1922) (Holmes Papers). To this draft opinion, Brandeis responded, "I have grave doubt, but shall acquiesce." Id.

[231] Stevens v. Arnold, 262 U.S. 266 (1923) (Holmes Papers). To that same opinion, Brandeis wrote, "I take your word for it." McReynolds answered, "I shan't row with you tho I was inclined to agree with the Dist. Court." And Taft commented, "I concur, though it is only because of my blind faith in you . . . . " Id.

[232] Nashville, Chattanooga, & St. Louis Ry v. Tennessee, 262 U.S. 318 (1923) (Brandeis Papers).

[233] United States v. Pennsylvania Rd. Co., 266 U.S. 191 (1924) (Brandeis Papers). To the draft of this unanimous Brandeis opinion, McReynolds responded, "I hold a different view." Sutherland commented, "Shall acquiesce."

[234] O'Brien, supra note 129, at 111.

public,[235] an image of unity expected to produce "the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[236] Figures 19 and 20 suggest that the Court may actually have striven harder to preserve unanimity as internal rates of dissensus at Conference increased. It is clear that this norm of acquiescence is responsible for sustaining the extraordinarily high rates of unanimity that characterize the published opinions of the Taft Court, rates that were 20 to 40 percentage points higher than unanimity in conference voting.

It is useful to begin our analysis of this phenomenon by considering the significance of the norm of acquiescence for the three distinct functions of Supreme Court opinions that we identified in Part II. With respect to the function of representing the institutional judgment of the Court, the norm of acquiescence facilitated the achievement of institutional unity. Justices must have believed that, in the absence of what Van Devanter called "strong conviction," it was their institutional responsibility to join an opinion for the Court. The norm of acquiescence also established among the Justices expectations of reciprocity, or, in McKenna's words, of "amiability." There was thus a price to be paid for failing fulfill the responsibility of joining court opinions. In this connection, Brandeis remarked to Frankfurter that "there is a limit to the frequency

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[235] Thus Holmes consistently averred that "I rather shudder at being held up as the dissenting judge and more or less contrasted to the Court." Holmes and Frankfurter, supra note 70, at 244-45. "I dislike even the traditional `Holmes *Dissenting.*'" 1 Holmes-Laski Letters, supra note 79, at 560. See Letter from Oliver Wendell Holmes to Miss Little, February 4, 1929 (Holmes Papers) (Reel 35, Frame 368) ("I rather grieve to be made to appear as chiefly occupied in dissenting. That is not my main business."); Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, November 22, 1929 (Holmes Papers) (Reel 24, Frame 339) ("I do not like being made to appear as a dissenting judge, though no doubt I have dissented more than some because I represent a minority on some very fundamental questions, upon which both sides should be heard.").

[236] Learned Hand, The Bill of Rights 72-73 (1958). Thus Canon 19 of the 1924 Canons of Judicial Ethics exhorted "judges constituting a court of last resort" to "use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision." Lisa L. Milford, The Development of the ABA Judicial Code 137 (1992).

with which you can [dissent], without exasperating men.[237] . . . [Y]ou may have a very important case of your own as to which you do not want to antagonize on a less important case etc. etc."[238] He noted that the "great difficulty of all group action . . . is when & what concessions to make. Can't always dissent—may have dissented much just then."[239] He once responded to Taft's invitation to join a separate opinion: "I agree with your criticism of the . . . opinion. You will recall that I voted the other way; and the opinion has not removed my difficulties. . . . But I have differed from the Court recently in three expressed dissents and concluded that, in this case, I had better `shut up,' as in Junior days."[240]

It is not necessary to establish a norm of acquiescence in order to sustain amicable working relationships among members of the Court.[241] The norm instead offers a way

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[237] A dissenting Justice, Brandeis told Frankfurter, doesn't "want to vent feelings or raise rumpus." *The Brandeis-Frankfurter Conversations,* supra note 71, at 309.

[238] Id., at 317. Brandeis added that "there may not be time, e.g. Holmes shoots them down so quickly & is disturbed if you hold him up." Id. For an example, see id. at 327.

[239] Id. at 309. At another point Brandeis observed to Frankfurter, "[T]here are reasons for withholding dissent, so that silence does not mean actual concurrence. (1) All depends on how frequent one's dissents have been when the question of dissenting comes, or (2) how important case, whether it's constitutionality or construction. So that I sometimes endorse an opinion with which I do not agree, "I acquiesce"; as Holmes puts [it] 'I'll shut up.'" Id. at 328.

[240] Letter from Louis D. Brandeis to William Howard Taft, December 23, 1922 (Taft Papers) (Reel 248). The case was *FTC v. Curtis Publishing Co*., 260 U.S. 568 (1923), and Brandeis ended up joining Taft's opinion, perhaps because the stakes were high enough. The majority opinion was by McReynolds, and, as Brandeis wrote to Taft, "I differ widely from McReynolds concerning the functions and practices of the Trade Comm'n. . . . I think the Court's treatment of the Federal Trade Comm'n – is much like that given the I.C.C. in its early years—and I fear that the fruit of our action may again be bitter. It is not good statesmanship to clamp down safety valves." Id. Existing documents show Taft negotiating through Van Devanter to effect changes in the McReynolds opinion, even as he determined to write separately, "dubitante."

[241] Working relationships among members of the Taft should thus be compared with those among members of the contemporary Court as described by Justice Scalia. See Antonin Scalia, The Dissenting Opinion, 1994 Journal of Sup. Ct. History 33, 40-41 (1994) (Dissents "do not, or at least need not, produce animosity and bitterness among the members of the Court. . . . [D]issents are simply the normal course of things. Indeed, if one's opinions were never dissented from, he would begin to suspect that his colleagues

for individual Justices to negotiate potential conflicts between their own intellectual perspectives and their perceived obligation to contribute to "solidarity of conclusion and the consequent influence of judicial decision."[242] The norm acquires its significance from the strength of this obligation. But the nature and force of this obligation depends upon the importance of the impact of Supreme Court opinions on persons outside the Court. To historically situate the norm of acquiescence, therefore, we must analyze it in connection to the outward-looking functions of Supreme Court opinions. We must focus on the relationship between the norm and the ability of Supreme Court opinions to resolve disputes between parties or to affect the future growth and administration of the law.

These two functions stand in very different relation to the norm of acquiescence. Although dissent can influence the attitude of litigants to the resolution of their case, it cannot modify the binding and dispositive force of the Court's judgment on the parties before it. That judgment, however, has no such dispositive force on the general legal public, which is therefore much more likely to be affected by a strong dissent. In addition, the trade-off between institutional solidarity and individual belief is quite different if all that is at stake in a Supreme Court opinion is the proper adjudication of a dispute between particular parties, than if the future development of the legal system also hangs in the balance.

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considered him insipid, or simply not worthy of contradiction."). See also Stanley H. Fuld, The Voices of Dissent, 62 Colum. L. Rev. 923, 928-29 (1962) ("In conference, each of the judges expresses himself frankly as he believes the law and the facts require and, when it comes time to publish his opinion, whether for majority or for minority, his writing reflects his actual thinking, with no punches pulled, though stated in reasoned and temperate tones. The personal atmosphere of the court is today, as it has ever been, instinct with a feeling of friendliness and good will.").

[242] Canon 19, supra note 55.

These considerations suggest that the concept of the Supreme Court opinion at the core of the Judiciary Act of 1925 was singularly calculated to exert pressure on the norm of acquiescence. As the Court's opinions began to modulate from the relatively routinized decisions of a court of last resort to interventions designed to shape the progress of American law, it is no wonder that a norm which developed and flourished in the first context began to falter in the second. The collapse of unanimity and the changing nature of Supreme Court opinions are thus intimately connected.

The point requires careful formulation, however, because courts resolve disputes between parties by articulating legal principles, and these principles both decide specific cases and also become precedents for the resolution of future cases. The audience for all court opinions, therefore, hovers ambiguously between particular parties and the general legal public. The relationship between these two audiences very much depends upon a jurisprudential account of how law works to accomplish its ends. If judicial opinions are understood to influence the legal system through the enunciation of definite and stable principles, upon which legal actors can rely, there is essentially no distinction between opinions addressed to the general legal public and opinions addressed to the parties to a particular case. The purpose of an opinion is to announce certain and fixed legal standards that will simultaneously discharge the Court's obligation to both audiences.

This jurisprudential understanding of law casts potential dissenters into an exceedingly awkward position. Whether a potential dissenter looks to the effect of his dissent on the parties to the case, or to its effect on the future evolution of the law, dissent potentially undermines the certainty and confidence which is a principal virtue of judicial decision-making. And if *stare decisis* functions, as it should, to fix and establish a

Court's opinion as regnant law, dissent seems merely ineffectual. As Edward White put it, "[t]he only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort."[243] A potential dissenter is thus relegated to registering his conscientious personal difference from the judgment of an opinion.[244] That is why, in its effort to discourage dissent on courts "of last resort," Canon 19 of the ABA's 1924 Canons of Judicial Ethics focused primarily on the exhortation that a judge 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 cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."[245]

The norm of acquiescence that is visible in the Taft Court fits comfortably with this jurisprudential perspective. If the institutional justification for dissent is unclear; if dissent carries potentially large deletorious effects for the establishment of law, both with respect to the parties and to the legal public; if the benefits to a dissenter are chiefly personal; then a norm of acquiescence offers a face-saving way for a dissenter to mediate between private intellectual disagreement and participation in the common goal of creating effective law.

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[243] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 608 (1895) (White, J., dissenting).

[244] Stone sometimes represented his practice of dissent in exactly these terms. So, for example, he once wrote to T.R. Powell: "One of my colleagues was once greatly surprised when I told him that I did not write a dissent to convince him. He then asked: `What do you write it for?' I replied: `So that others will not think that I agree with you, and of course I have to sleep with myself every night and I like to rest well.'" Letter from Harlan Fiske Stone to T.R. Powell, December 16, 1935 (Stone Papers).

[245] Canon 19, supra note 55.

It should come as no surprise, therefore, that those who opposed judicial dissent at the turn of the century typically appealed to a jurisprudential account of law that stressed fixity and finality. A 1905 article in *The Green Bag* argued that "The fundamental security of all peoples lies, not in the *justice*, but in the *certainty*, of their laws," from which it deduced that "the Dissenting Opinion is of all judicial mistakes the most injurious."[246] "There never should be a dissenting opinion in a case decided by a court of last resort," propounded *The Albany Law Journal* in 1898. "No judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality."

> It is a maxim of the law that it is to the interest of the public that there should be an end to litigation. It certainly is to the interest of the public that when a question is settled by the highest tribunal, it should remain settled for all time. The result of a dissenting opinion is simply to open up for future discussion, bickering and litigation the question which should then be finally settled by that tribunal. Somebody must settle the question; it must be settled somewhere; that tribunal has been selected as the final arbiter, and when it once settles it, it should remain settled forever.[247]

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[246] William A. Bowen, Dissenting Opinions, 17 *The Green Bag* 690, 693 (1905). "Obviously, if the Dissenting Opinion is injurious at all, it will be most unfortunately so in those cases which are of the greatest public moment. Yet it is the almost unbelievable fact, that it is the uniform justification of dissenting judges that the *importance* of the case warrants and demands their dissent." Id.

[247] "Evils of Dissenting Opinions," 57 *The Albany Law Journal* 74, 74-75 (January 29, 1898). The article adds, "The decision should be that of the court, and not of the judges as individuals. The judges should get together and render a decision settling the points in controversy."

> Dissenting opinions may be as pleasant to the minority judge as it is for a boy to make faces at a bigger boy across the street, whom he can't whip. They give a judge an opportunity of exhibiting his individual views and opinions. But what good does that do? What cares the public for the judge's individual views, except in so far as, by reason of his position, they assume the force of law? The only concern of the public is with the decision of the court as a court, so that they may know what it is, and know how to govern themselves.

Id. From this perspective, dissent was not only useless, it was also destructive of the law itself.

One can discern an echo of this position in Holmes's announced reticence "to express his dissent, once he's 'had his say' on a given subject."[248] Holmes believed that "There are obvious limits of propriety to the persistent expression of opinions that do not command the agreement of the court."[249] If a case or a legal principle were important enough, he was willing to dissent, to articulate an understanding of the law different from that announced by the Court.[250] But once his understanding was rejected, Holmes adopted the view that he would not continue to reiterate his own perspective.[251] Only in the most consequential circumstances, as for example in the area of freedom of speech,

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[248] *The Brandeis-Frankfurter Conversations,* supra note 71, at 330. See also Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J. dissenting) ("[I]t is useless and undesirable, as a rule, to express dissent.")

[249] FTC v. Beech-Nut Packing Co., 257 U.S. 441, 456 (1922) (Holmes, J., dissenting).

[250] Holmes was careful, however, to cast his dissent as a disagreement of legal principle rather than as a quarrel with the Court. Just as he frequently regarded opinions as expressions of "pure principle," Holmes and Frankfurter, supra note 70, at 206, so he stressed that in writing dissents "we are giving our views on a question of law, not fighting with another cock." 1 Holmes-Laski Letters, supra note 79, at 560. Before agreeing to join a Brandeis dissent, for example, he once insisted that Brandeis remove a sentence to the effect that "The Court gives no reason for declaring [the Federal Gift Tax Act] to be unreasonable." Holmes explained, "I think it better never to criticize the reasoning in opinions of the Court and its members. I feel very strongly about this. Of course it is OK to hit them by indirection as hard as you can." Untermyer v. Anderson, 276 U.S. 440 (1928) (Brandeis Papers). Holmes added, "If you will modify these expressions so as to avoid the personal touch I am with you, with delight." Id. Holmes edited another Brandeis dissent "to avoid the dogmatic air when one is in a minority." United States v. Oregon Lumber Co., 260 U.S. 290 (1922) (Brandeis Papers). "Dissenting Judges often say `This Court' etc.," Holmes observed. "It has an air of horror or contempt and I dislike the phrase extremely. I hope you will change it." Id. Thus although Holmes experienced the "pleasure in writing" dissents as flowing from the power to "say just what you think" without "having to blunt the edges and cut off the corners to suit someone else," it was a pleasure that did not derive from debating with the Court, but rather from the free pursuit of legal principles, the articulation of "some proposition broader than it is wise to attempt except in a dissent." Letter from Oliver Wendell Holmes to Mrs. John Chipman Gray, May 5, 1928 (Holmes Papers)(Reel 24, Frame 228); 1 Holmes-Laski Letters, supra note 79, at 646-47; Letter from Oliver Wendell Holmes to Baroness Moncheur, January 27, 1928 (Holmes Papers) (Reel 27, Frame 216).

[251] See, e.g., Washington v. Dawson & Co., 264 U.S. 219, 228 (1924) (Separate Opinion of Holmes, J.) ("The reasoning of Southern P. Co. v. Jensen, 244 U.S. 205, and cases following it, never has satisfied me, and therefore I should have been glad to see a limit set to its principle. But I must leave it to those who think the principle right to say how far it extends."); Miles v. Graham, 268 U.S. 501 (1925) (Holmes had dissented in Evans v. Gore, 253 U.S. 245 (1920), the precedent applied by *Miles*); Thomas Grey, "Holmes and the Logic of the Law," in Steven Burton, editor, The Path of the Law and its Influence 141 (Cambridge University Press, 2000); Thomas C. Grey, Molecular Motions: The Holmesian Judge in Theory and Practice, 37 Wm. & My. L Rev. 19, 27-36 (1995).

would he candidly repeat a position in the teeth of dispositive judicial resolution. And then he would remark, as he did in his dissent in *Gitlow v. New York*,[252] that "the convictions I expressed in [*Abrams*] are too deep for it to be possible for me as yet to believe that it and *Schaefer* . . . have settled the law."[253] In the absence of such deep conviction, Holmes implied, acquiescence in a settled rule of law would be necessary to ensure respect for the value of judicial finality.

If Holmes's conception of dissent was compatible with a strong norm of acquiescence, Brandeis struggled to articulate a conception of dissent that undercut the jurisprudential foundations of the norm. Brandeis sought to distinguish circumstances in which judicial finality was a significant jurisprudential virtue from those in which it was not. "In ordinary cases," he said to Frankfurter in 1923, "there is a good deal to be said for not having dissents."

> You want certainty & definiteness & it doesn't matter terribly how you decide, so long as it is settled. But in these constitutional cases, since what is done is what you call statesmanship, nothing is ever settled—unless statesmanship is settled & at an end.[254]

This is a remarkably suggestive passage, because it explicitly ties the norm of acquiescence to an account of how law achieves its purposes, and it offers a discriminating explanation of the difference between ordinary law, where the value of finality is highly consequential, and constitutional law, where it is not.[255] Brandeis's

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[252] 268 U.S. 652 (1925).

[253] Id. at 673 (Holmes, J., dissenting).

[254] *The Brandeis-Frankfurter Conversations*, supra note 71, at 314.

[255] By the 1930s, Brandeis was able to offer a clear line of demarcation. See, e.g., Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting):

explanation of the diminished importance of finality in constitutional law does not turn on the primacy of constitutional justice, but rather on the fact that constitutional law is a form of "statesmanship," and statesmanship requires continuous flexibility and growth. It is no act of statesmanship to announce a rule and expect it, in the words of *The Albany Law Journal*, to "remain settled for all time."

Brandeis advanced an image of constitutional law as requiring the continuous "capacity of adaptation to a changing world."[256] In a draft dissent he made this point explicitly: "Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth. . . . Because our Constitution possesses the capacity of adaptation, it

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> *Stare decisis* is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

In the 1920s, however, Brandeis was still considerably more tentative on the point. See, e.g, Di Santo v. Pennsylvania, 273 U.S. 34, 42-43 (1927) (Brandeis, J., dissenting):

> It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. The human experience embodied in the doctrine of stare decisis teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce. The many cases on the Commerce Clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized.

For a good discussion, see Morton J. Horwitz, Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 32, 53 n.99 (1993). For an example of a similar perspective to Brandeis's, see Letter of Harlan Fiske Stone to John Bassett Moore, April 10, 1929 (Stone Papers) ("[O]rdinarily I do not record dissents in matters of statutory interpretation.").

[256] Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

has endured as the fundamental law of an ever developing people."[257] Fittingly enough, Taft, whose view of dissent was very different from that of Brandeis, insisted that this passage be omitted before he would join Brandeis's dissent.[258] Taft believed that the "Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual."[259] For Taft the fundamental point of constitutional law was precisely to fix these rights and to render them "settled."[260]

The jurisprudential difference between Brandeis and Taft has important consequences for the norm of acquiescence.[261] If the law is regarded as continuously and properly evolving, the costs of acquiescence increase, because assent to a mistaken

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[257] United States v. Moreland, 258 U.S. 433 (1922) (Brandeis Papers).

[258] "I am very pleased with your opinion . . . except the last four or five sentences in respect to the growth of the Constitution. I object to those words, because they are certain to be used to support views that I could not subscribe to. Their importance depends, as old Jack Bunsby used to say, on their application, and I fear that you and I might differ as to their application. . . . Now it is possible – I have felt that way myself sometimes – that these particular sentences constitute the feature of the opinion that you most like, and therefore that you don't care to eliminate them. If not, I can write a short concurring opinion, avoiding responsibility for those words . . . ." Letter from William Howard Taft to Louis D. Brandeis, March 30, 1922 (Taft Papers) (Reel 240). Brandeis replied, "I believe strongly in the view expressed in the last five sentences but I agree with you that they are not necessary and I am perfectly willing to omit them." Letter from Louis D. Brandeis to William Howard Taft, March 39, 1922 (Taft Papers) (Reel 240).

[259] Truax v. Corrigan, 257 U.S. 312, 338 (1921).

[260] Taft's perspective might be said to reflect the received wisdom of the time. For a good example, see, e.g., South Carolina v. United States, 199 U.S. 437, 448-49 (1905):

> The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.

[261] For good discussions of the transition in American jurisprudence to the Brandeis view of constitutional law, see Howard Gillman, The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building, 11 Studies in American Political Development 191 (Fall 1997); Barry Friedman, The History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. Pa. L. Rev. 971, 1019 (2000) Gillman and Friedman date the demise of the Taft view to about the time when Figure 10 suggests that unanimity rates began to collapse.

opinion affects the future development of the law. So far from merely expressing conscientious personal disagreement, dissent constitutes, in the famous words of Charles Evans Hughes, "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[262]

If the virtue of law is conceived to lie in its flexible and adaptability, rather than in its stability and firmness, a potential dissenter must weigh the "dissatisfaction" that a dissent may engender in the parties to a particular case[263] against his obligation to future generations wisely to shape the development of the law.[264] Once the institutional

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[262] Charles Evans Hughes, The Supreme Court of the United States 68 (1937).

[263] "If a dissenting opinion is well written it impresses not only the particular litigant, but all who read it, with the idea that injustice has been done by the courts; a feeling of dissatisfaction arises, a feeling of great wrong is cast broadcast. The court has been weakened in popular esteem, for in the opinion of the reader of the dissenting opinion it has lent itself to injustice and inflicted wrong." "Evils of Dissenting Opinions," supra note 247, at 75.

[264] "Even where the theory of the dissent does not ultimately prevail, its expression is no futile gesture. The law is not a dead or static mechanism. It is a living organism which grows and develops to meet the ever-shifting panorama of life." Joseph M. Proskauer, "Dissenting Opinions," 160 Harper's Monthly Magazine 549, 554 (April 1930). To Frankfurter, Stone commented that Proskauer's article was "good and very instructive to a lot of people who think law, especially in our Court, is a system of mathematics. Sometime, though, I think if it were applied with scientific precision, that we might come out better than we do now." Letter from Harlan Fiske Stone to Felix Frankfurter, April 4, 1930 (Stone Papers). On the relationship between Brandeis's view of law to Stone's own practice of dissent, see Letter from Harlan Fiske Stone to Felix Frankfurter, June 8, 1928 (Stone Papers):

> I always write a dissent with real reluctance, and often acquiesce in opinions with which I do not fully agree, so you may know how strongly I have really felt in order to participate in so many dissents as I have recently. But where a prevailing view rests upon what appears to me to be false economic notions, or upon reasoning and analogies which will not bear analysis, I think great service is done with respect to the future development of the law, in pointing out the fallacies on which the prevailing view appears to rest, even though the particular ruling made should never be reversed.

Frankfurter answered this letter by affirming "I also share your conviction as to the `great service' which is rendered by dissenting opinions for the future development of the law." Letter from Felix Frankfurter to Harlan Fiske Stone, June 11, 1928 (Stone Papers).

By the 1930s, Stone had become entirely comfortable with this position. See Harlan F. Stone, "Dissenting Opinions Are Not Without Value," 26 J. Am. Judic. Soc. 78, 78 (October 1942) (hereinafter "Dissenting Opninions") ("While the dissenting opinion tends to break down a much cherished illusion of

structure of the Court decisively oriented its opinions toward the general legal public, and once members of the Court began to regard "growth" as "the life of the law,"[265] the norm of acquiescence was undermined from within. By the end of the 1940s, when, as Figure 10 indicates, the norm of acquiescence had utterly collapsed, a Justice like William O Douglas, perhaps the most consummate dissenter in the history of the Court, could affirm that "philosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it."[266] And it is undoubtedly the case that the virtual disappearance of unanimous Court opinions, which is in part a consequence of this very jurisprudential view of the law, helped in turn to produce a law that was in fact more uncertain and labile.

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certainty in the law and of infallibility of judges, it nevertheless has some useful purposes to serve. . . . Its real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law."); Letter from Harlan Fiske Stone to T.R. Powell, December 16, 1935 (Stone Papers) ("Of course I agree with you that no amount of criticism will affect the courts today, but it is likely to have a profound effect on the courts of the next generation." ).

[265] Washington v. Dawson & Co., 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting). There is clearly no necessary or logical relationship between this jurisprudential account of law and the role of the Court envisioned by the 1925 Act. That is why Justices like Taft and Van Devanter could simultaneously support the Act and advocate a jurisprudence that emphasized stability and certainty. But in the long run there might be a natural affinity between envisioning the Court as akin to a "ministry of justice" and envisioning the law as evolving continuously to adjust to a changing social environment.

[266] William O. Douglas, "The Dissent: A Safeguard of Democracy," 32 J. Am. Judic. Soc. 104, 105 (December 1948). Douglas continued:

> Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for complete subservience to the political regime is a *sine qua non* to judicial survival under either system. . . .
>
> When we move to constitutional questions, uncertainty necessarily increases. A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. . . . And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. *Stare decisis* has small place in constitutional law. The Constitution was written for all time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow, legalistic notions that dominated the thinking of one generation.
>
> So it is that the law will always teem with uncertainty.

Id. at 105-06.

## IV.

In Part III, I argued that institutional norms of unanimous decision-making can reveal something significant about the Court's changing apprehension of the jurisprudential nature of law. In this Part of my Lecture, I shall consider what practices of opinion writing can tell us about the Court's understanding of its own institutional authority. I shall discuss two such practices: the norm of acquiescence and the citation of scholarly law review literature.

### A.

A major justification for the norm of acquiescence was the need to preserve the authority of the Court. When progressives in the 1920s attacked judicial review, they pointed to dissent as evidence that the Court's decisions were not compelled by legal necessity and that they therefore represented a form of political judgment best left to "the legislature."[267] At issue in this form of attack, as Taft rightly understood, was "the prestige of the Court,"[268] which derived from its prerogative to pronounce law. Unanimity preserved the appearance of legal compulsion, which is why Canon 19 recited that "solidarity of conclusion" was prerequisite to preserve the "influence of judicial decision."[269] It was precisely this sense of "influence" that Chief Justice Warren sought to summon thirty years later when he struggled to make *Brown v. Board of Education*[270] into a unanimous decision.

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[267] Jackson Harvey Ralston, supra note 155, at 565.

[268] Letter from William Howard Taft to Willis Van Devanter, December 26, 1921 (Van Devanter Papers).

[269] Canon 19, supra note 55.

[270] 347 U.S. 483 (1954).

The norm of acquiescence aspired to achieve the "influence" of unanimity for as many of the Court's decisions as was possible. The norm was thus justified not only by a particular account of law, but also by the effort to maintain the institutional authority of the Court.[271] That is why figures like Taft, who fervently believed in the institutional primacy of the Court, were so infuriated by dissent. "The three dissenters act on the principle that a decision of the whole Court by a majority is not a decision at all, and therefore they are not bound by the authority of the decision, which if followed out would leave the dissenters to be the only constitutional law breakers in the country."[272]

The relationship between judicial authority and the norm of acquiescence was recognized early on. In 1898 *The Albany Law Journal* conceptualized dissent as appealing over the head of the Court directly to "the people." But, the *Journal* asked, "what can the people do?"

> A dissenting opinion is to some extent an appeal by the minority – from the decision of the majority – to the people. What can the people do? They can't alter it; they can't change it; right or wrong, they must respect and obey it. Why shake the faith of the people in the wisdom and infallibility of the judiciary? Upon the respect of the people for the courts depends the very life of the Republic.[273]

The passage is remarkable because it constructs such a strict opposition between the "courts," which pronounce law, and the "people," whose duty is to "respect and obey" the law. Dissent is useless, *The Albany Law Journal* argues, because the attitudes of the people bear no connection to the construction of law. This sharp distinction is

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[271] "Being out-voted the minority does not accept the judgment of the majority, but appeals to the judgment of the profession and to the lay public for vindication, thereby sowing the seeds of discontent." J.W. Sturgis, "Majority Abdication," 9 *ABAJ* 815 (December 1923).

[272] Letter from William Howard Taft to Henry L. Stimson, May 18, 1928 (Taft Papers) (Reel 302).

[273] "Evils of Dissenting Opinions," supra note 247, at 75.

underwritten by a rigid contrast between law and politics. Discontent with judicial decision-making is deemed irrelevant because courts are imagined as implementing the law, and the law is conceived as entirely distinct from popular will.

Such a crude distinction between courts and the people, between law and politics, is very difficult to sustain in a democracy. But if the authority of the Court flows from its prerogative to pronounce law, and if the law declared by the Court depends to some extent upon the popular will, then a norm of acquiescence which precludes a potentially dissenting justice from appealing to the people can come to seem merely arbitrary and autocratic. This is because "the reputation and prestige of a court—the influence and weight that it commands—depend on something stronger and more substantial than an illusion" of "absolute certainty and of judicial infallibility."[274] The reputation and prestige of the Court must instead depend upon the Court's institutional ability correctly to discern the law, which is to say correctly to discern so much of the popular will as underlies the law. To the extent that popular will is itself formed through processes of public discussion in which the Court itself plays a part,[275] the suppression of dissent can come to seem equivalent to the arbitrary foreclosure of public dialogue. The logic advanced by *The Albany Law Journal* is thus radically inverted.

By the 1940s, after the constitutional crises of the New Deal focused national attention on democratic control of the Court, there were Justices who were prepared to argue that democracy itself justified the practice of addressing dissents to the general

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[274] Fuld, supra note 241, at 928.

[275] For a discussion of the dialectical relationship of the Court to the popular will that sustains law, see Robert Post and Reva Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L. J. 442, 513-517 (2000).

public. William O. Douglas explicitly conceptualized dissent as a form of political speech, so that a judge's right and obligation to dissent was like the freedom of speech exercised by any citizen:

> Disagreement among judges is as true to the character of democracy as freedom of speech itself. . . .
>
> Democracy, like religion, is full of sects and schisms. . . . No man or group of men has a monopoly on truth, wisdom or virtue. An idea, once advanced for public acceptance, divides like an amoeba. . . .
>
> The truth is that the law is the highest form of compromise between competing interests; it is a substitute for force and violence . . . It is the product of attempted reconciliation between the many diverse groups in a society. The reconciliation is not entirely a legislative function. The judiciary is also inescapably involved. When judges do not agree, it is a sign that they are dealing with problems on which society itself is divided. It is the democratic way to express dissident views. Judges are to be honored rather than criticized for following that tradition, for proclaiming their articles of faith so that all may read.[276]

Because "no . . . group of men has a monopoly on truth," Douglas conceives Justices of the Court as "proclaiming their articles of faith," rather than as participating in the institutional and authoritative pronouncement of the law.[277] The distinction between law and politics is effaced, as is any account of the distinct institutional authority of the Court.[278] From this perspective it is only a short step to conceive dissent as, in the words of Justice Brennan, a contribution "to the marketplace of competing ideas."[279] There is no doubt that some such transformation has contributed to the transformation of the Taft

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[276] Douglas, supra note 266, at 105-06.

