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WILLIAM HOWARD TAFT AND
CHARLES EVANS HUGHES:
CONSERVATIVE POLITICIANS AS
CHIEF JUDICIAL REFORMERS

In the twentieth century the Chief Justice of the United States has played a leading part in judicial reform. A variety of conditions have been responsible for the development of this role, and foremost among them has been the creation of explicit institutional structures designed to facilitate reform.

The Chief Justice is "first among equals" on the Supreme Court over which he presides. Whether or not he is, in fact, more influential than his eight colleagues depends largely on his own skills and competencies.¹ But since 1922, the Chief Justice has sat as Chairman of the Judicial Conference of the United States. This institution composed of judges from the "inferior" federal courts, exercises broad responsibility for administration of business in the federal courts. Within its purview lie traditional subjects of judicial reform as well as more mundane housekeeping aspects of the court system. Thus the Chief Justice cannot avoid exposure to and direct involvement in judicial reform at the federal level and, to the extent issues of judicial federalism arise, at the state level as well. As conference

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¹ See MURPHY, *ELEMENTS OF JUDICIAL STRATEGY*, c. 3 and authorities cited in n.1 of c. 3 (1964).

chairman in a periodic gathering of "unequals," the Chief Justice is undisputed leader.²

During the decades of the twenties and thirties, the Chief Justice of the United States came to fill a role which would gain permanence, that of chief judicial reformer. It was a role, however neutral in appearance, which permitted the presiding officer of the nation's highest court to foster seemingly prosaic reforms of court organization, jurisdiction, administration, and procedure. Yet such alterations could pose far-reaching consequences for value allocations and power distribution among and between elements of the larger political system.

At the annual Judicial Conference of the United States, the American Law Institute, the American Bar Association meetings, and circuit judicial conferences, William Howard Taft and Charles Evans Hughes sounded reform themes strikingly similar in their symptomatic analysis of judicial problems, yet very different in their political theories and reform strategies. That they exhibited similarities is hardly unexpected given the common threads coursing through their backgrounds: Republicanism, previous judicial experience, presidency of the American Bar Association, prior elective office as President in the case of Taft and as Governor of New York in that of Hughes, important appointive positions, Taft as Secretary of War and Governor-General of the Philippines, and Hughes as Secretary of State. As advocates of change in the judicial system, Taft and Hughes fell squarely into the mainstream of the conservative reform tradition so dominant in the world of the bench and bar. Both labored assiduously to ward off specific threats to an independent federal judiciary and to preserve a social and political equilibrium which seemed ever precarious.

I. TAFT AND PROGRESSIVISM

To William Howard Taft, even the last days of the Edwardian era were fraught with dangers. All about him churned a "lack of respect for law and the weakened supremacy of the law." Physical force and lawless violence appeared increasingly "a calculated element in the winning of political and social issues."³

² See FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* cc. 1 & 2 (1973).

³ Taft, *The Attacks on the Courts and Legal Procedure*, before the Economic Club of Worcester, Mass., 13 May 1914, Series 9C. Taft Papers (Library of Congress).

Aider and abetter, if not prime cause, of this deplorable condition lay with progressivism of the social reform variety as distinguished from "efficiency progressivism" supported by leading members of the legal community.⁴ It was the former that composed, in the words of the organizing committee of the American Law Institute "that radical section of the community which would overthrow existing social, economic and political institutions."⁵

Theodore Roosevelt, Robert M. La Follette, and George W. Norris numbered among the conservative reformers' chief antagonists. Such social progressives looked to government to ameliorate defects in the fabric of society.⁶ But often they looked in vain as courts, particularly federal courts, struck down or otherwise emasculated legislative efforts to meet new industrial conditions. To progressives the "activist" superlegislative role of judges in construing constitutions and statutes in a manner according extensive protection to corporate property ranked as their fundamental objection to the judiciary.⁷

There existed two judicial systems, said Senator Norris, "one for the poor and the other for the well-to-do."⁸ The poor were disadvantaged in the judicial process, not because the process was slow, costly, or inefficient, as conservative reformers argued. They lost out because federal judges had usurped the sovereignty of the people by means of judicial review and because the judges themselves were "not responsive to the pulsations of humanity."⁹ The 1912 Progressive Party Platform minced no words in delineating a remedy. It demanded "such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy."¹⁰ The social progressive's answer to judicial supremacy was popular democracy. With it, fundamental changes could be expected

⁴ WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 176 (1967).

⁵ *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I., PROCEEDINGS 1 (1923).

⁶ MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* 10-11 (1946).

⁷ *Id.* at 214-15.

⁸ *New York Times*, § VI, p. 5, col. 1, 23 April 1922.

⁹ *Id.* at col. 3.

¹⁰ *The Progressive Party Platform of 1912*, in HOFSTADTER, ed., *THE PROGRESSIVE MOVEMENT: 1900-1915*, at 129-30 (1965).

in the substance of judicial decisions, the selection and tenure of judges, restriction of their powers over juries, contempt and injunction powers, and the jurisdiction of their courts. The major premise, as Theodore Roosevelt put it in 1912, was that "the judge is just as much the servant of the people as any other official."¹¹ Democratic responsibility became the keystone of the Progressive arch.

