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THE DIVIDED SUPREME COURT, 1944-1945

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THE United States Supreme Court has in recent years been supplying fascinating material for students interested in the interplay of personal and institutional factors in the judicial decision-making process. Contrary to the more restrictive practices of some other legal systems, the traditions of the American judiciary have never insisted that justices sitting *en banc* should hide the existence of division among themselves behind a facade of pretended unanimity. Justices who dissent from a decision of their brethren have been permitted to say so, and to give their reasons. This practice has had an immeasurably great effect in facilitating the growth of the law and in promoting a personalization of the responsibility of the judge.

There are, it is true, powerful factors operating to achieve unanimity in the decisions of such a body as the United States Supreme Court. Leaving aside such all-important matters as the generally settled character of the American legal system, fairly strict adherence to the principle of stare decisis, and the broad similarities in training and background which tend to characterize Supreme Court justices, there are other vital conformist effects in the *modus operandi* of the Court itself. Probably the most important of these is the result of the discussion which goes on around the judicial conference table, out of which a consensus can often be achieved. The influence of a strong chief justice may also be instrumental in working out solutions satisfactory to all members of the Court. The assigning to one judge of the responsibility for writing the Court's decision, rather than following the practice in certain early cases of having the justices read their individual opinions seriatim, is another influence strengthening the institutional element in the decision-making process. Justices who have only minor reservations as to the language or holding of the Court's opinion customarily maintain silence under these circumstances, or merely note that they concur in the result. A more vigorous difference in views will of course normally be expressed by a dissent, but even in such a case justices tend to feel that, having once made public their disagreement with a position supported by a majority of the Court's members, they should thereafter be ruled by the majority view and

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refrain from dissenting when succeeding cases involving the same question arise.[1]

During past years the influence of factors such as these has customarily resulted in the Supreme Court achieving unanimity in all except 10 to 20 per cent of its full opinions. Recently, however, the rate of dissent on the Supreme Court has been steadily increasing, and as Table I shows, during the two most recent terms of the Court its members have actually disagreed more often than they have agreed

TABLE I

Nonunanimous Opinions and Dissenting Votes on The Supreme Court, Selected Terms

Term	Total Opinions	Nonunanimous Opinions		Dissenting Votes Cast
		Number	Per Cent	
1900	196	46	23	119
1910	168	22	13	35
1920	223	39	17	83
1930	168	18	11	46
1935	160	26	16	80
1936	162	31	19	82
1937	170	46	27	88
1938	149	50	34	116
1939	141	42	30	85
1940	169	47	28	117
1941	162	59	36	160
1942	171	75	44	176
1943	137	80	58	194
1944	163	94	58	245

in cases set down for decision by formal opinion. Of the 163 full opinions handed down by the Court during the 1944-45 term (hereafter referred to as the 1944 term), 94 (58%) saw one or more of the justices registering dissent to the views of the majority. This ratio of nonunanimous opinions to the Court's total output was precisely the same as that of the preceding term, but with respect to the number of such opinions and of individual dissenting votes cast, the 1944 term set new records for the Court.[2]

In four of the 94 opinions to which dissents were filed during the

[1] For example, in Interstate Commerce Commission v. Jersey City, 322 U. S. 503, 64 S. Ct. 1129 (1944), Justices Douglas and Murphy disagreed with the Court's conclusion but did not dissent, since they felt that the earlier decision in Vinson v. Washington Gas Light Co., 321 U. S. 489, 64 S. Ct. 731 (1944), to which they had dissented, was controlling.

[2] In connection with these data on dissents, it should be explained that the count

1944 term, the complicated nature of the litigation or the fact that two cases were decided by a single opinion led to divisions among the justices on two distinct and separate issues within the same opinion, with the line-up of the justices varying on the two issues. For example, in *Hooven & Allison Co.* v. *Evatt*,[3] there was one division among the justices on the question whether imports for manufacture were entitled to immunity from state taxation while in the original package, while there was a slightly different division on the question whether the Philippine Islands are a "foreign country" within the meaning of the Constitutional provision relating to imports. As a result of this circumstance, there were 98 divisions among the justices in the 94 opinions under examination. No less than 30 of these 98 divisions were of the five to four variety, almost twice as many five to four decisions as in the preceding term. An additional 18 divisions involved a six to three or a five to three vote, while there were two dissenters in 27 divisions, and a single judge was in dissent on 23 occasions.