[277] See, e.g., Jesse W. Carter, Dissenting Opinions, 4 Hast. L. J. 118, 118 (1953) ("The right to dissent is the essence of democracy."); id. at 123 ("Freedom of speech is one of the greatest rights guaranteed to the individual by the bill of Rights and is an essential ingredient of any democracy. It applies no less to the dissenting judge than it does to the average citizen. . . . [T]he same right to freedom of expression should be accorded judges as is accorded legislators or the executive in their respective field.").

[278] See, e.g., Richard B. Stephens, The Function of Concurring and Dissenting Opinions in Courts of Last Resort, 5 U. Fla. L. Rev. 394, 400 (1952) ("Freedom of expression for the appellate judge is closely related to the constitutional guarantee of freedom of speech.").

[279] William J. Brennan, In Defense of Dissents, 37 The Hastings L. J. 427, 435 (1986).

Court's norm of acquiescence into an ethic "of individual expression."[280] To the extent that the norm of acquiescence was understood to uphold the Court's prestige as the unique voice of the law, the collapse of the norm can illuminate the shifting boundary between law and politics.

**B.**

Although La Follete's frontal assault on judicial review might be understood as a claim that constitutional meanings were to be democratically determined, his efforts did not strike a responsive chord within the Taft Court.[281] What may be described as the Court's liberal wing was not tempted to deny the distinction between law and politics. The problem from their perspective was not that there was no law for the Court to apply, but that the Court was applying the law incorrectly. The audience for their dissent was thus typically those who were able expertly and accurately to comprehend the requirements of the law. At least that is how Stone framed the question in 1942, when he observed that the appeal of "a considered and well stated dissent . . . can properly be only to scholarship, history and reason, and if the business of judging is an intellectual process, as we are entitled to believe that it is, it must be capable of withstanding and surviving these critical tests."[282]

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[280] O'Brien, supra note 129, at 107.

[281] Although Brandeis was widely rumored to be La Follette's first choice for a Vice Presidential running-mate, see "La Follettee To Run For Presidency As Progressive; Brandeis May Be Choice for Vice Presidential Nomination at Cleveland Conference. Offer To Be Made Today," New York Times, July 3, 1924, at 1, even Taft believed that despite Brandeis's manifest sympathy for La Follette, Brandeis "would not go so far as La Follette with reference to the abolition of the power of the Court." Letter from William Howard Taft to Max Pam, September 12, 1924 (Taft Papers) (Reel 267). Brandeis seems to intimate as much in his letter to Felix Frankfurter of June 16, 1922. See Brandeis-Frankfurter Letters, supra note 89, at 103.

[282] Stone, "Dissenting Opinions, supra note 264, at 78.

Unlike Douglas, who postulated the general public as the audience for dissent, Stone imagined dissent as addressed to those in a position to evaluate the technical, "critical" work of judging, which is not reducible to mere political will. As he wrote to Frankfurter, in a letter sadly wondering whether "dissenting has any utility beyond enabling the dissenter to live comfortably with himself,"[283] "I take some comfort . . . to know that there are those who study our work with painstaking care and appreciate its significance."[284] But whereas in the 19th Century such an audience of experts would have been located in the practicing "profession,"[285] Stone looked in a very different direction. He looked toward the institution of legal "scholarship."

The Court's struggle to establish a relationship with legal scholarship during the 1920s nicely illuminates the tensions underlying the Court's claim of authority to define federal law. If a dissent addressed over the head of the Court to the general public called

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[283] To which Stone added, "But that is sufficient justification for me." Letter from Harlan Fiske Stone to Felix Frankfurter, January 16, 1930 (Stone Papers),

[284] Id.

[285] So, for example, the editors of *The American Law Review* argued in 1886 that "the practice of writing dissenting opinions" ought not to be prohibited by legislation, because:

> [I]t has always been recognized that judicial decisions which merely announce conclusions of law, without either referring to *authority* for such conclusions or offering reasons in support of them, carry little weight. If mere legislation is the office of the courts, they would carry the weight which an act of legislation carries. Experience, we take it, shows that judicial decisions which are neither founded on authority nor on sound reasoning are never allowed to remain unquestioned by the profession. Cases are known where such decisions, always unsatisfactory to the profession, have been constantly assailed and finally overthrown after the lapse of many years. It is the office of the judge who writes a judicial decision to give the reasons upon which the court proceeds. The proper administration of justice is not satisfied with anything else. If these are omitted, the judgment becomes a mere arbitrary exercise of power. If it is the office of the judicial courts to furnish the reasons which the court gives for its decision, it cannot be affirmed with any show of logic that it is not equally their office to furnish the reasons which a portion of the court may give for the opposing view.

"Dissenting Opinions," 20 Am. L. Rev. 428, 429 (1886).

into question the Court's institutional prerogatives by blurring the boundary between law and politics, a dissent addressed over the head of the Court to the legal academy called into question the Court's unique competence to articulate law. Struggle over this issue is apparent not only in the willingness of dissenters to appeal to the scholarly literature of the legal academy, but in the Court's intolerance of such citations in its own majority opinions.

The emergence of legal academia as a potential threat to the status of the Court was in the 1920s a relatively recent phenomenon.[286] Writing in 1931, Cardozo discussed "the old prejudice" against "law teachers." "For a long time," he remarked, "the practicing lawyers, and the judges, recruited for the most part from the ranks of the practitioners, were suspicious that there would be a loss of practical efficiency if the teachers in the universities were not made to know their place."[287] But he noted that "[w]ithin the last ten or fifteen years the conspiracy of silence has been dissolving" due to "a disturbance of the weights of authority and influence":

> Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities. . . . [T]he outstanding fact is . . . that academic scholarship is charting the line of development and progress in the untrodden regions of the law.[288]

In 1926 Learned Hand, speaking to an audience of academics, confirmed "that you will be recognized in another generation anyway, as the only body which can be relied upon to state a doctrine, with a complete knowledge of its origin, its authority and

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[286] On the tension between the judiciary and the new profession of legal academia, see Jerold S. Auerbach, Unequal Jusice: Lawyers and Social Change in Modern America 91-92 (1976).

[287] Benjamin N. Cardozo, Introduction, Selected Readings on the Law of Contracts from American and English Legal Periodicals viii-ix (Association of American Law Schools ed. 1931).

[288] Id. at ix.

its meaning."[289] By 1941 Charles Evans Hughes could remember the days "thirty years" before when "Mr. Justice Holmes would refer somewhat scornfully to the 'notes' in law school reviews which ventured, not always with modesty, to criticise pronouncements of the Supreme Court. I recall that at one time he admonished counsel who had the temerity to refer to them in argument that they were merely the 'work of boys,' He thought the limit had been reached when what he had said in his judicial opinions was approved by the students as being 'a correct statement of the law.'"[290] But now, Hughes explained, matters were quite different. "It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical."[291]

Stone's turn to legal academia was thus not the idiosyncratic response of a former Dean of the Columbia Law School. It reflected the fact that law schools had become a "'fourth estate' of the law,"[292] bringing to bear a breadth and depth of comprehension that palpably competed with judges for the mantle of expert authority. This was an authority that clearly appealed to Brandeis, who expressed to Frankfurter his conviction that "much of the best and original legal thinking in America during the last generation is to

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[289] Learned Hand, Have the Bench and Bar Anything to Contribute to the Teaching of Law?, 24 Mich. L. Rev. 466, 468 (1926).

[290] Charles Evans Hughes, Foreword, 50 Yale L. J. 737, 737 (1941). When Stone circulated the draft of his opinion in *Raffel v. United States*, 271 U.S. 494 (1926), Holmes remarked on Stone's citation of a Harvard Law Review note: "If this is one of those editorial notes, I should not cite it." (Stone Papers). Stone, however, refused to remove the citation. 271 U.S. at 499.

[291] Hughes, supra note 290 at 737.

[292] Id.

be found in the law journals."[293] Brandeis believed that "law schools ought not to let Ct get by—country ought to insist on quality,"[294] and in dissent he would explicitly cite law review articles to sustain conclusions like: "[H]elpful discussion by friends of the court, have made it clear that the rule declared is legally unsound."[295]

If a dissent addressed to the general public challenged the Court's authority by blurring the very meaning of "law," a dissent addressed to the expertise of legal academia challenged the Court's authority in a different way. It posed the issue of whether judges or academics would control the articulation of law. Holmes saw this very clearly. He once identified the authority of the Court as "something ultra academic – I do not mean academic in the extreme but beyond academic considerations," and he was highly ambivalent about this authority:

> I have sometimes criticised the Harvard Law Rev. for the offhand and august way in which it says that a case may be supported or cannot be. After all there is something ultra academic – I do not mean academic in the extreme but beyond academic considerations – in the opinions of an experienced Judge. And the young men of a law school don't realize that. But of course a judicial opinion like

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[293] Brandeis-Frankfurter Letters, supra note 89, at 121. Brandeis continued: "It is, in the main, inaccessible to the bench and the bar. Now that the law journals have become an incident of the law schools of the Universities, the number of valuable contributions should increase rapidly. Would it not be desirable that the Law Schools should cooperate in publishing an Index covering all valuable articles, which have appeared during the last 35 years . . . and arrange for supplements to be published annually thereafter? The fact that articles would be thus made accessible should tend to encourage production."

[294] *The Brandeis-Frankfurter Conversations,* supra note 71, at 309. Brandeis emphasized to Zechariah Chafee "the value of a Law School professorship, as a fulcrum in efforts to improve the law and through it, society." IV The Letters of Louis D. Brandeis 564 (Melvin I. Urofsky & David W. Levy eds. 1975).

[295] Washington v. Dawson & Co., 264 U.S. 219, 236 & n. 18 (1924) (Brandeis, J., dissenting). Fifteen years after *Dawson & Co.*, Brandeis's dissenting appeal to the usefulness of law review literature would evolve in the hands of his protégé Frankfurter into a Court opinion that could overrule a precedent (*Evans v. Gore*, 253 U.S. 245 (1920)) on the basis of a frank avowal that: "The decision met wide and steadily growing disfavor from legal scholarship and professional opinion." O'Malley v. Woodrough, 307 U.S. 277, 281 (1939). In dissent, Butler grumbled that as against "the deliberate judgments of this Court" Frankfurter could adduce only the "selected gainsaying writings of professors,--some are lawyers and some are not—but without specification of or reference to the reasons upon which their views rest. And in addition it cites notes published in law reviews, some signed and some not; presumably the latter were prepared by law students." Id. at 298 (Butler, J., dissenting).

> a scientific one must stand or fall on its reasons not on dogma, but as the legal premises are not qualified with the accuracy of science, and as the main justification of the law in my opinion is the fact that it has come out this way rather than some other which so far as I can see is equally good, I think the decisions of an important Court must command a certain respect because it is a decision and the opinion of experienced men, whether it seems right academically or not. Of course you won't think that this means I am getting personally into a noli me tangere frame of mind. I welcome every criticism from logic to English, and try to learn from it. But if anyone is to dogmatize it must be the man in power not the law student.[296]

Holmes was torn between conceiving the authority of courts as flowing from their capacity to announce the arbitrary dicta of the state, and conceiving their authority as resting instead on the validity of their "reasons."[297] On the first view, the authority of an opinion is "beyond academic considerations;" its judgment "must command a certain respect because it is a decision." On the second, the authority of an opinion must "stand or fall on its reasons," and the authority of a Court's decisions are accordingly made subject to the evaluation of those whose experience and insight are capable of applying what Stone called the "critical tests" of judgment.[298] A judgment of the Court must earn respect because it is right, rather than merely command respect because it is a decision. Holmes could never quite reconcile the conflict between these two perspectives.

Because Holmes himself believed that the understanding of an "experienced Judge" could not be rivaled, he was not himself tempted to appeal to the realm of legal

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[296] Letter from Oliver Wendell Holmes to John Henry Wigmore, May 17, 1906 (Holmes Papers) (Reel 39, Frame 15).

[297] A.W.B. Simpson finds an analogous tension between "a concept of law rooted in reason, and one rooted in authority" in the genre of the legal treatise. See A.W.B. Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. Chi. L. Rev. 632, 665 (1981). Simpson associates the latter view of law with "the spirit of positivism." Id. at 668. See also Collier, supra note 48, at 215-223 (distinguishing "institutional authority from intellectual authority").

[298] Stone, "Dissenting Opinions," supra note 264, at 78.

scholarship in his opinions or dissents.[299] But Justices like Stone and Brandeis had come to Hand's view that judges "have little opportunity to go into questions as thoroughly and as scientifically as can those engaged in research in the universities,"[300] and they therefore had greater reason to appeal to the authority of legal academia. The implicit challenge to the Court's authority entailed in this appeal to academic expertise did not go unnoticed. It was in fact the site of determined struggle throughout the 1920s.

Although Taft, as a sophisticated former Yale law professor, was perfectly capable of writing to the Secretary of the *Yale Law Journal* to congratulate him "on the growing prestige" of the publication and to commend him on the Journal's doing "great good in considering carefully and discussing freely and frankly and criticising the opinions of the Courts,"[301] in fact the implicit threat to the Court's institutional position rankled him. He dismissed articles attacking the Court's decisions as "the way the academicians . . . get even with us."[302] When the erstwhile Solicitor General James M.

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[299] See Figures 26-28.

[300] Letter from Harlan Fiske Stone to Hessel E. Yntema, October 24, 1928 (Stone Papers).

[301] "It helps the cause of justice, and it helps the courts; and while there may be differing opinions as to the particular criticism and its soundness, this does not in the slightest degree detract from its usefulness." Letter from William Howard Taft to A.G. Gulliver, February 6, 1922 (Taft Papers) (Reel 239).

[302] Letter from William Howard Taft to Horace Taft, January 7, 1929 (Taft Papers) (Reel 307). The oddly disjunctive relationship between Taft and the legal academy is nicely captured by the occasion when Roscoe Pound asked Taft to consent to be interviewed by Pound's student Olson for the purpose of legal research. Taft graciously accepted, and then wrote Pound this account of the interview:

> Mr. Olson presented your letter of introduction of December 24th. I am afraid I was not very helpful to him. I don't quite understand what his particular purpose was. You describe it and he describes it as the investigation of the psychology of judicial decisions. So far as he developed it to me, it was to read me a criticism of my opinions and to question their reasoning, and then to invite my dissent or answer to his criticisms. Of course I could not spend my time meeting criticisms of my opinions and arguing them out with a law student. Just what kind of a study in psychology he was engaged in, other than that of the use of his reasoning powers to assault the opinions of our Court, I was unable to see. Of course it is the right of every law student . . . to read opinions and to approve or question their soundness, but I am sorry that I haven't the time to give to Mr. Olson the opportunity to practice his psychological research by defending each one of

Beck sent Taft an academic article criticising Taft's opinion in *Myers v. United States*,[303] Taft dryly noted "that another Commission of University Professors is engaged in reversing the Supreme Court. The continuance of the discussion is not a matter which causes me to sit up nights."[304]

Underlying the irony lay real anger. That members of the Court would abet an assault on the Court's authority by pandering to academic expertise was almost intolerable to Taft. Near the end of his life, Taft dismissed Stone because "he hungers for the applause of the law school professors and the admirers of Holmes."[305] Taft's ire at Brandeis's dissent in *Olmstead v. United States*,[306] a case holding that the Fourth

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> my opinions which he happens to differ with. I, therefore, asked him to excuse me from what I really did not have time for. Of course it is the privilege of every student and every American citizen to question the opinions of a Court, but it is hardly the duty – perhaps it is hardly proper – for the Judge who has written them, to supplement what he may have said in his opinions and to sustain the correctness of his conclusions by further discussion of them with young gentlemen pursuing their research.

Letter from William Howard Taft to Roscoe Pound, January 3, 1924 (Taft Papers) (Reel 260).

[303] 272 U.S. 52 (1926). Letter from James M Beck to William Howard Taft, October 24, 1929 (Taft Papers) (Reel 315). Beck observed, "As often, the College Professors attempt to reverse the Supreme Court."

[304] Letter from William Howard Taft to James M Beck, October 25, 1929 (Taft Papers) (Reel 315). When Milton Handler, fresh from his clerkship with Stone, sent Taft a copy of Handler's article that had just appeared in the *Columbia Law Review*, he evinced full awareness of the strained relationship between legal academia and the Court:

> I suppose that the chief raison d'etre of an article is the sublimation of the ego of the writer, and how else can this be done but by a restrained criticism of Judicial opinion. Only by showing the Courts to be wrong can the author display his own unparalleled wisdom. I fear that in this paper I fall into this pattern of law writer. While somewhat critical of the work of the Court, I have tried to approach the problem in a truly impartial and scientific way and I hope that my study will be of some value in this field.

Letter from Milton Handler to William Howard Taft, November 19, 1928 (Taft Papers) (Reel 306). Taft replied graciously thanking Handler for the article, adding that "We are always glad to be advised by academic leaders." Letter from William Howard Taft to Milton Handler, November 23, 1928 (Taft Papers) (Reel 306).

[305] Letter from William Howard Taft to Horace Taft, June 8, 1928 (Taft Papers) (Reel 302).

[306] 277 U.S. 438 (1928).

Amendment provided no protection against wiretapping, modulated easily into resentment at the scholars for whom Brandeis wrote: "His claques in the law school contingent will sound his praises and point the finger of scorn at us, but if they think we're going to be frightened in our effort to stand by the law and give the public a chance to punish criminals, they are mistaken, even though we are condemned for lack of high ideals."[307]

Part of this anger was no doubt due to the fact that the strained relationship between the Court and the law schools had become entangled with factional divisions within the Court itself. Not only were "the dissenting minority of three"[308] lionized in the law journals,[309] which must have been personally galling,[310] but the progressive cast of American legal academia in the 1920s was quite hostile to the conservative constitutional vision that the majority of the Court was seeking to implement.[311] "I have no doubt,"

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[307] Letter from William Howard Taft to Horace Taft, June 8, 1928 (Taft Papers) (Reel 302). Four days later, Taft confided to his brother that "I shall continued to be worried by attacks from the academic lawyers who write college law journals but I suppose it is not a basis for impeachment." Letter from William Howard Taft to Horace Taft, June 12, 1928 (Taft Papers) (Reel 302).

[308] Letter from William Howard Taft to Horace Taft, December 1, 1929 (Taft Papers) (Reel 316).

[309]It was a noteworthy occasion when every so often a favorable article appeared in the law journals. See, e.g., Letter from William Howard Taft to Willis Van Devanter, January 12, 1929 (Taft Papers) (Reel 307) ("I call your attention to the fact that once in a while even the Yale Law Journal thinks that the opinion of the majority of the Court should be sustained."). See also Letter from Dean Joseph R. Long to William Howard Taft, December 10, 1922 (Taft Papers) (Reel 248) (enclosing article praising Taft's opinion in the Child Labor Tax Case, 259 U.S. 20 (1922)); Letter from William Howard Taft to Dean Joseph R. Long, December 12, 1922 (Taft Papers) (Reel 248) ("I appreciate much your article."); Letter from Henry St. George Tucker to William Howard Taft, December 11, 1922 (Taft Papers) (Reel 248) (calling Taft's "attention" to the "very interesting" Long article).

[310] Thus when Taft began a campaign to persuade Yale to grant Willis Van Devanter an honorary degree, praising Van Devanter as "one of the ablest Judges that we have ever had on the Court," Taft was forced to explain Van Devanter's relative public obscurity by the fact that "He has not what some of our Judges have by reason of their relations to Law Schools – a claque who are continually sounding their praises, but when it comes to keeping the Court straight and consistent with itself, he is the man who does it." Letter from William Howard Taft to William Phelps, May 30, 1927 (Taft Papers) (Reel 292).

[311] Jerold S. Auerbach has written that "In the two decades preceding World War I a sense of public responsibility and an identification with political reform provided law teachers with their special identity."

Taft wrote his brother, "there is persistent hope, especially by the younger crowd of college professors, that in some way or other Holmes will be continued on the Court

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Auerbach, supra note 286, at 81. See Jerold S. Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900-1922," 5 Perspectives in American History 551 (1971). Taft was particularly outraged by mobilization within the law schools over the Sacco and Vanzetti case. He wrote an unsolicited letter to the President of Yale University complaining of the involvement of the law faculty in protesting the convictions:

> I don't know how much influence you can exercise with respect to the Yale Law School, but I am a good deal troubled in respect to something I have seen in the newspapers. The Harvard Law School is suffering from the exercise of influence upon it by Felix Frankfurter. He seems to be closely in touch with every Bolshevistic communist movement in this country. I know him very well. He is a man of ability and can be in certain directions quite useful, but for some reason or other he is against courts and recognized authority, a very bad tendency in a college law professor. I don't know anything about this criminal prosecution of two Italians . . . . I have no objection to the criticism of judicial opinions or judicial judgments – That is necessary. Nor have I any objection to this by professors of law schools, because they are competent men and may often exercise a very useful influence upon judges to help the science of the law, but I think it quite unwise for a law school of Connecticut, far removed from the situation, to have its Dean and Professors join in a public meeting and protest against the conduct of litigation in another State and second an article by Frankfurter. I don't know that anything can be done about the further activities of Dean Hutchins in this matter, but I think it would be wise to talk to him on the subject and say that as the Dean of the Law School he should restrain himself and not rush in, as he evidently has, and put the Law School, of which he is the head, in such a movement which involves the weighing of facts as well as of law, and relates to a trial which took place when Hutchins must have been a boy. . . . [M]y interest in Yale makes me feel that I am justified in suggesting to you that you restrain Hutchins . . . .

Letter from William Howard Taft to James R. Angell, May 1, 1927 (Taft Papers) (Reel 291). See "Yale Liberals Defend Sacco and Vanzetti; Review of Conviction Urged by Dean Hutchins, Professor C.B. Clark and Others," The New York Times, April 30, 1927, at 23; cf. Robert M. Hutchins, "Cross-Examination to Impeach," 36 Yale L. J. 384 (1927). For Angell's cool reply, see Letter from James R. Angell to William Howard Taft, May 3, 1927 (Taft Papers) (Reel 291). The following week Taft complained to Elihu Root:

> I think our Law Schools might be about better business than attempting to decide how trials ought to be conducted in capital cases in old Massachusetts, without other knowledge of the record than that derived from a magazine article by Prof. Felix Frankfurter, who has become an expert in attempting to save murderous anarchists from the gallows or the electric chair. I don't like to characterize any great profession, but I think the profession of law teacher, as well as the clerical profession, does not always exercise the best judgment in keeping out of fields in which they are apt to make egregious mistakes.

Letter from William Howard Taft to Elihu Root, May 12, 1927 (Taft Papers) (Reel 291). After Sacco and Vanzetti's execution, Taft wrote to one of Massachusetts Governor Fuller's advisors in the case that "It is remarkable how Frankfurter with his article was able to present to so large a body of readers a perverted view of the facts and then through the world wide conspiracy of communism spread it to many many countries. Our law schools lent themselves to the vicious propaganda. The utter lack of substance in it all is shown by the event. It was a bubble and was burst by the courage of the Governor and his advisors." Letter from William Howard Taft to Robert Grant, November 4, 1927 (Taft Papers) (Reel 296).

while the rest of us die off."[312] Of the unremitting criticisms of legal scholars, Taft remarked that "these gentlemen are so much torn by their anxiety about the Supreme Court that it is a wonder we are able to survive it."[313]

When the occasional academic dared to trespass upon the boundaries of judicial prerogative, the reaction of Taft and other Justices could be swift and murderous, as Stone learned to his chagrin in 1927. After the Court decided *Liberty Warehouse Co. v. Grannis*,[314] which held that federal courts had "no jurisdiction" to proceed in a diversity suit according to the terms of "the Declaratory Judgment Law of Kentucky,"[315] Professor Edwin Borchard of the Yale Law School, long a passionate advocate of a federal declaratory judgment statute,[316] wrote to Stone to express his concern that the Court "has recently taken what I believe to be a very unfortunate `sideswipe' at the declaratory judgment as a procedural method for challenging the constitutionality of a statute."[317] He

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[312] Letter from William Howard Taft to Horace Taft, December 8, 1929 (Taft Papers) (Reel 316). In 1930 Van Devanter's intimate friend, district judge John C. Pollock, wrote him that "I notice in a recent Law Review very high commendation of the legal opinions, more especially dissenting opinions, of a couple of gentlemen, you will readily realize to whom I refer. I cannot understand this and do not appreciate the viewpoint from which they are written. I apprehend you have seen the same. I begin to think every once in a while that as we grow older we grow out of touch with a lot of ideas that some people appreciate very highly, but which will not work out in practice." Letter from John C. Pollock to Willis Van Devanter, April 17, 1930 (Van Devanter Papers).

[313] Letter from William Howard Taft to Moses Strauss, February 19, 1929 (Taft Papers) (Reel 308). Taft brushed off Edward Corwin's criticisms of Taft's opinion in *Bailey v. Drexel Furniture Co.*, 259 U.S. 29 (1922), characterizing them as the objections "of the class not of lawyers but of government philosophers who think that the Constitution ought to be moulded to suit their particular sociological views as they may vary from time to time." Letter from William Howard Taft to Horace Taft, September 7, 1922 (Taft Papers) (Reel 245).

[314] 273 U.S. 70 (1927).

[315] Id. 76.

[316] See, e.g., Edwin M. Borchard, Declaratory Judgments (1919); Edwin M. Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. J. 1, 105 (1918); Edwin M. Borchard, The Declaratory Judgment, 25 The New Republic 192 (January 12, 1921).

[317] Letter from Edwin M. Borchard to Harlan Fiske Stone, February 4, 1927 (Stone Papers). *Grannis* was decided on January 3, 1927.

explained to Stone that he was "writing a comment on the case, and on the dangers to the declaratory judgment involved in it, for the Yale Law Journal," and asked if it would be "proper" for him to send it "to each member of the Court."[318]

Stone replied that "I would say that I think it would be quite in order for you to send your article in the Law Journal to all the members of the Court."[319] Borchard accordingly sent a copy of his Comment to each Justice,[320] with an accompanying letter that politely referred to the inadequacy of the reasoning in *Grannis* and suggested that occasion be taken, "if you find it consistent, to prevent the unfortunate result to which the Court's opinion . . . may easily lead."[321] Borchard sent a copy of his letter to Stone,

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[318] Id.

[319] Letter from Harlan Fiske Stone to Edwin M. Borchard, February 7, 1927 (Stone Papers). For Borchard's reply, see Letter from Edwin M. Borchard to Harlan Fiske Stone, February 9, 1927 (Stone Papers). At the time Stone was writing the Court's opinion in *Fidelity Nat. Bank & Trust Co. v. Swope*, 274 U.S. 123 (1927), in which the Court in effect upheld federal jurisdiction of a state declaratory judgment. Stone had been assigned *Swope* at the end of January when Taft, "[i]n the redistribution of cases to help out our dear friend Van, because of his near breakdown," asked that Stone take over the case. Letter from William Howard Taft to Harlan Fiske Stone, January 26, 1927 (Stone Papers). Taft added: "All the members of the Court voted to reverse the case except McReynolds, who was passed. Your forced familiarity with questions of this kind in the St. Louis case, [Missouri v. Public Service Comm'n, 273 U.S. 126 (1927)], which you were not able to use in the opinion handed down recently, may prove to be of use to you in this case. I hope so." Id. *Swope* issued on April 11, 1927. Van Devanter adjudged it "a fine opinion, judicial through and through. Enriches straight from the beginning to the conclusion." (Stone Papers). Taft also thought it "a good opinion." (Stone Papers). On April 29 Walter Wheeler Cook wrote Stone to congratulate him on the *Swope* opinion, confessing that *Grannis* had "alarmed me greatly. I feared the court was getting into a position where it would find itself bound to hold a federal declaratory judgment statute unconstitutional as giving non-judicial power." Letter from Walter Wheeler Cook to Harlan Fiske Stone, April 29, 1927 (Stone Papers). Stone replied to Cook that "I was not a little troubled when I came to write" *Swope* "about some of the things that had been said about what is a `case' or `controversy' or `judicial power' within the meaning of the Constitution." Letter from Harlan Fiske Stone to Walter Wheeler Cook, May 2, 1927 (Stone Papers).

[320] Edwin M. Borchard, Declaratory Actions as "Cases" or "Controversies," 36 Yale L. J. 845 (1927).

[321] In full, the letter said:

> I venture to ask your consideration of this Comment, which deals with the decision of the Supreme Court in the case of Liberty Warehouse Co. v. Grannis . . . . In that case, the Court, speaking through Mr. Justice Sanford, held, or intimated that the declaratory judgment procedure, now adopted by statute in some twenty-one states, was unconstitutional, because it did not present a "case" or "controversy". This conclusion is not, I respectfully venture to think, justified by the

together with a note explaining what he had done and observing that "It would be too bad if, through an inadvertence, such a useful procedure as the declaratory action should be strangled. I trust you will be convinced that this is so, and will use your influence in the Court to obtain some reconsideration of the procedure in question."[322]

Three days later Stone wrote Taft to express his concern about *Grannis*:

> I think we will have in increasing measure statutes like those involved in . . . the Grannis case . . .and that we ought to be extremely cautious about limiting the utility of such statutes.
>
> I have been troubled about the decision in the Grannis case for that reason and my sense of discomfort has not been allayed by reading in the April number of the Yale Law Review, at page 845, a comment on the Grannis case which expresses my own doubts about it.
>
> I don't know how you or any of the other members of the Court would feel about reopening the question in the Grannis case, but I think that there is some ground for giving the question some thought.[323]

To Stone's evident surprise, Taft responded in a white fury:[324]

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> facts, and I have, in the Comment referred to, expressed the opinion that the question was not adequately argued before the Court. I would not dare trouble you with my views on this matter, but for the fact that I believe that the opinion of the Court, which may or may not have been dictum, threatens with extinction, on insufficient grounds, what, in my opinion, is one of the most useful procedural reforms of recent years . . . . I trust you will be kind enough to give this matter your consideration, and perhaps take some occasion, if you find it consistent, to prevent the unfortunate result to which the Court's opinion in the Liberty Warehouse case may easily lead. I beg also to call your attention to the April (1927) Harvard Law Review (page 903), in which the editor appears to share the subscriber's view of the effect of the Court's decision in the Liberty Warehouse case.

