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THE COURT THAT CHALLENGED THE NEW DEAL (1930-1936)*

Russell W. Galloway, Jr.**

I. INTRODUCTION

This article discusses voting patterns of the United States Supreme Court during the October 1929 through 1935 Terms, the final years of the conservative era that lasted from roughly 1890 to the constitutional revolution of 1937. This was the period in which the Hughes Court's economic conservatives challenged the New Deal.

The predecessor Taft Court (1921-1929) had been dominated by a six-vote conservative bloc. At the core of this group were the celebrated Four Horsemen—Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler, while Chief Justice William Howard Taft and Edward T. Sanford provided the fifth and sixth votes. Oliver Wendell Holmes, Louis D. Brandeis, and Harlan Fiske Stone comprised the liberal, second bloc, which dissented in a small, but significant number of cases.

In early 1930, two events occurred which marked a minor turning point in Supreme Court history. On February 3, Chief Justice Taft resigned. On March 8, Sanford died. Suddenly the conservatives had only a narrow four-three margin. Should President Hoover select moderately liberal Justices, the balance of power on the Court could shift.

Much was at stake. In October, 1929, the stock market crashed, and the nation was headed into its worst depression. Over the next few years, demands for unprecedented government regulation of economic matters emerged. The fate of such demands depended heavily on whether the Court would give up the constitutionalized system of *laissez faire* economic policy that had emerged during the prior forty years. That, in turn, depended on the views of the two new Justices.

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This article will examine the voting patterns of the Court during the period from October, 1929 to the end of the October 1935 Term. The voting data will be considered one Term at a time.¹ Subsequently, the general trends and characteristics of the period as a whole will be summarized.

II. THE VOTING PATTERNS

A. *The October 1929 Term*

October, 1929, the month in which the stock market collapsed, was the start of the Term in which the Taft Court (1921-1929) ended and the Hughes Court (1930-1941) began. During the first few months of the October 1929 Term, the line-up of Justices occupying the bench was the same as it had been since 1925 when Stone took office. As mentioned previously, the Court was dominated by a six-vote conservative bloc: Van Devanter, McReynolds, Sutherland, Butler, Chief Justice Taft, and Sanford. Holmes, Brandeis, and Stone comprised a three-vote liberal bloc.

Taft participated in the first thirty-four cases of the Term. During this stretch, neither Taft, Sanford, nor the archconservative McReynolds cast a single dissent. Butler, Sutherland, and Van Devanter dissented once to the right in a substantive due process case.² In contrast, the liberals, Holmes and Brandeis, dissented together five times, with Stone joining them in three cases.³ The following table shows the Court's line-up in this twilight phase of the Taft era.

1. In brief, the statistical method used is the following. Votes were coded for all decisions with the majority or plurality opinions written by identified Justices. The Justices' disagreement and dissent rates were calculated. These data are presented in Appendices A and B, which contain disagreement and dissent tables for each of the seven Terms covered by the article. The disagreement and dissent data were then inspected to determine such matters as bloc alignments, relative dominance, changes in balance of power, and behavior of individual Justices. The findings, together with illustrative case authorities, are presented separately for each Term in the next section.

2. *Bromley v. McCaughn*, 280 U.S. 124 (1929).

3. *New Jersey Bell Tel. Co. v. State Bd. of Taxes and Assessment*, 280 U.S. 338 (1929) (6-2) (dormant commerce clause); *International Shoe Co. v. FTC*, 280 U.S. 291 (1929) (6-3) (antitrust); *United Rys. & Elec. Co. v. West*, 280 U.S. 234 (1929) (6-3) (substantive due process; rate regulation); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1929) (7-2) (due process; tax situs); *Railroad Comm'n v. Los Angeles Ry. Corp.*, 280 U.S. 145 (1929) (6-3) (rate regulation).

TABLE 1
ALIGNMENT OF JUSTICES —
START OF OCTOBER 1929 TERM

LIBERAL	MODERATE	CONSERVATIVE
Holmes Brandeis Stone		Van Devanter McReynolds Sutherland Butler Taft Sanford

Both Taft and Sanford maintained their conservative voting patterns during their final months on the Court. They disagreed with the liberals much more than with the Four Horsemen, as the following table shows.

TABLE 2
DISAGREEMENT RATES; TAFT AND SANFORD —
OCTOBER 1929 TERM

	DISAGREEMENT RATE WITH TAFT	DISAGREEMENT RATE WITH SANFORD
LIBERALS		
Holmes	17.6%	10.8%
Brandeis	14.7%	7.7%
Stone	9.1%	4.7%
CONSERVATIVES		
McReynolds	0.0%	0.0%
Sutherland	2.9%	1.5%
Van Devanter	2.9%	3.1%
Butler	2.9%	3.1%

In December, 1929, Chief Justice William Howard Taft was disabled by illness. He did not participate after December 9, and resigned February 3, 1930. Moving swiftly, President Hoover nominated Charles Evans Hughes to be Chief Justice. Hughes, one of the giants of Supreme Court history, had been an Associate Justice from 1910 to 1916 and was subsequently Secretary of State and a Wall Street corporate lawyer. Hughes's nomination was greeted by a storm of liberal opposition, but he was confirmed quickly and took office on February 24, 1930.

Roughly two weeks later, on March 8, 1930, Edward Sanford

died. Of the Taft Court's conservative wing, only the Four Horsemen remained. After the nomination of the conservative John J. Parker was rejected by the Senate, Hoover nominated Owen J. Roberts, a former law professor, Teapot Dome special prosecutor, and successful Philadelphia attorney. Roberts took his seat on April 21, 1930, marking the start of seven years with unusually stable personnel. Only one personnel change, the Holmes-Cardozo succession (1932), occurred during the rest of the 1929 to 1935 period.

During the portion of the Term after Taft stopped participating, the Court decided an additional one hundred cases. Analysis of these cases provides little useful information about voting patterns; all but five were unanimous. Holmes, Brandeis, and Stone dissented together in four cases,⁴ while Butler and Van Devanter dissented in the fifth.⁵ Hughes participated in only two divided cases and sided with the Four Horsemen in both. Roberts did not participate in any cases since he had been seated on the last decision day of the Term.⁶ No case of lasting importance was decided.

Analysis of voting data for the October 1929 Term, as a whole, reveals several interesting patterns. First, dissent and disagreement rates were very low in comparison to more recent years. Holmes's 7.5% dissent rate was the highest on the Court.⁷ Among those Justices who sat during the entire Term, all disagreement rates were below 10%.⁸ Even Holmes and Butler, at the Court's left and right extremes, agreed in 91% of the cases.

Second, when disagreement did occur, the Court divided along rather predictable conservative-liberal lines. Both the conservative and liberal wings functioned as tight voting blocs with nearly 100% agreement rates. This can be deduced from Table 3 which shows the cohesion within the blocs and the higher, but still very low, level of disagreement between the blocs.

Third, when the Court divided, the conservatives usually dominated. The conservatives won nine of the eleven cases involving bloc

4. *Baldwin v. Missouri*, 281 U.S. 586 (1930) (6-3) (due process; tax situs); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930) (6-3) (intergovernmental tax immunities); *Employers Liability Assurance Co. v. Cook*, 281 U.S. 233 (1930) (6-3) (workers' compensation); *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) (6-3) (workers' compensation).

5. *Superior Oil Co. v. Mississippi ex rel. Knox*, 280 U.S. 390 (1930) (6-2) (tax).

6. Roberts was seated on June 2, 1930.

7. See *infra* Appendix B, Table 1 for complete data on dissent rates during the Term.

8. See *infra* Appendix A, Table 1 for complete data on disagreement rates during the Term.

TABLE 3
DISAGREEMENT RATES — OCTOBER 1929 TERM

	HOLMES	BRANDEIS	STONE	McREYNOLDS	SUTHERLAND	VAN DEVANTER	BUTLER
LIBERALS							
Holmes	—	0.8%	1.5%	7.6%	8.3%	9.0%	9.0%
Brandeis		—	0.8%	6.9%	7.5%	8.3%	8.3%
Stone			—	5.4%	6.1%	6.9%	6.9%
CONSERVATIVES							
McReynolds				—	0.8%	1.5%	1.5%
Sutherland					—	0.8%	0.8%
Van Devanter						—	0.0%
Butler							—

voting.⁹ The Four Horsemen cast a total of only five dissents, while the three liberals, in contrast, cast twenty-six dissents as shown by the following table.

TABLE 4
DISSENT RATES — OCTOBER 1929 TERM

	DISSENTS	DISSENT RATE
LIBERALS		
Holmes	10	7.5%
Brandeis	9	6.7%
Stone	7	5.4%
CONSERVATIVES		
McReynolds	0	0.0%
Sutherland	1	0.7%
Van Devanter	2	1.5%
Butler	2	1.5%

In summary, the October 1929 Term was broken by the Taft/Hughes and Sanford/Roberts successions. In the early months before Taft's retirement, the Court was dominated by its established six-vote conservative bloc. The three-vote liberal bloc cast occasional dissents. After Taft's and Sanford's retirements, the Four Horsemen retained control and the three liberals continued dissenting occasionally as a bloc. Dissent and disagreement rates were very low, and no major cases were decided. All in all, apart from personnel changes, it was an uninteresting Term.

B. *The October 1930 Term*¹⁰

After the stock market crash of October, 1929, the United States moved steadily into the Great Depression: stock prices plummeted, production and construction dropped. Although President Hoover broke with traditional *laissez faire* economic theory and made some desultory efforts to use government programs to fight the hard times, the remedies were unsuccessful. Republican fortunes plunged along with the economy. In November, 1930, the Democrats swept the off-year elections and took control of Congress. The nation was shifting to the left.