Table II reveals the extent to which the various members of the Court participated in dissents during the 1944 term. Justice Roberts was by far the most active dissenter, objecting to 36 per cent of the opinions in which he participated. Chief Justice Stone was the second most frequent dissenter, with Justice Black a close third. Justices Reed

of opinions includes all full opinions plus per curiam decisions reported in the same manner as full opinions. Opinions, not cases, are counted; often several cases are decided by a single opinion. Occasionally there is some doubt whether a separate opinion is a concurring or a dissenting opinion. In this article two opinions have been treated as dissents although they were not so labelled by the court reporter. One is the separate opinion by Justice Douglas in United States v. General Motors Corp., 323 U. S. 373, 65 S. Ct. 357 (1945), which is strangely introduced as "concurring in part." The second is the indication given by four justices in Colorado-Wyoming Gas Co. v. Federal Power Commission, 324 U. S. 626, 65 S. Ct. 850 (1945), of a disagreement as to the points to be covered by the commission on remand of the case.

[3] 324 U. S. 652, 65 S. Ct. 870 (1945). Another complicated case was Malinski v. State of New York, 324 U. S. 401, 65 S. Ct. 781 (1945), in which four separate opinions were written in addition to the opinion of the Court. Justice Black apparently became confused in the maze, for in a footnote he indicated that he, along with Murphy and Rutledge, joined in Part I of the Court's opinion; but since there was no subsequent indication of dissent on his part, he must have agreed with Part II as well, which makes the footnote meaningless so far as it refers to him. A previous instance of similar confusion occurred when the Supreme Court decided a batch of Jehovah's Witnesses cases on May 3, 1943. On that occasion Justice Frankfurter announced that he joined in the views of Justice Jackson, who was dissenting to the opinion in Martin v. City of Struthers, 319 U. S. 141, 63 S. Ct. 862 (1943), among others. But Frankfurter had written a concurring opinion in that same case. The two other cases during the 1944 term in which there were separate divisions on two different questions were Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 65 S. Ct. 829 (1945), and American Power & Light Co. v. Securities and Exchange Commission, (U. S. 1945) 65 S. Ct. 1254.

and Jackson, with 17 dissents each, found themselves in the Court minority least often.

Table III compares the percentage of dissents by the justices during the 1944 term with their performance in the five preceding terms. A marked increase in the rate of dissents during the period is characteristic of every justice, but by 1944 the curve had rather levelled off for all the judges except Stone, Roberts, and Black.

TABLE II

Participation of Supreme Court Justices in Dissenting Opinions, 1944 Term

Justice	Number Dissents	Opinions Participated In	Per Cent Dissents
Roberts	57	159	36
Black	30	161	19
Stone	31	161	19
Frankfurter	24	161	15
Murphy	23	157	15
Douglas	23	156	15
Rutledge	23	162	14
Jackson	17	154	11
Reed	17	163	10

Further analysis of the phenomena of dissent on the Court leads to the problem of the judicial alignments manifested in the divisions during the 1944 term. One method for discovering the pattern of judicial dissent is to present the data on the pairing of justices in dissenting opinions in the chart form of Table IV. This table indicates for each justice the number of dissents he registered during the term, the other members of the Court who agreed with him in his dissents, and the number of times they did so. Dissents in which only a single justice participated are given in parentheses. The justices are arranged in the chart in such a manner that, so far as interrelationships permit, each justice is placed closest to those with whom he dissents most often, and farthest from those with whom he dissents least often.[4]

Examination of Table IV shows that the disagreements of the justices during the 1944 term did mark out a fairly well-defined pat-

[4] It should be pointed out that all members of the Court who dissent from a given decision are not necessarily in agreement with each other. One justice may dissent because he feels the majority decision goes too far, while another may hold that it does not go far enough. In Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031 (1945), for example, the majority in effect remanded the case for a new trial; Justice Murphy dissented on the ground that the lower court's judgment should have been affirmed,

tern. On one side of the Court, Justices Black, Douglas, Rutledge and Murphy constituted a bloc within which every justice joined each of his colleagues in from 10 to 17 dissents. On the other side of the Court, Justices Frankfurter, Stone and Roberts dissented in company with each other in from 15 to 26 cases. While Justice Jackson was with them less often, he was closer to this group than to the Black combination. The allegiance of the remaining member of the Court,

TABLE III

Participation of Supreme Court Justices in Dissenting Opinions, 1939-1944 Terms

Justice	1939	1940	1941	1942	1943	1944
Stone	3%	4%	14%	9%	12%	19%
Roberts	17	19	16	18	30	36
Black	3	9	13	13	14	19
Reed	1	5	9	10	13	10
Frankfurter	1	1	10	12	16	15
Douglas	3	9	17	14	16	15
Murphy	1	4	11	17	15	15
Jackson	..	..	7	11	17	11
Rutledge	..	..	..	3	12	14

Justice Reed, was divided between the two groups, since he recorded a substantial number of dissents with justices in each wing.

