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## Pierce Butler: A Supreme Technician

David R. Stras

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# Pierce Butler: A Supreme Technician

David R. Stras\*

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## INTRODUCTION

Despite serving for more than sixteen years on the Supreme Court of the United States and authoring more than 300 opinions, Pierce Butler is one of the lesser-known Justices in American history. When his name is mentioned by constitutional scholars, it is usually to

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\* Associate Professor, University of Minnesota Law School. This Article benefited greatly from the excellent research assistance provided by Jeff Justman. I would especially like to thank Jeff for helping me sort through the numerous digital pictures that I took of primary source documents housed at the Minnesota Historical Society and the Library of Congress. Special thanks go to the librarians and staff of those two excellent institutions as well as to those of Carleton College and the University of Minnesota Law School. I would also like to express my special appreciation to Mrs. Pierce Butler III, who kindly gave Jeff and me permission to examine Justice Butler's remaining private papers. Thanks also to the participants in the Legal History Colloquium Series at the University of Minnesota, the Conference on "Judges and Judging" at American University's Washington College of Law, and the Vanderbilt Law Review Symposium for their excellent comments on an early draft. Excellent suggestions were also provided by the faculties of St. Louis University School of Law and the University of Kansas School of Law at faculty workshops. Moreover, I would like to acknowledge the excellent comments and suggestions provided by Dale Carpenter, Jim Ely, Allan Erbsen, Michael Gerhardt, Arthur Hellman, Scot Powe, and Anders Walker on an earlier draft. Of course, any remaining errors in this Article are my own.

deride him for being one of the so-called “Four Horsemen of the Apocalypse,” a group of Justices that invalidated efforts by politicians, especially President Franklin Delano Roosevelt, to enact New Deal reforms.<sup>1</sup> Scholars have characterized his role in the development of constitutional law as “minimal,”<sup>2</sup> and he is the subject of only one full-length book, *A Supreme Court Justice is Appointed*, which focuses almost exclusively on his appointment to the Supreme Court rather than his background or contributions to the development of the law.<sup>3</sup> Some scholars have gone even further by characterizing Butler’s tenure on the Court as a “failure,” and when he is mentioned, it is often on lists of the least successful Supreme Court Justices of all time.<sup>4</sup>

Butler was not one of the great Justices in the Court’s history, but he is deeply understudied, likely underestimated, and regrettably misunderstood. Relying on primary source documents housed at the Library of Congress, the University of Washington, the Carleton College archives, and the University of Minnesota archives, this Article argues that several factors account for Butler’s lack of treatment in the scholarly literature. First, Butler wrote in highly technical areas of the law, such as public utilities regulation and tax law, which are of relatively low public salience and are consistently ignored by constitutional scholars. Second, Butler’s approach to opinion writing stressed simplicity and minimalism, and it was rare indeed when he used rhetorical flourishes to argue a point. He was, in short, a “technician,” content to decide technical matters using a mechanical approach. Third, Butler served with a highly distinguished group of jurists and American historical figures—including William Howard Taft, Benjamin Cardozo, Oliver Wendell Holmes, and Louis Brandeis—some of whom are consistently rated as the most successful Supreme Court Justices of all time. When compared against such an accomplished group, it is unsurprising that Butler is discussed less frequently than his colleagues. Finally, in those areas in which he wrote extensively, such as economic liberties, public utilities regulation, and taxation, he found himself on the wrong side of history. As a strict adherent to *Lochner*, for example, his opinions favoring property rights and economic liberties were essentially overruled by the end of his tenure on the Court. Even his

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1. E.g., Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 930 n.218 (2008).

2. NORMAN BINDLER, *THE CONSERVATIVE COURT, 1910–1930*, at 204 (1986).

3. See generally DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964).

4. E.g., ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 48 (1978).

innovative jurisprudence in the fields of taxation and public utilities regulation was largely curtailed by the end of the 1930s. For these four reasons, Butler is often neglected or characterized as a failure.

While it is true that many of Butler's opinions have not had lasting influence, merely labeling Butler as one of the "Four Horsemen" or an arch-conservative ignores the nuances in his jurisprudence, such as his surprisingly pro-defendant criminal rights positions and his robust view of private property rights. A more systematic examination of his votes reveals some philosophical distinctions between Butler and those who are conventionally viewed as his ideological allies on the Court, such as Justices McReynolds, Sutherland, and Van Devanter. This Article not only accounts for the reasons why Butler has been neglected by scholars, but it also provides a more complete picture of him by closely analyzing his professional career and judicial opinions.

Part I describes Butler's family background, including his early life as a child of immigrants and pioneers of the American West. Part II discusses his professional career until his nomination to the Supreme Court, including his representation of such diverse interests as farmers, railroads, and national governments. Butler's nomination and the controversy it engendered is the subject of Part III. Finally, Part IV confronts the conventional view of Butler as a monolithic conservative by discussing the many nuances of his jurisprudence; the Part includes a constitutional reassessment that challenges some of the traditional views regarding his judicial philosophy. Part IV further analyzes the reasons why Butler has largely been ignored by scholars despite being part of a dominant coalition of Justices during the 1920s and early 1930s. Finally, the Article concludes by making the modest claim that, though Butler can hardly be classified as one of the great Justices of all time, he has made some modest contributions to the development of American law and should not be viewed as a failure.

## I. THE EARLY YEARS

There is often a parallel in greatness. The babe Pierce Butler was sleeping—sleeping in the womb—the night Booth killed Lincoln. Their years did not lap but their lives paralleled. Both were from the soil; both were born in a house of logs; both had to struggle for learning; both became great lawyers; under their own power both went from windrow to Washington; both were champions of democracy and individual liberty; both

were stout defenders of government by the people and for the people; both freely gave to their country the last full measure of devotion.<sup>5</sup>

Pierce Butler was not born into a family of great wealth or political power, as were many of his contemporaries on the Supreme Court.<sup>6</sup> To the contrary, Butler's parents, Patrick and Mary Ann Butler, immigrated to the United States from Glendalough, County Wicklow, Ireland, following the Irish Potato Famine of 1848.<sup>7</sup> In 1852, they settled in Gallena, Illinois, where Patrick managed a tavern in a local hotel.<sup>8</sup> By all accounts, Patrick was a successful tavern keeper, serving many of the famous figures of the time, including future President and Union General Ulysses S. Grant.<sup>9</sup> After marrying Mary Ann in 1855,<sup>10</sup> Patrick Butler, along with his wife and new daughter Kate, journeyed on a steamboat north along the Mississippi River and ultimately settled in Waterford Township, Minnesota, located approximately thirty-five miles south of St. Paul.<sup>11</sup> There, the Butlers built a log cabin to house their ever-expanding family, which eventually included eight additional children: Walter, Isabella, John, William, Pierce, Cooley, Emmett, and Effie.<sup>12</sup>

Butler's childhood was characterized by hard work and a simple home life. Along with his eight siblings,<sup>13</sup> he participated in the daily chores, which included planting, plowing, cultivating, harvesting, and tending to the family's farm animals.<sup>14</sup> A robust education was also an important part of Butler's childhood; indeed, his father supplemented his education by teaching him Latin and German

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5. John T. Harding, Address at the Memorial of Mr. Justice Butler at the United States Court of Appeals for the Eighth Circuit: An Appreciation of Mr. Justice Butler (Mar. 4, 1940) (transcript on file with the Vanderbilt Law Review).

6. Indeed, the most influential position for Patrick Butler, Pierce's father, prior to his emigration to America was his participation in Sir Roger Murcheson's survey of Ireland. See John Paul Frank, *The Confirmation of Pierce Butler 1* (1940) (unpublished M.A. thesis, The University of Wisconsin), available at <http://minds.wisconsin.edu/handle/1793/28616>.

7. Letter from Robert O'Sullivan to John D. Carmody (Jan. 23, 1940) (on file with the Vanderbilt Law Review).

8. See DANELSKI, *supra* note 3, at 4; UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN MEMORIAM: HON. PIERCE BUTLER 12 (1940) [hereinafter EIGHTH CIRCUIT MEMORIAM] (noting that Patrick Butler came to America "either in 1851 or 1852").

9. DANELSKI, *supra* note 3, at 4.

10. Different sources cite different dates for Patrick Butler's marriage to Mary Ann. Compare EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 12 (suggesting that the Butlers married in 1854), with DANELSKI, *supra* note 3, at 4 (listing a marriage date of 1855).

11. Frank, *supra* note 6, at 1.

12. DANELSKI, *supra* note 3, at 4; Evelyn Burke, *The Butler Family*, NORTHWEST LIFE, Mar. 1944, at 18-20.

13. The youngest child in the family, Effie, passed away at the age of eight. See sources cited *supra* note 12.

14. DANELSKI, *supra* note 3, at 4-5.

at the dinner table.<sup>15</sup> When Butler turned fifteen, he began teaching classes at the county school, where he was known as a strict disciplinarian.<sup>16</sup>

By the age of sixteen, Butler had impressed his family with his extraordinary intellectual gifts. As a result, his parents decided to send him to college by enrolling him in preparatory school at Carleton College in Northfield, Minnesota.<sup>17</sup> While in Carleton's preparatory department, he continued with his chores on the family farm, including waking up early each morning to "wrestle milk cans" at a nearby dairy.<sup>18</sup> Butler would often study deep into the night and then wake up early again to complete his chores.<sup>19</sup> One newspaper article later summarized an average day for Butler: "[He] had to fill the wood box every night or get trimmed, and he filled it. As he got a little older he had to wade around in the mud and get the cows and milk them and then walk three miles to Carleton College and home again."<sup>20</sup>

After West Point denied him admission,<sup>21</sup> Butler enrolled in Carleton's regular academic program.<sup>22</sup> It was in that program that he first encountered the type of laissez-faire economic philosophy that would later characterize his jurisprudence on the Supreme Court. In particular, Butler's political economy textbook, written by the famous congressman and economist Amasa Walker, argued against

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15. *Id.* at 5.

16. David Burner, *Pierce Butler*, in 3 JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1978: THEIR LIVES AND MAJOR OPINIONS 1082, 1082 (Leon Friedman & Fred L. Israel eds., Chelsea House Publishers, 3d ed. 1997). Butler punished unruly students through corporal punishment and, on one notable occasion, he physically disciplined a student, threw a pail of water on his bleeding face, and then continued to teach the class as usual. *Id.*

17. Francis Joseph Brown, *The Social and Economic Philosophy of Pierce Butler*, 13 CATH. U. AM. STUD. SOC. 1, 1 (1945); Interview by Robert Goff and Lila Johnson with Pierce Butler III, attorney, Doherty, Rumble, and Butler, in Minneapolis, Minn. 6 (June 19, 1968) [hereinafter Pierce Butler III Interview] (on file with the author). The oral history with Butler's grandson, Pierce Butler III, appears to be based on personal knowledge because, during the course of the interview, Butler stated that he "knew . . . [his] grandfather well." *Id.* at 3.

18. THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 76 (Dennis J. Hutchinson & David J. Garrow eds., 2002) [hereinafter KNOX MEMOIR]; Eddy Gilmore, *Justice Butler Rose from West*, EVENING BULL.-PHILA., Feb. 24, 1937 (on file with the Vanderbilt Law Review) (noting that the "valedictory music of Butler's youth" was the "clanking of milk cans he wrestled for college money").

19. KNOX MEMOIR, *supra* note 18, at 76.

20. "Tergiverous Tim," *Tales of the Town*, NORTHFIELD NEWS (Minn.), Jan. 27, 1922, at 2. Some sources, however, suggest that Butler rode his horse to school instead of walking. *E.g.*, KNOX MEMOIR, *supra* note 18, at 76.

21. Butler's rejection from West Point potentially spared his life. The candidate who gained admission through the "competitive examination" process was killed in the Philippines in 1901 or 1902. Memorandum from Francis D. Butler to Sunnie Hershberg 1 (Jan. 6, 1961) [hereinafter Hershberg Memorandum] (on file with the Vanderbilt Law Review).

22. Brown, *supra* note 17, at 1.

government intervention in economic affairs and espoused a distinct laissez-faire philosophy.<sup>23</sup> One passage in the book made clear that “the government is best which governs least” and that when individual economic activities could accomplish a goal, “the government should undertake nothing.”<sup>24</sup> Of particular significance to his later jurisprudence, the text also took a firm stand on the freedom to contract in an employment relationship, stating that “the law cannot say how much [the laborer] shall accept for wages, how many hours shall constitute a day’s work, nor how much the employer shall give him.”<sup>25</sup> Foretelling how Butler would later view President Roosevelt’s New Deal reforms, Walker’s text further explained that social welfare programs should not shelter the “indolent and wasteful” and that the “taint of beggary” would attach to those accepting governmental assistance.<sup>26</sup>

Butler also studied constitutional law at Carleton, which further reinforced the laissez-faire philosophy that was emphasized in his economics course.<sup>27</sup> Indeed, he studied Judge Thomas Cooley’s *Constitutional Limitations*, a book described at the time as a “fecund source of laissez-faire constitutional principles.”<sup>28</sup> Given his childhood experiences and strong work ethic, it is hardly surprising that the economic and constitutional principles he studied while at Carleton resonated and stuck with him throughout his career.

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23. DANELSKI, *supra* note 3, at 6–7. Walker defined the term “laissez-faire” by recounting a famed meeting between a French finance minister and French manufacturers: “When a distinguished French minister of finance called the manufacturers of that country to Paris, and asked what he could do for them, they made well-known the answer, ‘Laissez nous faire.’ ” AMASA WALKER, *THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY* 115 (Boston, Little, Brown & Co. 1866). Walker continued: “It will, doubtless, be a matter of profound astonishment to the future historian, that a people who had a free and untrammelled industry, with natural advantages for the most productive agriculture in the world and for the legitimate growth of every kind of manufacture, should ever have asked for restrictions upon trade.” *Id.* at 115–16. For purposes of this Article, therefore, I define “laissez-faire” as the theory of political economy favoring development of national industry without government regulation. *See also* Richard A. Posner, *The Constitution as an Economic Document*, 56 *GEO. WASH. L. REV.* 4, 20 (1987) (defining proposals to constitutionalize laissez-faire as advocating the interpretation of “the Constitution as a general guarantor of free markets”) [hereinafter Posner, *Economic Document*]; Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *STAN. L. REV.* 548, 620 (1969) (defining the notion of “laissez faire” as “leaving the function of determining price and output to the market”).

24. DANELSKI, *supra* note 3, at 6 (quoting Walker’s text).

25. *Id.* (same).

26. *Id.* (same).

27. *Id.* at 6–7. Ironically, Butler received a failing grade in his constitutional law class. Burner, *supra* note 16, at 1082.

28. *Id.* (quoting CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS* 30 (1954)).

Though he would later take “little if any part in religious organizations” down the road,<sup>29</sup> Catholicism took on an increasingly important role in Butler’s life while he was attending Carleton.<sup>30</sup> He enrolled in classes on “Moral Philosophy” and “Evidences of Christianity,” the latter of which emphasized a belief in God and “things deemed essential to character building on the basis of Christianity.”<sup>31</sup> By the time Butler graduated from college, religion was a central aspect of his life. In his 1887 graduation speech, he emphasized the importance of the Roman Catholic Church and its positive influence on the world.<sup>32</sup>

While at Carleton, Butler also cemented his debating and speaking skills through activities that he would later characterize as among the most significant aspects of his education.<sup>33</sup> Specifically, Butler often debated and read speeches aloud on a variety of subjects with Frederick Dickson, a close friend and a future Ramsey County judge.<sup>34</sup> As Judge Dickson later recalled, Butler was “ever fond of any argument, and in these debates indulged in by the students he developed an ability in argument for which he was later distinguished in his law practice.”<sup>35</sup>

In addition, Butler developed a number of friendships while attending Carleton. Butler was a large, imposing man who excelled in such sports as wrestling and boxing, and he was “popular among his fellow students and the people of Northfield” because he “made friends easily and held them well.”<sup>36</sup> His experiences at Carleton also further sharpened and reinforced his strong work ethic. Indeed, he graduated from college at the relatively young age of twenty-one.<sup>37</sup> That strong work ethic would quickly propel him toward the top of the legal profession.

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29. Hershberg Memorandum, *supra* note 21, at 1.

30. It is interesting that Butler’s Catholicism played such a prominent role in his early life given that Carleton was a Congregational institution at the time and that Patrick Butler was Protestant. See Brown, *supra* note 17, at 1; Pierce Butler III Interview, *supra* note 17, at 6 (noting that Pierce “took instruction and became a Catholic” partly because of the “indifference to the religion of his father who was from Trinity College, which is, of course, a Protestant institution”).

31. DANELSKI, *supra* note 3, at 5–6 (internal citation omitted).

32. *Id.* at 19 (internal citation omitted).

33. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 14.

34. *Id.*

35. *Id.*

36. *Id.*

37. Burner, *supra* note 16, at 1082.

## II. A RISING LEGAL STAR

His appearance proclaimed the man! The large, powerful physique, the heavy, slightly stooped shoulders, the large head, the striking face, firm mouth and protruding chin indicated a man of power and resolute purpose. It cannot be said that he was affable in the sense that he was condescending, nor that he was amiable in the sense that he sought popularity by pleasing. He was, however, a very friendly, warm-hearted, companionable man. He liked his friends, who were legion. He treasured and enjoyed their company. He was simple in keeping with his origin. There were no classes among those he called friend. He never forgot the people with whom he associated in early life. There was about him an indefinable reserve—the reserve which always accompanies strength. He was a man easy to meet, but dangerous to oppose.<sup>38</sup>

Upon graduation from Carleton, Butler began a legal apprenticeship with the firm of Pinch & Twohy in St. Paul, Minnesota.<sup>39</sup> During his apprenticeship, Butler became acquainted with Walter H. Sanborn, who later became a judge on the U.S. Court of Appeals for the Eighth Circuit and one of Butler's most ardent supporters.<sup>40</sup> Butler found the apprenticeship intellectually engaging, and his inquisitive legal mind began to emerge during his time with the firm. In fact, in 1888, at the relatively young age of twenty-two, Butler was admitted to the bar after Sanborn quizzed him in open court, which was a common practice at the time.<sup>41</sup>

Perhaps the most important moment of Butler's apprenticeship occurred at a dinner with one of the firm's namesakes, John Twohy, who introduced Butler to Anna Cronin, the half sister of Twohy's wife.<sup>42</sup> On many subsequent occasions, Pierce and Anna were seated together during the Sunday evening dinners at Twohy's home.<sup>43</sup> The two grew quite fond of one another, began a courtship, and eventually married in 1891.<sup>44</sup> Over the course of their steady forty-eight-year marriage, Pierce and Anna had eight children.<sup>45</sup> Butler later attributed much of his professional success to Anna's constant support and assistance.

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38. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 42 (statement of Judge Thomas O'Brien). I acknowledge that remembrances of individuals often provide an extremely favorable impression of the deceased, and thus might provide a skewed picture of Butler. Nonetheless, it is necessary to rely, at least to a limited extent, on these sources because of Butler's order to destroy many of his public papers upon his death. *See infra* note 303 and accompanying text.

39. Brown, *supra* note 17, at 1.

40. DANIELSKI, *supra* note 3, at 7–8.

41. *Id.* at 8.