Voting patterns during the October 1930 Term were similar to those of the prior Term in some respects. Dissent and disagreement rates remained in the very low range that was characteristic of that era of Supreme Court history. Average dissents per case were a meager 0.28, up only marginally from the 0.26 figure for the prior Term. The highest disagreement rate on the Court was only 10.1% (Stone-McReynolds). Once again Stone, Brandeis, and Holmes comprised a close voting bloc and occupied the Court's left wing. The Four Horsemen held down the right wing, as they had in the October 1929 Term. Table 5 illustrates the alignment at the Court's extremes. The only major change in the alignment of these seven Justices was McReynolds's sharp shift to the right, as he increased his solo dissents and moved away from the other conservatives into a position by himself on the far right.

The most interesting developments concerned the voting patterns of Hughes and Roberts, the two newest Justices. The October 1930 Term was Hughes's first full Term and the first Term in which Roberts participated in the voting. Given the four-three bloc alignment of the remaining seven Justices, Hughes and Roberts controlled the outcome in divided cases, so their performance was of great interest and importance. During the October 1930 Term, both Hughes and Roberts sided more with the liberals than with the conservatives. Hughes was closely aligned with the liberals while

10. As in the prior Term, the cases decided during the October 1930 Term were extremely dull. The most memorable cases were *Stromberg v. California*, 283 U.S. 359 (1931) (freedom of speech, the "red flag" case), and *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press; prior restraints), but they stand out like mountain peaks above the desert of dry economic cases that occupied most of the Court's time. More than 60 of the 166 cases decided during the Term involved tax law.

TABLE 5
DISAGREEMENT RATES — OCTOBER 1930 TERM

	STONE	BRANDEIS	HOLMES	VAN DEVANTER	SUTHERLAND	BUTLER	McREYNOLDS
LIBERALS							
Stone	—	0.6%	1.3%	6.3%	7.0%	7.6%	10.1%
Brandeis		—	0.6%	5.4%	6.1%	6.6%	9.6%
Holmes			—	4.8%	3.6%	6.0%	9.6%
CONSERVATIVES							
Van Devanter				—	0.6%	1.2%	6.0%
Sutherland					—	1.8%	5.5%
Butler						—	4.8%
McReynolds							—

Roberts was closer to the center. The following table quantifies disagreement rates between Hughes and Roberts and the remainder of the Court.

TABLE 6
HUGHES'S & ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1930 TERM

	DISAGREEMENT RATE WITH HUGHES	DISAGREEMENT RATE WITH ROBERTS
LIBERALS		
Stone	1.9%	2.6%
Brandeis	1.3%	3.1%
Holmes	0.6%	2.5%
Average	1.3%	2.7%
CONSERVATIVES		
VanDevanter	3.8%	3.7%
Sutherland	4.4%	4.3%
Butler	5.1%	4.9%
McReynolds	8.9%	7.4%
Average	5.5%	5.1%

The result of Hughes's and Roberts's siding with the liberal wing was a small, but significant, shift to the left in the Court's balance of power. The liberals' dissent rates went down; the conservatives' dissent rates went up. For the first time in years, the liberals

fared better than the conservatives in the won-lost column, although the margin was very small as the following table shows.

TABLE 7
DISSENT RATES—OCTOBER 1929 & 1930 TERMS

	OCT. 1929 TERM	OCT. 1930 TERM	CHANGE
LIBERALS			
Stone	5.4%	3.8%	-1.6%
Brandeis	6.7%	3.0%	-3.7%
Holmes	<u>7.5%</u>	<u>2.4%</u>	<u>-5.1%</u>
Average	6.5%	3.1%	-3.4%
CONSERVATIVES			
Van Devanter	1.5%	2.4%	+0.9%
Sutherland	0.7%	3.0%	+2.3%
Butler	1.5%	3.6%	+2.1%
McReynolds	<u>0.0%</u>	<u>7.2%</u>	<u>+7.2%</u>
Average	0.9%	4.1%	+3.2%

The liberals won seven of the twelve decisions in which bloc-voting was present.¹¹

The October 1930 Term was the last full Term for another of the giants of Supreme Court history, Oliver Wendell Holmes, Jr. Holmes is normally considered a leader of the Court's liberal wing, and the voting data for the Term confirm this image. Holmes disagreed with his old partner and long-time friend, Brandeis, in only one out of 166 decisions during the Term. Similarly, he disagreed with Stone in only two out of 158 decisions. In contrast, he disagreed with the conservative McReynolds in sixteen of their joint decisions, or nearly 10%. The following table shows Holmes's alignment in his final full Term.

11. The liberals won *Near v. Minnesota*, 283 U.S. 697 (1931) (5-4) (freedom of speech); *State Bd. of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931) (5-4) (tax; equal protection); *Stromberg v. California*, 283 U.S. 359 (1931) (7-2) (freedom of speech); *Louisville & N.R.R. Co. v. United States*, 282 U.S. 740 (1931) (7-2) (ICC); *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931) (6-3) (tax; intergovernmental immunities); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931) (5-4) (substantive due process; police power); and *Aluminum Castings Co. v. Routhahn*, 282 U.S. 92 (1930) (7-2) (tax). The conservatives won *United States v. Bland*, 283 U.S. 636 (1931) (5-4) (citizenship); *United States v. Macintosh*, 283 U.S. 605 (1931) (5-4) (citizenship); *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931) (6-3) (tax; intergovernmental immunities); *Coolidge v. Long*, 282 U.S. 582 (1931) (5-4) (contract clause); and *United States v. Chicago, Milwaukee, St. Paul, & Pac. R.R. Co.*, 282 U.S. 311 (1931) (6-3) (ICC).

TABLE 8
HOLMES'S DISAGREEMENT RATES —
OCTOBER 1930 TERM

Stone	1.3%
Brandeis	0.6%
Hughes	0.6%
Roberts	2.5%
Van Devanter	4.8%
Sutherland	3.6%
Butler	6.0%
McReynolds	9.6%

In summary, the October 1930 Term witnessed a minor shift to the left in the Court's balance of power. The newly seated Hughes and Roberts sided with the liberals more than with the conservatives, giving the liberals a slight edge in the won-lost column. Dissent rates went down on the left and up on the right. Otherwise, the voting patterns were quite similar to prior Terms.

C. *The October 1931 Term*

One of the most widely noted successions in Supreme Court history occurred during the October 1931 Term. On January 11, 1932, the venerable Holmes resigned leaving a gaping hole in the liberal ranks.¹² President Herbert Hoover, a moderate conservative, might have pushed the Court farther to the right with a conservative appointment had he been left to his own devices. However, a groundswell of public support for Benjamin Nathan Cardozo as the only worthy successor of the great Holmes preempted the choice. Cardozo, a liberal, was sworn in on March 14, 1932, filling the gap in the liberal forces and leaving the Court's balance of power unchanged.

The October 1931 Term shared several common features with prior Terms. First, the high level of agreement among the Justices continued. More than four out of every five cases were unanimous. Disagreement rates crept up somewhat, but rates substantially above 10% remained rare.¹³ Second, the decisions issued by the Court remained dull and commonplace. No major cases were decided, and it

12. Holmes remained in close alignment with the liberals, Brandeis and Stone, in his final months on the Court. He agreed with Brandeis in all 45 decisions in which both participated. He agreed with Stone in all but one of 42 cases.

13. See *infra* Appendix A, Table 3.

is somewhat difficult to find decisions worthy of attention.¹⁴ Third, the Court continued to split into a three-vote liberal wing and a four-vote conservative wing, with Hughes and Roberts holding the deciding votes in divided cases.

Voting data for the October 1931 Term show a marked shift to the right in the balance of power. The liberals' dissent rates shot up to nearly triple the levels of the prior Term. The conservatives' dissent rates, in contrast, hovered slightly below the rather low levels of the prior Term. The turn toward greater conservative power is illustrated by the following table.

TABLE 9
DISSENT RATES—OCTOBER 1930 & 1931 TERMS

	OCT. 1930 TERM	OCT. 1931 TERM	CHANGE
LIBERALS			
Holmes	2.4%	11.1%	+8.7%
Stone	3.8%	9.1%	+5.3%
Brandeis	3.0%	8.7%	+5.7%
Average	3.1%	9.2%	+6.1%
CONSERVATIVES			
Sutherland	3.0%	2.0%	-1.0%
Van Devanter	2.4%	2.7%	+0.3%
Butler	3.6%	3.3%	-0.3%
McReynolds	7.2%	4.0%	-3.2%
Average	4.1%	3.0%	-1.1%

The shift to the right coincided with a major change in the voting patterns of Hughes and Roberts. In contrast to the prior Term when they were more closely aligned with the liberals,¹⁵ these two Justices crossed over into the conservative wing in the October 1931 Term. Both disagreed with the liberals more than with the conservatives, as the following table shows.

14. The most famous cases were probably *Nixon v. Condon*, 286 U.S. 73 (1932) (5-4) (equal protection; white primary); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (5-2) (substantive due process); and *Crowell v. Benson*, 285 U.S. 22 (1932) (6-3) (substantive due process). A few major criminal procedure decisions were issued. *See, e.g.*, *United States v. Lefkowitz*, 285 U.S. 452 (1932) (8-0) (search and seizure); *Blockburger v. United States*, 284 U.S. 299 (1932) (9-0) (multiple punishment). In general, however, the dreary parade of business, tax, and other economic cases spawned by the Depression continued.

15. *See supra* Table 6.

TABLE 10
HUGHES'S & ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1931 TERM

	DISAGREEMENT RATE WITH HUGHES	DISAGREEMENT RATE WITH ROBERTS
LIBERALS		
Holmes	11.1%	11.1%
Stone	9.2%	7.8%
Brandeis	8.8%	7.4%
Average	9.3%	8.1%
CONSERVATIVES		
Sutherland	2.0%	3.4%
VanDevanter	2.0%	4.1%
Butler	2.7%	4.7%
McReynolds	4.1%	5.4%
Average	2.7%	4.4%

The added support from Hughes and Roberts gave the Four Horsemen the votes they needed to fill out a majority in divided cases.¹⁶

Cardozo participated in a little over one-third of the 150 cases decided during the Term, a large enough number to provide a clear picture of his liberal leanings. He agreed with Stone in all forty-eight cases in which both voted and disagreed with Brandeis in only one of fifty-one cases. In contrast, he disagreed with both Butler and Van Devanter in 15.7% of the decisions, the highest disagreement rate on the entire Court since Hughes took over in 1930. The following table shows Cardozo's close alignment with the liberals in the October 1931 Term.