But for Taft a popularly responsive judiciary was complete anathema. As President of the American Bar Association he decried the agitation with reference to the courts, the general attacks upon them, the grotesque remedies proposed of recall of judges and recall of judicial decisions.¹² Such progressive-sponsored proposals were "radically erroneous and destructive . . . a form of muck-raking of the courts."¹³ He objected to them precisely because they threatened to break down the independence or insularity of federal judges from the political process. For Taft found few of the virtues of the federal judiciary duplicated in the states. Elective judges and a tradition of lay judges in limited jurisdiction courts contrasted unfavorably with United States judges who received executive appointments and held tenure during good behavior. These two factors, he thought, assured not only independence from political influence but higher quality magistrates as well.¹⁴

"Why is it," Taft queried, "that every law-breaker prefers to be tried in a state court? Why is it that the federal courts are the terrors of evil-doers?"¹⁵ The obvious answer was that in addition to presumed competence arising from their manner of appointment, federal judges enjoyed formidable powers over trials conducted in their courts, especially over juries. How different the situation in state courts "where opportunity is too frequently given to the jury to ignore the charge of the Court, to yield to the histrionic eloquence of counsel, and to give a verdict according to their emotions instead of . . . reason and their oaths."¹⁶

As Taft saw it, however, the real dangers of progressivism related to modification of then controlling case law, to the substance

¹¹ PRINGLE, THEODORE ROOSEVELT: A BIOGRAPHY 558 (1931).

¹² Taft, *Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 1, 4 (1916).

¹³ *Ibid.*

¹⁴ Taft, *The Selection and Tenure of Judges*, address delivered at the American Bar Association Meeting, Montreal, 1-3 Sept. 1913, p. 10, Series 9C, Taft Papers.

¹⁵ *Id.* at 11.

¹⁶ *Ibid.*

of the judicial product. The more he thought about it, the more certain he became "that the real issue is the right of property and [of] socialism."¹⁷ "[T]he whole Progressive Party program, including those portions affecting the judiciary, Taft argued, "intends the taking from the successful and the conferring on the unsuccessful that which the successful have earned."¹⁸ Such welfarist policies would inevitably produce dire consequences for the individual and for society as a whole. As Taft saw it: "The great and tremendous advantage of the right of property is that it furnishes a motive to a man to exercise industry and self-restraint, and the more he saves and uses to reproduce itself the more he improves the general prosperity of the community."¹⁹ Thus Taft devoutly believed that "the institution of property is civilization."²⁰

Yet that fundamental institution appeared under siege. Responsive state legislatures had enacted legislation hostile to resident and nonresident corporations alike. Such laws called for discriminatory taxation, rate regulation, "sometimes . . . direct deprivation of vested rights," and "restrictions upon interstate commerce."²¹ Injured by state laws, corporations sought out federal forums and protections there accorded them under the Fourteenth Amendment's Due Process Clause and Article I's Commerce Clause.²² It was the mere existence of this jurisdiction which Taft believed to be the root cause of "the popular impression . . . that the Federal courts are the friends of corporations and protectors of their abuses."²³ After all, the federal courts had no choice. Their unpopular decisions arose directly from their jurisdiction. Furthermore, the people of the South and West, where winds of progressivism blew strongest, had materially benefited from investments of foreign, usually eastern, capital. The original investments were made on reasonable terms solely because of "the presence of . . . federal courts, where

¹⁷ Taft to Gus Karger, 27 May 1913, Series 8, Taft Papers.

¹⁸ Taft, *Address*, at the Banquet of the Union League Club of New York, the Union League of Philadelphia, the Republican Club of Boston, and the Republican Club of New York, 4 Jan. 1913, Series 9C, Taft Papers.

¹⁹ *Ibid.*

²⁰ Taft, *Address*, before the New England Society of Detroit, 19 Dec. 1914, p. 15, Series 9C, Taft Papers.

²¹ Taft, *Recent Criticism of the Federal Judiciary*, 18 A.B.A. ANN. REPTS. 247 (1895).

²² Taft, note 14 *supra*, at 12-13; *Hearings on H.R. 661 on Additional Judges for the Eighth Circuit before the House Committee on the Judiciary*, 68th Cong., 1st Sess. 2 (1924).

²³ Taft, note 21 *supra*, at 249.

the owners of foreign capital think themselves secure in the maintenance of their just rights when they are obliged to resort to litigation."²⁴ Slings and arrows of unpopularity proved unavoidable for the federal courts because as Taft put it with his usual clairvoyance: "Men borrow with avidity, but pay with reluctance, and do not look on the tribunal that forces them to pay with any degree of love or approval."²⁵

There would be a rising tide of attacks on the federal judiciary as long as the states remained "laboratories of experimentation" and fundamental rights constituted the chief subject of experimentation. Even if states adopted direct democracy, or "nostrums," as Taft termed them, their citizens' basic rights remained unimpaired "because the Federal Constitution and the Federal Courts offer a bulwark of protection upon which they can still rely."²⁶ He queried a gathering of New York lawyers: "If it were not for the bulwark of the Fourteenth Amendment . . . what might happen in such states as Arizona, California, Oregon and other states which seem fad-ridden?"²⁷

Subversion of an independent federal judiciary marked a key step on the progressive's path to social democracy. That path was well marked. Its beginnings would require transformation of "a Republican representative system of government to one of direct and pure democracy."²⁸ Thereafter, law would become dependent "on the momentary passions of a people," expressed via initiative, referenda, and recall of judicial officials and decisions.²⁹ Taft, for one, refused "to acquiesce in the substitution for the deliberate judgment of trained lawyers in the interpretation of . . . constitution and statutes, the fitful and uncertain vote of a probable minority of an electorate that cannot in the nature of things understand . . . frequently complicated issues."³⁰ Judicial recall could be defined neither as due process nor as binding legal precedent.

²⁴ Taft, note 14 *supra*, at 12.

²⁵ *Ibid.*

²⁶ Taft, *Address*, before the Electrical Manufacturers' Club, at Hot Springs, Virginia, 6 Nov. 1913, p. 14, Series 9C, Taft Papers.

²⁷ Taft, *Address*, before the New York State Bar Association at Buffalo, 22 Jan. 1915, pp. 3-4, Series 9C, Taft Papers.

²⁸ Taft, note 3 *supra*, at 3.

²⁹ 2 PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* 766 (1939).

³⁰ Taft, *The Courts and the Progressive Party*, 186 SAT. EVE. POST 47 (28 March 1914).