Further study of Table IV reveals other facts worthy of mention with respect to the position of members of the Court. Justice Roberts' ideological location far to the right of his colleagues is demonstrated by the fact that on 21 occasions no other member of the Court would support his views. Justices Jackson and Black, with four lone dissents, and Murphy with three, are shown to possess relatively extreme views on a few issues. It is rather surprising that Justices Reed and Jackson, while tending to occupy a middle position on the Court, actually found themselves dissenting together only twice, whereas they dissented with

while Justices Roberts, Frankfurter and Jackson dissented on the ground that the judgment should have been reversed absolutely. Incidentally, the Screws case demonstrates that it is not always possible for a justice to vote according to his convictions. Justice Rutledge in this case agreed with the views of Justice Murphy, but if he had voted with Murphy the Court would have been divided into three groups, none commanding a majority. To prevent this stalemate, Rutledge cast his vote with the four-judge Douglas group, since he agreed more nearly with them than with the Roberts group.

In addition to the Screws case, five other decisions of the 1944 term saw the dissenting justices disagreeing with each other. There were numerous other decisions in which dissenting justices wrote individual dissents expressing somewhat different points of view, but not complete variance as to proposed disposition of the case.

Justice Roberts, on the far right of the Court, nine and eleven times respectively.

Table IV reveals a rather definite, but by no means clear-cut, division among the justices on the Court. Every member was found in dissent with every other member on at least one occasion, with the sole exception of the justices at the two extremes of the Court, Black

TABLE IV

Participation of and Agreements Among Supreme Court Justices in Dissenting Opinions, 1944 Term

Justice	No. Dissents	Black	Douglas	Rutledge	Murphy	Reed	Jackson	Frankfurter	Stone	Roberts
Black	30	(4)	16	17	14	6	1	2	2	
Douglas	23	16	(1)	12	10	6	2	1	4	3
Rutledge	23	17	12	—	13	3	2	3	2	2
Murphy	23	14	10	13	(3)	4	1	2	2	4
Reed	17	6	6	3	4	—	2	5	11	9
Jackson	17	1	2	2	1	2	(4)	8	9	11
Frankfurter	24	2	1	3	2	5	8	—	15	22
Stone	31	2	4	2	2	11	9	15	—	26
Roberts	57		3	2	4	9	11	22	26	(21)

and Roberts. It is interesting to compare this rather blurred pattern of division with that which prevailed on the Court only four years earlier, during the 1940-41 term, when the membership of the Court was the same except for two positions.[5] The division at that time, as shown in Table V, was a quite definite one between two four-judge groups (Black, Douglas, Murphy and Frankfurter in one, and Stone, McReynolds, Hughes and Roberts in the other). Members of one group were never found dissenting in company with justices in the other group, except for two cases in which Roberts joined Black and Douglas. Justice Reed was the middle man on the Court in 1940, just as in 1944.

The picture presented in Tables IV and V, while revealing, is less exact than it might be in some respects. Table VI follows the

[5] Chief Justice Hughes and Justice McReynolds were still on the Court at that time. By 1944 they had been replaced by Jackson and Rutledge.

somewhat preferable method of reducing the data on pairings during the 1944 term to a percentage basis. Account is taken of the agreements between every pair of justices, whether on the majority or minority side, in every nonunanimous opinion in which both participated. For example, during the 1944 term Justices Douglas and Frankfurter were both participants in 90 of the 98 divisions of

TABLE V

Participation of and Agreements Among Supreme Court Justices in Dissenting Opinions, 1940 Term

Justice	No. Dissents	Black	Douglas	Murphy	Frankfurter	Reed	Stone	McReynolds	Hughes	Roberts
Black	15	—	15	6	2	4				2
Douglas	15	15	—	6	2	4				2
Murphy	6	6	6	—	1					
Frankfurter	2	2	2	1	—					
Reed	8	4	4			—	1	2	3	3
Stone	7					1	—	2	7	2
McReynolds	9					2	2	—	8	7
Hughes	24					3	7	8	—	19
Roberts	31	2	2			3	2	7	19	(8)

opinion on the Court. In 47 of these they were on the same side, while in the other 43 they took opposite views. Thus the table shows the rate of agreement between them to be 52 per cent. The same data are given for every other pair of justices.

Table VI clarifies the nature of the relationships among the members of the Court. It makes more evident, for instance, the width of the gulf between Justice Roberts and his colleagues. Even with Justices Stone and Frankfurter his rate of agreement rose no higher than 61 per cent. The fairly close cohesion existing among the four justices in what may be called the Court's left-wing bloc is evidenced by their agreement in from 74 to 79 per cent of the disputed decisions. It is noteworthy that Justices Black and Douglas, who were never once on opposite sides of a decision during their first three terms together on the bench,[6] have been splitting increasingly often. Their rate of

[6] See C. H. Pritchett, "Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939-1941," 35 AMER. POLI. SCI. REV. 890 at 893 (1941).

agreement, however, is still the highest on the Court, though tied during the 1944 term by the Murphy-Rutledge figure.

