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THE ROOSEVELT COURT: THE LIBERALS CONQUER (1937-1941) AND DIVIDE (1941-1946)*

Russell W. Galloway, Jr.**

I. INTRODUCTION

This article discusses voting patterns on the United States Supreme Court during the October 1936 through 1945 Terms, a period in which the Court was dominated by Franklin D. Roosevelt and the eight Justices he appointed.¹ The decade of the Roosevelt Court (1937-1946) was an especially interesting and important period of Supreme Court history, a time of revolutionary changes in basic constitutional law.

To set the stage, from roughly 1890 to 1937 the Supreme Court was usually dominated by conservative Justices who were opposed to large-scale government intervention in the day-to-day economic life of the nation. After the 1929 collapse of the stock market and the onset of the Great Depression, however, the nation rejected the Court's *laissez faire* philosophy. Spurred by extreme hardship, the Roosevelt Administration proposed and Congress adopted a wide-ranging set of economic reforms involving unprecedented government regulation of the economy.

In the mid-1930's, the still conservative Supreme Court declared war on the New Deal. From 1934 through 1936, the Court issued a series of decisions declaring major New Deal statutes unconstitutional, often by narrow margins. Apparently, the Court was determined to block the nation's effort to adopt a government-regulated economy. A constitutional impasse was at hand.

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1. For a more detailed discussion of this period, see C.H. PRITCHETT, *THE ROOSEVELT COURT* (1948).

During the October 1935 Term, the Term immediately preceding the period covered in this article, the Court overturned several important New Deal legislative programs. The following table shows the alignment of Justices at the time.

TABLE 1
ALIGNMENT OF JUSTICES—OCTOBER 1935 TERM

| LIBERAL | MODERATE | CONSERVATIVE |
|------------------------------|----------|---|
| Cardozo Brandeis Stone | Hughes | McReynolds Butler Sutherland Van Devanter Roberts |

At the core of the dominant conservative wing were the "Four Horsemen," McReynolds, Butler, Sutherland, and Van Devanter. Roberts, who is commonly considered a moderate, was closely aligned with the conservatives during the Term, and he provided the fifth vote that secured the conservative dominance. Hughes, a moderate, also provided substantial support for the conservative bloc. Cardozo, Brandeis, and Stone comprised a cohesive liberal bloc, dissenting together in a small but significant number of major cases.

In the next few pages, we will examine voting patterns on the United States Supreme Court during the ensuing Roosevelt era, a period in which the liberal wing took control of the Court and then split into its own liberal (activist) and conservative (restrained) wings. First, we will analyze each Term as a separate statistical unit. Then we will summarize the trends that characterized the larger ten-year period.

II. THE VOTING PATTERNS OF THE ROOSEVELT COURT

A. *The October 1936 Term*

This was the Term in which the "Constitutional Revolution of 1937" occurred. Without a single change of personnel, control passed from the conservative wing to the liberal wing. The stage was set by President Roosevelt's Court-packing plan. After his landslide victory in the November 1936 election, Roosevelt proposed legislation allowing him to appoint six additional Justices, one for each Justice over the age of seventy. The proposal was announced on February 5, 1937, in

the middle of the October 1936 Term.

The Court's response was prompt and vivid. Beginning in March 1937, the Court issued a series of landmark decisions upholding economic reform statutes and indicating that it would no longer attempt to censor economic reform legislation under a regime of constitutional *laissez faire* economics. The most famous decisions, no doubt, were *West Coast Hotel Co. v. Parrish*² and *NLRB v. Jones & Laughlin Steel Corp.*,³ but the period from March to June 1937 saw other important liberal victories as well, both in economic reform and civil liberties cases.⁴

Voting data for the October 1936 Term vividly reflect the Constitutional Revolution of 1937. They show a sharp shift to the left in the balance of power. Dissent rates on the left dropped by more than two-thirds. Dissent rates on the right more than tripled. The conservative Four Horsemen accounted for sixty-three of the eighty-two dissents cast during the Term. McReynolds cast more dissents (20) than the five

2. 300 U.S. 379 (1937) (5-4 decision) (substantive due process; state minimum wage law for women and minors upheld). Although the conference vote in *West Coast Hotel Co.*, the first landmark case of the constitutional revolution, took place before Roosevelt's Court-packing plan was announced, most historians agree that the Court's change of position was in response to political pressure. Certainly, the Justices knew that the executive branch was planning a major offensive against the Court.

3. 301 U.S. 1 (1937) (5-4 decision) (federal commerce power; National Labor Relations Act upheld).

4. *E.g.*, *Helvering v. Davis*, 301 U.S. 619 (1937) (7-2 decision) (spending power; tenth amendment; Social Security old-age benefits tax held constitutional); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (5-4 decision) (spending power; Social Security unemployment compensation tax held constitutional); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) (5-4 decision) (equal protection; tax); *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937) (5-4 decision) (labor); *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937) (4-3 decision) (equal protection; tax); *Herndon v. Lowry*, 301 U.S. 242 (1937) (5-4 decision) (freedom of speech; solicitation of Communist Party membership held protected); *Highland Farms Dairy, Inc., v. Agnew*, 300 U.S. 608 (1937) (5-4 decision) (delegation of legislative power); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (7-2 decision) (dormant commerce clause; tax); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937) (5-4 decision) (due process; gold clauses); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (8-0 decision) (freedom of speech); *United States v. Wood*, 299 U.S. 123 (1936) (5-3 decision) (criminal procedure; jury bias).

Conservative victories over liberal dissents were few and rather insignificant. *E.g.*, *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459 (1937) (5-4 decision) (equal protection); *Great Northern Ry. Co. v. Washington*, 300 U.S. 154 (1937) (5-4 decision) (substantive due process; equal protection; dormant commerce clause); *Binney v. Long*, 299 U.S. 280 (1936) (6-2 decision) (tax).

most liberal Justices combined (19). Table 2 illustrates the changing fortunes of the liberal and conservative wings in the October 1935 and 1936 Terms.

TABLE 2
DISSENT RATES—OCTOBER 1935 & 1936 TERMS

| JUSTICE | OCT. 1935 TERM | OCT. 1936 TERM | CHANGE |
|----------------------|-------------------|-------------------|--------|
| LIBERALS | | | |
| Stone | 11.3% | 3.2% | -8.1% |
| Cardozo | 11.7% | 4.0% | -7.7% |
| Brandeis | 11.1% | 2.8% | -8.3% |
| Average | 11.4% | 3.4% | -8.0% |
| CONSERVATIVES | | | |
| Van Devanter | 1.4% | 7.5% | +6.1% |
| Sutherland | 3.5% | 9.4% | +5.9% |
| Butler | 3.4% | 12.2% | +8.8% |
| McReynolds | 4.2% | 13.4% | +9.2% |
| Average | 3.1% | 10.6% | +7.5% |

Closer examination of the voting data confirms that conservative dominance was broken in March 1937. During the early months of the Term, the conservatives were quite content with the Court's decisions. Seventy-seven of the first eighty-one decisions during the Term were unanimous. In contrast, twenty-eight of the last sixty-eight decisions were divided, with the liberals dominant. The Four Horsemen cast fifty-seven dissents during this string of cases compared to only thirteen by the other five Justices.

As in the prior Term, McReynolds, Butler, Sutherland, and Van Devanter comprised one close voting bloc, while Stone, Cardozo, and Brandeis comprised a second, even closer bloc. Stone and Cardozo agreed in all ninety-four decisions in which they both participated. In contrast, they disagreed with McReynolds and Butler in roughly 20% of the cases.⁵

5. Despite the vivid bloc alignments, disagreements rates at the Court's extremes remained in the rather low range that had typified the pre-1937 Court. The 50 and 60% disagreement rates that have characterized the modern Court were still several years away.

TABLE 3
DISAGREEMENT RATES—OCTOBER 1936 TERM

| | STONE | CARDOZO | BRANDEIS | VAN DEVANTER | SUTHERLAND | BUTLER | McREYNOLDS |
|----------------------|-------|---------|----------|-----------------|------------|--------|------------|
| LIBERALS | | | | | | | |
| Stone | --- | 0.0% | 2.1% | 15.2% | 16.0% | 20.4% | 21.3% |
| Cardozo | | --- | 2.1% | 11.6% | 13.4% | 16.2% | 17.4% |
| Brandeis | | | --- | 10.6% | 12.5% | 15.4% | 16.7% |
| CONSERVATIVES | | | | | | | |
| Van Devanter | | | | --- | 1.4% | 4.1% | 5.4% |
| Sutherland | | | | | --- | 4.1% | 5.4% |
| Butler | | | | | | --- | 4.1% |
| McReynolds | | | | | | | --- |

The shift to the left was made possible by the movement of Hughes and Roberts into close alignment with the liberal trio, Stone, Cardozo, and Brandeis. Table 4 shows Hughes' voting pattern during the October 1935 and 1936 Terms.

TABLE 4
HUGHES' DISAGREEMENT RATES—OCTOBER 1935 & 1936
TERMS

| JUSTICE | OCT. 1935 TERM | OCT. 1936 TERM | CHANGE |
|----------------------|-------------------|-------------------|--------|
| LIBERALS | | | |
| Stone | 7.9% | 2.1% | -5.8% |
| Cardozo | 8.4% | 2.7% | -5.7% |
| Brandeis | 7.7% | 2.8% | -4.9% |
| Average | 8.0% | 2.6% | -5.4% |
| CONSERVATIVES | | | |
| Van Devanter | 5.0% | 8.8% | +3.8% |
| Sutherland | 7.0% | 10.1% | +3.1% |
| Butler | 7.0% | 13.5% | +6.5% |
| McReynolds | 7.7% | 14.8% | +7.1% |
| Average | 6.7% | 11.8% | +5.1% |

In the October 1935 Term, Hughes was a little right of center; in the October 1936 Term, he was squarely in the liberal bloc.

Table 5 shows Roberts' voting pattern during the same two Terms.

TABLE 5
ROBERTS' DISAGREEMENT RATES—OCTOBER 1935 & 1936
TERMS

| JUSTICE | OCT. 1935 TERM | OCT. 1936 TERM | CHANGE |
|----------------------|-------------------|-------------------|---------------|
| LIBERALS | | | |
| Stone | 14.4% | 5.4% | - 9.0% |
| Cardozo | 14.7% | 5.4% | - 9.3% |
| Brandeis | <u>14.1%</u> | <u>2.8%</u> | <u>-11.3%</u> |
| Average | 14.4% | 4.5% | - 9.9% |
| CONSERVATIVES | | | |
| Van Devanter | 4.3% | 10.3% | + 6.0% |
| Sutherland | 2.1% | 11.6% | + 9.5% |
| Butler | 3.5% | 15.1% | +11.6% |
| McReynolds | <u>5.6%</u> | <u>16.3%</u> | <u>+10.7%</u> |
| Average | <u>3.9%</u> | <u>13.3%</u> | <u>+ 9.4%</u> |

In the October 1935 Term, Roberts was a consistent member of the conservative bloc; in the October 1936 Term, he was closely aligned with the liberals and farthest from the Four Horsemen.

In summary, control passed to the liberal wing during the October 1936 Term. This was made possible by a major leftward shift in the alignment of Hughes and Roberts. The addition of these two votes gave the liberal wing a five-four majority. As a result, the liberals' dissent rates dropped dramatically, and conservatives' dissent rates more than tripled. Although Roosevelt's Court-packing proposal was ultimately defeated, the Constitutional Revolution of 1937 was successful. The power of the conservative bloc was broken.

B. *The October 1937 Term*

During the October 1936 Term, liberal dominance had been achieved by political pressure, without any personnel changes. In the next few years, the old guard began to retire, and the Constitutional Revolution of 1937 was secured by the selection of New Dealers to fill their seats. During the October 1937 Term, three personnel changes occurred.

First, Van Devanter resigned effective June 2, 1937. Roosevelt selected Hugo Lafayette Black, Democratic Senator from Alabama to replace Van Devanter. Black, the "people's lawyer" and radical New Dealer, was more liberal than any

other member of the Court.⁶ The Van Devanter-Black succession was a major loss for the conservatives and gain for the already powerful liberals. Black took his seat on October 4, 1937, the first day of the Term.

Second, on December 10, 1937, Cardozo was stricken by his final illness. His seat remained vacant for the remainder of the Term. Cardozo had been a member of the Court's liberal wing since succeeding Holmes in 1933. His absence reduced the liberal wing by one for the last six months of the Term.

Third, on January 18, 1938, Sutherland resigned. Sutherland had been the intellectual leader of the conservative wing. After the loss of Van Devanter and Sutherland, only McReynolds and Butler were left of the once dominant Four Horsemen. On January 18, 1938, Stanley F. Reed was seated to replace Sutherland. Reed was a moderate New Dealer who had served as Roosevelt's Solicitor General during the crucial 1935-1937 period. Although not as liberal as Black, Reed was expected to fit comfortably into the Court's left wing.

Voting data for the October 1937 Term reveal a continuing shift of power away from the conservative wing. Dissent rates of the liberals and moderates sank to the lowest point in many years. In contrast, dissent rates of the conservatives rose.