16. Conservative victories in divided cases included the following: *Colorado v. Symes*, 286 U.S. 510 (1932) (7-2) (removal); *Reed v. Allen*, 286 U.S. 191 (1932) (6-3) (civil procedure); *Coombes v. Getz*, 285 U.S. 434 (1932) (6-3) (contract clause); *Heiner v. Bonnan*, 285 U.S. 312 (1932) (6-2) (substantive due process; conclusive presumption); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (6-2) (substantive due process; business affected with a public interest); *Crowell v. Benson*, 285 U.S. 22 (1932) (5-3) (Longshoremen's and Harbor Workers' Compensation Act); *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498 (1932) (6-2) (tax); *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932) (6-3) (due process; tax situs); *Bradford Elec. Light Co. v. Clapper*, 284 U.S. 221 (1931) (6-3) (federal jurisdiction); *United States v. Baltimore & Ohio R.R. Co.*, 284 U.S. 195 (1931) (6-3) (ICC); and *Chicago, Rock Island & Pac. Ry. Co. v. United States*, 284 U.S. 80 (1931) (6-3) (ICC; substantive due process, etc.).

The liberal wing won only three split decisions in which more than one Justice dissented. *United States v. Swift & Co.*, 286 U.S. 106 (1932) (4-2) (antitrust); *Nixon v. Condon*, 286 U.S. 73 (1932) (5-4) (equal protection; white primary); *Pacific Co. v. Johnson*, 285 U.S. 480 (1932) (6-3) (tax; contract clause).

TABLE 11
 CARDOZO'S DISAGREEMENT RATES —
 OCTOBER 1931 TERM

LIBERALS	
Brandeis	0.0%
Stone	<u>2.0%</u>
Average	1.0%
CONSERVATIVES	
Sutherland	12.0%
Van Devanter	15.7%
Butler	15.7%
McReynolds	<u>11.8%</u>
Average	13.7%

In summary, the balance of power shifted back to the conservatives during the October 1931 Term. Dissent rates on the left tripled the levels of the prior Term. Dissent rates of the conservatives fell to one-third the level of the liberals. The change was brought about by Hughes's and Roberts's sharp shift to the right. Even Cardozo's very liberal voting pattern was not enough to offset the conservative trend.

D. *The October 1932 Term*¹⁷

The Term opened roughly a month before the 1932 election swept Franklin Delano Roosevelt into office. The nation's economy was in disastrous shape. Despite Hoover's efforts, the Great Depression had continued to deepen, leaving 12 to 15 million Americans unemployed. It was a bitter time which called for dramatic change. Roosevelt's landslide victory over Hoover in the November presidential election signalled the beginning of a more liberal era in American history, an era in which the conservative Supreme Court would soon become an anachronism.

Voting data for the October 1932 Term suggest a minor shift back toward the center. Dissent rates were down somewhat on the left and up on the right. The pendulum did not, however, swing back to the left of center. The conservatives retained a narrow margin in the won-lost statistics, as the following table shows.

17. No personnel changes occurred during the Term or during any later Term covered by this article.

TABLE 12
DISSENT RATES—OCTOBER 1931 & 1932 TERMS

	OCT. 1931 TERM	OCT. 1932 TERM	CHANGE
LIBERALS			
Stone	9.1%	7.7%	-1.4%
Cardozo	7.8%	6.5%	-1.3%
Brandeis	<u>8.7%</u>	<u>5.4%</u>	<u>-3.3%</u>
Average	8.7%	6.6%	-2.1%
CONSERVATIVES			
Sutherland	2.0%	3.0%	+1.0%
McReynolds	4.0%	4.8%	+0.8%
Butler	<u>3.3%</u>	<u>6.0%</u>	<u>+2.7%</u>
Average	3.1%	4.6%	+1.5%

The conservatives won seven of the twelve cases involving identifiable bloc-voting.¹⁸

Hughes and Roberts were approximately in the center between the Court's extremes. This represented a shift to the left from the prior Term when both Justices were more closely aligned with the Four Horsemen. As the following table shows, Hughes was almost exactly in the center, with Roberts a little right of center.

18. Conservative victories in divided cases included: *Hurn v. Oursler*, 289 U.S. 238 (1933) (7-2) (federal jurisdiction); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (6-3) (equal protection; tax); *Burnet v. Guggenheim*, 288 U.S. 280 (1933) (6-2) (tax); *Rocco v. Lehigh Valley R.R. Co.*, 288 U.S. 275 (1933) (7-2) (personal injury); *Anglo-Chilian Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933) (6-3) (dormant commerce clause); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (5-3) (conflict of laws); *ICC v. Oregon-Washington R.R. & Nav. Co.*, 288 U.S. 14 (1933) (6-3) (scope of Interstate Commerce Act).

Liberal victories included: *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287 (1933) (6-2) (substantive due process; utility rates); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (7-2) (unfair competition); *Cook v. United States*, 288 U.S. 102 (1933) (6-2) (treaties); *ICC v. New York, New Haven & Hartford R.R. Co.*, 287 U.S. 178 (1932) (4-3) (mandamus); *Powell v. Alabama*, 287 U.S. 45 (1932) (7-2) (due process; assistance of counsel).

TABLE 13
HUGHES'S & ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1932 TERM

	DISAGREEMENT RATE WITH HUGHES	DISAGREEMENT RATE WITH ROBERTS
LIBERALS		
Stone	7.3%	7.2%
Brandeis	4.9%	7.8%
Holmes	<u>6.1%</u>	<u>5.5%</u>
Average	6.1%	6.9%
CONSERVATIVES		
Sutherland	3.7%	4.2%
McReynolds	6.1%	3.6%
Butler	<u>8.0%</u>	<u>7.3%</u>
Average	5.9%	5.1%

In his first full Term, Cardozo lined up with the liberals, Stone and Brandeis, although not as tightly as in the prior Term and later Terms. He was closest to Stone and farthest from Butler and McReynolds. Table 14 elucidates Cardozo's alignment with the liberals.

TABLE 14
CARDOZO'S DISAGREEMENT RATES —
OCTOBER 1932 TERM

LIBERALS	
Stone	2.4%
Brandeis	<u>6.0%</u>
Average	4.2%
CONSERVATIVES	
Sutherland	9.6%
McReynolds	11.3%
Butler	<u>11.4%</u>
Average	10.8%

Several other patterns are worth only passing comment. As in the prior two Terms, the Court in the October 1932 Term continued to grind out the economic cases that arose from the Depression. The most famous landmark of the Term was undoubtedly *Powell v. Alabama*,¹⁹ the renowned Scottsboro case, in which the Court held for the first time that the fourteenth amendment due process clause re-

19. 287 U.S. 45 (1932).

quired appointment of counsel for indigent criminal defendants. Butler and McReynolds dissented. Other than that, the fare was meager.²⁰ Dissent and disagreement rates remained at roughly the same level as for the prior Term.²¹ The highest disagreement rate was a mere 12.7% (Stone-Butler), and only six pairs of Justices had disagreement rates above 10%. Both the liberal and conservative blocs were a little less cohesive than before. In fact, the closest trio on the Court were Hughes, Roberts, and Van Devanter who occupied the center.

In summary, Cardozo lined up with the liberal wing in the 1932 Term, leaving the Court with the same 3-2-4 conservative plurality as before the Holmes/Cardozo succession. A minor shift to the left by Hughes and Roberts caused a corresponding shift in the overall voting profile, leaving the conservative wing with a narrow edge over the liberal wing. The Term was uneventful.

E. *The October 1933 Term*

Voting patterns during the October 1933 Term were almost identical to those of the prior Term. 83.4% of the decisions were unanimous. When divisions did occur, they tended to follow the established pattern—the three liberals squaring off against the conservative Four Horsemen. The highest disagreement rates were between Stone and Cardozo on the left and McReynolds and Butler on the right. Brandeis, Van Devanter, and Sutherland had more moderate voting records. Table 15 portrays the disagreement rates among the various Justices.

The alignment of Hughes and Roberts, the Court's swing votes, was also almost identical to that of the prior Term. Hughes was slightly left of center while Roberts was slightly right of center. Hughes's voting record was similar to that of Brandeis, the most moderate member of the liberal wing. Roberts's record was similar

20. A few interesting criminal procedure cases were decided. See, e.g., *Sorrells v. United States*, 287 U.S. 435 (1933) (5-4) (entrapment); *Sgro v. United States*, 287 U.S. 206 (1932) (7-2) (search and seizure); *Grau v. United States*, 287 U.S. 124 (1932) (7-2) (search and seizure); *Gebardi v. United States*, 287 U.S. 112 (1932) (9-0) (conspiracy).

21. 83.9% of the decisions were unanimous.

TABLE 15
DISAGREEMENT RATES — OCTOBER 1933 TERM

	STONE	CARDOZO	BRANDEIS	VAN DEVANTER	SUTHERLAND	MCREYNOLDS	BUTLER
LIBERALS							
Stone	—	2.6%	5.2%	10.5%	11.8%	13.5%	14.2%
Cardozo		—	5.1%	9.0%	10.4%	12.1%	12.7%
Brandeis			—	7.7%	7.8%	10.8%	8.9%
CONSERVATIVES							
Van Devanter				—	1.3%	4.5%	3.9%
Sutherland					—	4.5%	2.6%
McReynolds						—	4.5%
Butler							—

to that of Van Devanter, the most moderate of the conservatives. Table 16 sets forth a comparative representation of the disagreement rates of Justices Hughes and Roberts.