42. *Id.*

43. *Id.*

44. *Id.*

45. Burner, *supra* note 16, at 1083.

After leaving Pinch & Twohy, Butler entered into legal practice with Stan Donnelly, who was the son of former congressman and populist leader Ignatius Donnelly.<sup>46</sup> After a short tenure in private practice,<sup>47</sup> Butler became the assistant to newly elected Ramsey County Attorney Thomas O'Brien after giving a moving speech during the 1890 Ramsey County Democratic Convention.<sup>48</sup> Just twenty-four years old at the time, Butler became a successful and respected prosecutor. According to a colleague, Butler "had a remarkable memory, and this, with his impressive appearance, quick wit, mental alertness, and complete mastery of facts, made him a formidable and effective cross-examiner."<sup>49</sup>

Just two years later, Butler easily won election as Ramsey County Attorney.<sup>50</sup> Butler continued to prosecute cases with great integrity and skill, developing one of the highest success rates in the history of Ramsey County.<sup>51</sup> The *Minnesota Law Journal* stated at the time that he had "no equal for his age as a criminal lawyer in the state," and his "integrity, ability, and fearlessness" made him one of the most popular young lawyers in the county.<sup>52</sup> Butler was not afraid to prosecute powerful interests or even his own allies. On one notable occasion, he convicted fellow Catholic Democrat Ed Murphy of St. Paul on a request from the Women's Christian Temperance Union ("WCTU").<sup>53</sup> He personally and covertly gathered evidence against Murphy by frequenting his saloon.<sup>54</sup> When Butler later won the case, the WCTU was so pleased that it passed a resolution of appreciation for his "manly" and "masterful" job in handling the case.<sup>55</sup>

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46. Brown, *supra* note 17, at 1.

47. While in private practice, Butler also managed his family's mining affairs. RONALD F. HOWELL, CONSERVATIVE INFLUENCE ON CONSTITUTIONAL DEVELOPMENT, 1923-1937: THE JUDICIAL THEORY OF JUSTICES VAN DEVANTER, MCREYNOLDS, SUTHERLAND AND BUTLER 29 (1952) (noting that Butler handled "all the legal work of his five brothers who were engaged in a prosperous contracting and mining business" in Northern Minnesota); Pierce Butler III Interview, *supra* note 17, at 3 (explaining that the Butler brothers were innovative in that they were the first to use "standard gauge railway equipment" and "really large shovels and drag lines" in the iron-ore mines of Northern Minnesota).

48. DANELSKI, *supra* note 3, at 8.

49. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 18 (statement of Wilfrid Rumble, Butler's employee and later partner in Butler's firm).

50. DANELSKI, *supra* note 3, at 8.

51. *Id.* at 9.

52. *Id.* (internal citation omitted).

53. *Id.* at 8.

54. *Id.* at 8-9.

55. *Id.* at 9 (internal citation omitted).

After two full terms as Ramsey County Attorney, Butler returned to private practice.<sup>56</sup> Butler partnered with two experienced attorneys, Jared How and Homer Eller, and opened a general legal practice representing both plaintiffs and defendants in a variety of areas.<sup>57</sup> In one case, Butler represented St. Olaf College in a will contest involving a substantial sum of money.<sup>58</sup> In another, he defended an association of dairy farmers against a charge that they colluded in marketing milk.<sup>59</sup> He even defended a group of thirty businessmen who were accused of tarring and feathering a Minnesota farmer who held stock in a Nonpartisan League weekly newspaper.<sup>60</sup>

Butler was best known at the time, however, for his corporate defense work. In fact, colleagues called him “the foremost corporat[e] lawyer of the Northwest,”<sup>61</sup> and opined that his courtroom skills made him a fierce adversary—so much so that it earned him the nickname “Fierce Butler.”<sup>62</sup> Attorneys who worked with Butler at the time recalled that “witness after witness of the plaintiff left the witness stand in about the condition of Tomlinson’s soul, after it was ‘shredded.’ ”<sup>63</sup> His zealous advocacy for his corporate clients led to a position as corporate counsel for the Chicago, St. Paul, Minneapolis, and Omaha Railroad, a job that he held for six years.<sup>64</sup> That job required him to defend the railroad against personal injury and freight claims arising out of Minnesota and western Wisconsin.<sup>65</sup> Once again, Butler’s strong work ethic was apparent to his colleagues. His friends noted that he

devoted longer and longer hours to his practice. There appeared to be no limit to his capacity for work and for long-sustained mental effort. Office hours for him meant any time from early morning until midnight. The eight-hour day was then the Union

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56. *Id.*

57. *Id.*; see also Pierce Butler III Interview, *supra* note 17, at 8 (characterizing Butler’s firm as “highly individualistic,” without particular commitment to any kind of legal work or any particular group of clients).

58. UNITED STATES SUPREME COURT BAR, PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF PIERCE BUTLER, JANUARY 27, 1940, at 19 [hereinafter SUPREME COURT MEMORIAM] (statement of Wilfred Rumble).

59. *Id.*

60. M.H. Hedges, *Pierce Butler: Friend of Intolerance*, in BINDLER, *supra* note 2, at 124, 125. The Nonpartisan League was a political party that advocated state control of mills, grain elevators, banks, and other farm-related industries in order to reduce the power of corporate political interests in Minnesota. See generally CAROL E. JENSON, *AGRARIAN PIONEER IN CIVIL LIBERTIES: THE NONPARTISAN LEAGUE IN MINNESOTA DURING WORLD WAR I* (1986).

61. Hedges, *supra* note 60, at 125.

62. HOWELL, *supra* note 47, at 30.

63. DANELSKI, *supra* note 3, at 11.

64. *Id.* at 9.

65. Letter from Robert O’Sullivan to John D. Carmody, *supra* note 7.

standard. He once jestingly remarked that he was strict in the observance of the eight-hour schedule, eight hours in the forenoon and eight hours in the afternoon.<sup>66</sup>

After six successful years with the railroad, Butler decided to return to his old law firm. By then William Mitchell, who would later become Solicitor General of the United States during President Calvin Coolidge's Administration and U.S. Attorney General under President Herbert Hoover, had joined the firm as a partner.<sup>67</sup> Capitalizing on his tenure with the railroad, Butler's practice focused on general litigation with a particular emphasis on railroad valuation cases.<sup>68</sup> Perhaps his most famous case on the plaintiff's side was his representation of injured passengers of the Minneapolis Street Railway Company, where he recovered \$50,000 for the plaintiffs—a record verdict in that type of case at the time.<sup>69</sup> He also successfully defended a personal injury action brought against the Canadian Northern Railroad at both trial and on appeal.<sup>70</sup> During the appeal, Butler's advocacy skills thoroughly impressed Judge Willis Van Devanter, then an Eighth Circuit judge, who would later become one of Butler's most ardent supporters during Butler's consideration as a Supreme Court nominee.<sup>71</sup>

In 1908, Butler was elected President of the Minnesota Bar Association, a position that enabled him to lobby for legal reforms in the Minnesota legislature.<sup>72</sup> He was instrumental, for example, in pushing for the enactment of Minnesota's first workers' compensation law.<sup>73</sup> In an important speech before the Association, Butler questioned whether employees working in hazardous positions that served the public interest should be held responsible for their on-the-job injuries.<sup>74</sup> He concluded that "in certain occupations attended by grave and peculiar risks of injury to employees, there should be compensation for injuries . . . unless such injury was the result of

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66. MEMORIAL SERVICES FOR DECEASED MEMBERS—RAMSEY COUNTY BAR 6 (Mar. 23, 1940) [hereinafter RAMSEY COUNTY BAR MEMORIAM] (on file with the Vanderbilt Law Review) (remarks of M.J. Doherty).

67. DANELSKI, *supra* note 3, at 10.

68. *Id.* at 12.

69. Memorandum from Francis Butler to David J. Danelski, Professor, Univ. of Wash. 4 (Mar. 25, 1963) (on file with the Vanderbilt Law Review) [hereinafter Danelski Memorandum].

70. DANELSKI, *supra* note 3, at 13.

71. Of course, Van Devanter and Butler would later become two pillars of the so-called "Four Horsemen of the Apocalypse," who would impede President Franklin Delano Roosevelt's New Deal reforms for a number of years. *See, e.g.,* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559 (1997) (listing Butler and Van Devanter as two of the so-called "Four Horsemen").

72. DANELSKI, *supra* note 3, at 10.

73. Brown, *supra* note 17, at 96 & nn.53–54 (internal citation omitted).

74. *Id.* (internal citation omitted).

wrongful conduct on the part of the injured person or occurred by reason of irresistible force or an act of providence.”<sup>75</sup>

In light of his previous public service and growing national reputation, Butler was asked by then-Attorney General George Wickersham in 1909 to serve as a Special Assistant Attorney General in the prosecution of midwestern meat packers and millers for their suspected violation of federal law.<sup>76</sup> In the first case, Butler successfully convinced a Chicago jury that the meatpackers were conspiring to illegally fix the prices of dressed meat and livestock in violation of the Sherman Antitrust Act.<sup>77</sup> In the other case, Butler convicted the millers of producing adulterated flour—flour bleached with nitrogen peroxide—in violation of the Pure Food and Drugs Act.<sup>78</sup> Though Butler ultimately lost both cases on appeal,<sup>79</sup> Wickersham stated that Butler had done “as well as [he] could” in presenting the cases and called him “the foremost lawyer in his part of the country.”<sup>80</sup>

Further bolstering his reputation as an outstanding corporate attorney, Butler represented a number of railroads before the U.S. Supreme Court in the well-known *Minnesota Rate Cases*.<sup>81</sup> In those cases, the railroads challenged a decision of the Railroad & Warehouse Commission of the State of Minnesota that set maximum rates for passenger and freight transportation at an artificially low level for purely intrastate commerce.<sup>82</sup> Butler argued to the Court that the rates were so low that “they amounted to an unconstitutional interference with interstate commerce” and were “confiscatory” in nature.<sup>83</sup> Although the Court found no violation based on the Commerce Clause, Justice Hughes’s majority opinion drew substantially upon Butler’s theory of the case, which stated that Congress had authority to override state rate laws.<sup>84</sup> Indeed, the

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75. *Id.* at 96–97.

76. DANELSKI, *supra* note 3, at 11.

77. *Id.* at 11–12.

78. *Id.*

79. *Id.* at 12; *see* *Lexington Mill & Elevator Co. v. United States*, 202 F. 615 (8th Cir. 1913); *United States v. Swift*, 186 F. 1002 (N.D. Ill. 1911).

80. Burner, *supra* note 16, at 1083.

81. *Minnesota Rate Cases*, 230 U.S. 352, 371 (1913) (listing Pierce Butler as the appellees’ attorney).

82. *Id.* at 420 (“The question we have now before us, essentially, is whether, after the passage of the interstate commerce act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic.”).

83. *Id.* at 380.

84. *Id.* at 432–33:

If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate

Court's holding caused some commentators to proclaim that Butler had "lost the battle but won the war."<sup>85</sup> The force of the Court's statements giving Congress broad regulatory authority over railroad rates would be fully realized a year later in the *Shreveport Rate Cases*, in which the Court held that the Interstate Commerce Commission ("ICC") had authority over even purely intrastate rates if they substantially burdened interstate traffic.<sup>86</sup>

Butler and Mitchell continued to grow their practice, and both eventually achieved national reputations.<sup>87</sup> After Congress passed the Railroad Valuation Act of 1913, which required the ICC to set property values for railroads operating in interstate commerce, Butler was appointed as general counsel to represent a group of western railroads before the ICC.<sup>88</sup> Butler was again successful during this lengthy, four-year project: he convinced the ICC to raise the legal value of railroad property, which "resulted in the . . . enormous valuation of nineteen billion dollars for the railroads of the nation."<sup>89</sup>

Butler continued to represent railroads in the ensuing years, and in 1921, the Canadian government asked him to represent it in a condemnation action against the Grand Trunk Railway.<sup>90</sup> Pursuant to an act of Parliament, three arbitrators were appointed to hear the case in order to determine the value of the railroad property condemned by the Canadian government.<sup>91</sup> The railroad appointed William Howard Taft, former President and future Chief Justice of the United States, to serve as its arbitrator.<sup>92</sup> Even though the railroad was eligible for \$64 million in statutory damages, the arbitrators

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regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply.

85. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 6.

86. See *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914):

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.

87. See DANELSKI, *supra* note 3, at 10 (explaining that Butler's firm became "regarded as one of the leading firms in the state").

88. Danelski Memorandum, *supra* note 69, at 5.

89. Hedges, *supra* note 60, at 125.

90. DANELSKI, *supra* note 3, at 13.

91. Danelski Memorandum, *supra* note 69, at 5.

92. *Id.*

ultimately decided to award the railroad nothing.<sup>93</sup> Even Taft, who dissented from the ruling, was thoroughly impressed by Butler's advocacy skills.<sup>94</sup> Fortuitously, Butler and Taft also stayed in the same hotel in Montreal and struck up a friendship that would last for years.<sup>95</sup> In fact, Butler ate breakfast with Taft the morning after Taft was nominated for the position of Chief Justice by President Warren Harding.<sup>96</sup> One of Taft's sons later recalled that Butler was "one of [Taft's] dearest friends."<sup>97</sup> Taft's friendship turned out to be instrumental to Butler's eventual nomination to the Supreme Court in 1922.<sup>98</sup>

### III. A DIFFICULT CONFIRMATION

Those groundless objections made by irresponsible people and foolish delays because of them have been more or less annoying to me, but I have not worried.<sup>99</sup>

In 1921, William Howard Taft was confirmed as the Chief Justice of an aging Supreme Court. Although the constitutional power to appoint new Justices rests expressly with the President, Taft took it upon himself to find suitable replacements for a number of aging Justices facing imminent retirement—such as Oliver Wendell Holmes, Joseph McKenna, William Day, and Mahlon Pitney.<sup>100</sup> Of particular

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93. *Id.* at 14.

94. SUPREME COURT MEMORIAM, *supra* note 58, at 13 (noting the "warm friendship" Butler developed with Taft, despite Taft's dissent in the arbitration).

95. DANELSKI, *supra* note 3, at 13.

96. Danelski Memorandum, *supra* note 69, at 7.

97. Hershberg Memorandum, *supra* note 21, at 5.

98. See DANELSKI, *supra* note 3, at 49–55 (noting that Taft gave "encouraging words to Butler" and wrote that Butler "would make a great Justice of our Court"). In fact, Butler became so close to Taft and regarded him as such a highly capable Chief Justice that when Taft died and President Hoover was looking for a replacement, Butler took it upon himself to contact Charles Evans Hughes, the author of the opinion against Butler in the *Minnesota Rate Cases*, in an effort to persuade Hughes to become "available" for the job. Butler then recommended to President Hoover that Hughes be nominated to replace Taft as Chief Justice. Pierce Butler III interview, *supra* note 17, at 9–10. The story of Butler's role in the Hughes nomination has not been reported previously.

99. Letter from Pierce Butler to William Howard Taft, Chief Justice of the Supreme Court of the United States (Dec. 14, 1922) (on file with the Vanderbilt Law Review).

100. See DANELSKI, *supra* note 3, at 39–40. Though not normally the province of the Chief Justice, Taft "expected to be consulted" by Harding with respect to any vacancies on the Supreme Court. *Id.* at 40. As Danelski explained, not only had Taft given greater thought to potential replacements for aging Justices, but Taft had also served as an advisor to Harding on a variety of matters, including the composition of Harding's cabinet right after the presidential election. *Id.* at 29–30. Accordingly, as an informal advisor to Harding and a former President himself, Taft felt free to make suggestions to Harding regarding suitable replacements for vacancies on the federal courts. *Id.* at 33–34.

concern to Taft, many of these Justices were beginning to display signs of advanced age that hampered their performance on the Court.<sup>101</sup>

In 1922, one of those imminent retirements occurred when Justice Joseph Day announced his retirement after becoming ill.<sup>102</sup> Taft actively searched for a Catholic Democrat of preeminent national reputation to fill Day's seat because Joseph McKenna, the Court's only Catholic Justice, was in ill health and was rumored to be considering retirement as well.<sup>103</sup> According to political scientist David Danelski,<sup>104</sup> who thoroughly chronicled Pierce Butler's nomination to the Supreme Court, the selection of a Catholic Democrat was intended to strengthen President Harding's relationship with congressional Democrats, while avoiding the necessity of finding a Catholic Republican, of which there were few.<sup>105</sup> In other words, the selection of a Catholic Democrat would "kill several political pigeons with a single stone."<sup>106</sup>

Taft first looked to John W. Davis, the premier Supreme Court advocate of his time and one of the namesakes of the famous New York law firm Davis, Polk & Wardwell.<sup>107</sup> Davis was an obvious candidate, having served previously as a U.S. congressman from West Virginia, Solicitor General of the United States, and ambassador to the United Kingdom.<sup>108</sup> In addition, Davis had sought the Democratic nomination for the presidency in 1920 and had argued a number of cases before the Supreme Court during his tenure as Solicitor General.<sup>109</sup> Though not Catholic, Davis was the most attractive choice

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101. *Id.* at 39–40 (describing Justice McKenna's "senility," Justice Holmes's "difficulty breathing," and Justice Pitney's "stroke"). Indeed, Joseph McKenna was so mentally infirm by the end of his tenure on the Court that he drafted an opinion that was contrary to the result agreed upon by every member of the Court, including himself. *Id.* at 40.

102. *Id.* at 40.

103. *Id.* at 39.

104. Indeed, the only book written about Butler's life thoroughly chronicles his nomination and confirmation. DANELSKI, *supra* note 3. David Danelski's excellent book, entitled *A Supreme Court Justice is Appointed*, is the basis for much of the discussion in this Part regarding Butler's nomination and confirmation to the Supreme Court.

105. *Id.* at 43–45.

106. *Id.* at 43.

107. *Id.*

108. *Id.* Though not Catholic, Davis was viewed as a viable nominee because of his prominent standing with Democrats. In the view of one of Taft's advisors, Davis was the best choice because he was from New York, the state that was widely thought to be entitled to the next Supreme Court appointment. *Id.*

109. In fact, by the time Davis passed away in 1955, he had argued more cases before the Supreme Court than any other twentieth-century lawyer; it is believed that only Daniel Webster and Walter Jones argued more cases before the Court. For a detailed description of Davis's

in Taft's view because of Davis's preeminent standing with Democrats in Congress and his excellent "reputation all over the country."<sup>110</sup> However, Davis was not enthusiastic about the position, responding to Taft's overtures by saying that he would give the idea "prayerful consideration," but requesting a "breathing spell" in order to make up his mind.<sup>111</sup> Uncertain about whether Davis would ultimately accept the position, Taft began seeking other potential nominees.

The time was short to find Day's replacement; Harding was under enormous pressure to nominate Judge Martin Manton, who was a judge on the U.S. Court of Appeals for the Second Circuit. Taft viewed Manton as a "shrewd, cunning and political judge" who was unfit to fill the vacancy.<sup>112</sup> However, Manton fit all the other criteria for the nomination: he was a Catholic Democrat from New York—viewed by many as the next state in line for a Supreme Court appointment—and was supported by many prominent politicians and leaders of the Catholic Church, including New York Archbishop Patrick Hayes, a friend of Harding's.<sup>113</sup> Taft needed to find a suitable nominee quickly, if for no other reason than to ensure that Manton would not receive the nomination.

Taft and his advisers considered and rejected a number of prominent jurists before finally settling on Butler. Taft closely considered Learned Hand, who was eliminated because he was viewed as "a wild Roosevelt man and a progressive" who would "most certainly herd with Brandeis and be a dissenter."<sup>114</sup> Benjamin Cardozo, then a judge on the New York Court of Appeals and later a Supreme Court Justice, was rejected because of the widespread belief at the time that Jews could not outnumber Catholics on the Court.<sup>115</sup> Even Harlan Fiske Stone, who would later become Chief Justice, was an unsatisfactory nominee in Taft's view because of concerns about

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tenure in the Solicitor General's Office, see PETER N. UBERTACCIO III, *LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL* 73–80 (2005).

110. DANELSKI, *supra* note 3, at 43, 45, 46.

111. *Id.* at 47, 53.