TABLE 6
DISSENT RATES—OCTOBER 1935 - 1937 TERMS

| JUSTICE | OCT. 1935 TERM | OCT. 1936 TERM | OCT. 1937 TERM | CHANGE |
|----------------------|-------------------|-------------------|-------------------|---------|
| LIBERALS | | | | |
| Stone | 11.3% | 3.2% | 2.7% | - 8.6% |
| Brandeis | 11.1% | 2.8% | 0.7% | - 10.4% |
| CONSERVATIVES | | | | |
| Butler | 3.4% | 12.2% | 13.8% | + 10.4% |
| Sutherland | 3.5% | 9.4% | 16.4% | + 12.9% |
| McReynolds | 3.7% | 11.7% | 18.4% | + 14.7% |

The Court was dominated by the same coalition of liberals and moderates who had taken control during the prior Term, especially Stone, Brandeis, Hughes, and Roberts.⁷

6. See, e.g., C.H. PRITCHETT, *supra* note 1, at 35, which states: "Black naturally fitted into the existing left-wing group, though his location was quickly revealed as substantially farther to the left than the older justices . . ."

7. The Court issued several decisions confirming that the liberal doctrine of ju-

Hughes, a moderate who had sided with the liberals in recent Terms, did not dissent a single time during the October 1937 Term. Brandeis, a long-standing leader of the liberal wing, dissented only once in 151 cases. McReynolds, Sutherland, and Butler, in contrast, set new personal dissent records, accounting for nearly 70% of the Court's total dissents (58 out of 84). The following table shows the cohesion within the controlling group of liberals and moderates and their higher disagreement rates with McReynolds on the far right.

TABLE 7
DISAGREEMENT RATES—OCTOBER 1937 TERM

| JUSTICE | STONE | BRANDEIS | HUGHES | ROBERTS | McREYNOLDS |
|----------|-------|----------|--------|---------|------------|
| STONE | --- | 2.1% | 2.8% | 4.9% | 21.2% |
| BRANDEIS | --- | --- | 0.7% | 2.7% | 19.2% |
| HUGHES | --- | --- | --- | 2.0% | 18.9% |
| ROBERTS | --- | --- | --- | --- | 16.1% |

The dominant coalition received strong support in divided cases from Cardozo, Black, and Reed. Cardozo was in the heart of the liberal bloc during his final months in the fall of 1937. For example, he agreed with Stone in all forty-four cases in which they both participated. Black staked out a position on the far left. He was closest to Cardozo, and, after Cardozo left the Court, he filed a number of solo dissents espousing liberal positions. Reed was closely aligned with the dominant center coalition during the period late in the Term

dicial restraint in socio-economic cases was now the prevailing view. *E.g.*, *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (6-2 decision) (intergovernmental tax immunity); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (6-1 decision) (substantive due process); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (8-0 decision) (civil procedure; diversity); *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938) (6-1 decision) (securities); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (7-0 decision) (dormant commerce clause); *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123 (1938) (6-2 decision) (substantive due process; rate regulation); *Smyth v. United States*, 302 U.S. 329 (1937) (6-3 decision) (legal tender); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (5-4 decision) (intergovernmental tax immunity). The court also issued several decisions indicating a willingness to engage in liberal activism in civil liberties cases. *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938) (6-2 decision) (criminal procedure; waiver of constitutional rights); *Lovell v. Griffin*, 303 U.S. 444 (1938) (8-0 decision) (freedom of speech; handbills); *Nardone v. United States*, 302 U.S. 379 (1937) (7-2 decision) (criminal procedure; electronic surveillance); *but see Palko v. Connecticut*, 302 U.S. 319 (1937) (8-1 decision) (criminal procedure; due process).

when he began participating in decisions.⁸

TABLE 8
DISAGREEMENT RATES—OCTOBER 1937 TERM

| JUSTICE | CARDOZO | BLACK | REED |
|----------------------|---------|-------|-------|
| LIBERALS | | | |
| Stone | 0.0% | 8.3% | 2.4% |
| Brandeis | 6.1% | 7.4% | 4.5% |
| CONSERVATIVES | | | |
| Butler | 26.5% | 22.0% | 20.5% |
| McReynolds | 28.6% | 25.3% | 22.7% |

The conservative wing found itself stripped of its former power, but very cohesive in the face of adversity. From his position on the far right, McReynolds cast more dissents than all seven liberals and moderates combined. Sutherland remained true to the conservative position right to the end, agreeing with McReynolds in all fifty-five cases in which they both participated. He was also closely aligned with Butler. In contrast, his disagreement rate with Cardozo was nearly 30%. Butler and McReynolds agreed in roughly 95% of the cases.⁹

In summary, the Constitutional Revolution of 1937 was cemented during the October 1937 Term by the arrival of Roosevelt's first two appointees, Black and Reed. The coalition of liberals and moderates who had carried out the revolution during the prior Term—Cardozo, Stone, Brandeis, Hughes, and Roberts—controlled the Court once again. Reed aligned himself with this controlling coalition. Black lined up on the far left. The formerly powerful conservative wing was cut in half by the resignations of Van Devanter and Sutherland. The dissent rates of McReynolds and Butler, the two remaining conservatives, rose. The following table shows the balance of power at the end of the Term.

8. Reed participated in approximately 30% of the decisions during the Term. Black, in contrast, participated in all but two.

9. Roberts, after being closely aligned with the liberals in the prior Term, shifted back toward the center of the Court, although he was still left of center.

TABLE 9

ALIGNMENT OF JUSTICES—END OF OCTOBER 1937 TERM

| LIBERAL | MODERATE | CONSERVATIVE |
|--|-------------------------|----------------------|
| Black Reed Stone Brandeis Hughes ¹⁰ | ← Roberts ¹¹ | McReynolds Butler |

Obviously, the liberal wing was in control.

C. *The October 1938 Term*

By the fall of 1938 important changes were under way in the political and economic arenas. The world, it seemed, was at war, and the ominous trend toward global conflict was intensifying. Japanese forces occupied parts of China. Spain was ravaged by civil war. Mussolini, fresh from success in Ethiopia, was bent on further fascist aggression. In September, Hitler, the most dangerous force of all, demanded the cession of the Sudetenland to Nazi Germany. Meanwhile, the nation's commitment to domestic socio-economic reform was weakening. The Fair Labor Standards Act of June 25, 1938, was the last of the major New Deal reforms. In the 1938 elections, the Republicans scored significant victories, nearly doubling their representation in the House and gaining in the Senate as well. "The country had begun once more, though slowly, to swing toward conservatism."¹² On the Supreme Court, in contrast, the pattern was liberal dominance.

Like the prior Term, the October 1938 Term was disrupted by personnel changes. Cardozo died on July 9, 1938, and his seat remained vacant until January 30, 1939, when Felix Frankfurter was seated to replace him. Frankfurter had long been a leading liberal spokesman and had played a major role as a legislative consultant in developing New Deal policy. On February 13, 1939, Brandeis resigned. He was replaced on

10. Overall, Hughes was a moderate during his career as Chief Justice, but he voted with the liberal bloc during the October 1936 and 1937 Terms.

11. Roberts was aligned with the dominant liberal-moderate coalition. See *supra* Table 7. But he began to shift back toward the conservative pole, where he was more comfortable.

12. 2 HOFSTADTER, MILLER & AARON, *THE AMERICAN REPUBLIC* 535 (1959).

April 17, 1939, by William O. Douglas, another liberal and one of Roosevelt's inner circle of advisors and friends. These two changes did not alter the balance of power since, in both cases, one liberal replaced another.¹³

The swing to the left that characterized the prior two Terms continued in the October 1938 Term.¹⁴ Dissent rates in the Court's conservative wing continued to leap upward. McReynolds and Butler accounted for nearly 60% of all dissents cast during the Term. The liberals and moderates, in contrast, dissented infrequently. Brandeis, for example, did not cast a single dissent in his last sixty-five cases. The following table illustrates the pattern of liberal dominance that prevailed throughout the Term.

TABLE 10
DATA ON DISSENTS—OCTOBER 1938 TERM

| JUSTICE | CASES | DISSENTS | DISSENT RATE | CHANGE |
|----------------------|-------|----------|--------------|--------|
| LIBERALS | | | | |
| Douglas | 18 | 1 | 5.6% | --- |
| Black | 141 | 15 | 10.6% | +2.5% |
| Frankfurter | 65 | 2 | 3.1% | --- |
| Reed | 135 | 6 | 4.4% | -0.1% |
| Stone | 139 | 5 | 3.6% | +0.9% |
| Brandeis | 65 | 0 | 0.0% | -0.7% |
| CONSERVATIVES | | | | |
| Butler | 140 | 32 | 22.9% | +9.1% |
| McReynolds | 139 | 34 | 24.5% | +6.1% |

13. Frankfurter later became a leader of the Court's conservative wing, recording extremely high disagreement rates with liberal members of the Court, especially during the late 1950's and early 1960's. See *infra* Table 41. Douglas, on the other hand, probably deserves the title of "most liberal Justice" in the entire history of the Court.

14. Important liberal victories during the Term included: *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939) (5-4 decision) (trade regulation); *Hague v. CIO*, 307 U.S. 496 (1939) (5-2 decision) (freedom of speech and assembly); *Coleman v. Miller*, 307 U.S. 433 (1939) (7-2 decision) (political questions; ratification of a proposed amendment); *Lane v. Wilson*, 307 U.S. 268 (1939) (6-2 decision) (race relations; voting rights); *Mulford v. Smith*, 307 U.S. 38 (1939) (6-2 decision) (federal commerce power); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (6-2 decision) (inter-governmental tax immunity); *Interstate Circuit v. United States*, 306 U.S. 208 (1939) (4-3 decision) (antitrust); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (6-2 decision) (race relations; segregated schools); and *Welch v. Henry*, 305 U.S. 134 (1938) (5-3 decision) (substantive due process; tax).

Frankfurter and Douglas moved squarely into the Court's liberal wing during their first Term. They agreed with Black in nearly all cases.¹⁵ In contrast, they had much higher disagreement rates with McReynolds and Butler.

TABLE 11
DISAGREEMENT RATES—OCTOBER 1938 TERM

| JUSTICE | DOUGLAS | BLACK | FRANKFURTER | BUTLER | McREYNOLDS |
|-----------------------|---------|-------|--------------------|--------|------------|
| LIBERALS | | | | | |
| Douglas ¹⁶ | --- | 0.0% | 0.0% | 58.8% | 64.7% |
| Black | --- | --- | 1.5% ¹⁷ | 32.1% | 34.5% |
| Frankfurter | | | --- | 29.7% | 31.3% |
| CONSERVATIVES | | | | | |
| Butler | | | | --- | 2.2% |
| McReynolds | | | | | --- |

The most striking patterns appeared near the end of the Term when the liberal wing won a series of split decisions. McReynolds and Butler each dissented twelve times in the last eighteen cases. Frankfurter and Douglas sided with the liberals in all these cases.

An interesting development during the October 1938 Term was the shift of Roberts and Hughes to the right. Roberts moved back to the right of center after his brief sojourn in the liberal wing during the prior two Terms. Hughes also began to move away from the liberals, although less so than Roberts. He sided with the conservatives in six bloc voting cases late in the Term. Stone, in contrast, remained much more closely aligned with the liberal wing.¹⁸

15. Reed was also closely aligned with Douglas, Black, and Frankfurter. See *infra* appendix A, Table 3.

16. Douglas participated in only eighteen cases during the Term, so his figures do not represent anything close to a full-Term disagreement rate.

17. The close alignment of Black and Frankfurter is particularly noteworthy in light of their later roles as leaders of the liberal and conservative wings respectively. In the October 1938 Term, they disagreed in only 1 of the 65 cases in which they both participated.

18. See *infra* appendix A, Table 3. Note that Stone remained closely aligned with his old partner Brandeis right up to the end of Brandeis' tenure. The two disagreed in only 2 of the 66 cases in which they participated.

TABLE 12
DISAGREEMENT RATES — OCTOBER 1938 TERM

| JUSTICE | HUGHES | ROBERTS |
|----------------------|--------|---------|
| LIBERALS | | |
| Douglas | 33.3% | 33.3% |
| Black | 14.3% | 18.0% |
| Frankfurter | 10.9% | 13.8% |
| CONSERVATIVES | | |
| Butler | 19.4% | 15.0% |
| McReynolds | 21.0% | 15.7% |

In summary, the October 1938 Term was the third consecutive Term of liberal dominance. The already powerful liberal wing was reinforced when Douglas and Frankfurter moved into a close alliance with Black in their first Term. In response, Hughes and Roberts moved to the right, and the dissent rates of McReynolds and Butler reached new highs. Overall, the alignment during the Term was as follows:

TABLE 13
ALIGNMENT OF JUSTICES — OCTOBER 1938 TERM

| LIBERAL | MODERATE | CONSERVATIVE |
|--|---------------------|----------------------|
| Douglas Black Frankfurter Reed Stone (Brandeis) | Hughes Roberts → | McReynolds Butler |

D. *The October 1939 Term*

One personnel change occurred during the Term. Butler was absent at the start of the Term because of illness, and he died on November 16, 1939. This depleted the conservative wing still further, leaving McReynolds as the sole remaining member of the Four Horsemen. On February 5, 1939, Frank Murphy, Roosevelt's Attorney General, was seated to replace Butler. Murphy was one of the most liberal Justices ever to sit on the Court, so the Butler-Murphy succession was another major gain for the liberal wing and loss for the conservative wing. The seating of Murphy brought the number of Roosevelt appointees up to five, an absolute majority.

The most noteworthy patterns revealed by the voting

data for the October 1939 Term were the cohesion and dominance of the Roosevelt bloc. In 133 of the 137 cases decided during the Term, the five Roosevelt appointees were together on the winning side. Murphy, Black, and Douglas did not disagree a single time during the Term.