TABLE 16
HUGHES'S & ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1933 TERM

	DISAGREEMENT RATE WITH HUGHES	DISAGREEMENT RATE WITH ROBERTS
LIBERALS		
Stone	6.5%	9.7%
Cardozo	5.1%	9.6%
Brandeis	5.1%	4.5%
Average	5.6%	7.9%
CONSERVATIVES		
Van Devanter	4.5%	4.5%
Sutherland	5.9%	3.3%
McReynolds	7.7%	6.4%
Butler	8.3%	4.5%
Average	6.6%	4.7%

As in the prior two Terms, the conservatives held a narrow advantage in the overall won-lost figures, as the following table illustrates.

TABLE 17
DISSENT RATES — OCTOBER 1933 TERM

JUSTICE	DISSENT RATE
LIBERALS	
Stone	8.4%
Cardozo	7.0%
Brandeis	5.7%
Average	<u>7.0%</u>
CONSERVATIVES	
Van Devanter	1.9%
Sutherland	3.2%
McReynolds	5.1%
Butler	5.7%
Average	<u>4.0%</u>

The conservatives won eleven of eighteen bloc-voting cases.²² With the sole exception of Butler, each Justice's dissent rate increased, pushing the average number of dissents per case to 0.42, a low figure by standards of later years, but the first average dissent rate above 0.40 since the commencement of Hughes's Chief Justiceship.

In the October 1933 Term, major cases began to reach the Court involving anti-Depression economic regulations.²³ New Deal legislation was still a year or so away from being tested in the Court, but the States had gotten an early start and their anti-Depression measures reached the Court sooner. The two most famous cases of the Term were *Home Bldg. & Loan Ass'n v. Blaisdell*²⁴ which upheld the Minnesota Mortgage Moratorium Law against a contract

22. Conservative victories in divided cases included: *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535 (1934) (5-3) (tax; equal protection); *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934) (6-3) (tax); *Reynolds v. United States*, 292 U.S. 443 (1934) (7-2) (veterans benefits); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934) (5-4) (garnishment); *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934) (5-4) (Clayton Act); *Helvering v. Falk*, 291 U.S. 183 (1934) (6-3) (tax); *Freuler v. Helvering*, 291 U.S. 35 (1934) (6-3) (tax); *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (7-2) (full faith and credit); *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933) (6-3) (taking of property).

Liberal victories included: *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566 (1934) (6-3) (substantive due process; equal protection); *Nebbia v. New York*, 291 U.S. 502 (1934) (5-4) (substantive due process; equal protection; milk price regulation); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (5-4) (contract clause; due process); *Kraus Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933) (5-4) (maritime liens).

23. "It was not until 1934 that cases involving government power to deal with Depression problems caused the Court to speak." R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 78 (1941) [hereinafter cited as R. JACKSON].

24. 290 U.S. 398 (1934).

clause challenge, and *Nebbia v. New York*²⁵ which upheld New York's maximum milk price regulation against substantive due process and equal protection challenges. In both cases, Hughes and Roberts joined the three liberals, while the Four Horsemen dissented. These two decisions gave some hope to the Roosevelt Administration that the major New Deal reforms passed during the "100 Days" might also withstand the challenge of the third branch.²⁶ Apart from *Blaisdell* and *Nebbia*, no landmark cases were decided during the Term.

The October 1933 Term, in summary, was a typical Term for the early Hughes Court; the Court was unanimous in most cases. When splits occurred, the conservative Four Horsemen held a slight advantage over the three liberals, with Hughes and Roberts casting the swing votes.

F. *The October 1934 Term*

The cases decided during the October 1934 Term were more interesting than those decided in the prior five Terms.²⁷ The flow of important cases involving government action designed to combat the Depression increased. This was the Term in which New Deal cases began to reach the Court, and the Court commenced to strike down economic reform legislation with increasing frequency. The Court's famous battle against the New Deal was on. Surprisingly, the liberals went along with the conservatives in four of the five most famous cases.²⁸ Only one of the anti-New Deal decisions involved pure bloc-voting.²⁹

25. 291 U.S. 502 (1934). *Nebbia* was a true landmark case which marked a turning point in price regulation cases. It rejected the Taft Court's narrow version of the "business affected with a public interest" doctrine and returned to the liberal doctrine of *Munn v. Illinois*, 94 U.S. 113 (1877), that government may regulate prices whenever the activities of the business enterprise actually affect the public interest.

26. "[T]he surface indications confirmed the optimists in their belief that the Court would sustain reform and experimental legislation." R. JACKSON, *supra* note 23, at 82.

27. In addition to the cases discussed below, the following are worth noting: *Grove v. Townsend*, 295 U.S. 45 (1935) (9-0) (equal protection; the white primary); *Norris v. Alabama*, 294 U.S. 587 (1935) (8-0) (jury discrimination; the second *Scottsboro* case); *Baldwin v. Seelig*, 294 U.S. 511 (1935) (9-0) (dormant commerce clause).

28. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (9-0) (removal of FTC Commissioner); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (9-0) (substantive due process; *Frazier-Lemke* farm mortgage statute); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (9-0) (commerce power; delegation of legislative power; National Industrial Recovery Act); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (8-1) (delegation of legislative power; "hot oil" provisions of National Industrial Recovery Act; only Cardozo dissented).

29. *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (5-4) (substantive

The most striking aspect of the voting data for the October 1934 Term is the vivid bloc alignments. Both the conservative and liberal wings tightened up considerably. For example, Van Devanter, Sutherland, and McReynolds did not disagree in a single decision. Similarly, Brandeis moved back into close alignment with Stone and Cardozo. The following table shows the cohesion within the blocs and the still rather low disagreement rates between the Court's extremes.³⁰

TABLE 18
DISAGREEMENT RATES — OCTOBER 1934 TERM

	STONE	CARDOZO	BRANDEIS	VAN DEVANTER	SUTHERLAND	MCREYNOLDS	BUTLER
LIBERALS							
Stone	—	2.5%	1.9%	10.2%	10.2%	9.8%	11.5%
Cardozo		—	3.2%	10.2%	10.2%	9.8%	11.5%
Brandeis			—	9.7%	9.7%	10.0%	11.0%
CONSERVATIVES							
Van Devanter				—	0.0%	0.0%	1.3%
Sutherland					—	0.0%	1.3%
McReynolds							
Butler							—

Hughes and Roberts were a close pair in the center. They disagreed in only 4 of 155 cases. Hughes was almost exactly in the Court's statistical center. Roberts was once again a statistical moderate conservative, leaning toward the conservative wing but not fully aligning with it. The dissent rates set forth in Table 19 illustrate the alignment of Hughes and Roberts.

due process; Railroad Retirement Act of 1934). The one major New Deal victory of the Term, involving legislation nullifying so-called "gold clauses," was announced in a trilogy of decisions with pure five-four bloc-voting. See *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935), and companion cases.

30. 86.6% of the decisions issued during the Term were unanimous.

TABLE 19
HUGHES'S & ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1934 TERM

	DISAGREEMENT RATE WITH HUGHES	DISAGREEMENT RATE WITH ROBERTS
LIBERALS		
Stone	5.2%	7.6%
Cardozo	6.5%	8.9%
Brandeis	<u>4.6%</u>	<u>7.1%</u>
Average	5.4%	7.9%
CONSERVATIVES		
Van Devanter	5.2%	5.1%
Sutherland	5.2%	5.1%
McReynolds	5.3%	5.2%
Butler	<u>6.5%</u>	<u>3.8%</u>
Average	5.5%	4.8%

As in the prior three Terms, the conservatives held the edge in the won-lost column. The average dissent rate of the liberals was nearly twice that of the conservatives. Stone, Cardozo, and Brandeis cast more dissents (thirty-two) than all four core conservatives (twenty-two). Table 20 exemplifies the higher dissent rates among the liberals.

TABLE 20
DISSENT RATES — OCTOBER 1934 TERM

JUSTICE	DISSENT RATE
LIBERALS	
Stone	7.0%
Cardozo	7.0%
Brandeis	<u>6.5%</u>
Average	6.8%
CONSERVATIVES	
Van Devanter	3.2%
Sutherland	3.2%
McReynolds	3.3%
Butler	<u>4.5%</u>
Average	3.5%

In thirteen cases perfect bloc-voting patterns emerged aligning Stone, Cardozo, and Brandeis against Butler, McReynolds, Sutherland, and

Van Devanter. The conservatives won eight.³¹

In summary, the Court's pitched battle against the New Deal began in the October 1934 Term. The Court dealt the New Deal at least six major defeats during the Term. Disagreement rates among the Justices remained low, but when the Justices did differ, they divided into nearly perfect bloc alignments. Butler, McReynolds, Sutherland, and Van Devanter comprised an almost unanimous conservative bloc, while Stone, Cardozo, and Brandeis comprised a very cohesive liberal bloc. Hughes and Roberts moved back and forth between the blocs, giving the conservatives enough support to win a majority of the divided cases.

G. *The October 1935 Term*

The war between the Supreme Court and the Roosevelt Administration intensified during the October 1935 Term. In contrast to the October 1929 through October 1933 Terms, the session was characterized by a large number of interesting cases. Undoubtedly the most famous cases were ones involving anti-Depression economic reform activity. Repeatedly, the Court inflicted severe defeats on the advocates of the emerging welfare state.³² In addition, the Court issued a number of important decisions involving non-economic issues.³³

31. The conservative victories were *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935) (6-3) (substantive due process; utility rates); *Herndon v. Georgia*, 295 U.S. 441 (1935) (6-3) (federal question jurisdiction); *Senior v. Braden*, 295 U.S. 422 (1935) (6-3) (due process; tax situs); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (5-4) (substantive due process; railroad pensions); *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U.S. 193 (1935) (6-3) (regulation of stockyards); *Georgia Ry. & Elec. Co. v. City of Decatur*, 295 U.S. 165 (1935) (6-3) (substantive due process); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935) (6-3) (tax; equal protection); and *Dimick v. Schiedt*, 293 U.S. 474 (1935) (5-4) (seventh amendment right to jury trial).