We have extant the letters that Borchard sent to Van Devanter, Taft, Sanford, and Sutherland. They are identical. See, e.g. Letter from Edwin M. Borchard to William Howard Taft, April 15, 1927 (Taft Papers) (Reel 290). Taft's copy is marked "No ans."

[322] Letter from Edwin M. Borchard to Harlan Fiske Stone, April 15, 1927 (Stone Papers).

[323] Letter from Harlan Fiske Stone to William Howard Taft, April 18, 1927 (Taft Papers) Reel 290). On Taft's daily memorandum of things to do for April 21, 1927, the fourth item on the list reads: "Take up Borchard's letter." (Taft Papers) (Reel 290).

[324] Taft held very definite views of Borchard prior to this incident. In 1924 Nicholas Murray Butler had written Taft asking for recommendations for an international law scholar to replace John Bassett Moore at Columbia. Taft replied in most unpleasant terms:

> There is a man who has had a good deal of experience in international matters, who is now the Law Librarian at Yale. His name is Edwin Borchard. He has gotten up a compendium on a phase

> Replying to your letter of April 18th and the question of declaratory judgments raised by Borchard *in his general assault upon the Court by letter*, I am inclined to think that I had better allow the thing to proceed just as it is until somebody raises the question again. *Borchard has aroused the indignation of the members of the Court at his method of attempting to induce the Court to reconsider or rehear the issue in which he is so much interested. Our brother Butler was particularly incensed.* I haven't answered Borchard's letter, and I am rather inclined not to do so. If I did, I might have to write him a disciplinary letter. It is burdensome to do so.[325]

Flustered, Stone retreated, writing Taft a letter agreeing that "there is nothing to be done further at present upon the subject matter of the Liberty Warehouse case;"[326] repeating

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> of international law which I think has been well regarded. But I think he has reddish tendencies and I doubt if you would wish to take him over. He is Hebraic in look, and I have no doubt in fact. He is always for the Brandeis view of every constitutional question. I lodged a complaint with Swan against having him instill in the minds of the Yale Law School men that spirit of constitutional construction, for I believe that they have been using him on the subject of Federal Constitutional Law.

Letter from William Howard Taft to Nicholas Murray Butler, December 30, 1924 (Taft Papers) (Reel 270).

[325] Letter from William Howard Taft to Harlan Fiske Stone, April 24, 1927 (Taft Papers) (Reel 291) (Emphasis added). The following year the Court decided *Willing v. Chicago Auditorium Ass'n*., 277 U.S. 274 (1928), in which Brandeis, in his opinion for the Court, offhandedly remarked (citing *Grannis*) that a declaratory judgment "is beyond the power conferred upon the Federal judiciary." Id. at 289. Taft responded to Brandeis's draft opinion: "Borchard will moan but he can not by tears change our jurisdiction." (Brandeis Papers). On Brandeis's personal dislike of declaratory judgments and campaign against them, see Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: *Erie*, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 124-32 (2000).

Curiously enough, Taft had another run-in with Borchard at the end of the 1926 Term. In June 1927 Taft wrote the opinion for the Court in an obscure case, *Weedin v. Chin Bow*, 274 U.S. 657 (1927), which concerned the citizenship status of the children of American citizens who did not reside in the United States. Taft's published opinion, which was released on June 6, 1927, deliberately and specifically criticized a passage from Borchard's book The Diplomatic Protection of Citizens Abroad (1927), charging that it relied on evidence that "does not bear out the conclusion to which it is cited." Taft Papers (Reel 292). Borchard instantly telegraphed Taft at his summer residence in Murray Bay, Canada, to explain that Taft's charge rested on an apparent confusion regarding the reference of various footnotes. Telegram from Edwin M. Borchard to William Howard Taft, June 9, 1927 (Taft Papers) (Reel 292). He also sent a letter worrying that Taft's accusation, which was based on "an inadvertent mistake," "might by the profession be deemed to impugn my reliability." Letter from Edwin M. Borchard to William Howard Taft, June 9, 1927 (Taft Papers) (Reel 292). See also Letter from William Crosskey to William Howard Taft, June 9, 1927 (Taft Papers) (Reel 292). After consulting with his law clerk, William Crosskey, Taft removed the offending passages. See Telegram from William Howard Taft to Charles Cropley, June 10, 1927 (Taft Papers) (Reel 292); Letter from Charles Cropley to William Howard Taft, June 30, 1927 (Taft Papers) (Reel 292); Letter from William Howard Taft to Charles Cropley, July 5, 1927 (Taft Papers) (Reel 292); 274 U.S. at 673-74.

[326] Letter from Harlan Fiske Stone to William Howard Taft, April 25, 1927 (Taft Papers) (Reel 291). But Stone added: "My experience, however, in writing the opinion in the Swope case convinces me that we ought to approach this type of question when it comes up again with the greatest caution, and that we ought

"what I said to you orally – that my writing to you on this subject was entirely on my own initiative . . . It was not inspired by Borchard's letter, as I did not receive it until the day after I had sent my letter to you;" and acknowledging that Borchard's letter "shows a lack of a sense of propriety which perhaps merits a positive rebuke, although I shall content myself by not answering it."[327] But Stone concluded his letter by returning to what was for him the central point: "I am more concerned with the thoroughness and scientific quality of our decisions and opinions than I am with the lack of propriety of others for whom we are not responsible, even though they ought to know better."[328]

Borchard so incensed the Court because he inadvertently violated the boundary separating reason from action. He not only criticized the Court's logic in *Grannis*, but he

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not to follow some of the things that have been said in earlier cases, although quite possibly we can follow what was actually decided."

[327] Id.

[328] Id. Borchard clearly had no idea of the hornet's nest he had aroused. He wrote Stone again in 1928, affirming that "the law journals . . have agreed that Judge Sanford made a mistake" in *Grannis*, and complaining of further dicta damaging to a potential federal declaratory judgment statute in *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U.S. 71 (1928). Letter from Edwin M. Borchard to Harlan Fiske Stone, March 1, 1928 (Stone Papers). He asked Stone to "to talk this matter over with the Chief Justice" and perhaps to arrange "a meeting with Judge Sanford or any of the other Judges who would aid in preventing a further disaster to the declaratory judgment." In December, ignorant of Brandeis's personal opposition to declaratory judgments, see note 325 supra, and crediting Brandeis's public professions of respect for scholarly opinion, Borchard wrote Stone once again, enclosing Borchard's latest article responding to *Willing*. Edwin M. Borchard, The Supreme Court and the Declaratory Judgment, 14 *ABAJ* 633 (December 1928).

> Justice Brandeis has, on numerous occasions, praised the function of the Law Journals in exercising a critical function upon the work of the Court. I trust he still adheres to that view. At all events, I endeavored to indicate in the article the utmost respect for the Court and its judges, but to suggest that the random remarks made concerning the declaratory judgment, being unnecessary in each of the three cases in which such remarks were uttered, were not necessarily as well considered as they might have been.

Letter from Edwin M. Borchard to Harlan Fiske Stone, December 21, 1928 (Stone Papers). Borchard noted that he had not sent a copy of his article "to any member of the Court," and he asked Stone whether it would "hurt the cause of the declaratory judgment if I sent it to [Brandeis]. Or would you hand it to him if I sent it to you?" Stone advised Borchard that "By all means I would send a marked copy of your article to each member of the Court *without any comment*." Letter from Harlan Fiske Stone to Edwin M. Borchard, December 24, 1928 (Stone Papers) (Emphasis added).

also had the impertinence to suggest that the Court might act on the force of superior reasoning. He assumed that action ought to be guided by expert knowledge. He evidenced no appreciation that the Court's unique institutional authority to declare law lay precisely in its power to decide regardless of reasons, and he was heedless of the many ways in which a claim of expert knowledge might implicitly challenge that authority. The indignation aroused by Borchard's letter demonstrates, however, that Justices of the Taft Court were keen to perceive this threat. Stone was oblivious to the incendiary potential of Borchard's letter because he also believed that the Court's authority largely depended upon the "scientific quality" of its opinions. That is why Stone could so casually cite to Taft the reasoning of legal academics as grounds for guiding Court policy, without seeming to realize just how potentially explosive such a citation could be.

It was a realization that conservative members of the Court were determined to bring home to Stone. When Stone circulated a draft opinion in *Pizitz Dry Goods Co. v. Yeldell,*[329] which concerned the constitutionality of an Alabama statute authorizing recovery of punitive damages against an employer for wrongful deaths caused by the negligent acts of employees, he cited in support of his argument an article by his former Columbia colleague Young B. Smith.[330] Butler immediately pounced. "I have hastily examined this article. You cite it generally, I think it is not helpful – certainly it is not necessary. Some having axes to grind write for Law Reviews in the attitude of advocates

[329] 274 U.S. 112 (1927). The draft seems to have circulated April 11, 1927.

[330] Young B. Smith, Frolic and Detour, 23 Columb. L. Rev. 444, 716 (1923). As it happens, Stone wrote the frontpiece of the issue in which Smith's article appeared. See Harlan F. Stone, Charles Thaddeus Terry, 23 Columb. L. Rev. 415 (1923).

or propagandists. I do not suggest anything of the sort as to Mr. Scott [sic], but the fact that others do make it at least doubtful whether this Court ought to cite such writings—At least so it seems to me."[331] Van Devanter agreed. "To me it seems quite inappropriate to cite law journals."[332] Taft also piled on. "I doubt the wisdom of reference to a Law Review."[333] Stone conceded, withdrawing the reference and writing to Smith that "Confidentially, I cited your article . . . in the Pizitz case, but some of the brethren are so opposed to citing Law Review articles that I finally took it out."[334]

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[331] Stone Papers. For a subsequent and very public attack on the Court's consideration of "unknown, unrecognized and nonauthoritative text books, Law Review articles, and other writings of propaganda artists and lobbyists" in the field of antitrust law, see Remarks of Representative Wright Patman, 103 Cong. Rec. 16159-69 (August 27, 1957).

[332] Id.

[333] Id.

[334] Letter from Harlan Fiske Stone to Y.B. Smith, April 15, 1927 (Stone Papers). Eventually Stone got the message. In 1928 he wrote his friend Hessel Yntema, about the latter's project to organize academic inquiry in a way that would be useful to courts, that "The problem of how to make use of your studies in the most effective way so that they will be of assistance to courts is not as easy as might first appear."

> Ordinarily, where a brief is filed amicus curiae, it is filed in behalf of someone who has a similar case and who will therefore be directly affected by the determination of the court. The fact that there are those who have a scientific interest in the law would seem to me to be equally good ground for getting their idea before the court, and for the court's welcoming any assistance which they will be able to give. As a matter of fact, I am bound to say that I think there are many judges who distrust all such assistance, and hesitate to use or cite it. This is based partly on the kind of self confidence which leads a certain type of mind to reject ideas that it has not evolved itself, or which do not fall within the range of its own experience, and partly on the fact that in recent years there have been some rather unpleasant examples of men who have written what purported to be scientifically inspired articles in law journals who were actually secretly serving the interests of clients. There are also judges who firmly believe that "academic" persons who have devoted their talents to research in the investigation of particular fields cannot possibly know as much about a subject as those who have had a lifelong judicial and professional experience. Of course, there are some courts which know better. The Court of Appeals, headed by Judge Cardozo, and possibly some other courts, have reached that happy stage, but that attitude is, I am convinced, not a general one among judges the country over, despite the fact that because of faulty presentation, pressure of work, etc., they have little opportunity to go into questions as thoroughly and as scientifically as can those engaged in research in the universities.

Letter from Harlan Fiske Stone to Hessel E. Yntema, October 24, 1928 (Stone Papers).

Today, of course, the Court routinely cites law review literature.[335] Figure 24 compares the rate of citations to law review articles in Court opinions during the Taft Court era with the rate of such citations in opinions during the 1997 Term.[336] It shows that the rate of citations to law reviews has increased more than twenty-fold, from .03 citations per majority opinion to .59.[337] Brandeis is sometimes identified as the Justice who broke the barrier against citing law reviews in Supreme Court opinions.[338] Figure 25 does indicate that of all the Taft Court Justices, only Brandeis and Stone were likely to cite law reviews in their opinions for the Court. But a close inspection of Figures 26-27 also suggests that Brandeis primarily referred to law reviews in his dissents,[339] and that it

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[335] Wes Daniels, "Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978, 76 Law Library Journal 1, 4 (1983). For a sampling of the very large literature studying this phenomenon, see, e.g., Michael D. McClintock, The Declining Use of Legal Scholarship by Courts: An Empirical Study, 51 Okl. L. Rev. 659 (1998); Louis J. Sirico, Jr. & Jeffrey B. Margulies, The Citing of Law Reviews by the Supreme Court: An Empirical Study, 34 UCLA L Rev. 131 (1986); Neil N. Bernstein, The Supreme Court and Secondary Source Material: 1965 Term, 57 Georgetown. L. J. 55 (1968); Chester A. Newland, Legal Periodicals and the United States Supreme Court, 7 Kan. L. Rev. 477 (1959); Douglas B. Maggs, Concerning the Extent to which the Law Review Contributes to the Development of the Law, 3 S. Calif. L. Rev. 181 (1929); cf. William H. Manz, The Citation Practices of the New York Court of Appeals, 1850-1993, 43 Buf. L. Rev. 121 (1995); Friedman et al., supra note 52; Michael I. Swygert & Jon W. Bruce, The Historical Origins, Founding, and Early Development of Student Edited Law Reviews, 36 Hast. L. J. 739 (1985).

[336] Michael McClintock, supra note 335, argues that "the number of judicial citations of law reviews . . . declined dramatically from 1975 to 1996." Id. at 684. The decrease in the Supreme Court was 58.6%. Id. at 685. Given this decline, the contrast with the Taft Court revealed by Figure 24 is all the more stark.

[337] There were 41 citations to law review articles in the 1554 court opinions published in the Terms between 1921 and 1928. By contrast, there were 57 such citations in the 96 court opinions in the 1997 Term. A study of state supreme courts has found a similar change in citation practices; in the decade between 1915 and 1925, .5 percent of state supreme court opinions cited law review articles, a figure that had increased by more than twentyfold by the decade between 1960 and 1970, when 11.9% of state supreme court opinions cited law review articles. Friedman, et al., supra note 52, at 811-12. In the New York Court of Appeals, the number of citations to legal periodicals increased about tenfold in the period between 1920 and 1990. Manz, supra note 335, at 157.

[338] See, e.g., Chester A. Newland, Innovation in Judicial Technique: The Brandeis Opinion, 42 The Southwestern Social Science Quarterly 22, 24-26 (June 1961); John W. Johnson, Adaptive Jurisprudence: Some Dimensions of Early Twentieth-Century American Culture, 40 The Historian 16, 24 (November 1977).

[339] Cf. John W. Johnson, American Legal Culture: 1908-1940 41 (1981) (observing that Brandeis referred to social scientific studies in his dissents, but not his opinions).

was Stone who most systematically began to incorporate references to law review articles into his opinions for the Court. This means that while Brandeis was primarily content to invoke the prestige of legal academia to cast doubt on the Court's resolution of a legal question, it was Stone who sensed that the Court's institutional prestige to declare law required the supplementation of expertise, even as the Court was in very the act of deciding a question of law. It was Stone who began to create opinions that in their very composition interrogated the extent to which the Court's institutional authority could plausibly be deemed "ultra-academic."

Cardozo very quickly recognized the profound implications of this transformation. Not only did the Court's increasing citation of law review articles signal a "change in leadership" from "the benches of the courts to the chairs of universities,"[340] but it also signified "a recognition of the truth that an opinion derives its authority, just as the law derives its existence, from all the facts of life. The judge is free to draw upon these facts wherever he can find them, if only they are helpful. No longer is his material confined to precedents in sheepskin."[341] Cardozo saw, in other words, that the struggle to open up Court opinions to legal scholarship was not merely a competition for status between judges and scholars, but it was also a reflection of changing perceptions of the nature of judicial authority.

We can perhaps sharpen our perception of this shift by noting that, as Figure 28 indicates, Justices in the Taft Court era were in fact more willing to cite legal treatises

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[340] Cardozo, supra note 287 at ix.

[341] Id. "Under the drive of this impulse, the law teacher and the law reviews are coming to their own." Id.

and encyclopedias in their opinions than they were to cite law review articles.[342] While the reasons for this distinction are not entirely clear, we should note that law reviews were the more or less exclusive domain of "the academic scholar,"[343] whereas legal treatises had long been associated with practitioners and judges like Story, Kent, and Cooley.[344] Law review articles accordingly tended to be imbued with a distinct scholarly orientation. Whereas treatises and encyclopedias strove to present "an accurate account of the law"[345] as judges had constructed the law,[346] law reviews articles were more nearly

[342] During the 1921-1928 Terms, the Taft Court cited treatises and encyclopedias at the rate of .16 citations per majority opinion, as compared to a rate of .03 citations per majority opinion for law review articles. See, e.g., Max Radin , Sources of Law—New and Old, 1 S. Cal. L. Rev. 411, 416 (1928) ("If we place the authorities cited in the order of apparent importance, we should find the following series: first, reported cases of the same jurisdiction; second, reported cases of outside jurisdictions; third, cyclopedias and repertories; fourth recent treatises; fifth, old treatises; and sixth and last, articles in legal periodicals. Citations of the last class are very few indeed, although they are increasingly slightly."). Figure M illustrates that during the Taft Court era law review articles were more than twice as likely to be cited in dissents than in Court opinions, while legal treatises and encyclopedias predominated in Court opinions. If the 1997 Term is at all representative, Figure N indicates that law review articles have lost their distinctive association with dissent, while legal treatises and encyclopedias have remained somewhat more likely to be cited in Court opinions than in dissents. Between the Taft Court and the 1997 Term, the rate of citations to legal treatises and encyclopedias in Court opinions has increased almost sevenfold, from .16 to 1.1 citations per majority opinion. By contrast, a study of state supreme court opinions found a decrease in the citation of legal treatises and encyclopedias; in the period 1915-1925, 44.1% of state supreme court opinions cited these sources, whereas in the decade between 1960 and 1970, these sources were cited in only 39.2% of opinions. Friedman, et al., supra note 52, at 811. In the New York Court of Appeals, William H. Manz has counted 73 references to legal treatises in 1920, which modestly increased to 98 citations in 1990. Manz, supra note 335, at 157.

[343] Cardozo, supra note 287 at viii.

[344] But see Simpson, supra note 297, at 670-71 ("From Story's time onwards, the production of treatises was associated with organized systematic legal education . . . This does not mean that the typical treatise writer was a cloistered academic, as the law schools until Langdell's time employed practitioners as professors.").

[345] Paul D. Carrington, Stewards of Democracy: Law as Public Profession 184 (1999). Treatises and encyclopedias tended to perform the function that Harvard President Eliot imagined would be served by law professors; they would, he said, function "as expounders, systematizers and historians" of the law. Quoted in Arthur E. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967 184 (1967).

[346] See Johnson, supra note 339, at 19, 55-58; Friedman, et al., supra note 52, at 811 ("most older treatises did no more than compile cases; they wrapped the confusion of prior cases into a convenient package, usually in the form of black letter rules.").

associated with the view that law was "an instrument of social engineering,"[347] requiring "a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of today."[348] Not only did this orientation tend to displace judge-centered law, but it also sought to subsume legal reasoning into more general policy analysis.[349]

From this perspective, we can interpret the contemporary Court's routine citation to law review articles as both expressing and sustaining the view that judicial decisions have the responsibility of arranging human affairs in a manner designed to fulfill the purposes of the law. To the extent that these purposes have become self-conscious, the authority of the courts has in part come to depend upon their competence in achieving legal objectives, and not merely upon judicial fidelity to the internal demands of a self-enclosed system of legal precedents. The struggle in the Taft Court over the citation of legal scholarship illuminates the beginnings of this profound shift.

## V.

The decision-making practices of the Court can thus tell us a good deal about how the Court regards important but otherwise implicit tensions within the law. The nature of these practices sheds light, for example, on the question of whether the virtue of law is conceived to lie in its finality or in its capacity to serve social purposes, or whether law is seen as distinct from politics or as a product of popular will, or whether the authority of

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[347] Auerbach, supra note 286, at 76.

[348] Roscoe Pound, "The Need of a Sociological Jurisprudence," Green Bag, 19 (October 1907), 610-615. See "Law as a Social Instrument," 58 The New Republic 158 (March 27, 1929).

[349] See Laura Kalman, The Strange Career of Legal Liberalism 16 (1996); William E. Nelson, The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980 143-44 (2000).

the Supreme Court is understood as lying in its raw power to declare law or in its capacity competently to achieve legal objectives.

Of course these tensions are ultimately irresolvable. No sane view of law could entirely abandon either the value of certainty or that of adaptability;[350] the question is instead how a court will mediate the perennial tension between these two equally indispensable ideals.[351] The same can be said of the boundary between law and politics. It is as implausible to draw an impermeable barrier between law and popular will,[352] as it is to collapse law entirely into the domain of popular contestation. Similarly, the authority of the Court can wholly subsist neither in its control over the disposition of state legal power nor in its competence to serve legal purposes. The Court's actual legitimacy must always rest somewhere between these two extreme versions of its institutional position.

The demonstrable differences between the decision-making practices of the Taft Court and those of the contemporary Court indicate that the Court has substantially altered its approach to these questions from that which it pursued in the 1920s. The direction of the change roughly corresponds to the transition from what Philippe Nonet and Philip Selznick have called "autonomous" law to what they have termed "responsive

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[350] For a discussion, see Robert Post "Theories of Constitutional Interpretation," Representations No. 30 (Spring 1990), 19-21, 6-17, 27-28.

[351] Courts will undoubtedly mediate these tensions differently in different substantive areas of law. And, if the radically dissimilar rates of unanimity as between the United States Supreme Court and state supreme courts remains true, see note 129, different courts will also resolve these tensions differently, depending upon their distinct conceptions of the roles they are to perform in the legal system.

[352] See, e.g., Frank Michelman, "Constitutional Authorship," in Constitutionalism: Philosophical Foundations (Larry Alexander ed., Cambridge, 1998).

law."[353] In a system of "autonomous law," the "consolidation and defense of institutional autonomy are the central preoccupation of legal officials,"[354] who accordingly take pains to draw "a sharp line between legislative and judicial functions."[355] The task of the judiciary is to maintain fidelity to a system of certain and definite rules, even at the cost of "the adaptation of law to social facts."[356] By emphasizing procedural regularity above all else, autonomous law stresses "authority and obedience"[357] to the positive institutional authority of courts.

"Responsive law," by contrast, conceives the authority of legal institutions to lie in their ability competently to achieve the law's purposes. This requires the law to assume an "openness and flexibility"[358] that is incompatible with strict rule-bound decision-making. "[L]egal advocacy takes on a political dimension,"[359] and it accordingly becomes "more difficult to distinguish legal analysis from policy analysis, legal rationality from other forms of systemic decision making."[360] Rulemaking recedes in importance, as judicial legitimacy comes to depend upon "a union of legal authority and political will."[361]

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[353] Philippe Nonet and Philip Selznick, Law and Society in Transition: Toward Responsive Law 15 (1978).

[354] Id. at 54.

[355] Id.

[356] Id. at 64.

[357] Id. at 68.

[358] Id. at 78.

[359] Id.

[360] Id. at 83.

[361] Id. at 86.

The norm of acquiescence reflected and sustained a world in which the authority of the Court depended upon its capacity to maintain a domain of fixed and certain rules, a domain rigorously separated from the legislative realm of political will. The Court's refusal to cite law review articles reflected and sustained a world in which the authority of the Court depended upon its fidelity to a self-referential system of precedent. But as American law increasingly began to submit to what Nonet and Selznick call "the sovereignty of purpose,"[362] which is to say that as the legitimacy of our legal system came increasingly to be measured by its ability to achieve social ends, neither the norm of acquiescence nor the isolation of legal authority from policy expertise could be maintained. The collapse of the norm of acquiescence both expresses and facilitates an emphasis on the law's role as a flexible instrument for the accomplishment of political purposes. Similarly, the contemporary Court's frequent citation to law review articles positions the Court as an institution whose authority derives in considerable measure from its capacity competently to fulfill the policies of the law.

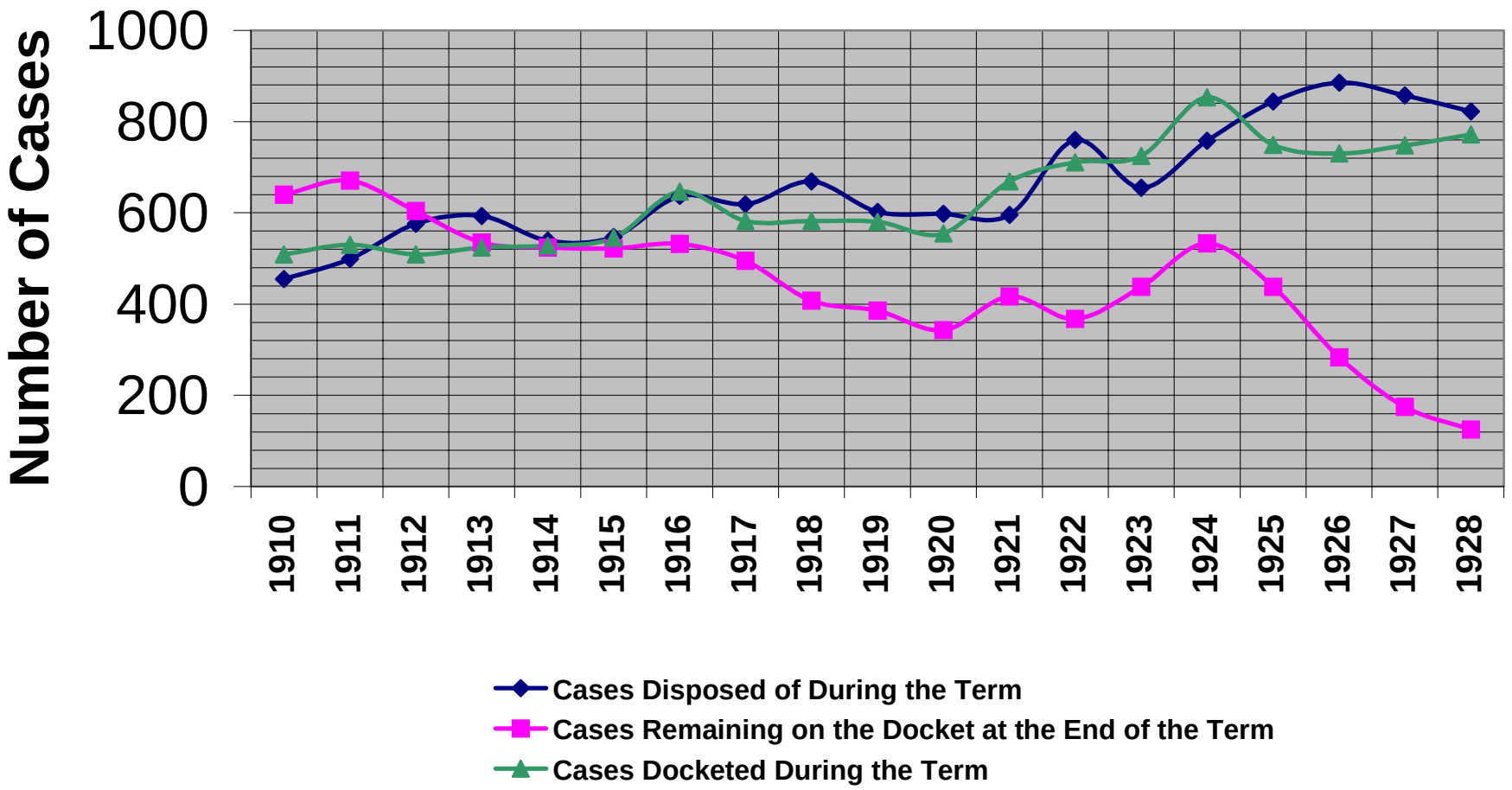
These are subtle and largely silent changes. They reside in the interstices of consciousness. They are pervasive, but rarely explicit; fundamental, but rarely deliberate. They implicitly shape the way the Court perceives and engages its mission. They are readily compatible with, although not logically entailed by, the shift in the Court's role promoted by the Judiciary Act of 1925. When we seek to grasp the nature of the Taft Court, in the full flush of its historical difference, we must bring these implicit transformations to mind. It has been my hope that recognizing their trace in the material

[362] Id. at 78.

substrate of the Court's decision-making practices can aid us in this project of imaginative reconstruction.