TABLE 14

DISAGREEMENT RATES AMONG THE ROOSEVELT APPOINTEES—
OCTOBER 1939 TERM

| JUSTICE | MURPHY | BLACK | DOUGLAS | FRANKFURTER | REED |
|-------------|--------|-------|---------|-------------|------|
| MURPHY | --- | 0.0% | 0.0% | 1.8% | 3.5% |
| BLACK | | --- | 0.0% | 1.5% | 3.1% |
| DOUGLAS | | | --- | 1.5% | 3.9% |
| FRANKFURTER | | | | --- | 2.3% |
| REED | | | | | --- |

It follows, obviously, that the Roosevelt bloc dominated the Court during the Term. The swing to the left that characterized the prior three Terms continued.¹⁹ Dissent rates went down on the left and up on the right. The three most conservative Justices cast 82% of the dissents during the Term. McReynolds cast twice as many dissents as the Court's six most liberal Justices combined!

19. Important liberal decisions during the Term included: *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (6-3 decision) (labor; antitrust exemption); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (9-0 decision) (freedom of religion); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (5-2 decision) (antitrust); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (8-1 decision) (standing); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (8-1 decision) (free speech; labor picketing); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) (5-3 decision) (dormant commerce clause; tax); *Nardone v. United States*, 308 U.S. 338 (1939) (7-1 decision) (criminal procedure; wiretapping); *Schneider v. State*, 308 U.S. 147 (1949) (7-1 decision) (free speech; handbills).

TABLE 15
DISSENT RATES—OCTOBER 1938 & 1939 TERMS

| JUSTICE | OCT. 1938 TERM | OCT. 1939 TERM | CHANGE |
|--|-------------------|-------------------|--------|
| LIBERALS | | | |
| Murphy | --- | 1.8% | --- |
| Black | 10.6% | 2.9% | -7.7% |
| Douglas | 5.6% | 2.9% | -2.7% |
| Frankfurter | 3.1% | 1.5% | -1.6% |
| Reed | 4.4% | 0.8% | -3.6% |
| Stone | 3.6% | 2.2% | -1.4% |
| MODERATES & CONSERVATIVES | | | |
| Hughes | 3.6% | 10.3% | +6.7% |
| Roberts | 9.4% | 17.0% | +7.6% |
| McReynolds | 24.5% | 26.7% | +2.2% |

The fortunes of the conservative wing fell to a new low during the October 1939 Term. McReynolds' dissent rate continued the steady climb that had begun in the October 1937 Term, reaching the highest level (26.7%) of any Justice since the January 1838 Term. Roberts continued his shift to the right. He had the second most conservative voting record, and he sided with McReynolds more than with any of the Roosevelt appointees. Hughes also shifted to the right into a position near the center of the Court. Stone, in contrast, remained closely aligned with the liberal bloc.²⁰

TABLE 16
DISAGREEMENT RATES — OCTOBER 1939 TERM

| | LIBERALS | | | MODERATES & CONSERVATIVES | | |
|---------|----------|-------|---------|---------------------------|---------|------------|
| | MURPHY | BLACK | DOUGLAS | HUGHES | ROBERTS | McREYNOLDS |
| STONE | 7.0% | 5.2% | 5.2% | 9.7% | 16.5% | 27.1% |
| HUGHES | 15.8% | 13.2% | 12.6% | --- | 6.7% | 16.0% |
| ROBERTS | 19.6% | 20.0% | 19.4% | --- | --- | 11.8% |

In summary, the October 1939 Term was the fourth consecutive Term of liberal dominance. The liberal wing—composed of the five Roosevelt appointees and

20. In one important case, *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (8-1 decision) (freedom of religion; compulsory flag salute), Stone was the only member of the Court to uphold the libertarian position.

Stone—controlled the Court. McReynolds, the only remaining member of the arch-conservative Four Horsemen, dissented more than all six liberals combined. In response to the liberal dominance, Roberts and Hughes moved to the right and dissented much more frequently than in prior Terms. The liberals had attained almost absolute control. The future of the Court was in their hands.

E. *The October 1940 Term*

During the October 1940 Term, the shadow of World War II fell upon the Court. In the spring of 1940, Hitler's Blitzkrieg had overrun Denmark, Norway, the Low Countries, and France. The Battle of Britain had begun, and America was forced to set aside its isolationism and prepare for the life and death struggle against the Axis. Breaking tradition, America elected Roosevelt for a third term in November, 1940, although the margin over Wilkie was the closest of FDR's presidential career. America buckled down for the effort to defeat Hitler. On December 7, 1941, Japan attacked Pearl Harbor, and the United States declared war. For the next four years, the dominant reality was war, and the Court was pushed into the background.

Voting patterns during the October 1940 Term were rather similar to those during the prior Term. The six-vote liberal wing was dominant.²¹ The Roosevelt appointees voted as a bloc in 150 of the 165 cases decided during the Term, and, of course, when they stuck together, their five votes controlled the outcome. Moreover, the fortunes of the conservative wing fell to a new low when McReynolds, the last of the Four Horsemen, resigned on January 1, 1941.²²

The extent of liberal dominance can best be illustrated by

21. Illustrative liberal decisions included: *Olsen v. Nebraska*, 313 U.S. 236 (1941) (8-0 decision) (substantive due process); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941) (5-3 decision) (labor); *Nye v. United States*, 313 U.S. 33 (1941) (5-3 decision) (criminal procedure; contempt); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) (5-2 decision) (dormant commerce clause); *A. F. of L. v. Swing*, 312 U.S. 321 (1941) (6-2 decision) (labor picketing); *United States v. Hutcheson*, 312 U.S. 219 (1941) (5-2 decision) (antitrust; exemption of labor unions); *United States v. F.H. Darby Co.*, 312 U.S. 100 (1941) (8-0 decision) (federal commerce power); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (6-3 decision) (federal pre-emption).

22. This was the only personnel change during the Term. McReynolds' seat remained vacant until the end of the Term, so the liberals held a six-to-two edge in nearly half of the cases.

comparing the dissent rates of Murphy, Frankfurter, Reed, and Stone with those of Roberts and Hughes.

TABLE 17
DATA CONCERNING DISSENTS — OCTOBER 1940 TERM

| JUSTICE | DISSENTS | DISSENT RATE |
|----------------------|----------|--------------|
| LIBERALS | | |
| Murphy | 6 | 3.9% |
| Frankfurter | 2 | 1.2% |
| Reed | 8 | 4.9% |
| Stone | 7 | 4.3% |
| Average | 5.8 | 3.6% |
| CONSERVATIVES | | |
| Hughes | 24 | 14.8% |
| Roberts | 31 | 19.7% |
| Average | 27.5 | 17.2% |

Obviously, the dissent rates of the conservatives were much higher.

Douglas and Black held down the Court's left extreme and rounded out the liberal bloc. For the third consecutive Term, they agreed in 100% of the cases in which they both participated. In an interesting development, which foreshadowed major future trends, Douglas and Black began to split off from the more moderate liberals such as Frankfurter and Reed. In nine cases, they dissented by themselves to the left.²³

The power of the conservative wing continued to erode for the fifth consecutive Term. With the resignation of McReynolds, Roberts took over the far right. Hughes continued his swing to the right, shifting into close alignment with McReynolds and Roberts. In fact, Hughes disagreed with McReynolds in only one of the sixty-one cases in which they both participated. In response to the Court's increasing liberalism, the dissent rates of Roberts and Hughes continued to climb.

23. Murphy showed signs of joining the Douglas-Black group late in the Term when he agreed with them in five dissents. In these cases, Frankfurter and Reed crossed over and gave the conservative wing a majority. See, e.g., *Wood v. Lovett*, 313 U.S. 362 (1941) (5-3 decision) (contract clause); *United States v. Classic*, 313 U.S. 299 (1941) (4-3 decision) (race relations; voting rights); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (4-3 decision) (labor).

TABLE 18
DISSENT RATES — OCTOBER 1937-1940 TERMS

| JUSTICE | OCT. 1937 TERM | OCT. 1938 TERM | OCT. 1939 TERM | OCT. 1940 TERM | CHANGE |
|---------|-------------------|-------------------|-------------------|-------------------|--------|
| ROBERTS | 2.0% | 9.4% | 17.0% | 19.7% | +17.7% |
| HUGHES | 0.0% | 3.6% | 10.3% | 14.8% | +14.8% |

Roberts and Hughes cast more dissents (55) than all six liberals (53).

Another development that anticipated future trends was the beginning of Reed and Stone's movement to the right. During the October 1940 Term, they were still members of the liberal wing. They were closest to Frankfurter and also quite close to Murphy. On the other hand, their disagreement rates with Douglas and Black rose, while their disagreement rates with McReynolds fell. The following table shows the change in Stone's voting pattern.

TABLE 19
STONE'S DISAGREEMENT RATES—OCTOBER 1939 & 1940
TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1940 TERM | CHANGE |
|------------|-------------------|-------------------|--------|
| DOUGLAS | 5.2% | 12.8% | + 7.6% |
| BLACK | 5.2% | 12.7% | + 7.5% |
| McREYNOLDS | 27.1% | 13.1% | -14.0% |

In summary, the October 1940 Term was the fifth consecutive Term of liberal dominance. The six-vote liberal bloc had two components. The strongest group was a cohesive four-vote coalition including Murphy, Frankfurter, Reed, and Stone. Douglas and Black were aligned somewhat farther to the left. Despite increasing support from Hughes and even Reed and Stone, the fortunes of the conservative wing continued to decline. McReynolds' resignation left Roberts on the far right, and his dissent rate climbed. Roberts and Hughes dissented more than all six liberals.

F. *The October 1941 Term*

When the Court reconvened in October 1941, several personnel changes took effect. First, Stone took over as Chief

Justice, succeeding Hughes, who had resigned on July 1. Stone had been on the Court since 1925 and was its senior member. Second, Robert H. Jackson, Roosevelt's brilliant and acerbic Attorney General, took over the Associate Justice position vacated by Stone. Third, James F. Byrnes, Roosevelt's close friend and advisor, took over the position left vacant by McReynolds' resignation on January 1. Roosevelt now had seven appointees on the Court.

The general voting configuration that emerged during the October 1941 Term is shown in the following table.

TABLE 20
ALIGNMENT OF JUSTICES — OCTOBER 1941 TERM

| LIBERAL | MODERATE | CONSERVATIVE |
|----------------------------|--|------------------|
| Douglas Black Murphy | Frankfurter → Jackson Byrnes ← Reed | Roberts Stone |

The highest disagreement rates were between Douglas, Black, and Murphy, on the left, and Roberts and Stone, on the right.

TABLE 21
DISAGREEMENT RATES—OCTOBER 1941 TERM

| JUSTICE | DOUGLAS | BLACK | MURPHY | STONE | ROBERTS |
|----------------------|---------|-------|--------|-------|---------|
| LIBERALS | | | | | |
| Douglas | --- | 2.1% | 10.9% | 29.9% | 36.1% |
| Black | | --- | 6.9% | 27.5% | 34.3% |
| Murphy | | | --- | 20.1% | 31.2% |
| CONSERVATIVES | | | | | |
| Stone | | | | --- | 14.2% |
| Roberts | | | | | --- |

The period in which Stone was Chief Justice is famous for its divisiveness, and this pattern was already evident in Stone's first Term, when the average number of dissents per case leaped from 0.78 to 1.11, the highest level in many years.

For the first time since the October 1935 Term, dissent rates on the left were as high as those on the right. There was an increased flow of liberal dissents by Douglas and Black, usually with Murphy on board.²⁴ In contrast, the Court's most

24. Conservative victories included: *Jones v. Opelika*, 316 U.S. 584 (1942) (5-4 decision) (free speech; sale of literature on public streets); *Betts v. Brady*, 316 U.S. 455 (1942) (6-3 decision) (criminal procedure; right to counsel); *Carpenters & Joiners*

conservative Justice, Roberts, dissented less frequently than in prior Terms.

TABLE 22
DISSENT RATES—OCTOBER 1939-1941 TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1940 TERM | OCT. 1941 TERM | CHANGE |
|---------|-------------------|-------------------|-------------------|--------|
| DOUGLAS | 2.9% | 9.4% | 18.8% | +15.9% |
| BLACK | 2.9% | 9.3% | 14.3% | +11.4% |
| MURPHY | 1.8% | 3.9% | 12.1% | +11.3% |
| ROBERTS | 17.0% | 19.7% | 16.5% | - 0.5% |

The most interesting development of the Term was the appearance of a rift among the Roosevelt appointees, who had previously functioned almost as a solid front. Frankfurter, for example, parted company with his former close allies, Douglas, Black, and Murphy.

TABLE 23
FRANKFURTER'S DISAGREEMENT RATES—
OCTOBER 1939 & 1941 TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1941 TERM | CHANGE |
|---------|-------------------|-------------------|--------|
| DOUGLAS | 1.5% | 25.5% | +24.0% |
| BLACK | 1.5% | 23.8% | +22.3% |
| MURPHY | 1.8% | 18.8% | +17.0% |

Reed also moved away from the liberals and into the center of the Court.²⁵ Byrnes and Jackson lined up between Reed and Frankfurter, very near the center of the Court. In short, the October 1941 Term saw the division of Roosevelt's appointees into a liberal (activist) bloc (Douglas, Black, and Murphy) and a moderate (restrained) bloc (Frankfurter, Jackson, Byrnes,

Union of America v. Ritter's Cafe, 315 U.S. 722 (1942) (5-4 decision) (labor); *Lisenba v. California*, 314 U.S. 219 (1941) (7-2 decision) (criminal procedure; coerced confession). There were also several important liberal decisions, including: *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (9-0 decision) (criminal procedure; sterilization); *Glasser v. United States*, 315 U.S. 60 (1942) (6-2 decision) (criminal procedure; right to counsel); *Bridges v. California*, 314 U.S. 252 (1941) (5-4 decision) (criminal procedure; contempt); *Edwards v. California*, 314 U.S. 160 (1941) (9-0 decision) (ban on immigration of indigents into state).