The most definite bloc on the right side of the Court is secured by grouping Justices Reed, Jackson, Frankfurter and Chief Justice Stone; rates of agreement within this combination range from 64 to 75 per cent. The distance between the two extremes on the Court widened during the year, for Justices Black and Roberts agreed in only 9 per cent of the disputed decisions, as contrasted with their rate of 24 per

TABLE VI

Agreements Among Supreme Court Justices in Nonunanimous Opinions, 1944 Term (In Percentages)

Justice	Black	Douglas	Rutledge	Murphy	Reed	Jackson	Frankfurter	Stone	Roberts
Black	—	79	78	74	62	53	47	41	9
Douglas	79	—	78	74	70	57	52	52	20
Rutledge	78	78	—	79	63	62	56	47	20
Murphy	74	74	79	—	64	57	54	46	25
Reed	62	70	63	64	—	64	67	72	41
Jackson	53	57	62	57	64	—	75	67	45
Frankfurter	47	52	56	54	67	75	—	74	61
Stone	41	52	47	46	72	67	74	—	61
Roberts	9	20	20	25	41	45	61	61	—

cent during the preceding term. Justice Reed's central position on the Court is again made clear by noting that he was the only justice to agree with all his colleagues (except Roberts) more than 60 per cent of the time.

Thus far attention has been centered on the bare facts of disagreement and dissent, and the pattern of division on the Court revealed by these facts. This approach, however, gives no clue to the causes of judicial division or the issues over which disagreement arose. For information of this sort it becomes necessary to examine the 94 opinions where dissents were filed in order to identify the issues around which controversy revolved and to discover the reactions of the individual justices to these issues. This examination reveals that cases raising labor or business regulation issues constituted the largest group among the nonunanimous decisions of the Court. Such issues were present in 37 of the 94 disputed decisions, and resulted in 38 of the 98 divisions recorded on the Court during the 1944 term. Table VII analyzes the votes of the Court majority, and of the individual justices, in these 38 divisions of opinion, with four separate categories of cases being distinguished.

Federal Administrative Regulation. Actions of federal regulating

agencies were at issue in 22 of the nonunanimous decisions (involving 23 divisions). The Interstate Commerce Commission[7] and the Wage and Hour Administration[8] were each involved in six cases, the National Labor Relations Board was in five,[9] the Office of Price Administration in three,[10] and the Securities and Exchange Commission[11]

TABLE VII

Voting Record of the Court Majority and Individual Justices on Business Regulation and Labor Issues, 1944 Term

	Administrative Regulation (except I.C.C.)		Interstate Commerce Commission		Sherman Act (Business)		Labor (except N.L.R.B.)	
	For	Against	For	Against	Govt.	Bus.	For	Against
Majority	15	4	3	3	3	2	8	2
Black	19	0	2	4	5	0	9	1
Douglas	16	1	1	5	3	0	8	2
Rutledge	18	1	2	4	5	0	9	1
Murphy	19	0	3	3	1	1	10	0
Reed	12	7	4	2	3	2	8	2
Jackson	14	5	4	2	0	1	6	4
Frankfurter	10	9	6	0	1	4	3	7
Stone	6	13	6	0	1	3	0	10
Roberts	0	19	4	2	0	5	0	10

[7] United States v. Pennsylvania R. Co., 323 U. S. 612, 65 S. Ct. 471 (1945); United States v. Capital Transit Co., (U. S. 1945) 65 S. Ct. 1176; North Carolina v. United States, (U. S. 1945) 65 S. Ct. 1260; Alabama v. United States, (U. S. 1945) 65 S. Ct. 1274; I.C.C. v. Parker, (U. S. 1945) 65 S. Ct. 1490; Barrett Line, Inc. v. United States, (U. S. 1945) 65 S. Ct. 1504.

[8] United States v. Rosenwasser, 323 U. S. 360, 65 S. Ct. 295 (1945); Western Union Telegraph Co. v. Lenroot, 323 U. S. 490, 65 S. Ct. 335 (1945); Gemsco, Inc. v. Walling, 324 U. S. 244, 65 S. Ct. 605 (1945); A. H. Phillips, Inc. v. Walling, 324 U. S. 490, 65 S. Ct. 807 (1945); Walling v. Youngerman-Reynolds Hardwood Co., (U. S. 1945) 65 S. Ct. 1242; Walling v. Harnischfeger Corp., (U. S. 1945) 65 S. Ct. 1246. The first two of these six cases involved federal enforcement action under the Fair Labor Standards Act. Private enforcement actions are not included in this category.