112. *Id.* at 45. At the time, Taft viewed Manton as too political because he was closely associated with Tammany Hall. *Id.* Taft's reservations regarding Manton turned out to be prophetic because Manton later resorted to accepting gifts and bribes from litigants having business before the Second Circuit. He resigned in 1939 after Manhattan District Attorney Thomas Dewey wrote to the House Judiciary Committee suggesting that Manton be impeached. Manton was later indicted and became the first federal judge to be convicted of accepting bribes. JOSEPH BORKIN, *THE CORRUPT JUDGE* 25–82 (1962) (noting that Manton was ultimately sentenced to two years imprisonment and ordered to pay a fine of \$10,000); see also *United States v. Manton*, 107 F.2d 834, 850 (2d Cir. 1939) (affirming Manton's conviction).

113. DANELSKI, *supra* note 3, at 45.

114. *Id.* at 42 (quoting the Taft papers).

115. *Id.* at 46.

Stone's temperament and doubts about whether President Harding would nominate Stone.<sup>116</sup>

While seeking Day's successor, Taft looked to others, including Justice Van Devanter, for guidance.<sup>117</sup> Van Devanter mentioned Butler as a possibility, in large part because Butler had appeared more than one hundred times before the Eighth Circuit.<sup>118</sup> Based on Taft's personal knowledge of Butler from the Grand Trunk Railway arbitration, he quickly agreed that Butler could be a suitable nominee.<sup>119</sup> Taft found that Butler's friends and colleagues in Minnesota and elsewhere in the Midwest strongly supported his nomination.<sup>120</sup> Judge Sanborn, who had known Butler since his legal apprenticeship at Pinch & Twohy, stated that Butler was "one of the few great men of my acquaintance" and that his character was "beyond reproach."<sup>121</sup> Former Attorney General George Wickersham, for whom Butler prosecuted the bleached flour and meatpacking cases in 1910, also viewed Butler as a very able attorney and a worthy nominee.<sup>122</sup> With Davis unable to commit to the position and Manton gaining support among political elites, Taft wrote to Harding and recommended that Butler be nominated to fill the vacancy created by the resignation of Justice Day.<sup>123</sup> According to the letter, Taft believed that Butler "would make a great Justice" because of Butler's "rugged character and force."<sup>124</sup>

Butler's former colleagues also urged Harding to nominate Butler. John Twohy, Butler's boss thirty-four years earlier, embarked on a cross-country campaign to urge prominent members of the Catholic Church and western congressmen to support Butler's nomination.<sup>125</sup> Carmi Thompson, who previously worked for the railroads and was Harding's preferred Republican candidate for the 1922 Ohio gubernatorial election, was also a Butler supporter.<sup>126</sup> Butler's predecessor as Ramsey County Attorney, Thomas O'Brien, sent telegrams to Knute Nelson, Chairman of the Senate Judiciary

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116. *Id.* at 48.

117. *Id.* at 49.

118. *Id.* at 54 (quoting Taft's letter to President Harding).

119. *Id.*

120. *Id.*

121. *Id.* at 49.

122. *Id.* at 50.

123. *Id.* at 54.

124. *Id.*

125. *Id.* at 61.

126. *Id.* at 65-66.

Committee, supporting Butler's nomination.<sup>127</sup> Notably, all five members of the Minnesota Supreme Court wrote that Butler's nomination would earn the "respect and approval of the entire bench and bar of Minnesota."<sup>128</sup>

The political timing of the vacancy was fortunate for Butler. Democrats had just beaten the Republicans handily in the 1922 congressional elections, reducing the Republican majority in the Senate from sixty to fifty-three.<sup>129</sup> Prominent Republicans and supporters of the Harding Administration, such as Senator Frank Kellogg of Minnesota and Carmi Thompson of Ohio, were among those who lost their election contests.<sup>130</sup> Meanwhile, critics of the Administration, such as Robert LaFollete of Wisconsin and Henrik Shipstead of Minnesota, were elected to office by resounding margins.<sup>131</sup> The declining popularity of the Harding Administration and the Republicans' slim majority in the Senate forced Harding to seek a nominee who would not provoke a bitter confrontation with Congress. Pierce Butler was a natural choice; he was strongly favored by Taft and was both a Democrat and a Catholic, which was just "what [the Administration] was looking for" in a nominee.<sup>132</sup> Accordingly, on November 22, 1922, Harding sent Butler's nomination to the Senate for consideration.<sup>133</sup>

Harding and Taft misjudged the reaction that Senate Democrats would have to Butler's nomination. Senators Shipstead and LaFollete opposed Butler because they believed that he was not progressive enough.<sup>134</sup> Many progressive organizations agreed, including the Chicago Federation of Labor, the Wisconsin Women's Progressive Association, and the Working Peoples Political League, to name just a few.<sup>135</sup> Newspapers such as *The Nation* and *The New York*

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127. *Id.* at 66.

128. *Id.* (quoting the letter from the Minnesota Supreme Court).

129. *Id.* at 86.

130. *Id.*

131. *Id.*

132. *Id.* at 87.

133. *Id.* at 88. Justice Van Devanter was so pleased with Butler's nomination that he wrote to a friend that Butler was "a fine lawyer, a broad-gauged, red-blooded man and in every way fitted for the [Supreme Court]." *Id.*

134. *See id.* at 90 (noting LaFollette's concerns about Butler's railroad advocacy).

135. *See* Telegram from Burghild Kuhlney, Secretary, Wisconsin Women's Progressive Association of Superior, to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Dec. 6, 1922) (on file with the Vanderbilt Law Review); Telegram from John Fitzpatrick, President, Chicago Federation of Labor, to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Dec. 6, 1922) (on file with the Vanderbilt Law Review); Telegram from Frank Fischer, Chairman, Working People's Political League, to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Nov. 29, 1922) (on file with the Vanderbilt Law Review).

*Times* argued against his confirmation.<sup>136</sup> Indeed, Butler had opponents on all sides—even the Ku Klux Klan opposed him.<sup>137</sup> As a result, Butler's nomination lapsed in the Senate, only to be revived when Harding renominated him to the Court on December 5, 1922.<sup>138</sup>

After the renomination, Chairman Knute Nelson ordered a subcommittee of the Senate Judiciary Committee to investigate Butler's qualifications.<sup>139</sup> Critics had raised two categories of objections to Butler's appointment: first, that he had acted improperly in personnel actions against several University of Minnesota professors while serving on the Board of Regents and second, that Butler could not preside over railroad cases impartially.<sup>140</sup> The subcommittee investigated those allegations carefully.<sup>141</sup>

The first objection—that Butler had acted improperly in personnel decisions involving several professors—arose from his service as a member of the Board of Regents for the University of Minnesota.<sup>142</sup> After advising Minnesota Governors John Johnson and Winfield Hammond on various matters, Butler was appointed in 1907 to a position on the Board of Regents, a post that he occupied until he was named to the Supreme Court.<sup>143</sup> Butler had earned a reputation for heavy-handedness as a Regent, even issuing “orders to the university president” regarding personnel decisions.<sup>144</sup>

Senator Shipstead contended in a letter to the subcommittee that Butler was not “judicial in mind or attitude” because he acted in an “unfair and unjudicial manner” in personnel decisions carried out against several University of Minnesota professors.<sup>145</sup> Two professors—Thomas Schaper and Stanley Rypins—alleged that Butler

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136. DANELSKI, *supra* note 3, at 90; Hedges, *supra* note 60, at 124–26.

137. DANELSKI, *supra* note 3, at 92.

138. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 7.

139. To my knowledge, the transcript of the proceedings of the subcommittee and other related documents have never been published. All sources related to those proceedings, including the transcript of the hearings, were obtained from the libraries of the Minnesota Historical Society and the University of Washington.

140. Letter from Henrik Shipstead, Senator-Elect of Minn., to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Dec. 7, 1922) (on file with the Vanderbilt Law Review) (noting four main concerns with Butler's nomination).

141. See *The Nomination of Pierce Butler, of Minnesota, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the Subcomm. of the S. Comm. on the Judiciary* (Dec. 8, 1922) [hereinafter *Subcommittee Hearings*] (on file with the author).

142. Letter from Henrik Shipstead, Senator-Elect of Minn., to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Dec. 7, 1922) (on file with the Vanderbilt Law Review).

143. DANELSKI, *supra* note 3, at 14–15.

144. *Subcommittee Hearings*, *supra* note 141, at 58.

145. Letter from Henrik Shipstead, *supra* note 140.

played an instrumental role in terminating them based on their outspoken liberal views.<sup>146</sup> Schaper, in particular, testified that Butler was unfit to serve on the Supreme Court because he was an "aggressive and overbearing bully" who behaved inappropriately by acting as the "judge, prosecutor, and executioner" with respect to his dismissal.<sup>147</sup> In short, Schaper argued that Butler lacked an appropriate judicial temperament.<sup>148</sup>

A more serious allegation originated from John Gray, a professor in the economics department who had adjudicated railroad valuation cases on behalf of the ICC.<sup>149</sup> Gray complained that Butler retaliated against him after Gray reached an unfavorable decision against the Texas Midland Railroad, Butler's client at the time.<sup>150</sup> Gray alleged that Butler was so enraged at the decision that he "lodged personal and private complaints" against him with the ICC.<sup>151</sup> Gray further accused Butler of retaliating against him by playing an instrumental role in denying Gray a promotion to the school of business when it opened in 1920.<sup>152</sup> Butler realized the seriousness of Gray's allegations; if the subcommittee believed them to be true, it would show that he acted improperly and unprofessionally.<sup>153</sup>

Butler and his allies disputed the allegations made by the professors. Butler defended Schaper's dismissal by writing that "[h]is removal [was] in harmony with the . . . tendency to silence disloyal communities, institutions, publications, officials, and individuals. We must see that sincere, loyal Americans are made the instructors of our youth, and not 'blatherskites,' such as this man."<sup>154</sup> Butler's son, Pierce, Jr., wrote a letter to Chairman Nelson, who was a member of the subcommittee that heard testimony on Butler's nomination, further disputing the charges made by the University professors.<sup>155</sup>

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146. See *Subcommittee Hearings*, *supra* note 141, at 21 (noting Shipstead's argument that Butler "let his bias and his prejudice" against Schaper and Rypins "rule his reason").

147. *Id.* at 59.

148. Butler was also allegedly involved in the termination of Gerhard Dietrichson, a professor in the Department of Chemistry. Dietrichson accused Butler of suppressing a report that confirmed Dietrichson's allegations of irregularities and difficulties in the school of chemistry, amounting to maladministration and waste of public funds. Dietrichson argued that he should have been reinstated once the report was made available to the Board of Regents. DANELSKI, *supra* note 3, at 95-97.

149. *Subcommittee Hearings*, *supra* note 141, at 79.

150. DANELSKI, *supra* note 3, at 98-99.

151. *Subcommittee Hearings*, *supra* note 141, at 81.

152. *Id.* at 80.

153. Letter from Pierce Butler to William Howard Taft, *supra* note 99.

154. *Subcommittee Hearings*, *supra* note 141, at 66.

155. Letter from Pierce Butler, Jr., to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Dec. 7, 1922) (on file with the Vanderbilt Law Review).

William Mitchell, Butler's law partner, sent a telegram to the subcommittee contesting Rypins's allegations in particular.<sup>156</sup> The thrust of the letters was clear: Butler was subject to unjustified attacks by dissatisfied and disloyal individuals who were not being honest.<sup>157</sup>

The subcommittee ultimately found that there was insufficient evidence to support allegations of inappropriate involvement in any of the personnel decisions and that, in any event, the claims were beyond the scope of their inquiry.<sup>158</sup> As Senator Albert Cummins stated succinctly, the subcommittee's purpose was not "to review the action of the board of Regents. That is perfectly ridiculous."<sup>159</sup> The subcommittee also dismissed the one charge that posed a real threat to Butler's prospects for confirmation—the allegation that Butler sought revenge against Gray for his unfavorable decision in the railroad valuation case—as unsupported by the evidence. No member of the ICC had any recollection of complaints filed by Butler against Gray.<sup>160</sup> In sum, the subcommittee concluded that it "would be absurd to claim that Butler would not be a decent Associate Justice of the Supreme Court" simply because of his actions as a Regent, regardless of the wisdom of the Board's actions in dealing with the professors.<sup>161</sup>

The other chief objection to Butler's nomination resulted from his longstanding representation of railroads in private practice. Senator Shipstead argued that Butler was "completely imbued with the viewpoint of these corporations, and so blind to the public interest, that he would be unable as a member of the Supreme Court to act with an unbiased mind, but would in his decisions necessarily and inevitably be influenced by his past interests and associations."<sup>162</sup> In Shipstead's view, the allegations raised two potential problems for Butler: first, that Butler would be biased toward the railroads in pending litigation before the Court and second, that Butler would be required to recuse himself from hearing all railroad cases, a substantial portion of the Court's docket at the time.<sup>163</sup> The subcommittee was unmoved by Shipstead's objections, in large part

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156. Telegram from William D. Mitchell, to Knute Nelson, Chairman, Subcomm. of the S. Comm. of the Judiciary (Nov. 29, 1922) (on file with the Vanderbilt Law Review).

157. *E.g., id.*

158. *Subcommittee Hearings, supra* note 141, at 70.

159. *Id.*

160. *Id.* at 83.

161. *Id.* at 78.

162. Letter from Henrik Shipstead to Knute Nelson, *supra* note 140.

163. See *Subcommittee Hearings, supra* note 141, at 8–13 (discussing the issue of Butler being a "partisan advocate" on behalf of corporations); *id.* at 96 (addressing the recusal problem).

because it was unable to find that Butler had done anything improper in his representation of the railroads<sup>164</sup> and that it would be hard to find a qualified nominee "of any prominence who would not be disqualified" in some of the cases before the Court.<sup>165</sup> Besides, as Senator Thomas Walsh of Montana noted, Butler would only potentially be disqualified in cases involving railroad valuation.<sup>166</sup> The subcommittee also looked into various other allegations of wrongdoing by Butler, but the remaining objections were found to be meritless.<sup>167</sup>

The outpouring of support from a number of important constituencies, including members of the academy and prominent politicians, helped Butler overcome the objections made by his critics. College and university presidents such as Donald Cowling of Carleton College, L.D. Coffman of the University of Minnesota, and M.L. Burton of the University of Michigan, all supported Butler's nomination.<sup>168</sup> President Coffman, for instance, described Butler as "without a peer among the legal fraternity," whose selection "would reflect a large measure of distinction upon the office."<sup>169</sup> Burton characterized Butler as having one of the "keenest analytical minds," making him an "eminently worthy nominee."<sup>170</sup> Two former Minnesota governors, J.A. Burnquist and J.A.O. Preus, also lined up to support Butler's nomination.<sup>171</sup> Even Felix Frankfurter, the well-known Harvard Law professor and future Supreme Court Justice, could not find a reason to object to Butler's appointment.<sup>172</sup>

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164. *Id.* at 95.

165. *Id.* at 90.

166. *Id.* It appears that the reservations expressed by Butler's critics in this regard were valid because Butler later participated in a case involving his former client, the Great Northern Railway. *See infra* note 335.

167. For instance, Shipstead was upset by Butler's representation of the Twin City Rapid Transit Company, which was accused of using "corrupt and improper" methods to secure the approval of the company's projects. Butler apparently fought to keep the city from examining the company's accounting records. The Committee quickly dismissed the charge, finding that Butler zealously advocated for his client, an obligation of every competent attorney. *Subcommittee Hearings, supra* note 141, at 93; Letter from Henrik Shipstead to Knute Nelson, *supra* note 140.

168. DANELSKI, *supra* note 3, at 71-72, 116.

169. Telegram from Lotus D. Coffman, President, Univ. of Minn., to Knute Nelson, Chairman, Subcomm. of the S. Comm. on the Judiciary (Nov. 28, 1922) (on file with the Vanderbilt Law Review).

170. Telegram from M.L. Burton, President, Univ. of Mich., to Knute Nelson, Chairman, Subcomm. of the S. Comm. on the Judiciary (Nov. 28, 1922) (on file with the Vanderbilt Law Review).

171. DANELSKI, *supra* note 3, at 116.

172. *Id.* at 127. In fact, Frankfurter wrote to Butler's son prior to the Senate subcommittee hearings to stress that the allegations made by Senator Shipstead that Frankfurter opposed Butler's appointment were false:

Accordingly, on December 21, 1922, the U.S. Senate confirmed Butler by a vote of 61-8, with only a few progressive Democrats voting against his appointment.<sup>173</sup> Less than two weeks later, Butler took the oath of office and became the seventy-first Justice to sit on the Supreme Court of the United States.<sup>174</sup>

#### IV. BUTLER'S JURISPRUDENCE

His philosophy was that of *laissez faire*, and he expressed it in its simplest forms. He was concerned for the rights of the criminal; he had no feeling for the rights of the radical dissenter. Nor will the reading of his opinions yield an easy understanding of the ambiguities in his thought.<sup>175</sup>

As a Supreme Court Justice, Butler's jurisprudence was deceptively nuanced. Those who categorize him merely as one of the so-called "Four Horsemen of the Apocalypse"<sup>176</sup> fail to give him credit for the intricacy and sophistication with which he approached constitutional questions. To be sure, Butler often took positions that were "favorable toward constitutional protection of economic liberties through judicial restriction of government action."<sup>177</sup> But it is far too simplistic to assert, as some commentators have, that Butler was the "epitome of ultra-conservatism"<sup>178</sup> or that he was "insensitive to matters of civil liberties."<sup>179</sup> To the extent that labels are helpful in describing Butler, previous commentators have largely mischaracterized his jurisprudence by widely labeling him as a "conservative."<sup>180</sup> For example, Butler took stereotypically

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Therefore, I should like you, and your father, to know, that it's all rubbish—made out of whole cloth. That I am to appear as a witness, or that I am in any wise [sic] involved, directly or indirectly, in the opposition [to your father's nomination], is as true as that I am a son-in-law of Mr. Justice Brandeis—in other words, it's utterly baseless in fact.

Letter from Felix Frankfurter, Professor of Law, Harvard Univ., to Pierce Butler, Jr. (Dec. 9, 1922) (on file with the Vanderbilt Law Review).

173. Burner, *supra* note 16, at 1085.

174. *Id.*

175. *Id.* at 1090.

176. *E.g.*, FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 217 (1955) (naming Butler as one of the "Four Horsemen of Reaction").

177. EDWARD NEWTON KEARNEY, *FOUR ECONOMIC CONSERVATIVES AND CIVIL LIBERTIES: A STUDY OF THE POSITIONS OF JUSTICES BUTLER, MCREYNOLDS, SUTHERLAND AND VAN DEVANTER, WITH EMPHASIS ON THE PERIOD 1923-1937*, at 6 (1965).

178. Robert W. Langran, *Why Are Some Supreme Court Justices Rated As "Failures"?*, 1985 Y.B. SUP. CT. HIST. SOC'Y 9, 10.

179. *Id.* at 11.

180. *See, e.g.*, Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 685 (2005) (characterizing Butler as a member of a "four person conservative bloc" that opposed many of President Roosevelt's New Deal programs); Samuel R.

libertarian<sup>181</sup> (or even liberal) positions in cases involving the Fourth Amendment and the rights of criminal defendants.<sup>182</sup> Moreover, even in Fourteenth Amendment cases, where much of his economic liberties jurisprudence is grounded, Butler's opinions are difficult to categorize consistently as conservative or liberal.<sup>183</sup> Accordingly, previous

Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 252 n.12 (2002) (same); William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1159 (2005) (characterizing Butler as a "deeply conservative" member of the Supreme Court in the 1930s).

As this Article explains, I do not think it is particularly helpful to refer to Butler as a "conservative" because his views are much more nuanced than that simple label conveys. Instead, I use that term in this Article not so much to describe Butler's jurisprudence, but to refer to the four Justice voting bloc that many historians label as the "Four Horseman"—which includes Justices Butler, McReynolds, Sutherland, and Van Devanter.