25. Reed was a little closer to Douglas and Black than to Roberts and Stone, but not much. See *infra* appendix A, Table 6.

and Reed).²⁶

Stone continued his swing to the right that had begun in the prior Term. After fifteen Terms in the liberal wing, he crossed into the conservative wing during the October 1941 Term.

TABLE 24
STONE'S DISAGREEMENT RATES—OCTOBER 1939 & 1941
TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1941 TERM | CHANGE |
|---------|-------------------|-------------------|--------|
| DOUGLAS | 5.2% | 29.9% | +24.7% |
| BLACK | 5.2% | 27.5% | +22.3% |
| MURPHY | 7.0% | 20.1% | +13.1% |
| ROBERTS | 16.5% | 14.2% | - 2.3% |

Stone was closest to Frankfurter and Roberts and farthest from Douglas and Black. Overall, he was the Court's second most conservative Justice.

In summary, the October 1941 Term saw major changes in voting patterns on the Court. The Roosevelt appointees split into a three-vote liberal bloc (Douglas, Black, and Murphy) and a four-vote moderate bloc (Frankfurter, Jackson, Byrnes, and Reed). Stone crossed over from the liberal wing and joined Roberts on the right. The overall result was a minor shift of power away from the Court's most liberal members.

G. *The October 1942 Term.*

The Roosevelt appointment occurred in the October 1942 Term. After only one Term on the Court, Byrnes resigned effective October 3, 1942, the first day of the Term. Wiley B. Rutledge, Byrnes' replacement, was not sworn in until Febru-

26. Cf. C.H. PRITCHETT, *supra* note 1, at 39-40, which states:

Some startling changes in judicial divisions occurred [during the October 1941 Term] . . . and the Court began to give the appearance of flying apart in all directions [L]ooking backward, it is clear that the 1941-42 term was definitely a turning point for the Roosevelt Court [W]ith seven New Deal appointees this group may have felt a certain sense of relief from the previous constraint of being only a bare majority, or less than a majority, of the Court. The battle being won, they broke ranks.

ary 15, 1943. As a result, only eight Justices participated in most of the cases decided during the Term.²⁷

The most noteworthy development was the continuing split of the Roosevelt appointees into two blocs. The liberal (activist) bloc included the very close Black-Douglas pair, Murphy on the left extreme, and the newly seated Rutledge, whose liberal voting pattern is shown in the following table.

TABLE 25
RUTLEDGE'S DISAGREEMENT RATES — OCTOBER 1942
TERM

| JUSTICE | DISAGREEMENT RATE WITH RUTLEDGE |
|----------------------|------------------------------------|
| LIBERALS | |
| Murphy | 18.2% |
| Black | 7.8% |
| Douglas | <u>7.8%</u> |
| Average | 11.0% |
| CONSERVATIVES | |
| Stone | 30.0% |
| Frankfurter | 27.5% |
| Roberts | <u>36.7%</u> |
| Average | 31.3% |

The seating of Rutledge completed the so-called "Libertarian Four" (Douglas, Black, Murphy, and Rutledge) and initiated a six year period in which the liberal-activist bloc was only one vote shy of a majority.

The moderate (restrained) bloc of Roosevelt appointees included Frankfurter, Reed, and Jackson. During the October 1942 Term, Frankfurter continued his sharp shift away from the liberal bloc.

27. Rutledge participated in 51 of the 147 cases decided during the Term, a sufficient number to gain a rather clear indication of his alignment.

TABLE 26
FRANKFURTER'S DISAGREEMENT RATES — OCTOBER
1939 & 1942 TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1942 TERM | CHANGE |
|---------------------|-------------------|-------------------|--------|
| LIBERALS | | | |
| Murphy | 1.8% | 29.5% | +27.7% |
| Black | 1.5% | 29.2% | +27.7% |
| Douglas | 1.5% | 26.2% | +24.7% |
| CONSERVATIVE | | | |
| Roberts | 18.5% | 17.2% | - 1.3% |

Reed and Jackson were also right of center, agreeing with Roberts more than with the Libertarian Four.²⁸

Roberts and Stone, the two pre-Roosevelt holdovers, were much more closely aligned with the moderates than with the liberals. Roberts held down the far right for the third consecutive Term. Stone was squarely in the right wing for the second consecutive Term. Overall, the alignment was as follows:

TABLE 27
ALIGNMENT OF JUSTICES — OCTOBER 1942 TERM

| LIBERAL | MODERATE | CONSERVATIVE |
|----------|---------------|--------------|
| Murphy | Frankfurter → | Roberts |
| Black | Stone → | |
| Douglas | Reed → | |
| Rutledge | Jackson → | |

Dissent and disagreement rates continued the upward trend that characterized Stone's period as Chief Justice. The average number of dissents per case jumped by more than 10% to 1.25. Disagreement rates of 30% to 35% were common. The balance of power was evenly divided between the Court's right and left wings. As the following table shows, the dissent rates on the left were just a shade higher than on the right.

28. See *infra* appendix A, Table 7.

TABLE 28
DATA CONCERNING DISSENTS — OCTOBER 1942 TERM

| JUSTICE | DISSENTS | DISSENT RATE |
|--|----------|--------------|
| LIBERALS | | |
| Murphy | 25 | 19.4% |
| Black | 22 | 15.3% |
| Douglas | 22 | 15.2% |
| Average | 23.0 | 16.5% |
| CONSERVATIVES & MODERATES | | |
| Stone | 16 | 11.0% |
| Frankfurter | 20 | 13.6% |
| Roberts | 29 | 20.0% |
| Average | 21.7 | 14.8% |

The liberal-activists were able, in short, to steal enough votes from the moderate-conservative coalition to maintain approximate parity in wins and losses.²⁹

Close examination of the voting data suggests that the Term had two rather distinct phases. During the first eighty-six cases, before Rutledge began to participate, the moderate-conservative coalition was dominant. Murphy, Black, and Douglas cast nearly two-thirds of all dissents in those cases. During the last sixty-one cases, after Rutledge's vote began to count, the Libertarian Four were dominant. The four liberals cast less than 30% of all dissents in these cases. Clearly, the addition of Rutledge shifted the balance of power toward the liberal-activist pole.

29. In spite of the even balance of power, the Term had a definitely liberal flavor. Important liberal decisions included: *Schneiderman v. United States*, 320 U.S. 118 (1943) (5-3 decision) (denaturalization); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (6-3 decision) (first amendment; compulsory pledge of allegiance); *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943) (6-3 decision) (labor); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943) (5-4 decision) (eminent domain); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (5-4 decision) (free speech; door to door solicitation); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (5-4 decision) (free speech; tax on distribution of religious literature); *McNabb v. United States*, 318 U.S. 332 (1943) (7-1 decision) (criminal procedure; federal supervisory power); *Wickard v. Filburn*, 317 U.S. 111 (1942) (8-0 decision) (federal commerce power).

There were also many conservative decisions. *E.g.*, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (9-0 decision) (Japanese curfew); *Helvering v. Griffiths*, 318 U.S. 371 (1943) (5-3 decision) (tax); *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9 (1943) (5-3 decision) (labor); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) (5-3 decision) (criminal procedure; waiver of jury trial).

To summarize, the October 1942 Term saw a widening of the schism among the Roosevelt appointees. The Libertarian Four—Murphy, Black, Douglas, and Rutledge—held down the left wing. Frankfurter, Reed, and Jackson along with Roberts and Stone were right of center. Neither wing was dominant. Dissent and disagreement levels rose once again.

H. *The October 1943 Term*

The alignment during the October 1943 Term was roughly the same as during the prior Term.³⁰ The Libertarian Four, Murphy, Douglas, Black, and Rutledge, occupied the Court's left wing. The other Roosevelt appointees, Jackson, Reed, and Frankfurter, joined Stone in the center of the Court. Roberts held down the right wing, often in splendid isolation.³¹

Dissent and disagreement rates continued to leap upward to modern Supreme Court records.³² Average dissents per case jumped from 1.25 to 1.47 per case, a modern record. Roberts' 30.1% dissent rate was the highest since the January 1838 Term. Disagreement rates between Justices at the Court's left and right extremes surpassed 40% for the first time since the January 1838 Term, reaching the highest level since the 1790's.

30. No personnel changes occurred during the Term.

31. Roberts cast solo dissents in 11 cases.

32. There was heavy bloc-voting during the Term. Liberal victories included: *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (4-3 decision) (antitrust); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (5-4 decision) (patent); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (6-3 decision) (criminal procedure; coerced confession); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944) (6-3 decision) (eleventh amendment); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (6-3 decision) (freedom of religion); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943) (4-3 decision) (labor); and *Roberts v. United States*, 320 U.S. 264 (1943) (6-3 decision) (criminal procedure; sentencing). Conservative victories included: *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (5-4 decision) (Fair Labor Standards Act); *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (6-3 decision) (criminal procedure; coerced confession); *Feldman v. United States*, 322 U.S. 487 (1944) (4-3 decision) (privilege against self-incrimination); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (5-4 decision) (dormant commerce clause); *Snowden v. Hughes*, 321 U.S. 1 (1944) (7-2 decision) (privileges and immunities clause); and *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943) (5-4 decision) (Federal Employers' Liability Act).

TABLE 29
DISAGREEMENT RATES—OCTOBER 1943 TERM

| JUSTICE | MURPHY | DOUGLAS | BLACK | RUTLEDGE | ROBERTS |
|--------------|--------|---------|-------|----------|---------|
| LIBERALS | | | | | |
| Murphy | --- | 12.7% | 12.9% | 11.8% | 42.5% |
| Douglas | | --- | 8.7% | 16.5% | 46.7% |
| Black | | | --- | 15.7% | 43.3% |
| Rutledge | | | | --- | 35.5% |
| CONSERVATIVE | | | | | |
| Roberts | | | | | --- |

The four Justices not listed in Table 29 were distributed between the extremes.³³ Frankfurter had the second most conservative record for the second straight Term. Stone, Reed, and Jackson were balanced in the middle between Roberts and the liberal-activists.

TABLE 30
DISAGREEMENT RATES — OCTOBER 1943 TERM

| JUSTICE | MURPHY | ROBERTS |
|-------------|--------|---------|
| FRANKFURTER | 33.1% | 24.4% |
| STONE | 27.2% | 30.0% |
| REED | 29.4% | 29.3% |
| JACKSON | 30.1% | 32.2% |

No single bloc of Justices was dominant. The generally liberal character of the Court becomes clear, however, when one considers that Roberts, the Court's most conservative member, dissented nearly twice as often as any other Justice. Apart from Roberts, the dissents were evenly spread among the remaining Justices.³⁴ The Libertarian Four, for example, cast seventy-six dissents, while the four moderates cast seventy-four.

To summarize, the Court continued its drift toward disagreement and polarization during the October 1943 Term. Roberts, the Court's most conservative member, set a modern record for dissents, but otherwise the balance of power was evenly distributed between the four liberal-activists and the four moderates. Major cases were few, as is often the situation during war.³⁵

33. See *infra* appendix A, Table 8.

34. See *infra* appendix B, Table 8.

35. The most famous cases of the Term were probably *Smith v. Allwright*, 321 U.S. 649 (1944) (8-1 decision) (race; primary elections); *Federal Power Comm'n v.*

I. *The October 1944 Term*³⁶

An interesting feature of the October 1944 Term was the unprecedented number of dissents and disagreements among the Justices.³⁷ Average dissents per case continued their steady climb to 1.59, another modern record which was nearly triple the average at the start of the Roosevelt era. Roberts, in his final Term on the Court, dissented in 35.9% of the cases, the highest dissent rate since the 1790's. Black and Roberts disagreed in 83 of the 151 decisions in which they both participated! Their 55% disagreement rate was the highest since the August 1793 Term. In fact, all of the Libertarian Four disagreed with Roberts at nearly record levels.

TABLE 31
DISAGREEMENT RATES—OCTOBER 1944 TERM

| JUSTICE | BLACK | DOUGLAS | RUTLEDGE | MURPHY | ROBERTS |
|----------|-------|---------|----------|--------|---------|
| BLACK | --- | 11.5% | 12.3% | 14.2% | 55.0% |
| DOUGLAS | | --- | 12.8% | 15.2% | 47.6% |
| RUTLEDGE | | | --- | 12.0% | 46.4% |
| MURPHY | | | | --- | 43.5% |

Once again, the remaining four Justices were scattered between the extremes. Stone took over the second most conservative position. Frankfurter continued to lean to the right. Jackson was very near the Court's statistical center. Reed was a little left of center.

Hope Gas Co., 320 U.S. 591 (1944) (6-2 decision) (Natural Gas Act); and United States v. Dotterweich, 320 U.S. 277 (1943) (5-4 decision) (criminal law; strict and vicarious liability).

36. No personnel changes occurred during the Term. In November 1944 Roosevelt was elected for a fourth term. On April 12, 1945, he died of a cerebral hemorrhage, and Harry S. Truman became President.

37. See *infra* appendix A, Table 9 and appendix B, Table 9. The statistics represent more than differences of opinion about legal issues. There were strong animosities on the Court at the time, especially between Black, on the one hand, and Roberts and Jackson, on the other.