The liberal victories were *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935) (5-4) (corporations; equal protection); *Perry v. United States*, 294 U.S. 330 (1935) (5-4) (gold clause companion case); *North v. United States*, 294 U.S. 317 (1935) (5-4) (gold clause companion case); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935) (5-4) (Congress' power to enact gold clause legislation; contract clause); and *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935) (5-4) (tax; substantive due process; equal protection).

32. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (5-4) (substantive due process; minimum wage legislation); *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (5-4) (bankruptcy); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (5-4) (federal commerce power; Bituminous Coal Conservation Act of 1935); *Jones v. SEC*, 298 U.S. 1 (1936) (6-3) (Securities Act of 1933); *United States v. Butler*, 297 U.S. 1 (1936) (6-3) (spending power; Agricultural Adjustment Act of 1933); *Colgate v. Harvey*, 296 U.S. 404 (1935) (6-3) (equal protection; privileges and immunities; state income tax).

33. *E.g. Brown v. Mississippi*, 297 U.S. 278 (1936) (9-0) (landmark case holding, for the first time, that admission of a coerced confession violates the fourteenth amendment due

Voting data for the October 1935 Term show a substantial shift to the right. The average dissent rate of the three liberals jumped by more than two-thirds. Each of the three broke the old Hughes Court record for full-Term dissent rate.³⁴ In contrast, the average dissent rate of the Four Horsemen declined marginally, falling below the already low level of the prior term. The following table shows the dramatic increase in the dissent rates among the liberals.

TABLE 21
DISSENT RATES—OCTOBER 1934 & 1935 TERMS

	OCT. 1934 TERM	OCT. 1935 TERM	CHANGE
LIBERALS			
Cardozo	7.0%	11.7%	+4.7%
Stone	7.0%	11.3%	+4.3%
Brandeis	<u>6.5%</u>	<u>11.1%</u>	<u>+4.6%</u>
Average	6.8%	11.4%	+4.6%
CONSERVATIVES			
Van Devanter	3.2%	1.4%	-1.8%
Sutherland	3.2%	3.5%	+0.3%
Butler	4.5%	3.4%	-1.1%
McReynolds	<u>3.3%</u>	<u>4.2%</u>	<u>+0.9%</u>
Average	3.5%	3.1%	-0.4%

The three liberals cast nearly three times as many dissents (49) as all Four Horsemen (18) and nearly twice as many as all six moderates and conservatives (27).

The main cause of the emergence of conservative dominance in the October 1935 Term was Roberts's shift to the right. In his first Term, Roberts was closer to the liberals than to the conservatives. Thereafter, he was right of center, but usually not too far. In the October 1935 Term, however, Roberts was closely aligned with the conservative bloc. He sided with the conservatives in eighteen of the twenty-three bloc-voting cases decided during the Term. The following table shows Roberts's shift to the right.

process clause); *Grossjean v. American Press Co.*, 297 U.S. 233 (1936) (9-0) (freedom of speech); *United States v. Constantine*, 296 U.S. 287 (1935) (6-3) (tax penalty).

34. Brandeis's 11.1% dissent rate was matched by Holmes in the October 1931 Term, but Holmes participated in fewer than one-third of the cases decided in that Term. The highest prior full-Term dissent rate of the Hughes era was Stone's 9.1% rate in the October 1931 Term.

TABLE 22
ROBERTS'S DISAGREEMENT RATES—
OCTOBER 1930, 1934 & 1935 TERMS

	OCT. 1930 TERM	OCT. 1934 TERM	OCT. 1935 TERM	CHANGE
LIBERALS				
Cardozo	—	8.9%	14.7%	+5.8%
Stone	2.6%	7.6%	14.4%	+11.8%
Brandeis	<u>3.1%</u>	<u>7.1%</u>	<u>14.1%</u>	<u>+11.0%</u>
Average	2.8%	7.9%	14.4%	+11.6%
CONSERVATIVES				
Van Devanter	3.7%	5.1%	4.3%	+0.6%
Sutherland	4.3%	5.1%	2.1%	-1.2%
Butler	4.9%	3.8%	3.5%	-1.4%
McReynolds	<u>7.4%</u>	<u>5.2%</u>	<u>5.6%</u>	<u>-1.8%</u>
Average	5.1%	4.8%	3.9%	-1.2%

Hughes also shifted from slightly left of center to slightly right of center in the October 1935 Term.³⁵

Data concerning disagreement rates, as set forth in Table 23, suggest that the liberal and conservative wings were more polarized than in prior Terms. The number of bloc-voting cases jumped to twenty-three.³⁶ For the first time since the start of the Hughes era,

35. See *infra* Appendix A, Tables 6, 7.

36. Conservative victories in bloc-voting cases included: *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (5-4) (substantive due process; state minimum wage law); *Ash-ton v. Cameron County Water Improvement Dist.*, 298 U.S. 513 (1936) (5-4) (scope of federal bankruptcy power); *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U.S. 492 (1936) (6-3) (Interstate Commerce Act); *Graves v. Texas Co.*, 298 U.S. 393 (1936) (6-2) (intergovernmen-tal tax immunity); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (5-4) (federal com-merce power; tenth amendment; substantive due process); *Jones v. SEC*, 298 U.S. 1 (1936) (6-3) (SEC sanction proceedings must be terminated upon withdrawal of false statement); *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936) (6-3) (equal protection; milk price regu-lations); *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135 (1936) (6-3) (substantive due pro-cess; equal protection; tax); *United States v. Butler*, 297 U.S. 1 (1936) (6-3) (Agricultural Adjustment Act held unconstitutional; tenth amendment; spending power); *Colgate v. Harvey*, 296 U.S. 404 (1935) (6-3) (privileges or immunities; equal protection; tax); *United States v. Constantine*, 296 U.S. 287 (1935) (6-3) (tenth amendment); *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935) (6-3) (tax); *McFeely v. Commissioner*, 296 U.S. 102 (1935) (6-3) (tax); *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935) (5-4) (tax).

Liberal victories in bloc-voting cases included: *Borden's Farm Prods. Co. v. Ten Eyck*, 297 U.S. 251 (1936) (5-4) (equal protection; milk price regulation); *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88 (1936) (6-3) (tax); *McCandless v. Furlaud*, 296 U.S. 140 (1935) (5-4) (stock fraud); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) (5-4) (substantive due process; tax); *Becker Steel Co. v. Cummings*, 296 U.S. 74 (1935) (7-2) (alien property).

full-Term disagreement rates between Justices at the Court's extremes climbed above 15%,³⁷ with five pairs of Justices posting disagreement rates above this level. The 16.0% disagreement rate between Cardozo and McReynolds was the highest in many years.

TABLE 23

DISAGREEMENT RATES — OCTOBER, 1935 TERM

	CARDOZO	STONE	BRANDEIS	VAN DEVANTER	SUTHERLAND	BUTLER	MCREYNOLDS
LIBERALS							
Cardozo	—	0.0%	0.7%	13.5%	15.3%	15.2%	16.0%
Stone		—	0.7%	13.1%	14.9%	14.9%	15.7%
Brandeis			—	12.9%	14.7%	14.6%	15.4%
CONSERVATIVES							
Van Devanter				—	2.1%	2.1%	2.9%
Sutherland					—	1.4%	2.8%
Butler						—	1.4%
McReynolds							—

As Table 23 shows, both blocs were cohesive. The liberals were especially close. Cardozo and Stone agreed in all of the 141 cases in which they both participated. Brandeis disagreed with Cardozo and Stone only once.

In summary, the Court was unusually polarized during the October 1935 Term; the conservatives were dominant. With the help of strong support from Roberts and mixed support from Hughes, the Four Horsemen were able to take command and mount a concerted attack on the economic reforms characteristic of the New Deal era. In response, the three liberals dissented as a bloc in fifteen cases, many involving important constitutional issues in the economic arena. A constitutional impasse was at hand, and the stage was set for the constitutional revolution of 1937.

III. TRENDS DURING THE OCTOBER 1929 THROUGH OCTOBER, 1935 TERMS

A. Voting Patterns

The Court's line-up during most of the period covered by this

37. Cardozo had 15.7% disagreement rates with Butler and Van Devanter in the October 1931 Term, but he participated in only one-third of the cases decided in the Term. The prior record was the 14.2% disagreement rate between Stone and Butler in the October 1933 Term.

article was four conservatives, three liberals, and two moderates. Table 24 illustrates the alignment of the Justices. On the right were the Four Horsemen: from the extreme to the more moderate, McReynolds, Butler, Sutherland, and Van Devanter. On the left were Stone, Brandeis, and Holmes/Cardozo. Hughes and Roberts were the moderates.

TABLE 24
ALIGNMENT OF JUSTICES —
OCTOBER 1930 THROUGH 1935 TERMS

LIBERAL	MODERATE	CONSERVATIVE
Stone Brandeis Holmes/Cardozo	Hughes Roberts	McReynolds Butler Sutherland Van Devanter

In general, the conservative wing fared better than the liberal wing during the 1930-1936 period. The conservatives were able to pick up an extra vote from the moderates often enough to win roughly two out of every three bloc-voting cases. As a result, the average dissent rate of the liberals was more than twice that of the conservatives. As Table 25 shows, however, the lowest dissent rates on the Court belonged to the moderates, Hughes and Roberts, whose swing votes created the majority in the close cases.