[9] Wallace Corp. v. N.L.R.B., 323 U. S. 248, 65 S. Ct. 238 (1944); Regal Knitwear Co. v. N.L.R.B., 324 U. S. 9, 65 S. Ct. 478 (1945); Republic Aviation Corp. v. N.L.R.B., 324 U. S. 793, 65 S. Ct. 982 (1945); International Union of Mine, Mill and Smelter Workers Local No. 15 v. Eagle-Picher Mining & Smelting Co., (U. S. 1945) 65 S. Ct. 1166; Inland Empire District Council, Lumber and Sawmill Workers v. Millis, (U. S. 1945) 65 S. Ct. 1316.

[10] Bowles v. Seminole Rock & Sand Co., 324 U. S. 835, 65 S. Ct. 1215 (1945); North Carolina v. United States, (U. S. 1945) 65 S. Ct. 1260; Alabama v. United States, (U. S. 1945) 65 S. Ct. 1274.

[11] Otis & Co. v. S.E.C., 324 U. S. 887, 65 S. Ct. 483 (1945); American Power & Light Co. v. S.E.C., (U. S. 1945) 65 S. Ct. 1254.

and the Federal Power Commission[12] in two each.[13] When the six Interstate Commerce Commission cases are excluded, as is done in Table VII, a very clear division between the two wings of the Court in this class of cases becomes apparent. The four members of the Court's left wing cast 72 votes to uphold the government's regulatory actions, and only two votes against them. Justices Jackson, Reed and Frankfurter supported the administrative agencies more often than not, but Chief Justice Stone viewed their contentions unfavorably in 13 cases, and Justice Roberts opposed them in every single instance.

The Interstate Commerce Commission cases constitute an exception to the rule in administrative regulation cases. That agency has encountered more opposition from the Court than the other federal regulatory agencies have experienced, and the attitudes of the individual justices toward the I.C.C. are almost the exact opposite of their reactions toward the other agencies. Three of the four left wing justices voted against the I.C.C. oftener than they voted for it, whereas the other five justices were predominantly favorable to the I.C.C., Frankfurter and Stone supporting it in every one of the six cases. The explanation of this special situation is that the I.C.C. has become suspect by the liberals on the Court as tending to protect the entrenched interests of the railroads as challenged by their truck competitors and the public generally. Two of the six cases during the 1944 term, for instance, concerned I.C.C. orders approving intrastate increases in rail rates, entered against the opposition of the O.P.A. and the states concerned. In deciding the two cases the Court majority, comprising the four left wing justices plus Jackson, reversed the I.C.C. orders as not based on adequate findings.

Sherman Act Prosecutions of Business. The present Court is generally sympathetic to the enforcement of the Sherman Act. Of the five disputed decisions involving anti-trust action against business combinations or restrictive practices,[14] three were favorable to the government. The two listed as going against the government in Table VII

[12] Colorado Interstate Gas Co. v. F.P.C., 324 U. S. 581, 65 S. Ct. 829 (1945); Connecticut Light & Power Co. v. F.P.C., 324 U. S. 515, 65 S. Ct. 749 (1945). Colorado-Wyoming Gas Co. v. F.P.C., 324 U. S. 626, 65 S. Ct. 850 (1945), is excluded, since the Court partly affirmed and partly reversed the commission.

[13] There were 24 appearances of regulatory agencies in the 22 cases, since the Interstate Commerce Commission was opposed by the Office of Price Administration in the North Carolina and Alabama cases.

[14] United States v. Crescent Amusement Co., 323 U. S. 173, 65 S. Ct. 254 (1944); Hartford-Empire Co. v. United States, 324 U. S. 570, 888, 65 S. Ct. 373, 815 (1945); Georgia v. Pennsylvania R. Co., 324 U. S. 439, 65 S. Ct. 716 (1945); Associated Press v. United States, 324 U. S. 439, 65 S. Ct. 1416 (1945).

are the original decision and the rehearing in the *Hartford-Empire Co.* case in which the Court majority, while upholding the company's conviction, approved a less stringent decree than had been ordered by the trial judge, whose position was supported by the minority. The division between the two wings of the Court is a fairly clear one on this issue, with Black, Douglas and Rutledge voting for the government in each case, whereas Jackson, Frankfurter, Stone and Roberts cast only two votes among them for the government in the five cases.

Labor Cases. Excluding cases involving the N.L.R.B., which have already been included in the administrative regulation category, there were ten decisions during the term where the interests of organized labor or some kind of an employer-employee conflict were involved. Two were workmen's compensation cases,[15] four were proceedings brought by employees under the Fair Labor Standards Act,[16] two were Sherman Act prosecutions of labor unions,[17] and two concerned Texas and Florida statutes requiring registration of labor organizers.[18] General support for the labor position in these cases extended through two-thirds of the Court, but Frankfurter, Stone and Roberts were in opposition, the two latter unanimously so.