TABLE 32
DISAGREEMENT RATES — OCTOBER 1944 TERM

| JUSTICE | LIBERALS | | CONSERVATIVES | |
|-------------|----------|---------|---------------|---------|
| | BLACK | DOUGLAS | STONE | ROBERTS |
| REED | 21.4% | 16.8% | 18.8% | 34.6% |
| JACKSON | 27.6% | 26.1% | 19.3% | 32.6% |
| FRANKFURTER | 31.6% | 29.9% | 14.4% | 22.5% |
| STONE | 36.2% | 31.3% | --- | 23.2% |

In light of the cohesion of the four-vote liberal-activist wing and the additional support provided by moderates such as Reed and Jackson, it is not surprising that the liberal wing had the edge in the won-lost column. In fact, the average dissent rate of the three most conservative Justices was 50% higher than that of the three most liberal Justices, as the following table shows.

TABLE 33
DISSENT RATES — OCTOBER 1944 TERM

| JUSTICE | DISSENTS | DISSENT RATE |
|----------------------|----------|--------------|
| LIBERALS | | |
| Black | 28 | 18.2% |
| Douglas | 23 | 15.4% |
| Rutledge | 23 | 14.7% |
| Average | | 16.1% |
| CONSERVATIVES | | |
| Frankfurter | 25 | 16.2% |
| Stone | 32 | 20.8% |
| Roberts | 55 | 35.9% |
| Average | | 24.3% |

On the other hand, the lowest dissent rates on the Court belonged to the moderates, Reed (10.9%) and Jackson (12.2%), so the liberal-activists did not dominate the Court. Moreover, despite the strength of the liberal wing, the Term was rather dull, and major innovations were few.³⁸

38. The most famous case of the Term was *Korematsu v. United States*, 323 U.S. 214 (1944) (6-3 decision) (exclusion of Japanese persons from West Coast). Interestingly, Justices Roberts and Jackson joined Murphy in protesting against this antilibertarian decision, while Black, Douglas, and Rutledge voted with the majority in upholding the exclusion order. Liberal victories included: *Bridges v. Wixon*, 326 U.S. 135 (1945) (5-3 decision) (deportation); *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945) (5-4 decision) (labor); *Hill v. Florida*, 325 U.S. 538 (1945) (6-3 decision)

To summarize, the October 1944 Term witnessed record-setting levels of dissent and disagreement. The cohesive Libertarian Four took advantage of support from the moderates to gain an edge in the won-lost figures, driving Roberts and Stone, the two most conservative Justices, to their highest dissent rates ever. The Term was statistically the strongest yet for the liberal-activists.

J. *The October 1945 Term*

By the fall of 1945, the war was over. On May 4, 1945, Germany had surrendered. In August, atomic bombs had been dropped on Hiroshima and Nagasaki. On September 2, 1945, Japan had surrendered. Roosevelt was dead, and the nation turned to the difficult challenges of the post-War years. After years of making war, the nation and the Supreme Court faced the challenge of making peace.

Three events altered the panel of Justices that sat during the October 1945 Term. First, Owen J. Roberts, the Court's most conservative member, resigned effective July 31, 1945, and President Harry Truman appointed his old Senate friend, Harold H. Burton, a Republican, to succeed Roberts. Burton was sworn in on the first day of the Term. Second, Robert H. Jackson was absent throughout the Term while serving as prosecutor at the Nuremberg war trials. Third, Chief Justice Stone died on April 22, 1946. His seat remained open for the rest of the Term.

In general, the voting patterns for the Term were nebu-

(labor); *Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161 (1945) (5-4 decision) (Fair Labor Standards Act); *Screws v. United States*, 325 U.S. 91 (1945) (5-4 decision) (conspiracy to violate civil rights); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581 (1945) (5-4 decision) (administrative law); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (5-4 decision) (antitrust); *Otis & Co. v. SEC*, 323 U.S. 624 (1945) (5-3 decision) (securities); *Thomas v. Collins*, 323 U.S. 516 (1945) (5-4 decision) (freedom of speech; "preferred position" of first amendment rights); *Ex parte Endo*, 323 U.S. 283 (1944) (9-0 decision) (detention of Japanese persons excluded from West Coast); and *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (9-0 decision) (race relations; labor).

Conservative victories during the Term included: *In re Summers*, 325 U.S. 561 (1945) (5-4 decision) (freedom of religion); *International Union of Mine, Mill & Smelt Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945) (5-4 decision) (labor); *Williams v. North Carolina*, 325 U.S. 226 (1945) (6-3 decision) (full faith and credit); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (5-4 decision) (Federal Employers' Liability Act); and *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945) (4-2 decision) (antitrust).

lous. Roberts' departure eliminated the last of the pre-Roosevelt conservative wing. The Court's new "right" wing was occupied by such liberals and moderates as Stone, Frankfurter; and Reed and even Burton had once been reform mayor of Cleveland during the depression. For the time being, this was a Court without conservatives.

If one works at it—and anticipates future trends a little—one can identify latent blocs.³⁹ The Libertarian Four leaned slightly to the left. The other four—the "less liberals": Frankfurter, Burton, Stone, and Reed—leaned slightly to the right. But the pattern is weak. Rutledge, for example, disagreed with the "liberal" Douglas more than with the "conservative" Frankfurter.

There were no tight blocs during the Term. Disagreement rates among the Libertarian Four were quite high, hovering around twenty percent. Even Black and Douglas disagreed in one-sixth of the cases. Similarly, the forces on the right were dispersed. Frankfurter, for example, had disagreement rates above 20% with Burton, Stone, and Reed. The closest group on the Court were Burton, Stone, and Reed.

As expected, Burton was one of the Court's less liberal members during his first Term. He disagreed with Douglas and Rutledge, the Court's most liberal members, more than with Reed, Stone, and Frankfurter.

TABLE 34
BURTON'S DISAGREEMENT RATES — OCTOBER 1945
TERM

| JUSTICE | DISAGREEMENT RATE WITH BURTON |
|----------------------|----------------------------------|
| LIBERALS | |
| Douglas | 29.8% |
| Rutledge | 30.6% |
| CONSERVATIVES | |
| Stone | 13.3% |
| Frankfurter | 24.2% |

But Burton's voting pattern was much more moderate than Roberts' record during the prior Term.

Stone finished his great career on the Court in the right

39. See *infra* appendix A, Table 10.

wing, closest to Reed and Burton and farthest from Douglas and Rutledge.

TABLE 35
STONE'S DISAGREEMENT RATES — OCTOBER 1945 TERM

| JUSTICE | DISAGREEMENT RATE WITH STONE |
|----------------------|------------------------------|
| LIBERALS | |
| Douglas | 33.3% |
| Rutledge | 26.5% |
| CONSERVATIVES | |
| Reed | 10.4% |
| Burton | 13.3% |

Neither the liberals nor the "less liberals" were dominant. Dissents were distributed rather evenly across the spectrum of Justices. The Libertarian Four held a slight edge, but it was very thin, as the following table shows.

TABLE 36
DISSENT RATES — OCTOBER 1945 TERM

| JUSTICE | DISSENTS | DISSENT RATE |
|----------------------|----------|--------------|
| LIBERALS | | |
| Douglas | 22 | 16.7% |
| Rutledge | 21 | 15.7% |
| Black | 16 | 12.1% |
| Murphy | 12 | 9.2% |
| Average | 17.8 | 13.4% |
| CONSERVATIVES | | |
| Reed | 14 | 10.7% |
| Stone | 14 | 14.3% |
| Burton | 21 | 15.7% |
| Frankfurter | 29 | 22.0% |
| Average | 19.5 | 15.8% |

After five consecutive increases, the average dissent rate finally fell off from the record 1.59 dissents per case in the prior Term to 1.31 dissents per case in the October 1945 Term.

In summary, the voting patterns on the Supreme Court during the October 1945 Term were nebulous and diffuse. Voting blocs were almost non-existent. Control was evenly distributed among the eight liberals and moderates. The over-

all impression is that of a Court hesitating at the end of a long swing to the left and making ready for a pull back to a more moderate posture.⁴⁰

III. TRENDS ON THE ROOSEVELT COURT

A. Voting Patterns

The Roosevelt Court began with the Constitutional Revolution of 1937, in which the balance of power shifted from the conservative to the liberal wing. This revolution took place during the October 1936 Term and was initially carried out without a single change of personnel. Thereafter the revolution was cemented into place when Roosevelt reconstituted the Court by appointing eight new Justices. The following table shows that the liberals dissented much less than the conservatives in the aftermath of the revolution in sharp contrast to the conservative dominance in the October 1935 Term.

TABLE 37
DISSENT RATES — OCTOBER 1935-1939 TERMS

| JUSTICE | OCT. 1935 TERM | OCT. 1936-1939 TERM |
|-------------------------|-------------------|------------------------|
| PRE-FDR LIBERALS | | |
| Cardozo | 11.7% | 5.1% |
| Brandeis | 11.3% | 1.4% |
| Stone | 11.1% | 2.9% |
| FDR APPOINTEES | | |
| Black | --- | 7.2% |
| Douglas | --- | 3.2% |
| Murphy | --- | 1.8% |
| Frankfurter | --- | 2.0% |
| Reed | --- | 2.9% |
| CONSERVATIVES | | |
| Butler | 3.4% | 16.1% |
| McReynolds | 4.2% | 20.4% |

40. A number of interesting cases were decided during the Term. *E.g.*, *Pinkerton v. United States*, 328 U.S. 640 (1946) (criminal law; conspiracy); *Colegrove v. Green*, 328 U.S. 549 (1946) (legislative districts); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (dormant commerce clause); *Morgan v. Virginia*, 328 U.S. 373 (1946) (race relations); *Pennkamp v. Florida*, 328 U.S. 331 (1946) (free speech/fair trial); *United States v. Causby*, 328 U.S. 256 (1946) (eminent domain); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (court martial); *In re Yamashita*, 327 U.S. 1 (1946) (court martial); *Marsh v. Alabama*, 236 U.S. 501 (1946) (free speech).

The Constitutional Revolution of 1937 was initially carried out by a coalition of five Justices, including three liberals (Cardozo, Brandeis, and Stone), one moderate (Hughes), and one renegade conservative (Roberts). During the October 1936 and 1937 Terms, these Justices voted almost as a unit, as is clear from the following table.

TABLE 38
AGREEMENT RATES — OCTOBER 1936-1937 TERMS

| JUSTICE | CARDOZO | BRANDEIS | STONE | HUGHES | ROBERTS |
|----------|---------|------------------|------------------|------------------|------------------|
| CARDOZO | --- | 96.9% 187/193 | 100% 141/141 | 95.9% 188/196 | 92.8% 181/195 |
| BRANDEIS | | --- | 97.9% 234/239 | 98.3% 286/291 | 97.2% 282/290 |
| STONE | | | --- | 97.5% 232/238 | 94.9% 223/235 |
| HUGHES | | | | --- | 96.9% 285/294 |
| ROBERTS | | | | | --- |

Roosevelt's appointees made their first appearance during the October 1937 Term and already had an absolute majority of five votes by the October 1939 Term. During these three Terms, they were very cohesive. Black and Douglas, for example, did not disagree in a single case during the first three Terms in which they were both on the Court. They agreed in 335 cases before recording their first disagreement in the October 1941 Term. Of course, the extent of the liberal partnership of Black and Douglas is well known. It is perhaps more surprising that Black and Frankfurter, the leaders of the Court's competing wings in the 1950's, agreed in 199 out of the 202 cases in which both participated during their first two Terms together on the Court. The following table shows the close agreement among the Roosevelt appointees during these early years.

TABLE 39
 AGREEMENT RATES AMONG ROOSEVELT APPOINTEES — OCTOBER
 1937-1939 TERMS

| JUSTICE | MURPHY | BLACK | DOUGLAS | FRANKFURTER | REED |
|-------------|--------|---------------|-----------------|------------------|------------------|
| MURPHY | --- | 100% 57/57 | 100% 56/56 | 98.2% 56/57 | 96.5% 55/57 |
| BLACK | | --- | 100% 154/154 | 98.5% 199/202 | 94.5% 291/308 |
| DOUGLAS | | | --- | 98.7% 152/154 | 95.9% 140/146 |
| FRANKFURTER | | | | --- | 97.4% 188/193 |
| REED | | | | | --- |

Analysis of the voting data reveals that the Justices appointed by Roosevelt were more liberal than the remaining Justices appointed by earlier Presidents. The Four Horsemen, of course, remained conservative until the end of their tenures. Roberts, the key swing vote during the Constitutional Revolution of 1937, moved back to the right as early as the October 1938 Term and held down the far right position from the October 1940 Term to the end of his tenure. Hughes, a moderate, moved sharply to the right in the October 1939 and 1940 Terms and ended his tenure in close alignment with McReynolds and Roberts. Even Stone, a leader of the liberal wing since 1926, crossed over into the right wing beginning in the October 1941 Term. He had the second most conservative voting record on the Court in the October 1941 and 1944 Terms. The following table illustrates these trends by showing the increasing disagreement between Black on the left and Roberts, Hughes, and Stone.