It was "legalized terrorism," Taft as President argued when he vetoed the Arizona enabling act in 1911.³¹ How, he asked, could a recall election take property from an individual who, but for the election, would have owned the property by virtue of a favorable judicial decision? "An election," he argued, "is not a judicial hearing. The parties in an electoral controversy do not have their day in court, and a day in court has been vouchsafed to parties litigant since the dawn of civilization."³² Even if the sun had set on civilization, how could a recall decision be regarded as binding legal precedent? "It could not be," he maintained, "because there is no method of determining what the ground of the decision is. It is to be an exception grafted on the Constitution, an excrescence on a symmetrical body."³³ In short, democratization of the judicial process threatened to open the doors wide to majoritarian suppression of individual rights, especially property rights. As Taft told the Augusta Georgia Bar Association, the Progressives advocated an appeal "from that very independent judiciary that [is] to save us from a possibly tyrannous majority, to the tyrannous majority itself."³⁴

Confronted by attacks and remedies advanced by those whom he considered "ultra reformers" and "'hair trigger' gentlemen,"³⁵ Taft told the House Judiciary Committee in 1914 of his eagerness "to vindicate the [federal] courts by remedying the real objections to their administration of justice."³⁶ But he emphatically denied "that there is in the decisions of the courts, or the character of the judges, or the result of litigation that which justifies . . . radical innovation."³⁷ As he saw it, "the real difficulty with the courts is not in the courts themselves, and is not in the lawyers." The "real difficulty," Taft thought, "is a lack of dispatch of business and

³¹ Quoted in Mowry, note 6 *supra*, at 171. The proposed Arizona constitution provided for judicial recall.

³² Taft, note 30 *supra*, at 10.

³³ *Ibid.*

³⁴ Taft, *Address*, before the Augusta, Ga., Bar Association, 14 March 1913, p. 6, Series 9C, Taft Papers.

³⁵ TAFT, *POPULAR GOVERNMENT, ITS ESSENCE, ITS PERMANENCE AND ITS PERILS* 182 (1913).

³⁶ *Hearings on Reforms in Judicial Procedure—American Bar Association Bills, before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 17 (1914).

³⁷ Taft, *Address*, to the General Court of the Legislature of Massachusetts, at Boston, Mass., 18 March 1912, S. Doc. No. 451, 62d Cong., 2d Sess. 6-7 (1912).

the cost of litigation.”³⁸ Tinkering with structures, administrative systems, and procedures could go far in resolving such mechanical problems. Clearly, reform to Taft meant “efficiency-as-economy” not “efficiency-as-social service.”³⁹

II. HUGHES AND F.D.R.

Chief Justice Charles Evans Hughes, like his predecessor, fit into the classic conservative reformer mold. Whatever his social reform and economic regulation achievements as Governor of New York,⁴⁰ his view of judicial reform was indistinguishable from that of Taft. As with Taft, valid judicial reform related to structure and procedure rather than to substance. In his 1932 address to the Fourth Circuit Judicial Conference at Asheville, North Carolina, he declared:⁴¹

Criticism of courts should never be confused with criticism of the judicial function. It is the imperfection of the discharge of that function that is the target. It is the adaptation, the operation, of the machinery, not its purpose, that is called in question.

“Now, our business,” he told the conference participants, “is to diminish friction in the machinery of the administration of justice, to improve that administration by preventing unnecessary delays, by dispensing with useless formalities, by cutting through a web of meaningless technicalities, by insuring speedy, expert, impartial, application of our laws, thus enabling our courts as completely as possible to achieve their aims.”⁴² Mobilizing bench and bar to oil and occasionally overhaul judicial machinery would prevent charges “well-laid by the public, of maladministration of justice in the United States.”⁴³ Unlike Taft, however, Hughes demonstrated greater willingness to place blame for valid criticism of the courts on the behavior of crafty lawyers who “constantly foul our

³⁸ Taft, *Address*, before Connecticut State Bar Association, New London, Conn., 2 Feb. 1914, p. 9, Series 9C, Taft Papers.

³⁹ WIEBE, note 4 *supra*, at 176.

⁴⁰ See WESSER, CHARLES EVANS HUGHES, POLITICS AND REFORM IN NEW YORK: 1905–1910 c. 13 (1967).

⁴¹ Hughes, *Chief Justice Hughes Addresses Judicial Conference of Fourth Circuit*, 18 A.B.A.J. 445, 446 (1932).

⁴² *Id.* at 447.

⁴³ New York Times, 28 April 1925, p. 4.

reputation by their utterances and their acts.”⁴⁴ In the wake of several impeachment proceedings, he assailed judges “who by pettiness, petulance, arbitrary conduct or procrastination in rendering decisions . . . brought [their offices] into disrepute.”⁴⁵ The process and personnel constituted sources of remediable judicial defects. The substantive law, the judicial function, remained sound. And given the prevailing influence of the Blackstonian view of judges as finders and expounders, not makers of law, little could be done about preordained substance. In fact nothing should be done. As president of the Association of the Bar of the City of New York, he told the assembled lawyers and judges that “there are fundamental difficulties arising from social conditions which lie beyond the reach of corrective means within our power.”⁴⁶

President Franklin D. Roosevelt’s Court-Packing Plan, announced on 5 February 1937, electrified the nation and galvanized Hughes into action. He had assumed the mantle of chief judicial reformer bequeathed by Taft by implementing reforms either instituted or advocated by his energetic predecessor: the Judicial Conference of the United States, the Judiciary Act of 1925, and the development and ultimate enactment in 1938 of the Federal Rules of Civil Procedure. The Court-Packing Plan, however, resembled in its ultimate source and configuration the kind of threat always feared by Taft. Its immediate source, however, was a coordinate branch of government, not remote states and their congressional representatives. It was a political attack from without the judiciary aimed squarely at the judicial function and the existing state of the substantive law. For his part, the President cloaked his proposal in the rhetoric of conservative judicial reform. He cited complaints “of the complexities, the delays, and the expenses of litigation in United States Courts. . . . Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.”⁴⁷ Reorganization would promote efficiency and economy in the judicial branch. But Roosevelt’s motives were transparent. He objected

⁴⁴ *Ibid.*

⁴⁵ *Address of the Chief Justice, Honorable Charles Evans Hughes*, 15 A.L.I., PROCEEDINGS 34 (1938).