A second important group of disputed decisions arose out of Supreme Court review of convictions for civil or criminal offenses, under both federal and state laws, where issues of a broad "civil liberties" character were raised, or where the rights of defendants in criminal prosecutions were at issue. There were 18 nonunanimous decisions of this sort during the 1944 term, resulting in 19 divisions of opinion. Judicial alignments in these cases are analyzed in Table VIII under three categories.

Civil Liberties Cases. The six cases classified in this group involved the government's evacuation program for West Coast Japanese

[15] Tiller v. Atlantic Coast Line, 323 U. S. 574, 65 S. Ct. 421 (1945); Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545 (1945).

[16] Brooklyn Saving Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895 (1945); Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers, 325 U. S. 161, 65 S. Ct. 1063 (1945); Borden Co. v. Borella, (U. S. 1945) 65 S. Ct. 1223; 10 East 40th Street Bldg. v. Callus, (U. S. 1945) 65 S. Ct. 1227.

[17] Allen Bradley Co. v. Local No. 3, I.B.E.W., (U. S. 1945) 65 S. Ct. 1533; Hunt v. Crumboch, (U.S. 1945) 65 S. Ct. 1545.

[18] Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315 (1945); Hill v. Florida, (U. S. 1945) 65 S. Ct. 1373. An important decision, Elgin Ry. Co. v. Burley, (U. S. 1945) 65 S. Ct. 1282, was excluded from consideration with the labor cases because the issue raised was that of the union versus some of its individual members. Herb v. Pitcairn, 325 U. S. 117, 65 S. Ct. 459 (1945), a workmen's compensation case, was excluded since the issue raised there was not definitely decided by the Court.

and Japanese-Americans,[19] a Texas statute requiring registration of labor organizers,[20] a charge of treason,[21] the action of Illinois in refusing a conscientious objector admission to the bar,[22] the Sherman Act prosecution of the Associated Press,[23] and the attempt to deport Harry Bridges.[24] In spite of the fact that concern for safeguarding the fundamental civil liberties has been one of the outstanding char-

TABLE VIII

Voting Record of the Court Majority and Individual Justices on Civil Liberties and Criminal Prosecutions, 1944 Term

	Civil Liberties		Federal Criminal Prosecutions		State Criminal Prosecutions	
	Govt.	Ind.	Govt.	Def.	State	Def.
Majority	3	3	3	3	2	5
Black	3	3	3	3	1	6
Douglas	3	3	6	0	2	5
Rutledge	2	4	3	3	1	6
Murphy	0	6	0	6	0	7
Reed	5	1	5	1	3	4
Jackson	1	3	5	1	4	3
Frankfurter	5	1	2	4	5	2
Stone	5	1	5	1	2	5
Roberts	3	3	1	4	7	0

acteristics of the present Court, only three of the six decisions went in favor of the private rights for which protection was claimed.

The recent history of the Court has demonstrated that it is generally the justices on the left of the Court who have been most ardent in support of civil liberties. In three of the civil liberties cases decided during the 1944 term, this characteristic line-up was maintained. The decision in the *Thomas* case upholding freedom of speech and assembly was objected to by a predominantly right wing group consisting of Roberts, Stone, Frankfurter and Reed. In the *Summers* case it was the solid left wing of Black, Douglas, Rutledge and Murphy which protested the barring of a conscientious objector from the practice of law. And in the *Bridges* case the minority voting to approve deporta-

[19] Korematsu v. United States, 325 U. S. 885, 65 S. Ct. 193 (1945).
[20] Thomas v. Collins, 323 U. S. 516, 65 S. Ct. 315 (1945).
[21] Cramer v. United States, 325 U. S. 1, 65 S. Ct. 918 (1945).
[22] In re Summers, (U. S. 1945) 65 S. Ct. 1307.
[23] Associated Press v. United States, (U. S. 1945) 65 S. Ct. 1416.
[24] Bridges v. Wixon, (U. S. 1945) 65 S. Ct. 1443.

tion was composed of Roberts, Stone and Frankfurter (Jackson not participating).

In the remaining three cases, however, this alignment was not maintained. The *Korematsu* decision upholding the government's Japanese evacuation policy was attacked by Murphy from the left, Jackson from the center, and Roberts from the right. In the *Cramer* case Justices Black and Douglas joined with Reed and Stone in concluding that the government had proved its treason charges. Finally, the Associated Press' contention that application of the Sherman Act would impair freedom of the press was supported by Murphy along with Stone and Roberts (Jackson not participating).