# APPENDI X

## Figure A: Supreme Court Appellate Docket 1910-1928



## Figure B: Average Number of Pages for Full Opinions That Are Unanimous

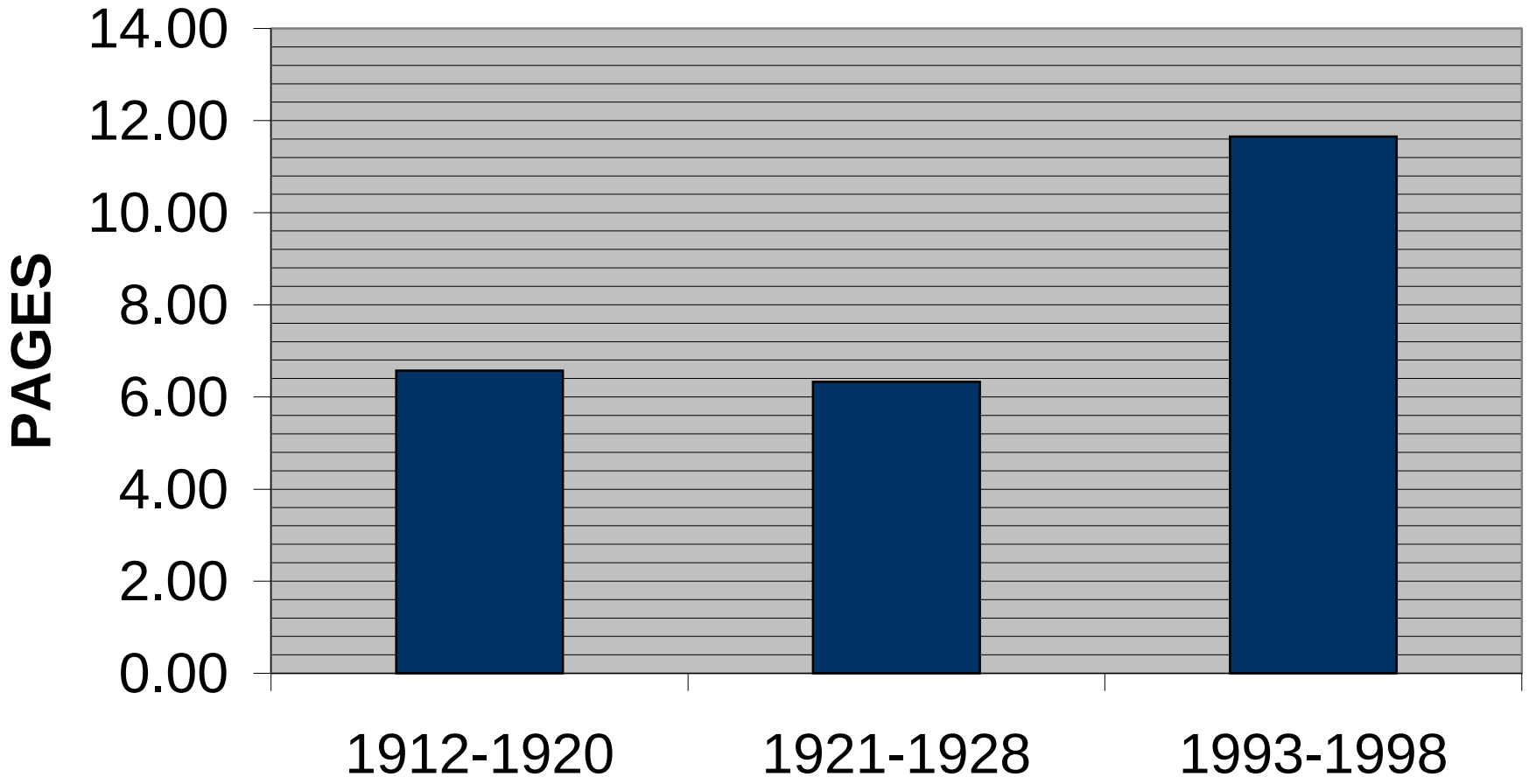
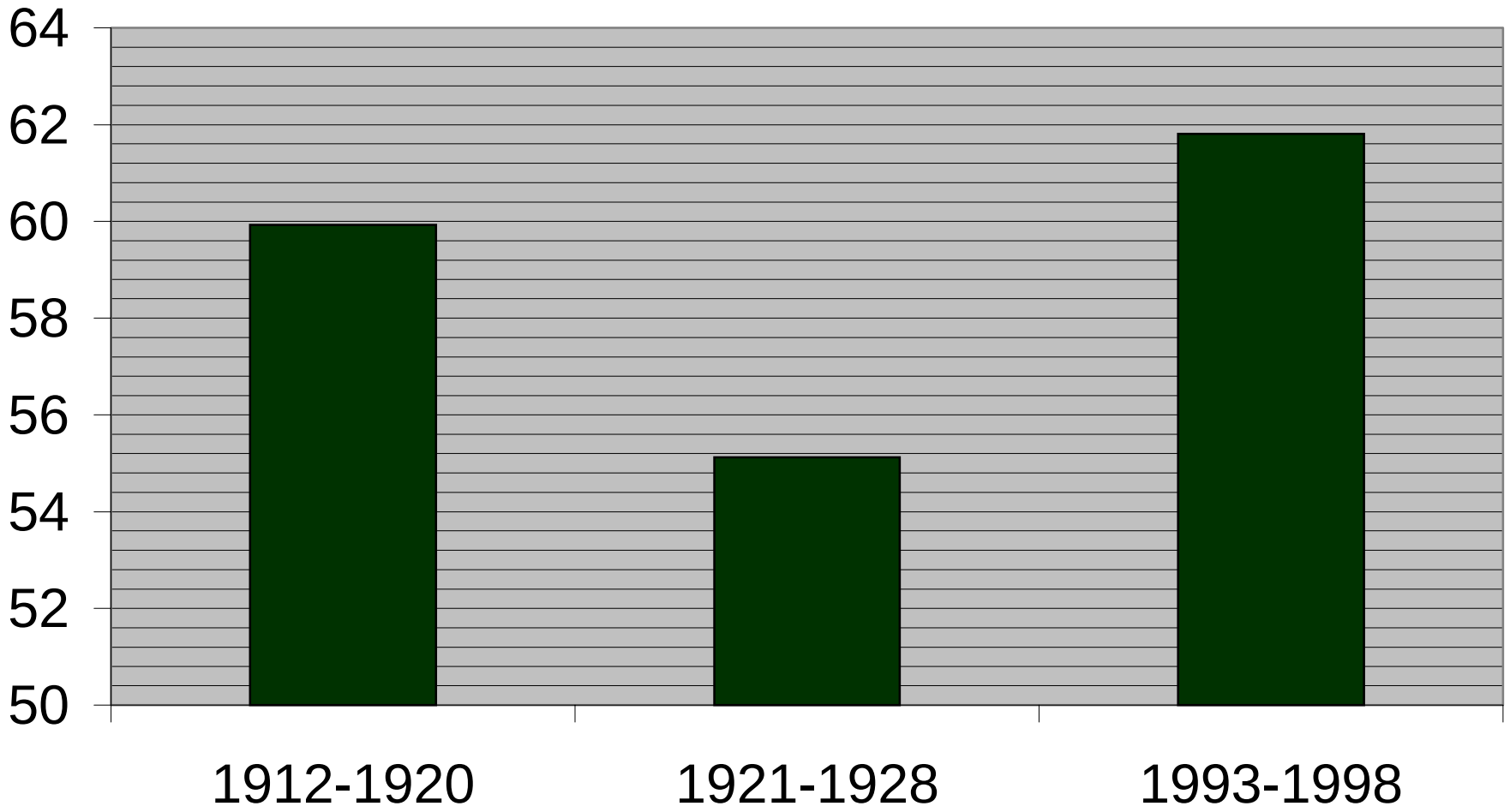
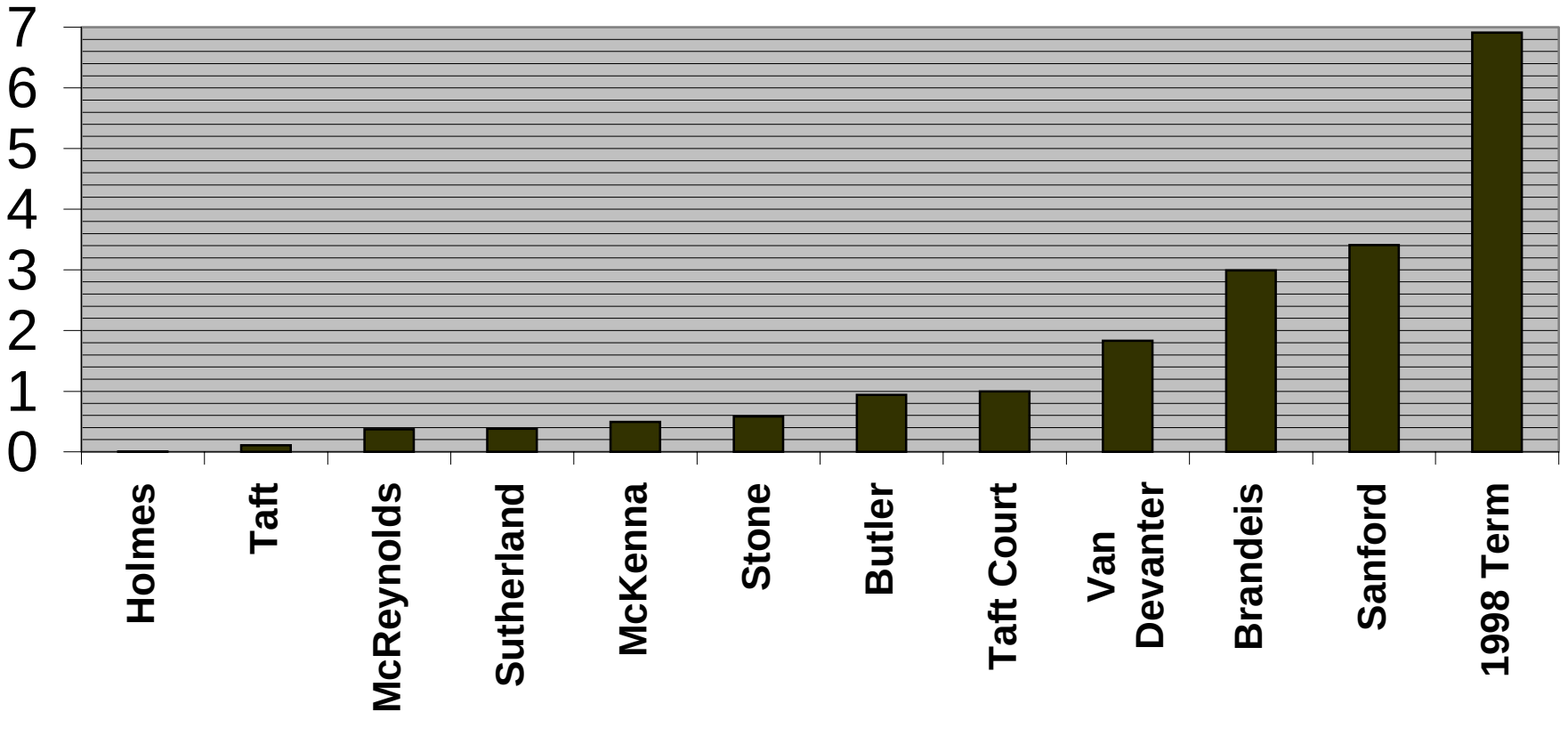


**Figure C: Average Number of Days from Argument to Delivery of Unanimous Full Opinions**



# Figure D: Average Number of Footnotes For Each Majority Opinion, 1921-1928 Terms



## Figure E: Use of Footnotes in Majority and Dissenting Opinions, by Justice, 1921-1928 Terms

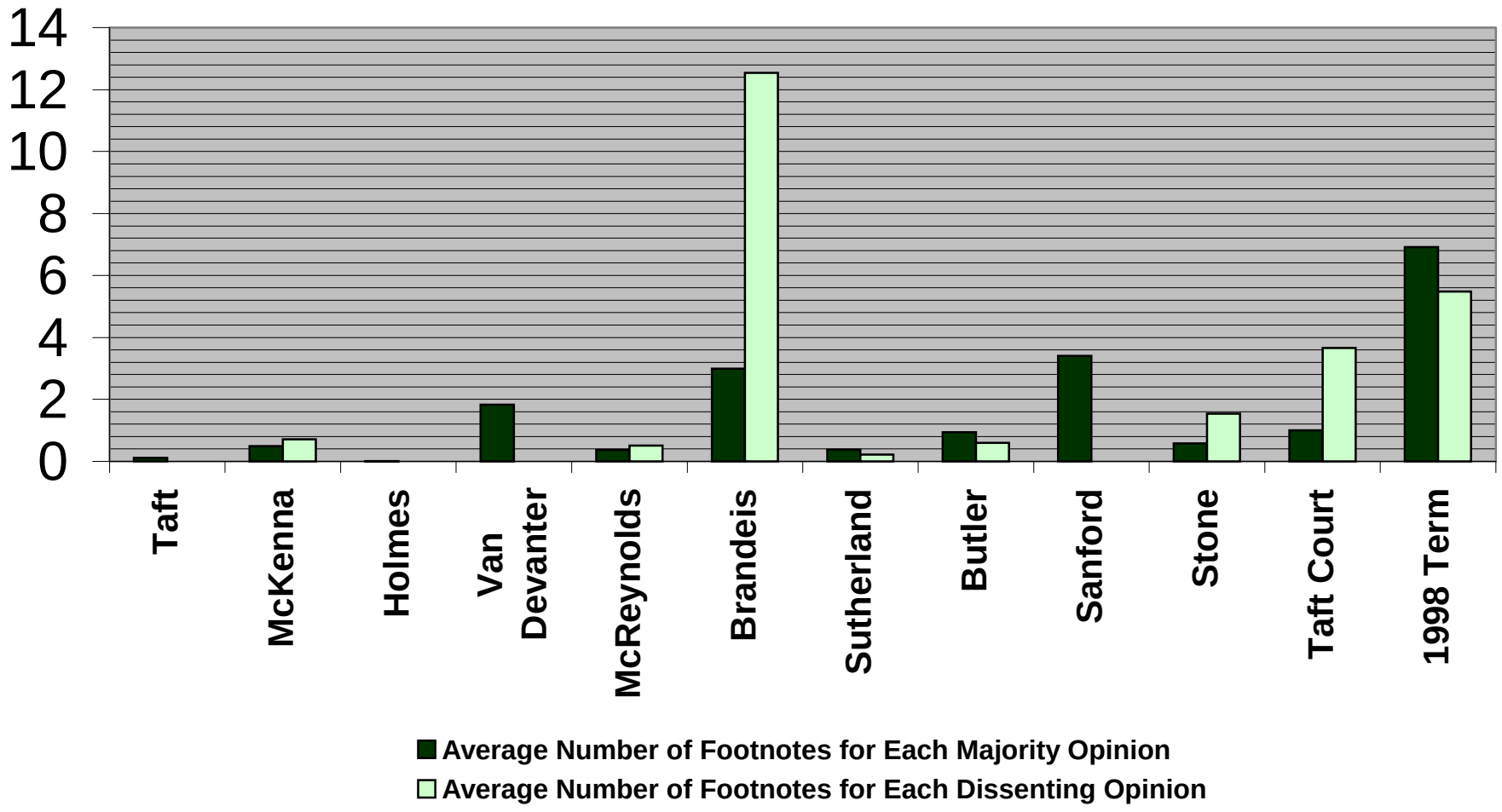
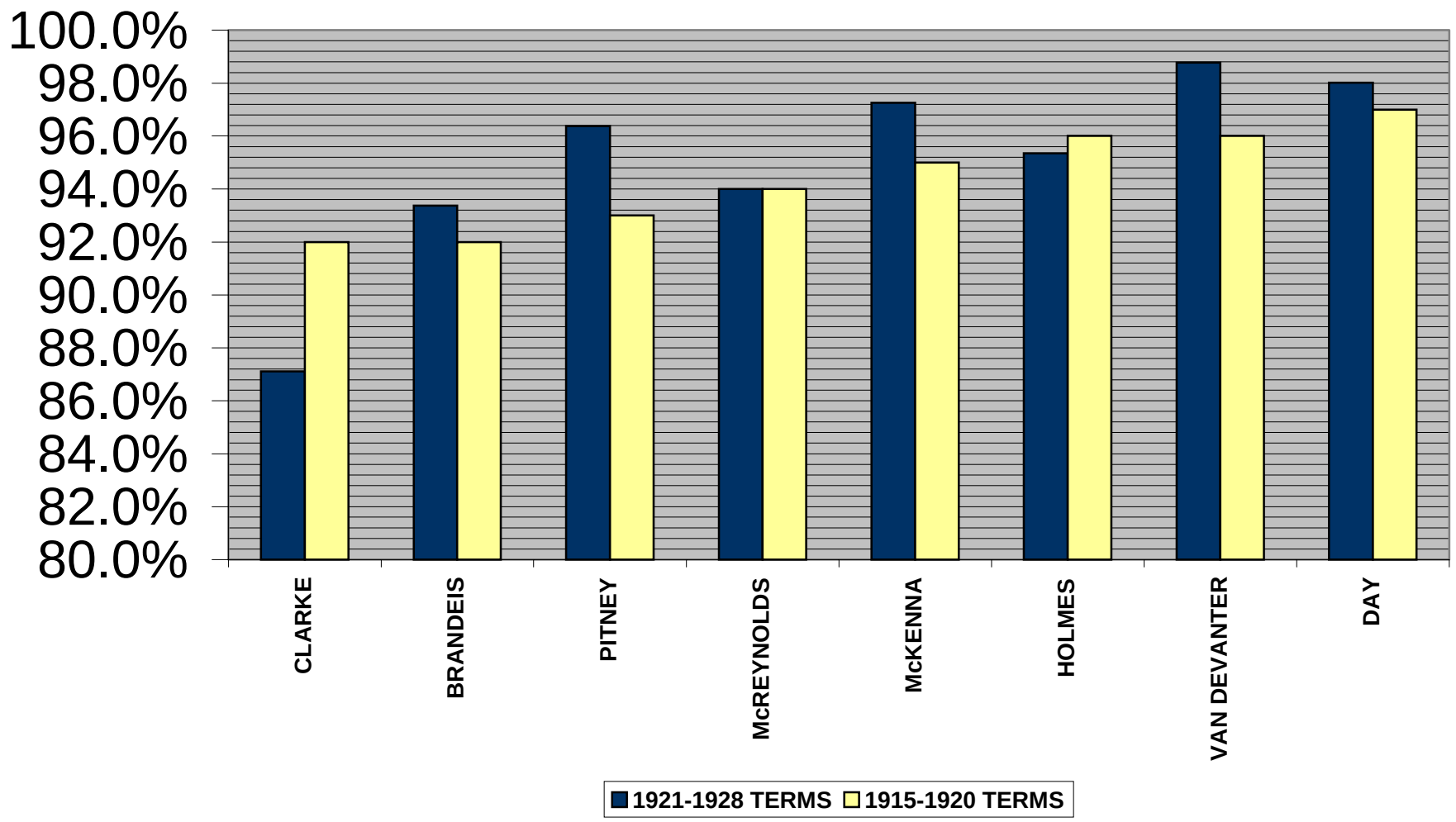
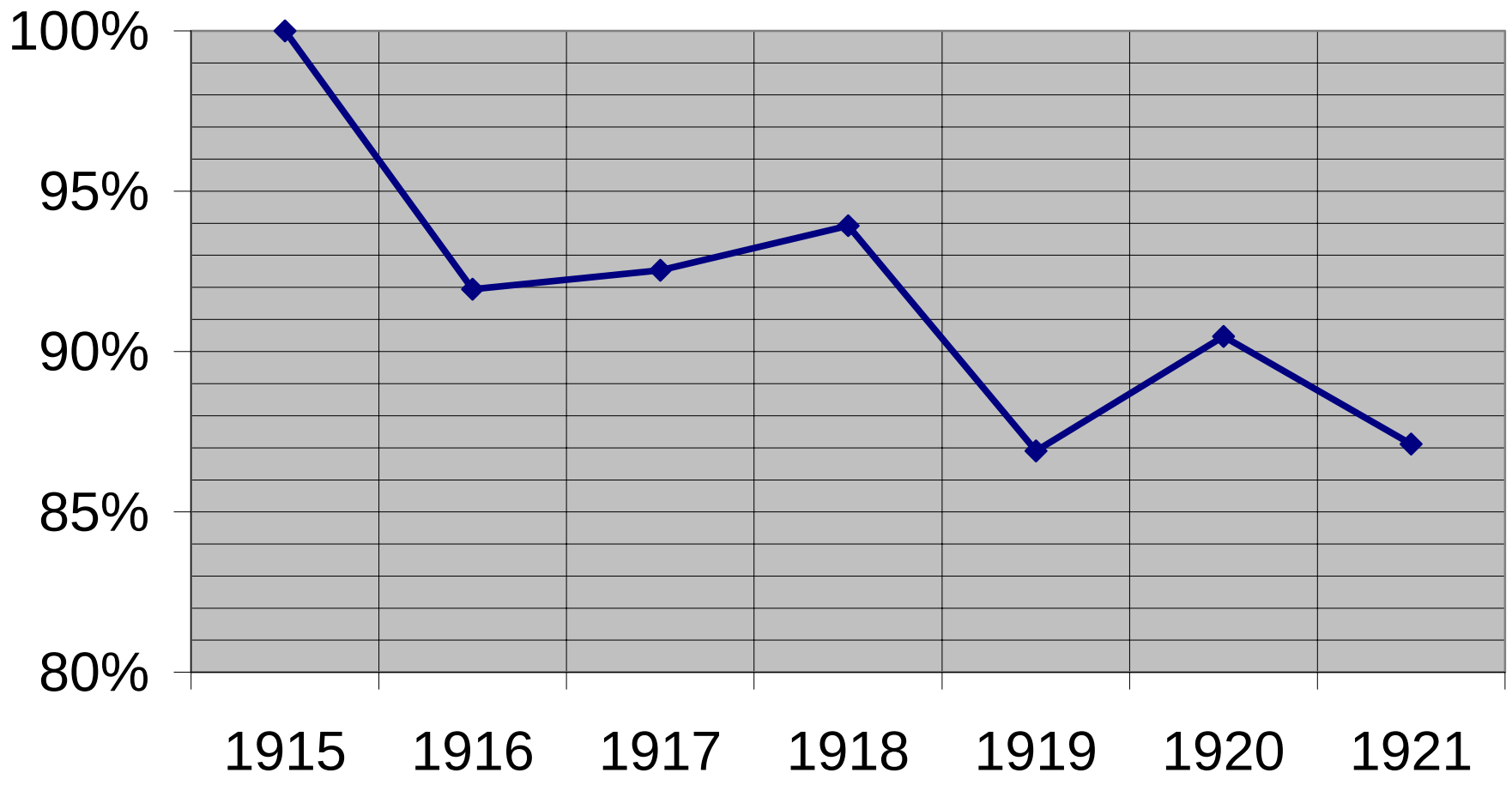


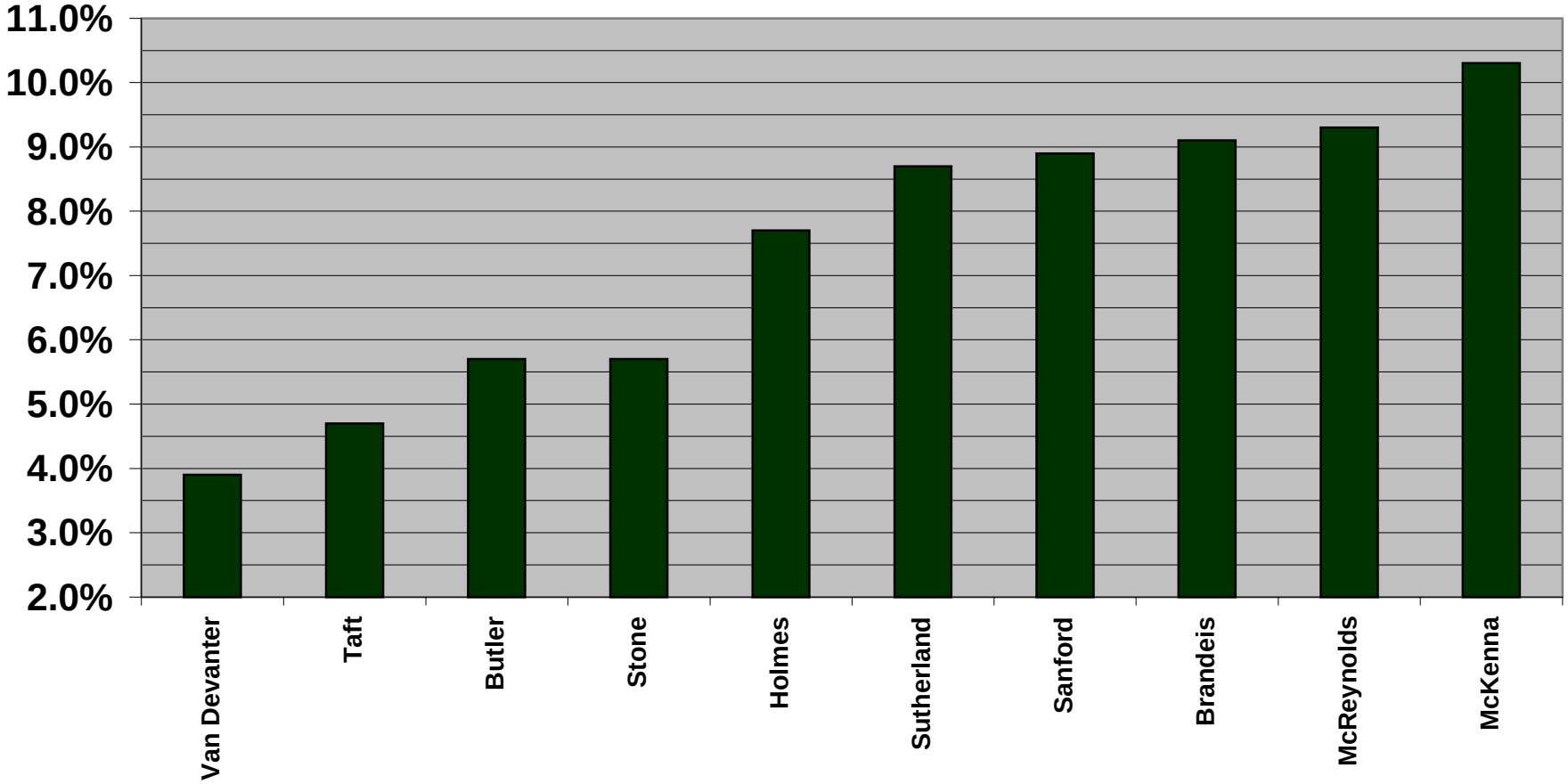
**Figure F: Percentage of All Opinions in Which A Justice Joins the Court Opinion**



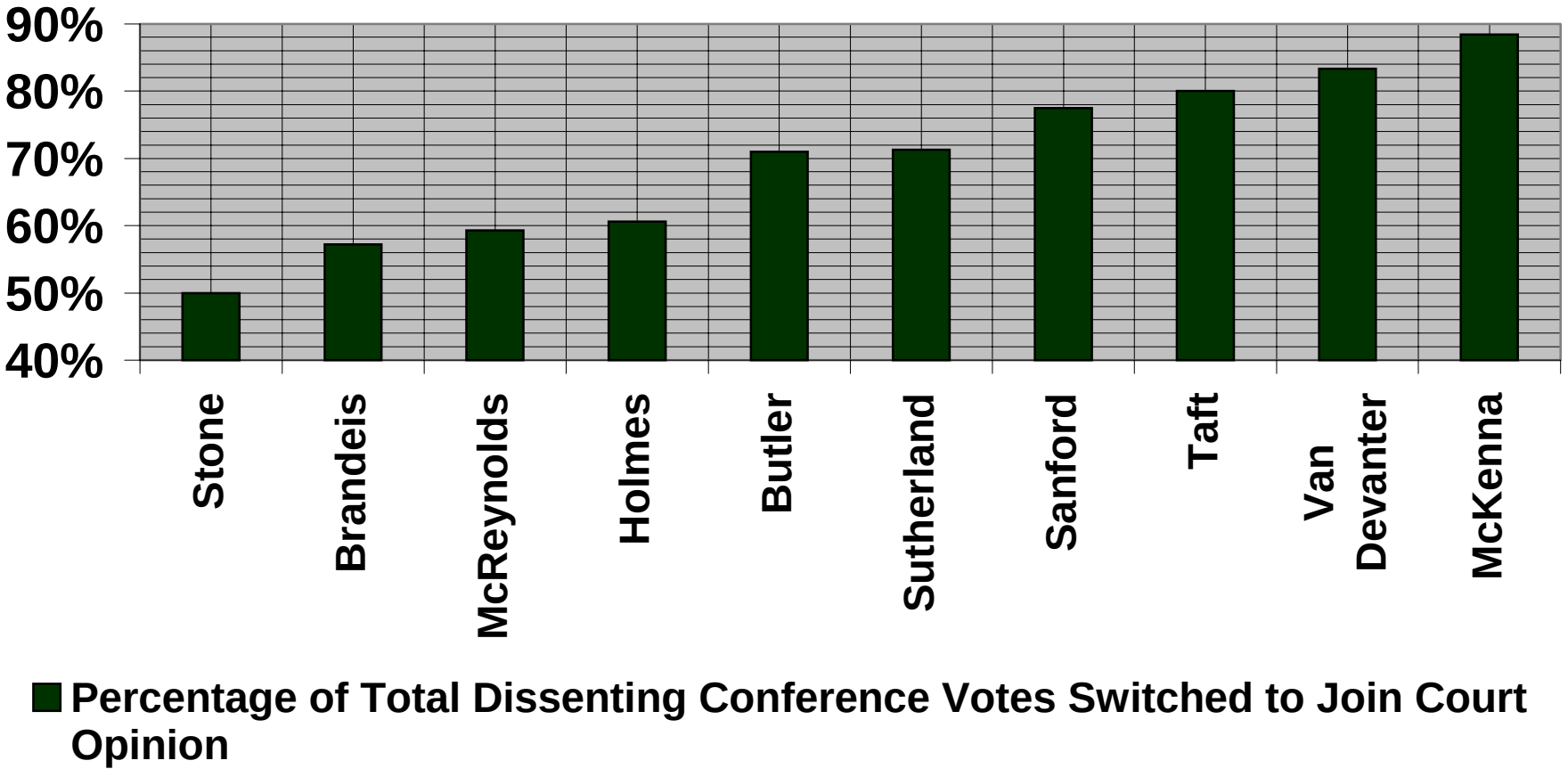
## Figure G: Percentage of All Opinions in Which Clarke Joined the Court Opinion, by Term