⁴⁶ *New York Times*, 9 May 1928, p. 11.

⁴⁷ 6 ROSENMAN, ed., *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 52 (1937).

to the Court's treatment of New Deal legislation designed to mitigate economic adversity by expansive national action. The country, he argued in a "fireside chat," could not yield its "constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present."⁴⁸ Interior Secretary Harold Ickes, a former Bull Moose Progressive, exclaimed: "What a blow this will be to the prestige of Chief Justice Hughes. . . . Of course, the proposal . . . is a distinct slap in his face, and in those of Van Devanter, McReynolds, Roberts, and Sutherland, who have constituted the old guard majority."⁴⁹ Hughes responded first with a short-run political strategy involving public refutation of the President's allegation of delayed justice in the Supreme Court and subsequently in the inferior federal courts;⁵⁰ second, with a shift in judicial strategy, which by altering the substantive work of the Court, reputedly saved that institution from political attack;⁵¹ and third, with a reform plan designed to insulate United States courts, and particularly the Supreme Court, from similar future onslaughts.

To the Chief Justice, the New Deal generally and the Court Plan specifically merely symbolized an accelerating worldwide trend toward national executive-centered government accompanied by threats not only to courts and legislatures but also to federalism and ultimately to the rule of law.⁵² With the strident sounds of totalitarianism ringing out from Germany, Italy, the Soviet Union, and Spain, he warned the 1938 Conference of Senior Circuit Judges:⁵³

We are living in a time when all legal processes, all processes of reason, here and abroad throughout the world, are more or less subject to attack. We are living at a time when the dis-

⁴⁸ S. REP. NO. 711, 75th Cong., 1st Sess. 44 (1937).

⁴⁹ 2 ICKES, *THE SECRET DIARY OF HAROLD L. ICKES: THE INSIDE STRUGGLE: 1936-39*, at 66 (1954).

⁵⁰ See communications between Hughes and members of the Senate Judiciary Committee on the state of the Supreme Court's docket, in 2 PUSEY, *CHARLES EVANS HUGHES* 754-57 (1951). On the state of district court business, see *New York Times*, 29 Sept. 1937, p. 17, col. 3. For Attorney General Cummings's rebuttal of Hughes, see *id.*, 30 Sept. 1937, p. 2, col. 2.

⁵¹ See MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 106 *et seq.* (1968).

⁵² *New York Times*, 30 Sept. 1931, p. 26.

⁵³ Extract from the Proceedings of the Judicial Conference 174-92 (Sept. 1938); Administration in the Federal Courts—Administrative Office Bill 12-13 (1938) (mimeo).

position . . . to control by executive force, makes a strong appeal to a multitude of people. . . .

Now the maintenance of this form of government [of limited powers] rests peculiarly with the Judiciary. . . . It is of vital importance that every step should be taken to keep the work of the courts so far as practically possible in the good opinion of the country. It is of the greatest importance that everything should be done to conserve the confidence of the people in the administration of justice.

So motivated, Hughes moved to take a leadership role in judicial reform. And when he last addressed the American Law Institute in the spring of 1941, he proclaimed success. The Chief Justice then observed that though "[T]he lamps of justice are dimmed or have wholly gone out in many parts of the earth . . . these lights are still shining brightly here."⁵⁴

Like Taft, Hughes too believed "[o]ur government is based upon the principles of individualism and not upon those of socialism."⁵⁵ Property rights were of high importance; they were not absolute. Government might be required to intervene "with necessary restrictions and regulations not to curtail the liberty of the people, but to protect it."⁵⁶ Thus, Hughes recognized, in the words of Samuel Hendel, "the necessity for an extension of governmental activities to cope with the problems of modern life."⁵⁷ But the national government was not necessarily the sole source of such extension.

The key to protection of individual rights, including those relating to property, lay with development and maintenance of limited government. Balance not dominance constituted the hallmark of such government. During the 1924 presidential campaign Hughes had hammered at candidate Robert La Follette's judicial platform. That platform, he thought, would "destroy our system of government by its assault upon the jurisdiction of the Supreme Court in the interpretation of the Constitution."⁵⁸ It would un-

⁵⁴ *Address of the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States*, 18 A.L.I., PROCEEDINGS 29 (1941).

⁵⁵ HUGHES, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK: 1906-1908, at 45 (1908).

⁵⁶ *Ibid.*

⁵⁷ HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 6 (1951).

⁵⁸ *New York Times*, 29 Oct. 1924, p. 8, col. 3. La Follette proposed a constitutional amendment that would permit Congress to overrule decisions of the Supreme Court.

balance the existing political structure, weaken national judicial power, and threaten "our stability without which the security and expansion of American enterprise are impossible."⁵⁹ Above all, the La Follette proposal endangered a viable federalism. Hughes argued that:⁶⁰

. . . the very existence of State governments depends upon the maintenance of the provisions of the Constitution. If Congress by passing a measure twice could make it effective despite the decision of the Supreme Court, then a majority in Congress could pass any act it pleased and override the authority of the States. Congress could destroy the States.