TABLE 40
 BLACK'S DISAGREEMENT RATES — OCTOBER 1937, 1940
 & 1944 TERMS

| JUSTICE | OCT. 1937 TERM | OCT. 1940 TERM | OCT. 1944 TERM |
|---------|-------------------|-------------------|-------------------|
| ROBERTS | 9.5% | 25.3% | 55.0% |
| HUGHES | 8.2% | 22.5% | --- |
| STONE | 8.3% | 12.7% | 36.2% |

After the Roosevelt appointees attained a clear majority, they broke ranks, and new alignments began to emerge. The formerly cohesive Roosevelt bloc split into a liberal-activist wing and a more restrained moderate wing. This pattern was especially apparent during the October 1941 through 1944 Terms. At first, the liberal wing included Douglas, Black, and Murphy. The moderate wing included Frankfurter, Jackson, and Reed.⁴¹ Stone tended to side with the moderates, and Roberts, the other pre-Roosevelt holdover, was off by himself on the far right. When Rutledge was seated in February 1943, he joined the liberal-activist wing. In October 1945, Burton joined the moderate wing. Stone's death in April 1946 left the Court's balance of power hanging between the two four-vote wings.

The split of the Roosevelt bloc into two wings can best be illustrated by tracing Frankfurter's movement away from Douglas, Black, and Murphy. In the October 1939 Term, those four Justices agreed in nearly all cases. Only four Terms later, Frankfurter disagreed with the other three in nearly one-third of the cases.

TABLE 41

FRANKFURTER'S DISAGREEMENT RATES — OCTOBER 1939-1943 TERMS

| JUSTICE | OCT. 1939 | OCT. 1940 | OCT. 1941 | OCT. 1942 | OCT. 1943 |
|---------|-----------|-----------|-----------|-----------|-----------|
| DOUGLAS | 1.5% | 8.1% | 25.5% | 26.2% | 31.8% |
| BLACK | 1.5% | 8.0% | 23.8% | 29.2% | 29.1% |
| MURPHY | 1.8% | 3.9% | 18.8% | 29.5% | 33.1% |

A similar pattern was present in Reed's voting, as the following table shows.

TABLE 42

REED'S DISAGREEMENT RATES — OCTOBER 1939 & 1943 TERMS

| JUSTICE | OCT. 1939 TERM | OCT. 1943 TERM |
|---------|-------------------|-------------------|
| DOUGLAS | 3.9% | 23.4% |
| BLACK | 3.1% | 24.6% |
| MURPHY | 3.5% | 29.4% |

41. Byrnes was also aligned with this group, but his tenure on the Court was only one Term.

The seating of Rutledge during the October 1942 Term brought the string of Roosevelt appointments to an end. The following table lists the changes in Court personnel during Roosevelt's presidency.

TABLE 43
THE ROOSEVELT APPOINTMENTS

| | | | |
|--------------|---|-------------|------------|
| Van Devanter | → | Black | |
| Sutherland | → | Reed | |
| Cardozo | → | Frankfurter | |
| Brandeis | → | Douglas | |
| Butler | → | Murphy | |
| Hughes | → | Jackson | |
| McReynolds | → | Byrnes | → Rutledge |

The effect of these appointments on the Court's alignment was drastic. In economic cases, the Court moved from a 5-1-3 conservative majority to an 8-1 liberal majority.

Obviously, the overall trend during the years of the Roosevelt Court was toward greater liberalism. This trend arguably reached its peak in the October 1944 Term, when the Libertarian Four gained the edge in the won-lost column and Owen Roberts dissented in 35.9% of the cases and disagreed with Hugo Black in 55% of the cases.

Dissent and disagreement rates rose sharply during the years of the Roosevelt Court. Average dissents per case rose from .53 in the October 1935 Term to 1.59 in the October 1944 Term. In the October 1935 Term, the highest disagreement rate on the Court was 16%. In the October 1944 Term, there were four disagreement rates above 40%, the one disagreement rate of 55% was recorded. The fact that unprecedented levels of disagreement appeared on a Court having eight members who owed their seats to the same President is an often noted irony of Supreme Court history.

B. *Substantive Legal Trends*

During the 1937-1946 period, the United States Supreme Court was a liberal Court, much more liberal than its predecessors. The Roosevelt Court's comparative liberalism was es-

pecially evident in economic cases and civil liberties cases.

In cases involving essentially economic interests, the Roosevelt Court carried out its most famous constitutional revolution, rejecting the conservative activism that had been dominant since the 1890's. The gist of the revolution was that the Court almost ceased declaring economic reform legislation unconstitutional, adopting instead the deferential stance long advocated by the liberals, Holmes, Brandeis, Stone, and Cardozo. The doctrine of substantive due process in economic cases and the related doctrine of liberty of contract were virtually eliminated.⁴² The commerce clause was invested once again with the broad sweep that Chief Justice Marshall had established more than a century earlier.⁴³ Other federal powers were given a similarly broad interpretation.⁴⁴ The notion that the tenth amendment restricts the federal government by reserving large areas for exclusive state control was rejected.⁴⁵ The doctrine of unconstitutional delegation of legislative power was discarded.⁴⁶

The Court's deferential attitude toward economic legislation was applied not only to the federal government but to the states as well. The elimination of the substantive due process/liberty of contract doctrine freed the states from far-reaching restraints⁴⁷ as did the softening of dormant commerce clause restrictions.⁴⁸ In short, the Roosevelt Court withdrew from its role as constitutional censor of socio-economic legislation, and adopted instead the posture of judicial restraint characteristic of Holmesian liberalism.

42. See, e.g., *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Curry v. McCanless*, 307 U.S. 357 (1939); *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

43. See, e.g., *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. F.H. Darby Lumber Co.*, 312 U.S. 100 (1941); *Mulford v. Smith*, 307 U.S. 38 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

44. See, e.g., *Helvering v. Davis*, 301 U.S. 619 (1937) (taxing and spending power); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (taxing and spending power).

45. See, e.g., *United States v. F.H. Darby Lumber Co.*, 312 U.S. 100 (1941).

46. See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *H.P. Hood & Sons v. United States*, 307 U.S. 588 (1939).

47. See cases cited *supra* note 40.

48. See, e.g., *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

But the economic liberalism of the Roosevelt Court went far beyond the bare bones of the Constitutional Revolution of 1937. Granted that the Court would no longer declare socio-economic reform legislation unconstitutional, there still remained the vastly important task of construing and enforcing the sweeping statutes characteristic of the age of big government. Here the Roosevelt Court showed its liberalism by taking the position that these statutes were to be liberally construed. Again and again, the Court insisted upon vigorous enforcement of reform legislation. This position was perhaps most evident in labor cases,⁴⁹ leading Corwin to conclude in 1941, "Constitutional law has always a central interest to guard. Today it appears to be that of organized labor."⁵⁰ The Court generally gave vigorous support to legislative and executive programs of business and trade regulation.⁵¹

The Roosevelt Court also adopted a more liberal posture than its predecessors in civil liberties cases. In this area, the Court rejected the hands-off approach that characterized its economic cases. Adopting an explicit double standard,⁵² the Court took an activist role in civil liberties cases, employing judicial review aggressively to nullify governmental action which did not conform to its libertarian policies.

The libertarian posture of the Roosevelt Court was perhaps most evident in first amendment cases. By the early 1940's, the doctrine that first amendment freedoms have a "preferred position" in our constitutional system had ob-

49. See, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Thomas v. Collins*, 323 U.S. 516 (1945); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Kirchbaum v. Walling*, 316 U.S. 517 (1942); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *NLRB v. Waterman S.S. Co.*, 309 U.S. 206 (1940).

50. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* viii (1946).

51. See, e.g., *Gemco, Inc. v. Walling*, 324 U.S. 244 (1945) (Administrator, Fair Labor Standards Act); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (FPC); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (FCC); *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942) (FPC); *Gray v. Powell*, 314 U.S. 402 (1941) (Bituminous Coal Division); *United States v. Morgan*, 313 U.S. 409 (1941) (Secretary of Agriculture). See C.H. PRITCHETT, *supra* note 1, at 167-97, which discusses "[t]he generally favorable attitude of the Roosevelt Court toward administrative legislation." *Id.* at 168.

52. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945); *Korematsu v. United States*, 323 U.S. 214 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

tained majority support.⁵³ In a series of famous cases, the Court reinforced the freedoms of speech, press, and religion. The Jehovah's Witnesses won a series of victories, overthrowing the compulsory flag salute,⁵⁴ license taxes for the distribution of religious literature,⁵⁵ bans on the distribution of handbills,⁵⁶ bans on the distribution of literature in company towns,⁵⁷ and other similar restrictions.⁵⁸ The Court reinforced freedom of the press by increasing the protection for published comments on judicial proceedings⁵⁹ and by restricting the power of the Post Office Department to censor publications by denying second-class mailing privileges.⁶⁰ The Court also protected the first amendment rights of unpopular radical groups against government suppression.⁶¹

With several noteworthy exceptions such as the Japanese relocation cases,⁶² the Roosevelt Court played an important role in the maintenance of civil liberties during World War II. The Court rejected efforts to punish individuals for issuing publications protected by the first amendment.⁶³ It insisted upon full compliance with the restrictions of the treason clause.⁶⁴ It overturned conspiracy to resist the draft convictions based on insufficient evidence.⁶⁵ It prohibited denaturalization in the absence of "clear, unequivocal, and convincing

53. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

54. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

55. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opeleika*, 316 U.S. 584 (1942)).

56. *Lovell v. Griffin*, 303 U.S. 444 (1938).

57. *Marsh v. Alabama*, 326 U.S. 501 (1946).

58. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first case incorporating freedom of religion into the due process clause of the fourteenth amendment); *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

59. See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947) (no contempt unless publication creates clear and present danger of obstruction of justice); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (same); *Times-Mirror Co. v. Superior Court*, 314 U.S. 252 (1941) (same).

60. See, e.g., *Hennegan v. Esquire*, 327 U.S. 146 (1946).

61. See, e.g., *United States v. Lovett*, 328 U.S. 303 (1946) (bill of attainder); *Bridges v. Wixon*, 326 U.S. 135 (1945) (deportation).

62. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (evacuation); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (curfew). But see *Ex parte Endo*, 323 U.S. 283 (1944) (detention).

63. *Hartzel v. United States*, 322 U.S. 680 (1944).

64. *Cramer v. United States*, 325 U.S. 1 (1945).

65. *Keegan v. United States*, 325 U.S. 478 (1945).

evidence."⁶⁶ On this basis, Pritchett concluded in 1948:

The strong bias of the Roosevelt Court toward the maintenance of civil liberties was responsible to a large degree for the serious and on the whole successful effort made to prevent the development of intolerance and witch-hunts during World War II on the scale which had marred American participation in the preceding war.⁶⁷

The Roosevelt Court engaged in some libertarian activism in race discrimination cases, continuing the pattern that had emerged in the prior decades. The Court invalidated the white primary system, which had denied effective voting rights to blacks.⁶⁸ It took the first, halting steps toward the eradication of segregation, using the dormant commerce clause to nullify a state statute requiring segregated seating on public motor carriers.⁶⁹ It reversed convictions where blacks had been excluded from grand and petit juries.⁷⁰ It resurrected two remaining provisions of the Reconstruction Era Civil Rights Acts.⁷¹ On the whole, however, the efforts of the Roosevelt Court to resist the blight of racial discrimination were weak and ineffective.

The record of the Roosevelt Court in criminal procedure cases was mixed. In cases involving the application of the Bill of Rights to federal criminal trials, the Court showed some characteristic liberal activism.⁷² Similarly, the Court made occasional reforms by using its supervisory power over federal criminal procedure.⁷³ Moreover, the Court put some bite into

66. *Schneiderman v. United States*, 320 U.S. 118, 118 (1943).

67. C.H. PRITCHETT, *supra* note 1, at 117 (1948).

68. *Smith v. Allwright*, 321 U.S. 649 (1944).

69. *Morgan v. Virginia*, 328 U.S. 373 (1946).

70. *See, e.g., Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939). *But see Akins v. Texas*, 325 U.S. 398 (1945) (intentional limit of one black on grand jury upheld).

71. *See, e.g., Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

72. The Roosevelt Court is clearly a Bill of Rights court The values enshrined in these provisions are closely related to the freedoms of the First Amendment, and the Roosevelt Court has to a considerable degree exhibited the same kind of concern for protection of the procedural rights of defendants in criminal cases that it has shown for the protection of civil liberties.

C.H. PRITCHETT, *supra* note 1, at 137. On the other hand, restrictive interpretation of Bill of Rights provisions were also adopted in a number of cases.

73. *See, e.g., McNabb v. United States*, 318 U.S. 332 (1943).

the due process requirement that state criminal prosecutions comply with standards of fundamental fairness.⁷⁴ On the other hand, the Court rejected the contention voiced by Black, Douglas, Murphy, and Rutledge that the fourteenth amendment makes the Bill of Rights applicable to the states and thus declined to engage in the liberal activist criminal procedure revolution later carried out by the Warren Court.⁷⁵

IV. CONCLUSION

The Roosevelt Court came into existence in March, 1937 in response to Roosevelt's Court-packing scheme. From that time until the end of the October 1945 Term, the Court was dominated by relatively liberal Justices. As conservatives were replaced by liberal and moderate New Dealers, the Court became more liberal than at any other time in its entire history. Once they gained control of the Court, the Roosevelt appointees split into two wings, with the liberal-activists and the more moderate advocates of judicial restraint vying for control. By the October 1942 Term, the Court had four liberal-activists, four moderates, and only one conservative. The Court's liberalism was evident across a broad spectrum of cases involving socio-economic issues, first amendment rights, war-time civil liberties, racial discrimination, and criminal procedure.