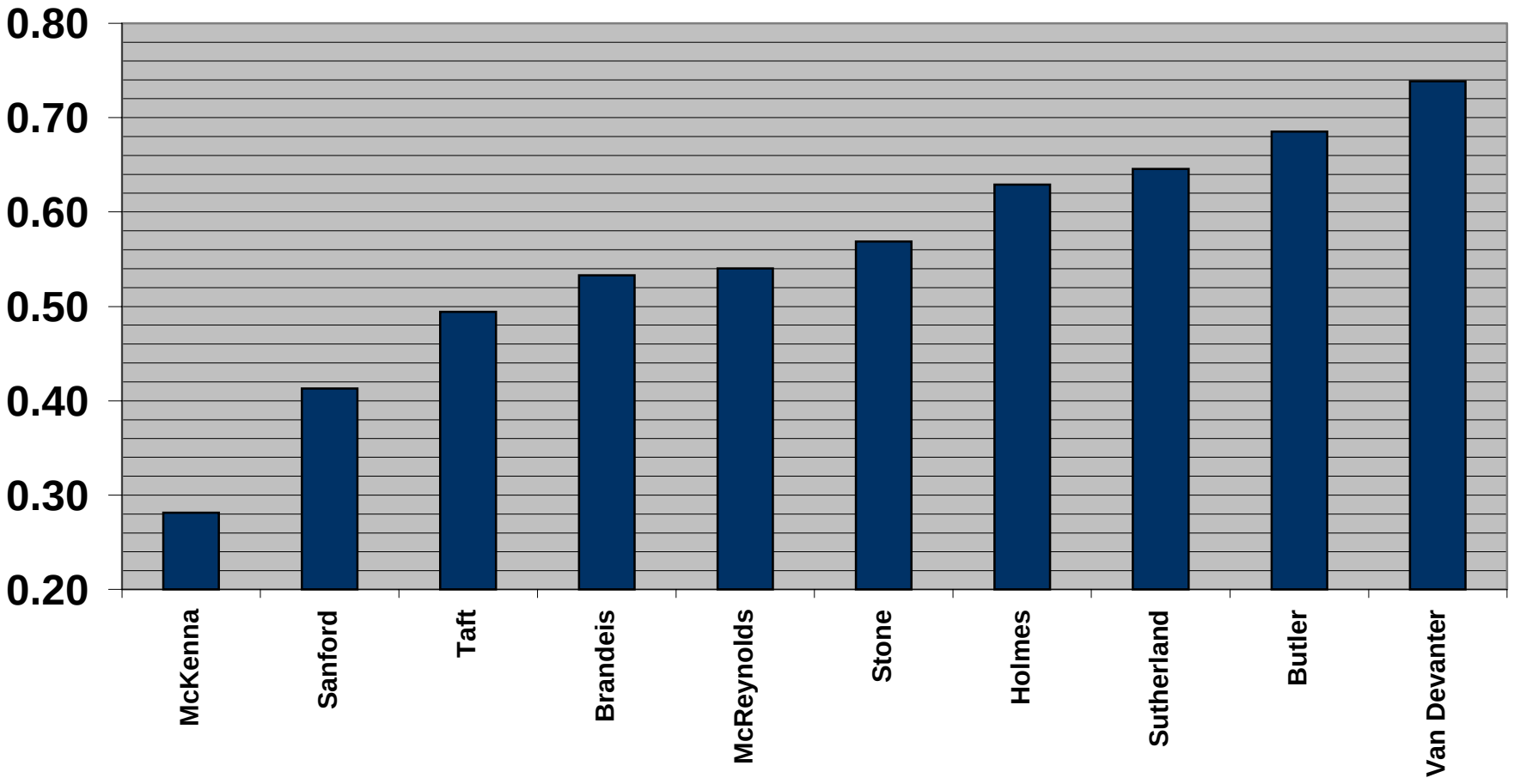
## Figure H: Percentage of Cases in Which A Justice Participated And Changed His Conference Vote In Order To Join The Court Opinion



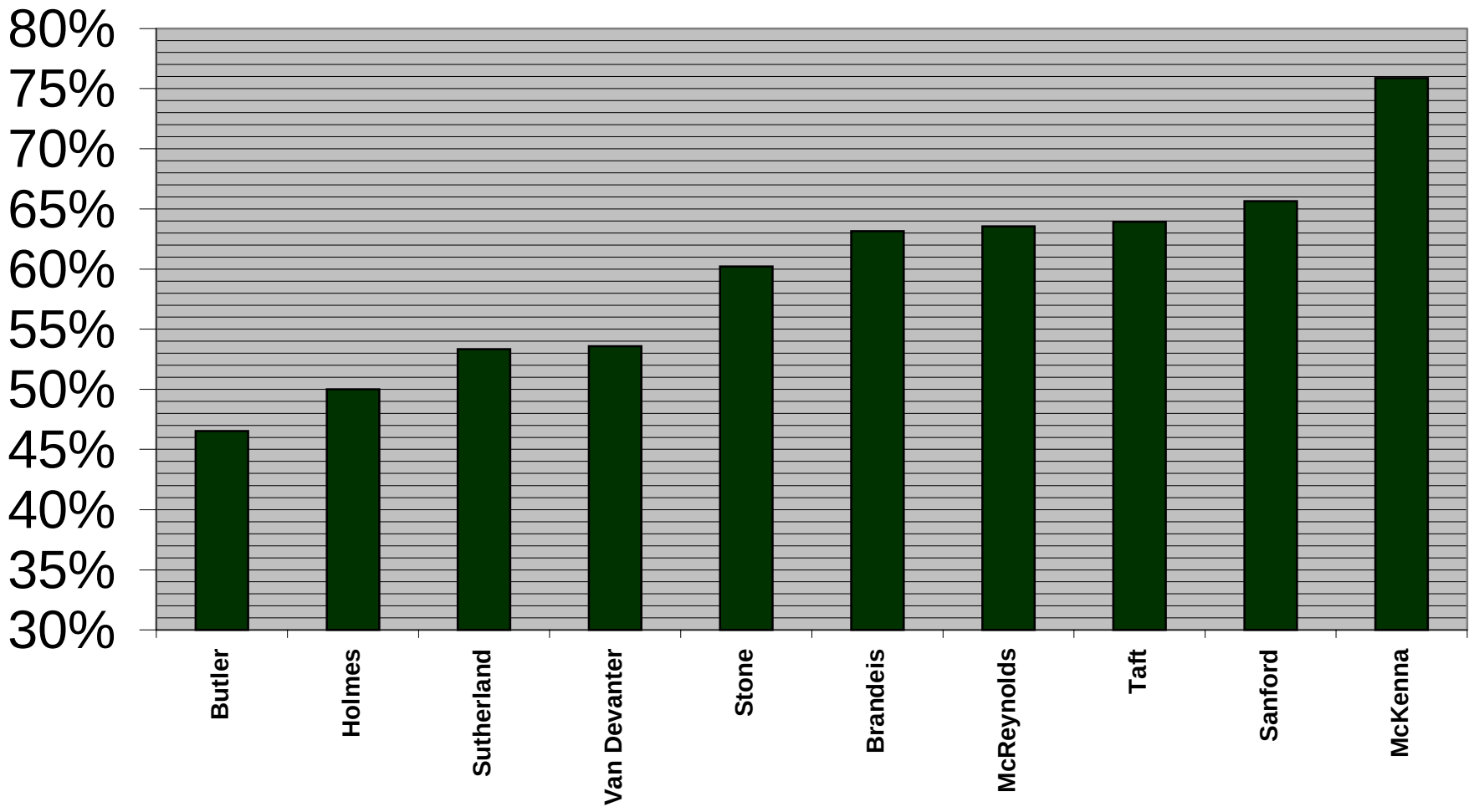
## Figure I: The Willingness of Justices to Switch Their Conference Votes to Join the Court Opinion



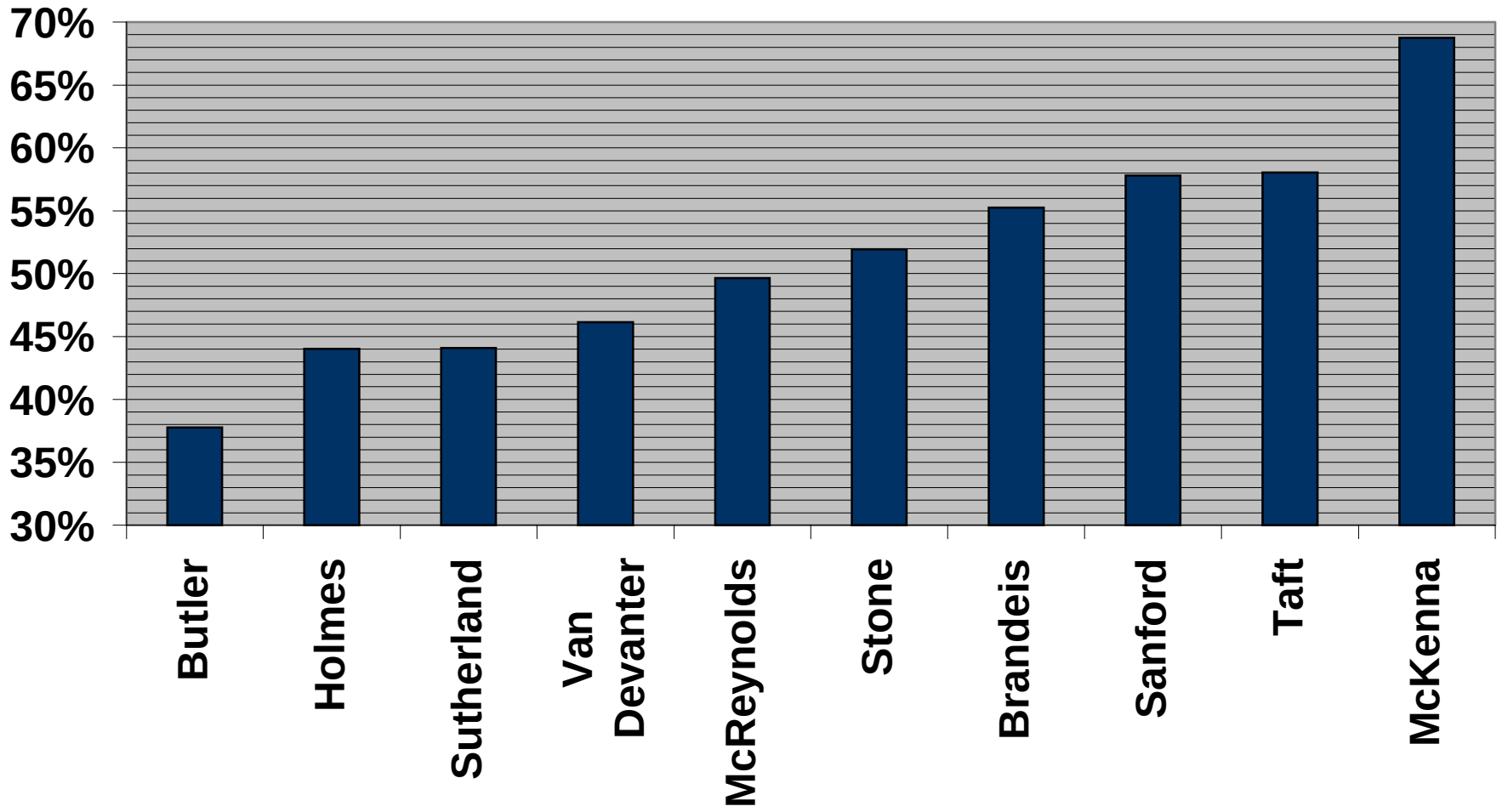
## Figure J: The Ability of a Justice to Attract Votes



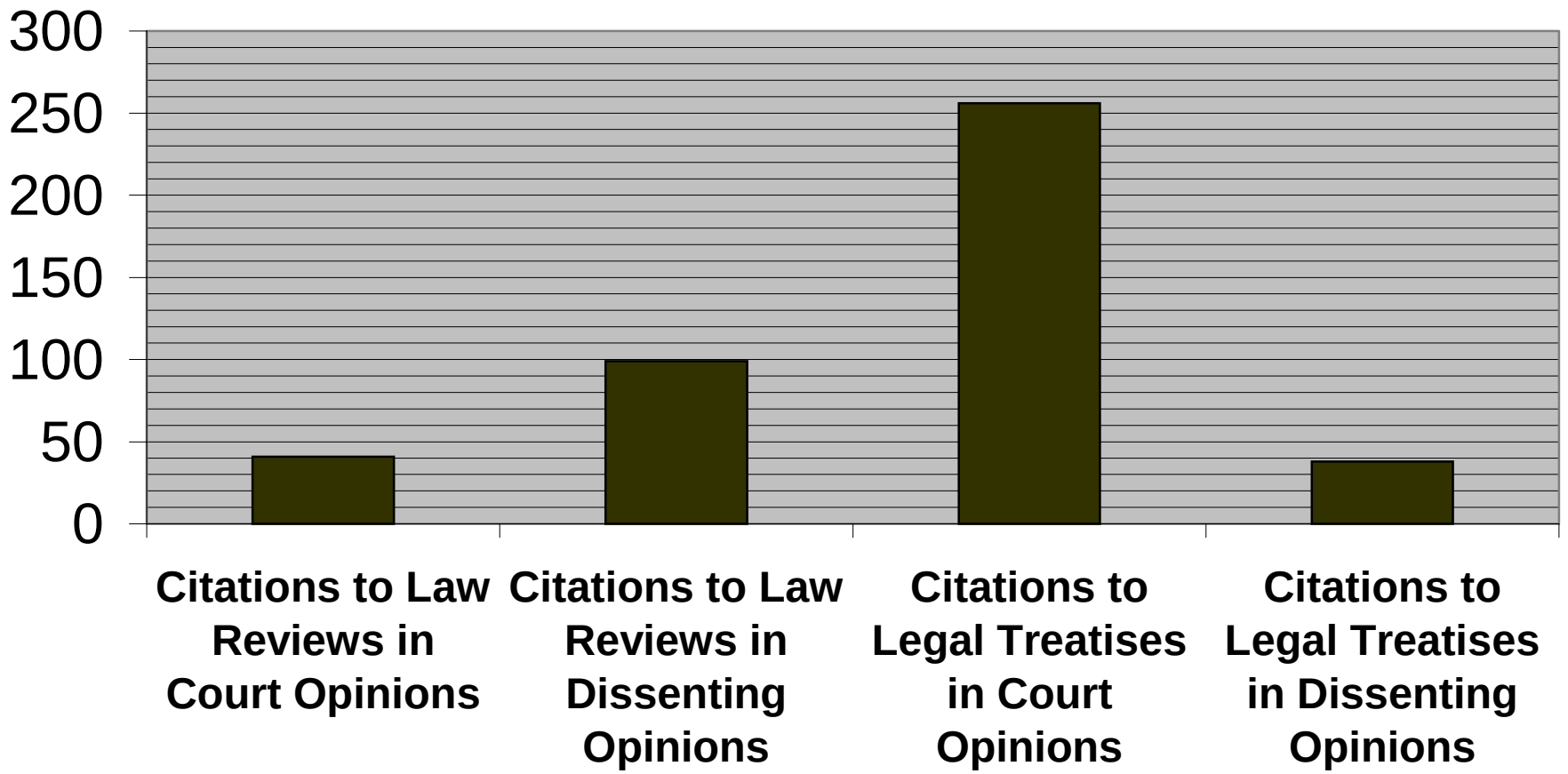
## Figure K: Success in Achieving Unanimous Opinions



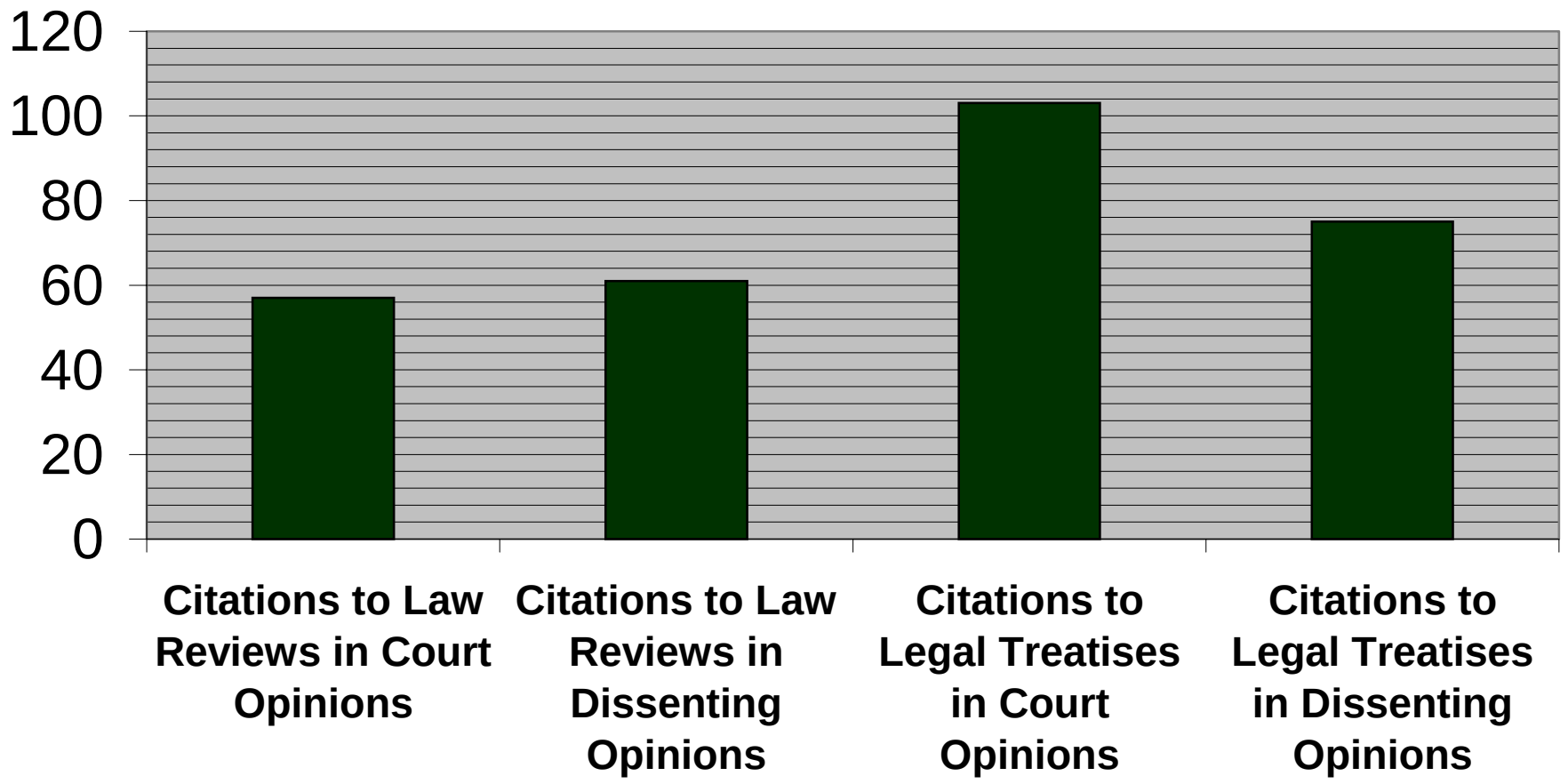
## Figure L: Percentage of Justice's Opinions That Were Unanimous in Conference



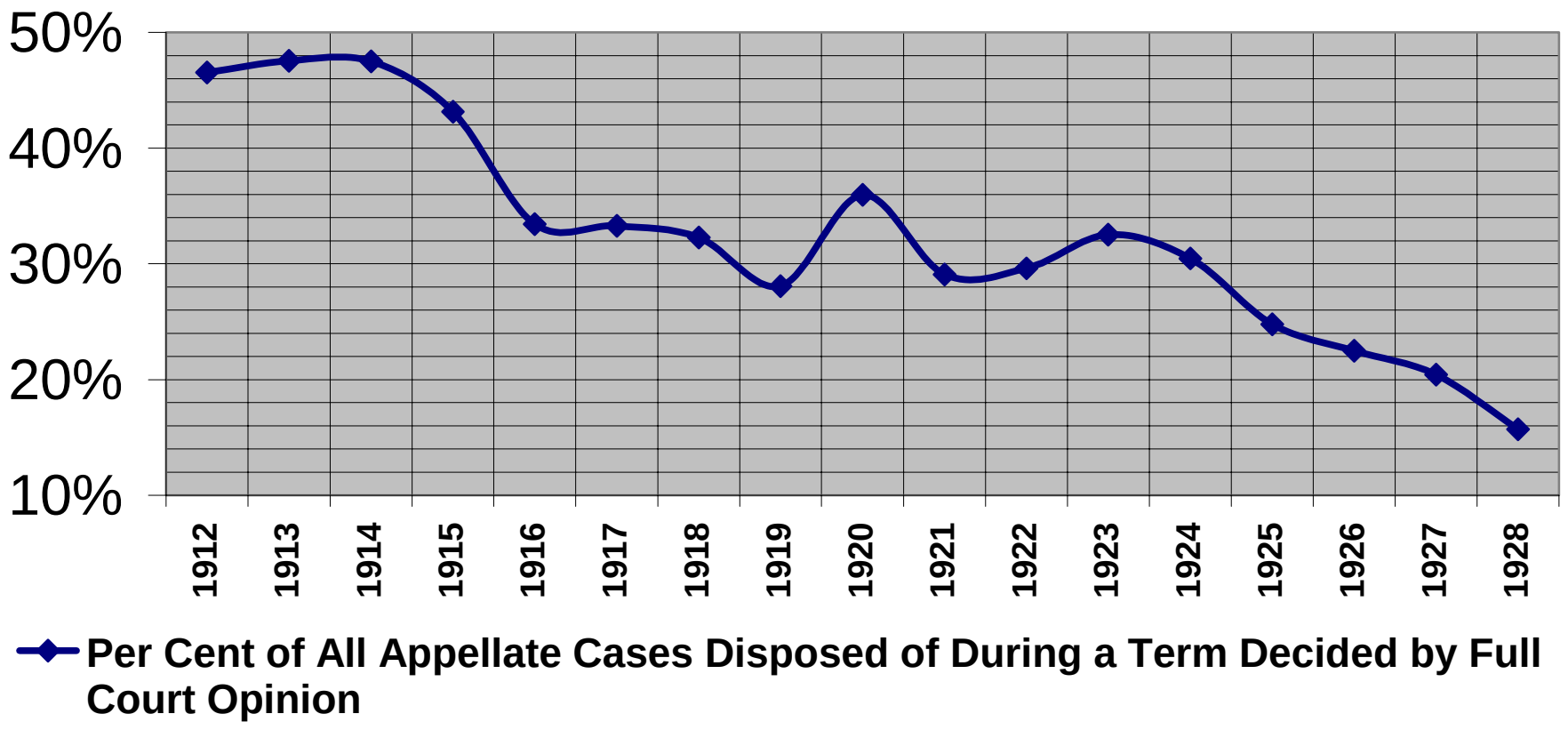
# Figure M: Citations to Legal Scholarship, 1921-1928 Terms



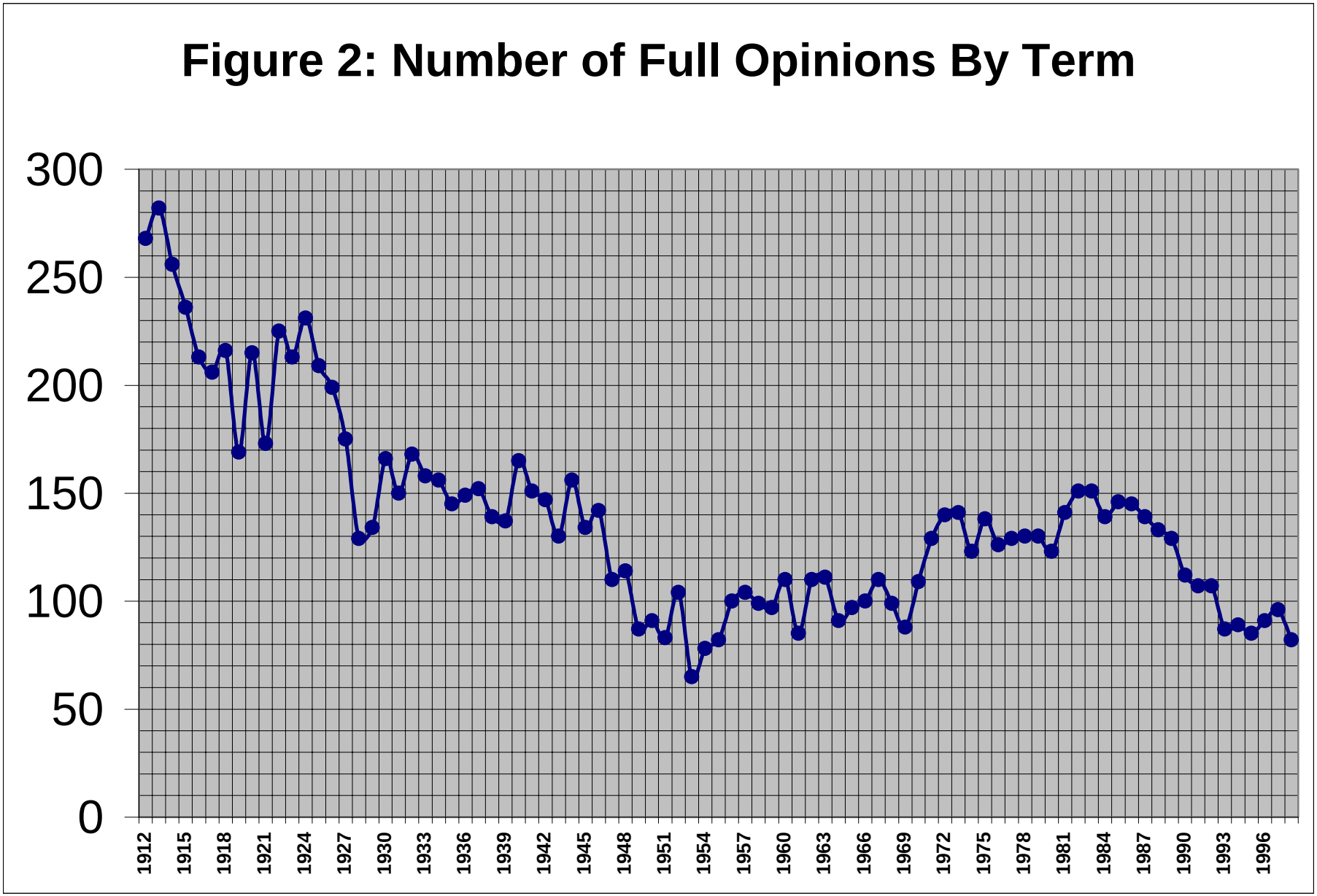
# Figure N: Citations to Legal Scholarship, 1997 Term



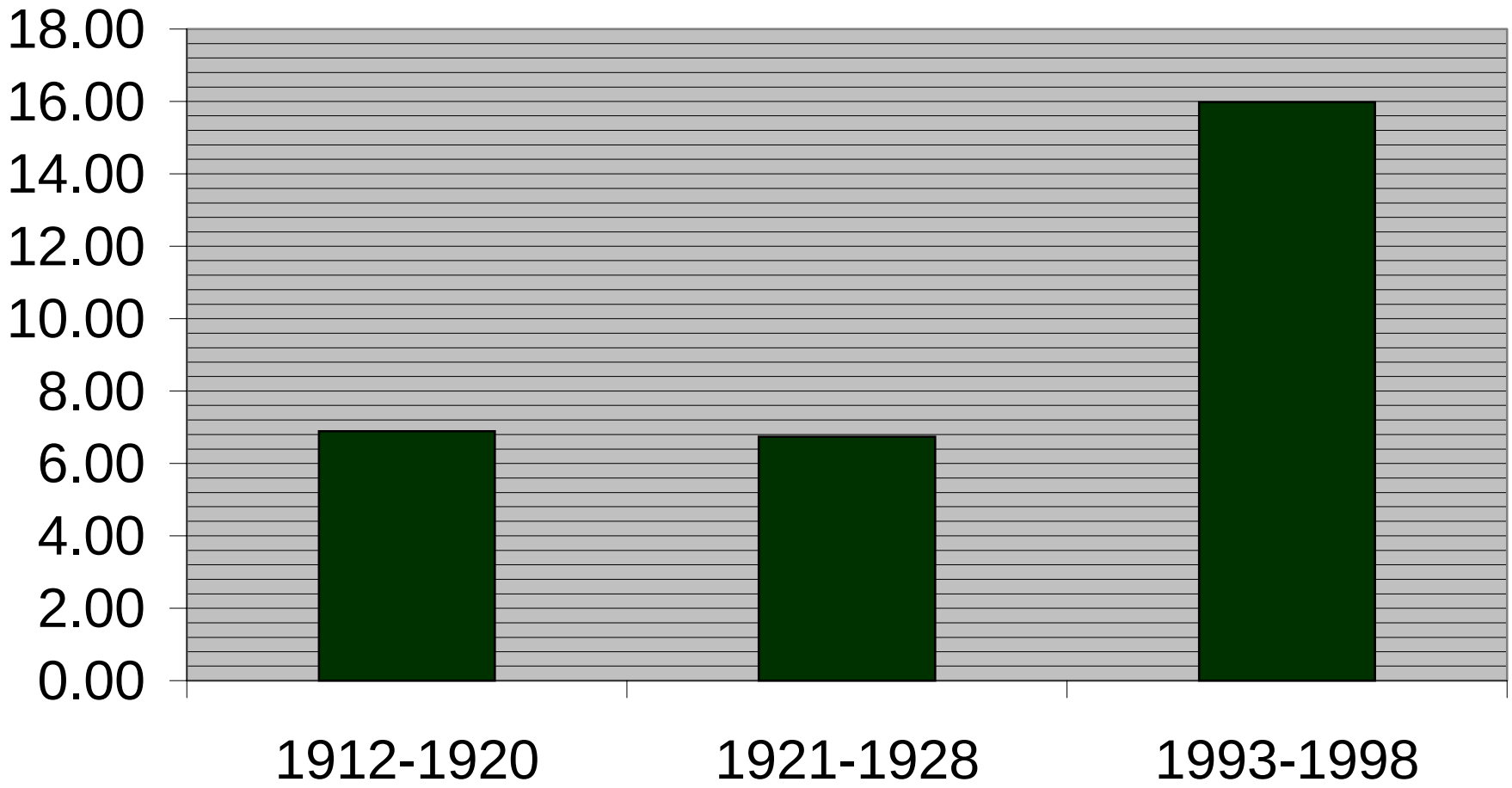
# Figure 1: Percentage of Cases on Appellate Docket Decided by Full Opinion