For Hughes, the path to ordered individual freedom lay through dual federalism judicially safeguarded. As early as 1908, he warned against "an unnecessary exercise of Federal power, burdening the central authority with an attempted control which would result in the impairment of proper local autonomy, and extending it so widely as to defeat its purpose."⁶¹ Nearly twenty years later, he admonished the American Bar Association: "There may be an imperialism at home as well as abroad," and urged his listeners to rally to the defense of "our dual system of government" because it promoted freedom.⁶² Concern for the political position of the Supreme Court and for the theory of dual federalism would be revealed not only in the jurisprudence of the Hughes Court but also in the essentials of the Chief Justice's major judicial reform, the Administrative Office Act of 1939.⁶³

III. REFORM STRATEGIES: TAFT

As judicial reformers, Taft and Hughes followed quite different paths although their goal of an independent, even a less popularly responsive and more insulated, federal judiciary remained identical. Nationalism ranked as the capstone of Taft's reform philosophy. How to enhance the power, legitimacy, and status of the national government's legal institutions? How to strengthen the kind of federal trial and appellate magistrates who were standing

⁵⁹ New York Times, 2 Nov. 1924, p. 17, col. 5.

⁶⁰ *Ibid.*

⁶¹ HUGHES, note 55 *supra*, at 51.

⁶² Hughes, *Liberty and Law*, 11 A.B.A.J. 563, 565 (1925).

⁶³ 53 STAT. 1223 (1939).

firm against attempts by social reformers, labor organizers, and direct democracy advocates to subvert the then constitutionally protected right of property?

He entertained no illusions as to the source of threats to federal institutions and to private property. It was the states. They could be trusted neither to protect individual rights nor even to guarantee basic order. When violence erupted in the Colorado minefields in 1914, Taft thought it "noteworthy that Colorado is the only State in the Union that has adopted the recall of judicial decisions."⁶⁴

Strong federal law and institutions were Taft's answer to ever unpredictable and sometimes dangerous exercises of state power. As Chief Justice, he and his colleagues would set records for wielding their power of judicial review to nullify state economic and social reform legislation. Taft, Willis Van Devanter, Pierce Butler, George Sutherland, and Edward T. Sanford constituted a majority bloc decidedly antagonistic to exercises of state authority. In fact in the 1929 Term of Court, Taft, Van Devanter, and Butler were the only members who never dissented in a direction favorable to state authority.⁶⁵ Taft's broad construction of national commerce power preempted state regulation, yet validated national legislation regulating social and economic forces.⁶⁶ In the realm of judicial reform Taft similarly sought to augment the power and status of the United States courts and thereby enhance their independence. Specifically he pressed for enactment of proposals which had long been germinating: (1) centralization of federal judicial administration; (2) nationalization of procedural rules; and (3) enhancement of the status and power enjoyed by federal appellate courts.

Establishment of the Conference of Senior Circuit Judges in 1922 capped Taft's campaign to bring at least some centralizing influence to administration of the United States courts. For a decade he had called for institutional machinery "to keep close and current watch upon the business awaiting dispatch in all the districts and circuits of the United States, and likely to arise during the ensuing year [and to estimate] the number of judges needed in

⁶⁴ Taft to George W. Wickersham, 29 April 1914, Series 8, Taft Papers.

⁶⁵ See SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM, 1889-1959*, at 89-97 (1968).

⁶⁶ See Kutler, *Chief Justice Taft, National Regulation, and the Commerce Power*, 51 J. AM. HIST. 651-58 (1965).

the various districts to dispose of such business."⁶⁷ Reflecting his hierarchical theory of administration which became apparent in *Myers v. United States*,⁶⁸ he argued for introducing "into the administration of justice the ordinary business principles in successful executive work, of a head charged with the responsibility of the use of the judicial force at places and under conditions where the judicial force is needed."⁶⁹

The Act of 1922 provided Taft and his successors with an information and communication system, at first quite rudimentary, a policy-making institution with ready access to Congress and the media, and a vehicle for centralized supervision of the geographically remote district courts.⁷⁰ The act failed, however, to provide him with a "flying squadron" of national judges-at-large who might be freely assigned to congested courts. Such a departure from historic principles of localism fell before heated congressional opposition. Nevertheless, the Conference, together with the expanded power of the intercircuit assignment of resident judges,⁷¹ offered Taft some hope of meeting those criticisms of the courts which he regarded as valid: delayed justice, immobile and dilatory judges, high court fees,⁷² abuses in the appointment of receivers, and misconduct in the court clerk's office.⁷³ The Judicial Conference would act as a centralized catalyst to promote speedy, economical, efficient, and honest federal justice.

Nationalization of federal civil procedure ranked high among Taft's goals. As President he had declared: "One great crying need in the United States is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment."⁷⁴ Delays and confusion in the administration of federal justice arose from the Conformity Act of 1872.⁷⁵ Requiring adherence by federal courts to state procedures in all civil cases at common law, that act spawned a great diversity of procedures in federal tribunals. These

⁶⁷ Taft, *Address of President*, 39 A.B.A. REPT. 384 (1914).

⁶⁸ 272 U.S. 52 (1926).

⁶⁹ Taft, note 3 *supra*, at 16.

⁷⁰ Taft, *Informal Address*, 46 A.B.A. REPT. 561, 564 (1921).

⁷¹ 42 STAT. 837, 839 (1922). Section 3 extended the intercircuit assignment power formerly confined to the Second Circuit. 38 STAT. 203 (1913).

⁷² Taft, *The Delays of the Law*, 18 YALE L.J. 28, 35 (1908).

⁷³ TAFT, note 35 *supra*, at 212-13.

⁷⁴ MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 114 (1965).

⁷⁵ 17 STAT. 197 (1872).

variations reflected, of course, different state procedures on which, by the act, federal procedure was patterned. Thus, common law pleadings, rooted in the old forms of action, characterized federal procedure in some United States district courts while modern code pleading typified that in adjacent districts.