181. For purposes of this Article, I use Jan Narveson's definition of the term "libertarianism":

the doctrine that the only relevant consideration in political matters is individual liberty: that there is a delimitable sphere of action for each person, the person's "rightful liberty," such that one may be forced to do or refrain from what one wants to do only if what one would do or not do would violate, or at least infringe, the rightful liberty of some other person(s).

JAN NARVESON, *THE LIBERTARIAN IDEA* 7 (2001); see also DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 2 (1997):

Libertarians defend each person's right to life, liberty, and property—rights that people possess naturally, before governments are created. In the libertarian view, all human relationships should be voluntary; the only actions that should be forbidden by law are those that involve the initiation of force against those who have not themselves used force—actions like murder, rape, robbery, kidnapping, and fraud.

Posner, *Economic Document*, *supra* note 23, at 21:

[T]he economic libertarian approach (whether it takes the form of reinterpretation of the existing Constitution, amendment, or both) diminishes the role of democracy—potentially dramatically. The approach does not entail merely a redirection of constitutional protection from so-called personal liberties to economic liberties, for the consistent libertarian believes as strongly in the former as in the latter. To him the "marketplace in ideas" is a reality and not a metaphor, and sexual freedom, provided it does not cause harm to third parties, is as worthy of constitutional protection as freedom to choose an occupation or decide how much rent to charge a tenant. What is envisaged therefore is a drastic curtailment, across the board, in the scope of permissible legislative, executive, and administrative action.

See generally LEONARD E. READ, *ELEMENTS OF LIBERTARIAN LEADERSHIP* 13-183 (1962) (chronicling the basic tenets of libertarianism in America).

182. See *infra* notes 194-222 and accompanying text.

183. Compare *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Butler, J., dissenting without opinion from the Supreme Court's holding that a compulsory sterilization statute as applied to the feeble-minded was constitutional, a position considered liberal in retrospect), with *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 408 (holding that utility rates set by the Indianapolis Water Company were too high and therefore confiscatory under Justice Butler's cost of reproduction analysis of the Fourteenth Amendment, a position considered conservative).

commentators have underestimated the complexity of Butler's jurisprudence.

Some of the confusion is no doubt a result of the fact that Butler did not write many of the famous opinions of the period.<sup>184</sup> In fact, of the more than 300 opinions that Butler authored while serving on the Court, many were written in highly technical areas, such as in the fields of public utilities regulation and taxation.<sup>185</sup> To date, no scholar has systematically analyzed these areas of Butler's jurisprudence. As a result, Butler remains one of the lesser-known Supreme Court Justices in history, poorly understood and deeply underanalyzed, despite the fact that he served on the Supreme Court for nearly seventeen years.<sup>186</sup>

After briefly reassessing Justice Butler's constitutional jurisprudence, this Part argues that two reasons explain Justice Butler's lack of treatment in the scholarly literature. First, as a matter of style and philosophy, Justice Butler was a deeply private man and employed a minimalist approach to crafting judicial opinions, even in high-profile cases. Second, and perhaps more importantly, Butler's main areas of legal expertise—public utilities regulation and taxation—are not areas of high salience in the legal community, at least among those scholars that write about the Supreme Court.

### A. A Constitutional Reassessment

Despite the relative paucity of opinions from Butler concerning civil liberties, scholars have remained intently focused on how he and his ideological allies approached cases involving the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.<sup>187</sup> In so doing, they note that, like his fellow conservatives, Justices Van Devanter, McReynolds, and Sutherland, Butler was often hostile to claims involving civil liberties.<sup>188</sup> In First Amendment cases, for example,

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184. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (opinion by Justice Roberts); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (opinion by Justice McReynolds); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (opinion by Justice Sutherland).

185. See *infra* notes 306–428 and accompanying text.

186. Even in Butler's life, he remained largely "unknown to the public," and his contribution to American constitutional law is described as "minimal." BINDLER, *supra* note 2, at 204. However, Butler is not the only lesser-known Justice to serve for such a lengthy period: James M. Wayne (thirty-two years), Samuel Nelson (twenty-seven years), and Robert Grier (twenty-four years) all served on the Court for decades while remaining relatively unknown. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 28 (2007).

187. E.g., HOWELL, *supra* note 47; KEARNEY, *supra* note 177; see also Cushman, *supra* note 71, at 572–80 (discussing the approach of the "Four Horsemen" to constitutional questions).

188. E.g., KEARNEY, *supra* note 177, at 6.

Butler often took a characteristically conservative approach, deferring to state governments as the most appropriate bodies to tend to the welfare and needs of citizens and permitting extensive regulation of speech.<sup>189</sup> When cases involved economic rights, however, Butler generally subscribed to *Lochner* and its progeny to invalidate state legislation that impaired the freedom of contract or property rights.<sup>190</sup> However, Butler also joined in opinions that were the precursors to modern substantive due process cases dealing with personal liberty and autonomy.<sup>191</sup>

Nonetheless, an underlying and consistent theme runs through Butler's jurisprudence: Butler strongly believed in protecting private property rights, a value that often influenced his votes and opinions in constitutional cases. Nowhere is that belief more apparent than in his strict adherence to *Lochner* in Fourteenth Amendment cases involving economic and property rights.<sup>192</sup> Butler's elevated view of property rights also seemingly influenced his Fourth Amendment jurisprudence—an area in which he often disagreed with Justices Van Devanter, McReynolds, and Sutherland.

Even in cases not directly involving property rights, however, Justice Butler often sided with criminal defendants against the government, demonstrating the anti-government tendencies that were an outgrowth of his education, upbringing, and prior experience as a prosecutor.<sup>193</sup> Therefore, it is too simplistic and inaccurate to label

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189. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 723–38 (1931) (Butler, J., dissenting) (“It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.”).

190. See, e.g., *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 618 (1936) (finding state legislation fixing wages for women “repugnant” to the Fourteenth Amendment).

191. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating legislation that unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of their children); see also *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923):

Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

192. See, e.g., *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1926) (“But a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.”).

193. As his son Francis would later explain, Butler's experience as a prosecutor made him especially committed to giving criminal defendants all of the procedural rights that they were entitled under the Constitution. See *infra* notes 220–21 and accompanying text. As Ramsey County Attorney, Butler was exposed to the types of abuses that can occur when prosecutors and the police elevate the need to win above all else. *Id.* As a result, Butler was a “stickler” in criminal cases. See *infra* text accompanying note 212.

Butler as a monolithic conservative, as many commentators have done, because Butler adopted pro-defendant positions in a number of cases involving the constitutional rights of criminal defendants.

### 1. The Rights of Criminal Defendants

Aside from his laissez-faire and pro-property jurisprudence on economic rights, Butler's libertarian leanings are most apparent in his Fourth Amendment opinions. It was not uncommon for Butler to take a position contrary to his conservative colleagues when addressing cases involving the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"<sup>194</sup> and in giving robust construction to the warrant requirement of the Fourth Amendment.<sup>195</sup>

Perhaps the most famous example of Justice Butler's Fourth Amendment jurisprudence was his dissent in *Olmstead v. United States*,<sup>196</sup> in which the Court held, in an opinion by Chief Justice Taft, that evidence obtained under a wiretap did not violate the Fourth Amendment.<sup>197</sup> The majority opinion, joined by Butler's conservative colleagues McReynolds, Sutherland, and Van Devanter, adopted a literal construction of the Fourth Amendment, holding that the wiretap was not a search because the text of the Fourth Amendment is limited to searches of "persons, houses, papers, and effects."<sup>198</sup>

In dissent, Justice Butler rejected the narrow interpretation of the Fourth Amendment adopted by the Court and instead would have broadly construed the types of property in which a criminal defendant has a Fourth Amendment interest: "The direct operation or literal meaning of the words used [in the Fourth Amendment] do not measure the purpose or scope of its provisions."<sup>199</sup> According to Butler:

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate

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194. U.S. CONST. amend. IV.

195. *Id.*

196. 277 U.S. 438, 486–88 (1928).

197. *Id.* at 465.

198. *Id.* (quoting U.S. CONST. amend. IV). The Court reasoned:

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

*Id.*

199. *Id.* at 488 (Butler, J., dissenting).

the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence.<sup>200</sup>

Butler would have therefore held in *Olmstead* that the wiretap constituted a search and that the federal prohibition officers violated the Fourth Amendment because they did not secure a search warrant prior to conducting the wiretap.<sup>201</sup> Although Butler did not join the other dissents in the case, written by Justices Holmes and Brandeis, Butler's dissent was surprisingly similar in tone and substance to those other dissents because each would have given broad construction to the text of the Fourth Amendment.<sup>202</sup> Nearly forty years later in *Katz v. United States*,<sup>203</sup> the Court vindicated the views expressed by Justices Butler, Holmes, and Brandeis by overruling *Olmstead* expressly and holding that a wiretap constituted a search under the Fourth Amendment.<sup>204</sup>

In several of the other Fourth Amendment decisions of the period, Justice Butler sided with criminal defendants. In *Agnello v. United States*,<sup>205</sup> for example, Justice Butler wrote the opinion for the Court holding that a warrantless search of the residence of a drug conspirator several blocks away from the location of his arrest could not be sustained as a valid search incident to arrest.<sup>206</sup> The Court's holding was based in part on the sanctity of the home: "[T]he protection of the Fourth Amendment extends to all equally—to those just suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is itself unreasonable and abhorrent to our laws."<sup>207</sup> Such searches, he stated, were unlawful

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200. *Id.* at 487.

201. *Id.* at 488.

202. Compare *id.* at 487 (Butler, J., dissenting) (employing a broad construction of the Fourth Amendment), with *id.* at 477 (Brandeis, J., dissenting) (arguing that the Amendment should be construed "in light of its object"), and *id.* at 484 (suggesting that the government should not foster crime by using tainted evidence in criminal trials).

203. 389 U.S. 347 (1967).

204. *Id.* at 359. In a 1937 decision, the Court held that federal agents were not authorized by the Federal Communication Act of 1934 to intercept telephonic communications through a wiretap. *Nardone v. United States*, 302 U.S. 379, 384 (1937). That case, however, did not involve the question addressed in *Olmstead*—whether a wiretap is a search under the Fourth Amendment.

205. 269 U.S. 20 (1925).

206. *Id.* at 31.

207. *Id.* at 32. Justice Butler further noted that "Congress ha[d] never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose." *Id.*

“notwithstanding facts unquestionably showing probable cause.”<sup>208</sup> Similarly, again writing for the Court in *United States v. Lefkowitz*,<sup>209</sup> Justice Butler struck down an exploratory search conducted by prohibition officers without a warrant because the officers arrested the conspirator merely as a pretext to search for evidence.<sup>210</sup> In a number of other cases, Justice Butler joined opinions of the Court invalidating searches under the Fourth Amendment.<sup>211</sup>

In the words of Chief Justice Hughes, Justice Butler was a “stickler for the rights of criminals.”<sup>212</sup> That strand of his jurisprudence extended beyond the Fourth Amendment and included a broad understanding of the Sixth Amendment right to a jury trial in criminal cases.<sup>213</sup> In *District of Columbia v. Clawans*,<sup>214</sup> Butler alone joined a dissent authored by Justice McReynolds that would have required a jury trial for the offense of engaging, without a license, in the sale of secondhand goods, which carried a penalty of ninety days in jail or a fine of \$300 in the District of Columbia.<sup>215</sup> In contrast, the majority opinion found no constitutional violation when the government denied the defendant a jury trial because he would not have been afforded one “when the Constitution was adopted.”<sup>216</sup> In an earlier case, Butler also joined a unanimous Court in holding that the Sixth Amendment requires a jury trial for the crime of reckless driving while exceeding the speed limit, which carried a sentence of between ten and thirty days in jail under a District of Columbia ordinance.<sup>217</sup> Finally, in *Snyder v. Commonwealth of Massachusetts*,<sup>218</sup> Butler joined Justices Roberts, Sutherland, and Brandeis in a dissent arguing that a criminal defendant has a constitutional right under the

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208. *Id.* at 33.

209. 285 U.S. 452 (1932).

210. *Id.* at 467.

211. *See, e.g.*, *Nathanson v. United States*, 290 U.S. 41, 44 (1933) (finding a search warrant deficient because it rested upon mere suspicion without supporting facts); *Sgro v. United States*, 287 U.S. 206, 212 (1932) (voiding a search warrant because it had not been executed within ten days as required by law); *Grau v. United States*, 287 U.S. 124, 128 (1932) (invalidating a search warrant for lack of probable cause); *Gambino v. United States*, 275 U.S. 310, 316 (1927) (holding that evidence wrongfully procured without a search warrant was inadmissible); *Byars v. United States*, 273 U.S. 23, 28–34 (1927) (invalidating a search warrant issued upon affiant’s statement that he had “good reason” to believe that defendant possessed certain illegal items).

212. *Burner*, *supra* note 16, at 1087.

213. *E.g.*, *District of Columbia v. Colts*, 282 U.S. 63, 73–74 (1930); *see also* *District of Columbia v. Clawans*, 300 U.S. 617, 633 (1937).

214. 300 U.S. 617 (1937).

215. *Id.* at 633 (McReynolds & Butler, JJ., dissenting).

216. *Id.* at 627.

217. *Colts*, 282 U.S. at 73–74.

218. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

Due Process Clause of the Fourteenth Amendment to be present when the jury visits the scene of an alleged crime.<sup>219</sup>

In numerous cases Butler adopted a position—often contrary to his conservative allies—broadly construing constitutional provisions protecting criminal defendants.<sup>220</sup> Butler's son Francis later explained that his father's support for the rights of criminal defendants arose from his previous experience as a prosecutor:

[Butler's] early experience was as Assistant County Attorney and then for four years as County Attorney while he was still under the age of thirty-two. This together with other matters imbued him with the definite thought that those arrested of crimes should be given all of the safeguards. He knew the advantage that could be taken by police or prosecutors who fought to win cases rather than to win them with due regard to the rights of individuals. Thus the long line of dissents or participation in majority opinions which protected the accused. In view of his early life as a vigorous prosecutor it is an example of devotion to individual liberty and also of his compassion and warmth for individual people of all walks of life.<sup>221</sup>

Commentators, however, sometimes cite the famous Scottsboro boys case, *Powell v. Alabama*,<sup>222</sup> as proof that Justice Butler was insensitive to the civil liberties of criminal defendants, particularly when a case involved black defendants.<sup>223</sup> As an initial matter, that proposition is dubious because a number of the opinions he joined favoring the rights of the criminally accused, including *Brown v. Mississippi* and *Moore v. Dempsey*, involved black defendants.<sup>224</sup> But more fundamentally, Justice Butler dissented from the Court's opinion on the basis of the record in *Powell*, not because he viewed the right to counsel as non-fundamental or objected to the incorporation of the

219. *Id.* at 134–35.

220. See also *Palko v. Connecticut*, 302 U.S. 319, 329 (1937) (Butler, J., dissenting without opinion from the Court's holding that the Double Jeopardy Clause did not bar the retrial of a criminal defendant for first-degree murder after the first jury found him guilty of second-degree murder in a trial replete with legal errors prejudicing the State of Connecticut); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (Butler, J., joining a unanimous Court in holding that use of a confession obtained by coercion, brutality, and violence could not be a basis for a conviction under the Due Process Clause of the Fourteenth Amendment); *Moore v. Dempsey*, 261 U.S. 86, 91–92 (1923) (Butler, J., joining an opinion, over the dissent of Justices McReynolds and Sutherland, holding that a district court should have held a hearing on a motion for a writ of habeas corpus when the state trial appeared to be a sham and the defendants were convicted under the pressure of a mob).

221. Hershberg Memorandum, *supra* note 21, at 3.

222. 287 U.S. 45 (1932).

223. See, e.g., HOWELL, *supra* note 47, at 36 (arguing that Butler was a “stubborn bigot,” who was “callous to human needs and well-being”). Although I do not believe that Butler was a bigot or racist based on my review of his entire voting record, the possibility cannot be completely dismissed in light of his votes in the Scottsboro Boys case as well as in other cases involving the constitutional rights of minorities and aliens under the Fourteenth Amendment. See *infra* notes 249–264 and accompanying text.

224. *Brown*, 297 U.S. at 281; *Moore*, 261 U.S. at 87.

right to counsel under the Fourteenth Amendment.<sup>225</sup> In fact, in the opening sentence of the dissent, Butler stated that if it were true that defendants were “denied the right of counsel,” they would be entitled to the reversal of their convictions.<sup>226</sup> In his view, however, defendants’ counsel performed “a rigorous and rigid cross-examination” of the state’s witnesses and submitted a motion for a change of venue together with supporting papers, both of which indicated to Butler that the defendants were not denied the effective assistance of counsel.<sup>227</sup> Though it might be easy to argue against Butler’s view of the record in the case, there is not any language in the opinion suggesting that it represents a broader insensitivity to the civil liberties of criminal defendants. To the contrary, a review of Butler’s entire record in criminal cases suggests that he often sided with criminal defendants over the state or federal governments, far more often than did his ideological allies Justices McReynolds, Sutherland, and Van Devanter.<sup>228</sup>

## 2. The Fourteenth Amendment

One of the most important jurisprudential developments of the early twentieth century was the Supreme Court’s success in striking down a number of state laws regulating property and contractual rights as inconsistent with the Fourteenth Amendment. In a line of cases that is now harshly criticized, the Court invalidated laws regulating economic rights, beginning with the case of *Lochner v. New York*,<sup>229</sup> in which the Court struck down a New York law limiting the number of hours that bakers could work each week.<sup>230</sup> In the decades

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225. *Powell*, 287 U.S. at 74–76 (Butler, J., dissenting). On the incorporation issue, Butler would have refused to address it as a procedural matter because it was not properly raised in the courts below or before the Supreme Court. *Id.* at 76.

226. *Id.* at 73 (internal quotation marks omitted).

227. *Id.* at 75.

228. *See, e.g.*, Burner, *supra* note 16, at 1090 (“[Butler] was concerned for the rights of the criminal.”). It is important to note, however, that when the rights of aliens were at issue, Butler almost always sided with the United States government. *See, e.g.*, *Kessler v. Strecker*, 307 U.S. 22, 38 (1937) (Butler, J., concurring in Justice McReynolds’s dissenting opinion arguing that an alien should have been deported because of his association with socialist organizations); *United States v. Bland*, 283 U.S. 636, 637 (1931) (Butler, J., joining Justice Sutherland’s majority opinion denying an alien’s citizenship petition because she would only take the required oath by adding qualifying language); *United States v. Macintosh*, 283 U.S. 605, 626 (1931) (same); *United States v. Schwimmer*, 279 U.S. 644, 652 (1929) (Butler, J., holding for a six-justice majority that Rosika Schwimmer was properly denied her citizenship application because she refused to take up arms even in cases of national necessity).

229. 198 U.S. 45 (1905).

230. *Id.* at 64.

that followed *Lochner*, the Court continued to take a narrow view of state police powers and a broad view of the Fourteenth Amendment.<sup>231</sup> These decisions were so controversial that in 1937 they provoked a strong response from President Franklin Delano Roosevelt, who threatened to pack the Court with additional members to ensure the survival of his New Deal programs.<sup>232</sup> Roosevelt's Court-packing plan failed, ostensibly because Justice Owen Roberts abruptly switched his vote in economic liberties cases beginning in *West Coast Hotel v. Parrish*.<sup>233</sup> The press labeled that dramatic turn of events as the "switch in time that saved the nine."<sup>234</sup> Among the Court's strongest adherents to *Lochner*, however, was Justice Butler, who authored many of the important Fourteenth Amendment opinions of the period.