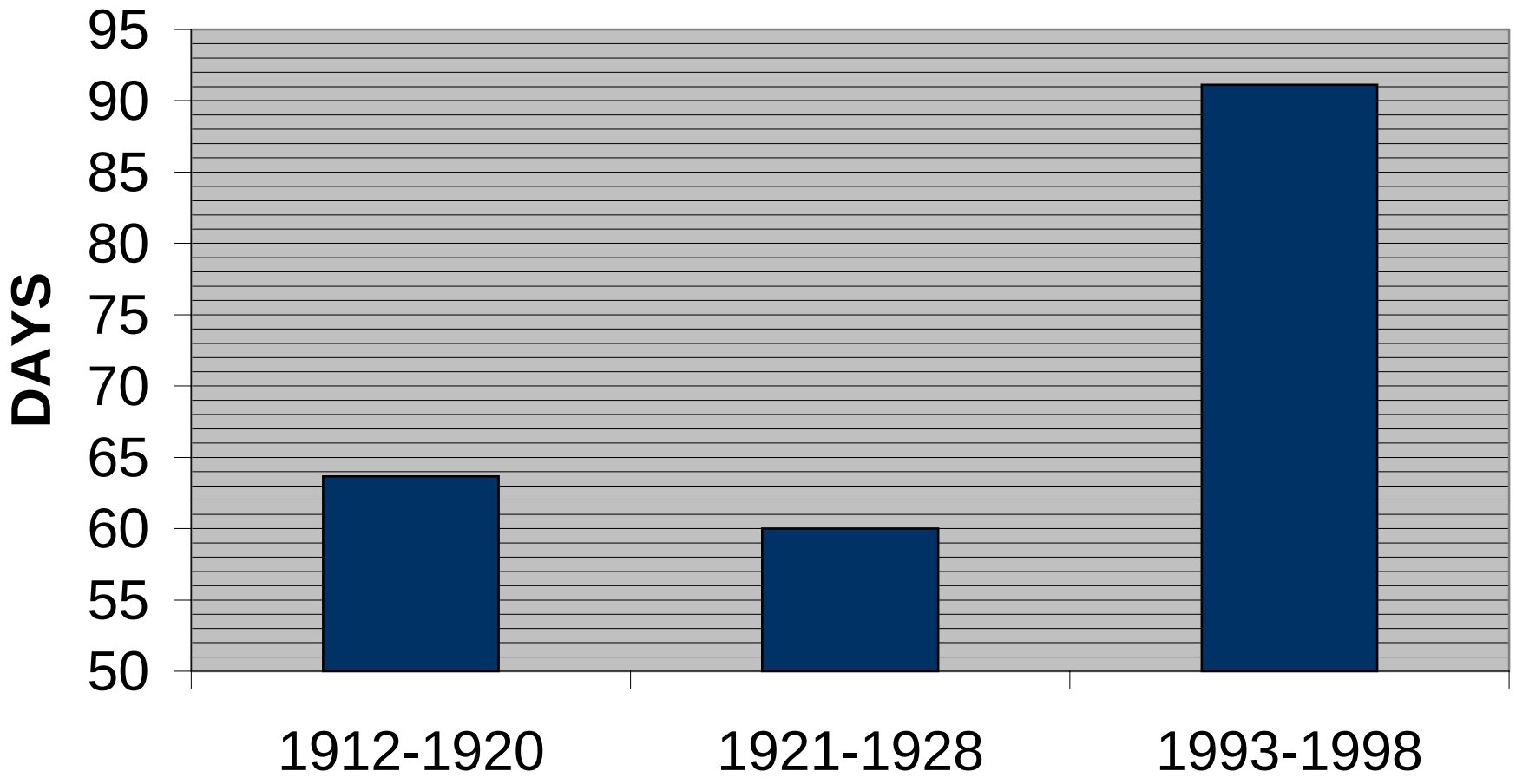
## Figure 2: Number of Full Opinions By Term



## Figure 3: Average Number of Pages for Full Opinions



## Figure 4: Average Number of Days from Argument to Delivery of Full Opinions



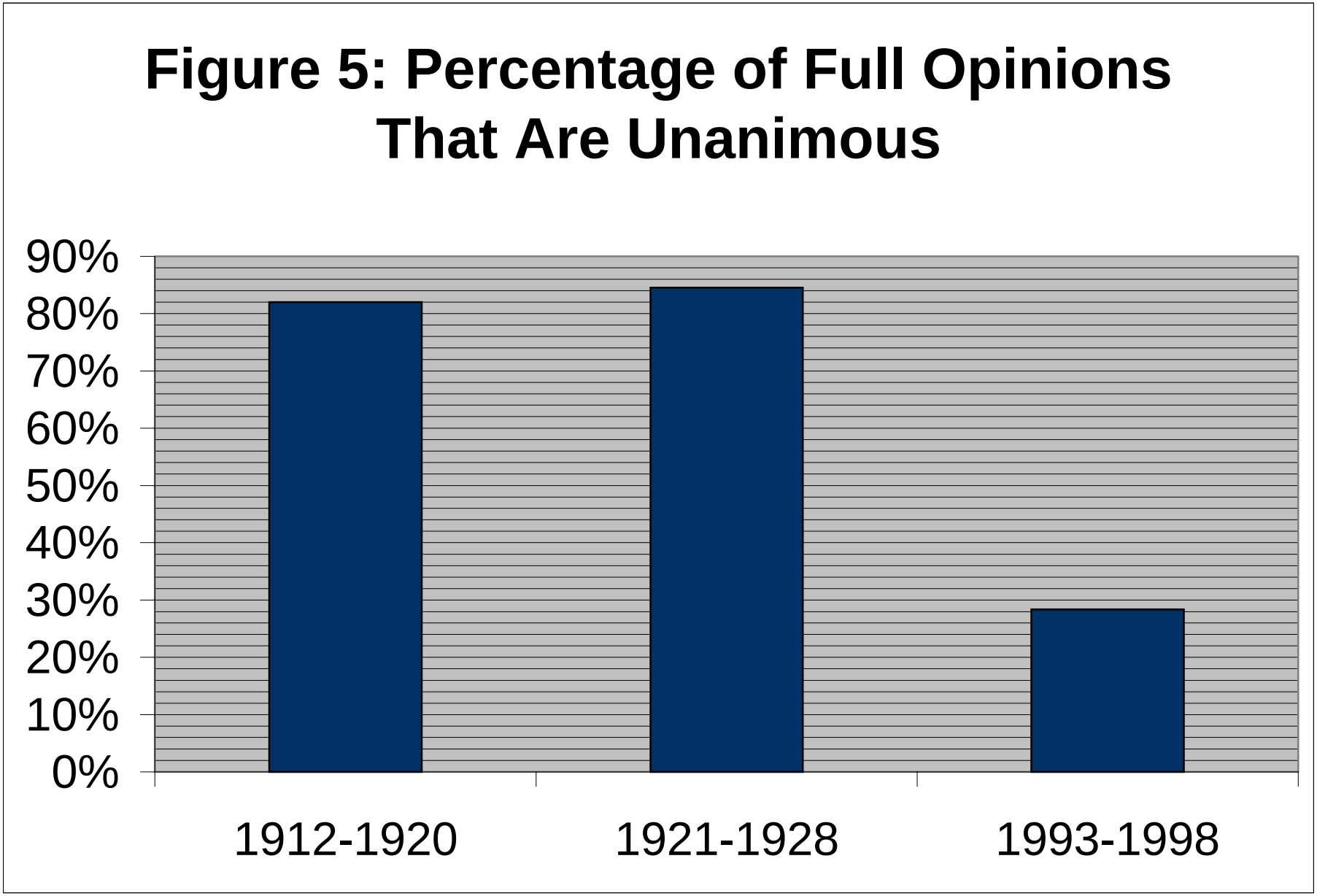
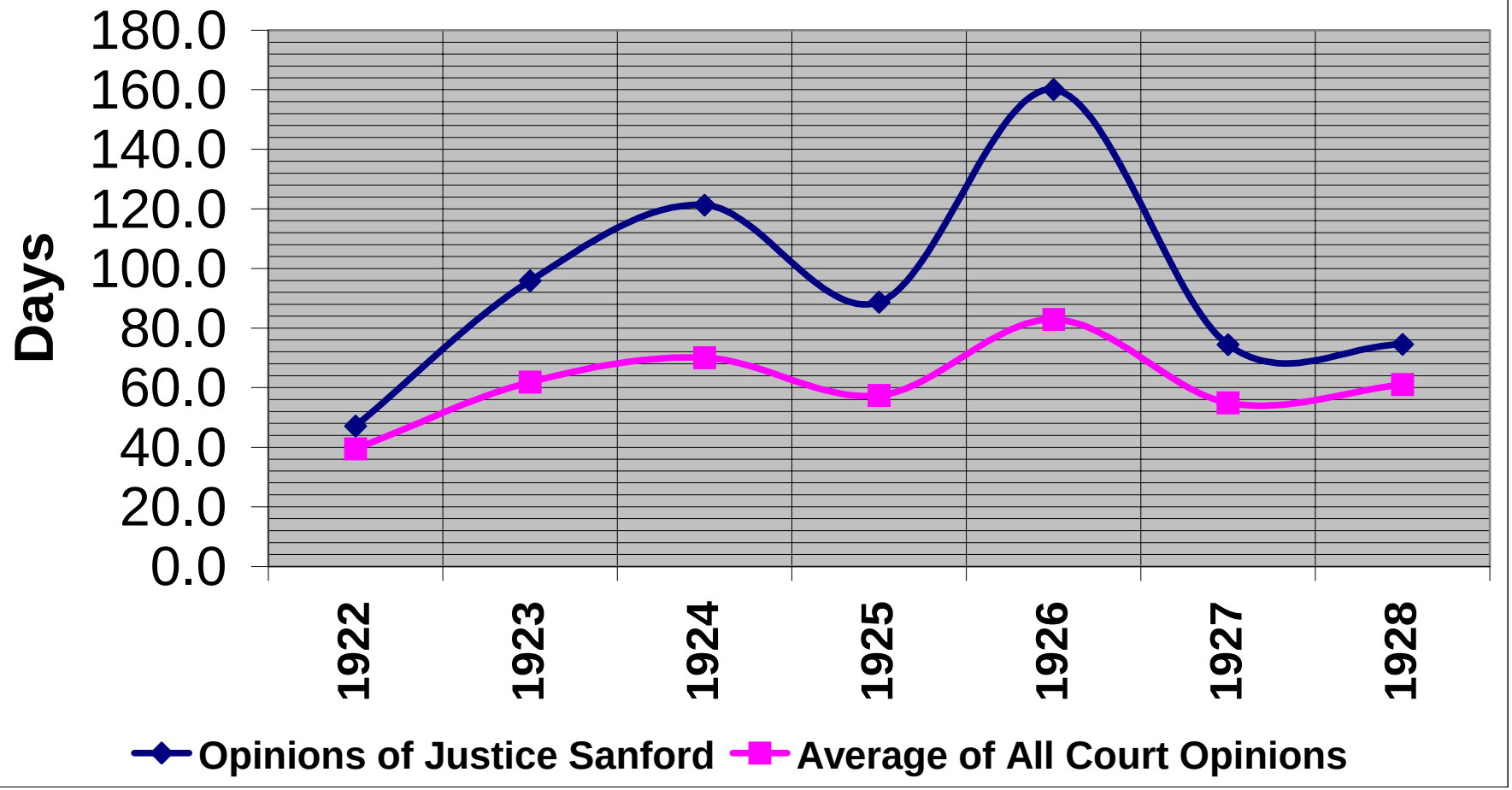
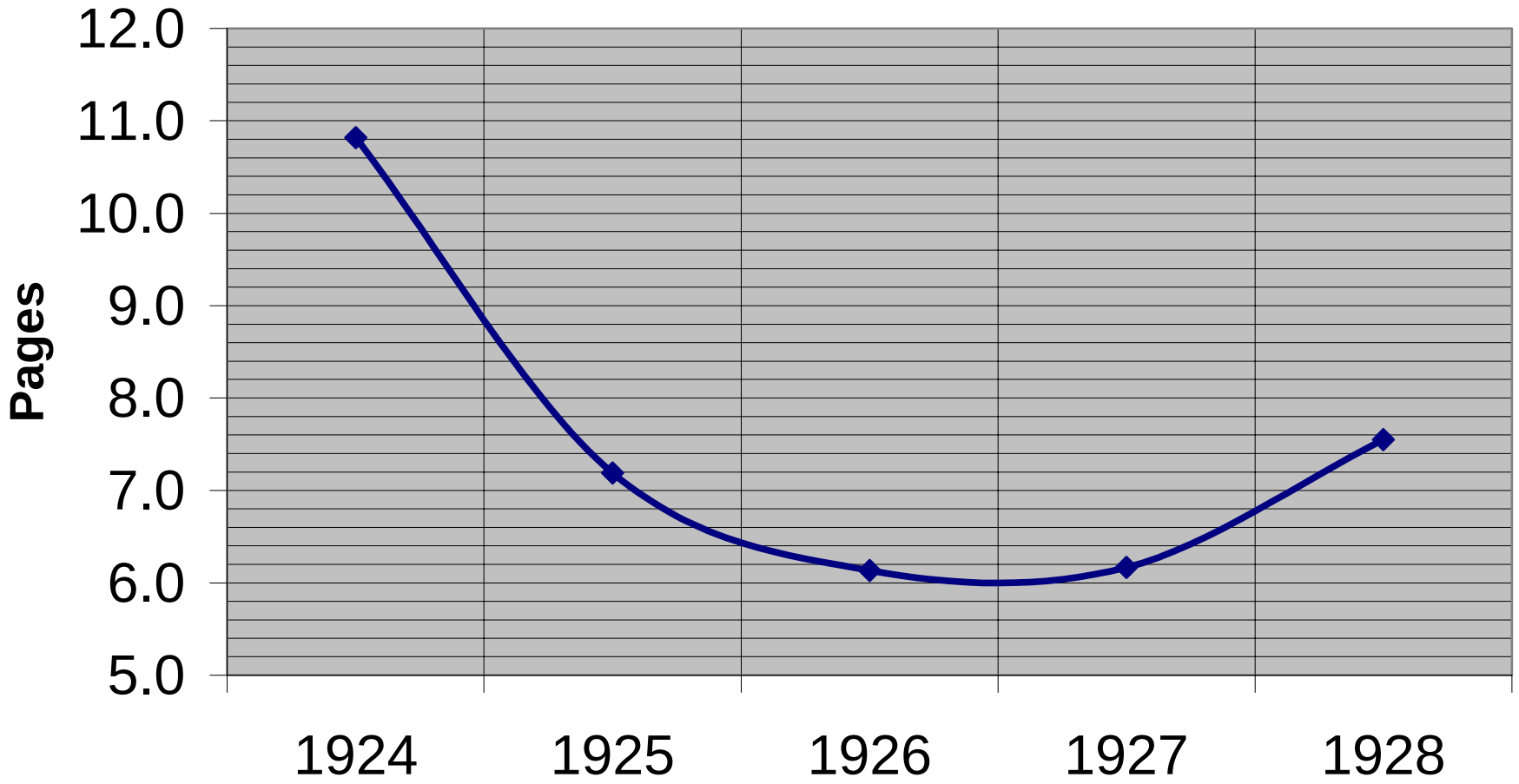


Figure 5: Percentage of Full Opinions That Are Unanimous
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
1912-1920
1921-1928
1993-1998

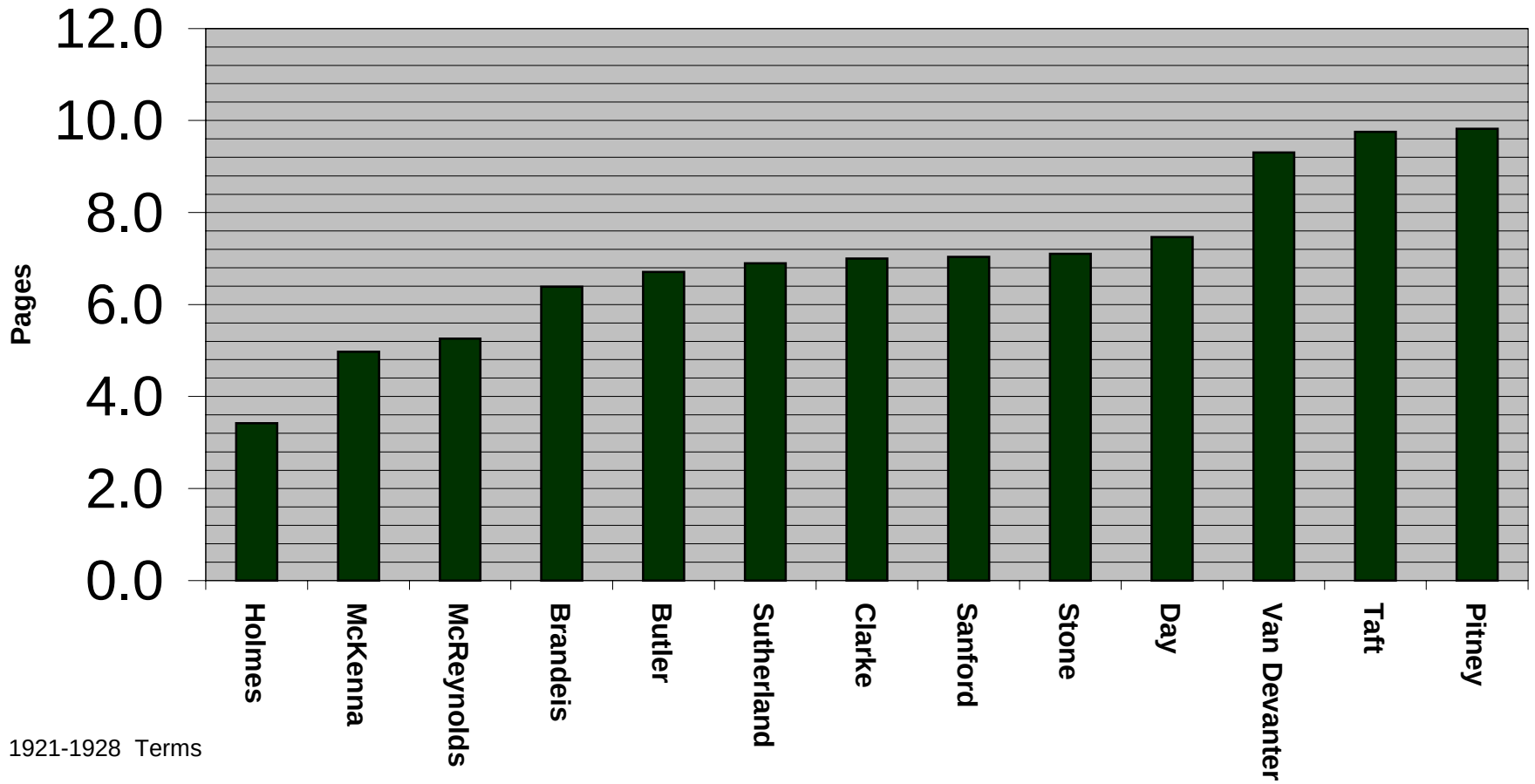
# Figure 6: Average Number of Days from Argument to Delivery of Opinion



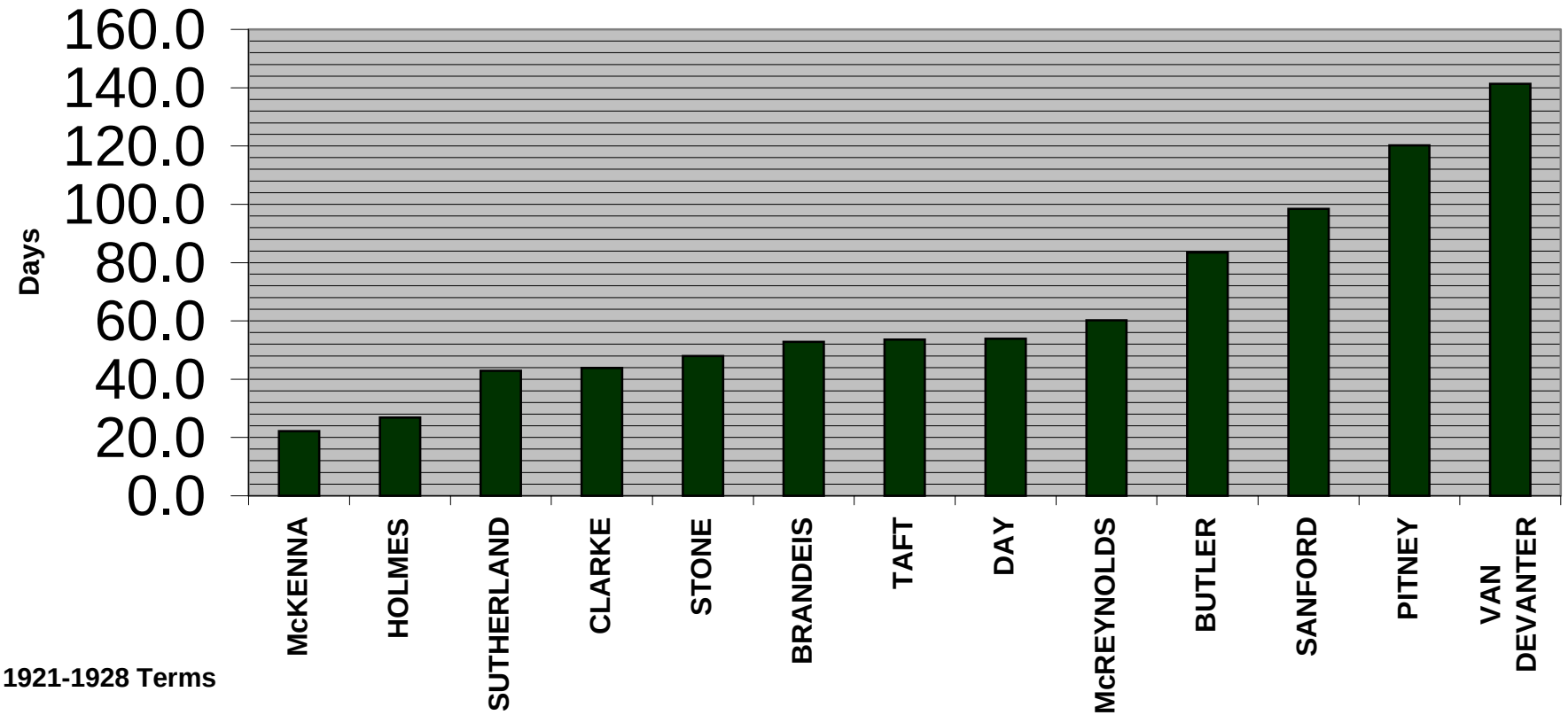
## Figure 7: Average Number of Pages for Opinions by Justice Stone



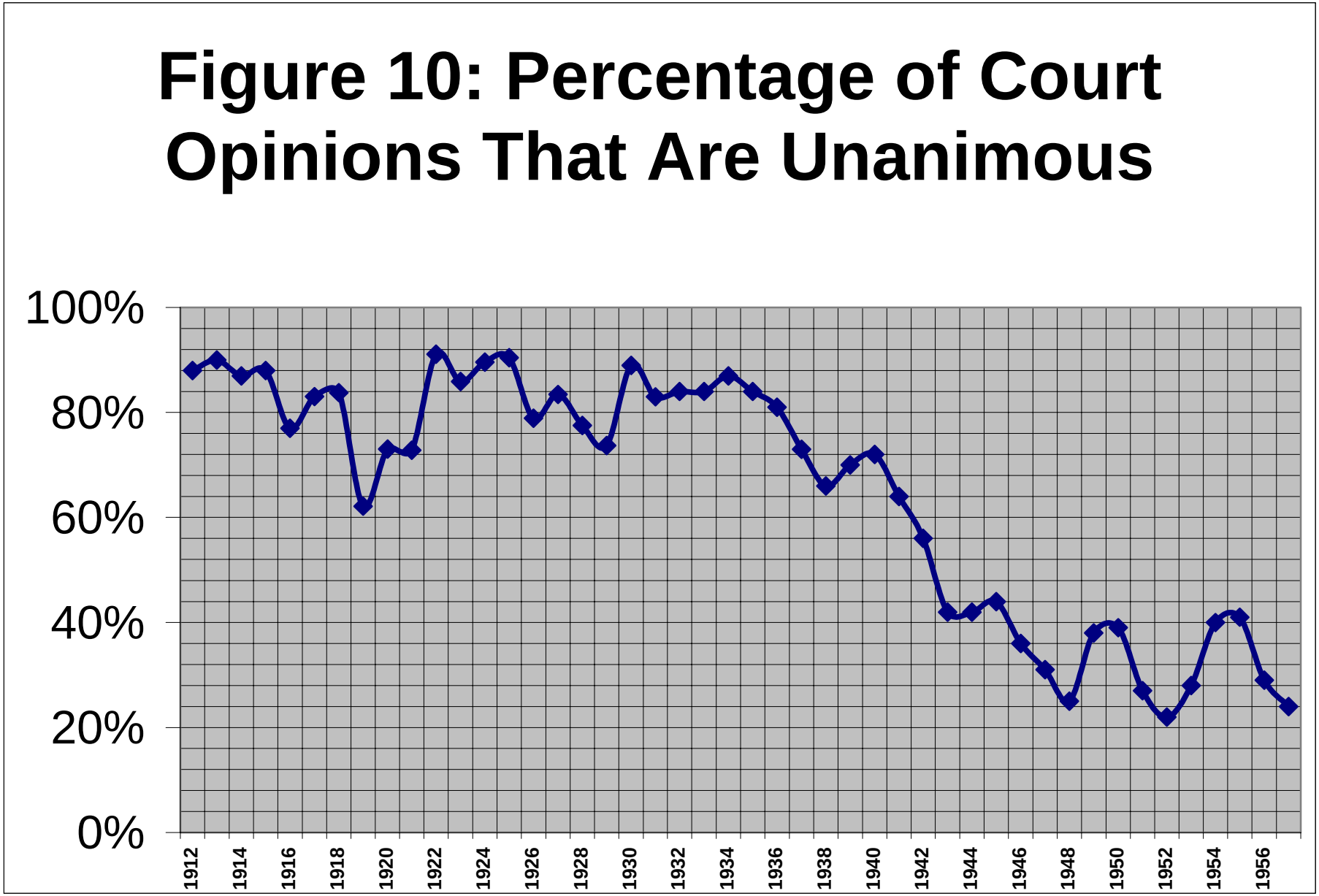
# Figure 8: Average Number of Pages Per Opinion by Justice



# Figure 9: Average Number of Days from Argument to Delivery of Opinion, by Justice



# Figure 10: Percentage of Court Opinions That Are Unanimous



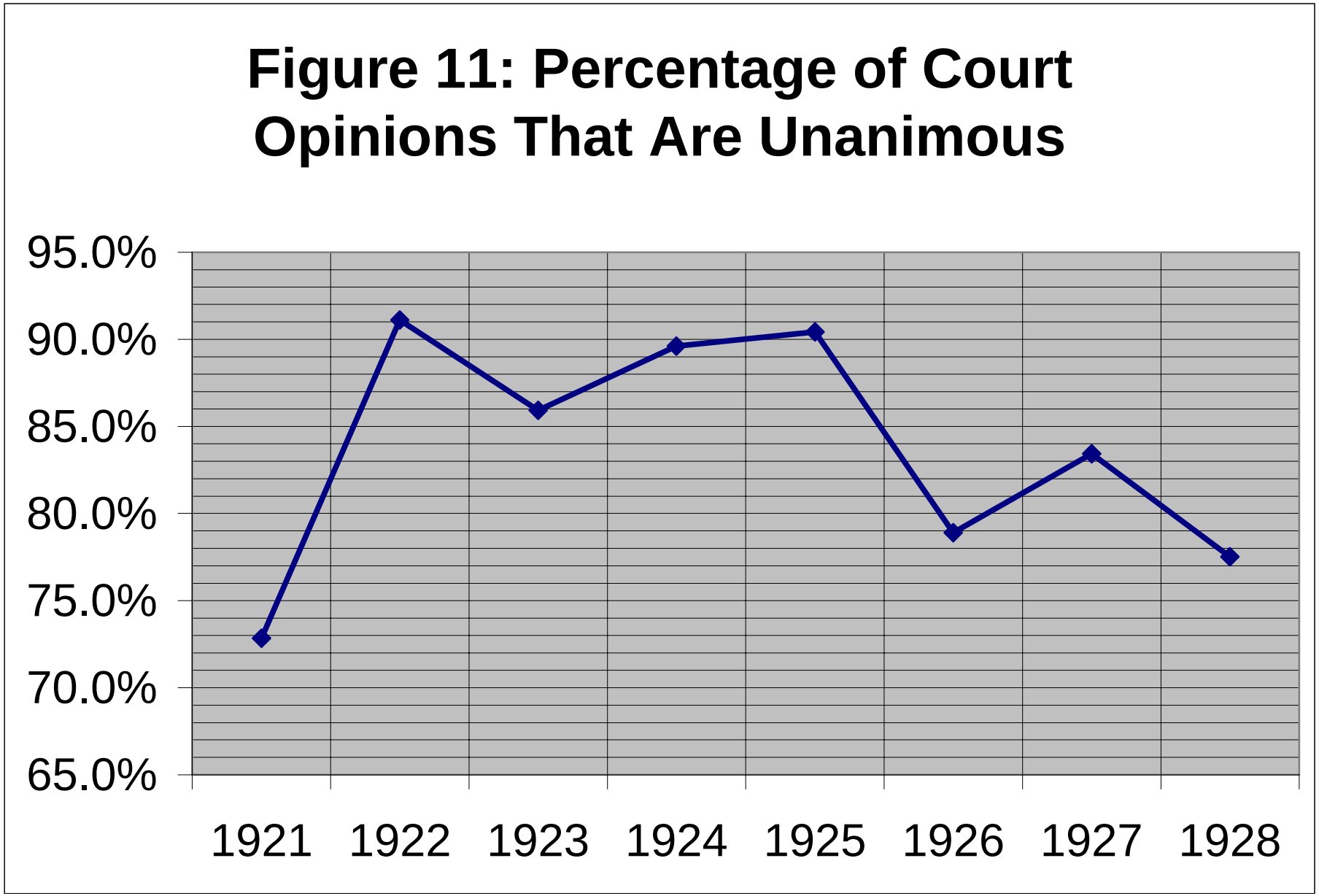
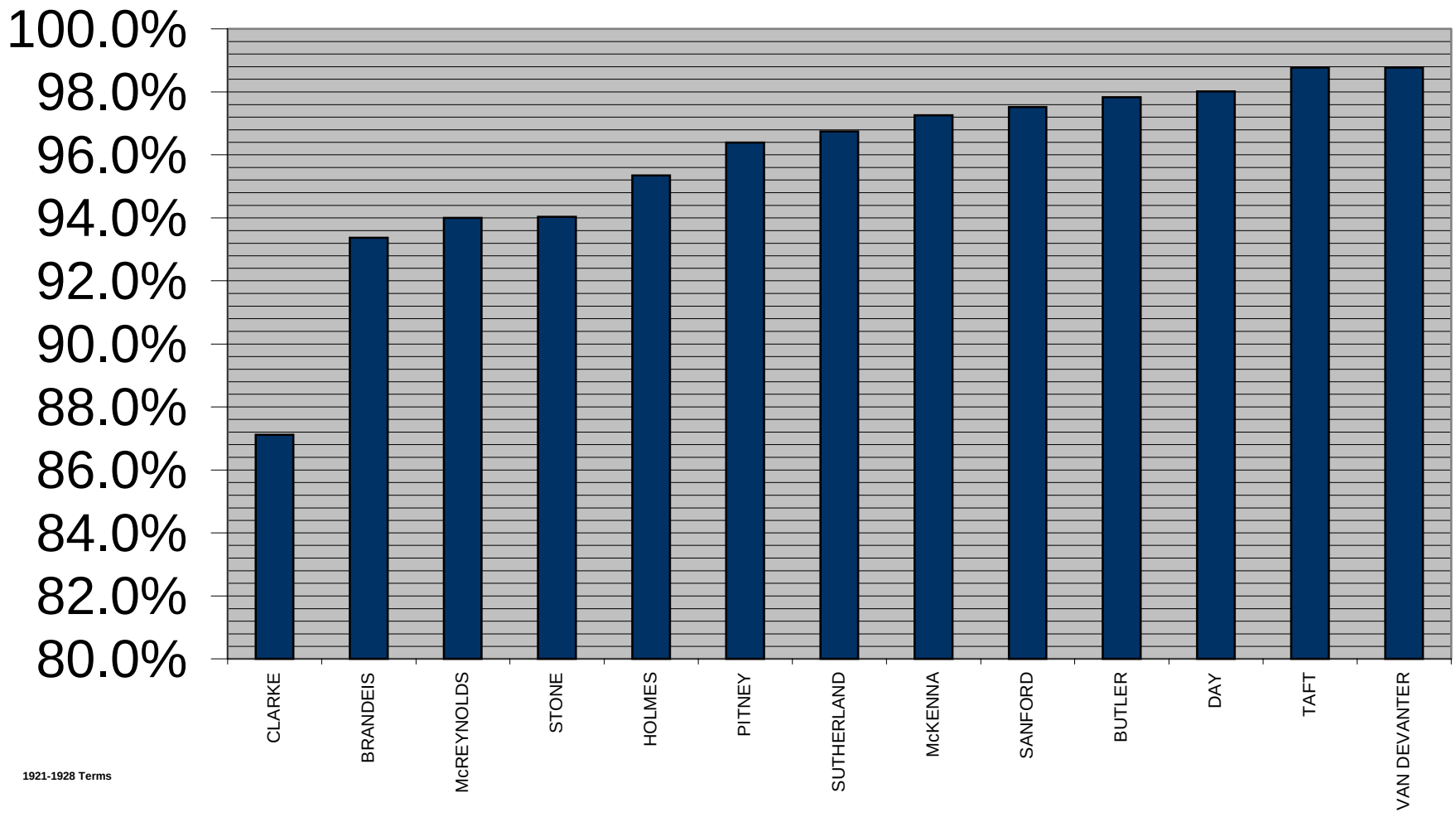