Under the leadership of Taft, Roscoe Pound, and its congressional lobbyist, Thomas W. Shelton, the American Bar Association launched, in 1912, what became a long-term battle for a uniform system of judicial procedure. Ten years later, the proposed reform was expanded to include not merely modernization of procedures at law but also the merger of law and equity procedures in one form of civil action.⁷⁶ Billed by conservative reformers as a cost-reduction step of particular benefit to poor litigants, federal procedural reform enjoyed strong support from the business community. The Credit Men's Association, Chamber of Commerce of the United States, Southern Commercial Congress, and National Civic Federation all endorsed it.⁷⁷ Under the existing system, interstate business involved in federal court litigation required the assistance of numerous different expert federal practitioners familiar with state procedures used in the various district courts.⁷⁸ Corporation lawyers with multistate federal practices would derive substantial advantages from a single, simplified procedural code.⁷⁹ Taft eschewed articulation of the subtle direct benefit of procedural reform to corporate property interests seeking access to and a haven in federal courts.⁸⁰ Shelton, however, minced no words in telling the House Judiciary Committee that "it must appeal to you that the courts were created for the benefit of commerce and society, and that if there were no businesses we would need no courts. Therefore . . . you ought to do that thing which will meet most largely with the approval of the business men of the country."⁸¹

Congress hesitated chiefly because of opposition from Progres-

⁷⁶ *Hearings on S. 2060 and S. 2061 on Procedure in Federal Courts before the Senate Committee on the Judiciary*, 68th Cong., 1st Sess. 75-77 (1924).

⁷⁷ *Hearings*, note 36 *supra*, at 19.

⁷⁸ *Hearings on H.R. 2377 and H.R. 90 on Procedure in Federal Courts before House Committee on the Judiciary*, 67th Cong., 2d Sess., 11 (1922).

⁷⁹ *Id.* at 25.

⁸⁰ Taft, *Delays and Defects in the Enforcement of Law in This Country*, 187 No. AM. REV. 851, 853 (1908).

⁸¹ *Hearings*, note 36 *supra*, at 19-20.

sives and southern and western Democrats led by Senator Thomas J. Walsh of Montana.⁸² They objected that local attorneys would be disadvantaged by the virtual necessity of learning two sets of procedures and that, as the Supreme Court would formulate the new rules, rule-making power, once lodged in accessible and responsive state legislatures, would now be delegated to that remote national court.⁸³

As Walsh and his allies saw it, the Supreme Court had already manifested acute conservatism in its existing procedural rule-making role. Not only was it overburdened by its normal caseload but:

its work is of such a character that the justices have no opportunity, or at least little opportunity, from their own experience and observation, to know whether the system as a whole or in any detail works satisfactorily or not. They are not thrown into such intimate contact with the members of the bar or the judges of the trial courts as would serve to enlighten them touching defects. While not exactly recluses, something of the sanctity and the solitude of the priesthood attends them.

How, asked reform opponents, "would those who have any complaint to make against the rules as a whole or against any specific provision of the rules . . . make themselves heard?"⁸⁵ If state legislatures readily accessible to local lawyers and bar organizations were to be superseded, the rule-making power should be transferred not to the Supreme Court but to Congress.⁸⁶ At least in the latter forum all interests, especially local ones, would be guaranteed access. Procedural reform failed during Taft's lifetime, largely because of Walsh's opposition, but it would be revived and brought to fruition under his successor in company with President Roosevelt's Attorney General, Homer S. Cummings.

More successful was Taft's quest to elevate the status of federal appellate courts by reducing the Supreme Court's obligatory jurisdiction, expanding its discretionary review powers, and thereby rendering courts of appeals the courts of last resort in many cases. Again, Taft offered his proposal as an efficiency measure designed

⁸² S. REP. No. 892, pt. 2, 64th Cong., 2d Sess. (1917).

⁸³ *Id.* at 1-3. See Walsh, *Reform of Federal Procedures*, S. Doc. No. 105, 69th Cong., 1st Sess. 1-3 (1926).

⁸⁴ Note 82 *supra*, at 5.

⁸⁵ *Ibid.*

⁸⁶ S. REP. No. 892, note 82 *supra*, at 5-6.

to permit the Supreme Court to keep abreast of its swollen docket and to give that tribunal more time to consider cases raising genuine constitutional issues.⁸⁷ Yet behind the efficiency facade lay the historic issue of federal-state court relations and collaterally the accessibility to harassed property owners of appellate federal forums. As Sidney Ulmer has noted, the framers of the Judiciary Act of 1789 built in a federal bias.⁸⁸ State court decisions upholding the constitutionality of state statutes as against federal constitutional challenge were made appealable as of right to the Supreme Court. But decisions upholding rights alleged under the federal Constitution, laws, and treaties were appealable only via certiorari. The 1925 Judges' Bill terminated Supreme Court review by right of decisions from federal courts of appeals, including decisions involving constitutional challenges to state statutes.⁸⁹ To charges that the measure rendered the intermediate federal appellate courts superior in status and power to the highest courts of the states, Taft replied:⁹⁰

. . . the bill is not intended to detract in any way from the dignity of the State courts of last resort or to exalt the dignity of the circuit courts of appeals. Neither will it so operate. There is no putting of one above the other.

At the heart of the Chief Justice's thinking, however, lay recognition that federal constitutional protections were safer in the hands of judges of United States courts than in those of state courts. Courts of Appeals, when confronted with state statutes alleged to conflict with the Constitution would, he asserted, "be more likely to preserve the Federal view of the issue than the State court, at least to an extent to justify making a review of its decision by our court conditional upon our approval."⁹¹ But decisions of state courts were quite a different matter given the presence of elected judges, recall provisions, and ripples of progressivism at the state level.

⁸⁷ MASON, note 74 *supra*, at 111. See *Hearings on H.R. 10479 on Jurisdiction of Circuit Courts of Appeals, etc. before the House Committee on the Judiciary*, 67th Cong., 2d Sess., pt. 1 (1922).

⁸⁸ Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change?* 58 MINN. L. REV. 121, 134 (1973).

⁸⁹ 43 STAT. 936 (1925).

⁹⁰ Taft to Royal S. Copeland, 31 Dec. 1924, quoted in 66 CONG., REC. 2921 (1925).

⁹¹ Taft to Copeland, 16 Jan. 1925, *id.* at 2922.