It is interesting to note that Justices Black and Douglas were on the opposite side from Justice Roberts in every one of the six decisions. Justice Murphy gave dramatic evidence of his especial concern for civil liberties by being the only member of the Court to vote against the government in all six cases.

Federal Criminal Prosecutions. Six of the term's divisions occurred in cases where the Court was reviewing convictions for the violation of various federal statutes.[25] In most of these cases the question was one of statutory construction. As might have been anticipated, no particular pattern is revealed in judicial reaction to these cases, though there is the curious fact that Douglas supported the government in every case, whereas Murphy was equally steadfast in opposition.

State Criminal Prosecutions. More basic issues were presented in the six cases (involving seven divisions) where the Supreme Court disagreed in reviewing state convictions in criminal cases,[26] for in four instances there was an alleged denial of right to counsel, and two involved the use of allegedly coerced confessions. The Court continued its crusade against laxness in state judicial procedure by upholding the defendant's claim in five of these seven divisions, the principal support for this position coming from the justices on the left of the Court. It is worth noting that Roberts supported the state in every

[25] Kann v. United States, 323 U. S. 88, 65 S. Ct. 148 (1944); United States v. Johnson, 323 U. S. 806, 65 S. Ct. 249 (1945); Singer v. United States, 323 U. S. 338, 65 S. Ct. 282 (1945); United States v. Beach, 325 U. S. 193, 65 S. Ct. 602 (1945); Robinson v. United States, 324 U. S. 282, 65 S. Ct. 666 (1945); Keegan v. United States, (U. S. 1945) 65 S. Ct. 1203.

[26] Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363 (1945); Tomkins v. Missouri, 323 U. S. 485, 65 S. Ct. 370 (1945); House v. Mayo, 324 U. S. 42, 65 S. Ct. 517 (1945); Malinski v. New York, 324 U. S. 401, 65 S. Ct. 781 (1945); Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989 (1945); Akins v. Texas, (U. S. 1945) 65 S. Ct. 1276. The Malinski case involved two divisions.

case, while Frankfurter was not far behind. Again Murphy was the most extreme in protecting individual rights.

The issues covered in Tables VII and VIII account for 53 of the 94 nonunanimous decisions rendered during the 1944 term.[27] Issues presented by the most significant of the remaining decisions are analyzed in Table IX under five headings.

Federal and State Taxation. Nine divided opinions had to do with

TABLE IX

Voting Record of the Court Majority and Individual Justices on Tax, Federal-State, and Eminent Domain Issues, 1944 Term

	Federal Taxation		State Taxation		Federal-State Conflicts		Federal-State Court Relations		Eminent Domain	
	Govt.	Tax-payer	State	Tax-payer	Fed.	State	Fed.	State	Govt.	Indi-vidual
Majority	9	0	2	1	6	2	2	2	2	2
Black	7	2	2	0	4	3	3	1	4	0
Douglas	4	5	3	0	4	4	2	1	3	1
Rutledge	9	0	3	0	5	3	3	1	3	1
Murphy	8	1	3	0	6	2	3	1	2	1
Reed	7	2	2	1	7	1	2	2	2	2
Jackson	9	0	2	1	3	4	1	3	2	1
Frankfurter	9	0	2	1	5	3	0	4	3	0
Stone	8	1	2	1	7	1	2	2	1	2
Roberts	3	6	0	3	3	5	0	3	0	4

interpretation of federal tax laws.[28] The government won every one of these cases. The only justices who sided with the taxpayer more often than with the government were Douglas and Roberts, a rather unusual combination. In three additional cases the constitutionality of state taxes was challenged, in two instances on the ground of alleged violation of equal protection of the laws,[29] and in the third because of a claimed

[27] This figure eliminates duplications arising from the fact that several decisions fell in more than one of the categories employed.

[28] McDonald v. Commissioner, 323 U. S. 57, 65 S. Ct. 96 (1944); Commissioner v. Harmon, 323 U. S. 44, 65 S. Ct. 103 (1944); Commissioner v. Smith, 324 U. S. 177, 65 S. Ct. 591 (1945); Commissioner v. Wemyss, 324 U. S. 303, 65 S. Ct. 652 (1945); Merril v. Fahs, 324 U. S. 308, 65 S. Ct. 655 (1945); Commissioner v. Wheeler, 324 U. S. 542, 65 S. Ct. 799 (1945); Commissioner v. Smith, 324 U. S. 695, 65 S. Ct. 891 (1945); Angelus Milling Co. v. Commissioner, (U. S. 1945) 65 S. Ct. 1162; Goldstone v. United States, (U. S. 1945) 65 S. Ct. 1323 (1945).