Figure 11: Percentage of Court Opinions That Are Unanimous
95.0%
90.0%
85.0%
80.0%
75.0%
70.0%
65.0%
1921
1922
1923
1924
1925
1926
1927
1928

**Figure 12: Percentage of All Opinions in Which a Justice Joins the Court Opinion**



## Figure 13: Dissenting Votes As A Percentage of Court Opinions

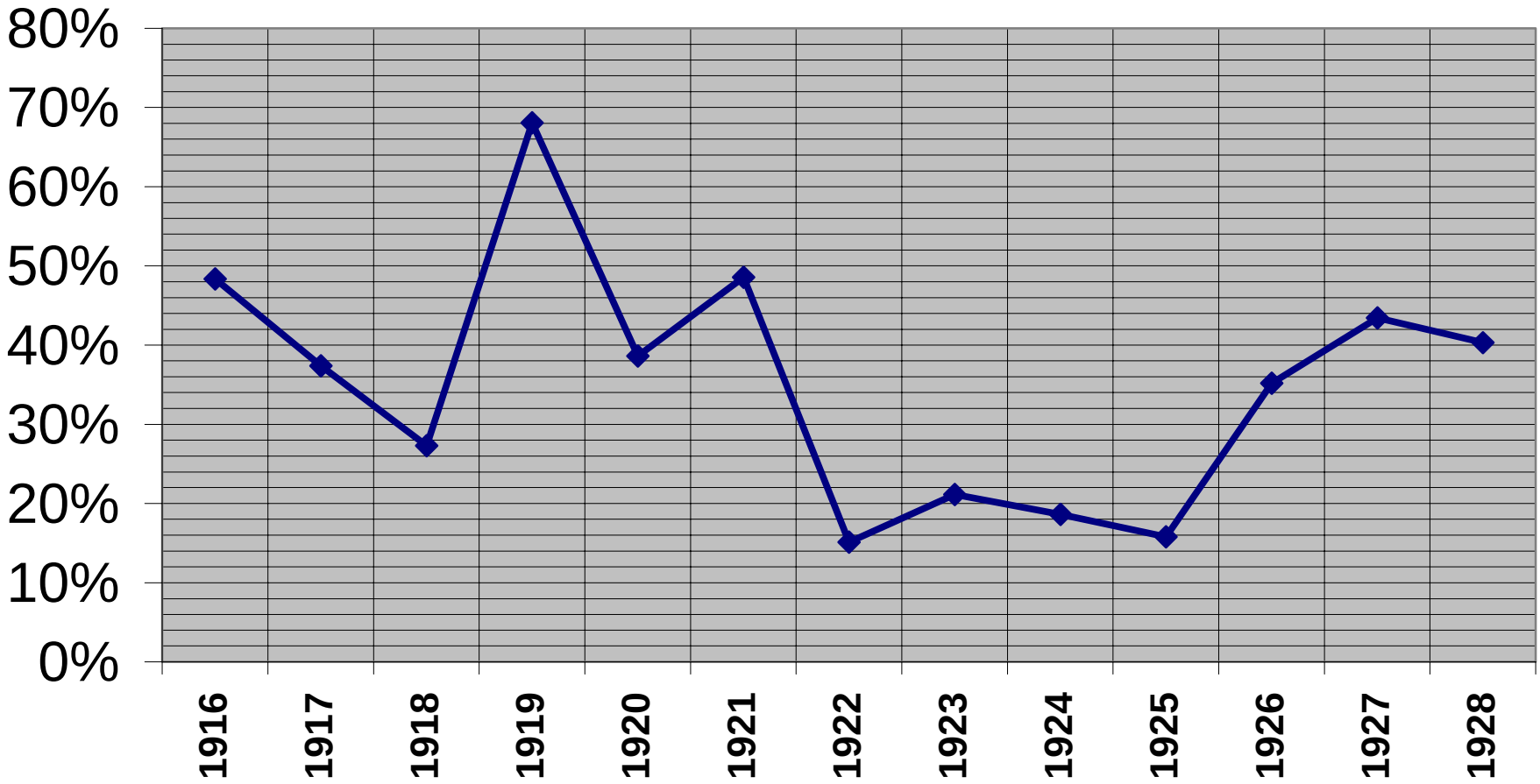
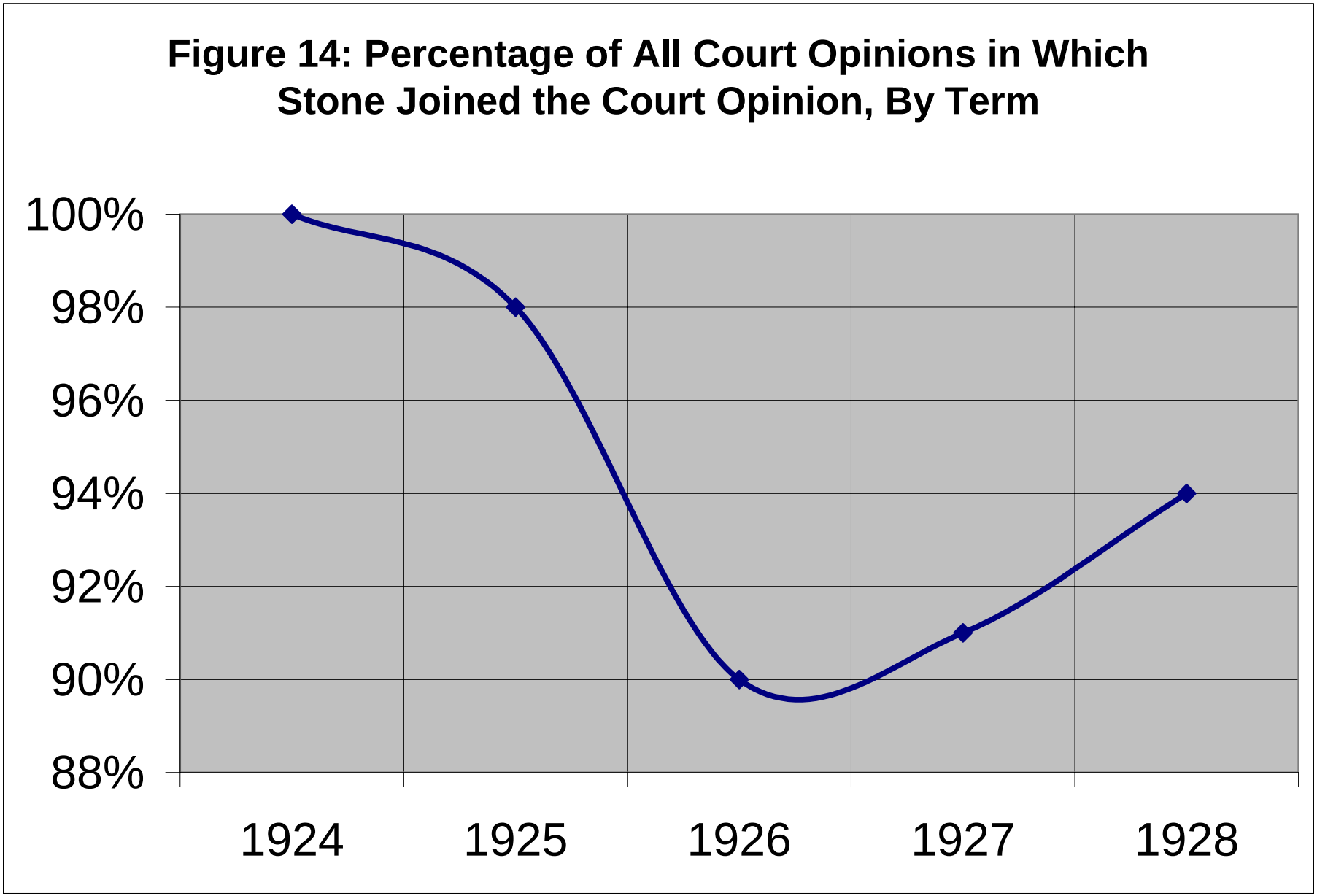


**Figure 14: Percentage of All Court Opinions in Which Stone Joined the Court Opinion, By Term**



## Figure 15: Jurisdiction of Cases In Which Court Issued Full Opinions, 1921 Term

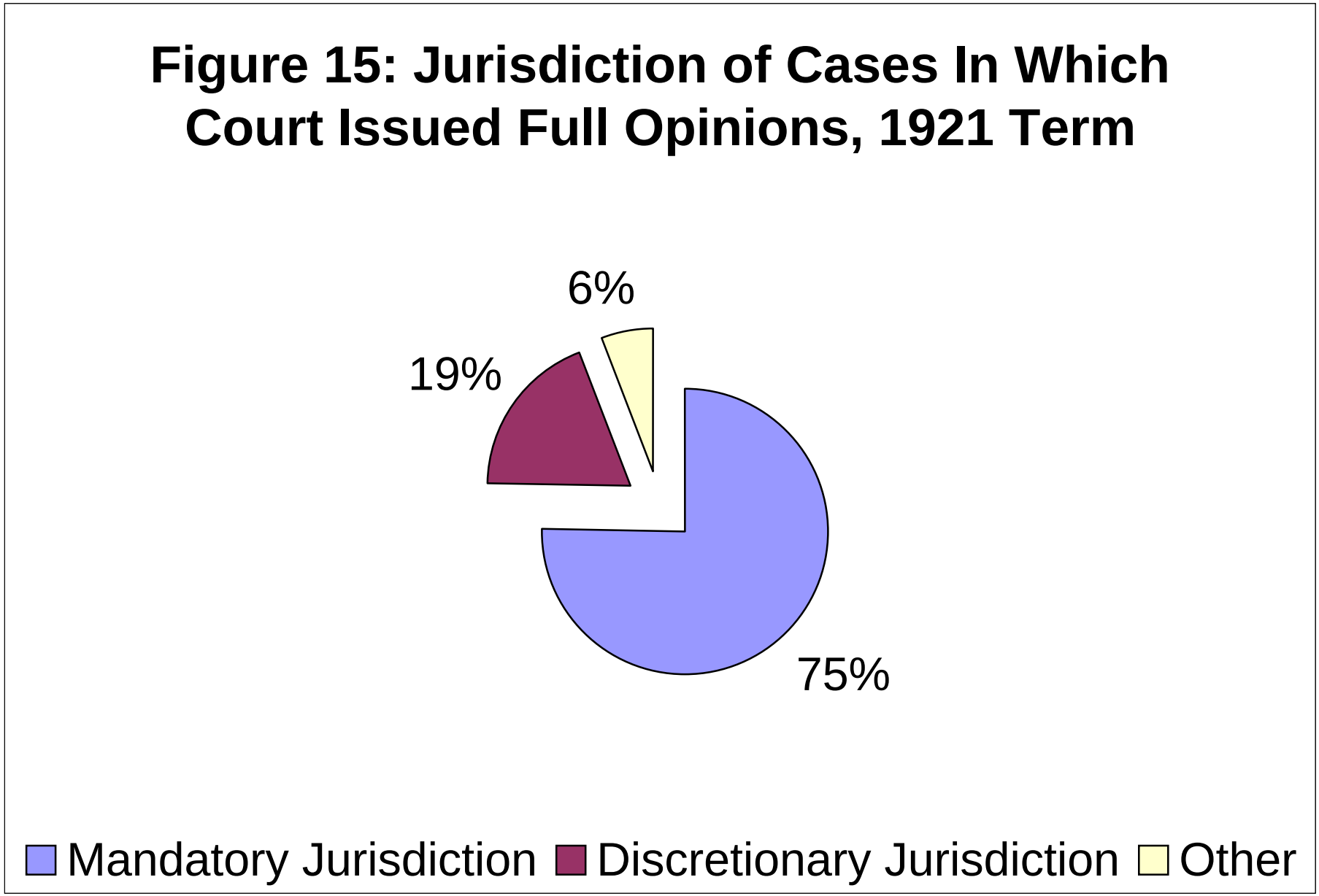


**Figure 16: Jurisdiction of Cases in which Court Issued Full Opinions, 1928 Term**

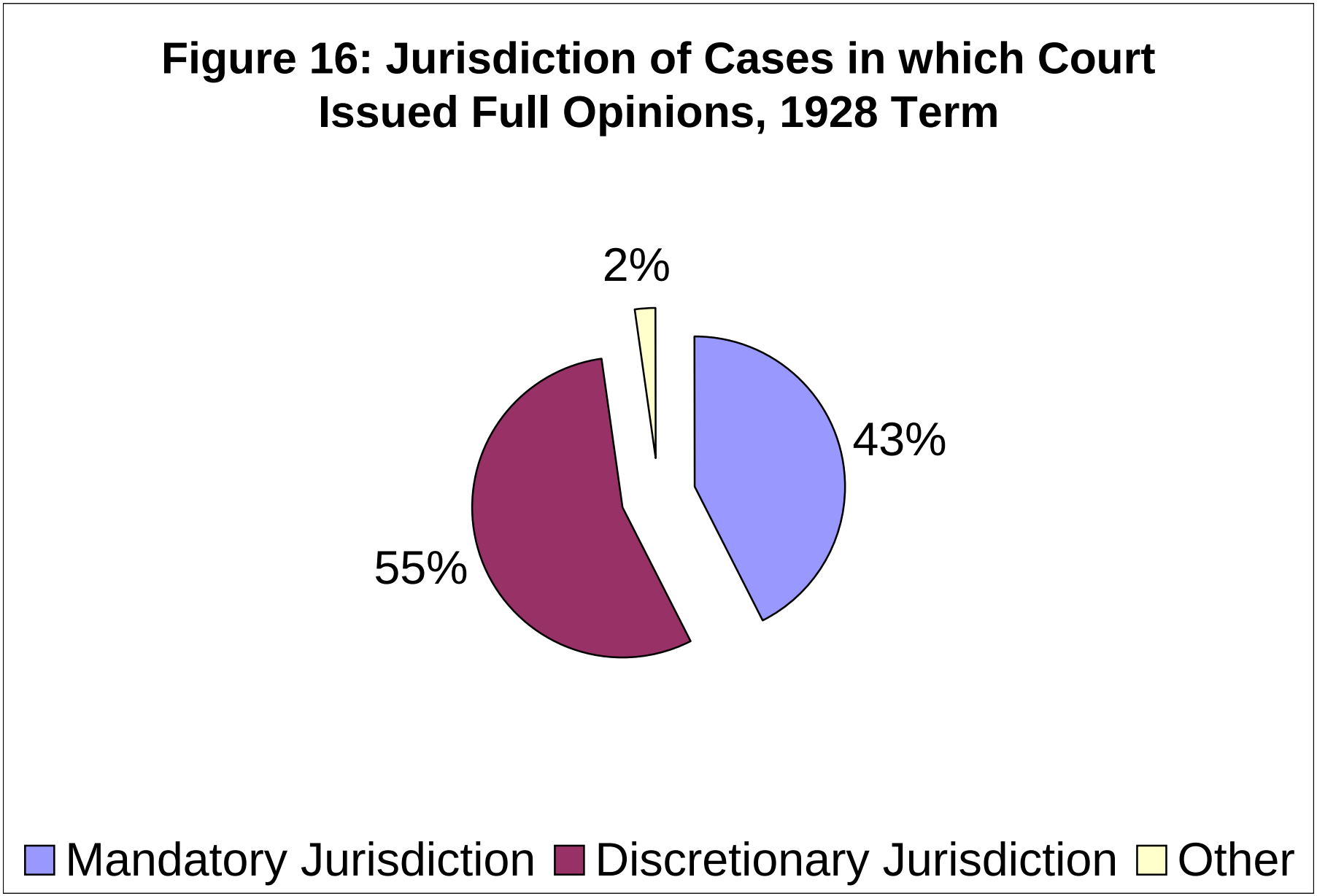
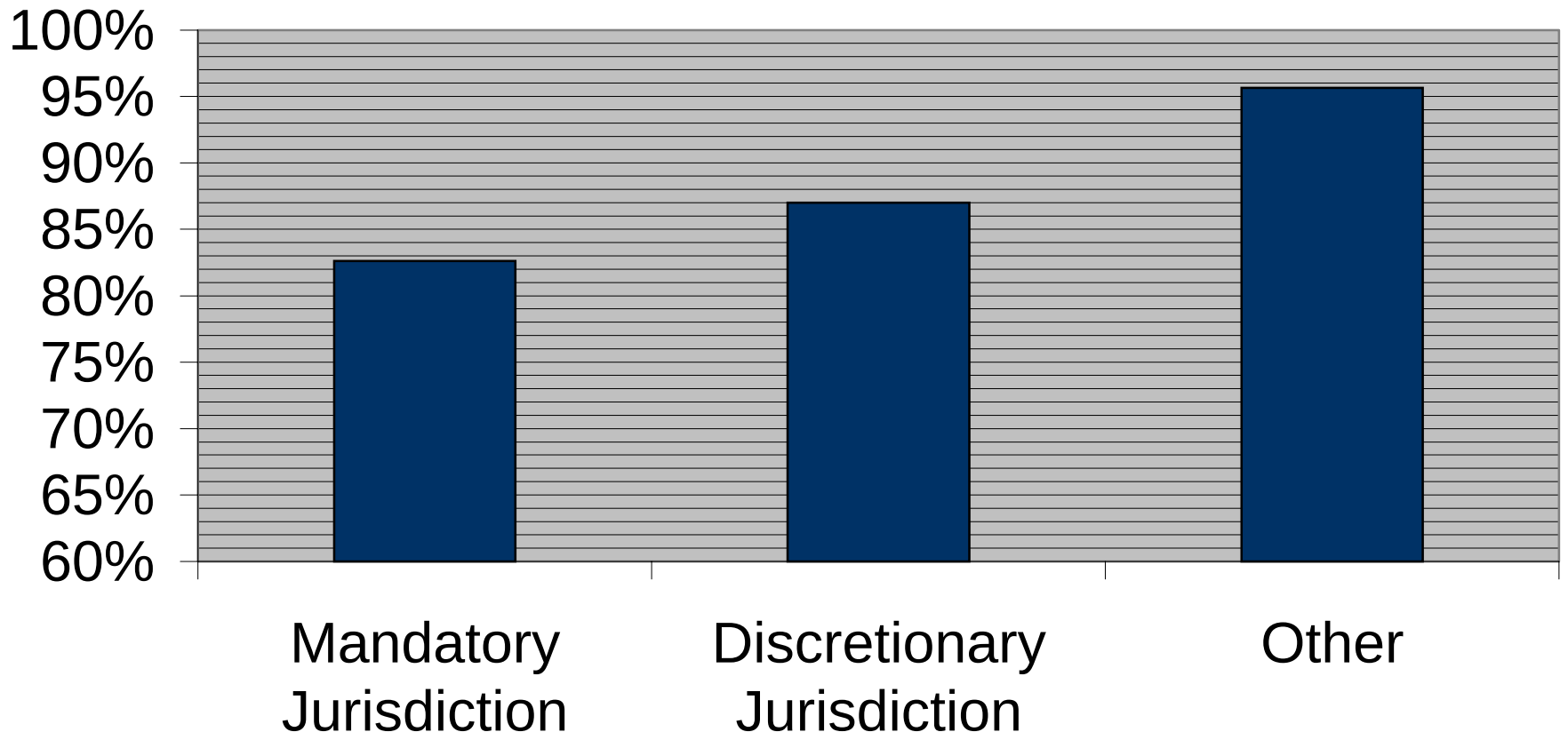
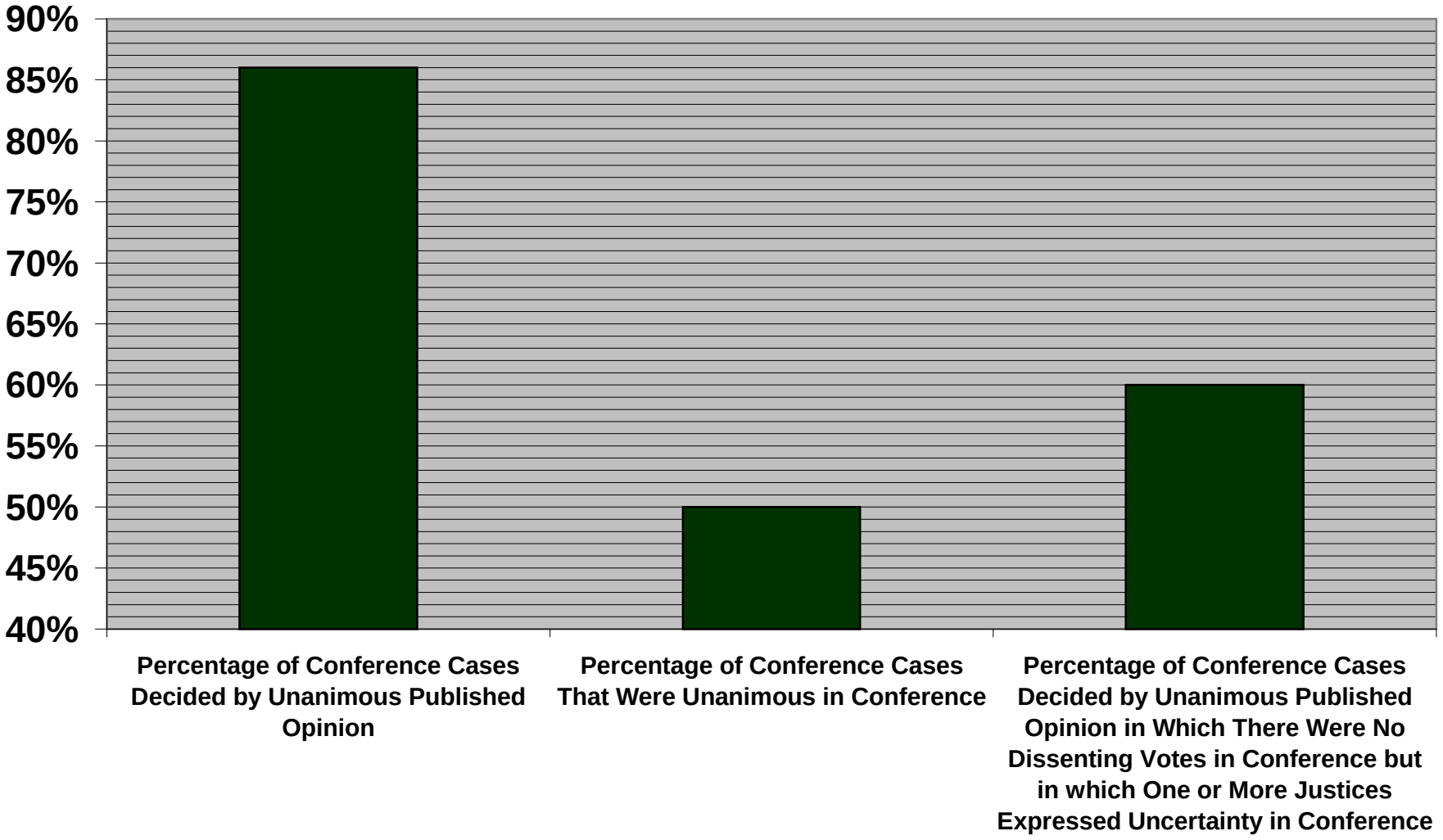