The conservative bloc maintained its power by voting very cohesively, with Butler, Sutherland, and Van Devanter especially close. Sutherland and Van Devanter, for example, disagreed only twelve times in more than one thousand cases in which both participated, achieving an agreement rate of nearly 99%. McReynolds had the most disagreements with the other conservatives, but

TABLE 25
DISSENT RATES —
OCTOBER 1929 THROUGH 1935 TERMS

	CASES	DISSENTS	DISSENT RATE
LIBERALS			
Cardozo	678	54	8.0%
Stone	1052	79	7.5%
Brandeis	1071	71	6.6%
Holmes	345	19	5.5%
Average			7.1%
MODERATE			
Hughes	977	17	1.7%
Roberts	932	17	1.8%
Average			1.8%
CONSERVATIVE			
Van Devanter	1068	23	2.2%
Sutherland	1070	29	2.7%
Butler	1075	44	4.1%
McReynolds	1070	45	4.2%
Average			3.3%

even his agreement rates were above 96%. Table 26 illustrates the intra-conservative disagreement rates.

TABLE 26
CONSERVATIVES' DISAGREEMENT RATES —
OCTOBER 1929 THROUGH 1935 TERMS

	VAN DEVANTER	SUTHERLAND	BUTLER	McREYNOLDS
VAN DEVANTER	—	1.1% 12/1061	2.3% 24/1065	3.6% 38/1062
SUTHERLAND		—	1.9% 20/1067	3.5% 37/1064
BUTLER			—	3.8% 41/1069
McREYNOLDS				—

Cohesion among the conservatives peaked during the October 1934 Term when McReynolds, Sutherland, and Van Devanter did not

disagree a single time.

Disagreement rates within the liberal bloc were even lower. Holmes, for example, disagreed with Brandeis in only two of the 344 cases in which both participated before Holmes retired. Similarly, Holmes agreed with Stone in 98.5% of the cases. Cardozo, Holmes's replacement, moved right into Holmes's spot in the liberal bloc, agreeing with Stone in 98.2% of the cases. Stone and Brandeis, the only two liberals to sit throughout the entire 1930-1936 period disagreed only twenty-two times in more than one thousand cases.

TABLE 27
LIBERALS' DISAGREEMENT RATES —
OCTOBER 1929 THROUGH 1935 TERMS

	CARDOZO	STONE	BRANDEIS	HOLMES
CARDOZO	—	1.8% 12/669	3.7% 25/672	—
STONE		—	2.1% 22/1047	1.5% 5/331
BRANDEIS			—	0.6% 2/344
HOLMES				—

Naturally, disagreement rates between the conservative and liberal Justices were substantially higher. By modern standards, however, disagreement rates between Justices at the Court's right and left extremes were surprisingly low. In the 1950's and 1970's, disagreement rates above 50% became common, and occasionally disagreement rates approached 70%. In contrast, the highest overall disagreement rates in the 1930-1936 period was 12.9% (Cardozo-Butler). As Table 28 shows, the highest disagreement rates were between Cardozo and Stone, on the left, and McReynolds and Butler on the right.

The conservative edge in the won-lost column was gained primarily through the support of Roberts. In his first Term, Roberts lined up with the liberals, giving them their only winning Term. In

TABLE 28
DISAGREEMENT RATES —
OCTOBER 1929 THROUGH 1935 TERMS

	CARDOZO	STONE	BRANDEIS	HOLMES
VAN DEVANTER	10.3% 69/679	9.7% 101/1044	8.9% 94/1062	7.3% 25/344
SUTHERLAND	11.3% 76/672	10.4% 109/1051	9.2% 98/1063	6.4% 22/342
BUTLER	12.9% 87/676	11.5% 121/1055	10.2% 109/1068	8.1% 28/344
McREYNOLDS	12.2% 82/673	11.4% 120/1050	10.7% 113/1060	9.1% 31/342

the remaining five terms, Roberts was right of center. The following table shows that Roberts was closest to Hughes and disagreed with the liberals, on the average, nearly twice as often as with the conservatives.

TABLE 29
ROBERTS'S DISAGREEMENT RATES —
OCTOBER 1930 THROUGH 1935 TERMS

JUSTICE	DISAGREEMENT RATE WITH ROBERTS
LIBERALS	
Cardozo	10.1%
Stone	8.1%
Brandeis	6.8%
Holmes	4.3%
Average	7.8%
MODERATE	
Hughes	3.4%
CONSERVATIVES	
Van Devanter	4.1%
Sutherland	3.8%
Butler	4.8%
McReynolds	5.6%
Average	4.6%

Chief Justice Hughes's voting data place him almost exactly in the Court's statistical center. His disagreement rates with the Justices at the Court's extremes were almost perfectly symmetrical: Car-

dozo, 6.1%; Stone, 6.1%; Butler, 5.9%; McReynolds, 6.3%. Hughes was closest to Holmes, Roberts, and Van Devanter, the Justices nearest to the Court's center.

TABLE 30
HUGHES'S DISAGREEMENT RATES —
OCTOBER 1929 THROUGH 1935 TERMS

JUSTICE	DISAGREEMENT RATE WITH HUGHES
LIBERALS	
Cardozo	6.1%
Stone	6.1%
Brandeis	5.5%
Holmes	3.1%
Average	<u>5.6%</u>
MODERATE	
Roberts	3.4%
CONSERVATIVES	
Van Devanter	3.5%
Sutherland	4.4%
Butler	5.9%
McReynolds	<u>6.3%</u>
Average	<u>5.0%</u>

As previously stated, perhaps the most striking feature of the voting data for the October 1929 through 1935 Terms was the exceptionally low dissent and disagreement rates. Although the following table shows the very high percentage of unanimous decisions and the low dissent and disagreement rates, it also shows a trend toward reduced unanimity and increased dissent and disagreement rates during the 1929 through 1936 period. The doubling of the average dissent rates from the October 1929 to the October 1935 Term suggests that the modern trend toward higher dissent rates was already underway in the early 1930's.

TABLE 31
MISCELLANEOUS VOTING DATA —
OCTOBER 1929 THROUGH 1935 TERMS

TERM	UNANIMOUS DECISIONS	AVERAGE DISSENTS PER CASE	HIGHEST FULL-TERM DISAGREEMENT RATE
Oct. 1929	91.0%	0.26	9.0%
Oct. 1930	89.2%	0.28	10.1%
Oct. 1931	82.7%	0.39	13.3%
Oct. 1932	83.9%	0.38	12.7%
Oct. 1933	82.8%	0.42	14.2%
Oct. 1934	86.6%	0.38	11.5%
Oct. 1935	82.1%	0.53	16.0%
Average	85.4%	0.38	12.4%

B. Substantive Legal Trends

Undoubtedly, the main business of the Court in the 1930-1936 period comprised "economic cases." Civil rights cases, a major docket item of the post-1937 Court, still represented a minor item for the early Hughes Court. Therefore, analysis of the era's substantive developments must focus first on economic issues. Most of the numerous economic cases that burden the U.S. Reports of the period involved routine interpretation of tax, bankruptcy, insolvency, and personal injury statutes or routine review of administrative decisions. The more interesting cases, in contrast, involved constitutional censorship of economic regulations.

The 1930-1936 Court is most famous for its economic conservatism which culminated in its attack on the New Deal in 1935 and 1936. The leading cases in this field were *Panama Refining Co. v. Ryan*,³⁸ the "hot oil" case; *Railroad Retirement Board v. Alton R.R. Co.*,³⁹ the railroad pension case; *A.L.A. Schechter Poultry Corp. v. United States*,⁴⁰ the "sick chicken" case; *Louisville Joint Stock Land Bank v. Radford*,⁴¹ the farm mortgage case; *Humphrey's Executor v. United States*,⁴² the President's removal power case; *United States v. Butler*,⁴³ the Agricultural Adjustment Act case;

38. 293 U.S. 388 (1935) (8-1).

39. 295 U.S. 330 (1935) (5-4).

40. 295 U.S. 495 (1935) (9-0).

41. 295 U.S. 555 (1935) (9-0).

42. 295 U.S. 602 (1935) (9-0).

43. 297 U.S. 1 (1936) (6-3).

Jones v. SEC,⁴⁴ the Securities Act case; *Carter v. Carter Coal Co.*,⁴⁵ the Bituminous Coal Conservation Act case; and *Moorehead v. New York ex rel. Tipaldo*,⁴⁶ the New York minimum wage case. This notorious series of cases tore gaping holes in the web of legislation enacted by state and federal legislators to combat the Depression.⁴⁷

The Court used a variety of constitutional theories to roll back anti-Depression economic reforms. The centerpiece of the Court's jurisprudence was substantive due process, that is, the concept that unreasonable infringements of economic liberty are unconstitutional. The Court applied this principle in an aggressive, nondeferential manner, substituting its judgment for that of the legislature whenever a majority of Justices believed a statute to be unreasonable.⁴⁸ The Court also relied upon the tenth amendment doctrine of dual federalism,⁴⁹ the newly-coined concept of unlawful delegation of legislative power,⁵⁰ the equal protection clause,⁵¹ the privileges and immunities clause,⁵² the dormant commerce clause,⁵³ the doctrine of intergovernmental immunity,⁵⁴ and the contract clause.⁵⁵

Of course, conservative constitutional activism was not the whole story in economic cases decided during the 1930-1936 period. In most cases, the Court restricted itself to the normal judicial role of interpreting and enforcing economic statutes. Moreover, celebrated liberal victories in divided economic cases were not entirely absent.⁵⁶ However, the early Hughes Court's most famous economic cases in-

44. 298 U.S. 1 (1936) (6-3).

45. 298 U.S. 238 (1936) (5-4).

46. 298 U.S. 587 (1936) (5-4).

47. The Court's attack on the New Deal culminated on "Black Monday," May 27, 1935, when the *Schechter, Radford*, and *Humphrey* cases were decided. See R. JACKSON, *supra* note 23, at 106.

48. *E.g.*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *United Rys. & Elec. Co. v. West*, 280 U.S. 234 (1929).

49. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1936).

50. *E.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1936).

51. *E.g.*, *Colgate v. Harvey*, 296 U.S. 404 (1935); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

52. *E.g.*, *Colgate v. Harvey*, 296 U.S. 404 (1935).

53. *E.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessment*, 280 U.S. 338 (1929).

54. *E.g.*, *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 213 (1930).

55. *E.g.*, *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

56. *E.g.*, *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935) (5-4) (contract clause; gold clauses); *Nebbia v. New York*, 291 U.S. 502 (1934) (5-4) (substantive due process; rate regulation); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (5-4) (contract clause; mortgage moratorium).

volved constitutional censorship of economic legislation.

The Court issued only four non-summary decisions involving first amendment issues in the 1930-1936 period. This is an amazingly small number in comparison to the plethora of first amendment cases in later years. Three of the cases are well-known and have a distinctly liberal-activist flavor. *Stromberg v. California*⁵⁷ was the first case ever to reverse a state criminal conviction for violating the first and fourteenth amendments. *Near v. Minnesota ex rel. Olson*,⁵⁸ an acknowledged landmark of first amendment law, made two major contributions: (1) it "incorporated" the freedom of press guarantee, making that provision applicable to the States for the first time, and (2) it established a strong constitutional presumption against prior restraints. *Grossjean v. American Press Co.*,⁵⁹ held a publisher's license tax based on gross receipts to be an unconstitutional abridgment of the freedoms of speech and the press. In the only other first amendment case, *Herndon v. Georgia*,⁶⁰ the Court refused to reach the merits, holding that the federal issues had not been properly presented. Overall, the Court made a small contribution indeed to the advancement of first amendment law in the period under consideration.

The Court was almost completely passive in the race discrimination field during the 1930-1936 period. Apart from criminal procedure cases, in which race was merely an incidental feature,⁶¹ the Court decided only five cases involving racial discrimination. This amounts to an average of less than one case a Term. The field was almost dormant, in striking contrast to later years when race relations was a prolific docket item. And when the Hughes Court did handle race issues, the results were mixed. Only three of the five cases were noteworthy. First, *Nixon v. Condon*⁶² held unconstitutional a white primary system in which the State had delegated voter-selection power to the Democratic Party's executive committee, which in turn banned blacks from voting in the primary. Second,

57. 283 U.S. 359 (1931) (7-2) (the "red flag" case; McReynolds and Butler dissented).

58. 283 U.S. 697 (1931) (5-4) (the Four Horsemen dissented).

59. 297 U.S. 233 (1936) (9-0).

60. 295 U.S. 441 (1935) (6-3) (the three liberals dissented).

61. *E.g.*, *Brown v. Mississippi*, 297 U.S. 278 (1936) (conviction of black defendant reversed because based on coerced confession); *Herndon v. Georgia*, 295 U.S. 441 (1935) (inciting insurrection conviction of black Communist upheld); *Powell v. Alabama*, 287 U.S. 45 (1932) (conviction of nine black defendants reversed because of failure to provide adequate appointed counsel).

62. 286 U.S. 73 (1932) (5-4) (the Four Horsemen dissented).

*Norris v. Alabama*⁶³ provided an updated test for detecting unconstitutional grand jury discrimination and reversed a rape conviction because the jury selection system failed to comply with the new test. Third, *Grovey v. Townsend*⁶⁴ nullified *Nixon v. Condon* by upholding a white primary where the exclusion of blacks was imposed by the state political party convention. Since the modest liberalization of the jury discrimination rules was probably more than offset by the retrenchment on the white primary/state action issue, the overall outcome of the Court's efforts was arguably a slight regression.

In contrast to first amendment and race discrimination cases, the 1930-1936 Court did decide a substantial number of cases in criminal procedure, the third major domain of civil rights law. Moreover, several acknowledged landmark decisions were issued. The most famous, no doubt, were *Powell v. Alabama*⁶⁵ and *Brown v. Mississippi*.⁶⁶ *Powell*, the first Scottsboro case, was the earliest case to hold that failure by a State to provide an indigent criminal defendant with adequate assistance by appointed counsel violates the due process clause of the fourteenth amendment. On this basis, the Court reversed the convictions of nine black youths after a highly publicized Alabama rape trial. Similarly, *Brown* was the first case holding that the use of a coerced confession to convict a criminal defendant violates fourteenth amendment due process. The Court also issued a few well-known criminal procedure decisions involving federal criminal prosecutions. The most famous were *Blockburger v. United States*,⁶⁷ which enumerated the modern test for determining when multiple convictions for the same course of conduct are allowed, and *Sorrells v. United States*,⁶⁸ which set forth the modern test for entrapment.

But, in spite of occasional high points, the overall impact of the 1930-1936 Court was minimal in the criminal procedure field. The Court continued to hold that the criminal procedure provisions of the Bill of Rights—fourth amendment, self-incrimination, double jeopardy, jury trial, assistance of counsel, etc.—do not apply to the states. Thus, the only major constitutional handle on the state courts, where

63. 294 U.S. 587 (1935) (8-0) (the second Scottsboro case).

64. 295 U.S. 45 (1935) (9-0). The case was overruled by the Stone Court nine years later in *Smith v. Allwright*, 321 U.S. 649 (1944).

65. 287 U.S. 45 (1932) (7-2) (Butler and McReynolds dissented).

66. 297 U.S. 278 (1936) (9-0).

67. 284 U.S. 299 (1932) (9-0).

68. 287 U.S. 435 (1932) (5-4) (the split was unusual—Stone, Brandeis, and Roberts dissented to the left, while McReynolds dissented to the right).

nine out of ten prosecutions take place, was the fourteenth amendment due process clause. The Court held that all that due process requires is a trial not so fundamentally unfair as to "shock the conscience." The case that best illustrates the Court's general rule of judicial restraint was *Snyder v. Massachusetts*,⁶⁹ which held that the fourteenth amendment does not require jury trial, indictment, or compliance with the privilege against self-incrimination. Liberal-activist due process decisions like *Powell* and *Brown* were the rare exceptions. Viewed as a whole, the Court's contribution to the criminal procedure field was almost as meager as its contribution to the first amendment and race relation fields.

IV. CONCLUSION

The Supreme Court of the 1930-1936 period was made up of a cohesive four-vote conservative wing, a cohesive three-vote liberal wing, and two moderates. Unanimous decisions were issued in 85.4% of the cases, but when bloc-voting was present, the conservatives won nearly two-thirds due to support from the moderate-conservative Roberts and the moderate Hughes. Conservative dominance was most pronounced in the October 1934 and 1935 Terms when the Court challenged the New Deal, creating a constitutional impasse and temporarily nullifying the nation's ability to combat the Depression. A few advances, although minor, were made in civil liberties cases involving the first amendment and criminal procedure. In all, the period was a backwater of Supreme Court history, an era whose most famous cases were swept away by the constitutional revolution of 1937 and the ensuing era of economic liberalism.

69. 291 U.S. 97 (1934) (5-4) (the split was unusual—Cardozo, Stone, and Hughes joined McReynolds and Van Devanter in support of the reactionary decision, while Butler, Sutherland, Roberts, and Brandeis dissented).

APPENDIX A
 TABLE 1
 DISAGREEMENT RATES —
 OCTOBER 1929 TERM

	HOLMES (133) ^a	BRANDEIS (133)	STONE (131)	HUGHES (59)	TAFT (34)	SANFORD (65)	McREYNOLDS (131)	SUTHERLAND (133)	VAN DEVANTER (133)	BUTLER (133)
HOLMES	%b #c	0.8 1/133	1.5 2/131	3.8 2/53	17.6 6/34	10.8 7/65	7.6 10/131	8.3 11/133	9.0 12/133	9.0 12/133
BRANDEIS	% #		0.8 1/131	3.8 2/53	14.7 5/34	7.7 5/65	6.9 9/131	7.5 10/133	8.3 11/133	8.3 11/133
STONE	% #			3.8 2/52	9.1 3/33	4.7 3/64	5.4 7/129	6.1 8/131	6.9 9/131	6.9 9/131
HUGHES	% #				—	—	0.0 0/51	0.0 0/53	0.0 0/53	0.0 0/53
TAFT	% #					0.0 0/34	0.0 0/34	2.9 1/34	2.9 1/34	2.9 1/34
SANFORD	% #						0.0 0/65	1.5 1/65	3.1 2/65	3.1 2/65
McREYNOLDS	% #							0.8 1/133	1.5 2/133	1.5 2/133
SUTHERLAND	% #								0.8 1/133	0.8 1/133
VAN DEVANTER	% #									0.0 0/133
BUTLER	% #									

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 1930 TERM

	STONE (158) ^a	BRANDEIS (166)	HOLMES (166)	HUGHES (158)	ROBERTS (162)	VAN DEVANTER (166)	SUTHERLAND (165)	BUTLER (166)	McREYNOLDS (166)
STONE	%b #c	0.6 1/158	1.3 2/158	1.9 3/154	2.6 4/154	6.3 10/158	7.0 11/158	7.6 12/158	10.1 16/158
BRANDEIS	% #		0.6 1/166	1.3 2/158	3.1 5/162	5.4 9/166	6.1 10/165	6.6 11/166	9.6 16/166
HOLMES	% #			0.6 1/158	2.5 4/162	4.8 8/166	3.6 6/165	6.0 10/166	9.6 16/166
HUGHES	% #				2.6 4/155	3.8 6/158	4.4 7/159	5.1 8/158	8.9 14/158
ROBERTS	% #					3.7 6/162	4.3 7/161	4.9 8/162	7.4 12/162
VAN DEVANTER	% #						0.6 1/165	1.2 2/166	6.0 10/166
SUTHERLAND	% #							1.8 3/165	5.5 9/165
BUTLER	% #								4.8 8/166
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 1931 TERM