In just his first full Term on the Supreme Court, it quickly became clear that Justice Butler's pro-property and libertarian leanings would, like his views on the Fourth Amendment, also dominate his economic liberties jurisprudence. In *Jay Burns Baking Co. v. Bryan*,<sup>235</sup> Justice Butler wrote the majority opinion invalidating a Nebraska statute that required loaves of bread to be sold in strict weight increments.<sup>236</sup> The Nebraska statute was designed to prevent bread manufacturers from defrauding the public by selling bread below the weight specified, but Justice Butler wrote that the statute's requirements were too stringent and thus subjected "bakers and sellers of bread to restrictions which [were] essentially unreasonable

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231. See Olken, *supra* note 180, at 278 (describing *Lochner* and the cases that followed as employing "a relatively narrow, categorical conception of local police powers"); William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 687 (2007) (stating that "[t]he death of *Lochner* liberated the states' police powers").

232. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 94-95 (16th ed. 2007); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2170 (1999).

233. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins* in an opinion authored by Chief Justice Hughes); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 333 (1998); Kalman, *supra* note 232, at 2172. *But see* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 4-5 (1998) (criticizing the standard story of the "switch in time that saved the nine").

234. William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 593-94 (2004). Some authorities question the conventional view that Roberts's vote was cast in *Parrish* after Roosevelt's announcement of his plan to pack the Supreme Court. Under the alternative view, it was primarily the resignation of Justice Willis Van Devanter a month after *Parrish* was decided that led to the eventual defeat of Roosevelt's Court-packing plan. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1028-30, 1053-56 (2000) (discussing the differing historical accounts of the demise of the Court-packing plan, and noting that Justice Van Devanter's resignation was well-timed to thwart the proposal); Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 942 (1999) (explaining how Justice Van Devanter resigned strategically in order to "help defeat FDR's plan").

235. 264 U.S. 504 (1924).

236. *Id.* at 517.

and arbitrary.”<sup>237</sup> Nearly two years later, in *Weaver v. Palmer Bros.*, Justice Butler again wrote for the Court in striking down a Pennsylvania law that completely prohibited the use of “shoddy”<sup>238</sup> and certain secondhand materials in mattress production.<sup>239</sup> The Court found that the prohibition on the use of shoddy was “purely arbitrary”<sup>240</sup> and thus violated the Fourteenth Amendment because the State of Pennsylvania had failed to present evidence of “danger to the health of users of comfortables filled with shoddy.”<sup>241</sup>

Throughout his tenure on the Supreme Court, Butler consistently supported the Court’s post-*Lochner* invalidation of state laws that interfered with private property rights, the right to contract, and other economic rights. He largely developed his reputation as one of the “Four Horsemen of the Apocalypse” by consistently voting with Justices McReynolds, Sutherland, and Van Devanter in economic rights cases.<sup>242</sup> In fact, Butler is responsible for authoring what became *Lochner*’s last major gasp in *Morehead v. New York ex. rel. Tipaldo*,<sup>243</sup> in which a closely divided Court struck down New York’s minimum wage law as violative of the Fourteenth Amendment.<sup>244</sup> The case concerned whether the State of New York could, consistent with the requirements of the Due Process Clause of the Fourteenth Amendment, impose “minimum wage rates for all competent experienced women workers.”<sup>245</sup> In answering that question in the negative, Butler invoked the fundamental right to contract recognized in *Lochner* and its progeny:

The right to make contracts about one’s affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and

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237. *Id.* In a decision involving a similar Nebraska statute ten years later, Justice Butler again wrote for the Court but upheld the amended statute. *P.F. Peterson Baking Co. v. Bryan*, 290 U.S. 570, 575 (1934). According to Justice Butler, the amended statute was far more flexible than the statute considered in *Jay Burns* because it involved three rather than two ounce allowances for bread weight and required the minimum weight to be maintained for just twelve instead of twenty-four hours after baking. *Id.* at 573 (noting that, under the *Jay Burns* statute, “it was impossible to make good bread in the regular way without exceeding the tolerances then prescribed”). Accordingly, the Court held in *P.F. Peterson* that the amended Nebraska statute did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 575.

238. Under the Pennsylvania statute, “shoddy” was defined as “any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up, or ground up.” *Weaver v. Palmer Bros.*, 270 U.S. 402, 409 (1926).

239. *Id.* at 415.

240. *Id.*

241. *Id.* at 412.

242. *E.g., id.*

243. 298 U.S. 587 (1936).

244. *Id.* at 618.

245. *Id.* at 610.

employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception.<sup>246</sup>

In recognizing the liberty to contract, Justice Butler also rejected the policies underlying the New York law and further elucidated his own laissez-faire leanings, stating that the "prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."<sup>247</sup> The Court ultimately held in *Morehead* that New York's minimum wage law violated the Fourteenth Amendment for the same reasons as a materially indistinguishable federal law that was previously invalidated by the Court in *Adkins v. Children's Hospital of the District of Columbia*.<sup>248</sup>

*Lochner* and the other economic liberties cases were emblematic of Justice Butler's view that private property rights deserved robust constitutional protection. However, in Butler's view, even the protection of property rights, a core tenet of his judicial philosophy, had its limits. In a series of cases in 1923, better known as the "Alien Land Law Cases," Butler deferred to state and federal governments in the regulation of matters relating to property ownership by resident aliens. He authored a series of four opinions for the Court, each of which raised the question of whether states could, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, limit land ownership by Japanese aliens.<sup>249</sup> The Washington and California statutes at issue prevented Japanese aliens from leasing agricultural land,<sup>250</sup> becoming stockholders in a corporation authorized to hold land,<sup>251</sup> and making cropping contracts with respect to agricultural land.<sup>252</sup> Despite the obvious restraint on property and contract rights for both the landowner and the resident alien in each of the four cases,<sup>253</sup> Justice Butler wrote for five other Justices in upholding each measure as consistent with "those powers

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246. *Id.* at 610-11.

247. *Id.* at 616.

248. *Id.* at 618.

249. *Frick v. Webb*, 263 U.S. 326, 335 (1923); *Webb v. O'Brien*, 263 U.S. 313, 318 (1923); *Porterfield v. Webb*, 263 U.S. 225, 231 (1923); *Terrace v. Thompson*, 263 U.S. 197, 211 (1923).

250. *Porterfield*, 263 U.S. at 232; *Terrace*, 263 U.S. at 220.

251. *Frick*, 263 U.S. at 333.

252. *O'Brien*, 263 U.S. at 319 n.1.

253. *See, e.g., Porterfield*, 263 U.S. at 232-33 (observing that the California Alien Land Law "forbids [Japanese aliens] to lease land in the State" and "deprives Porterfield of the right to enter into contracts for the leasing of his realty").

of police that were reserved [to each state] at the time of the adoption of the Constitution.”<sup>254</sup> Though the Court recognized that resident aliens are protected by the Fourteenth Amendment, Butler nonetheless wrote for the Court that “[s]tate legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.”<sup>255</sup> The Court thus concluded that such laws were not arbitrary because resident aliens possessed “rights, privileges and duties” that “differ[ed] widely” from citizens,<sup>256</sup> and the classification system in the state statutes was presumed to be “substantial and reasonable” because it was based upon the federal naturalization laws.<sup>257</sup> Thus, in the “Alien Land Law Cases,” Butler drew a firm distinction between the right of resident aliens to work for a living and their right to possess an ownership interest in land, the latter of which was not constitutionally protected.<sup>258</sup>

Similarly, in a case addressing the right of racial minorities to get an education, Justice Butler dissented from an opinion of the Court that struck down a Missouri statute that permitted the University of Missouri School of Law to deny equal admission to black

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254. *Terrace*, 263 U.S. at 217. In *Terrace*, Justice Butler recognized the broad regulatory authority of the state in regulating the health and welfare of its citizens: “And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.” *Id.*

255. *Id.* at 218.

256. *Id.*

257. *Id.* at 220.

258. One explanation for the seeming inconsistency between his staunch protection of private property rights in other contexts and his approval of the highly restrictive limitations on property rights in the “Alien Land Law Cases” is that the latter involved a conflict between two core pillars of his philosophy: his deep and abiding sense of national patriotism, DANIELSKI, *supra* note 3, at 15, and his opposition to restrictions on private property. Indeed, Butler was rarely sympathetic (and perhaps even hostile) to the claims of aliens in naturalization and deportation cases. See, e.g., *Kessler v. Stricker*, 307 U.S. 22, 35–38 (1939) (Butler, J., dissenting from the majority’s holding that a federal statute authorizing the deportation of aliens who belonged to certain proscribed organizations did not apply to an individual who joined the Communist Party but then later failed to pay his membership dues); *United States v. Macintosh*, 283 U.S. 605, 613, 626 (1931) (denying citizenship to a Canadian professor who stated that he would only take up arms for the United States if he believed a war was morally justified); *United States v. Schwimmer*, 279 U.S. 644, 647, 653 (1929) (upholding a lower court decision denying naturalization to a woman who stated that she would refuse to take up arms even in cases of national necessity). One passage in *Schwimmer* aptly summarizes Justice Butler’s views on national loyalty and patriotism: “[O]ne who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons . . . are incapable of the attachment for and devotion to principles of the Constitution . . .” *Id.* at 652.

students by providing a legal education elsewhere.<sup>259</sup> The State of Missouri argued that it was fulfilling the "separate but equal" requirement of *Plessy v. Ferguson*<sup>260</sup> by paying the tuition and fees for such students to attend a law school in a neighboring state.<sup>261</sup> The Court rejected that argument in a 7-2 opinion, holding that it would be impossible to conclude that "what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere."<sup>262</sup> Justice McReynolds, in a dissenting opinion joined by Justice Butler, argued that the Court should have accorded broad deference to the decision of the State of Missouri to provide black students with a free legal education in a law school of a neighboring state.<sup>263</sup> By providing such an opportunity, McReynolds wrote, the state did not show an "unmistakable disregard" for the prospective student's rights, and it acted in a manner that "satisf[ie]d any reasonable demand for specialized training."<sup>264</sup>

Despite Butler's broad deference to states in regulating the welfare of racial minorities and resident aliens, Justice Butler joined opinions of the Court containing broad language that arguably formed the foundation for the substantive due process cases of the latter half of the twentieth century. In *Meyer v. Nebraska*, for instance, Butler joined in an opinion written by Justice McReynolds that recognized:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>265</sup>

The Court further stated that, in language echoed in many of the later privacy cases, "the individual has certain fundamental rights which must be respected."<sup>266</sup> Likewise, in *Pierce v. Society of Sisters*,<sup>267</sup>

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259. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 353-54 (1938) (McReynolds, J., dissenting).

260. 163 U.S. 537, 540, 548 (1896).

261. *Gaines*, 305 U.S. at 344.

262. *Id.* at 350.

263. *Id.* at 353-54 (McReynolds, J., dissenting). Indeed, Justice McReynolds's dissent quoted language from prior opinions of the Court to the effect that "[t]he right and power of the state to regulate the method of providing for the education of its youth at public expense is clear." *Id.* at 353 (quoting *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927)).

264. *Id.* at 353-54.

265. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

266. *Id.* at 401.

267. 268 U.S. 510 (1925).

Justice Butler joined an opinion of the Court invalidating an Oregon law requiring parents to send their children to public school (with certain exceptions) as unreasonably interfering “with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>268</sup> Finally, in *Buck v. Bell*,<sup>269</sup> although the exact reasons for Justice Butler’s lone dissenting vote are unknown, one possible explanation is that forced sterilization of the feeble minded was inconsistent with his expansive view of personal liberty and autonomy under the Fourteenth Amendment.<sup>270</sup>

The foregoing discussion demonstrates that Justice Butler’s Fourteenth Amendment jurisprudence, which provided broad deference to the regulatory authority of the state in matters relating to race and alienage but not for economic and personal liberties, is more complex than it first seems. Commentators who characterize Butler as a “monolithic conservative,” part of the “conservative wing” of the Court, or one of the “Four Horsemen of the Apocalypse,” often fail to note the substantial jurisprudential distinctions between Butler and his ideological allies on the Court. Unlike the other three, Butler often took paradigmatically libertarian positions in cases involving the rights of criminal defendants, especially under the Fourth Amendment. Even his Fourteenth Amendment decisions, which have since been widely criticized because they reinforced the inequality among socioeconomic classes prior to the New Deal, are difficult to characterize as quintessentially conservative because they arguably set the stage for the substantive due process cases of the latter half of the twentieth century.<sup>271</sup>

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268. *Id.* at 534–35.

269. 274 U.S. 200, 208 (1927) (Butler, J., dissenting).

270. Perhaps Butler would have been viewed differently had he explained the reasons for his dissent in *Buck*, one of the least celebrated decisions in Supreme Court history. For example, Justice John Marshall Harlan was rarely thought of as one of the great Supreme Court Justices until the 1950s when his views in *Plessy v. Ferguson*, 163 U.S. 537, 554–64 (1896) (Harlan, J., dissenting), were vindicated in *Brown v. Board of Education*, 347 U.S. 483 (1954). I do not mean to suggest that Butler would be lauded as one of the great Justices if he had explained his vote in *Buck*, only that he might be remembered more favorably had he articulated the justifications for his dissent.

271. In fact, some prominent scholars have asserted that the entire line of economic liberties cases beginning with *Lochner* set the stage for *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and their progeny, which have a distinctly liberal character. See Laurence H. Tribe, Lawrence v. Texas: *The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939 (2004) (arguing that the “ghost of *Lochner* was reborn in the guise of *Griswold v. Connecticut*”). Moreover, even if one doubts the link between *Lochner* and the Court’s recent privacy cases, Justice Butler joined in two opinions of the Court that undoubtedly set the stage for the Court’s modern substantive due process case law. See *id.* at 1934 (characterizing *Meyer* and *Pierce* as the “two sturdiest pillars” of the modern “substantive due process temple”).

*B. A Judicial Minimalist and Deeply Private Man*

One reason why Pierce Butler has been systematically undertreated in the academic literature is that he served with some of the most distinguished jurists ever to sit on the Court, including Oliver Wendell Holmes, Benjamin Cardozo, and Louis Brandeis.<sup>272</sup> He even served on the Court for more than seven years with former President William Howard Taft.<sup>273</sup> Butler, however, is rarely mentioned in the same breath with these other jurists, partly because he was a deeply private man who did not view his role as a Justice as requiring public engagement.<sup>274</sup> Perhaps even more importantly, Justice Butler often wrote short, mechanical opinions in low-profile areas of the law, contrasting sharply to some of the other Justices with whom he served.<sup>275</sup> Accordingly, he can be readily characterized as a judicial minimalist,<sup>276</sup> avoiding broad pronouncements in favor of answering only the questions directly raised by each case.

Justice Butler's minimalist approach can be traced, in part, to his belief that judges deduce or discover legal principles through the cases they decide.<sup>277</sup> This theory, a variation on natural law principles, was an important aspect of Butler's judicial philosophy. As then-Solicitor General Robert Jackson recounted upon Butler's death in 1939:

Fearful of the rule of men in place of the rule of law, [Butler] appealed to the accumulated body of the law as a continuous social expression and not as what might

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272. Indeed, Butler's interactions with giants like Holmes were memorable. Once, after persuading all of his colleagues except Holmes to vote in a certain way, Butler said, "I am glad we have finally arrived at a just decision," to which Holmes replied, "[h]ell is paved with *just* decisions." Burner, *supra* note 16, at 1086.

273. Taft, in fact, was influential in Butler's nomination to the Supreme Court. *See supra* notes 90–124 and accompanying text.

274. *See, e.g., Associate Justice Butler of U.S. Supreme Court Speaks at Dedication of Civil Courts Building*, ST. LOUIS DAILY GLOBE-DEMOCRAT, June 22, 1930 (on file with the Vanderbilt Law Review); *see also* Symposium, *National Conference on Judicial Biography*, 70 N.Y.U. L. REV. 485, 487 (1995) (examining why certain Justices have received critical attention and discussing, among other topics, the "Biographies of Titans: Holmes, Brandeis and other Obsessions").

275. *See, e.g., McDonald v. Thompson*, 305 U.S. 263, 264–67 (1938) (seven paragraph majority opinion); *Moore v. Mitchell*, 281 U.S. 18, 22–24 (1930) (six paragraph majority opinion).

276. Although there are a number of conceptions of judicial minimalism in the scholarly literature, this Part primarily works from the definition advanced by Cass Sunstein, which stresses "two principal features, narrowness and shallowness" of judicial opinions and "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided." CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3, 10–11 (1999).

277. *E.g., Pierce Butler III Interview*, *supra* note 17, at 18 (describing Justice Butler's perception of the judge as one "whose job is to declare what the law is" and his philosophy as a "belie[f] in the omni-presence theory of law, the natural law notion").

appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its misapplication merely because the end in view appeared at the moment to be desirable.<sup>278</sup>

When the Court went beyond the basic legal principles and language required for a decision, Butler feared that “the specter of such language would rise to plague the Court in the future.”<sup>279</sup> Butler was neither a “rhetorician”<sup>280</sup> nor “a stylist,”<sup>281</sup> and he “had no flair for an unusual turn of a phrase or for the use of uncommon language.”<sup>282</sup> Instead, “he wrote with economy of expression but with a precision and clarity that never left doubt as to the meaning of his opinions or as to the scope or effect of the decisions announced.”<sup>283</sup> In short, his opinions were “clear, forcible, and direct”<sup>284</sup> and were “free of obiter dicta.”<sup>285</sup>

As his son Francis would later explain, Butler’s minimalist style was entirely intentional. Butler wanted to prevent attorneys from opinion mining, in which advocates “find generalised [sic] statements in some opinion or another which will apparently suit the purpose of the advocate in the particular case although in fact inapplicable to the facts on which the case was decided.”<sup>286</sup> Butler also believed that narrowly written opinions promoted the stability and legitimacy of the Court. As he noted in an opinion toward the end of his career, it was important that the Court’s decisions be “sufficiently definite and permanent to enable counsel to advise [their] clients.”<sup>287</sup>

Butler’s minimalism also extended to his concurring and dissenting opinions, of which there were relatively few. Of the 359 total opinions that he authored, only four were concurrences.<sup>288</sup> Again

278. SUPREME COURT MEMORIAM, *supra* note 58, at 14 (statement of Solicitor General Robert H. Jackson).

279. Hershberg Memorandum, *supra* note 21, at 3. In fact, Butler was such a strong adherent to the principle of *stare decisis* that he even advocated in favor of it when it would contradict his dissent in another case. Memorandum from Pierce Butler, Associate Justice of the Supreme Court of the United States, to Harlan F. Stone, Associate Justice of the Supreme Court of the United States 3 (Nov. 8, 1928) (“In order to avoid any possibility of impairing the zoning decisions—and I did not agree with the first one—I think it better to let the decision rest upon the ground stated in the opinion.”) (on file with the Vanderbilt Law Review).

280. RAMSEY COUNTY BAR MEMORIAM, *supra* note 66, at 7 (statement of Michael Doherty).

281. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 22 (statement of Wilfred Rumble).

282. *Id.*

283. RAMSEY COUNTY BAR MEMORIAM, *supra* note 66, at 8 (statement of Michael Doherty).

284. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 45 (statement of James O’Brien).

285. RAMSEY COUNTY BAR MEMORIAM, *supra* note 66, at 8 (statement of Michael Doherty).

286. Hershberg Memorandum, *supra* note 21, at 3.

287. *R.R. Comm’n of Cal. v. Pac. Gas & Elec. Co.*, 302 U.S. 388, 418 (1938) (Butler, J., dissenting).