74. *See, e.g.*, *Rice v. Olsen*, 324 U.S. 786 (1945) (right to counsel); *Ashcraft v. Tennessee*, 322 U.S. 143 (1943) (coerced confession). *But cf.* *Foster v. Illinois*, 332 U.S. 134 (1947) (right to counsel).

75. *See, e.g.*, *Betts v. Brady*, 316 U.S. 455 (1942).

APPENDIX A

TABLE 1
DISAGREEMENT RATES—OCTOBER 1936 TERM

| | | Stone (94) ^a | Cardozo (148) | Brandeis (143) | Hughes (146) | Roberts (146) | Van Devanter (146) | Sutherland (148) | Butler (147) | McReynolds (148) |
|--------------|----------------|----------------------------|------------------|-------------------|-----------------|------------------|-----------------------|---------------------|-----------------|---------------------|
| Stone | % ^b | | 0.0 | 2.1 | 2.1 | 5.4 | 15.2 | 16.0 | 20.4 | 21.3 |
| | # ^c | | 0/94 | 2/94 | 2/94 | 5/92 | 14/92 | 15/94 | 19/93 | 20/94 |
| Cardozo | % | | | 2.1 | 2.7 | 5.4 | 11.6 | 13.4 | 16.2 | 17.4 |
| | # | | | 3/144 | 4/149 | 8/147 | 17/147 | 20/149 | 24/148 | 26/149 |
| Brandeis | % | | | | 2.8 | 2.8 | 10.6 | 12.5 | 15.4 | 16.7 |
| | # | | | | 4/144 | 4/142 | 15/142 | 18/144 | 22/143 | 24/144 |
| Hughes | % | | | | | 4.1 | 8.8 | 10.1 | 13.5 | 14.8 |
| | # | | | | | 6/147 | 13/147 | 15/149 | 20/148 | 22/149 |
| Roberts | % | | | | | | 10.3 | 11.6 | 15.1 | 16.3 |
| | # | | | | | | 15/145 | 17/147 | 22/146 | 24/147 |
| Van Devanter | % | | | | | | | 1.4 | 4.1 | 5.4 |
| | # | | | | | | | 2/147 | 6/146 | 8/147 |
| Sutherland | % | | | | | | | | 4.1 | 5.4 |
| | # | | | | | | | | 6/148 | 8/149 |
| Butler | % | | | | | | | | | 4.1 |
| | # | | | | | | | | | 6/148 |
| McReynolds | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 2
DISAGREEMENT RATES—OCTOBER 1937 TERM

| | Cardozo (49)a | Black (150) | Reed (44) | Stone (146) | Brandeis (151) | Hughes (148) | Roberts (149) | Butler (152) | Sutherland (55) | McReynolds (152) |
|------------|------------------|----------------|--------------|----------------|-------------------|-----------------|------------------|-----------------|--------------------|---------------------|
| Cardozo | % b | 4.3 | --- | 0.0 | 6.1 | 8.5 | 12.5 | 26.5 | 28.3 | 28.6 |
| | #c | 2/48 | 0/0 | 0/47 | 3/49 | 4/47 | 6/48 | 13/49 | 13/46 | 14/49 |
| Black | % | | 9.3 | 8.3 | 7.4 | 8.2 | 9.5 | 22.0 | 20.8 | 25.3 |
| | # | | 4/43 | 12/144 | 11/149 | 12/146 | 14/147 | 33/150 | 11/53 | 38/150 |
| Reed | % | | 2.4 | 4.5 | 4.7 | 4.7 | 4.7 | 20.5 | --- | 22.7 |
| | # | | 1/41 | 2/44 | 2/43 | 2/43 | 9/44 | 0/0 | 10/44 | 10/44 |
| Stone | % | | | | 2.1 | 2.8 | 4.9 | 16.4 | 24.5 | 21.2 |
| | # | | | | 3/145 | 4/144 | 7/143 | 24/146 | 13/53 | 31/146 |
| Brandeis | % | | | | | 0.7 | 2.7 | 14.6 | 18.5 | 19.2 |
| | # | | | | | 1/147 | 4/148 | 22/151 | 10/54 | 29/151 |
| Hughes | % | | | | | | 2.0 | 14.2 | 17.3 | 18.9 |
| | # | | | | | | 3/147 | 21/148 | 9/52 | 28/148 |
| Roberts | % | | | | | | | 12.8 | 11.1 | 16.1 |
| | # | | | | | | | 19/149 | 6/54 | 24/149 |
| Butler | % | | | | | | | | 5.5 | 5.9 |
| | # | | | | | | | | 3/55 | 9/52 |
| Sutherland | % | | | | | | | | | 0.0 |
| | # | | | | | | | | | 0/55 |
| McReynolds | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 3
DISAGREEMENT RATES—OCTOBER 1938 TERM

| | Douglas (18)a | Black (141) | Frankfurter (65) | Reed (135) | Stone (139) | Brandeis (66) | Hughes (140) | Roberts (128) | Butler (140) | McReynolds (139) |
|-------------|------------------|----------------|---------------------|---------------|----------------|------------------|-----------------|------------------|-----------------|---------------------|
| Douglas | % b | 0.0 | 0.0 | 5.9 | 11.8 | --- | 33.3 | 33.3 | 58.8 | 64.7 |
| | #c | 0/18 | 0/18 | 1/17 | 2/17 | 0/0 | 6/18 | 6/18 | 10/17 | 11/17 |
| Black | % | | 1.5 | 6.7 | 10.8 | 10.6 | 14.3 | 18.0 | 32.1 | 34.5 |
| | # | | 1/65 | 9/135 | 15/139 | 7/66 | 20/140 | 23/128 | 45/140 | 48/139 |
| Frankfurter | % | | | 3.2 | 4.8 | --- | 10.9 | 13.8 | 29.7 | 31.3 |
| | # | | | 2/63 | 3/63 | 0/0 | 7/64 | 9/65 | 19/64 | 20/64 |
| Reed | % | | | | 6.8 | 4.8 | 8.2 | 11.5 | 26.1 | 27.8 |
| | # | | | | 9/133 | 3/62 | 11/134 | 14/122 | 35/134 | 37/133 |
| Stone | % | | | | | 3.0 | 4.3 | 13.5 | 23.0 | 24.8 |
| | # | | | | | 2/66 | 6/138 | 17/126 | 32/139 | 34/137 |
| Brandeis | % | | | | | | 0.0 | 7.7 | 18.2 | 20.0 |
| | # | | | | | | 0/66 | 4/52 | 12/66 | 13/65 |
| Hughes | % | | | | | | | 8.7 | 19.4 | 21.0 |
| | # | | | | | | | 11/127 | 27/139 | 29/138 |
| Roberts | % | | | | | | | | 15.0 | 15.7 |
| | # | | | | | | | | 19/127 | 20/127 |
| Butler | % | | | | | | | | | 2.2 |
| | # | | | | | | | | | 3/138 |
| McReynolds | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 4
DISAGREEMENT RATES—OCTOBER 1939 TERM

| | | Murphy (57) ^a | Black (137) | Douglas (136) | Frankfurter (137) | Reed (130) | Stone (135) | Hughes (136) | Roberts (136) | McReynolds (120) |
|-------------|----------------|-----------------------------|----------------|------------------|----------------------|---------------|----------------|-----------------|------------------|---------------------|
| Murphy | % ^b | | 0.0 | 0.0 | 1.8 | 3.5 | 7.0 | 15.8 | 19.6 | 38.1 |
| | # ^c | | 0/57 | 0/56 | 1/57 | 2/57 | 4/57 | 9/57 | 11/56 | 16/42 |
| Black | % | | | 0.0 | 1.5 | 3.1 | 5.2 | 13.2 | 20.0 | 30.0 |
| | # | | | 0/136 | 2/137 | 4/130 | 7/135 | 18/136 | 27/135 | 36/120 |
| Douglas | % | | | | 1.5 | 3.9 | 5.2 | 12.6 | 19.4 | 29.4 |
| | # | | | | 2/136 | 5/129 | 7/134 | 17/135 | 26/134 | 35/119 |
| Frankfurter | % | | | | | 2.3 | 3.7 | 11.8 | 18.5 | 28.3 |
| | # | | | | | 3/130 | 5/135 | 16/136 | 25/135 | 34/120 |
| Reed | % | | | | | | 3.1 | 10.1 | 16.3 | 26.5 |
| | # | | | | | | 4/128 | 13/129 | 21/129 | 30/113 |
| Stone | % | | | | | | | 9.7 | 16.5 | 27.1 |
| | # | | | | | | | 13/134 | 22/133 | 32/118 |
| Hughes | % | | | | | | | | 6.7 | 16.0 |
| | # | | | | | | | | 9/134 | 19/119 |
| Roberts | % | | | | | | | | | 11.8 |
| | # | | | | | | | | | 4/119 |
| McReynolds | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 5
DISAGREEMENT RATES—OCTOBER 1940 TERM

| | | Douglas (160) ^a | Black (162) | Murphy (153) | Frankfurter (165) | Reed (164) | Stone (161) | Hughes (162) | McReynolds (62) | Roberts (157) |
|-------------|----------------|-------------------------------|----------------|-----------------|----------------------|---------------|----------------|-----------------|--------------------|------------------|
| Douglas | % ^b | | 0.0 | 4.7 | 8.1 | 9.4 | 12.8 | 22.9 | 21.7 | 25.0 |
| | # ^c | | 0/157 | 7/149 | 13/160 | 15/159 | 20/156 | 36/157 | 13/60 | 38/152 |
| Black | % | | | 4.7 | 8.0 | 9.3 | 12.7 | 22.5 | 21.7 | 25.3 |
| | # | | | 7/150 | 13/162 | 15/161 | 20/158 | 36/160 | 13/60 | 39/154 |
| Murphy | % | | | | 3.9 | 8.6 | 7.4 | 17.3 | 17.5 | 21.4 |
| | # | | | | 6/153 | 13/152 | 11/149 | 26/150 | 10/57 | 31/145 |
| Frankfurter | % | | | | | 6.1 | 5.6 | 16.0 | 17.7 | 21.0 |
| | # | | | | | 10/164 | 9/161 | 26/162 | 11/62 | 33/157 |
| Reed | % | | | | | | 8.1 | 16.1 | 14.5 | 20.5 |
| | # | | | | | | 13/160 | 26/161 | 9/62 | 32/156 |
| Stone | % | | | | | | | 9.5 | 13.1 | 19.6 |
| | # | | | | | | | 15/158 | 8/61 | 30/153 |
| Hughes | % | | | | | | | | 1.6 | 9.1 |
| | # | | | | | | | | 1/61 | 14/154 |
| McReynolds | % | | | | | | | | | 14.3 |
| | # | | | | | | | | | 8/56 |
| Roberts | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 6
DISAGREEMENT RATES—OCTOBER 1941 TERM

| | | Douglas (149) ^a | Black (147) | Murphy (149) | Reed (147) | Byrnes (151) | Jackson (127) | Frankfurter (151) | Stone (146) | Roberts (109) |
|-------------|-----|-------------------------------|----------------|-----------------|---------------|-----------------|------------------|----------------------|----------------|------------------|
| Douglas | % b | | 2.1 | 10.9 | 17.2 | 18.8 | 24.0 | 25.5 | 29.9 | 36.1 |
| | # c | | 3/145 | 16/147 | 25/145 | 28/149 | 30/125 | 38/149 | 43/144 | 39/108 |
| Black | % | | | 6.9 | 16.1 | 14.3 | 21.0 | 23.8 | 27.5 | 34.3 |
| | # | | | 10/145 | 23/143 | 21/147 | 26/124 | 35/147 | 39/142 | 36/105 |
| Murphy | % | | | | 16.6 | 16.1 | 22.0 | 18.8 | 20.1 | 31.2 |
| | # | | | | 24/145 | 24/149 | 28/127 | 28/149 | 29/144 | 34/109 |
| Reed | % | | | | | 16.3 | 13.7 | 15.0 | 15.4 | 20.8 |
| | # | | | | | 24/147 | 17/124 | 22/147 | 22/143 | 22/106 |
| Byrnes | % | | | | | | 12.6 | 11.9 | 14.4 | 20.2 |
| | # | | | | | | 16/127 | 18/151 | 21/146 | 22/109 |
| Jackson | % | | | | | | | 14.2 | 18.7 | 19.1 |
| | # | | | | | | | 18/127 | 23/123 | 18/94 |
| Frankfurter | % | | | | | | | | 11.0 | 22.0 |
| | # | | | | | | | | 16/146 | 24/109 |
| Stone | % | | | | | | | | | 14.2 |
| | # | | | | | | | | | 15/106 |
| Roberts | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 7
DISAGREEMENT RATES—OCTOBER 1942 TERM

| | | Murphy (129) ^a | Black (144) | Douglas (145) | Rutledge (51) | Jackson (137) | Reed (146) | Stone (146) | Frankfurter (147) | Roberts (145) |
|-----------------------|-----|------------------------------|----------------|------------------|------------------|------------------|---------------|----------------|----------------------|------------------|
| Murphy | % b | | 12.6 | 12.6 | 18.2 | 25.2 | 27.3 | 27.3 | 29.5 | 34.6 |
| | # c | | 16/127 | 16/127 | 8/44 | 31/123 | 35/128 | 35/128 | 38/129 | 44/127 |
| Black | % | | | 2.8 | 7.8 | 25.4 | 22.4 | 25.2 | 29.2 | 33.8 |
| | # | | | 4/142 | 4/51 | 34/134 | 32/143 | 36/143 | 42/144 | 48/142 |
| Douglas | % | | | | 7.8 | 24.4 | 22.9 | 25.0 | 26.2 | 34.3 |
| | # | | | | 4/51 | 33/135 | 33/144 | 36/144 | 38/145 | 49/143 |
| Rutledge ^d | % | | | | | 18.4 | 24.0 | 30.0 | 27.5 | 36.7 |
| | # | | | | | 9/49 | 12/50 | 15/50 | 14/51 | 18/49 |
| Jackson | % | | | | | | 14.7 | 16.2 | 16.8 | 20.0 |
| | # | | | | | | 20/136 | 22/136 | 23/137 | 27/135 |
| Reed | % | | | | | | | 16.2 | 10.3 | 18.8 |
| | # | | | | | | | 22/145 | 15/146 | 27/144 |
| Stone | % | | | | | | | | 14.4 | 16.7 |
| | # | | | | | | | | 21/146 | 24/144 |
| Frankfurter | % | | | | | | | | | 17.2 |
| | # | | | | | | | | | 25/145 |
| Roberts | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

d Rutledge's disagreement rates suggest that he was the most liberal Justice during the Term. The rates are skewed, however. Careful examination of the votes during the final part of the Term, when Rutledge was participating, reveals that Murphy, Black, and Douglas were more liberal.