Thus the 1925 Judges' Bill fit comfortably into Taft's reform mosaic. It, like his other efforts, was designed to elude or erode state judicial power and procedures by enhancing that of the federal system.

IV. REFORM STRATEGIES: HUGHES

Charles Evans Hughes maintained a much lower reform profile than did his predecessor. He never developed as complete a theory of judicial reform as did Taft. Nor did he even endorse all of Taft's reforms. He had entertained constitutional doubts about the 1925 Judges' Bill.⁹² On Attorney-General Homer S. Cummings's initiative he continued to enact Taft's civil procedure reform.⁹³ In so doing Hughes acted more as shepherd than as midwife. But on the one judicial reform which he alone sponsored, he followed strategies diametrically opposed to those pursued by Taft. Where his predecessor had pressed for nationalism and administrative centralization, Hughes labored to implement principles of federalism and administrative decentralization.

The Administrative Office Act of 1939 provided an apt vehicle for Hughes's reform views. Enactment came in the wake of the court-packing crisis, a crisis that thrust Hughes into a political-reform leadership role. The President's Court Plan provided an immediate stimulus for the Chief Justice's somewhat delayed reformist response. Section 1 of the plan had struck at the work of the Supreme Court, but sections 2 and 3 related to the administration of the inferior federal courts wherein there admittedly existed problems of delay and judicial misbehavior.⁹⁴ Section 2 revived Taft's old nationalistic dream of judges-at-large, by enabling the Chief Justice to assign any district or circuit judge thereafter appointed to any other district or circuit in the absence of objection from the presiding judge of the assigned judge's home circuit. Section 3 created a Court proctor appointed by the Supreme Court and acting under its direction. This official would gather information on the business of district and circuit courts:⁹⁵

investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; . . . recommend with the approval of the Chief

⁹² MASON, note 74 *supra*, at 111.

⁹⁴ S. 1392, 75th Cong., 1st Sess. (1937).

⁹³ 2 PUSEY, note 50 *supra*, at 683-84.

⁹⁵ *Ibid.*

Justice, to any court of the United States, methods for expediting cases pending on its docket; and . . . perform such other duties consistent with his office as the court shall direct.

Hughes found the structural changes proposed in sections 2 and 3 unacceptable. He assailed the vesting of greatly enlarged intercourt assignment powers in the Chief Justice as compelling him to "practically determine who should try cases for the Government in all the circuits or districts of the country."⁹⁶ The proctor idea held some attraction. After defeat of the Court-Packing Bill, it lingered on, promoted by Attorney General Cummings, American Bar Association President Arthur T. Vanderbilt, and Ninth Circuit Judge William Denman, who had originally pressed it on Cummings.⁹⁷ S. 3212 introduced in the Seventy-fifth Congress by Senator Henry F. Ashurst, chairman of the Judiciary Committee, conformed to the recommendations of Attorney General Cummings in that it placed foremost responsibility for the work of the director on the Chief Justice and the Judicial Conference.⁹⁸ At hearings on the bill, Arthur Vanderbilt attacked this bifurcation of responsibility. He urged that the measure be "recast" in such a way that the supervision of the Chief Justice is understood to be continuous . . . so that the Chief Justice has the sole responsibility."⁹⁹

Hughes gave a cold reception to all efforts to create an executive-centered administrative system for the federal courts. Such a Taft-type system failed to accord with his Court Plan strategy and with his long-held administrative and political theories. Centering primary responsibility for federal judicial administration on the Chief Justice would, Hughes believed, pose dangers for the Chief and his Court. Scandals or other problems in faraway courts might reflect badly on the Chief Justice "as the responsible officer who apparently had been neglectful in a matter which did not seem important perhaps at the time but later developed importance."¹⁰⁰ In

⁹⁶ Quoted in Chandler, *Some Major Advances in the Federal Judicial System: 1922-47*, 31 F.R.D. 307, 343-44 (1963).

⁹⁷ See Fish, note 2 *supra*, at 613.

⁹⁸ S. 3212, 75th Cong., 3d Sess. (1937).

⁹⁹ *Hearings on S. 3212 on Administrative Office of the United States Courts before the Senate Committee on the Judiciary*, 75th Cong., 3d Sess. 52 (1938).

¹⁰⁰ *Extract*, note 53 *supra*, at 5-6.

light of Roosevelt's admittedly valid attack on inferior court performance,¹⁰¹ the Chief Justice regarded a hierarchical system as affording opportunities for "making the Chief Justice and the Court itself a center of attack."¹⁰² If the attorney general's bill ran counter to Hughes's strategy for dealing with past and future politically inspired attacks on the Supreme Court, it was also out of harmony with his theories of administration. As he told the 1938 Judicial Conference, the fatal feature of the then pending proposal was its "undue centralization."¹⁰³

The Chief Justice entertained no objection to centralizing house-keeping or staff functions, especially as severance of the judiciary's budget from that of the Department of Justice was included. But, if he deferred to the doctrine of separation of powers, he adamantly opposed centralization of executive or control powers within the judicial system. At the 1938 Conference where he assumed reluctant leadership of the reform movement, Hughes unveiled his own plan:¹⁰⁴

Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various Circuits. . . . immediate responsibility for the work of the courts in the Circuits, with power and authority to make the supervision all that is necessary to insure competence in the work of all the judges of the various districts within the Circuit.

To this end, the Administrative Office Act provided for circuit judicial councils composed of all judges of the several courts of appeals.

Even the council composition reflected the chief's deep-seated fear of centralized power. The Conference discussed making the senior circuit judges solely responsible for exercising the council's extensive powers, but Hughes favored multimember councils, because he "thought it . . . very unwise to impose upon the Senior Circuit Judge all of the corrective power over District Judges."¹⁰⁵

¹⁰¹ *Id.* at 10.

¹⁰³ *Id.* at 14.

¹⁰² *Id.* at 6.

¹⁰⁴ *Id.* at 14-15.