288. SUPREME COURT MEMORIAM, *supra* note 58, at 29 (statement of Robert Taft).

Francis explained his father's philosophy regarding concurring opinions:

[H]e was strong in his opinions on the decision but tolerant of other methods of expressing that decision, to the end that there would not be a large group of opinions but that the Court would stand as a whole insofar as it could without violating the principles of the individual Justices.<sup>289</sup>

To Butler, the cost of concurring separately was that it would lead to instability or ambiguity in the law; Butler believed that it was "most desirable for the country to know what the law was without caviling over small pieces of language."<sup>290</sup>

Even in dissent, Justice Butler was a minimalist, often dissenting without comment or joining dissenting opinions written by his colleagues.<sup>291</sup> Although dissenting opinions were less common prior to the New Deal than they are today,<sup>292</sup> the number of dissenting opinions on the Court rose as voting blocs formed during the 1920s and 1930s.<sup>293</sup> In fact, during Butler's tenure, Justices Holmes and Brandeis came to be known as much (or more) for their dissents as for

289. Hershberg Memorandum, *supra* note 21, at 4. The papers of Justice Harlan Fiske Stone reveal Butler's willingness to incorporate language suggested by his colleagues when doing so would not compromise the Court's holding. For example, in *United States v. Schwimmer*, 279 U.S. 644 (1929), Butler heeded Justice Stone's advice to "leave out the references to distrust and dislike" of conscientious objectors, because of the potential for such language to give the impression that the Court was "actuated by feelings of prejudice." Memorandum from Harlan F. Stone, Associate Justice of the Supreme Court of the United States, to Pierce Butler, Associate Justice of the Supreme Court of the United States 2 (May 23, 1929) [hereinafter Stone Memorandum] (on file with the Vanderbilt Law Review). Instead, Butler inserted Stone's proposed language linking the Court's holding to the relevant statute. Compare *Schwimmer*, 279 U.S. at 652-53 ("It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act."), with Stone Memorandum, *supra*, at 2 (same).

290. Hershberg Memorandum, *supra* note 21, at 4. One example of Butler's minimalism in this regard is *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), in which he indicated that he was "disposed to acquiesce in the opinion and conclusion reached," despite believing Justice Stone's opinion to be a "tight squeeze on all points." Letter from Pierce Butler, Associate Justice of the Supreme Court of the United States, to Harlan F. Stone, Associate Justice of the Supreme Court of the United States (Apr. 14, 1939) (on file with the Vanderbilt Law Review).

291. *E.g.*, *Palko v. Connecticut*, 302 U.S. 319, 329 (1937) (Butler, J., dissenting without comment). When Justice Butler did write separately to note his dissent, his opinions were again forceful, direct, and often short. His dissenting opinion in *Olmstead v. United States*, discussed above, spanned less than three pages. 277 U.S. 438, 485-88 (1928) (Butler, J., dissenting). Even in one of his lengthier dissents in the famous case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Butler wrote separately to criticize the Court's decision to overrule *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), rather than resolving the case on narrower grounds. *Erie*, 304 U.S. at 87-90 (Butler, J., dissenting).

292. During the Taney Court, dissents never exceeded twenty-five percent of the Court's overall docket. PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY 18-19* (1969). That ratio declined slightly to a maximum of twenty-one percent during the pre-New Deal Court, then rose dramatically to more than half of the decisions rendered after 1942. *Id.*

293. *Id.* at 167-70 (chronicling the formation of voting blocs on the Court during this period).

their majority opinions.<sup>294</sup> In contrast to Holmes and Brandeis, Butler rarely wrote dissenting opinions, at least until his last few years on the Court.<sup>295</sup> That minimalist tendency extended to even the most important cases before the Court, such as *Buck v. Bell*, in which the Court, in a notorious opinion written by Justice Holmes, upheld a compulsory sterilization statute for the feeble minded.<sup>296</sup> Justice Butler simply noted his dissent at the end of the opinion,<sup>297</sup> leaving generations of scholars to speculate about whether his reason for dissenting was religiously, philosophically, or doctrinally motivated.<sup>298</sup> Another stark example of Butler's silence in dissent is *Palko v. Connecticut*,<sup>299</sup> where he again dissented without opinion, despite his otherwise strong views regarding the rights of criminal defendants.<sup>300</sup>

Butler's lack of treatment in the scholarly literature is further reinforced by the fact that he was a private man who viewed his public role as a Justice narrowly. In one of the few newspaper articles in

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294. As John Paul Frank has explained, "Justices Holmes and Brandeis gave the practice [of dissent] a glorious connotation because their dissents were usually so far superior to the majority opinions, and because so many of their dissents subsequently became the law." JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 126 (1958).

295. As discussed later in this Article, Butler authored over half of his dissents during his last few years on the Supreme Court. See *infra* notes 427–28 and accompanying text. Though Butler was hesitant to write separately, that began to change once his colleagues started overruling cases that were decided earlier in his tenure, particularly those in which he had authored the opinion. See *id.* Thus, it is possible to argue that Butler deviated from his minimalist tendencies during his last two years on the Court, though it was often to attack his colleagues for deviating from prior case law. A strong adherence to stare decisis, however, is arguably consistent with judicial minimalism. See James E. Ryan, *Does it Take A Theory? Originalism, Active Liberty, and Minimalism*, 58 *STAN. L. REV.* 1623, 1634 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE BAD FOR AMERICA* (2005) and STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); Cass R. Sunstein, *Burkean Minimalism*, 105 *MICH. L. REV.* 353, 402 (2006).

296. 274 U.S. 200, 207 (1927).

297. *Id.* at 208.

298. See, e.g., John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 *CATH. HIST. REV.* 369, 378 (1981) (suggesting that Butler's muteness leaves his true motivations for dissenting unknown).

299. 302 U.S. 319, 329 (1937).

300. See *supra* notes 194–228 and accompanying text (discussing Justice Butler's jurisprudence involving the rights of criminal defendants). In yet another case, *Nashville, Chattanooga & St. Louis Railway v. White*, 278 U.S. 456 (1929), Butler wrote to Justice Van Devanter that, though he disagreed with the holding reached by the Court, it was "doubtful whether [a] dissenting opinion or noting of disagreement would do any good, and unless you[re] inclined the other way, I am disposed to acquiesce." Memorandum from Pierce Butler, Associate Justice of the Supreme Court of the United States, to Willis Van Devanter, Associate Justice of the Supreme Court of the United States (Jan. 22, 1929) (on file with the Vanderbilt Law Review). Interestingly, neither Justice Butler nor Justice Van Devanter dissented in the case. See *White*, 278 U.S. 456.

which he permitted himself to be quoted, Butler explained the need for judicial privacy:

Judges generally, and I think wisely, refrain from speaking. When one is required to give consideration to both sides of a question, he properly may not indulge in sallies of the imagination. Since becoming a member of the court I have generally asked to be excused from taking prominent part in public ceremonies.<sup>301</sup>

When asked what he thought of President Roosevelt's New Deal policies for another newspaper article, Justice Butler said only that he "won't talk about politics, nor medicine."<sup>302</sup>

Remarkably, and contrary to the practice of many other Justices of the period, Justice Butler ordered his clerk upon his death to destroy anything relating to matters considered by the Court, except published opinions, so his papers contain little of relevance to his work as a Justice.<sup>303</sup> Even seventy years after his death, Butler still exerts posthumous control over his personal papers; those who wish to examine them must secure express permission from his descendants.<sup>304</sup>

Butler's preferences to keep his views private, as well as his minimalist approach to crafting opinions, were important facets of his professional life. When writing for the Court, Butler wrote narrow opinions free of dicta and musings about public policy. He also wrote very few concurrences and dissents, often electing to dissent without an opinion. Throughout his tenure as a Justice, he rarely spoke out on matters of public concern<sup>305</sup> and permitted his published opinions to speak for themselves. Those proclivities, along with his tendency to write for the Court in areas of high legal and technical complexity but low public salience, have all contributed to his lack of treatment in the scholarly literature.

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301. *Associate Justice Butler of U.S. Supreme Court Speaks at Dedication of Civil Courts Building*, ST. LOUIS DAILY GLOBE-DEMOCRAT, June 22, 1930 (on file with the Vanderbilt Law Review).

302. *Justice Butler Catches Limit*, WATERTOWN DAILY TIMES (N.Y.), Apr. 24, 1937, at 20 (on file with the Vanderbilt Law Review).

303. Letter from Francis Butler to Paul E. Edlund, Acting Chief, Gift and Exchange Div., Library of Congress (Aug. 4, 1965) (on file with the Vanderbilt Law Review); Letter from Francis Butler to David C. Mearns, Chief, Manuscript Div., Library of Congress (June 11, 1959) (on file with the Vanderbilt Law Review).

304. I am thankful to Mrs. Pierce Butler III, who kindly gave my research assistant and me access to all of the Butler family papers housed at the Minnesota Historical Society.

305. Like many Justices, Pierce Butler spoke occasionally at dedications of new buildings and graduation ceremonies. *E.g.*, *Associate Justice Butler of U.S. Supreme Court Speaks at Dedication of Civil Courts Building*, ST. LOUIS DAILY GLOBE-DEMOCRAT, June 22, 1930. However, even these events were rare.

*C. A Technical Justice*

As much as or more than his contemporaries on the Court, Butler focused his attention on highly technical areas of the law such as public utilities regulation and taxation. Although there were undoubtedly strong constitutional underpinnings to the cases that the Supreme Court heard in those areas, Butler authored comparably few opinions in areas of widespread political or legal salience. As a result, Butler's jurisprudence has not been widely studied by scholars, nor was it closely followed by the media of the period. Perhaps Butler's most well-known opinion is his dissent in *Olmstead v. United States*,<sup>306</sup> even though it is not nearly as prominent as the opinions written by his colleagues in cases such as *Buck v. Bell*,<sup>307</sup> *West Coast Hotel v. Parrish*,<sup>308</sup> or *United States v. Carolene Products*,<sup>309</sup> much less landmark decisions from other eras such as *Marbury v. Madison*<sup>310</sup> or *Brown v. Board of Education*.<sup>311</sup>

Moreover, even in those areas where Butler wrote often, such as in the fields of public utilities regulation and taxation, few of his opinions hold much currency today despite their importance in the era in which he served. Many have been explicitly or implicitly overruled, and others have been effectively superseded by technological, legal, or political advancements. Nowhere is that observation more applicable than with respect to Butler's public utilities jurisprudence.

### 1. Public Utilities Regulation

During the 1920s and 1930s, railroads and other public utilities flooded the Supreme Court with appeals, challenging the rate schedules set by state legislatures and public utility commissions.<sup>312</sup> Justice Butler's extensive experience as a railroad attorney for the Chicago, St. Paul, Minneapolis, and Omaha Railroad and in private practice<sup>313</sup> positioned him to take a leadership role in this burgeoning area of the Court's docket.

Asserting his leadership, Butler used his expertise to urge the Court to adopt a cost of reproduction method for valuing the property

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306. 277 U.S. 438, 485–88 (1928) (Butler, J., dissenting).

307. 274 U.S. 200 (1927).

308. 300 U.S. 379 (1937).

309. 304 U.S. 144 (1938).

310. 5 U.S. (1 Cranch) 137 (1803).

311. 347 U.S. 483 (1954).

312. HOWELL, *supra* note 47, at 65.

313. See *supra* notes 61–71 and accompanying text.

of railroads and other public utilities. According to that method, regulators must start with a “hypothetical condition” in which it is assumed that the railroad or other utility does not exist, and then regulators must determine how much it would cost to reproduce the business at the time of the valuation proceedings.<sup>314</sup> Based on the cost of reproduction of the business, a utility is

entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.<sup>315</sup>

In other words, the cost of reproduction theory is a method of valuing the tangible and intangible property of public utilities to ensure a rate of return for utilities comparable to other businesses with similar levels of risk in a competitive market.

Despite Butler’s advocacy for the cost of reproduction theory, a competing method of valuing utilities known as the prudent investment theory attracted several adherents on the Court, including Justice Louis Brandeis. Generally stated, the prudent investment theory values the property of a utility as it serves the public; it is not aimed at determining the value of a utility’s property in a competitive market.<sup>316</sup> Instead, public utilities are entitled only to a fair return on the amount of money prudently invested in them as measured primarily by the original cost of the capital invested and any overhead or other reasonable expenses incurred in the provision of services.<sup>317</sup>

Before Justice Butler joined the Supreme Court in 1922, the stage had been set for vigorous debate over the merits of the two competing valuation theories.<sup>318</sup> For years, the Supreme Court had

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314. Brown, *supra* note 17, at 20.

315. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 692 (1923).

316. HOWELL, *supra* note 47, at 69.

317. CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 321, 325–26 (3d ed. 1993). As Phillips’s leading treatise on public utilities regulation explains, “the prudent investment standard . . . shift[s] attention from the left-hand, or asset, side to the right side of the balance sheet, which constitutes the capital embarked in the enterprise.” *Id.* at 326.

318. There are two primary differences between Butler’s cost of reproduction theory and Brandeis’s prudent investment theory: time and scope. First, Justice Butler calculated the value of a public utility at the time of the ratemaking proceedings, while Justice Brandeis considered only the cost incurred by the utility at the point when the plant and any improvements were originally constructed. *Id.* at 322–26. Second, Butler employed a broad measure of a utility’s value by comparing it to private business ventures and including measures for such intangible property rights as goodwill and going value, while Brandeis narrowly calculated the value of a public utility by examining only the amount prudently invested in it and counting only the utility’s property that was employed in the public interest. *See supra* note 316 and accompanying text. In a decade when prices were rising steadily, the choice between these two theories was stark, especially for public utilities companies, who had millions of dollars hanging in the

come to varying conclusions in its attempts to determine the validity of rates prescribed by state legislatures and public utilities commissions. In its earliest attempt to resolve the issue in 1876, the Court held in *Munn v. Illinois* that the setting of rates for businesses “affected with a public interest” was exclusively a legislative function and that, if such rates were too low to earn a reasonable rate of return, legislative action was the only recourse.<sup>319</sup> Put another way, the *Munn* case established the principle that rate setting for public utilities was not subject to judicial review.<sup>320</sup>

After several cases limiting the scope of *Munn*,<sup>321</sup> the Supreme Court finally reversed course in *Smyth v. Ames* and held that public utilities were entitled to a “fair return” on the “fair value” of their property used for the public interest.<sup>322</sup> According to the Court, rates that were set too low to earn a fair return were confiscatory, depriving a utility and its investors of their property rights in violation of the Equal Protection and Due Process Clauses of the Constitution.<sup>323</sup> The Court further held that, despite its contrary declaration in *Munn*, it served as the final authority on the constitutionality of the rates set by state legislatures and public utility commissions.<sup>324</sup> But the Court was vague regarding how it would evaluate the reasonableness of such rates:

[T]he basis of all calculations as to the reasonableness of rates to be charged by a corporation . . . must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters

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balance. Compare, e.g., *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 420–21 (1926) (holding, in an opinion by Justice Butler, that a rate of return of no less than 7% of the value of the utility—\$19 million—was the minimum necessary to avoid being confiscatory), *with id.* at 422 (Brandeis, J., dissenting) (arguing that a lower rate would not be confiscatory and that a \$19 million valuation was “clearly in error”).

319. *Munn v. Illinois*, 94 U.S. 113, 126, 133–34 (1876). *Munn* involved Illinois legislation that set a schedule of maximum prices on grain elevators located in the city of Chicago. *Id.* at 123. The Supreme Court extended the *Munn* rule to the regulation of railroads in *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 94 U.S. 155, 161 (1877).

320. See *Munn*, 94 U.S. at 133–34 (“For protection against abuses by legislatures the people must resort to the polls, not to the courts.”).

321. See *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 399 (1894) (asserting that review of rate regulations was “within the scope of judicial power and a part of judicial duty”); *Chicago, Minneapolis & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (holding that “[t]he question of the reasonableness of a rate charge for transportation by a railroad company . . . is eminently a question for judicial investigation”).

322. 169 U.S. 466, 546–47 (1898).

323. *Id.* at 522–24.

324. *Id.* at 526–27.

for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.<sup>325</sup>

Like *Lochner* and other economic liberty cases of the period, protection of private property rights was the driving force behind *Smyth*,<sup>326</sup> but the Court provided little guidance about how to value those property rights. It stated, in essence, that all factors must be considered by the courts in conducting the valuation, including the “original cost of construction” and the “amount expended in permanent improvements,” which are the foundation for the prudent investment theory, in addition to the “present cost” of “construction,” which is at the core of the cost of reproduction theory.<sup>327</sup>

In the twenty-five years following *Smyth*, the Court either evaded fair value claims by holding that such claims were inadequately proven or premature,<sup>328</sup> or it was equivocal regarding the controlling standard for valuing utility property.<sup>329</sup> When Butler joined the Court in 1922, he was already known as one of the strongest proponents of the cost of reproduction theory.<sup>330</sup> As Justice Butler explained in a 1915 article:

Doubtless everyone will admit that no other enterprise has done so much for the development of the greater part of this country as have the railroads, and that it would be a great calamity if they were to be dealt with in such a way as to impair their usefulness as instruments of public service and progress.<sup>331</sup>

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325. *Id.* at 546–47.

326. Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 251, 261–62 (1984).

327. *Smyth*, 169 U.S. at 546–47; see also *supra* text accompanying notes 314–17.

328. William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 450 (2005).

329. See PHILLIPS, *supra* note 317, at 326 (noting that the Court “consistently refused to resolve the controversy” between the two theories of valuation). In the early part of the twentieth century, public utilities and state utility commissions switched sides in the debate over the competing valuation methods. *Id.* at 321. Prior to World War I when prices were stable, public utilities generally argued for original cost while utility commissions applied a reproduction cost formula. *Id.* But when construction prices began to soar during and after World War I, utilities began to demand consideration of reproduction cost in determining the fair value of utility property, while commissions endorsed an original cost formula. *Id.* at 322.

330. Brown, *supra* note 17, at 9.

331. Pierce Butler, *Valuation of Railway Property for Purposes of Rate Regulation*, 23 J. POL. ECON. 17, 17–18 (1915). Butler viewed the low rates set by many public utility commissions as an unconstitutional deprivation of the private property rights of railroads and its investors. See *id.* at 25 (emphasizing that the Fifth Amendment prohibits states from setting rates “so unreasonable and low as not to yield a fair return upon the full value of the property”). According to Butler, “The title to railroad property is not held either in whole or in part for the use or benefit of the public. The company has full title and ownership.” *Id.* at 26.

Butler believed the country benefited from the expansion of railroads and recognized that “many considerations suggest[ed] the wisdom and justice of allowing railway carriers liberal and generous rates.”<sup>332</sup> In Butler’s view, however, utility commissions often set rates “so low” that they did not permit a fair return on the value of a railroad’s property.<sup>333</sup>

It is unsurprising, therefore, that Butler successfully led the charge on the Supreme Court in favor of the cost of reproduction theory early in his tenure.<sup>334</sup> During his first partial Term on the Court in early 1923, the Court decided two cases that established the cost of reproduction theory as the predominant valuation method. In the first case, argued several weeks before Butler joined the Court,<sup>335</sup> the Court held that the Public Service Commission of Missouri erred in valuing Southwestern Bell Telephone Company’s property “without according any weight to the greatly enhanced costs of material, labor, supplies, etc.” at the time of the ratemaking investigation.<sup>336</sup> Similar to the economic liberties cases discussed above,<sup>337</sup> the foundation for the Court’s opinion in *Southwestern Bell* was robust protection of private property rights under the Fourteenth Amendment.<sup>338</sup>

In *Bluefield Water Works & Improvement Co. v. Public Service Commission*,<sup>339</sup> a case decided several weeks after *Southwestern Bell*, Butler had his first opportunity to write for the Court on the

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332. *Id.* at 29.

333. *Id.* at 18.

334. The concerns of critics of his nomination that feared that he would be biased in favor of railroads appeared to be well-founded. *See supra* note 140 and accompanying text. Although I do not mean to suggest that Butler acted improperly in advancing his cost of reproduction theory while serving on the Court, he did raise eyebrows when he participated in a 1936 Supreme Court case involving his former client, the Great Northern Railway. *Great N. Ry. Co. v. Weeks*, 297 U.S. 135 (1936). Recusal decisions have always been left up to the discretion of members of the judiciary, except in limited circumstances, and there is a long history of Justices that have participated in cases where the ethical course of action is not always clear. *See generally* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 *BROOK. L. REV.* 589 (1987) (reviewing the history of judicial recusal and the controversy surrounding judges’ decisions not to recuse themselves).