[29] Charleston Federal Savings v. Alderson, 324 U. S. 182, 65 S. Ct. 624 (1945); Lincoln National Life Ins. Co. v. Read, (U. S. 1945) 65 S. Ct. 1220.

immunity under the "original package" doctrine.[30] In the first two cases the claims were denied, but in the third the protest was successful. The four justices on the left were unanimous in upholding the state taxing power, while Roberts voted against the state in all three cases.

Federal-State Problems. During the term there were 12 decisions in which a federal-state problem of some sort was raised. In four of these cases the relationship between federal and state courts was the issue.[31] The remaining eight included such questions as I.C.C. action in an alleged intrastate matter, and the legality of an Arizona statute limiting the length of trains.[32] The judicial division in these latter eight cases is not particularly significant, and would seem to indicate that the federal-state angle was not the determining factor in the judicial decisions. Alignments in the four cases relating to federal-state judicial relations do, however, reveal something of a pattern, with the left wing justices predominantly federally-oriented, and the right wing, particularly Frankfurter and Roberts, supporting the state courts.

Eminent Domain Cases. The divisions among the justices in the four eminent domain cases[33] are principally interesting as demonstrating again the antigovernment position generally taken by Justice Roberts when private property claims are involved.

Perhaps the most significant fact revealed by this analysis is that what was supposed to have been made into a New Deal court by President Roosevelt's appointments has split into two fairly evenly divided wings in much the same fashion as the more conservative Court of the thirties. The divisions are, of course, occurring on different issues. The present Court tends to be unanimous on many questions that were the subject of bitter controversy ten years earlier. For example, the constitutionality of federal legislation can now be taken

[30] Hooven & Allison Co. v. Evatt, 324 U. S. 652, 65 S. Ct. 870 (1945).

[31] Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152 (1944); Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363 (1945); Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989 (1945); Guaranty Trust Co. v. York, (U. S. 1945) 65 S. Ct. 1464.

[32] United States v. Capital Transit Co., (U. S. 1945) 65 S. Ct. 1176; North Carolina v. United States, (U. S. 1945) 65 S. Ct. 1260; Alabama v. United States, (U. S. 1945) 65 S. Ct. 1274; Nebraska v. Wyoming, (U. S. 1945) 65 S. Ct. 1332; Hill v. Florida, (U. S. 1945) 65 S. Ct. 1373; Radio Station WOW, Inc. v. Johnson, (U. S. 1945) 65 S. Ct. 1475; Southern Pacific Co. v. Arizona, (U. S. 1945) 65 S. Ct. 1515; Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031 (1945).

[33] United States v. General Motors, 323 U. S. 373, 65 S. Ct. 357 (1945); Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442 (1945); United States v. Willow River Power Co., 324 U. S. 499, 65 S. Ct. 761 (1945); United States v. Commodore Park, Inc., 324 U. S. 386, 65 S. Ct. 803 (1945).

almost for granted. But the new questions that have been raised as the entire Court moved leftward have been even more provocative of disagreement, and have revealed that the justices are still widely separated in their attitudes on public questions.

These divisions are obviously not, as some have attempted to suggest, based on personal dislikes or "feuds" among the justices. They tend to follow a consistent pattern, as is clear when the voting records of the four justices on the Court's left (Black, Douglas, Rutledge and Murphy) are compared with those of the four on the right (Jackson, Frankfurter, Stone and Roberts).[34] In nine of the twelve categories used for the preceding analysis, these two groups of justices took widely varying positions, as is indicated by the following analysis of their votes:

	Left	*Right*
For the government in administrative regulation cases	97%	39%
For the Interstate Commerce Commission	33	83
For the government in Sherman Act prosecutions	93	13
For labor in labor-business cases	90	23
For the individual in civil liberties cases	67	36
For the defendant in state criminal cases	86	36
For the state in state tax cases	100	50
For the federal government in federal-state court controversies	73	20
For the government in eminent domain cases	80	46

There are special reasons for the quantity of disagreement expressed by way of dissents to the Court's decisions at the present time. It is a preponderantly young and vigorous Court, most of its members without previous experience as judges. It is being asked increasingly to rule on questions of statutory construction, where often the intent of Congress was not clear. It is breaking new ground in several difficult fields, such as civil liberties. The fact that one member of the Court, Justice Roberts, now resigned, was at odds with all the rest of the Court on numerous issues, has added to the appearance of unusual disagreement on the Court. Actually, it is clear that in many respects the justices are closer together than the data on dissents would seem to indicate. They are, nonetheless, engaged in a basic controversy as to the allowable extent of public controls versus private rights. This issue is a fundamental one for American society, and it is on the whole a healthy sign to have the members of the Supreme Court from their individual viewpoints debating it in deadly earnest.

[34] Justice Reed is omitted as the middle man on the present Court.