¹⁰⁵ *Id.* at 15-16. See Judge Groner to Members of the Conference of Senior Circuit Judges, 21 Dec. 1938. D. Lawrence Groner Papers, Box 4 (University of Virginia, Charlottesville, Va.).

Diffusion of power rather than its concentration appealed to him, perhaps because the latter promoted control while the former fostered voluntarism, independence, and individual freedom.

Hughes's council plan thoroughly accorded with his belief in local autonomy and responsibility. In his 1932 address to the Fourth Circuit Judicial Conference, he had declared: "We are apt to look too far away for the accomplishment of reforms. Improvement is generally a personal and local matter."¹⁰⁶ The plan also coincided with his judicial philosophy. As Chief Justice, Hughes joined by newly appointed Justice Owen J. Roberts dramatically altered the judicial reception extended to exercises of state authority. Taft had favored state actions only about 25 percent of the time. But Hughes and Roberts voted to uphold state authority 52 and 48 percent of the time respectively.¹⁰⁷ Both thus took a middle road on federalism questions. But more significantly, the Hughes-Roberts bloc was capable of providing a pro-state Court majority when combined with the once outnumbered Holmes-Brandeis-Stone and later Stone-Cardozo-Brandeis blocs.¹⁰⁸

Hughes's acknowledged concern for the states and interest in pragmatically balancing central and local governmental powers became evident in the outline of the 1939 act. If the new Administrative Office provided "the centralized and executive administration necessary to give coherence and efficiency," the circuit council concept gave the decentralization which Hughes thought "necessary to buttress the sense of local responsibility" and would facilitate "speedy correction of local defects in administration and consultation as to local problems."¹⁰⁹ Such a plan he argued offered "de-centralization and a distribution of authority which . . . will greatly promote efficiency and will put the responsibility

¹⁰⁶ Hughes, note 41 *supra*, at 447.

¹⁰⁷ SPRAGUE, note 65 *supra*, at 96-97.

¹⁰⁸ *Id.* at 96-106. See 2 PUSEY, note 50 *supra*, at cc. 66-68. According to SMALL, ed., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1453-90 (1964), Taft sat on 114 cases or 12.67 per year in which the Supreme Court voided state legislative acts. Hughes, whose tenure on the Court exceeded Taft's by two years, voted in 82 cases or 7.46 per year overturning state acts. But 14 of these cases involved state legislation determined to have infringed on non-property First, Fifth, and Fourteenth Amendment rights. Only a maximum of 7 and a more realistic minimum of 3 cases decided by the Taft Court involved unconstitutional state violations of fundamental personal rather than property rights.

¹⁰⁹ *Address of Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States*, 17 A.L.I., PROCEEDINGS 30 (1940).

immediately and directly where it belongs with respect to the administration of justice in the respective Circuits."¹¹⁰

Moreover, the council system cemented the federalism analogy to the administrative system of the United States Courts. "[A]s we have the States as *foci* of administration with regard to local problems pertaining to the States," the former governor told the assembled senior circuit judges in 1938, "We have in the various Circuits of the country *foci* of federal action from the judicial standpoint for supervision of the work of the federal courts."¹¹¹ For Hughes, the optimum means of assuring an independent federal judiciary and insulating it from future hostile popular tides lay with the decentralization of administrative, but not judicial, power. The core of the latter remained unimpaired in the Supreme Court of the United States.

V. CONCLUSION

Major reforms in the administration and procedures of the United States Courts had their inception and consummation during the two decades of the Taft and Hughes Chief Justiceships. As conservative reformers both jurists played prominent roles. Taft, however, was by far the more visible. Both perceived the American polity as pluralistic in nature but that the rule of law required a special place be given courts, especially those of the United States. Consequently both Taft and Hughes vigorously defended federal judicial institutions: Taft, against popular democracy centered primarily in the states, and Hughes from the same force transmitted through Congress and subsequently the presidency.

If the sources of political dangers differed, so did the responses. For Taft the answer lay with a federal judiciary of strengthened powers, administration, and status. The means to this end required a reform program emphasizing centralization and nationalism. The ultimate end for Taft involved ensuring existence of a federal judiciary ready, willing, and able to repel local and regional majorities antagonistic to private property rights. For Hughes property constituted a less absolute concept than it did for Taft. Moreover by the 1930s the world political climate had been transformed. Individual freedom broadly construed was threatened not by local tyrannies, but by modern centralized political and military power.

¹¹⁰ *Extract*, note 53 *supra*, at 21.

¹¹¹ *Id.* at 14.

Under these circumstances the ultimate value for Hughes was not property rights alone but preservation of balanced government in order to assure maintenance of independent courts and the rule of law. To that end his halting and pragmatic reform effort reflected a felt need for balance in federal-state relations as well as among branches of the national government. The former concept was applied to the federal judiciary's administrative system while that systemic reform itself constituted a means of strengthening the independence and status of United States courts vis-à-vis the coordinate branches.

Economy, efficiency, speedy justice, and inexpensive litigation are the traditional stock in trade of conservative judicial reformers. Yet they hardly account for the enactment of major changes in the federal judicial system during the 1920s and 1930s. Rather they were but rhetoric behind which operated politically astute Chief Justices who sought realization or protection of important political values. By altering administrative structures and judicial procedures they sought to maintain an equilibrium that appeared threatened by other elements in the political system. Judicial reform thus meant more than the rhetoric indicated. It entailed different use of federal judicial manpower, a changed rule-making locus, altered jurisdiction of the Supreme Court, and a reformed administrative system. Each of these reforms had at least the potential for rendering the substantive or policy actions of the federal judiciary less responsive to popular impulses. Alternatively, such reforms were overtly designed to expand the judiciary's capacity to meet recognized increased quantitative demands made upon them. Thus in the end, judicial reform may be synonymous with "good government." But it may determine in a vital fashion the ultimate allocation of values and resources in society. It may, in short, be a decisive aspect of politics.