335. Because the opinion was released several months after Butler was confirmed and there is no indication that he declined to participate, it appears that Butler took an active part in the consideration of this case, although it is unclear what role he played in the outcome or the opinion itself. *See Brown, supra* note 17, at 24 (observing that Justice Butler’s “influence, if any, . . . on the decision is not evident from the record”).

336. *Sw. Bell Tel. Co. v. Pub. Serv. Comm’n of Mo.*, 262 U.S. 276, 287 (1923).

337. *See supra* notes 229–48 and accompanying text.

338. *See Sw. Bell*, 262 U.S. at 287 (“The property [of utilities] is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of the law.” (quoting *Minnesota Rate Cases*, 230 U.S. 352, 454 (1913))).

339. 262 U.S. 679 (1923).

constitutionality of public utility rates. The Public Service Commission of West Virginia had fixed maximum rates for a company that furnished water to the residents of Bluefield, Virginia.<sup>340</sup> The company argued unsuccessfully before the Supreme Court of Appeals of West Virginia that those rates were confiscatory.<sup>341</sup> The Supreme Court of the United States reversed, holding that the Commission "did not accord proper, if any, weight to the greatly enhanced costs of construction" at the time of the ratemaking investigation.<sup>342</sup> Justice Butler believed that the rates set by the Commission were too low because the Commission failed to consider the cost of reproducing the utility's property.<sup>343</sup> Beyond explaining how the rate base should be calculated, Butler went on to describe how to compute a fair rate of return on the utility's property, a point on which the Court had rarely spoken since *Smyth v. Ames*:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.<sup>344</sup>

According to Butler, a variety of factors should have been considered in determining a fair rate of return, including (1) "the financial soundness of the utility . . . under efficient and economical management," (2) its ability "to maintain and support its credit and enable it to raise the money necessary for proper discharge of its public duties," and (3) the "money market and business conditions generally."<sup>345</sup> In setting a fair rate of return, the Court stated, no single factor was determinative, and utility commissions were required to consider "all relevant facts" and exercise "enlightened judgment."<sup>346</sup>

Just three years later, Justice Butler once again took the opportunity to expand the cost of reproduction method in *McCardle v. Indianapolis Water Co.*<sup>347</sup> Affirming the lower court's judgment invalidating confiscatory rates set by the Indiana Public Service Commission, Butler, writing for the majority, found that the

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340. *Id.* at 683.

341. *Id.*

342. *Id.* at 689.

343. *Id.* at 692.

344. *Id.* at 692-93.

345. *Id.* at 693.

346. *Id.* at 692.

347. 272 U.S. 400 (1926).

Commission erred in estimating the fair value of the utility's property using a ten-year trailing average of prices ending two years before the rate-making investigation. He specifically noted that during those two years, prices had already increased by thirty to thirty-five percent.<sup>348</sup> In an arguable departure from prior utility rate cases, Butler further stated that the cost of reproduction theory required "an honest and intelligent forecast as to probable price and wage levels during a period in the immediate future" in addition to consideration of such levels "at the time of the investigation."<sup>349</sup> In other words, the theory required "a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future."<sup>350</sup> Butler additionally declared that the applicable rate base must also include the value of intangible property, such as water rights, going value, and good will.<sup>351</sup> In adopting a non-confiscatory cost of reproduction value of \$19 million for the water company, Butler rejected valuations based upon the original cost of the utility's property of \$10 million and even the Commission's higher estimate of \$15.3 million, which was based on the cost of reproduction two years prior to the Commission's consideration of the utility's rates.<sup>352</sup>

While Butler and his allies on the Court made steady progress toward entrenching cost of reproduction as the prevailing standard in rate cases,<sup>353</sup> Justice Louis Brandeis led a minority of Justices in opposing it. In *Southwestern Bell*, for instance, Brandeis authored a lengthy dissent criticizing the majority for adopting a standard that was "laborious," "baffling," and even circular.<sup>354</sup> The "most serious vice," according to Brandeis, was that "the method [did] not lead to certainty. Under it, the value for ratemaking purposes must ever be

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348. *Id.* at 411–12.

349. *Id.* at 408–09.

350. *Id.*

351. *Id.* at 413–15; HOWELL, *supra* note 47, at 78.

352. PHILLIPS, *supra* note 317, at 323.

353. Though the cost of reproduction theory dominated the Court's consideration of the reasonableness of public utility rates during the first decade of Butler's tenure, the Court never concluded that it was the sole method on which to calculate the rate base. Instead, in many cases, the Court held that it was an essential factor for public utility commissions to consider along with the many other factors discussed in *Smyth v. Ames*, 169 U.S. 466 (1898).

354. *Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 292 (1923) (Brandeis, J., dissenting). Brandeis criticized the cost of reproduction method as circular to the extent that it calculated the value of utilities by capitalizing their net earnings because such earnings are determined primarily by the rates that a utility will be permitted to charge, which is the core question in ratemaking investigations. *Id.*

an unstable factor.”<sup>355</sup> The prudent investment theory, on the other hand, would

offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time . . . .<sup>356</sup>

After all, Brandeis asserted, the market or exchange value of utility property was “not of legal significance” because such property was rarely exchanged in the marketplace, and a utility fully engaged its property to provide a public service as a “substitute for the state.”<sup>357</sup> According to Brandeis, therefore, a rate of return was “constitutionally compensatory” if it permitted a utility to earn a “fair return on the amount prudently invested in it” and afforded it “the opportunity to earn the cost of service.”<sup>358</sup>

The onset of the Great Depression—which led to falling prices in land, raw materials, and labor—and changes in Court personnel eventually led to the demise of the cost of reproduction theory.<sup>359</sup> The theory began to lose support in the 1933 case of *Los Angeles Gas &*

355. *Id.* at 308. As Stephen Siegel has pointed out, however, the prudent investment theory is not free from administrative difficulties. For instance, to attract new capital, the theory required setting railroad and utility rates of return higher than “prevailing rates to compensate investors for . . . unique” limits on investments in the public utility context, yet politicians were unlikely to set above-normal rates of return when the general public was generally seeking lower utility rates. Siegel, *supra* note 326, at 238–39.

356. *Sw. Bell*, 262 U.S. at 306–07 (Brandeis, J., dissenting).

357. *Id.* at 290–92. In a later case, Justice Stone harshly attacked the cost of reproduction theory along similar lines, calling it “the most speculative undertaking imposed upon [courts] in the entire history of English jurisprudence.” *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 689 (1935) (Stone, J., dissenting).

358. *Sw. Bell*, 262 U.S. at 289, 291; HOWELL, *supra* note 47, at 70. The cost of service, as defined by Brandeis, consisted of capital charges, including an allowance for the use of capital, “the risk incurred,” and a sufficient return “to attract [additional] capital,” as well as operating expenses, such as the cost of labor and raw materials. *Sw. Bell*, 262 U.S. at 291.

359. See PHILLIPS, *supra* note 317, at 327 (explaining that a judicial shift away from the cost of reproduction theory began in 1933). Around this time, scholars and commentators also began to criticize the cost of reproduction theory. For instance, the Interstate Commerce Commission continued to defend the use of original cost or prudent investment formulas in valuing public utilities. *Id.* One prominent commentator, Ben Lewis, summarized the prevailing criticism against the cost of reproduction theory at the time, referring to it as “the unpredictable product of incalculable considerations” that bear “no derivative relation to any figures in evidence and no ascertainable relation to any functional purpose of rate making” and resulting only in “indecision and confusion.” Ben W. Lewis, *Public Utilities*, in 2 GOVERNMENT AND ECONOMIC LIFE 616, 692–94 (Leverett S. Lyon & Victor Abramson eds., 1940). For instance, using a cost of reproduction theory, the nation’s railroads would have been worth nearly \$18 billion in 1914, \$41 billion by 1920, but then would have dropped to \$31 billion just three years later. See PHILLIPS, *supra* note 317, at 336 (using estimations computed by the Interstate Commerce Commission).

*Electric Co. v. Railroad Commission of California*, in which the Court held that, though the cost of reproduction theory was relevant in determining the reasonableness of rates, the Commission was not limited to that valuation method.<sup>360</sup> In addition to selecting original cost as the basis for its determination of rates, the California Railroad Commission did not include allowances for going value in its valuation, a factor considered under the cost of reproduction theory.<sup>361</sup> Despite the Commission's emphasis on original cost, the Court, in an opinion authored by Chief Justice Hughes, upheld the rates because the Commission did not deduct the cost of an obsolete gas manufacturing plant and added nearly \$5 million to the historical cost of \$60,704,000 to calculate "fair value."<sup>362</sup>

Justice Butler predictably dissented in the case because, in his view, the Court and the Commission refused "to give any weight" to reproduction cost in its determination of whether the rates were confiscatory.<sup>363</sup> Butler also criticized the majority for permitting the Commission to exclude express consideration of going value.<sup>364</sup> To the extent that going value was considered by the Court or the Commission, Butler continued, the figure was "arrived at upon considerations that ha[d] no relation to any amount that in any view reasonably may be assigned to that element."<sup>365</sup> He disagreed with the majority that the Commission's valuation method was merely a "relevant fact," and thus he would have concluded that the "rates should [have been] set aside because [they were] arrived at by arbitrary methods condemned by our decisions."<sup>366</sup>

The Court sustained valuations based on original cost in four additional cases between 1934 and 1938.<sup>367</sup> By 1938, Butler had all but lost the war in utility rate cases.<sup>368</sup> In Butler's last gasp on the

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360. 289 U.S. 287, 305-06 (1933). In other words, the Court focused primarily on the end result of the Commission's findings, the rates imposed on the utility, rather than the question of whether the Commission used the preferred methodology to calculate those rates.

361. *Id.* at 297.

362. *Id.* at 316-17.

363. *Id.* at 323 (Butler, J., dissenting).

364. *See id.* at 324-26 (explaining that when "any going value exists, the amount justly attributable thereto must be ascertained and included").

365. *Id.* at 325.

366. *Id.* at 326.

367. PHILLIPS, *supra* note 317, at 328 (citing *R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co.*, 302 U.S. 388 (1938); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938); *Lindheimer v. Ill. Bell Tel. Co.*, 292 U.S. 151 (1934); and *Dayton Power & Light Co. v. Pub. Utils. Comm'n*, 292 U.S. 290 (1934)).

368. The Court's rapidly changing jurisprudence in utility rate cases generally coincides in time with its landmark reversal in economic liberties cases starting with *West Coast Hotel v.*

issue in 1938, he once again dissented from an opinion of the Court approving the use of original cost in a valuation proceeding conducted by the California Railroad Commission.<sup>369</sup> “Because the Commission refused to pay any attention to the company’s evidence of reproduction cost” or include anything “in its rate base to cover intangible elements of value,” Butler would have set aside the order “as having been made without procedural due process of the law.”<sup>370</sup> Exhibiting his frustration more generally with the Court’s decisive change of course in utility rate cases, Butler protested “against the Court’s refusal to deal with the case disclosed by the record and reasonably to adhere to principles that have been settled.”<sup>371</sup> According to Butler, the Court’s decisions “ought to be sufficiently definite and permanent to enable counsel usefully to advise clients. Generally speaking, at least, [the Court’s] decisions of yesterday ought to be the law of today.”<sup>372</sup>

Nearly six years after Butler’s death, the Court abandoned the fair value rule of *Smyth v. Ames* altogether in *Federal Power Commission v. Hope Natural Gas Co.*<sup>373</sup> Despite the fact that the Court eventually discarded Butler’s cost of reproduction theory, his contribution to the jurisprudence of public utilities regulation can hardly be characterized as inconsequential for several reasons. First, the cost of reproduction theory dominated the Court’s jurisprudence for over a decade. Indeed, many courts, including the Supreme Court, continue to discuss and cite Justice Butler’s most important opinions in the area, including *Bluefield Water Works*.<sup>374</sup> Second, the cost of reproduction theory still remains a viable method of valuing utilities, especially in periods of high inflation.<sup>375</sup> One prominent treatise notes that if rates for public utilities are based on original cost during an inflationary period, then such rates will result in “an excessive increase in the demand for the services of public utilities relative to the demand for other commodities and, in turn, will require an

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*Parrish*, 300 U.S. 379 (1937), suggesting more generally that the Court was retreating from its robust role in economic regulation in a variety of areas.

369. *R.R. Comm’n of Cal. v. Pac. Gas & Elec. Co.*, 302 U.S. 388, 402 (1938) (Butler, J., dissenting).

370. *Id.* at 402, 408, 415.

371. *Id.* at 418.

372. *Id.*

373. 320 U.S. 591 (1944); see also PHILLIPS, *supra* note 317, at 328 (discussing the impact of the *Hope Natural Gas* case).

374. See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989) (citing *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 692–93 (1923)). According to a Westlaw search conducted on August 6, 2008, *Bluefield Water Works* has been cited in over 1700 cases and administrative decisions.

375. PHILLIPS, *supra* note 317, at 331.

expansion in the capacity of public utilities' plans in order to satisfy the new demand."<sup>376</sup> Such a scenario leads to "wasteful consumption" of resources.<sup>377</sup> Third, a handful of state utility commissions still rely on "fair value or current value" in setting rates, essentially using the modern equivalent of Butler's cost of reproduction theory.<sup>378</sup>

More fundamentally, however, Butler wrote over ninety opinions that were related in some way to public utilities or the welfare of the nation's railroads.<sup>379</sup> While important to the nation's infrastructure of the period, Butler's extensive work in the area of public utilities regulation, as in the taxation area, demonstrates that he focused much of his attention and energy on highly technical areas of the law rather than the high-profile constitutional law cases that interested many of his colleagues.

## 2. Tax Law

Consistent with his predispositions toward limited government and robust private property rights, Butler was skeptical of governmental taxation efforts. In authoring over seventy opinions in tax-related cases,<sup>380</sup> Butler used a variety of tools to limit or strike down state and federal taxes. For instance, he strictly adhered to the doctrine of reciprocal tax immunity between federal and state governments and used a variety of constitutional tools, including the Commerce Clause and the Fourteenth Amendment, to impede governmental taxation efforts. Indeed, one commentator went so far as to write that Butler voted against state or federal taxes "wherever conceivable grounds could be found."<sup>381</sup>

Butler's hostility to taxation can be traced to his laissez-faire philosophy, which was a product of his own background and his studies of Amasa Walker's *Briefer Political Economy* at Carleton College.<sup>382</sup> As a child, Butler was taught to value hard work, self-

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376. *Id.*

377. *Id.*

378. *Id.* at 338.

379. Ninety-two results were found when the following Westlaw search was conducted on January 26, 2009, in the Supreme Court database: "au (Butler) and sy,di (railway or railroad or utility)." Though only a rough measure, this search reveals that approximately twenty-eight percent of the 327 majority opinions that Justice Butler authored were related to public utilities or the nation's railroads.

380. Eighty-one results were found when the following Westlaw search was conducted on January 26, 2009, in the Supreme Court database: "au (Butler) & sy,di (tax!)." Approximately twenty-five percent of Butler's majority opinions were in tax-related cases.

381. Burner, *supra* note 16, at 1082.

382. *See supra* notes 23–26 and accompanying text.

reliance, and determination, and that government was to play only a limited role in society:

He felt the secret of America's success lay in the opportunity afforded to the individual, protected by the constitution and that individual enterprise, ingenuity and courage would be undermined and weakened, if not destroyed, by a paternalistic government as exemplified by the extension of governmental power over the individual, over private enterprise, and over purely state or local matters.<sup>383</sup>

In the rare instances that Butler spoke publicly about his views, a consistent theme of his speeches was limited government.<sup>384</sup> As he stated at a meeting of the Minnesota Bar Association before his appointment as a Justice, "Too much paternalism, too much wet-nursing by the state, is destructive of initiative and development. An athlete should not be fed on pre-digested food, nor should the citizens of tomorrow be so trained that they will expect sustenance from the public 'pap.'"<sup>385</sup> Thus, consistent with his stance in a number of prominent Fourteenth Amendment cases,<sup>386</sup> Butler took positions in tax cases that were "favorable toward constitutional protection of economic liberties through judicial restriction of government action."<sup>387</sup>

In fact, Butler voted to invalidate several state and local tax laws on the basis of the Fourteenth Amendment.<sup>388</sup> In perhaps his most famous tax opinion, *Coolidge v. Long*,<sup>389</sup> Justice Butler wrote for the Court in invalidating a Massachusetts inheritance tax that retroactively taxed a vested property interest conveyed by an irrevocable trust deed.<sup>390</sup> According to Butler, a tax on property after the right to "possession and enjoyment" of the property "had fully vested before the enactment" was "repugnant to the contract clause of the Constitution and the due process clause of the Fourteenth Amendment."<sup>391</sup> Unlike many of Butler's other Fourteenth

383. EIGHTH CIRCUIT MEMORIAM, *supra* note 8, at 8.

384. In a 1926 address to Catholic women at Soldier Field, Butler argued that "care should be taken lest activities of government be expanded beyond their public sphere. It is possible by too many enactments and regulations to impair the dignity of law and respect for authority." *Justice Butler Says Church Is Nation's Guide*, N.Y. HERALD-TRIB., June 23, 1926.

385. DANELSKI, *supra* note 3, at 17; HOWELL, *supra* note 47, at 309.

386. *See supra* notes 229-71 and accompanying text.

387. KEARNEY, *supra* note 177, at 6.

388. *See Brown*, *supra* note 17, at 50-51 (explaining that "[t]he due process and equal protection clauses of the Fourteenth Amendment were the constitutional arguments most frequently used by Justice Butler and the conservatives in nullifying state taxation" and listing the cases in which those arguments were made).

389. 282 U.S. 582 (1931).

390. *Id.* at 605-06.

391. *Id.* at 599, 605-06. Writing for three other Justices, Justice Owen Roberts vigorously dissented to the result in the case, disagreeing with Butler that the property had vested in the

Amendment opinions,<sup>392</sup> *Coolidge* remains good law with respect to a state's inability to tax vested property interests retroactively, but its impact has been diminished somewhat by the Court's tendency in later cases to factually distinguish the law in *Coolidge* from other similar taxation schemes.<sup>393</sup> Butler also authored or joined opinions of the Court that struck down state and local taxes based on the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment.<sup>394</sup>

Butler was involved in another source of deep division on the Court: invalidation of state and local tax laws based upon the Constitution's Commerce Clause. In a series of decisions during the

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beneficiaries before the inheritance tax was enacted and that the Contracts Clause limited the Commonwealth's ability to tax the property in question. *Id.* at 617 ("The Coolidge children could not obtain possession or control of the corpus despite their parents' release of all interest in it. The trustees still had duties to perform."); *id.* at 638 (stating that "the power to tax property" is "no wise[sic] hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act").

It bears mentioning that Butler had a similar view about federal taxes operating retroactively on vested property interests. In at least two cases, Butler joined an opinion of the Court invalidating such taxes under the Due Process Clause of the Fifth Amendment. See *Nichols v. Coolidge*, 274 U.S. 531, 542–43 (1927) (Butler, J., joining an opinion authored by Justice McReynolds invalidating a federal statute under the Fifth Amendment that retroactively taxed property transferred by a decedent prior to the statute's passage, even if "the conveyance was intended to take effect in possession or enjoyment at or after [the decedent's] death"); see also *Blodgett v. Holden*, 275 U.S. 142 (1927) (Butler, J., joining an opinion authored by Justice McReynolds that held a gift tax with retroactive effects in violation of the Fifth Amendment).