	HOLMES (45) ^a	STONE (143) ^c	BRANDEIS (150)	CARDOZO (51)	HUGHES (148)	ROBERTS (148)	SUTHERLAND (149)	VAN DEVANTER (150)	BUTLER (150)	McREYNOLDS (150)
HOLMES	%b #c	2.4 1/42	0.0 0/45	—	11.1 5/45	11.1 5/45	11.4 5/44	11.1 5/45	13.3 6/45	11.1 5/45
STONE	% #		1.4 2/143	0.0 0/48	9.2 13/142	7.8 11/141	11.3 16/142	11.2 16/143	11.9 17/143	13.3 19/143
BRANDEIS	% #			2.0 1/51	8.8 13/148	7.4 11/148	10.7 16/149	11.3 17/150	12.0 18/150	12.7 19/150
CARDOZO	% #				8.2 4/49	6.0 3/50	12.0 6/50	15.7 8/51	15.7 8/51	11.8 6/51
HUGHES	% #					1.4 2/147	2.0 3/148	2.0 3/148	2.7 4/148	4.1 6/148
ROBERTS	% #						3.4 5/148	4.1 6/148	4.7 7/148	5.4 8/148
SUTHERLAND	% #							2.0 3/149	2.0 3/149	4.7 7/149
VAN DEVANTER	% #								2.0 3/150	5.3 8/150
BUTLER	% #									6.0 9/150
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 1932 TERM

	STONE (168) ^a	CARDOZO (168)	BRANDEIS (166)	HUGHES (164)	ROBERTS (166)	VAN DEVANTER (165)	SUTHERLAND (167)	McREYNOLDS (168)	BUTLER (166)
STONE	%b #c	2.4 4/168	3.6 6/166	7.3 12/164	7.2 12/166	9.7 16/165	10.8 18/167	11.3 19/168	12.7 21/166
CARDOZO	% #		6.0 10/166	4.9 8/164	7.8 13/166	7.3 12/165	9.6 16/167	11.3 19/168	11.4 19/166
BRANDEIS	% #			6.1 10/163	5.5 9/164	7.4 12/163	8.5 14/165	9.0 15/166	10.4 17/164
HUGHES	% #				2.5 4/162	1.9 3/161	3.7 6/163	6.1 10/164	8.0 13/163
ROBERTS	% #					3.1 5/163	4.2 7/165	3.6 6/166	7.3 12/164
VAN DEVANTER	% #						1.2 2/164	4.2 7/165	4.9 8/163
SUTHERLAND	% #							5.4 9/167	3.0 5/165
McREYNOLDS	% #								6.6 11/166
BUTLER	% #								

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 1933 TERM

	STONE (155)	CARDOZO (157)	BRANDEIS (157)	HUGHES (156)	ROBERTS (156)	VAN DEVANTER (155)	SUTHERLAND (154)	McREYNOLDS (157)	BUTLER (157)
STONE	%b #c	2.6 4/155	5.2 8/155	6.5 10/154	9.7 15/154	10.5 16/153	11.8 18/152	13.5 21/155	14.2 22/155
CARDOZO	% #		5.1 8/157	5.1 8/156	9.6 15/156	9.0 14/156	10.4 16/154	12.1 19/157	12.7 20/157
BRANDEIS	% #			5.1 8/156	4.5 7/156	7.7 12/156	7.8 12/154	10.8 17/157	8.9 14/157
HUGHES	% #				5.2 8/155	4.5 7/154	5.9 9/153	7.7 12/156	8.3 13/156
ROBERTS	% #					4.5 7/154	3.3 5/153	6.4 10/156	4.5 7/156
VAN DEVANTER	% #						1.3 2/153	4.5 7/155	3.9 6/155
SUTHERLAND	% #							4.5 7/154	2.6 4/154
McREYNOLDS	% #								4.5 7/157
BUTLER	% #								

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 1934 TERM

		STONE (157) ^a	CARDOZO (157)	BRANDEIS (154)	HUGHES (155)	ROBERTS (157)	VAN DEVANTER (157)	SUTHERLAND (157)	McREYNOLDS (155)	BUTLER (157)
STONE	% ^b # ^c		2.5 4/157	1.9 3/154	5.2 8/155	7.6 12/157	10.2 16/157	10.2 16/157	9.8 15/153	11.5 18/157
CARDOZO	% #			3.2 5/154	6.5 10/155	8.9 14/157	10.2 16/157	10.2 16/157	9.8 15/153	11.5 18/157
BRANDEIS	% #				4.6 7/152	7.1 11/154	9.7 15/154	9.7 15/154	10.0 15/150	11.0 17/154
HUGHES	% #					2.6 4/155	5.2 8/155	5.2 8/155	5.3 8/151	6.5 10/155
ROBERTS	% #						5.1 8/157	5.1 8/157	5.2 8/153	3.8 6/157
VAN DEVANTER	% #							0.0 0/157	0.0 0/153	1.3 2/157
SUTHERLAND	% #								0.0 0/153	1.3 2/157
McREYNOLDS	% #									1.3 2/153
BUTLER	% #									

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 1935 TERM

	CARDOZO (145) ^a	STONE (141)	BRANDEIS (144)	HUGHES (143)	ROBERTS (143)	VAN DEVANTER (141)	SUTHERLAND (144)	BUTLER (145)	MCREYNOLDS (144)
CARDOZO	%b #c	0.0 0/141	0.7 1/144	8.4 12/143	14.7 21/143	13.5 19/141	15.3 22/144	15.2 22/145	16.0 23/144
STONE	% #		0.7 1/140	7.9 11/139	14.4 20/139	13.1 18/137	14.9 21/141	14.9 21/141	15.7 22/140
BRANDEIS	% #			7.7 11/142	14.1 20/142	12.9 18/140	14.7 21/143	14.6 21/144	15.4 22/143
HUGHES	% #				6.4 9/141	5.0 7/139	7.0 10/142	7.0 10/143	7.7 11/142
ROBERTS	% #					4.3 6/139	2.1 3/143	3.5 5/143	5.6 8/142
VAN DEVANTER	% #						2.1 3/140	2.1 3/141	2.9 4/140
SUTHERLAND	% #							1.4 2/144	2.8 4/143
BUTLER	% #								1.4 2/144
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

APPENDIX B

TABLE 1

DISSENT RATES — OCTOBER 1929 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Holmes	134	10	7.5%	%
Brandeis	134	9	6.7%	%
Stone	130	7	5.4%	%
Hughes	53	0	0.0%	%
Taft	34	0	0.0%	%
Sanford	64	0	0.0%	%
McReynolds	132	0	0.0%	%
Sutherland	134	1	0.7%	%
Van Devanter	134	2	1.5%	%
Butler	134	2	1.5%	%

TABLE 2

DISSENT RATES — OCTOBER 1930 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Stone	158	6	3.8%	-1.6%
Brandeis	166	5	3.0%	-3.7%
Holmes	166	4	2.4%	-5.1%
Hughes	158	2	1.3%	+1.3%
Roberts	162	2	1.2%	+1.2%
Van Devanter	166	4	2.4%	+0.9%
Sutherland	165	5	3.0%	+2.3%
Butler	166	6	3.6%	+2.1%
McReynolds	166	12	7.2%	+7.2%

TABLE 3
DISSENT RATES — OCTOBER 1931 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Holmes	45	5	11.1%	+8.7%
Stone	143	13	9.1%	+5.3%
Brandeis	150	13	8.7%	+5.7%
Cardozo	51	4	7.8%	— %
Hughes	148	0	0.0%	-1.3%
Roberts	148	2	1.4%	+0.2%
Sutherland	149	3	2.0%	-1.0%
Van Devanter	150	4	2.7%	+0.3%
Butler	150	5	3.3%	-0.3%
McReynolds	150	6	4.0%	-3.2%

TABLE 4
DISSENT RATES — OCTOBER 1932 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Stone	168	13	7.7%	-1.4%
Cardozo	168	11	6.5%	-1.3%
Brandeis	166	9	5.4%	-3.3%
Hughes	164	3	1.8%	+1.8%
Roberts	166	2	1.2%	-0.2%
Van Devanter	165	3	1.8%	+0.9%
Sutherland	167	5	3.0%	+1.0%
McReynolds	168	8	4.8%	+0.8%
Butler	166	10	6.0%	+2.7%

TABLE 5
DISSENT RATES — OCTOBER 1933 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Stone	155	13	8.4%	+0.7%
Cardozo	157	11	7.0%	+0.5%
Brandeis	157	9	5.7%	+0.3%
Hughes	156	4	2.6%	+0.8%
Roberts	156	4	2.6%	+1.4%
Van Devanter	155	3	1.9%	+0.1%
Sutherland	154	5	3.2%	+0.2%
McReynolds	157	8	5.1%	+0.3%
Butler	157	9	5.7%	-0.3%

TABLE 6
DISSENT RATES — OCTOBER 1934 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Stone	157	11	7.0%	-1.4%
Cardozo	157	11	7.0%	0.0%
Brandeis	154	10	6.5%	+0.8%
Hughes	155	3	1.9%	-0.7%
Roberts	157	3	1.9%	-0.7%
Van Devanter	157	5	3.2%	+1.3%
Sutherland	157	5	3.2%	0.0%
McReynolds	153	5	3.3%	-1.8%
Butler	157	7	4.5%	-1.2%

TABLE 7
 DISSENT RATES — OCTOBER 1935 TERM

JUSTICE	CASES	DISSENTS	RATES	CHANGE
Cardozo	145	17	11.7%	+4.7%
Stone	141	16	11.3%	+4.3%
Brandeis	144	16	11.1%	+4.6%
Hughes	143	5	3.5%	+1.6%
Roberts	143	4	2.8%	+0.9%
Van Devanter	141	2	1.4%	-1.8%
Sutherland	144	5	3.5%	+0.3%
Butler	145	5	3.4%	-1.1%
McReynolds	144	6	4.2%	+0.9%