TABLE 8
DISAGREEMENT RATES—OCTOBER 1943 TERM

| | | Murphy (127)a | Douglas (129) | Black (127) | Rutledge (128) | Jackson (129) | Reed (129) | Stone (128) | Frankfurter (130) | Roberts (123) |
|-------------|----|------------------|------------------|----------------|-------------------|------------------|---------------|----------------|----------------------|------------------|
| Murphy | %b | | 12.7 | 12.9 | 11.8 | 30.1 | 29.4 | 27.2 | 33.1 | 42.5 |
| | #c | | 16/126 | 16/124 | 15/127 | 37/123 | 37/126 | 34/125 | 42/127 | 51/120 |
| Douglas | % | | | 8.7 | 16.5 | 24.4 | 23.4 | 28.3 | 31.8 | 46.7 |
| | # | | | 11/126 | 21/127 | 30/123 | 30/128 | 36/127 | 41/129 | 57/122 |
| Black | % | | | | 15.7 | 23.1 | 24.6 | 25.6 | 29.1 | 43.3 |
| | # | | | | 20/127 | 28/121 | 31/126 | 32/125 | 37/127 | 52/120 |
| Rutledge | % | | | | | 23.8 | 22.0 | 23.0 | 28.1 | 36.5 |
| | # | | | | | 29/122 | 28/127 | 29/126 | 36/128 | 43/121 |
| Jackson | % | | | | | | 21.1 | 24.6 | 17.7 | 32.2 |
| | # | | | | | | 26/123 | 30/122 | 22/124 | 38/118 |
| Reed | % | | | | | | | 15.7 | 15.5 | 29.3 |
| | # | | | | | | | 20/127 | 20/129 | 36/123 |
| Stone | % | | | | | | | | 18.0 | 30.0 |
| | # | | | | | | | | 23/128 | 36/121 |
| Frankfurter | % | | | | | | | | | 24.4 |
| | # | | | | | | | | | 30/123 |
| Roberts | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 9
DISAGREEMENT RATES—OCTOBER 1944 TERM

| | | Black (154)a | Douglas (149) | Rutledge (156) | Murphy (150) | Reed (156) | Jackson (147) | Frankfurter (154) | Stone (154) | Roberts (153) |
|-------------|----|-----------------|------------------|-------------------|-----------------|---------------|------------------|----------------------|----------------|------------------|
| Black | %b | | 11.5 | 12.3 | 14.2 | 21.4 | 27.6 | 31.6 | 36.2 | 55.0 |
| | #c | | 17/148 | 19/154 | 21/148 | 33/154 | 40/145 | 48/152 | 55/152 | 83/151 |
| Douglas | % | | | 12.8 | 15.2 | 16.8 | 26.1 | 29.9 | 31.3 | 47.6 |
| | # | | | 19/149 | 22/145 | 25/149 | 37/142 | 44/147 | 46/147 | 70/147 |
| Rutledge | % | | | | 12.0 | 20.5 | 23.8 | 26.0 | 32.5 | 46.4 |
| | # | | | | 18/150 | 32/156 | 35/147 | 40/154 | 50/154 | 71/153 |
| Murphy | % | | | | | 18.7 | 23.6 | 26.8 | 34.2 | 43.5 |
| | # | | | | | 28/150 | 34/144 | 40/149 | 51/149 | 64/147 |
| Reed | % | | | | | | 21.1 | 20.1 | 18.8 | 34.6 |
| | # | | | | | | 31/147 | 31/154 | 29/154 | 53/153 |
| Jackson | % | | | | | | | 15.1 | 19.3 | 32.6 |
| | # | | | | | | | 22/146 | 28/145 | 47/144 |
| Frankfurter | % | | | | | | | | 14.4 | 22.5 |
| | # | | | | | | | | 22/153 | 34/151 |
| Stone | % | | | | | | | | | 23.2 |
| | # | | | | | | | | | 35/151 |
| Roberts | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

TABLE 10
DISAGREEMENT RATES—OCTOBER 1945 TERM

| | | Douglas (131) ^a | Rutledge (131) | Black (132) | Murphy (130) | Reed (131) | Stone (96) | Burton (134) | Frankfurter (132) |
|-------------|----------------|-------------------------------|-------------------|----------------|-----------------|---------------|---------------|-----------------|----------------------|
| Douglas | % ^b | | 25.2 | 16.3 | 21.7 | 25.4 | 33.3 | 29.8 | 31.8 |
| | # ^c | | 33/131 | 21/129 | 28/129 | 33/130 | 32/96 | 39/131 | 41/129 |
| Rutledge | % | | | 21.2 | 16.2 | 25.2 | 26.5 | 30.6 | 21.2 |
| | # | | | 28/132 | 21/130 | 33/131 | 26/98 | 41/134 | 28/132 |
| Black | % | | | | 17.2 | 20.0 | 26.0 | 22.7 | 30.8 |
| | # | | | | 22/128 | 26/130 | 26/96 | 30/132 | 40/130 |
| Murphy | % | | | | | 20.5 | 21.1 | 25.4 | 27.3 |
| | # | | | | | 26/127 | 20/95 | 33/130 | 35/128 |
| Reed | % | | | | | | 10.4 | 17.6 | 25.6 |
| | # | | | | | | 10/96 | 23/131 | 33/129 |
| Stone | % | | | | | | | 13.3 | 20.8 |
| | # | | | | | | | 13/98 | 20/96 |
| Burton | % | | | | | | | | 24.2 |
| | # | | | | | | | | 32/132 |
| Frankfurter | % | | | | | | | | |
| | # | | | | | | | | |

a Total number of cases in which Justice participated

b Disagreement rate

c Ratio of disagreements to number of cases in which both Justices participated

APPENDIX B

TABLE 1

DISSENT RATES—OCTOBER 1936 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|--------------|-------|----------|-------|--------|
| Stone | 94 | 3 | 3.2% | -8.1% |
| Cardozo | 149 | 6 | 4.0% | -7.7% |
| Brandeis | 144 | 4 | 2.8% | -8.3% |
| Hughes | 149 | 2 | 1.3% | -2.2% |
| Roberts | 147 | 4 | 2.7% | -0.1% |
| Van Devanter | 147 | 11 | 7.5% | +6.1% |
| Sutherland | 149 | 14 | 9.4% | +5.9% |
| Butler | 148 | 18 | 12.2% | +8.8% |
| McReynolds | 149 | 20 | 13.4% | +9.2% |

TABLE 2

DISSENT RATES—OCTOBER 1937 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|------------|-------|----------|-------|--------|
| Cardozo | 49 | 4 | 8.2% | +4.2% |
| Black | 150 | 12 | 8.0% | --- |
| Reed | 44 | 2 | 4.5% | --- |
| Stone | 146 | 4 | 2.7% | -0.5% |
| Brandeis | 151 | 1 | 0.7% | -2.1% |
| Hughes | 148 | 0 | 0.0% | -1.3% |
| Roberts | 149 | 3 | 2.0% | -0.7% |
| Butler | 152 | 21 | 13.8% | +1.6% |
| Sutherland | 55 | 9 | 16.4% | +7.0% |
| McReynolds | 152 | 28 | 18.4% | +5.0% |

TABLE 3
DISSENT RATES—OCTOBER 1938 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 18 | 1 | 5.6% | --- |
| Black | 141 | 15 | 10.6% | +2.6% |
| Frankfurter | 65 | 2 | 3.1% | --- |
| Reed | 135 | 6 | 4.4% | -0.1% |
| Stone | 139 | 5 | 3.6% | +0.9% |
| Brandeis | 65 | 0 | 0.0% | -0.7% |
| Hughes | 140 | 5 | 3.6% | +3.6% |
| Roberts | 128 | 12 | 9.4% | +7.4% |
| Butler | 140 | 32 | 22.9% | +9.1% |
| McReynolds | 139 | 34 | 24.5% | +6.1% |

TABLE 4
DISSENT RATES—OCTOBER 1939 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Murphy | 57 | 1 | 1.8% | --- |
| Black | 137 | 4 | 2.9% | -7.7% |
| Douglas | 136 | 4 | 2.9% | -2.7% |
| Frankfurter | 137 | 2 | 1.5% | -1.6% |
| Reed | 130 | 1 | 0.8% | -3.6% |
| Stone | 135 | 3 | 2.2% | -1.4% |
| Hughes | 136 | 14 | 10.3% | +6.7% |
| Roberts | 135 | 23 | 17.0% | +7.6% |
| McReynolds | 120 | 32 | 26.7% | +2.2% |

TABLE 5
DISSENT RATES—OCTOBER 1940 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 160 | 15 | 9.4% | + 6.5% |
| Black | 162 | 15 | 9.3% | + 6.4% |
| Murphy | 153 | 6 | 3.9% | + 2.1% |
| Frankfurter | 165 | 2 | 1.2% | - 0.3% |
| Reed | 164 | 8 | 4.9% | + 4.1% |
| Stone | 161 | 7 | 4.3% | + 2.1% |
| Hughes | 162 | 24 | 14.8% | + 4.5% |
| McReynolds | 62 | 9 | 14.5% | -12.2% |
| Roberts | 157 | 31 | 19.7% | + 2.7% |

TABLE 6
DISSENT RATES—OCTOBER 1941 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 149 | 28 | 18.8% | + 9.4% |
| Black | 147 | 21 | 14.3% | + 5.0% |
| Murphy | 149 | 18 | 12.1% | + 8.2% |
| Reed | 147 | 14 | 9.5% | + 4.5% |
| Byrnes | 151 | 12 | 7.9% | --- |
| Jackson | 127 | 10 | 7.9% | --- |
| Frankfurter | 151 | 16 | 10.6% | + 9.4% |
| Stone | 146 | 21 | 14.4% | +10.1% |
| Roberts | 109 | 18 | 16.5% | - 3.2% |

TABLE 7
DISSENT RATES—OCTOBER 1942 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Murphy | 129 | 25 | 19.4% | +7.3% |
| Black | 144 | 22 | 15.3% | +1.0% |
| Douglas | 145 | 22 | 15.2% | -3.6% |
| Rutledge | 51 | 2 | 3.9% | --- |
| Jackson | 137 | 15 | 10.9% | +3.0% |
| Reed | 146 | 14 | 9.6% | +0.1% |
| Stone | 146 | 16 | 11.0% | -3.4% |
| Frankfurter | 147 | 20 | 13.6% | +3.0% |
| Roberts | 145 | 29 | 20.0% | +3.5% |

TABLE 8
DISSENT RATES—OCTOBER 1943 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Murphy | 127 | 21 | 16.5% | - 2.9% |
| Douglas | 129 | 22 | 17.1% | + 1.9% |
| Black | 127 | 18 | 14.2% | - 1.1% |
| Rutledge | 128 | 15 | 11.7% | + 7.8% |
| Jackson | 124 | 19 | 15.3% | + 4.4% |
| Reed | 129 | 18 | 14.0% | + 4.4% |
| Stone | 128 | 16 | 12.5% | + 1.5% |
| Frankfurter | 130 | 21 | 16.2% | + 2.6% |
| Roberts | 123 | 37 | 30.1% | +11.1% |

TABLE 9
DISSENT RATES—OCTOBER 1944 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Black | 154 | 28 | 18.2% | +4.0% |
| Douglas | 149 | 23 | 15.4% | -1.7% |
| Rutledge | 156 | 23 | 14.7% | +3.0% |
| Murphy | 150 | 22 | 14.7% | -1.8% |
| Reed | 156 | 17 | 10.9% | -3.1% |
| Jackson | 147 | 18 | 12.2% | -3.1% |
| Frankfurter | 154 | 25 | 16.2% | 0.0% |
| Stone | 154 | 32 | 20.8% | +8.3% |
| Roberts | 153 | 55 | 35.9% | +5.8% |

TABLE 10
DISSENT RATES—OCTOBER 1945 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 132 | 22 | 16.7% | +1.3% |
| Rutledge | 134 | 21 | 15.7% | +1.0% |
| Black | 132 | 16 | 12.1% | -6.1% |
| Murphy | 130 | 12 | 9.2% | -5.5% |
| Reed | 131 | 14 | 10.7% | -0.2% |
| Stone | 98 | 14 | 14.3% | -6.5% |
| Burton | 134 | 21 | 15.7% | --- |
| Frankfurter | 132 | 29 | 22.0% | +5.8% |