392. See *supra* notes 235–71 and accompanying text.

393. See Robert C. DeGaudenzi, Note, *Death Is Still Certain, But Are Taxes?: An Examination of the Due Process Limitations on Retroactive Tax Legislation After Carlton v. United States*, 67 ST. JOHN'S L. REV. 327, 333–34 (1993) (explaining that the Court "retreated from these early estate and gift tax decisions, often by distinguishing them factually") (internal citation omitted). *Coolidge's* importance is also diminished by the Court's greater willingness to tolerate retroactivity with respect to income taxes than estate and gift taxes. See Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1168 & n.130 (1996) ("According to the Supreme Court's most recent pronouncement on retroactive federal income taxation, to survive a due process challenge Congress's decision to apply a tax change retroactively need only pass the 'rational-basis' test."); Pat Castellano, Comment, *Retroactively Taxing Done Deals: Are There Limits?*, 43 U. KAN. L. REV. 417, 447 (1995) ("Although the Supreme Court consistently upheld retroactive income tax legislation because it serves a legitimate legislative purpose, the Supreme Court was less deferential to retroactive gift and estate tax legislation affecting voluntary, vested transactions.").

394. See, e.g., *Colgate v. Harvey*, 296 U.S. 404, 433 (1935) (Butler, J., joining an opinion authored by Justice Sutherland that set aside a Vermont law that exempted from taxation income from intrastate loans, but not those originating from out of state, on the basis of the Privileges and Immunities Clause of the Fourteenth Amendment); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 402 (1928) (invalidating a Pennsylvania tax on the gross receipts of taxicab operators on the basis of the Equal Protection Clause of the Fourteenth Amendment because it was levied solely on "incorporated operators" and not on "natural persons and partnerships").

1920s and 1930s, Butler voted to invalidate such laws based on their interference with interstate and foreign commerce.<sup>395</sup> For example, in *New Jersey Telephone Co. v. State Board of Taxes and Assessment of New Jersey*, Butler authored the majority opinion setting aside a New Jersey tax on the gross receipts of a telecommunications company because a portion of those receipts were derived from interstate commerce.<sup>396</sup> In yet another case, Butler employed the “original package” doctrine of *Brown v. Maryland*<sup>397</sup> to invalidate an Alabama franchise tax.<sup>398</sup> Although Alabama was attempting to tax the value of bags of nitrate fertilizer brought into the state by the Anglo-Chilean company through the port in Mobile, Alabama, it was clear to Butler that the franchise tax was “in substance” a tax on imports that burdened foreign commerce.<sup>399</sup> When a majority of the Court upheld laws that Butler viewed as burdensome to interstate or foreign commerce, he noted his dissent in his customarily concise but direct language, such as in *Southern Pacific Co. v. Gallagher*:

The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation-maintenance and use-of appellant's railroad for interstate transportation. Discussion can neither obscure nor more plainly disclose the trust that the tax in question directly burdens commerce among the States. Concededly, that is repugnant to the commerce clause as, from the beginning, it has been construed by this Court.<sup>400</sup>

While Butler voted on several notable occasions to sustain state and local tax laws against Commerce Clause challenge,<sup>401</sup> he was more receptive than virtually any of his colleagues to claims that such laws placed an impermissible burden on interstate and foreign commerce.<sup>402</sup>

395. *E.g.*, *Puget Sound v. Tax Comm'n*, 302 U.S. 90 (1937); *Cooney v. Mountain States Tel. Co.*, 294 U.S. 384 (1935); *State Tax Comm'n v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1925); *Tex. Transp. & Terminal Co. v. New Orleans*, 264 U.S. 160 (1924).

396. 280 U.S. 338, 349 (1930).

397. 25 U.S. (12 Wheat.) 419 (1827). In *Brown*, Chief Justice Marshall wrote for the Court in holding that it was unconstitutional for a state or locality to tax goods that were imported in their original packaging and then transported through the state or locality to be sold elsewhere. *Id.* at 457.

398. *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 229 (1933).

399. *Id.* at 225, 229. Justice Cardozo, by contrast, would have characterized the franchise tax not as a tax on imports, but as a tax on the privilege of doing business within the State of Alabama. *Id.* at 232–33 (Cardozo, J., dissenting).

400. 306 U.S. 167, 181 (1939) (Butler, J., dissenting).

401. *E.g.*, *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Virginia v. Imperial Coal Sales Co.*, 293 U.S. 15 (1934); *E. Ohio Gas Co. v. Tax Comm'n*, 283 U.S. 465 (1931); *Lacoste v. Dep't. of Conservation*, 263 U.S. 545 (1924).

402. Barry Cushman has written that “the Four Horsemen repeatedly sustained the power of big government to take other people’s money,” that they “upheld scores of taxes on business in

Consistent with his laissez-faire approach to taxation questions, Butler also strictly adhered to the principle “that neither the Federal nor state governments could tax the agencies or instrumentalities of the other.”<sup>403</sup> The tax immunity doctrine had its genesis in Chief Justice Marshall’s majority opinion in *McCulloch v. Maryland*, in which the Court held that the state of Maryland could not constitutionally tax the issuance of currency by a branch of the Bank of the United States.<sup>404</sup> On the question of intergovernmental tax immunity, Butler was an absolutist; he believed that virtually any taxation of a federal or state agency, employee, or instrumentality by the other violated the principles of *McCulloch*, regardless of the amount of the tax or the extent of interference with governmental functions.<sup>405</sup>

Not surprisingly, Butler authored several opinions extending the doctrine of intergovernmental tax immunity in a variety of

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the face of every conceivable manner of constitutional challenge,” and even that they were “closet liberals,” whose intent was to work “surreptitiously to undermine the very causes that their conservative patrons held most dear.” Cushman, *supra* note 71, at 560–61. While it is true that Butler and the other so-called “Horsemen” did vote in a number of cases to sustain taxes in a variety of contexts, Cushman overstates his case at least insofar as Butler is concerned. Indeed, in many of the closely divided cases involving the constitutionality of federal, state, or local taxes, Butler voted to invalidate such taxes on the basis of a myriad of constitutional provisions, many of which I discuss in this Article. In these cases, rarely was Butler joined by Justices that are traditionally viewed by historians as liberal, such as Justices Brandeis, Cardozo, Stone, or Holmes. See, e.g., *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933) (holding, in an opinion by Justice Butler joined by the other “Horsemen,” that an Alabama franchise tax on bags of nitrate fertilizer violated the Commerce Clause, with Justices Stone, Cardozo and Brandeis dissenting); *Coolidge v. Long*, 282 U.S. 582 (1931) (holding, in an opinion by Justice Butler, that a state inheritance tax as applied to a trust deed violated the Due Process Clause of the Fourteenth Amendment, over the dissent of Justices Roberts, Stone, Holmes, and Brandeis); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930) (holding, in an opinion by Justice Butler, that a Missouri tax on insurance companies violated the doctrine of intergovernmental tax immunity, with Justices Stone, Holmes, and Brandeis dissenting); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (holding, in an opinion by Justice Butler, that a tax levied solely against “incorporated operators” and not on “natural persons and partnerships” was arbitrary and thus violated the Equal Protection Clause, with Justices Holmes, Brandeis, and Stone dissenting).

403. Brown, *supra* note 17, at 46.

404. 17 U.S. (4 Wheat.) 316, 436 (1819). The concept of state immunity from federal taxation, by contrast, did not become firmly established until 1870 when the Supreme Court decided in *Collector v. Day* that a state judge could not be subjected to federal income tax on the money that he earned as a judge. 78 U.S. (11 Wall.) 113, 124 (1870).

405. See, e.g., *Helvering v. Gerhardt*, 304 U.S. 405, 428 (1938) (Butler, J., dissenting) (holding that “[i]t is an established principle of our constitutional system of dual government” that the states cannot tax the “instrumentalities, means and operations whereby the United States exercises its governmental powers,” the federal government cannot tax the “instrumentalities, means and operations whereby the states exert the governmental powers belonging to them,” and that “[w]here th[is] principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute”).

contexts. In *Jaybird Mining Co. v. Weir*,<sup>406</sup> for example, Butler invalidated an Oklahoma ad valorem tax on an Indian mining company on the ground that the company was an instrumentality of the U.S. government, which had assumed guardianship of the landowners and their tribe.<sup>407</sup> In another case, Butler wrote an opinion setting aside a Mississippi excise tax on gasoline dealers as applied to sales to the U.S. Coast Guard because “[w]hile Mississippi [could] impose charges upon [the dealer] for the privilege of carrying on trade that is subject to the power of the State, it [could] not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.”<sup>408</sup> In the last significant case in which Butler spoke for a majority of the Court on the question of intergovernmental tax immunity, Butler struck down an Alabama excise tax on gasoline sold to the United States.<sup>409</sup>

Butler’s broad vision for intergovernmental tax immunity, however, began to lose ground in the 1930s at about the same time that the Court was reversing course on economic liberties and public utilities cases.<sup>410</sup> In 1938, the Court weakened the tax immunity doctrine by deciding two cases that substantially curtailed the ability of states to avoid federal taxation.<sup>411</sup> In both cases, Butler vehemently dissented, pointing out in one that “[e]xpressly or sub silentio, [the

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406. 271 U.S. 609 (1926).

407. *Id.* at 612–14.

408. *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 221 (1928).

409. *See Graves v. Tex. Co.*, 298 U.S. 393, 400–01 (1936). In *Graves*, the Court rejected a construction of the Alabama statute proffered by the Attorney General of Alabama that the excise tax was on the storage of gasoline, not its withdrawal and sale to the United States. *Id.* at 398–40. But even if the tax was on mere storage, Butler still would have invalidated it under the doctrine of intergovernmental tax immunity:

A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. . . . So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional.

*Id.* at 401.

410. Eduard A. Lopez, *The Constitutional Doctrines of State Immunity from Federal Regulation and Taxation After Garcia v. San Antonio Metropolitan Transit Authority*, 4 J.L. & POL. 89, 95 (1987).

411. *See Helvering v. Gerhardt*, 304 U.S. 405, 419 (1938) (holding that states were not immune from federal taxation of “activities thought not to be essential to the preservation of state governments”); *see also Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386 (1938) (holding that states were not immune from federal taxes on income derived from a lease of school lands because interference with state government “cannot be supported by merely theoretical conceptions of interference with the functions of government”).

Court] overrule[d] a century of precedents”<sup>412</sup> and in the other that the Court overruled a “long line of decisions of this and other Courts.”<sup>413</sup> As Butler stated in *Mountain Producers Corp.*, the first of the two 1938 intergovernmental tax immunity cases, the Court’s opinion brought “forward no real reason for so sweeping a change of construction of the Constitution.”<sup>414</sup> Though the majority explained in one of the 1938 cases that state immunity from federal taxation was “narrowly limited,”<sup>415</sup> by 1939 the Court had started to retreat from even strict enforcement of federal immunity from state taxation.<sup>416</sup> The Court held in *Graves v. New York*, for example, that the salaries of employees of the Home Owners Loan Corporation, a federal instrumentality, could be taxed through state income taxes without offending intergovernmental tax immunity principles.<sup>417</sup> In doing so, the Court expressly overruled a case decided just two years before, *New York ex rel. Rogers v. Graves*,<sup>418</sup> in which it had prohibited state taxation of the salary of an employee of a wholly owned corporate instrumentality of the United States.<sup>419</sup> Justice Butler again dissented, criticizing the majority for overruling long-established doctrine:

Appraisal of lurking or apparent implications of the Court’s opinion can serve no useful end for, should occasion arise, they may be ignored or given direction different from that at first seemingly intended. But safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired.<sup>420</sup>

Despite having many of his tax opinions overruled by a Court in transition by the late 1930s, Butler made his greatest enduring

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412. *Gerhardt*, 304 U.S. at 430 (Butler, J., dissenting). In his dissent in *Gerhardt*, Butler again advanced his view that intergovernmental tax immunity is “not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.” *Id.* at 428.

413. *Mountain Producers*, 303 U.S. at 390 (Butler, J., dissenting).

414. *Id.* at 390–91. *Mountain Producers*, in particular, drew Butler’s opinion in *Jaybird Mining Co. v. Weir*, 271 U.S. 609 (1926), into substantial doubt by overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), a case that formed the foundation for *Jaybird Mining*, and by holding that a federal tax on the profits of a company “operating under a government contract or lease” with Wyoming resulted in only an “indirect and remote” tax on the state. *Mountain Producers*, 303 U.S. at 386–87.

415. *Gerhardt*, 304 U.S. at 415 (Butler, J., dissenting) (characterizing the immunity recognized in *Collector v. Day* as “narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted”); *id.* at 412 (“The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.”).

416. *Graves v. New York*, 306 U.S. 466, 486 (1939) (Butler, J., dissenting).

417. *Id.* at 487.

418. 299 U.S. 401 (1937).

419. *Id.* at 408–09.

420. *Graves*, 306 U.S. at 493 (Butler, J., dissenting).

contributions to modern tax jurisprudence in cases involving ordinary statutory construction. Butler truly earned the label of a “technician” in deciding largely mundane cases involving federal tax statutes, sometimes publishing detailed mathematical formulas and calculations to support or explain the Court’s holding in particular cases.<sup>421</sup> In light of Butler’s constitutional jurisprudence and his laissez-faire philosophy, it is not surprising that he often narrowly construed such statutes so as to prohibit or reduce taxes for taxpayers.<sup>422</sup>

In that regard, one of Butler’s greatest influences on modern tax jurisprudence was his advocacy of the canon of interpretation that ambiguities in tax statutes should be construed in favor of the taxpayer and against the government. In one of Butler’s most interesting tax opinions, *Miller v. Standard Nut Margarine Co.*, he invoked that canon to hold that a butter substitute, “Nu-ine,” was not subject to an oleomargarine tax enacted by Congress.<sup>423</sup> According to Butler, “It [was] elementary that tax laws are to be interpreted liberally in favor of taxpayers, and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers.”<sup>424</sup> Butler applied that canon of construction in at least two other opinions that he authored.<sup>425</sup> As with his constitutionally based tax opinions,

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421. See, e.g., *M.E. Blatt Co. v. United States*, 305 U.S. 267, 275 (1938) (employing a mathematical table in the majority opinion to explain the effect of depreciation on the value of alterations and improvements paid for by a lessee); *Helvering v. Tex-Penn Co.*, 300 U.S. 481, 493–94 (1937) (using tables to explain the consequences of a commercial transaction); *U.S. Cartridge Co. v. United States*, 284 U.S. 511, 513 (1932) (using a table to illustrate the taxpayer’s income, deductions, and reductions from judgment).

422. See, e.g., *Thomas v. Perkins*, 301 U.S. 655, 663 (1937) (holding that the taxpayer did not have to include in his income a payment made from a purchaser of an oil interest because the assignor was entitled to deduct depletion); *Tex-Penn Co.*, 300 U.S. at 499 (holding that cash received by the taxpayer from a stock sale was not includable in taxable income); *Helvering v. Taylor*, 293 U.S. 507, 514–16 (1935) (holding that a taxpayer need not pay an amount shown to be “arbitrary and excessive” even when he cannot show the exact amount owed in taxes); *U.S. Cartridge Co.*, 284 U.S. at 520 (holding that the taxpayer could properly deduct the lost value of buildings and leftover inventory); *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 265 (1931) (holding that the taxpayer could bring a suit for overpayment of income taxes); *V. Loewers Gambrinus Brewery Co. v. Anderson*, 282 U.S. 638, 645 (1931) (holding that the taxpayer was entitled to a deduction as a result of the obsolescence of the company’s buildings).

423. 284 U.S. 498, 508, 510–11 (1932). The oleomargarine tax was promulgated to support the dairy industry by eliminating the competitive price advantage enjoyed by butter substitutes. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 353 (2004).

424. *Standard Nut*, 284 U.S. at 509.

425. See *Bonwit Teller*, 283 U.S. at 263 (stating that a refund portion of a tax law “is to be construed liberally in favor of the taxpayers”); *Bowers v. N.Y. & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) (“[S]uch laws are to be interpreted liberally in favor of the taxpayers.”).

however, this canon also lost favor as the Court's personnel changed in the late 1930s.<sup>426</sup>

In his last three years on the Supreme Court, Butler dissented an astounding seventy-three times, over half of the total number of occasions that he joined or authored a dissent during his entire tenure on the Court. It is unsurprising, therefore, that as Butler's frustration with his colleagues grew, he used increasingly "smoldering language" to critique his colleagues, especially in tax cases.<sup>427</sup> Ultimately, as Justices Black and Reed replaced more conservative Justices Van Devanter and Sutherland, respectively, many of Butler's tax opinions were overruled. Nonetheless, according to one commentator, Butler "went down fighting, embittered and disgusted, but valiant and uncompromisingly belligerent to the very end."<sup>428</sup>

### CONCLUSION

It would be surprising if Pierce Butler showed up on any constitutional law scholar's list of great Justices. After all, he was a judicial minimalist who wrote in simple terms and decided only the case before him. He was surrounded on the Court by Justices who are lauded as some of the best in our nation's history, including Oliver Wendell Holmes, Benjamin Cardozo, and Louis Brandeis. Moreover, many historians view Butler as a quasi-villain, evidenced by his standard categorization as one of the so-called "Four Horsemen of the Apocalypse" that impeded the New Deal reforms implemented by President Franklin Delano Roosevelt. Finally, even in those areas where he distinguished himself—economic liberty, taxation, private property rights, and public utilities regulation—many of his opinions

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426. See *White v. United States*, 305 U.S. 281, 292 (1938) (stating, over the dissent of Butler and two other Justices, that the Court was "not impressed by the argument that . . . all doubts should be resolved in favor of the taxpayer"). Although the canon generally laid dormant in federal courts for more than fifty years after *White*, it has recently regained favor with Justices Stevens and Thomas, both of whom discussed it in a 2001 Supreme Court opinion. See *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) (arguing that the Court "should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter"); *id.* at 839 n.1 (Stevens, J., dissenting) (noting that Justice Thomas "accurately points to a tradition of cases construing 'revenue-raising laws' against their drafter"). Moreover, the canon is still invoked relatively frequently by a number of state courts. *E.g.*, *Ex parte Healthsouth Corp.*, 978 So. 2d 745, 756 (Ala. 2007); *Ordlock v. Franchise Tax Bd.*, 135 P.3d 628, 633 (Cal. 2006); *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967); *Tax Appeal of Dir. of Taxation v. Med. Underwriters of Cal.*, 166 P.3d 353, 368 (Haw. 2007); *In re 1605 Book Center, Inc.*, 631 N.E.2d 86, 88 (N.Y. 1994); *Qwest Corp. v. City of Bellevue*, 166 P.3d 667, 673 (Wash. 2007).

427. Brown, *supra* note 17, at 54.

428. *Id.* at 105.

were overruled later in his tenure or shortly after his death. He is, as a result, a neglected Justice.

But in the brief and superficial treatment of him in the literature, scholars have greatly oversimplified or even mischaracterized his modest legal contributions. Prior to this Article, for instance, not a single legal scholar had systematically examined Justice Butler's jurisprudence in the areas of tax law or public utilities regulation, the fields in which nearly half of his opinions were written. Few have noted his surprisingly pro-defendant votes in cases involving criminal rights or his embrace of robust notions of personal liberty and private property. An understanding of his views in these areas of law, which were important to him as a practicing lawyer and a judge, is essential to understanding his votes in a variety of areas, including his reasons for strictly adhering to *Lochner*. For example, it is relatively clear that Butler's votes in economic liberties cases were motivated by the laissez-faire, pro-private property, and self-determination principles that he learned during his schooling and from his immigrant parents.

Many of the principles that Butler championed as a Justice are no longer widely accepted; nonetheless, his influence lingers, particularly in his areas of specialty. And though it is difficult to categorize Butler's Supreme Court career as a success from a historical standpoint, it is equally difficult to classify him as a failure. He was, after all, a judge who tried to decide the controversies before him in a narrow, concise, and technical manner.