**Figure 17: Percentage of Cases Decided Unanimously, by Jurisdiction, 1921-1928 Terms**



## Figure 18: Unanimity of Conference Cases



## Figure 19: Unanimity of Conference Cases, by Term

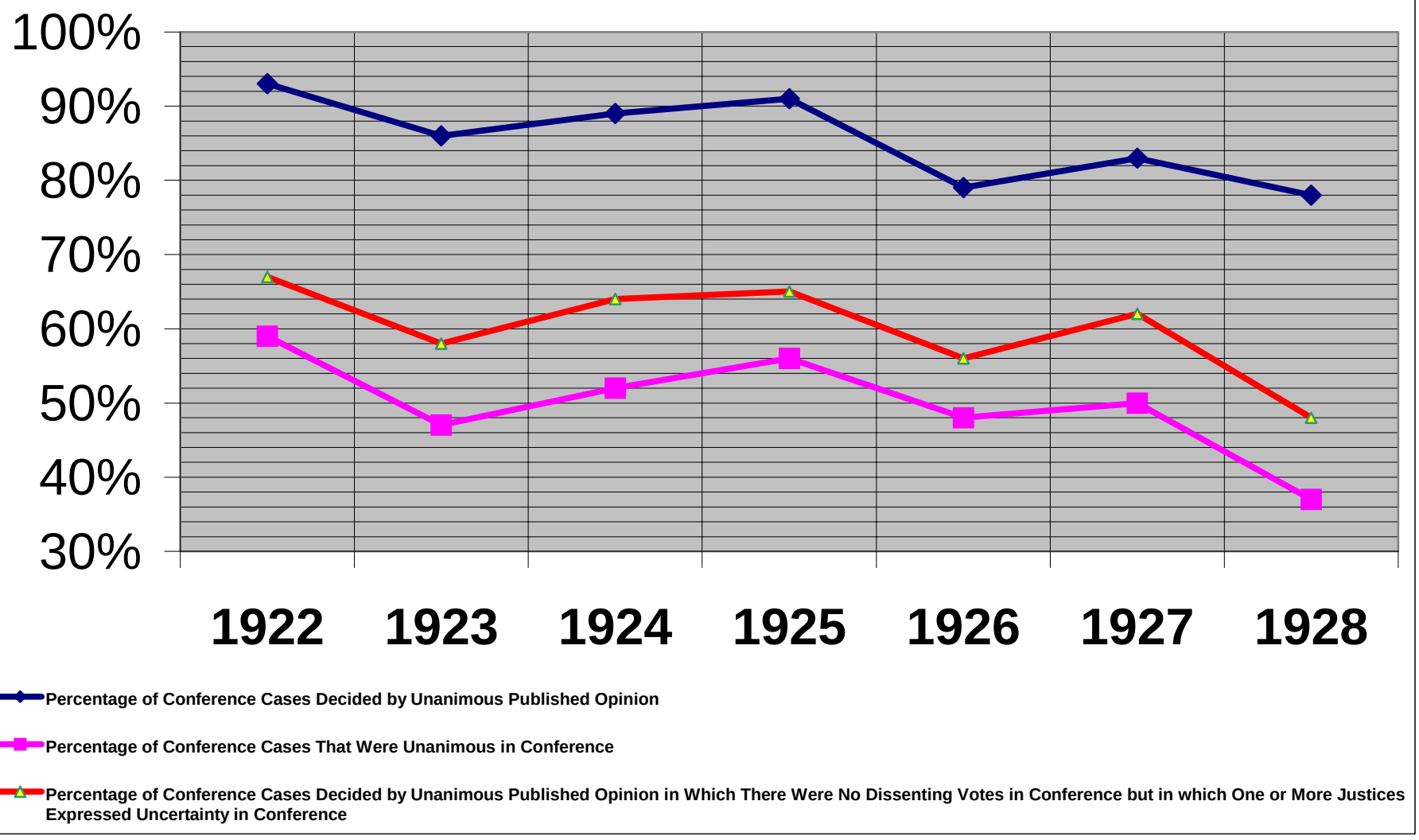
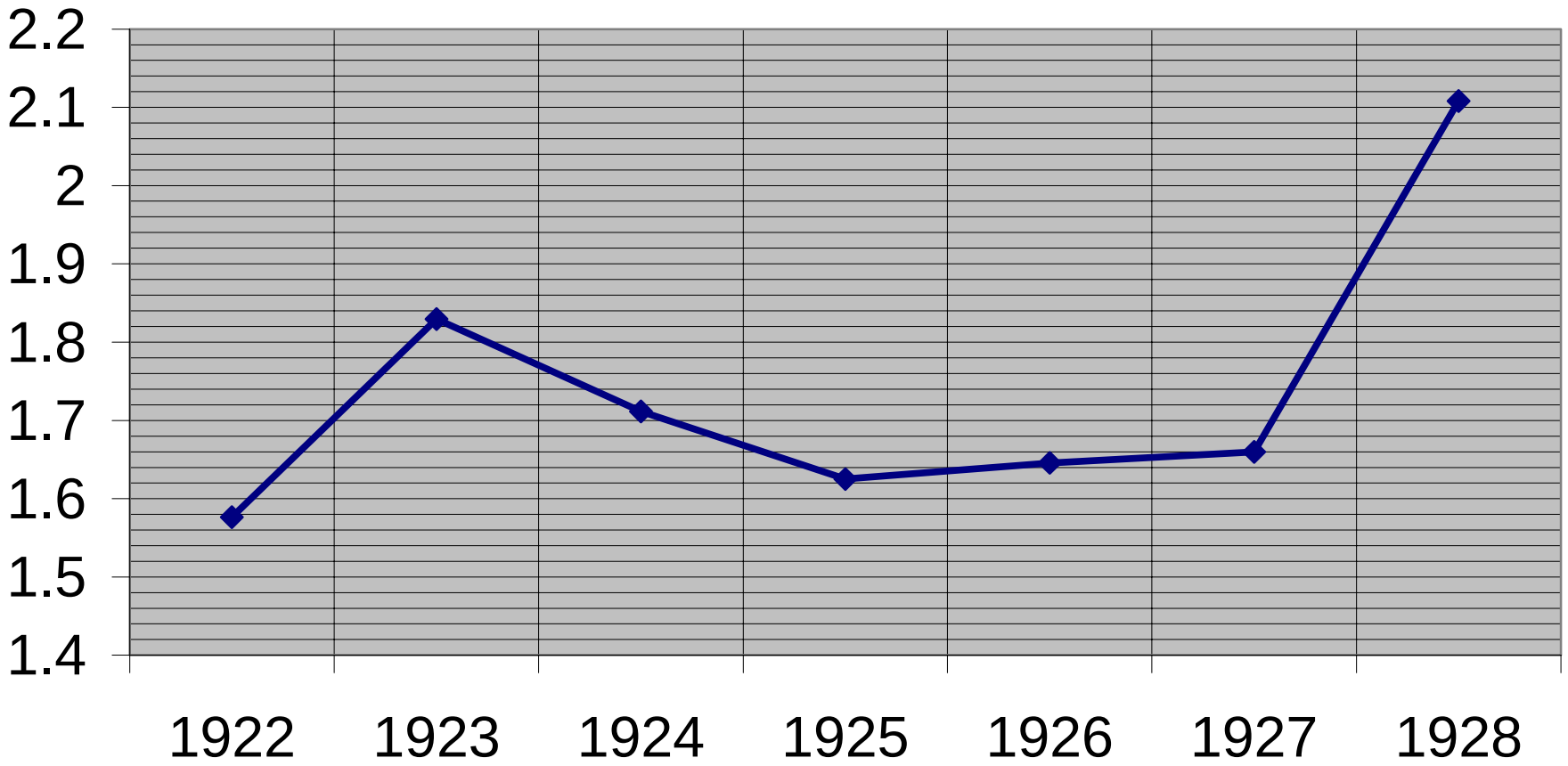
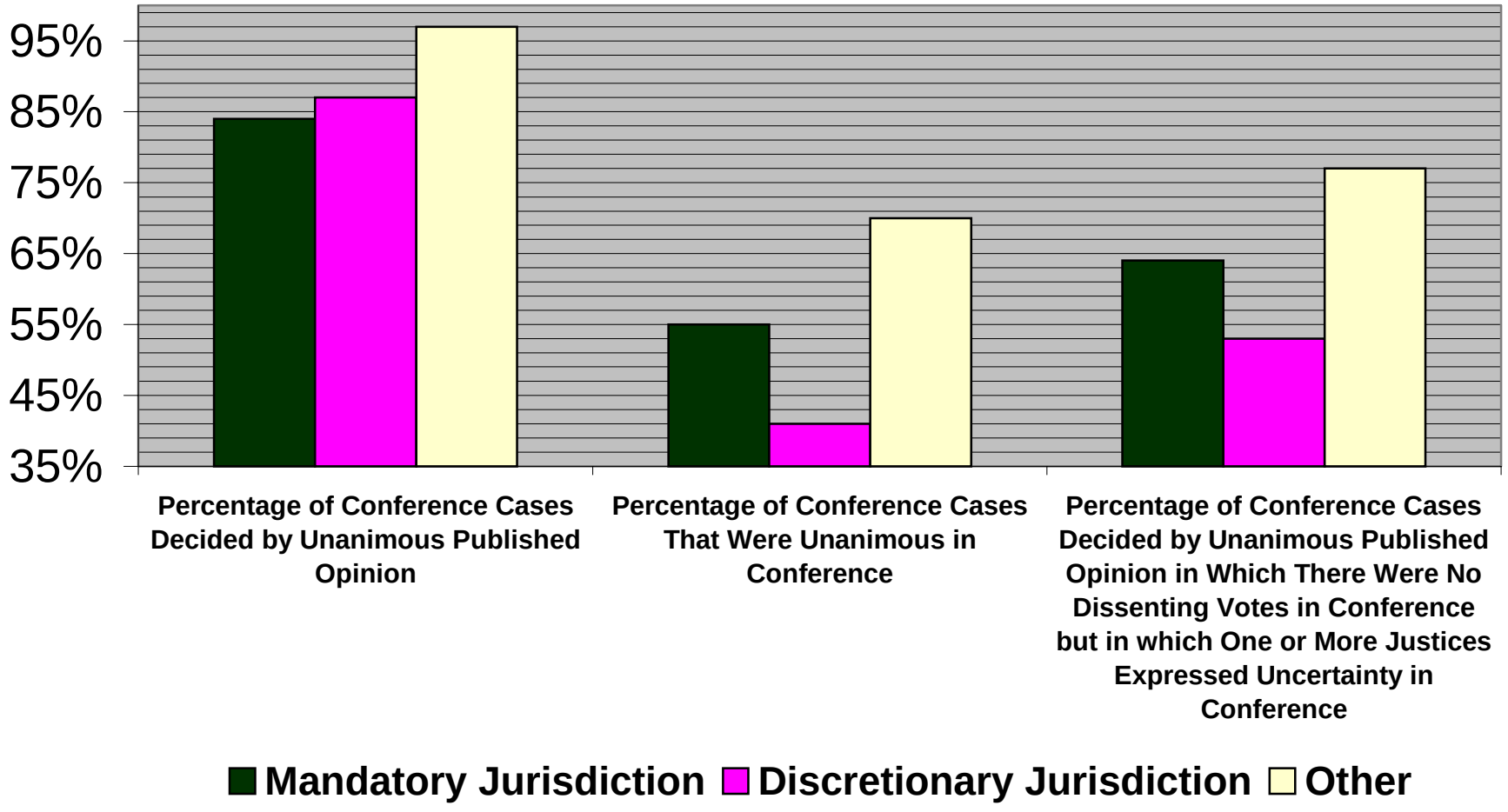


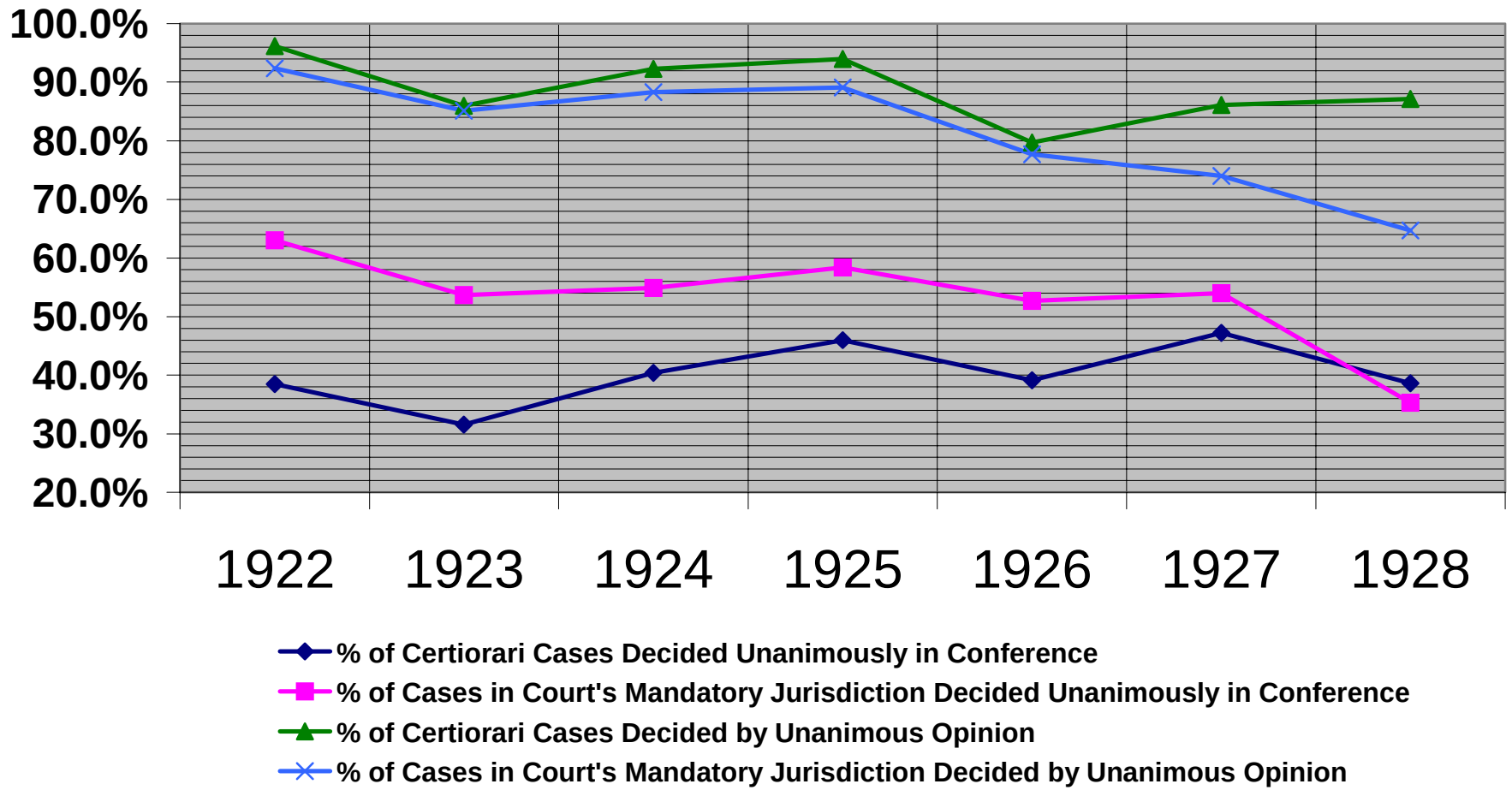
**Figure 20: Unanimity Rate of Published Conference Opinions As A Mutliple of Conference Unanimity Rate**



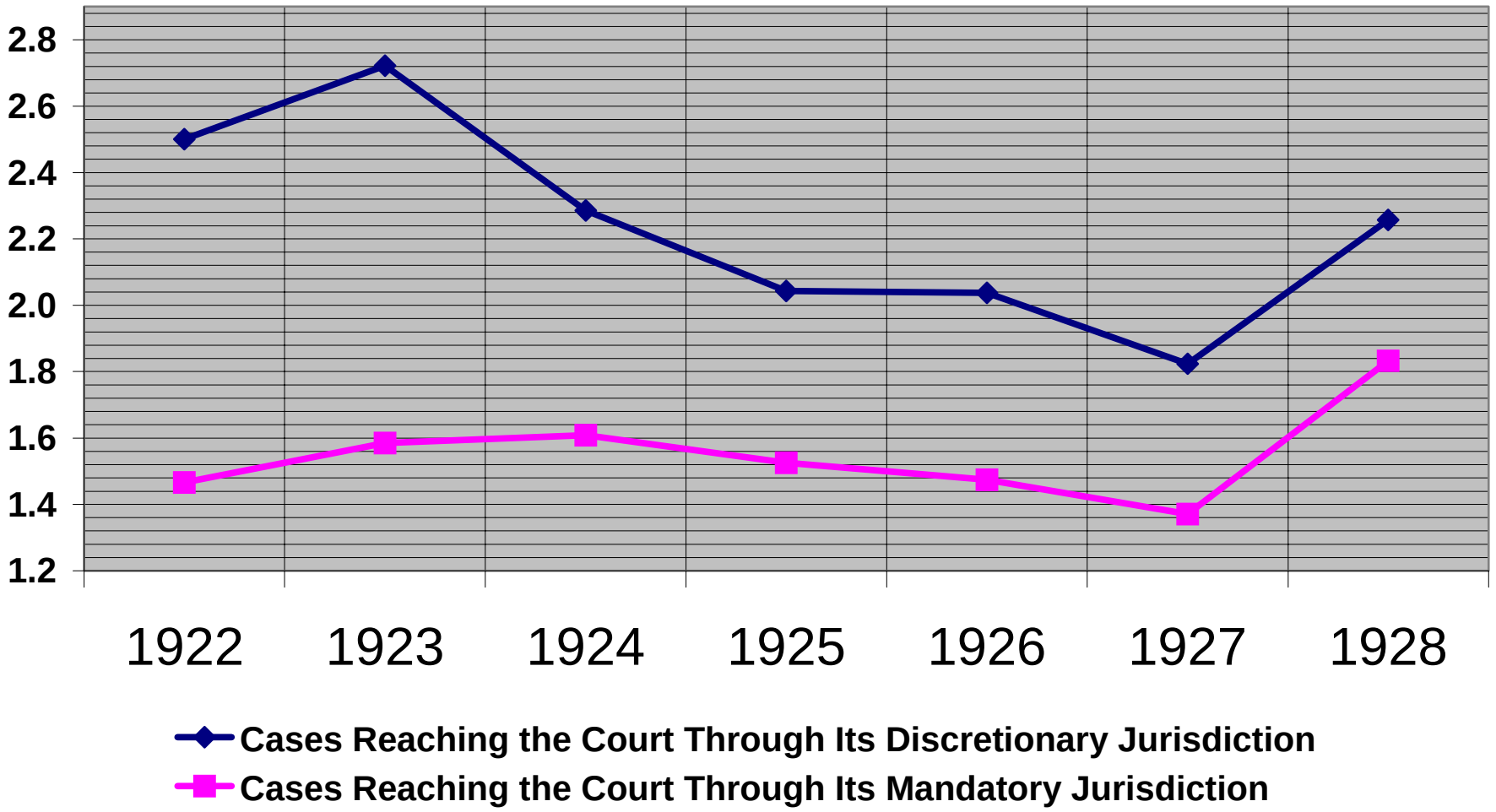
# Figure 21: Unanimity of Conference Cases by Jurisdiction



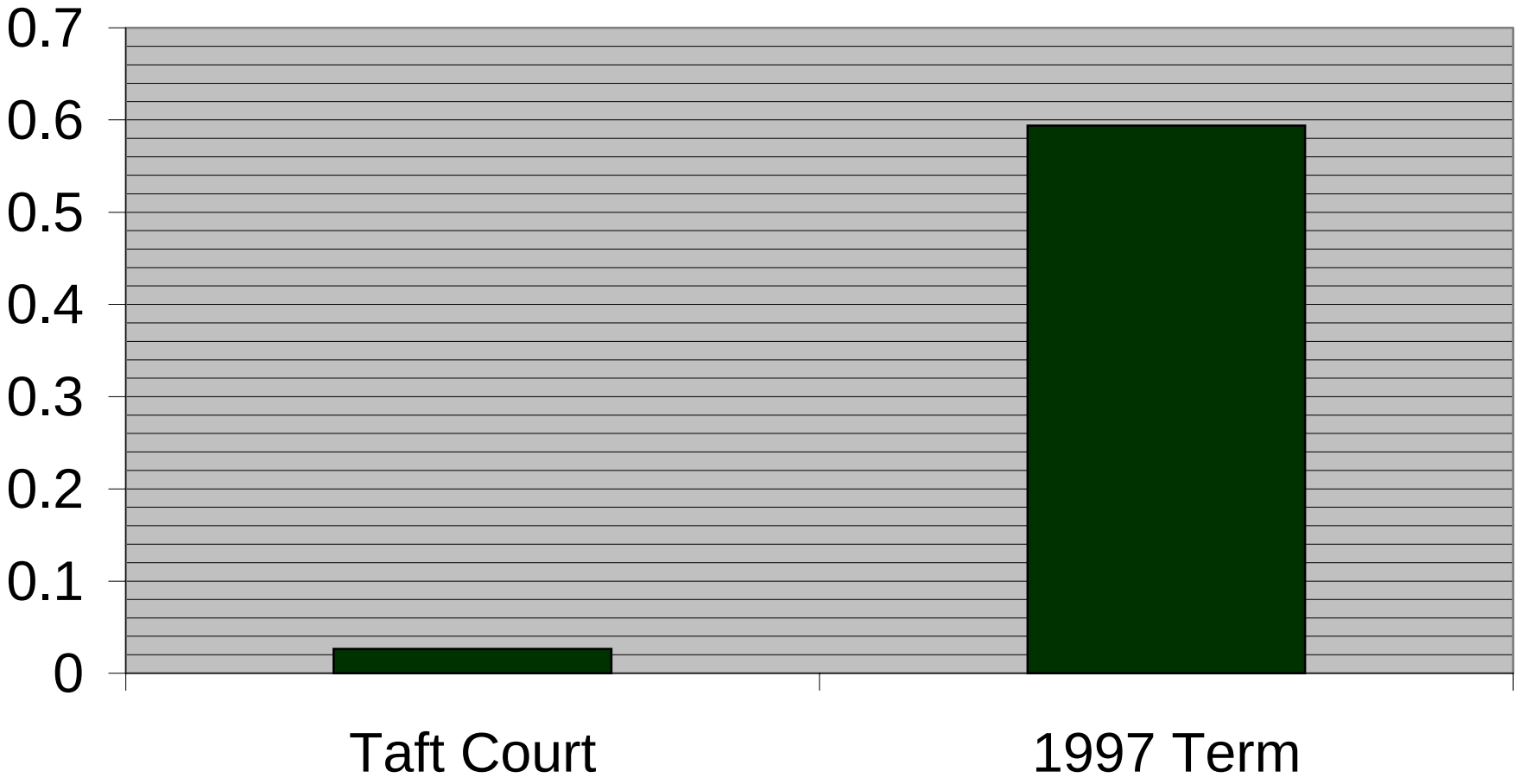
# Figure 22: Unanimity of Conference Cases, by Term and Jurisdiction



## Figure 23: Unanimity Rate of Published Conference Opinions As A Multiple of Conference Unanimity Rate



## Figure 24: Number of Citations to Law Review Articles Per Majority Opinion



# Figure 25: Number of Citations in Majority Opinions, 1921-1928 Terms

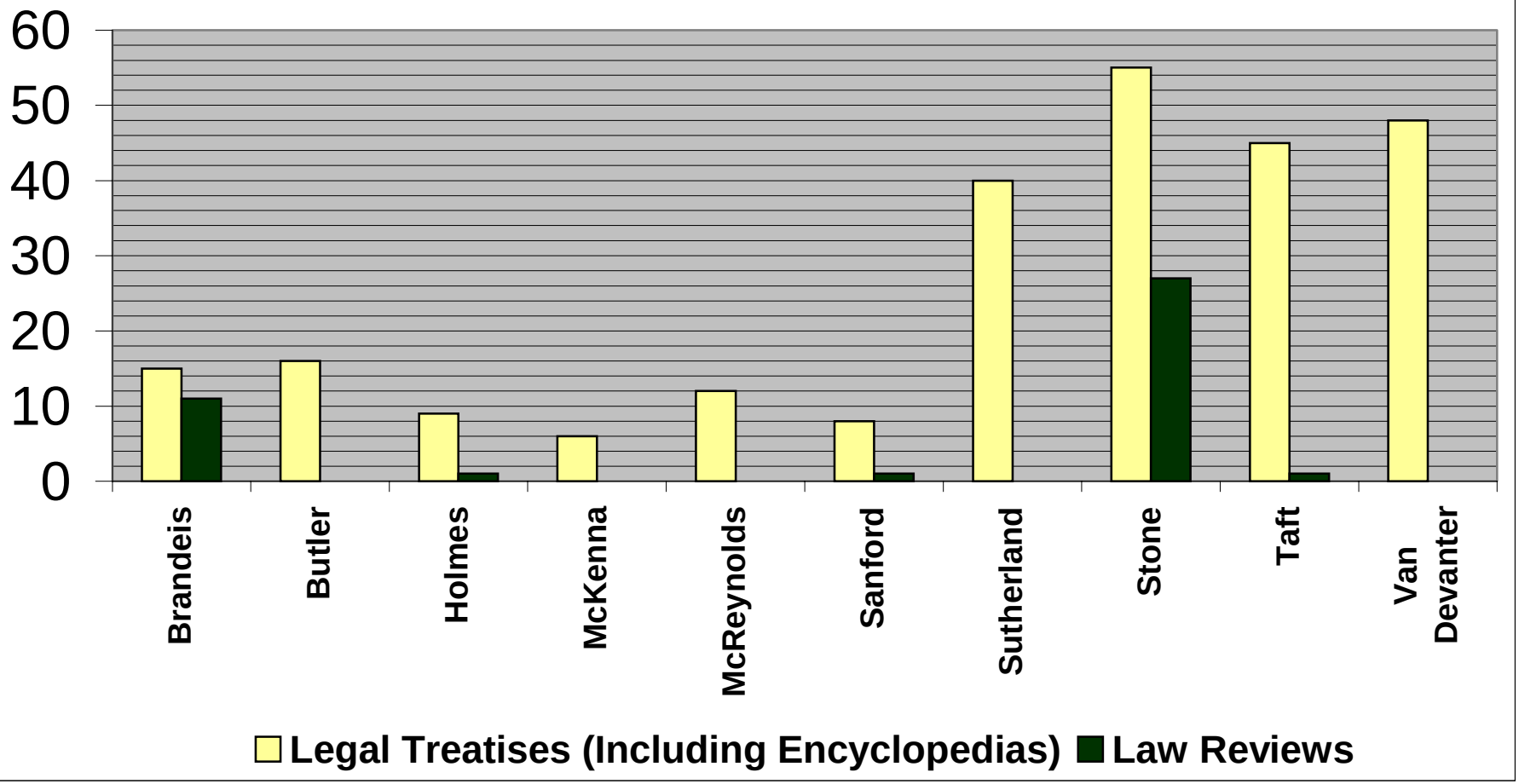
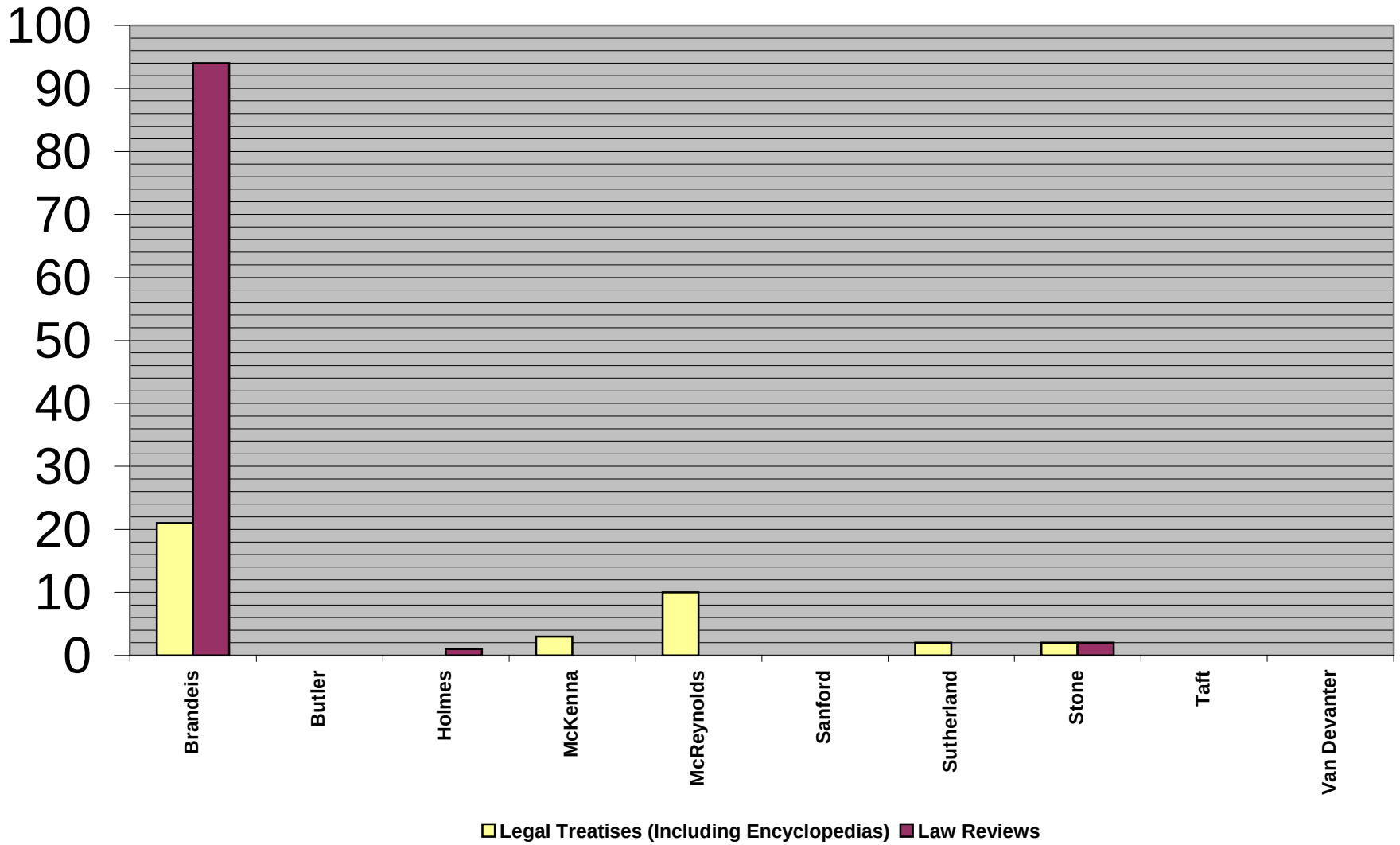
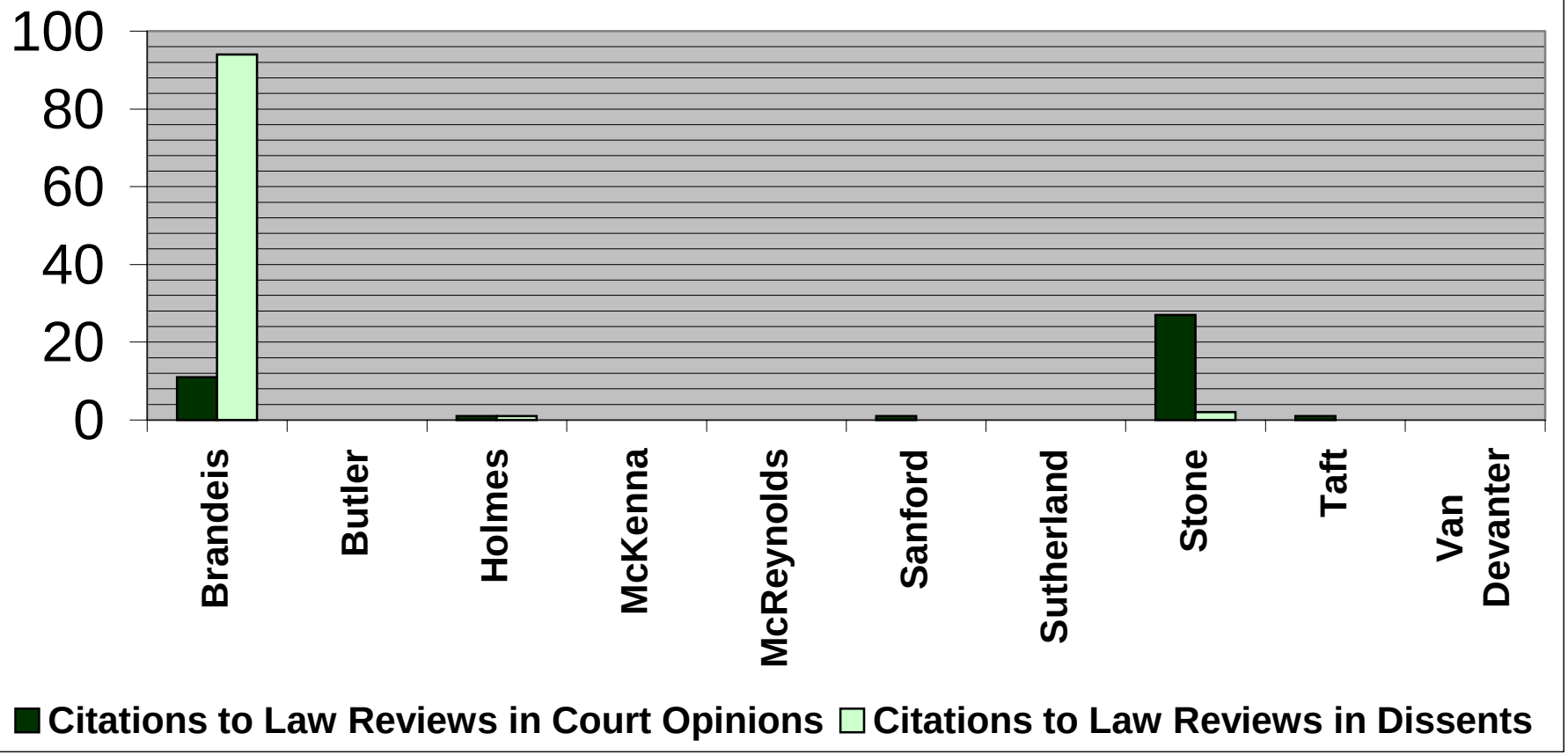


**Figure 26: Number of Citations in Dissenting Opinions, 1921-1928 Terms**



# Figure 27: Citations to Law Reviews in Court Opinions and Dissents, by Justice, 1921-1928 Terms



# Figure 28: Number of Citations in Court Opinions